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Gender Violence in Prison & Hyper-masculinities in the 'Hood: Cycles of Destructive Masculinity

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Gender Violence in Prison & Hyper-masculinities in the 'Hood: Cycles of Destructive Masculinity

SpearIt[†]

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I. INTRODUCTION TO THE PROBLEM

*Criminologists have long maintained that men who are victimized by sexual assault in prison often leave prison far more violent and anti-social than when they went inside.*¹

*The impact of the imprisonment binge on the social fabric of poor neighborhoods has not been fully appreciated or adequately studied. . . . With the influence of prison culture, outside relationships have become more violent and rapacious.*²

After directing and starring in the prison-gang film *American Me*,³ Edward James Olmos faced the wrath of the real gang depicted in the movie. Among other portrayals, leaders of the Mexican Mafia, the “Eme,” were not happy about one scene featuring the gang’s co-founder being sodomized as a juvenile inmate. After the film reached the box office, rumor had it that the Eme put out a death contract on Olmos, along with three other insiders who served as consultants to the film.⁴ Despite the problems this film caused Olmos and others, it helps to illuminate the terrible and equally threatening cycle between prisons and the barrio.

This film, despite being nearly twenty years dated, offers a viable blueprint for understanding how gender norms in society influence the prison setting, and in turn, how prison culture negatively impacts marginal communities, which reabsorb the bulk of released inmates.⁵ As an account of a prison gang’s genesis, the film is also a lesson in gender bias in society. The raping of Santana’s mother, which conceives Santana himself, depicts how violence achieves sex; in prison, her son shows how sex achieves violence, how sexual

1. M. Dyan McGuire, *The Impact of Prison Rape on Public Health*, 3 CAL. J. HEALTH PROMOTION 72, 76 (2005).

2. JOHN IRWIN, *THE WAREHOUSE PRISON* 248–49 (2004).

3. *AMERICAN ME* (Y.O.Y. Productions 1992).

4. See Jesse Katz, *Film Leaves a Legacy of Fear*, L.A. TIMES, June 13, 1993, at A1.

5. See generally MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* (2007), available at http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf.

victimization is the best way to disrespect and destroy—lessons he will bring back to his old neighborhood.

Akin to a docudrama, *American Me* dramatizes and re-enacts how this gang formed in prison, which producers claim was “inspired by true events.”⁶ As a work of part fact and part fiction, the film offers a compelling model for considering gender bias in society and its relationship to violence in prison. Like a traditional documentary, Olmos narrates the scenes depicting the life of Eme leader Rodolfo Cadena, portrayed through the character, Santana. From the film’s perspective, the rape of Santana gave birth to the Mexican Mafia, which was put into business by Santana’s immediate revenge killing of his own rapist.

The film begins with Santana’s own conception—itsself the product of rape during the “Zoot Suit Riots” in 1943. Beginning in Los Angeles and spreading to other cities in California and other states, the riots built on a series of skirmishes between Mexican-American youth, who were targeted by Marines, servicemen, and civilians largely based on their “pachuco” style of clothing, which was viewed as unpatriotic and extravagant during time of war.⁷ During the riots, the attackers stripped males of their suits, and there were allegations of rape against the women. This is where *American Me* begins: Santana’s origins as an *hijo de la chingada*.⁸

Part I concludes the introduction to the Article’s thesis by discussing the gender norms in society that rely heavily on the debasement of women. Part II, *Documenting Destructive Masculinity*, surveys documentary sources, from classic prison biographies to audio-visual works, to examine gender violence in prison.⁹ As opposed to some studies based on “random” samples for interview or

6. AMERICAN ME, *supra* note 3.

7. Rodolfo F. Acuña, *Zoot Suit Riots*, 89 J. AM. HIST. 1168, 1168–69 (2002) (movie review).

8. This is a Spanish phrase used in the Spanish colonial period to denote the offspring of indigenous women raped by Spanish males. The phrase is typically translated as “son of the fuck” or “son of the bitch.”

9. For a more comprehensive overview on this topic, see GERALD G. GAES & ANDREW I. GOLDBERG, NATIONAL INSTITUTE OF JUSTICE, PRISON RAPE: A CRITICAL REVIEW OF THE LITERATURE (2004); CONNIE CLEM, NATIONAL INSTITUTE OF CORRECTIONS, ANNOTATED BIBLIOGRAPHY ON PRISON RAPE/INMATE SEXUAL ASSAULT (2007), available at <http://nicic.org/Downloads/PDF/Library/019764.pdf>.

survey, this Article approaches the problem by focusing on inmates who claim first-hand knowledge of victimization. From these documentary sources the possibilities and permutations of gender violence emerge, including among inmates, guard-on-inmate, and inmate-on-guard. Part III, *Structural Impediments*, examines legal, political, and administrative factors which help foster the destructive behaviors described in the previous part. It tells of shortcomings in prison policies and procedures that contribute systemically to victimization. There is considerable debate on the prevalence of sexual violence in prison, but to the extent it exists, structural failures in prisons and in the law contribute to the problem as well. In Part IV, *Ghetto Girls and Boys Beware*, the Article shifts focus to outside of prison, to the states in which tens of thousands of inmates are released each year. It theorizes how cycles of destructive masculinity disproportionately affect marginal communities. Finally, Part V, *Prospects for Damage Control*, proposes a set of ideas to combat gender violence in both prisons and the outside. Looking to the future, this part considers legal and community interventions which may help mitigate the social costs of gender violence; prisoners, prison staff, and scholars all have sensible ideas about what can help assuage the problem. The question is whether anyone is listening.

Before proceeding, a quick note on terminology and methodology is in order. Although this Article uses the term “rape,” it does so in full knowledge that there is little consensus regarding what counts as rape in prison. There is no standardized definition of the term and researchers fail to distinguish clearly between “consensual homosexuality, prostitution, and rape in their conceptual schemes.”¹⁰ But the problem is more complex since some of these might still be deemed rape. For example, prostitution may embody a species of rape when it is forced, as opposed to one who volitionally becomes a prostitute. These distinctions, helpful as they may be, still overlook the fact that some acts which appear as consensual may in actuality lend to categorization as rape.

For this Article’s purposes, “rape” is a general term that refers to implicit or explicit use of force, coercion, or manipulation that

10. Helen M. Eigenberg, *Correctional Officers Definitions of Rape in Male Prisons*, 28 J. CRIM. JUST. 435, 435 (2000).

involves oral or anal intercourse.¹¹ This frame hardly maps onto the legal definition of rape, which has been defined differently at various times. At common law, the crime of rape was typically “carnal knowledge of a woman, not the perpetrator’s wife, forcibly and against her will.”¹² Legislation has revised the definition of rape in some jurisdictions, and in others, dispensed with the term altogether in favor of others like “sexual assault,” “sexual battery,” or “sexual misconduct.”¹³ Other jurisdictions use sex-neutral terms and most have abolished the spousal exception.¹⁴

Rape embodies both “sexual” and “gender” dimensions. That is, rape of an individual may stem primarily from the desire for sex, whereas for others rape aims to establish a gender hierarchy; although there is often overlap between the two, sometimes they are polar opposites. The distinction harkens to Anthony M. Scacco’s classic prison study that determined that some assaults “cannot be categorized as homosexual attacks, rather they are assaults by heterosexually oriented males on other males for a political reason, i.e., in order to show power or dominance over other human beings.”¹⁵ Another researcher adds, “the word ‘sexual’ should be reserved to describe a realm of erotic desire and physical gratification, and there is much evidence that the physical interactions and threatened assaults that occur in prison, even the ones that involve genitals, are expressions of dominance and power that have little to do with desire.”¹⁶ Sexual release for these attackers may be a by-product of gender violence, but sex drive is not the primary motive behind the assault.¹⁷ The era of lynching illustrates the point; when mobs would excise the victim’s penis the violence was gendered because “by mutilating the lynching victim, the mob

11. See James E. Robertson, *Rape Among Incarcerated Men*, 17 AIDS, PATIENT CARE AND STDs 423, 424 (2003).

12. CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW CASES AND MATERIALS 407 (2d ed. 2009).

13. See, e.g., JOSHUA DRESSLER, CASE AND MATERIALS ON CRIMINAL LAW 396–404 (5th ed. 2009).

14. *But see* MODEL PENAL CODE § 213.1(1) (1980).

15. James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 13 (1999).

16. Alice Ristroph, *Sexual Punishment*, 15 COLUM. J. GENDER & L. 139, 139 (2006).

17. See ANTHONY M. SCACCO, RAPE IN PRISON 67 (1975).

simultaneously stripped his humanity and, not infrequently, his sexuality.”¹⁸ When Santana’s attacker warned that if he told anyone even a word of what had occurred, “there will be shit on my knife, not on my dick,” the distinction is likewise clear.¹⁹

The definition of rape in law and scholarship might be unstable, but for one inmate, the meaning is clear:

The old prison rape scenes you see on TV are mostly told from the punk’s point of view. A punk or “pressure punk” as we call them, is someone that might put on the act of being a man, but when a knife is at his throat or a rape gang of four or five comes after him he will fuck or suck dick to avoid being hurt, or killed. A real man would rather be dead or beaten to death than submit to another man.²⁰

The contours of rape, however, may not be so rigid since few are likely to concede that anything short of death disqualifies as rape. Some researchers have taken a more inclusive approach that moves beyond the bright-line rule espoused by this inmate. These accounts offer a broader spectrum of occurrence in prison, such as when one inmate prostitutes another or when a “man” demands sex from his “boy” or “wife.” In these and other scenarios, victimization occurs without overt violence, and “vulnerable prisoners endure repeated harassment by theft, robbery, vandalism, fraud, and other offences with the threat of violence underlying all of the crimes.”²¹ Even if an inmate compels another to assent to sex without direct force, it might still be deemed rape since the substrate of the entire transaction is the fact of violence itself; a sex slave might denude himself or accept a penis in his mouth without a fight, but this “voluntary” behavior should not evade classification as rape.

18. W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930* 65 (1993).

19. See, e.g., BILLY WAYNE SINCLAIR, *A LIFE IN THE BALANCE* 70 (2001) (“I would’ve stuck that shank up his black ass.”).

20. ROBERT J. GAGNON, *053803: LIFE AT FIFTEEN* 85 (2006); WILLIAM F. PINAR, *THE GENDER OF RACIAL POLITICS AND VIOLENCE IN AMERICA* 1027 (2001).

21. Andy Hochstetler, Daniel S. Murphy & Ronald L. Simons, *Damaged Goods: Exploring Predictors of Distress in Prison Inmates*, 50 *CRIME & DELINQUENCY* 436, 440 (2004).

Supporting this distinction, Beth Ritchie's "gender entrapment" conceptualizes how an inmate can be "lured into compromising acts."²² From this perspective, rape may occur more subtly, and a prisoner might be raped without resistance in the same way a sleeping victim can be raped—agency may be compromised for a number of reasons, but it does not mean that anything less than rape has occurred. Although in prison there are clearly consensual sexual relationships, there is a great grey zone in which ideologies about economics, family, and other motivations complicate the concept of rape. Gender entrapment demonstrates that adherence to a rigid definition of rape may blur the issues of voluntariness and duress, and specifically, the limits of free will.

A. *Gender Norms in Society*

The rape of Santana's mother, despite dating back over half a century, still offers a powerful illustration of how violence can take gendered forms. Here the point was not merely about sexual gratification, but was to send a message to the *pachucos*. It was a way of expressing power and domination over both male and female bodies against which the men were helpless. According to the story, the tactic worked true to form because Santana's stepfather harbored permanent resentment for Santana, the constant reminder of his wife's rape.

In a later scene, the Eme contracts with a rival gang to carry out a retaliatory hit against sympathizers of the Black Guerilla Family, another rival gang. The hired hitmen are supposed to shoot up a bar and its patrons, but instead of just shooting to kill, they shoot the genitals of one of the males with a shotgun. Like Santana's mother's rape, this violent act models ideas about gender and violence in society at large. Although there were countless other ways that the attackers might have tortured her, they chose rape. Likewise, for the victims at the club, despite the many places on the body that the shotgun could have aimed at, they chose emasculation.

22. BETH RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED, BLACK WOMEN* 161 (1995).

The historicity of these specific acts in the film is debatable, but the fact of gender violence in American society is not. Gender construction characterizes a situational interaction that grows “out of social practices in specific social structural settings and serves to inform such practices in reciprocal relation.”²³ Some define American society as a “rape culture,” where violence against and objectification of women is normative.²⁴ A more radical read, however, might see today’s culture as a modern snapshot of a longer historical trend; from traditional rape law that rejected the idea that a husband could rape his wife to the rape of female slaves, gender violence is a part of the American fabric.²⁵ Moreover, a rudimentary look at American cultural norms shows how negative stereotypes based on gender are a normal feature of mainstream society.²⁶ These norms, especially the masculine biases found in everyday life, provide the foundation on which gender violence in prison is built.²⁷ Popular culture acknowledges rape in prison “either as the ultimate act of emasculation, desperation, and depravity, or the bitter vengeance of homosexual rape for incarcerated criminals.”²⁸ The negative treatment of women in society is the ideology by which prisoners express power behind bars, or as one warden in a Florida prison explains, “[t]his society away from society mirrors the actual society out there.”²⁹

23. JAMES MESSERSCHMIDT, *NINE LIVES: ADOLESCENT MASCULINITIES, THE BODY AND VIOLENCE* 6 (1999).

24. Meredith Simons, *Is American Culture a Rape Culture?*, SLATE (Aug. 19, 2009), http://www.slate.com/blogs/xx_factor/2009/08/17/is_america_home_to_a_rape_culture.html.

25. Rape is epidemic for women on Indian reservations in the United States since jurisdictional issues preclude prosecution of non-Indians who assault Indians. See Darryl Fears & Kari Lydersen, *Native American Women Face High Rape Rate, Report Says*, WASH. POST, Apr. 26, 2007, at A14.

26. See, e.g., Alyn Pearson, *Rape is a Serious Problem for Women*, in *VIOLENCE AGAINST WOMEN* 22, 25 (Karen F. Balkin ed., 2004) (arguing that “[n]early every advertisement is sexist in some way.”); Sarah Sobieraj, *Taking Control: Toy Commercials and the Social Construction of Patriarchy*, in *MASCULINITIES AND VIOLENCE* 15, 15 (Lee Bowker ed., 1998).

27. See, e.g., SCACCO, *supra* note 17, at 85.

28. Melissa Schrif, *The Angola Prison Rodeo: Inmate Cowboys and Institutional Tourism*, 4 *ETHNOLOGY* 331, 341 (2004); see also Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape; Most Favor Condoms for Inmates*, BOSTON GLOBE, May 17, 1994, at 22 (citing poll data indicating that a majority of citizens believe rape in prison is a part of the punishment that offenders deserve).

29. TURNED OUT: SEXUAL ASSAULT BEHIND BARS (Interlock Media 2004).

As an explanation for how social norms influence the gender order in prison, this Article relies on an “importation” perspective. Importation is premised on the idea that inmate culture is primarily a reflection of the values acquired on the outside that inmates bring into the institution.³⁰ For inmates, socially acquired attitudes and beliefs are the foundations for constructing hyper and hegemonic masculinities in prison.³¹ Scholars assert that prisons facilitate and accentuate enactments of hegemonic masculinity, including “male dominance, heterosexism, whiteness, violence and ruthless competition.”³² The rape of men in prison may also correspond to the exploitation of human beings which reflects the essentials of racial politics and violence in America.³³ Others consider power to be the primary motivator that animates behavior inside, hence “the individual, legally classified as a criminal, is the product of a society that naturally turns to violence to solve its problems.”³⁴ Still, others view aggression in prison as a reflection of the high levels of violence that characterizes American society.³⁵ Common to all these accounts is that prison culture is not created *ex nihilo*, nor is it caused by the institution alone; rather, research supports that prisoners reproduce the outside in fundamental ways.³⁶

30. See Ronald L. Akers et al., *Homosexual and Drug Behavior in Prison*, 21 SOC. PROBS. 410, 410–11 (1974).

31. See R.W. CONNELL, GENDER AND POWER 183 (1987) (defining hegemonic masculinity as “always constructed in relation to various subordinated masculinities as well as in relation to women. The interplay between different forms of masculinity is an important part of how a patriarchal social order works.”); Hans Toch, *Hypermasculinity and Prison Violence*, in MASCULINITIES AND VIOLENCE 168, 173 (describing the hypermasculine worldview as illuminating “an important theme in prison violence, which is that the fearful—those showing apprehension—are inviting targets of predation. Two objectives can be achieved when one assaults a man who is fearful: (a) one shows contempt for the man’s demeaning ‘femininity,’ while (b) one reassures oneself that one is different (i.e., nonfearful from one’s target).

32. Don Sabo et al., *Gender and the Politics of Punishment*, in PRISON MASCULINITIES 3, 5 (Don Sabo et al. eds., 2001).

33. PINAR, *supra* note 20, at 1014.

34. SCACCO, *supra* note 17, at 66; see also MICHAEL HARRINGTON, THE AMERICAN CHARACTER 7 (1972).

35. See MICHAELS ADAMS, FIRE AND ICE 53 (2004) (asserting that crime rates in the United States are about three times the rate of other countries); Ian O’Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241, 249 (2004) (noting that the U.S. homicide rate is among the highest in the world).

36. See PINAR, *supra* note 20, at 1015.

The importation perspective has a long pedigree that was articulated succinctly by Hans Toch in his forward to Daniel Lockwood's classic, *Prison Sexual Violence*: "we see men feeding on men in ways that are not only truly primeval but reflective of advanced rules of our societal games. [That is,] the repulsive, disgusting offensive depravity we must face and reject . . . links us disquietingly to ourselves."³⁷ The symbiosis between outside and inside resides in the recognition that male behavior in prison is but an exaggeration of many accepted forms of masculinity in society.³⁸ Readers might not appreciate this fact, but the connections are worth considering:

One man is incarcerated for murdering his wife, another beats his spouse for years without public detection, and yet another dishes out daily verbal abuse and ridicule unbeknown to friends and kin. . . . A prison rapist "enslaves" a new prisoner, a prison guard bashes the crotch of an inmate with his fist during a pat search, and a husband pressures his wife to have kinky sex in order to demonstrate his control. A pedophile is locked up for child molestation, while a schoolteacher masturbates in front of downloaded computer video clips of "young, hot, barely legal girls." Each man resides on a cultural continuum that reverberates the patriarchal forces of the larger gender order.³⁹

Advocating the importation theory, however, does not detract from deprivation or functionalist models that describe inmate motivations. These models understand that inmate culture corresponds to the pains and deprivations of the prison experience.⁴⁰ Rather than being antithetical to importation theory, deprivation at times compliments the perspective. For some prisoners, the lack of space, women, and material goods as well as the frustration of forced celibacy in an all-male environment may motivate aggressive

37. DANIEL LOCKWOOD, *PRISON SEXUAL VIOLENCE* xii (1980); see also JOANNA BOURKE, *RAPE: SEX, VIOLENCE, HISTORY* 356 (2007).

38. See Sabo, *supra* note 32, at 13.

39. *Id.* at 13–14.

40. See Akers et al., *supra* note 30, at 410.

behavior. Such cases may have more to do with the impacts of the prison experience than with imported social norms. These realities, however, do not preclude inmates from responding through gender violence. Similarly, when an inmate enters prison as a misogynist, something like poverty may lead to sexual violence—in the same way an inmate may respond to the pain of prison in terms of the gender values he acquired on the outside.

1. Pornography & Prostitution

Social cultural norms depict how gender bias pervades mainstream culture. Perhaps like no other practice, the objectification of the female body reigns supreme. Arguably, among American cultural habits, nothing perpetuates this behavior like the consumption of pornography, a multi-billion dollar industry.⁴¹ In addition to print media and “on demand” services on cable and satellite, online subscriptions and video sales generate more revenue than Microsoft, Google, Amazon, Ebay, Yahoo!, Apple, Netflix, and Earthlink combined.⁴² Pornography embodies all sorts of sexual preferences, but the heterosexual genre is the most popular and lucrative.⁴³ Although some feminists defend pornography,⁴⁴ others contend that it is an industry built by males for consumption by males, where the female body is the objective other that allows men to fulfill their deepest demented desires;⁴⁵ from rape to bestiality to fetish of Asians or drunken mothers, to plain snuff films in which a woman is killed in the climax of rape.

A rudimentary analysis of porn cinematography indicates that more than mere sex occurs in the films. For example, in much of the

41. See Jerry Ropelato, *Internet Pornography Statistics*, TOPTENREVIEWS, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html> (nothing that U.S. pornography revenues, at over 13 billion dollars, “exceed[] the combined revenues of ABC, CBS, and NBC”).

42. *Id.*

43. *See id.*

44. See DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY, AND SEXUAL HARASSMENT* 99 (1995); Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 139 (2007).

45. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 182 (1987) (“[P]ornography makes women into objects. Objects do not speak.”).

porn industry, male penetration and ejaculation are the “money shots” of the business, specifically shots where the male withdraws his erect penis from whichever orifice of the female it occupied, then ejaculates onto the woman, sometimes on the face, breasts, or buttocks.⁴⁶ In such a scene, the actors “shift from a tactile to a visual pleasure at the crucial moment of the male’s orgasm,” in essence portraying that a “woman prefers the sight of the ejaculating penis or the external touch of the semen to the thrust of the penis inside her.”⁴⁷ Although orgasm is clearly the male’s alone, the “truth of bodily pleasure that heterosexual pornography wants to show is that of women. In general, in contrast to men’s very visible ejaculation, women’s orgasms cannot be documented. But they can be faked.”⁴⁸ Accordingly one scholar asserts, “[p]ornography tells lies about women. But pornography tells the truth about men.”⁴⁹ And the truth is not all that sexy since “men are not represented as having sex at all; rather they are represented as having power.”⁵⁰

Despite that pornographers can portray practically any form of debasement and brutality against a female body, the Supreme Court has reiterated that obscenity is not protected by the First Amendment of the U.S. Constitution.⁵¹ The mass-produced degradation and objectification of women, however, is not without social costs.⁵² One analyst notes that research isolates pornography as the trigger for behaviors that can severely damage “not only the users, but many others, including strangers. The damage is seen in men women, and children, and in both married and single adults. It involves

46. See PINAR, *supra* note 20, at 964.

47. LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 101 (1989).

48. PINAR, *supra* note 20, at 964.

49. JOHN STOLTENBERG, *REFUSING TO BE A MAN* 106 (2000).

50. CALVIN THOMAS, *MALE MATTERS: MASCULINITY, ANXIETY, AND THE MALE BODY ON THE LINE* 20 (1998).

51. *Miller v. California*, 413 U.S. 15 (1973) (outlining a three-part criteria to determine obscenity).

52. See generally *THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS* (James R. Stoner, Jr. & Donna M. Hughes eds., 2010).

pathological behaviors, illegal behaviors, and some behaviors that are both illegal and pathological.”⁵³

In the last decades, some scholars have linked pornography directly to violence in society.⁵⁴ More recent scholarship adds to the point by outlining the negative repercussions for society due to its consumption of pornography.⁵⁵ In her ethnographic study of abused women, Beth Ritchie outlines the various ways in which men treated women, including “forced intercourse, rape using objects like hairbrushes or broomsticks, and being forced to perform degrading sexual acts while viewing pornographic material.”⁵⁶ The idea that pornography is dangerous for women was the crux of Catherine Mackinnon’s *Only Words*, which compiled court hearings and research documenting the harms of pornography to women.⁵⁷ One consumer she cites points to porn’s power to elicit and propel negative proclivities:

I can remember when I get horny from looking at girly books and watching girly shows that I would want to go rape somebody. Every time I would jack off before I come I would be thinking of rape and the women I had raped and remembering how exciting it was.⁵⁸

Prison administrations seemingly support that pornography creates a negative environment for prisoners, and many jurisdictions ban possession of pornographic materials. Cementing the constitutionality of this type of rule, a recent Tenth Circuit decision upheld the prohibition of pornography in Kansas prisons.⁵⁹ For federal facilities, the Code of Federal Regulations states that a warden “may reject a publication only if it is determined detrimental

53. Mary Anne Layden, *Pornography and Violence: A New Look at Research*, THE SOCIAL COSTS OF PORNOGRAPHY (2010), available at http://www.socialcostsofpornography.org/Layden_Pornography_and_Violence.pdf.

54. See Diana E.H. Russell, *Pornography and Rape: A Causal Model*, 9 POL. PSYCHOL. 41 (1988).

55. See generally THE SOCIAL COSTS OF PORNOGRAPHY, *supra* note 52.

56. RITCHIE, *supra* note 22, at 90; see also CATHARINE A. MACKINNON, ONLY WORDS 114 n.3 (1993).

57. MACKINNON, *supra* note 56, at 118 n.27.

58. *Id.* at 18.

59. *Sperry v. Werholtz*, 413 F. App’x 31 (10th Cir. 2011).

to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”⁶⁰ The types of publication that meet the criteria are listed in subsection 7, and include “sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.”⁶¹ Here one might speculate on what the general ban on pornography might imply for society, that is, if pornographic materials lead to negative social environments in prison, how does this inculcate women and children on the outside?

Like pornography, the realities of prostitution say much about gender bias in contemporary society. In fact, there are deep connections between the two. The word “pornography” comes from the Greek *pornographos*, which translates to “writing” or “description of prostitutes.”⁶² This definition makes sense considering that “people who had engaged in paid sex or prostitution were almost four times more likely to have used internet pornography than those who had not engaged in paid sex.”⁶³ Because “prostitution” can take many forms, it can camouflage in different settings. For example, a woman who sells herself for sex on the street is likely to be arrested and charged with a misdemeanor. In this setting the behavior fits the definition of a criminal offense. However, if the same woman solicits or sells herself in the porn setting, she can make a profit. This difference in treatment might seem paradoxical to some since sex for money is money for sex, regardless of the setting.

Legal only in parts of Nevada, prostitution is still common in the United States and generates billions of dollars.⁶⁴ As another industry patronized mostly by males, street prostitution speaks to sex and gender distinctions. Some clients may pay for sex, by and large, to relieve themselves sexually or to derive physical pleasure. Others,

60. 28 C.F.R. § 540.71(b) (2009).

61. *Id.*

62. *Pornography*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=pornography> (last visited Nov. 2, 2011).

63. MARY EBERSTADT & MARY ANNE LAYDEN, *THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS*, THE WITHERSPOON INSTITUTE 24 (2010).

64. Louis Gormley, *Prostitution Pumps Millions into Nevada's Economy*, NEVADA OUTPOST, Dec. 11, 1998, available at <http://www.jour.unr.edu/outpost/community/archives/com.gormley.prostitute.html>.

however, attach different meaning to the patronage, including using a prostitute for all sorts of instrumentalities.⁶⁵ For such a customer, the very power of possessing the money to rent a body may epitomize gender bias. More popularly, the American fascination with “pimps and hos” indicates the normative status of prostitution—from television shows to songs, it has made “bitch betta have my money,” a national anthem with lyrics like:

This dick of mine ain't friendly
Will it hurt you, yea maybe.⁶⁶

2. Hate Language

Like trends in sex consumption, examination of popular language reveals gender bias. Words effectively convey sexuality in terms of violence, including the use of threats based on sexual imagery, e.g., “[d]on't ever fuck me, Tony” or “I'm going to fuck you up.”⁶⁷ The word “fuck” itself may relate to the Latin *pugno*, which can mean to strike, fight or stab with a weapon.⁶⁸ Accordingly, it is common to talk about violence in slang terms of “wanting some ass” or “tearing up that ass.”

Popular terms and phrases aid in the construction of masculinity by aligning “female” synonymous with weakness and powerlessness. In American cultural economics, simply calling a male a “girl” is derogatory;⁶⁹ not even calling him a *bad* girl or a *stupid* girl, but simply a “girl.” Calling a male “Nancy” is a generic example of this practice, as is “sissy,” shorthand for “sister.” In other words, the mere identification as female is itself degrading.

65. See Steven Sawyer et al., *A Brief Psychoeducational Program for Men Who Patronize Prostitutes*, 26 J. OF OFFENDER REHAB. 111, 112 (1998) (citing feminist literature that asserts that prostitution is a mode of both “male dominance” and “cultural oppression of women”).

66. AMG, BITCH BETTA HAVE MY MONEY (Select Records 1992); see also JA RULE, *Bitch Betta Have My Money*, on CAN I GET A . . . (Def Jam Recordings 1998).

67. See generally INEZ CARDOZO-FREEMAN, *THE JOINT: LANGUAGE AND CULTURE IN A MAXIMUM SECURITY PRISON* (1984).

68. *Id.* at 32 n.80.

69. See Patrick D. Hopkins, *Gender Treachery: Homophobia, Masculinity, and Threatened Identities*, in RACE, CLASS, GENDER, AND SEXUALITY: THE BIG QUESTIONS 168, 169 (Naomi Zack et al. eds., 1998).

Expressions which revolve around the penis are the bread and butter of sexist speech. Phallogocentric language inherently suggests something debasing about being penetrated by a penis, vaginally, anally, or orally. For example, calling someone a “cocksucker” is typically not viewed as flattering, but rather represents a subversion of the sucker to the recipient. Likewise, the notion of getting “screwed” or “nailed” replicates the idea of penetration, as does getting “stuffed,” “shafted,” or “dicked” around. Other common references like “hit it,” “pound,” “ram,” and “bang” indicate gendered language that extricates the penis to violence.

The receptacle of violence, a woman’s body, is a degraded subject in common parlance. Like calling a male a “girl,” references to female genitalia connote weakness and contempt such as when a boy is called a “pussy” as a way of saying he is insufficiently masculine. While “cunt” might transmit the ultimate putdown, to the contrary, to say that someone “has balls” embellishes positive qualities. The word “bitch” likewise is an all-purpose way of dehumanizing female bodies. Though a technical term to describe a female dog, the term today is widespread and is used by both sexes. Calling someone a “bitch,” whether male or female, is so normal that the gender invective is barely cognizable.

Language also demeans sexual acts and persuasions. For example, when a male exhibits feminine qualities, he is told to “be a man” or to “stop acting gay.” Likewise, during slavery and Jim Crow, it was common for the ruling class elite to call an African-American adult “boy” as a derogatory epithet. The gender labor embedded in the practice is obvious—despite age and physical maturity, the word intended to articulate a social order in which blackness and manhood are mutually exclusive. Today, hateful language is a regular part of American culture including in professional sports⁷⁰ which has suffered from a string of troubles including an Atlanta Braves coach suspended for shouting gay slurs at a fan in the audience;⁷¹ basketball

70. See Buzz Bissinger, *Homophobia In Major League Baseball, NBA, NFL Is Here To Stay*, BUSINESS INSIDER (May 5, 2011), <http://www.businessinsider.com/homophobia-in-major-league-baseball-nba-nfl-is-here-to-stay-2011-5?page=1>.

71. Craig Calcaterra, *Allegation: Braves’ Pitching Coach Roger McDowell Made “Shocking Gay Slurs” to Fans at AT&T Park*, NBC SPORTS (Apr. 27, 2011), <http://hardballtalk>

idol Kobe Bryant fined \$100,000 for calling a referee a “faggot”⁷²; as well as fellow NBA star Joakim Noah caught yelling anti-gay remarks at fans.⁷³

Other mainstream media indicate linguistic trends in popular culture. For example, Comedy Central’s *The Daily Show with Jon Stewart*⁷⁴ makes gender jokes in practically every episode. In a recent airing after the killing of Osama Bin Laden, Stewart tries to imitate how a tough New Yorker might have handled Bin Laden: “[h]ey, I’ll tell you what I’d do, you give me a gun, you drop me in [explicative] Abbotabad o badda badda or whatever they call their [explicative] cities over there. . . . I’ll go over there and shoot him in the Abbotabad o bingos, boom!” at which Stewart gestures forcefully at his own crotch.⁷⁵ The punch-line of the comedy is clear—emasculatation defines masculinity. Later in the telecast, Stewart describes how, after Bin Laden was pronounced dead, the country experienced a great moment of pride: “I went on Google Earth last night . . . take a look at the time lapsed footage of our southern coast,” after which the camera shows an image of the country with the state of Florida swelling and pointing in an upward direction.⁷⁶ Stewart exclaims, “[n]ot only did we get fully erect, our testicles descended!”⁷⁷ The scene, despite rousing cheers from the audience, may not be so funny. Rather, it reinforces that utmost hate must express itself through gender distinction, where killing causes an erection.

.nbcsports.com/2011/04/27/gloria-allred-claims-braves-pitching-coach-roger-mcdowell-made-shocking-gay-slurs-to-fans-at-att-park/.

72. Ebenezer Samuel, *Lakers’ Kobe Bryant fined 100G for anti-gay slur at ref, Martina Navratilova says lessons to learn*, NYDAILYNEWS (Apr. 13, 2011), http://www.nydailynews.com/sports/basketball/2011/04/13/2011-04-13_kobe_bryant_slammed_by_gay_rights_group_after_appearing_to_direct_antigay_slur_a.html.

73. *Joakim Noah caught using gay slur towards fan*, CBS SPORTS (May 22, 2011), <http://eye-on-basketball.blogs.cbssports.com/mcc/blogs/entry/22748484/29502001>.

74. *The Daily Show with John Stewart* (Comedy Central television broadcast May 2, 2011).

75. *Id.*

76. *Id.*

77. *Id.*

B. Prison Reproductions of Destructive Masculinity

Building on social norms like those described above, this section details how inmates construct masculinities premised on their hatred of women and on hateful language. But before considering how inmates rework masculinity, it is important to understand the importance of masculinity and why men seek to achieve it. Masculinity is characterized as a locus in gender relations through which men engage gender and feel the effects of this engagement through bodily experience, personality, and culture.⁷⁸ Masculinity is not some fixed thing to be defined, but rather is knowable in the processes and relationships that males and females conduct in gendered life.⁷⁹ Put more plainly, masculinity may be understood as the characteristics conventionally viewed as desirable in men.⁸⁰ Masculinity may include risky behavior to prove bravery or honor, or, for example, avoiding seeing the doctor for fear of being viewed as sick—a feminine trait.⁸¹ It goes without saying that practices of violence and sexuality are integral to conceptions of masculinity. From how many sexual partners to how many fights one has had, sex and violence are the lynchpins of masculine evaluators.

Males face constant scrutiny to be seen as manly, which makes masculinity important in the life of men. In prison, the importance is highly exaggerated. In a homosocial setting like prison, adherence to gender ideology requires the manufacture of female bodies in order to establish one's identity as "man." The process typically involves "turn out," or "pinking," a form of rape that effectively turns an anus into vagina. In making men into women, the sexual obligation of a "man" is practically non-existent. A man need never worry about the sexual gratification of his partner, and the relationship is not give-and-take, but a take-only—the punk services the man, and the man is not obliged at all. Although these attitudes are extreme, they might further reflect gender norms on the outside as well. After all, this is

78. See R.W. CONNELL, *MASCULINITIES* 71 (2d ed. 2005).

79. See *id.*

80. See Richard Bolai, *Postmodern Terms—Lacanian to Novelty*, TIMELESS—THEBOOKMANN—FEININ (Apr. 19, 2007), <http://thebookmann.blogspot.com/2007/04/postmodern-terms-lacanian-to-novelty.html>.

81. See RONALD LEVANT & WILLIAM POLLACK, *A NEW PSYCHOLOGY OF MEN* 96 (2003).

the dominant story in pornography and prostitution—satisfaction of the man. In the prison gender order, were a man to gratify his wife or boy sexually, others might interpret it as suspect behavior, perhaps as showing mercy for a sex-starved partner. From the inmates' perspective, however, the line is unambiguously crossed when an individual willfully commits oral sex or consents to anal penetration. As one inmate describes, "homosexuality, while not generally viewed as grounds for banishment, is grounds for the loss of all serious respect in the joint. A dicksucker can never be a leader or seen as a stand up guy."⁸² When the boundary is crossed, when a "man" falls in love with his "wife" or is seduced by another, he falls into his own trap and is said to have gotten himself turned out, a one way ticket to the victim class.

II. DOCUMENTING DESTRUCTIVE MASCULINITY

*The community provides the attitudes, the point of view, the philosophy of life, the example, the motives, the contacts, the friendships and the incentives. No child brings those into the world. He finds them there and available for use and elaboration. The community gives the criminal his materials and habits as it gives the doctor, the lawyer, and the teacher and the candlestick maker.*⁸³

*"[T]urning out," a non-sexual description that reveals the non-sexual ritualistic nature of what is really an act of conquest and emasculation. . . . The rape redefines him as a "female" in this perverse subculture and he must assume that role as the "property" of his conqueror. . . . a slave in the fullest sense of the term.*⁸⁴

Having offered an account of gender norms in society, this Article turns to the crux of this research to chart how these norms play out in the male prison setting. Documentary works candidly detail how prisoners recreate gender order. As on the outside, behind bars there

82. KENNETH E. HARTMAN, *MOTHER CALIFORNIA: A STORY OF REDEMPTION BEHIND BARS* 84 (2009).

83. Frank Tannenbaum, *The Professional Criminal*, 110 *THE CENTURY* 577 (1925).

84. Gordon James Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 *HOWARD J. CRIM. JUST.* 267, 273 (1999).

is no such thing as “masculinity” in the singular, instead inmates construct competing ideologies and multiple masculinities.⁸⁵ The evidence suggests that some systems suffer systemically from sex and gender violence, while for others, it is scarcely a problem.⁸⁶

A. Prisoner on Prisoner

American Me inspired controversy due to Santana’s rape scene. The episode begins after lights out in the detention center, where the attacker tip-toes to Santana’s bed and harnesses him from behind. As Santana struggles with the attacker, the camera pans to the reactions of the other juveniles; most appear to understand what is taking place, but most seem too scared to aid Santana, seemingly because they too have fallen prey to this attacker. As the assailant warns Santana not to tell, otherwise he will get a dagger in the anus, he was transmitting the prison code: silence is golden and snitching is deadly business. Or as one inmate learns, “punks get fucked, but snitches get killed.”⁸⁷ Santana’s portrayal finds a parallel account in *System Failure: Violence, Abuse & Neglect at the CYA*, a documentary on the California Youth Authority.⁸⁸ Describing a situation in which he witnessed a fellow prisoner attacked and sodomized, the inmate attributed the problem to a lack of oversight in the evening shifts: “[a]fter ten o’clock there’s only one staff member, and that staff member is confined to a station with both doors locked . . . 75 wards, ten o’clock lights out.”⁸⁹ He describes the scene, “one dude was laying in his bed, another guy over there got up in the middle of the night, crawled on the ground; staff member in there, snoozing, the dude crept on the floor and didn’t get noticed, jumped on this guy’s

85. See R.W. CONNELL, *THE MEN AND THE BOYS* 10 (2001); James W. Messerschmidt, *Masculinities, Crime, and Prison*, in *PRISON MASCULINITIES*, *supra* note 32, at 67 (rejecting the idea of a “universal” masculinity).

86. See BOURKE, *supra* note 37, at 335–37; GAES & GOLDBERG, *supra* note 9 (indicating that sexual victimization may be as high as 41 percent or as low as 1 percent).

87. T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN’S PRISON* 51 (2006); Terry Kupers, *Rape and the Prison Code*, in *PRISON MASCULINITIES*, *supra* note 32, at 111, 114.

88. *SYSTEM FAILURE: VIOLENCE, ABUSE AND NEGLECT IN THE CALIFORNIA YOUTH AUTHORITY* (WITNESS 2004).

89. *Id.*

bed with knife—‘say something and I’m going to stab you.’ Then he sexually assaulted the guy.”⁹⁰

Despite that Santana exacts instant blood revenge, this scene angered real-life gang members since it portrayed their leader as a rape victim. According to an associate warden from the San Quentin State Prison who consulted Olmos on the film, Olmos was aware that the rape episode could cause a problem.⁹¹ It is nearly impossible to determine whether the rape actually took place, but more certain is that gang members saw the depiction as a tremendous blow to the gang’s reputation and manhood.⁹² One ex-hitman from the Eme described the scene as a “no no” because it was not based on gang ethics, reasoning that “if it had ever happened, he never would have become a Mexican Mafia member.”⁹³ And if he had become a Mexican Mafia member and they learned about the rape later then “they would have killed him.”⁹⁴

What might the negative associations with rape mean for the study of rape? Why is it so important for the gang to distance itself from victimization and to deny that the rape occurred? Further, are there connections between this sort of denial and admittance to being violated? What does it imply for attempts to gauge the prevalence of rape in prison? In other words, if there are consequences for inmates who discuss their experiences, how might this complicate attempts to understand the frequency of sexual violence in prison? Is there merit to the inmate who claims that “most men who have been raped in prison never tell anyone”?⁹⁵

Although this section discusses the ways that inmates inflict harm on one another through gender violence, the subtitle, “Prisoner on Prisoner,” also lends itself to an interpretation of an inmate inflicting violence on himself. Masturbation is one way that inmates cope with violence in prison. As described in one inmate’s account:

90. *Id.*

91. *See* Katz, *supra* note 4, at 1.

92. *Id.*

93. 60 Minutes: La Eme Mobsters and “American Me” Killings (CBS television broadcast Feb. 23, 1997).

94. *Id.*

95. TURNED OUT: SEXUAL ASSAULT BEHIND BARS, *supra* note 29.

You can become so consumed with impotent hatred, so enraged at someone or something in prison, you must *masturbate* to the violence taking place in your mind, because if you cannot contain it *somehow*, if you loosen the grip on yourself a little, you may start by speaking out, loudly—and end your days in a screaming, raging froth from which there is no return. You will leave this world *berserk*.⁹⁶

Under other extreme conditions, prisoners develop scatological strategies to exhibit power. This practice was pronounced in the “dirty protests” in the 1980s in British-run prisons in Ireland.⁹⁷ There, Irish prisoners covered their cells with feces and urine as a line of defense against the onslaughts of British guards.⁹⁸ By turning their insides out, the prisoners were able to mount some form of resistance and exercise autonomy. In the United States, some prisoners adopt similar strategies, including inmates who “gas” guards with concoctions of feces and urine.⁹⁹ These attacks are frequent in solitary units and disease ridden excrement is reported to impact the mental well being of the guards.¹⁰⁰

Inmates who suffer stress disorders following victimization may also turn to substance abuse to cope with the pain.¹⁰¹ In the most severe cases, however, inmates engage in self-mutilation and suicide.¹⁰² Due to feelings of self-hatred or guilt, prisoners are known

96. JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST* 78 (1991).

97. See BOBBY SANDS, *BOBBY SANDS: WRITINGS FROM PRISON* (1998).

98. See generally *id.*

99. See generally Terry A. Kupers, *Trauma and its Sequelae in Male Prisoners: Effects of Confinement, Overcrowding, and Diminished Services*, 66 AM. J. OF ORTHOPSYCHIATRY 189 (1996).

100. See Rina Palta, *Drinking Whiskey with a Sergeant at California's Securest Prison*, THE INFORMANT, MAR. 10, 2011, <http://informant.kalwnews.org/2011/03/drinking-whiskey-with-a-sergeant-at-californias-securest-prison/>.

101. See Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. SOC. L. 135, 144 (1992); STOP PRISONER RAPE, *STORIES FROM INSIDE: PRISONER RAPE AND THE WAR ON DRUGS* 9 (2007), available at <http://www.justdetention.org/pdf/StoriesFromInside032207.pdf> (indicating that despite the lack of research on rape and drug abuse, “rape survivors in the community are . . . six times more likely to use cocaine, and ten times more likely to use other hard drugs”).

102. See Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79—The Prison Rape Elimination Act of 2003*, 32 NOTRE DAME J. L. & LEGIS. 142, 152 (2006) (referring to suicide as “the [m]ost [l]ethal [c]onsequence of

to harm themselves by cutting into their flesh with sharp objects, sometimes leaving dozens of wounds on a single arm.¹⁰³ Mental decomposition can lead to gnawing on skin and flesh, and in some cases, transgender prisoners have been known to self-mutilate their genitalia, cutting the scrotum with razors or other objects.¹⁰⁴ Suicide is common to victims of gender violence; one researcher notes that suicide is “the most serious mental health concern after an inmate has been [raped].”¹⁰⁵ As one inmate explains, “[t]hey rape them, go in there and rape them and guys commit suicide because of that.”¹⁰⁶ In one suicide note, an inmate who was a victim of repeated violent assaults, as if trying to take a final stand and assert some sort of control wrote, “I’d rather die of my own free will than be killed.”¹⁰⁷

1. Rape and Turning Out

The hallmark of masculinity in prison is the penetration of another male, the “premier act of domination.”¹⁰⁸ As one researcher notes, “[a] victim may experience a lifetime of pain and suffering after only one event.”¹⁰⁹ From the outside, the behavior may look like homosexual sex, yet it can be the very epitome of masculinity as it represents “validation of the penetrator’s masculinity.”¹¹⁰ This perspective reveals an organization that follows a “dominance-enforcement model” in which “the sexual element expresses and symbolizes a previously imposed power relationship, the desires of the passive partner are irrelevant, the rulers are prohibited from taking a passive role, and sexual penetration of an adult male is

[p]rison [s]exual [v]iolence” and “a significant cause of death in America’s correctional institutions”); Knowles, *supra* note 84, at 269.

103. See Vladimir Carli et al., *Self-Harm in Prisoners*, CNS SPECTRUMS, Aug. 9, 2010, <http://www.cnsspectrums.com/asp/articleDetail.aspx?articleid=3581>.

104. See CRUEL AND UNUSUAL (Outcast Films 2006).

105. Robert W. Dumond, *Confronting America’s Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 31 J. AM. ACAD. PSYCHIATRY & L. 354, 356 (2003).

106. HUMAN RIGHTS WATCH, NO ESCAPE MALE RAPE IN U.S. PRISONS: THE RODNEY HULIN STORY (2010), <http://www.hrw.org/legacy/reports/2001/prison/video.html>.

107. *Id.*

108. Robertson, *supra* note 15, at 14.

109. Dumond, *supra* note 105, at 355.

110. Stephen “Donny” Donaldson, *A Million Jockers, Punks, and Queens, in PRISON MASCULINITIES*, *supra* note 32, at 118.

viewed as the natural fruit of conquest.”¹¹¹ Prison rape reflects the traditional definitions of masculinity in society and disallows male rape victimization.¹¹² Accordingly, incarcerated individuals follow the patterns of the outside, with males possessing and manipulating power, control, and sexual aggression while women sit at the receiving end.¹¹³ Although some violence is rooted in the need for relieving sexual appetite, much involves other utilities, which can include sending a message to rivals, enhancing economic prospects, carrying out the bidding of higher ups, or in some cases, showcasing raw power. As described by one prisoner, “I like power; matter of fact I love power. I love being in control. I have to be the dominant one and I practice that and enforce that in every relationship that I’ve been in [in] prison.”¹¹⁴

For those poor in power, the prison is rich with difficulty. In *No Escape*, one inmate recounts how quickly incoming inmates are sized up by predatory men in a Texas prison: “[i]f someone coming in is kind of scared or hesitant, shy, he’s gonna get turned out. Chances are really high.”¹¹⁵ In the film *Turned Out: Sexual Assault Behind Bars*, prisoners describe the subtle and not-so-subtle methods for turning out inmates.¹¹⁶ The process might start with a simple and seemingly innocuous gesture such as loaning an inmate a package of cookies or coffee or cigarettes, attached to which is an enormous interest rate. As one prisoner in Alabama describes,

If a man borrows too much stuff, gets too far in debt, either you fight for it and let him know I’m not gonna pay you, so me and you just gonna have to whoop each other’s ass and we gonna go to lock up; or we gonna go back here and fuck, just however you want to do it, that’s the way it works . . . he might

111. Stephen Donaldson, *A Million Jockers, Punks, and Queens, Stop Prisoner Rape: Sex Among American Male Prisoners and its Implications for Concepts of Sexual Orientation*, STOP PRISONER RAPE (Feb. 4, 1993), http://spr.igc.org/en/stephendonaldson/doc_01_lecture.html.

112. See Eigenberg, *supra* note 10, at 437.

113. See *id.*

114. TURNED OUT: SEXUAL ASSAULT BEHIND BARS, *supra* note 29.

115. HUMAN RIGHTS WATCH, *supra* note 106; BOURKE, *supra* note 37, at 348.

116. TURNED OUT: SEXUAL ASSAULT BEHIND BARS, *supra* note 29.

have borrowed ten soups and ended up fucking out his ass the rest of his life here.¹¹⁷

As this inmate relates, turn out may rely on economic assumptions, which, as on the outside, associates poverty with femininity.¹¹⁸ Poor prisoners who lack resources are also those likely to get caught up in schemes that force them to join the ranks of women.¹¹⁹

Turn out occurs through raw force as well. In one interview, a man describes how he and his partner victimized another inmate, each holding the victim at knifepoint:

I give him the grease, I tell him to put some on his finger, stick it in his ass and, you know, fuck his self, to loosen his self up because I know he had never been penetrated before—it was his first time. It's an old penitentiary trick that I learned from some old convicts. If he screams rape, he had grease under his fingernails, so he greased his own self up. I'm just going to basically lie and tell them I've been fucking him and that he's been my boy.¹²⁰

The first attacker starts intercourse with the victim, but then his partner wants in on the action:

He greases himself up and he shows no mercy. He fucks him for real, so I had to tell him “hold up man, slowdown, chill out, you don't want to hurt him for real, then he'll have to go to the hospital and he will automatically have to say what happened.”¹²¹

Corroborating the testimony, his partner in a separate interview explains the relentless nature of the attack: “[h]e had sex with him first, then I have sex with him, then he have sex with him, then I have sex with him, then he have sex with, then that was the end.”¹²² The

117. *Id.*

118. See Sasha Gear, *Rules of Engagement: Structuring Sex and Damage in Men's Prisons and Beyond*, 7 *CULTURE, HEALTH & SEXUALITY* 195, 199 (2005).

119. *Id.*

120. TURNED OUT: SEXUAL ASSAULT BEHIND BARS, *supra* note 29.

121. *Id.*

122. *Id.*

next day the victim ends up in segregation lockup, which suggests that he had reported the incident and which makes one of his rapists ponder: “[i]n my head I’m like damn . . . we got ourselves a rape case.”¹²³ The assessment, however, is a miscalculation because rather than prosecuting the attackers, the victim settles for becoming a sissy, sold from one inmate to another, as one of his attackers explains, “he just went crazy, just went to sleeping with different guys, I mean just tossing that ass up, then everybody fucked him.”¹²⁴ For such an inmate victim, the past may always pose a burden since in prison word travels quickly. According to his assailant, even “if he stays gone for five or six years or whatever, if he ever comes back to prison and someone in prison remembers him from then, he will always be a boy.”¹²⁵

Academics debate whether color-bias is a primary motivation for turn outs, but documentary evidence stresses that it is indeed a factor.¹²⁶ The modern literature on sexual violence in prison indicates increased trends of “black-on-white” victimization from the 1970s onwards.¹²⁷ Differentiating early literature from later periods, one scholar notes “the near-unanimous insistence on race as the most important structuring aspect of rape in prison. According to virtually every report in this period, prison victims were disproportionately

123. *Id.*

124. *Id.*

125. *Id.*

126. See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 *YALE L. & POL’Y REV.* 1, 53–61 (2010) (“[T]he 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.”).

127. See LEE H. BOWKER, *PRISONER SUBCULTURES* 109 (1977); LOCKWOOD, *supra* note 37, at 78; PINAR, *supra* note 20, at 1031–34; SCACCO, *supra* note 17, at 71–74; CARL WEISS & DAVID JAMES FRIAR, *TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT* 49 (1974); WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON* 44 (1982); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *NCJ 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES*, 2006 at 4 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf>; Leo Carroll, *Humanitarian Reform and Biracial Sexual Assault in a Maximum Security Prison*, 5 *URB. LIFE* 417 (1977); Christopher Hensley et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 *J. INTERPERSONAL VIOLENCE* 595, 596–97 (2003); Christopher Hensley et al., *Examining the Characteristics of Male Sexual Assault Targets in a Southern Maximum-Security Prison*, 20 *J. INTERPERSONAL VIOLENCE* 667, 668–70 (2005); Knowles, *supra* note 84, at 268, 272, 275–78.

white and assailants disproportionately African-American,” reflecting demographic shifts in those prisons and political culture.¹²⁸ However, the issue of “blacks exclusively raping whites” is a documented occurrence that dates back to the 1960s.¹²⁹ In enacting anti-prison rape legislation, Congress adopted the view that “[t]he 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.”¹³⁰ Later studies dispute this proposition, including the federally funded study that produced *The Myth of Prison Rape*, which, despite the literature, makes the surprising claim that the “history of prison rape research has no definitive analysis between rapists’ and rape victims’ race or ethnicity.”¹³¹ Such a statement is at odds with the contention that the racial inequality aspect of prison rape “may be the largest in any violent crime committed in the United States.”¹³² In the documentaries, the typical story of African-American inmates pressuring boys and sissies tends to follow this pattern. One inmate notes the difficulty:

For a white guy to go in the penitentiary, it don’t matter if he’s fucking rock hard and three hundred pounds. . . . [F]or a young white guy, like myself, that was real skinny and wasn’t working out and wasn’t really healthy and been doing drugs and shit, it’s not just one or two people coming at him, it’s just boom, boom, boom, boom, boom, boom, boom, boom—every five minutes, it’s just boom, boom, boom, it’s just constant.¹³³

128. REGINA KUNZEL, *CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY* 151 (2008).

129. Knowles, *supra* note 84, at 272.

130. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(9) (2009).

131. MARK S. FLEISHER, *THE MYTH OF PRISON RAPE: SEXUAL CULTURE IN AMERICAN PRISONS* 23 (2009).

132. Knowles, *supra* note 84, at 268.

133. *TURNED OUT: SEXUAL ASSAULT BEHIND BARS*, *supra* note 29; PARSELL, *supra* note 87.

2. Forced Families, Prostitution & Slavery

Behind bars, the true obligation of a “man” is the expression and maintenance of masculinity, and like life on the outside, prisoners express masculinity by having a “family.” The meaning of manhood embeds in dialectics—identity as a man cements by having a wife and children. As these terms suggest, the hierarchical system in prison mirrors the outside, which places “marital-reproductive heterosexuals alone at the top, followed closely by un-married heterosexuals, those who prefer solitary sexuality, lesbians, and gay men, prostitutes, transvestites, and sado-masochists.”¹³⁴ Creation of a prison family distorts the already socially distorted patriarchy, but it may alternately reflect the intense desire for family, or the lived realities of individuals whose own family life has been anything but stable. In the quest for family these inmates may attempt to fill the void by creating one in prison: “we’re removed from our natural families, so we make bonds and friendships.”¹³⁵

Gender constructions involved in creating a prison family reveal a “situated accomplishment” different than sex, since sex refers to identification as a woman or man, whereas gender is the corroboration of that identification achieved in social interactions.¹³⁶ Turning out an inmate is the definitive method of establishing a rank in the prison social hierarchy in which the daddy is one who makes a boy, sissy, or son of his victim. Or, if the relationship becomes serious, the turn out can become his “wife,” a phenomenon one inmate describes as normal in prison:

Like going to work and drinking coffee are the normal thing on the street, having boys and prison wives is a normal thing in here. The same things go on here as go on out there. When they go to work and make their money, we do our hustling and make our money.¹³⁷

134. JAMES W. MESSERSCHMIDT, *CRITIQUE AND RECONCEPTUALIZATION OF THEORY* 74 (1993).

135. *TURNED OUT: SEXUAL ASSAULT BEHIND BARS*, *supra* note 29.

136. Messerschmidt, *supra* note 85, at 79.

137. *TURNED OUT: SEXUAL ASSAULT BEHIND BARS*, *supra* note 29.

Some inmates live in between spheres of family, such as one inmate with a tattoo of his “family tree”: one side lists the names of his biological family members and the other side lists the names of his prison family.¹³⁸

Although some cases are more harmful than others, the motivation to acquire power often underlies the creation of a prison family. Describing how the acquisition of boys and power go hand in hand, one man explains,

The more boys that I picked up, the more I wanted . . . it became a challenge to see a pretty little young boy come in, everybody shooting at him, everybody trying to get him, everybody trying to pull him in; it became a challenge, it made my dick hard to chase him to see if I could get him before anyone else.¹³⁹

This particular inmate had several boys who themselves had other boys, which thereby increased the size of his family. Another explains how he uses his other boys as a way of attracting others with material items like food, cigarettes and coffee: “[b]ut I’m not giving it to him directly,” the inmate assures, “he’s getting it from one of my boys, and for me, my boys get my boys—they tell him the type of person I am and the benefits that they have of being with me.”¹⁴⁰

Although being the “head” of a family cements masculinity, it can be the very thing that strips a male of manhood. When a man falls for his wife or boy in a way that moves beyond the political, beyond the business of establishing masculinity, he is said to have gotten himself turned out. One family man describes the emotional path that led to his masculine demise: “[w]e cared deeply about each other. I woke up, first thing I wanted to see was him; before I went to bed at night the last thing I wanted to see was him. I loved him.”¹⁴¹ For this inmate, the seriousness of the relationship turned the turn out scheme on itself and he got caught up in the process. He recounts, “on the street I never thought that I would ever be with another man, period.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

In no way or thought I could love another man or have affection toward another man, but over the years, I don't know, prison turned me out, into sort of a freak."¹⁴²

In family life, being a man's wife or boy can mean protection and better comforts in a harsh world. However, status is not static, and just like a man can lose his position, so too can a wife. All subordinates are potentially subject to prostitution, where the man makes money by renting his subordinates for sex to other inmates. Those marked as punk sometimes "endure years of sexual slavery and torture."¹⁴³ One inmate describes his own experience at the hands of his man: "[i]t happens all the time. They could pimp me out and make, you know, triple, make more money than they've invested," or as another attests, "they either want you for your money or your ass."¹⁴⁴ Sometimes inmates will settle for drugs, as described by an inmate who tells of life as a teenager in jail and prison in Florida, where he extorts his homosexual cellmate's prescription Demoral. In his situation, he became a "man" through force of intimidation, even though no violence was involved:

I had a good life for a week or so. I'd never had a servant before, lot less one that hung onto my every word and was thrilled if I just talked halfway nice to him/her. I was beginning to see that the rules were different in here than on the street.

Outside these walls, weaker people have an even say with the stronger and the laws enforced that. But here the stronger ruled the weak, and the weak had to be ruled otherwise they'd just do what ever they wanted, all of which involved disrespecting their superiors. Besides, the weak enjoy being controlled; it takes away their sense of responsibility. It's as if you're the Daddy and they're the kid, when problems arise, your say is final. Sometimes you might have to beat them a little just to remind them of their place, but for the most part, it's understood who runs things.¹⁴⁵

142. *Id.*

143. Dumond, *supra* note 105, at 356.

144. TURNED OUT: SEXUAL ASSAULT BEHIND BARS, *supra* note 29.

145. GAGNON, *supra* note 20, at 31.

As this inmate's language suggests, an emasculated male is called "she" or "her" to indicate inferior status. The extreme of subordination is sex enslavement, which may be distinguished from prostitution since there is nothing gained by a slave "lent out" for the purposes of sexual assault by other inmates.¹⁴⁶ Boys and sissies typically obtain material rewards for their services, but slaves get nothing; instead, a man might lend out the slave to an individual or group, in some cases as a form of punishment. Some slaves are forced to perform multiple sex acts in a day, and it is not uncommon for an individual to perform oral sex on or be sodomized by a line-up of inmates in a single session.¹⁴⁷

B. Guard on Prisoner

When he entered Angola prison back in the 1970s, Billy Wayne Sinclair recounts how guard and staff attitudes helped perpetuate toxic ideas about gender. As the driver carrying Sinclair and the other new inmates arrives, he jokes, "I've got five fresh fish in here," referring to the inmates.¹⁴⁸ Without hesitation the uniformed guard looks at the group and retorts, "[t]hat young one in there is going to make some dude happy tonight."¹⁴⁹ Although such language may seem unbelievable to an outsider, for prisoners it is anything but. Later that night Sinclair witnesses the same inmate attacked at knifepoint, "while [a] guard stood at his post, no more than a hundred feet from the attack, watching."¹⁵⁰ Even though these events are decades removed, according to the data, guards not only make such statements and ignore such attacks, they even orchestrate them.

1. Direct Assaults & Orchestral Maneuvers in the Dark

Violence perpetuated against inmates by guards includes both the sexual and gendered variety. In 2005, the Bureau of Justice Statistics reported that "42% of allegations [of sexual violence] involved staff

146. McGuire, *supra* note 1, at 75.

147. *See id.*

148. SINCLAIR, *supra* note 19, at 100.

149. *Id.*

150. *Id.* at 103.

sexual misconduct.”¹⁵¹ Although direct sexual assaults are common, there are also gendered modes of behavior such as the old “Tucker telephone” in Arkansas prisons. This form of abuse consisted of a naked inmate being strapped to a table with electrodes attached to his foot and genitals. Electrical charges were then sent through his body, and in some cases “long distance” calls would render the prisoner unconscious.¹⁵² Other forms of violence surface in times of crisis like the Attica Riots, where prisoners were stripped naked and beaten in the genitals, including one whom guards caught and applied burning cigarettes to his genitals.¹⁵³

The classic set of letters penned by Jack Henry Abbott describes a beating he takes in a strip search:

I am thrown down the stairs, and I lie on the floor, waiting. My nose is bleeding and my ears are ringing from blows to my skull.

“Get up!”

Immediately I am knocked down again.

“Strip!”

I stand, shakily, and shed my clothing. His hands are pulling my hair, but I dare not move.

“Turn around!”

I turn.

“Bend over!”

I bend over. He inspects my anus and my private parts, and I watch, anxiously, hoping with all my might he does not hurt me there.¹⁵⁴

151. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 210333, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, 1 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf>.

152. PINAR, *supra* note 20, at 1062.

153. *Id.* at 1064.

154. ABBOTT, *supra* note 96, at 9; BOURKE, *supra* note 86, at 339.

This episode resonates with a transgender inmate's account from *Cruel and Unusual*, which describes a sergeant's assault in similar circumstances:

I worked outside the fence, I was minimum security. On the way out one morning, the sergeant had frisked me once and then he decided he was going to do it again in front of everybody else. He got behind me and started feeling my breasts and squeezing my nipples with his fingers and rolling them around and grabbing my butt and squeezing it and patting it and just acting like a pervert. And there's nothing you can do but just stand there and take it. I had wrote a grievance on that and that's when they came out to the breakyard—they told me that I was never going to leave the camp, I was never going to leave the prison alive.¹⁵⁵

In another account, an inmate in Florida relives how he was strip-searched by a sergeant after visiting hours. After taking him to the “shakedown room,” the sergeant masturbated at the inmate from inside the control room.¹⁵⁶ This was not an isolated episode, as later the sergeant would expose himself to the inmate and demand service:

[H]e looks at me and tells me to lick it—his exact words . . . I started pleading with him . . . he put his hand on my head and tells me to lick it, and he's using an authoritative tone ordering me to lick it. He forced my head down there, and he had his other hand down there. He ejaculated on my face and my mouth.¹⁵⁷

Detailing how he resisted from fighting back, the inmate notes the costs of defending oneself in prison:

If I'm ever placed in this same situation in what we refer to as the “free world,” I could have simply walked away or if he would have gone to put his hands on me I could have defended myself, could have broken his jaw . . . but when it's somebody

155. CRUEL AND UNUSUAL, *supra* note 104.

156. *Id.*

157. *Id.*

standing in a uniform, and all you see is sergeant stripes and a whistle hanging there and an I.D., and they are the people who run your life—I didn't know what to do. Only thing I kept thinking was another 15 years if I hurt this man, I'm going to be in prison another 15 years. Nobody's going to believe me, nobody is ever going to believe this. If he's capable of doing something like that, he could pull drugs out of his pocket and say "look what I found on you," rip his shirt and say "you just assaulted me."¹⁵⁸

This inmate's story not only illustrates the disparity in power between inmates and guards, but also how sometimes inmates achieve some semblance of justice. This inmate eventually cooperated with prison officials to set up a video-sting operation on the guard, which recorded the sergeant exposing himself again to the inmate. Although the guard lost his job as a result of the sting, this was insufficient punishment from the inmate's perspective. More troubling was that the guard got no jail or prison, and was still a danger on the street.¹⁵⁹ This inmate's story supports research that suggests prison officials use their authority to gain sexual contact with inmates.¹⁶⁰

Intense fear of attack can lead to unanticipated outcomes, and inmates have been known to achieve erections due to the attack of guards. Abbott tells in dramatic fashion:

I was so constantly and arbitrarily attacked in my cell there, after a while my desire for physical relief was so powerful and all-pervading that when the guards finally would leave off the attack and exit my cell, I would sometimes achieve an erection out of despair and pain.

I have in those conditions had to masturbate to relieve myself, but not masturbate with any vision in my mind, my imagination. The pure physical act of caressing the penis after

158. *Id.*

159. *Id.*

160. See Cindy Struckman-Johnson et al., *Sexual Coercion Reported By Men and Women in Prison*, 33 J. OF SEX RES. 67, 75 (1996).

numberless exposures to attack is enough. It is entirely a physical thing, entirely involuntary.¹⁶¹

In addition to direct confrontation, guards foment violence by orchestrating attacks by other inmates.¹⁶² Although reports have documented guards promoting “gladiator fights” among inmates, there is equally compelling evidence showing that guards arrange rape rooms for “booty bandits,” known rapists, to have access to inmates.¹⁶³ Perhaps the most famous case comes from Corcoran State Prison in California, where one such rapist testified that guards knew about his reputation and used him regularly to “punish” insubordinate inmates.¹⁶⁴ There are even instances where staff members forced prisoners to have sex with one another.¹⁶⁵ In another case, a Michigan inmate filed an affidavit citing a guard who threatened to rape the inmate’s daughter and distributed her home address to other inmates.¹⁶⁶

2. Turning a Blind Eye

Guards tend to subscribe to the same code of silence that governs prisoner subculture, and those who break ranks and report the abuses of fellow staff may be shunned or harmed.¹⁶⁷ Even though prisons prohibit consensual sex and issue disciplinary sanctions for violations, the acts are a widespread occurrence behind bars, suggesting that guards selectively use their authority to report violations.¹⁶⁸ One might speculate that guards may use this same discretion when it comes to non-consensual behavior (or at the very

161. ABBOTT, *supra* note 96, at 55.

162. See GEORGE F. COLE & CHRISTOPHER E. SMITH, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 513 (11th ed. 2007).

163. BOURKE, *supra* note 37, at 341.

164. Richard Stratton, *The Making of Bonecrusher*, *ESQUIRE* (Sept. 1, 1999), http://www.esquire.com/features/ESQ0999-SEP_BONECRUSHER.

165. PINAR, *supra* note 20, at 1065.

166. *Michigan Prison Guard Threatens to Rape Inmate's Daughters and Gives Out Home Address to Prisoners*, *IDAHO OBSERVER*, Mar. 2010, available at <http://proliberty.com/observer/20100329.htm>.

167. See Sabo et al., *supra* note 32, at 11–12.

168. See Eigenberg, *supra* note 10, at 436 (citing scholastic uncertainty about whether “officers regularly report these infractions or whether they use their discretionary power to ignore some violations”).

least may misinterpret the acts), “try to avoid embarrassing confrontation with inmates,” or simply fail to define certain acts as rape simply because there is no knife to the throat.¹⁶⁹

Perhaps one of the most frequent complaints is that guards ignore victimization and allow attacks to take place in their presence.¹⁷⁰ In both research and formal grievances, inmates report that guards fail to respond to pleas for protection against violence. Sometimes the behavior arises from neglect, but other times procedural barriers prevent aid, such as when guards cannot compile enough credible evidence to grant an inmate protective custody.¹⁷¹ When guards turn a blind eye to the problem, ignore it outright, or are unable to respond, inmates report feelings of desperation and hopelessness.¹⁷² One account offers candid testimony of this problem at its worst:

From my angle, I could make out someone laid over a bunk with his hands tied to the bunk rails. A sock had been shoved in his mouth and his pants were pulled down to his knees that were planted on the concrete floor. Various characters were taking turns corn-holing him from behind. When the Dorm officer came through for count time, everyone scrambled back to their bunks leaving the victim in this user friendly position. The guard stopped for a moment, took in the situation then continued counting. Once the guard was gone, the butt party was continued.¹⁷³

Like the way that skepticism attaches to rape victims on the outside, inmates are similarly doubted.¹⁷⁴ Rape perpetuated against women on the outside often entails the victim overcoming presumptions that she must be lying or that the sex was consensual.¹⁷⁵

169. *Id.* at 436.

170. See PINAR, *supra* note 20, at 1065; see also *ABC News: Prison Rape: Part of the Punishment?* (ABC News Productions 2001) (citing a Texas guard who admits that guards routinely ignore inmate victimization).

171. See PINAR, *supra* note 20, at 1065.

172. *Id.*

173. GAGNON, *supra* note 20, at 100.

174. See, e.g., BOWKER, *supra* note 26, at 83 (discussing that in campus gang rapes, “reactions of many students and not a few faculty and administrators were notably victim-blaming and perpetrator-exonerating”).

175. *Id.*

Likewise, in some facilities, homosexuals, queens, and others are assumed to be in a state of permanent consent.¹⁷⁶ Others assume that if a “man” cannot fight off his aggressors, he must have “wanted it,” typically designated by the creed “fuck or fight.” Such was the conclusion of a psychologist in the infamous Rodney Hulin Jr. case, who is reported to have told the victim’s mother after multiple rapes, “he probably likes it.”¹⁷⁷ Lawyers for Texas Prisoners attorney Donna Brorby describe how this attitude guides prison officials in their work: “[y]ou see this pattern in some of the investigations that express this disbelief that a gay who did not want to have anal sex could be a victim of a rape—that somehow if it happened it was because the guy wanted it.”¹⁷⁸ This indeed captures the sentiment of one guard who chides a victim of a gangbang—“*I thought you liked dick.*”¹⁷⁹

For homosexual and transgender inmates, the lack of staff response is acute. In an MSNBC documentary, one inmate describes how homosexuals experience “disrespect day in and day out,” both from inmates and guards.¹⁸⁰ Another inmate adds that negative attitudes run up to the highest levels of administration:

Three days after I was out in the prison, I was in my cell and the warden came into my cell and he says “do you have a penis or a vagina between your legs?” I says I still have a penis. He says, “let me see.” So I had to drop my drawers and show him. Then he says “you know we’re not going to treat you here. We don’t recognize transsexuals as a serious medical need and were not going to treat you.” Then he says, “more than likely you’ll wind up killing yourself.”¹⁸¹

Although the attitudes by guards and administrative staff may contribute to gender violence, sometimes guards are at the receiving end of the same. Inmates have homosexually raped guards,¹⁸² most

176. See BOURKE, *supra* note 37, at 342.

177. HUMAN RIGHTS WATCH, *supra* note 106.

178. *Id.*

179. PARSELL, *supra* note 87, at 212.

180. *Lockup Raw: Prison Love* (MSNBC television broadcast July 12, 2008).

181. CRUEL AND UNUSUAL, *supra* note 104.

182. PINAR, *supra* note 20, at 1061.

evidently in times of riot.¹⁸³ There are also reports by female guards who have suffered victimization at the hands of male inmates.¹⁸⁴

III. STRUCTURAL IMPEDIMENTS

*Correctional officers, administrators, mental health staff, support staff, teachers have all been identified as violating inmates sexually.*¹⁸⁵

*How many inmates have they prosecuted for rape in prison?*¹⁸⁶

The previous section elaborated on guards' contributions to the problem of gender violence. This section broadens the focus to consider how the law, institutional rules, and policies contribute structurally to the problem. As Santana's rape as a juvenile depicts, attacks are facilitated when inmates are stacked in barracks-style housing. Some cells are designed this way, but many result from the problem of overcrowding, where one's "cell" might be a converted gymnasium or cafeteria, and one's "roommate" might consist of several dozen to a couple hundred others. In such prisons, the opportunity for attack is greater simply because the exposure is greater. Overcrowding offers a simple illustration of how other systemic issues factor into gender violence. Structural complications are largely divorced from the will of inmates and even staff, and instead correspond to legal, budgetary, regulatory, and other constraints. Overcrowding exacerbates violence in jurisdictions where financial woes have forced cuts in hiring and reduced prison staffs. The practical result is fewer eyes overseeing a greater number of inmates, all of which increases the scope of violence.

Sometimes the problem occurs when prison staff use sex as a method to control inmates or as a management tool. Despite institutional bans on sex, it may have a strategic, if improper, use in

183. See generally ABBOTT, *supra* note 96; JAMES. B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* (1983).

184. See S.C. Light, *Assaults on Prison Officers: Interactional Themes*, in *PRISON VIOLENCE IN AMERICA* 207 (Michael C. Braswell et al. eds., 1994).

185. See Dumond, *supra* note 102, at 158.

186. Michael J. Carlson, *Surviving Rape in Prison*, in *PRISONS* 34 (Mary K. Hill ed., 2006).

prison, especially when it serves the prison's purposes.¹⁸⁷ As one warden admits:

We have sex, all types of vices . . . and sometimes those things keeps 'em busy, keeps them out of our hair. And there again I don't condone it, and if we catch 'em we'll punish 'em; and I know it goes on and it probably does have some element of helping us keep control.¹⁸⁸

This account accords with one inmate who believed that guards rarely enforced no-sex rules because non-enforcement "helped keep violence down."¹⁸⁹

Procedures that attend the reporting of victimization also contribute to the problem. For example, there are considerable consequences for filing a formal complaint against another inmate. Complaining to guards is viewed as the "worst offense" of the prisoner code.¹⁹⁰ In the eyes of inmates, a complainer will likely be viewed as a "snitch," and subject to reprisal that crosses "all racial lines."¹⁹¹ "I'd kill a fucking snitch," is an attitude among prisoners that forces prison systems to put complainants in "protective custody" to minimize exposure to retaliation.¹⁹² In some jurisdictions the inmate must request to be put under protective custody before it will be considered.¹⁹³ Protective custody is usually no different from administrative segregation, security housing, or special housing, among other terms that euphemize the state of solitary confinement. This is where the most severe rule breakers dwell: the mentally ill and death row inmates, not to mention those sent there as validated gang members. Because protective custody places inmates in close

187. *See id.*

188. TURNED OUT: SEXUAL ASSAULT BEHIND BARS, *supra* note 29; Dumond, *supra* note 105, at 357.

189. PARSELL, *supra* note 87, at 131.

190. Kupers, *supra* note 87, at 112.

191. PARSELL, *supra* note 87, at 225.

192. *Id.*

193. *See, e.g.*, NEB. JAIL STANDARDS BD., NEB. CRIME COMM'N, JAIL BULLETIN NO. 134 at 7 (Apr.–May 2007), available at http://www.ncc.state.ne.us/pdf/jail_standards/jail_bulletins/134.PDF.

proximity to violent or predatory inmates, victims are at great risk of being re-victimized.¹⁹⁴

In addition to impediments on the inside, Supreme Court jurisprudence on Eighth Amendment claims is little help for assuring bodily integrity behind bars. Attitudes in the judiciary in general have done little to defuse the problem of sex and gender violence in prison despite that as early as *U.S. v. Bailey*, Supreme Court Justice Harry Blackmun noted in his dissent that a “youthful inmate can expect to be subjected to homosexual gang rape his first night in jail.”¹⁹⁵ Despite this ominous account, the Court set the bar high for holding a prison accountable for sexual assault. By today’s jurisprudence, a prisoner must prove that the prison agents acted with “deliberate indifference,” a standard that requires proving that a guard’s disregard of the risk of harm created by the prison condition was “reckless” or “conscious,” which is no easy task.

The Supreme Court established “deliberate indifference” as the standard for Eighth Amendment suits against prison officials for claims of rape in *Farmer v. Brennan*.¹⁹⁶ Deliberate indifference represents the standard for actions brought by prisoners in both state and federal courts.¹⁹⁷ Constitutional claims against federal prisons, called “Bivens suits,” are brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*.¹⁹⁸ Constitutional claims against state officials are deemed “1983” suits and are brought pursuant to 42 U.S.C. § 1983. In order to obtain relief under *Farmer*, prisoners must make out a prima facie case and survive the defendant’s motion to dismiss. Since inmates do not have a right to a free attorney in 1983 suits, most state cases are filed pro-se by inmates, making a motion to dismiss a high hurdle.¹⁹⁹

194. See Buchanan, *supra* note 126, at 27.

195. United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting); cf. HARTMAN, *supra* note 82, at 10–11; SINCLAIR, *supra* note 19, at 102.

196. 511 U.S. 825, 834 (1994).

197. James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 427 (2001).

198. 403 U.S. 388 (1971).

199. See Olga Giller, *Patriarchy on Lockdown*, 10 CARDOZO WOMEN’S L.J. 659, 676 (2004) (describing that surviving this motion is extremely difficult because “many prisoners have limited language, education and research skills”).

If a plaintiff manages to overcome these obstacles, he must satisfy the two-part test announced by the Court. The first part, described as “objective,” determines whether the harm of deprivation was “sufficiently serious.”²⁰⁰ The second part, the “subjective” element, mandates that the prison official have a “sufficiently culpable state of mind,” which means practically that the official “must both be aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.”²⁰¹ In the context of a rape case, the first part is typically met since rape is usually deemed sufficiently serious, but determining what constitutes the subjective standard for deliberate indifference has been the more complicated question.

More certain is that the subjective standard required by the Court, in addition to being difficult to prove, creates a scheme of perverse incentives that ignores the lived realities of guards and inmates in the prison context.²⁰² A legal standard that depends on the subjective perceptions of guards may implicitly encourage officials to turn a blind eye to potential harms, further entrenching a culture already prone to such behavior.²⁰³ Moreover, the negative consequences for prisoners who report inmate or guard misconduct, combined with guards’ reluctance to prosecute such practices, results in a ruling that holds little more than symbolic protection for inmates, especially since the guards themselves may represent the primary perpetrators of assault in the first place.²⁰⁴ A subjective standard of knowledge also shifts the focus off the actual harm suffered by an inmate on to the mental state of the guard, effectively diverting attention from institutional standards and practices and diminishing the suffering by viewing claims from a government-centered view.²⁰⁵

Although the test outlined in *Farmer* may be difficult for plaintiffs, the path to litigation is made rockier when considered against the backdrop of the Prison Litigation Reform Act of 1995

200. *Farmer*, 511 U.S. at 834.

201. *Id.* at 834, 837.

202. See Saeeda Verrall, Not Part of the Penalty (2008) (LLM dissertation, Harvard 2008).

203. *Id.* at 24.

204. See generally *supra* Part II.B.

205. See Verrall, *supra* note 202, at 26.

(PLRA).²⁰⁶ This legislation was established in part to minimize the filing of “frivolous” lawsuits by inmates against prisons and staff.²⁰⁷ The PLRA also places significant limits on the ability to seek civil redress in federal courts and mandates that prisoners exhaust all administrative remedies before filing suit for damages.²⁰⁸ In essence, these procedural requirements expose inmates to reprisal from other inmates or to the unsavory position of having to report abuse to the very guards who may have abused them or who have turned a blind eye. Both state and federal prisoners are also barred from bringing civil actions of “mental or emotional injury suffered while in custody without a prior showing of physical injury.”²⁰⁹ Perhaps the most adverse measure of the PLRA is that it bars a plaintiff from recovering attorney’s fees, which sharply limits access to attorneys, not to mention that the act requires filing fees from indigent claimants who have previously made unsuccessful claims.²¹⁰

The *Farmer* ruling alone effectively means that sexual assault claims will almost always be doomed as collateral to the punishment, or as one commentator describes, “in practice, the deliberate indifference standard precludes relief in all but the most egregious cases.”²¹¹ In conjunction with the edicts of the PLRA, the chances of a rape victim bringing a successful suit are almost non-existent. The point was iterated in Justice Clarence Thomas’ concurring opinion in *Farmer*: “Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence . . . because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute ‘punishment’ under the Eighth Amendment.”²¹² Yet even meritorious claims are likely to fail since the PLRA makes mandatory that a prisoner fund or find an attorney to represent him pro bono.

206. Pub. L. No. 104-34, 110 stat. 1321 (1996) (codified in scattered sections of 18, 28 & 42 U.S.C.).

207. *Blissett v. Casey*, 969 F. Supp. 118, 128 (N.D.N.Y. 1997) *aff’d*, 147 F.3d 218 (2d Cir. 1998).

208. 42 U.S.C. § 1997e(a) (2006).

209. *Id.* § 1997e(e).

210. 28 U.S.C. § 1915(b)(1) (2000).

211. Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 590 (2006); Ristroph, *supra* note 16, at 166.

212. *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring).

The structural failures of prisons on the inside combined with legal hurdles on the outside combine to foster a violent ecology in which neither prisoners nor staff fear prosecution. From severe overcrowding to unhelpful Supreme Court jurisprudence to harmful legislation by Congress, prisoners face an uphill battle to achieve gender justice in prison. Part IV describes how injustice spreads beyond the prison walls and into some of the most disadvantaged communities in the country.

IV. GHETTO GIRLS AND BOYS BEWARE

*People brought habits, understanding, and expectations wrought from their pre-prison experience with them to prison, and they often returned to the outside world with new ideas, perspectives, and even new identities forged behind bars. Sexual ideas, attitudes and understanding were among these prison importations and exportations.*²¹³

*[H]aving engaged in these forms of sexual aggression—in response to the deprivations and pressures of prison life rather than preexisting preferences—may distort their sexual identity and their ability to create and maintain sexual intimacy outside of prison.*²¹⁴

Santana's release from prison brings this Article's thesis full circle; namely, it shows that marginal communities disproportionately absorb the post-prison stress disorders caused by gender violence in prison.²¹⁵ Research indicates that Santana's relocation pattern is not random and that the vast majority of inmates eventually return to the communities where they committed the crime or where they have family or friends: neighborhoods where crime

213. REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 226 (2010).

214. CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 184 (2005); *see also* IRWIN, *supra* note 2, at 160.

215. *See* Dumond, *supra* note 105, at 356; Lara E. Gibson et al., *An Examination of Antecedent Traumas and Psychiatric Comorbidity Among Male Inmates with PTSD*, 12 J. TRAUMATIC STRESS 473, 479 (1999) (reporting that "self-reported rape and physical assault were cited as the second and third most common antecedent traumatic events").

rates and drug use are high and standards of living low.²¹⁶ By the time Santana exits prison, he has spent his entire adult life as a ward of the state, and as if on cue, he returns to his old neighborhood.

Santana soon meets a girl from the same community, the cousin of his brother's best friend, and they begin dating. In dramatic cinematography that portrays their first intimate encounter, the film alternates with happenings back inside prison. Behind bars, members of his gang have invited an Italian mafioso's son to drink prison-made alcohol, a set up to retaliate against the mafioso. As the couple begin exchanging affections, the film pans to the prison where the gang appears to befriend the inmate, getting him tipsy and telling jokes in benign camaraderie. As the passion grows between Santana and the woman, he has a look of confusion, which she realizes is due to the fact that he has never been with a woman before. But back in prison, the gang is anything but confused, and after the inmate is drunk, they joke that things will get better as soon as the "broad" arrives. The mafioso's son responds, "who's the broad?" "[y]ou," says one of the Eme members as they seize him and begin their attack, spreading his legs and bending him over a bag of grains to muffle his screams and cries. As one of the men prepares himself to sodomize the inmate, the film returns to Santana's date, which has taken a stark turn. In bed, he eventually starts to become violent with the woman and forces her into the same compromised position as the victim in prison. Oblivious to her cries and screams, Santana's prison instincts take over as if he has done this before. At the moment Santana reaches orgasm, the prisoners reach their own climax by stabbing a dagger into their victim's anus.²¹⁷

The point is clear—Santana is merely doing what he learned to do in prison, and what his friends are still doing. It is the model of one who has been "prisonized" or "institutionalized" to prison culture in a way that disrupts the potential for successful reintegration. Although Santana's encounter starts off as consensual, it soon escalates into rape, a colossal failure in the transition from prison life

216. See Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 845 (2006).

217. AMERICAN ME, *supra* note 3.

to the outside world.²¹⁸ Although the woman fights back and eventually escapes his grasp, the inmate back in prison is not so lucky. The prison attack was not merely a killing, but a display of destructive masculinity, a symbolic ritual that accomplishes more than merely murder.

Santana's situation resounds with reports about the negative long-term consequences for both perpetrators and victims of prison violence. First and foremost is the contention that due to the frustration of being raped, some may turn their rage on the outside world and rape someone else in an attempt to regain their manhood.²¹⁹ Due to their victimization, some prisoners leave confinement more antisocial than when they entered, and this sets the stage for sexual and other crimes.²²⁰ Congress used a similar line of reasoning when it created the Prison Rape Elimination Act (PREA), which asserts that "prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released."²²¹ This view also comports with the idea that inmates who adapt to the "sexually dysfunctional world of prison may guarantee a degree of social marginalization upon release that will compromise future relationships and long-term social adjustment in free society."²²² More specifically, Santana illustrates the position that perpetrators of sexual violence may be sexually violent with females on the outside when released.²²³

The spatial designation, "outside," may distort the issue because it is not society at large that is made vulnerable by this phenomenon, but rather, the burden is felt mostly by poor minority communities. Although this Article on gender violence represents one set of problems resulting from structural failures, there are others. Closely related is the spread of HIV/AIDs and other sexually transmitted diseases which tie directly to this thesis. Infection in U.S. prisons is

218. See IRWIN, *supra* note 2, at 173.

219. See ANTHONY M. SCACCO, *MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSION* (Anthony M. Scacco ed., 1982).

220. See *id.* at 78.

221. 42 U.S.C. § 15601(8) (2006).

222. HANEY, *supra* note 214, at 310.

223. See generally Edward Sagarin, *Prison Homosexuality and its Effects*, 39 *PSYCHIATRY* 245 (1976).

more than three times that of the general population with three-fourths of AIDs-related deaths suffered by African Americans.²²⁴ Victimization in prison is an urgent public health issue that spatially concentrates on inner city slums.²²⁵ Furthermore, masculinity norms may complicate matters since a man who is raped in prison and who then returns home to a girlfriend or wife may not be forthcoming with information about the assault, which may put the community at further risk.²²⁶

That returning prisoners increase the likelihood of transmission to others in the community might make one question why condoms are not allowed in prison. Beyond, one might wonder why homosexual sex in prison is banned in the first place. Although the answers may seem self-evident, closer scrutiny shows that prison, as an institution, also hates homosexuality. This may have something to do with why sex among inmates is proscribed behind bars, and even though some facilities permit conjugal visits, historically these have been limited to heterosexual unions. California became the first state to allow for same-sex visits in 2007, yet for almost a century, carefully worded rules afforded no room for same-sex conjugal visits since same sex marriage unions were disallowed; hence what appears outwardly as merely penal policy is really a cultural code of contempt for homosexual-sex.

V. PROSPECTS FOR DAMAGE CONTROL

The mission of America's correctional institutions is to provide for the care, custody, and control of those individuals committed to

224. Will H. Courtenay & Don Sabo, *Preventive Health Strategies for Men in Prison*, in PRISON MASCULINITIES, *supra* note 32, at 157, 172 (noting that “prisons are not sealed off from their surrounding communities, and men constantly move in and out of the corrections system. . . . Upon release, many infected male prisoner return to communities in which low income and racially oppressed populations of both males and females already exhibit high rates of infectious disease”); LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, HIV IN PRISONS tbls. 4, 7 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp06.pdf>; cf. Nat’l Alliance of State and Territorial Aids Dirs., *Staggering Rates Among African American Women, MSM and the Incarcerated*, THE BODY (Nov. 2005), <http://www.thebody.com/content/art6867.html>.

225. See Wolff et al., *supra* note 216, at 835, 845.

226. See Jerita L. DeBraux, *Prison Rape: Have We Done Enough? A Deep Look Into the Adequacy of the Prison Rape Elimination Act*, 50 HOWARD L.J. 203, 219 (2006–07).

*their supervision. Prisoner sexual assault destabilizes the safety and security. . . . Administrative and programmatic solutions, focusing on prevention, intervention, and prosecution, have long been recommended by authorities, yet not implemented by the responsible officials.*²²⁷

*This culture of violence spills over into the community once the inmates are released. This year close to 650,000 inmates will finish their sentences and be released from America's prisons. Statistics predict that an even greater number of inmates will be released next year and every year thereafter into the foreseeable future.*²²⁸

The arguments advanced in this Article point to a number of problems resulting from cycles of destructive masculinity and conclude by considering how legal and cultural interventions may mitigate gender violence in prison, and perhaps, in general. Although the focus of this work has been on gender violence, the structural arguments herein lend themselves to other points of analysis, including how prisons complicate economics, family life, and public health. As mentioned, the banning of condoms may compromise public health by promoting the spread of disease. Yet in some prison systems, condoms are highly prized contraband, whose possession results in disciplinary punishment.²²⁹ Structural failures also affect the mental health of marginal communities. Punishments like solitary confinement are known to exacerbate mental illness, which eventually makes its way back to communities that lack mental health treatment.²³⁰ Further, an economics-based analysis might elaborate on how seemingly innocuous policies, from making outgoing telephone calls “collect” to for-profit canteen services to counting prisoners for tax purposes, suck money from inmates, their families, and communities.²³¹ These other potential avenues of analysis dramatize

227. Dumond, *supra* note 105, at 357.

228. Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 J. LEGIS. 129, 133 (2006).

229. See Knowles, *supra* note 84, at 270.

230. See Spearlt, *Mental Illness in Prison*, 14 BERKELEY J. CRIM. L. 277, 284 (2009).

231. See, e.g., IRWIN, *supra* note 2, at 164–65.

how collateral consequences of imprisonment disproportionately impact marginal communities.

A. Legal Interventions: Legislation, Litigation, Administration

Statutes designed by legislators, decisions penned by judges, and prison policies endorsed by the state offer some prospects for remedy. Given the complexity of the problem, attempts at reform are likely to be more successful through an integrated, interdisciplinary approach that considers these formal and informal areas of law comprehensively rather than in isolation.

Generally speaking, prison overcrowding contributes to many of the problems this Article describes, some of which is the result of over-criminalization and harsh sentencing laws. The sentencing trends of the last few decades—including reliance on mandatory minimum sentences, longer sentences, life without parole formulas, among other offspring of “tough on crime” politics have helped pack prisons. The reduction of prison populations entails curtailment of these trends and reevaluation of what constitutes proportional punishment for offenders—perhaps meaning that non-violent offenses receive non-violent punishment instead of forced restraint.

Legislative measures like the PREA may compliment, or complicate, sentencing reforms. Although a pessimistic read of this legislation may see it as symbolic²³² or merely hortatory,²³³ there are some substantive benefits of this law. For example, in addition to transmitting a “zero tolerance” stance against rape, the Act has other practical utilities, including its role in collecting data on victimization, reviewing existing prison practices, and ensuring development of national standards for combating sexual abuse. Earlier this year, the commission that oversees this development announced standard proposals, which if adopted, would impact

232. See Ristroph, *supra* note 16, at 146; James E. Robertson, *A Punk's Song about Prison Reform*, 24 PACE L. REV. 527, 556 (2004), available at <http://digitalcommons.pace.edu/plr/vol24/iss2/7> (describing the PREA as symbolic legislation that may have limited impact).

233. See Ristroph, *supra* note 16, at 175. See also Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares about Prison Rape*, SLATE (Oct. 1, 2003, 2:07 PM), <http://www.slate.com/id/2089095/>.

almost all jails and prisons, state and federal.²³⁴ Despite the effort, critics have called the proposals “weak” for their exclusion of immigration facilities, failure to secure necessary staffing, and failure to minimize obstacles for sexually abused inmates to access judicial relief, among other deficiencies.²³⁵

Justice has been slow since the passing of the PREA, and even if there has been some positive effect, it only addresses half the problem argued by this Article because it overlooks the norms of society. Furthermore, faith in legislation might be tempered by the fact that anti-rape statutes have had minimal, if any, effect on rape in society.²³⁶ If success in the outside world is any indicator, then the efficacy of such legislation casts a long shadow of doubt on prospects for prison reform.

More critically, the PREA says nothing about ending institutional control of prisoner sexuality, and may even expand it.²³⁷ Rather than protect sexual autonomy, the Act “carefully avoids any suggestion of permissiveness toward same-sex intimacy in prison,” and says nothing about evidence-based measures which might help reduce rape and its effects, including “opportunities for conjugal visits; condom distribution; the elimination of regulations against ‘non-assaultive’ sexual relations among prisoners,” or others which can give inmates more control over their own lives.²³⁸ The NIJ would do well to investigate these possibilities more.

But caution is a must for the NIJ when allocating PREA funds to study prison rape. The first NIJ grant of almost a million dollars sponsored the study that turned into *The Myth of Prison Rape*, a work described as “flawed, sloppy, and irresponsible.”²³⁹ Among the flaws,

234. National Standards to Prevent, Detect and Respond to Prison Rape, 76 Fed. Reg. 6248 (Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115).

235. *U.S.: Improve Weak Standards to End Prison Rape*, HUMAN RIGHTS WATCH (Apr. 4, 2011), <http://www.hrw.org/en/news/2011/04/04/us-improve-weak-standards-end-prison-rape#!documentDetail;D=DOJ-OAG-2011-0002-0001>.

236. See generally Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009).

237. See Ristroph, *supra* note 16, at 182.

238. *Id.*

239. JUST DETENTION INTERNATIONAL, PREA UPDATE: STOP PRISONER RAPE’S PERIODIC REPORT ON THE PRISON RAPE ELIMINATION ACT 1 (2006), available at <http://www.justdetention.org/pdf/preaupdate0206.pdf>.

is how the researchers accepted at face value responses to questions about prison rape.²⁴⁰ Yet decades of prison research show that any attempt to understand the scope of prison rape is confounded by resistance to the raw nature of the solicitation.²⁴¹ Inmates are hesitant to discuss anything involving rape and assaults, especially since divulging such information can lead to all sorts of problems,²⁴² including perceptions of being a snitch, of cooperating with prison officials, or of being part of a sting operation. Although the study acknowledged that one crosses a “cultural boundary” in prison, the utilized interview method ignored this boundary and instead treated prisoners as regular interviewees.²⁴³ Parsell illustrates the point when he denies knowing about the “fags” at his old prison, even though he was drugged and sodomized and his best friends in the prison were prostitutes and queens, claiming that “they never bothered me.”²⁴⁴ These topics are perhaps the most sensitive for inmates to discuss, and therefore, denials or know-nothing attitudes should be recorded with a healthy dose of skepticism rather than the authors’ simple assertion, “we are compelled to accept inmate’s words as they are reported.”²⁴⁵ Yet another critic of this study notes that the “method of face-to-face interviews with prisoners, on a topic as sensitive as prison rape, does not seem ideally suited to elicit candor.”²⁴⁶

240. *Id.* at 6.

241. See Eigenberg, *supra* note 10, at 435.

242. See McGuire, *supra* note 1, at 73 (“[T]here is good reason to believe that prison rape is vastly underreported and the available data regarding sexual victimization in prison probably represents very conservative estimates of the actual occurrence of prison rape.”).

243. See FLEISHER, *supra* note 131, at xii. See also Gibson, *supra* note 215, at 480 (“We suspect that participants may indeed have been sexually assaulted while incarcerated, but may have been embarrassed or afraid to admit this during the interviews. . . . It is possible that the men felt pressure to present themselves as strong or masculine, or may have feared the consequences of portraying themselves as vulnerable in the prison setting. Admitting that one had been sexually assaulted by another male inmate may have felt particularly risky to participants, given the hierarchical nature of the prison system and the intricate rules around secrecy and loyalty.”).

244. PARSELL, *supra* note 87, at 170, 177 (when later asked again by a different inmate, responds, “I wouldn’t know”).

245. FLEISHER, *supra* note 131, at 133.

246. Cathy Young, *Assault Behind Bars: How Big A Problem Is Prison Rape—and What Can Be Done About It?*, REASON.COM (May 2007), <http://reason.com/archives/2007/04/18/assault-behind-bars>.

The study is flawed on other fronts. Although it claims to be a qualitative study that “didn’t study the prevalence of rape,” it nonetheless drew a number of conclusions on this very point. As a study that picked a handful of prisoners from only ten states, 564 out of a nearly 2,500,000 member population, it is scarcely indicative of the prevalence of prison rape as a whole. Still the authors conclude, “when all the interviews were analyzed we corroborated Johnson’s (1971) finding that there was no epidemic of prisoner rape.”²⁴⁷ Why this study would want to corroborate the findings of a researcher who studied prisons forty years ago when they were a fraction of the size they are today is suspect. More problematic, how can today’s conclusion be drawn from such a scrawny sample?

Legislation that funds such scholarship leaves much to be desired, but better results for inmates may be achieved through litigation. Courts may be the best legal avenue to help address the problem of prison rape, especially when inmates unite in class action suits.²⁴⁸ Such suits have proved effective for obtaining injunctive relief for women prisoners.²⁴⁹ More recently, this strategy reaped success in *Plata v. Brown*,²⁵⁰ a Supreme Court case that consolidated two class action suits. Finding for the inmate-plaintiffs, the Court held that overcrowding in California prisons created conditions that violated the Eighth Amendment’s prohibition against cruel and unusual punishment.²⁵¹ This ruling upheld an order by a federal court that California reduce its prison population to 137.5 percent of its designed capacity, requiring reduction of over 30,000 inmates.²⁵² In a dissenting opinion, Justice Scalia blasted the decision, characterizing it as “perhaps the most radical injunction issued by a court in our Nation’s history.”²⁵³ He described the order as an example of a “structural injunction,” which he asserted departs from the historical

247. FLEISHER, *supra* note 131, at 1.

248. See Amy Laderberg, *The “Dirty Little Secret”: Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 326–27 (1998).

249. *See id.*

250. 131 S. Ct. 1910, 1922 (2011).

251. *See id.* at 1947.

252. *Id.* at 1923.

253. *Id.* at 1950 (Scalia, J., dissenting).

practices of equity and “vastly expands its use by holding that an entire system is unconstitutional because it *may produce* constitutional violations.”²⁵⁴ Despite Scalia’s disavowal, this case stands for the proposition that victims might fare better by uniting as a class in long-term struggle than on an individual, case-by-case basis.

Finally, executive and administrative decision-making plays an important role in reducing gender violence. Literature suggests that administrative reforms have helped lessen rape in prison and at least one state has put together a “ten point” program for ending prison sexual violence.²⁵⁵ Among the common calls are use of clear glass for cell construction, elimination of “blind spots” in prisons, and fewer prisoners/more oversight. One of the constant refrains is for better classification for incoming inmates to prisons.²⁵⁶ Some researchers report that both inmates and correctional officers agree that better intake screening and classification, better supervision by staff, and better training for inmates and staff can help reduce violence.²⁵⁷ For example, education for inmates on topics like the spread of AIDS and other sexually transmitted diseases might help decrease victimization, whereas better intake screening might consider non-traditional indices for housing including how young and inexperienced an inmate is, whether he is a first time offender, and his physical appearance, size, strength and weight.²⁵⁸ At least one inmate, who attended a mandatory session on the spread of disease, supports this point:

I walked out of the small movie room thinking about women, HIV and homosexuality. . . . We all knew that you got HIV from having sex with men in prison. Simple as that. If you

254. *Id.* at 1953 (emphasis in original).

255. OHIO DEP’T OF REHAB. & CORR., OHIO CORR. INSTIT. SEXUAL ASSAULT ABATEMENT: A TEN POINT PLAN (2004), available at http://www.drc.ohio.gov/web/PREA/10pointplan_v2.pdf.

256. STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 9 (2006), available at http://www.justdetention.org/pdf/in_the_shadows.pdf.

257. Struckman-Johnson et al., *supra* note 160, at 74; McGuire, *supra* note 1, at 80; Robert W. Dumond & Doris A. Dumond, *Training Staff on Inmate Sexual Assault*, in PRISON SEX: PRACTICE AND POLICY 89 (Christopher Hensley ed., 2002).

258. See Dumond, *supra* note 102, at 150.

decided early on not to do it, you cut your risk down by a hundred percent, as long as the decision stayed in your hands.²⁵⁹

Researchers have examined how conjugal visits may reduce rape in prison.²⁶⁰ Aside from easing tensions and sexual deprivation, allowing access to intimate partners may lessen the need for males to establish masculinity, i.e., if one has access to his wife or significant other, then it may displace the need to establish masculinity through homosexual conquest or by creating a prison family.²⁶¹ Of course, this line of reasoning roots in the assumption that violence stems from deprivation, which is true in only some cases, but does not necessarily account for all gender violence.

Although the merits of conjugal visits are debatable, it is more certain that inmates who report assaults and violence are forced to do so at great peril, which represents another administrative pitfall. Accordingly, vulnerable inmates or those seeking protective custody might be placed in protective housing that is less punitive in nature.²⁶² As it stands, inmates placed in protective custody are subject to solitary conditions that resemble the harshest disciplinary sanctions—extreme isolation that is psychologically difficult to endure, and which effectively punishes and discourages inmates from seeking help.²⁶³

Administrators might also take a proactive approach by prosecuting sexual offenses behind bars and making treatment mandatory for offenders. There is a general lack of treatment for sex-offenders in prison, despite that according to the Department of Justice they are more likely to be rearrested for rape or sexual assault when released from prison.²⁶⁴ Therapists and correctional officers

259. R. DWAYNE BETTS, *A QUESTION OF FREEDOM: A MEMOIR OF LEARNING, SURVIVAL AND COMING OF AGE IN PRISON* 107–08 (2009).

260. See PINAR, *supra* note 20, at 1049; see also Rachel Wyatt, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J INT'L L. 579, 597–98 (2006).

261. See Philip Ellenbogen, *Beyond the Border*, 42 COLUM. J. L. & SOC. PROBS. 335, 357 (2009); see also HARTMAN, *supra* note 82.

262. See STOP PRISONER RAPE, *supra* note 101, at 46.

263. See *id.*

264. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, *SEX OFFENSES AND OFFENDERS* 27 (1997), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF>.

support this idea and agree that clinical treatment can reduce recidivism rates for sex offenders.²⁶⁵ Even though the exact recidivism differences between treated and untreated offenders are not fully known, there is still a significant variance between groups.²⁶⁶ Specifically, researchers posit that hyper-masculine men who approach maturity may be the best candidates for psychotherapy, a process that enables them to embrace previously contemptuous forms of femininity.²⁶⁷

Administrators might also reconsider the prohibition against sex in prison. Such an empty rule renders it subject to abuse, since prison guards can either prosecute inmates or simply look the other way. The same idea applies for the distribution of condoms—marking a condom as contraband brings all sorts of negative repercussions, including health care needs that costs taxpayers dearly. That millions of taxpayer dollars are spent treating sexually transmitted diseases instead of spending pennies for condoms seemingly has little to do with policy and everything to do with culture.

B. Community Interventions

Legal reform is a powerful means of scaling back the problem of gender violence in prison, yet social action plays a critical role as well. Although the law can help address the institutional causes of rape, it cannot change deeply entrenched social norms without the will of the people. Rather, law and culture must work together comprehensively to remedy the issue inside and out.

Although it might sound counter-intuitive, inmates may play a role in deconstructing destructive masculinity. In the same way the prison code of silence is based on destructive varieties of “honor” for its sustenance, inmates might foster a culture of intervention over silence. Of course, in prison intervention has proven to be a deadly business for decades. For example, one inmate described a “tug of consciousness” when he was faced with the choice of saving another

265. A PRACTITIONER’S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER xxiii (Nat’l Inst. of Corr. & Barbara K. Schwartz eds., 1988).

266. *Id.*

267. Donald L. Mosher & Silvan S. Tompkins, *Scripting the Macho Man: Hypermasculine Socialization and Enculturation*, 25 J. OF SEX RES. 60, 82 (1988).

prisoner, Parks, from sex slavery by accepting him as a gift from another inmate.²⁶⁸ The inmate recalls his vexation about whether the gift might jeopardize his own well-being:

I was not homosexual and didn't want to be part of the subculture with an inherent potential for violence. Had I taken Parks under my wing, I would have been forced to fight, even kill, to protect him from predatory homosexual studs who wanted him. In prison, sex is property. An inmate has an absolute duty to protect his property or he is considered weak—a condition that inevitably evokes a lethal challenge.²⁶⁹

From this perspective, the inmate's solution was simple: not having property was easier than the extra exposure to violence. But, hypothetically speaking, what if he would have chosen differently? Might it have prevented the attack he witnessed later that night as several other inmates laid claim:

I lay on my bunk powerless to help Parks as the rapist got in the bunk beside him.

"Watch for me," he said, undressing. "If the Man comes in, stall him."

"Turn over bitch," he demanded.

I imagined Parks' face twitching uncontrollably as fingers packed in cold Vaseline. He screamed as his attacker penetrated him in a single thrust, driving into the boy's rectum, relishing the power it gave him.

"Shake back, bitch," the attacker moaned. "Give daddy a wiggle."

Parks felt a searing pain as one of the other inmates pressed a lit cigarette against his flesh.

"Give your daddy a wiggle, bitch" he demanded, choking off a laugh, "or I'll keep this fire on your ass all night."

268. SINCLAIR, *supra* note 19, at 104.

269. *Id.*

Parks started crying as he pushed his buttocks back and wiggled his ass against his attacker . . . he knew his life would never be the same again.²⁷⁰

Although the author did not “want to be a part” of this culture, his omission does not save him from exposure to the violence, which according to one researcher is one of the most frequently reported traumas antecedent to post-traumatic stress disorders.²⁷¹

Inmates may take a more active course, however, by engaging in other methods of transgressing the gender order of prison and subverting “the meanings on which both the oppressive gender-sex *status quo* of the inside and that of the outside, rely.”²⁷² For example, research in South African prisons describes how inmates break the hierarchy by consciously failing to recognize participants as superior or inferior; in this scheme, inmates take turns being the “man” and being the “woman.”²⁷³ This logic disrupts prevailing notions, and instead, by penetrating and being penetrated, inmates blur gender roles.²⁷⁴ Although the refusal to keep hierarchies intact may expose inmates to resentment and violence from others, to the degree that inmates exercise a “not-man-not-woman” status, the transgressions may result in the “partial freeing of the male body ‘through its enslavement’ by the prison regime. . . .”²⁷⁵

Religion may also play a role in lessening violence in prison. Specifically, Muslim groups in prison take a firm stance on homosexuality and Muslim prisoners negate the culture of rape through the Islamic alternative to sexual violence:

The Islamic regime acquires a double significance in its strict opposition to homosexuality . . . Sexual possession, domination, and submission represent forms of “hard currency” in prison. Thus by asserting the distinction between

270. *Id.* at 106–07; *see also* WILBERT RIDEAU, *IN THE PLACE OF JUSTICE* 156–57 (2010).

271. *See* Gibson, *supra* note 215, at 479; *see also* KEN COOPER, *HELD HOSTAGE* 119 (2009) (quoting an inmate describing his witness of an assault: “I wanted to rip those animals to pieces with my bare hands, but I lay horrified, knowing I was incapable of doing anything. Stupefied, I felt like I was the one being raped.”).

272. Gear, *supra* note 118, app., at 195.

273. *See id.* at 204.

274. *See id.*

275. *Id.* at 205.

halal and haram, between what is permitted and what is forbidden, the Muslim community simultaneously follows Islamic laws and negates one of the defining characteristics of prison life.²⁷⁶

As early as the 1970s, one inmate noted that “[s]ome youths targeted for enslavement found instant sanctuary in joining the Muslims.”²⁷⁷ Sinclair’s account of his Muslim friend, Life, offers an extreme version of how religious values might play a role in gender justice.²⁷⁸ Active in nurturing new inmates, Life educated inmates on what to expect from prison, and more specifically, on how to protect oneself from victimization. In one episode, after Life hears that a new inmate has been turned out, he becomes enraged and arms himself to confront his attackers. Although another inmate pleads with the men not to “kill each other over an asshole,” a fatal battle ensues with Life losing his own life because of “what he believed in—the simple principle that a young man had a right to be free of homosexual slavery.”²⁷⁹

Life demonstrates how Islam can be a force against violence and homosexuality, but that is not to say that beliefs associated with religion are gender-free. Many of the beliefs espouse a radically hetero-normative worldview that condemns all sex whose aim is not reproductive. Sometimes, the beliefs reinforce other types of gender norms, as Life’s instructions about the appropriate response to unwanted advances: “[y]ou get a knife, a ball bat, or a piece of pipe and kill the motherfucker. You hit him and you keep on hitting him till he’s dead. When a brother tries to deny a brother the right to be a man, he no longer deserves to live.”²⁸⁰ More extreme, religion may operate as part of an elaborate system of self-identification that undermines reform. For instance, “Prison Islam” or “Prislam” groups model themselves on gang structures and use religious rhetoric to

276. Robert Dannin, *Island in a Sea of Ignorance: Dimension of the Prison Mosque*, in *MAKING MUSLIM SPACE IN NORTH AMERICA AND EUROPE* 139 (Barbara Daly Metcalf ed., 1996).

277. RIDEAU, *supra* note 270, at 98.

278. *See generally* SINCLAIR, *supra* note 19.

279. *Id.* at 155.

280. *Id.* at 149.

legitimize violence and other criminal activities.²⁸¹ Under such ideology, depending on how closely the groups embrace gang culture, it might not be far-fetched to suggest that some Prislam groups are likely to involve themselves in other activities, like gang-rape. Like any intervention effort, the force of religion may have drawbacks in addition to benefits, but it may be that the benefits of more inmates acting like Life still outweigh the costs.

Academics and activists may also have a cultural role in combating gender violence. Accordingly, one scholar suggests that research on prison rape should “draw more upon the vast research on rape in the community,” which has been largely neglected “on the assumption that rape in prison is somehow drastically different from the rape of women in the community”; instead there may be deeper links between the two, and an exploration of these similarities might help prison officials reduce the problem.²⁸² Moreover, PREA-funded studies like *The Myth of Prison Rape* must not go unchallenged by scholars because shoddy work not only is harmful to prisoners, but to scholarship itself.

Art and other forms of cultural productions may be one way of reforming gender consciousness. Despite the difficulty of measuring its impact, some have argued that the arts are an “effective means of intervention for gang-involved and affiliated youth and their families,” and that “arts are the best path for change, peace, wholeness, and abundance.”²⁸³

In the same way comedians like Jon Stewart and others reinforce negative gender norms, others might use comedy and other social outlets to challenge negative stereotypes. This might include stigmatizing sexual violence in the same way use of crack was culturally shunned and “crack head” became a derogatory epithet; perhaps it is time for rapists and assaulters to bear the brunt of cultural assault. As an illustration, the animated series, *Boondocks*,

281. See *Linking Prisoner Radicalization and Terrorism*, NAT'L INST. OF JUST. J. No. 261 (Oct. 2008), <http://www.nij.gov/nij/journals/261/prisoner-radicalization-jis-sidebar.htm>.

282. Eigenberg, *supra* note 10, at 445.

283. LOS ANGELES CITY COUNCIL'S AD HOC COMM. ON GANG VIOLENCE AND YOUTH DEV., THE COMMUNITY ENGAGEMENT ADVISORY COMMITTEE'S "COMMUNITY-BASED GANG INTERVENTION MODEL: DEFINITION AND STRUCTURE" 8 (2008), available at <http://xa.yimg.com/kq/groups/19394053/450429876/name/CommunityBasedGangInterventionModel.pdf>.

constantly discusses the negative effects of prisons and jails, paying critical attention to prison rape.²⁸⁴ This program puts a comical spin on a subject that is anything but humorous, resulting in a relentless awareness that things are terribly wrong in some prisons. Media outlets are effective at influencing public opinion, and their power may be harnessed to move the issue in a positive direction. This might resonate especially well with the subset of our population that, rather than read esteemed law and policy journals, listens to music, surfs the internet or watches television. Cultural productions like pornography might perpetuate destructive masculinities, but because true arts are about creating, they can be employed to construct new masculinities based on something other than degrading women.

284. *See generally* BOONDOCKS: SEASON I (Sony Pictures Entertainment broadcast, 2005).