Real Rape Too

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As a society, we have been largely indifferent to the prevalence of male rape victimization. In the prison context, we dismiss it as par for the course, as "just deserts," or worse yet, as a rarely stated but widely known component of deterrence. We treat prisons as invisible zones, as zones without law, as zones that need not concern us. Outside the prison context, our response is no better. We tell ourselves male rape victimization is a rarity, or perhaps something that only happens to gay men. In short, we render male victim rape invisible, or at least un-articulable. This Article renders male victim rape visible.

This Article is also a critique of unjust silence and unjust talk. It is a critique of the unjust silence surrounding male rape victimization that permeates legal scholarship about rape. And it is a critique of the unjust talk about the specter of male rape that permeates self-defense and provocation cases. The Article argues that reconceptualizing rape as a gender-neutral crime might help advocates of rape law reform forge new alliances. It posits that addressing the reality of male victim rape can help us rethink the very real harm of rape. And it demonstrates that incorporating the reality of male victimization can have profound implications for rethinking the law of rape.

What motivates this Article is the underlying belief that rape has been gendered for too long. Originally, it was gendered in a way that tilted the scales to benefit men: men as fathers, men as husbands, and men as rapists. Feminists were right to point out the sexism inherent

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in traditional rape laws in this country. Though many, including Catherine MacKinnon, were wrong to view rape as solely a mechanism of male domination of women. But the real problem is this: In arguing for reform, feminist scholars have legitimized and contributed to the very gender distinctions of which they have been so critical. In response to one form of subordination, they have entrenched another. Many rape statutes have been reformed so that they are gender neutral, but how we apply those laws is still very much gendered. As a consequence, male victims have suffered. But more broadly, the law of rape has suffered. And it shows.

INTRODUCTION

To really understand *Johnson v. Johnson*,[1] it helps to start at the beginning. According to Roderick Johnson, a former Navy sailor, it was his falling in with the wrong crowd and subsequent drug problem that led him to burglarize a neighbor and, consequently, to an eighteen-month prison sentence.[2] The length of the sentence, however, was nothing compared to the terms imposed on him by other inmates and the indifference of the prison officials towards those terms. Almost immediately upon his arrival at prison, a gang called the Gangster Disciples claimed ownership of Johnson and beat and raped him daily. The Gangster Disciples also rented Johnson out as a sex slave to other inmates, charging five or ten dollars depending on the sex act, payable in cash, commissary privileges, or cigarettes.[3]

The prison staff ignored Johnson's appeals for protection, even as medical personnel documented bruises on Johnson's body.[4] It was the staff's failure to

1. 385 F.3d 503 (5th Cir. 2004).
2. Adam Liptak, *Inmate Was Considered "Property" of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES, Sept. 25, 2005, at A14.
3. *Id.*
4. *Id.*

protect Johnson that prompted his civil suit.[5] At trial, witnesses included a former high-ranking member of the Gangster Disciples. Asked whether Johnson was considered a member of the gang, the witness answered "no."[6] Asked what Johnson was considered, the witness answered "property."[7] When asked whether Johnson ever consented to forced sex, the witness smirked. "You'll be beaten until you say yes. He'd be beaten, stabbed, whatever."[8]

In a way, *Johnson v. Johnson* is unique—most male rape victims lack the resources to file suit. What is not unique is Johnson's experience of prison rape. In a 2007 study, the Bureau of Justice Statistics found that 4.5 percent of the inmates surveyed reported being sexually abused in the previous twelve months.[9] Extrapolating nationally, the study estimated that more than 60,000 inmates are sexually abused each year.[10] In all likelihood these numbers are conservative. Because of the stigma of appearing weak and the fear of retaliation, male victims of prison rape often choose not to report their victimization to prison authorities or counselors.[11] In addition, the findings fail to reflect the impact of repeated assaults. Prisoners who are raped rarely have access to safe spaces. Instead, they are subjected to repeated, if not daily, sexual assaults.[12]

As a society, we rarely think of male-victim rape.[13] On the few occasions that we do, we assume male rape victimization occurs only in prisons. That assumption is wrong. In fact, even outside of prisons, males are victims of rape. A study conducted by the Bureau of Justice Statistics, based on surveys of households, estimated that more than 36,000 males age twelve and over were victims of completed rape or attempted rape during 2008 alone and that one in

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Jennifer C. Kerr, *60,0000 Inmates Sexually Assaulted Every Year*, HUFFINGTONPOST.COM, June 23, 2009, *available at* http://www.huffingtonpost.com/2009/06/23/60000-inmates-sexually-ab_n_219385.html.
10. *Id.*
11. Michael B. King, *Male Rape in Institutional Settings*, *in* MALE VICTIMS OF SEXUAL ASSAULT 67 (Gillian C. Mezey & Michael B. King eds., 1992).
12. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 7 (2001) [hereinafter NO ESCAPE]. This is to say nothing of the assaults that take the form of gang rapes, which cause a qualitatively different type of harm. For one, gang rape involves public humiliation. As one commentator has observed, "gang rape is a crime that involves, and indeed requires, an audience." Kimberly K. Allen, Note, *Guilty by (More Than) Association: The Case for Spectator Liability in Gang Rape,* 99 GEO. L.J. 837, 848 (2011).
13. I use the terms "male-victim rape" or "male rape victimization" to describe male-on-male rape. This is not to suggest that female-perpetrator/male-victim rape does not exist. In fact, many child sexual abuse victims identify their abusers as female. Moreover, as the recent prosecution of female officer Lynndie England in connection with abuse at Abu Ghraib should make clear, women are not above sexually abusing adult men. For a discussion of female-perpetrator/male-victim rape, see the chapter "Female Perpetrators; Male Victims" in Joanna Bourke's *Rape*. JOANNA BOURKE, RAPE: SEX, VIOLENCE, HISTORY 204–37 (2007).

thirty-three men in the United States has been the victim of rape or attempted rape.[14] Again, this number probably underestimates the frequency of male-victim rape. Even more than female victims, male rape victims are likely to encounter disbelief or derision when they report their victimization.[15] In addition, male victims, both straight and gay, face the added risk of homophobia.[16] Indeed, prior to the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*[17] invalidating sodomy laws, those who came forward as rape victims risked being prosecuted as criminals in many states.[18]

This Article is about male rape victimization and our collective response to such victimization. It is about addressing the prevalence of male-on-male rape without reducing it to entertainment[19] or a joke[20] and without dismissing it as something too rare to concern us. As a society we have been largely indifferent to the prevalence of male rape victimization. In the prison context, we dismiss it as par for the course, as "just deserts," or, worse yet, as a rarely stated but widely known component of deterrence.[21] We show the same level of

14. Michael Rand, BUREAU OF JUSTICE STATISTICS, CRIME VICTIMIZATION 2008 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf (National Crime Victimization Survey).

15. Richard Tewksbury, *Effects of Sexual Assaults on Men: Physical, Mental and Sexual Consequences*, 6 INT'L J. MEN'S HEALTH 22, 25 (2007).

16. RICHIE J. MCMULLEN, MALE RAPE: BREAKING THE SILENCE ON THE LAST TABOO 114 (1990).

17. 539 U.S. 558 (2003). *Lawrence* overruled the Court's prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which it upheld the constitutionality of laws criminalizing consensual same-sex intimacy.

18. *See infra* notes 106–108 and accompanying text. For example, a male rape victim who, during police questioning, admitted that he had engaged in acts of consensual sex with males on prior occasions could be prosecuted for committing sodomy based on those prior acts.

19. For example, the HBO series *Oz* routinely presented prison rape as a form of entertainment. *See* Joe Wlodarz, *Maximum Insecurity: Genre Trouble and Closet Erotics in and out of HBO's* Oz, 20 CAMERA OBSCURA: FEMINISM, CULTURE, AND MEDIA 59 (2005).

20. NO ESCAPE, *supra* note 12, at 3. Examples where prison rape is played for laughs are legion. Prison rape has been reduced to a joke in films, from *My Cousin Vinny* to *Stir Crazy* to *Let's Go to Prison* to *Naked Gun 33 1/3*. Prison rape has been reduced to a joke in commercials. *See, e.g.,* Sabrina Qutb & Lara Stemple, *Selling a Soft Drink, Surviving Hard Time: Just What Part of Prison Rape Do You Find Amusing?*, S.F. CHRON., June 9, 2002, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/06/09/IN181350.DTL (criticizing a soft drink commercial in which a delivery man refuses to bend over in front of inmates to pick up a dropped can). Television shows have also reduced prison rape to a joke. For example, a recurring skit on *Saturday Night Live* features Keenan Thompson as a convicted felon telling juveniles about prison life. Each of his skits ends with a "humorous" story of prison rape.

21. *See, e.g.*, Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561 (2006). As recently as 1994, half of surveyed Americans agreed with the proposition that prison rape is part of the punishment criminals pay for their wrongdoing. *See* Robert W. Dumond, The Impact and Recovery of Prison Rape, Presentation at the National Conference "Not Part of the Penalty": Ending Prisoner Rape 13 (Oct. 19, 2001), *available at* http://www.wcl.american.edu/nic/resources/12.%20The%20Impact%20and%20Recovery%20of%20Prisoner%20Rape.pdf.

concern the prison officials showed Roderick Johnson. We treat prisons as invisible zones, as lawless zones, as zones that need not concern us.[22]

Outside the prison context, our response is no better. We tell ourselves male rape victimization is "exceedingly rare"[23] or perhaps something that happens only to gay men. In short, we render male rape victimization invisible. Sodomy was once considered such an unspeakable crime that it was cloaked in euphemisms and rhetorical legerdemain.[24] This is now how we treat male-victim rape.[25] A prime example is our response to the victimization of Abner Louima. On August 9, 1997, Louima was arrested following a verbal altercation with a police officer, Justin Volpe, during which another individual struck Volpe, knocking him down. Volpe responded by striking Louima repeatedly en route to the police precinct and by taking Louima into a bathroom where he forced a broken broomstick six inches into Louima's rectum.[26] Had Louima been female, we would have called this rape or at the very least sexual assault.[27] Instead, we fell back on words that seemed easier and more consistent with male-on-male violence: police brutality.[28] Nothing more. Nothing less.

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22. In using the term "zones," this Article borrows from the work of Gerald Neuman and Alexandra Natapoff, as well as my prior work. *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 837 (2008) (describing how the zone of law enforcement is also a zone of underenforcement, since officers can engage in "sanctionable and criminal behavior usually without fear of consequences"); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1721 (2007) (noting that "the United States is peppered with underenforcement zones, arenas in which underenforcement has reached systemic proportions that affect the local quality and meaning of lawfulness"); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (identifying Guantanamo, formal "red light districts," and the District of Columbia as "anomalous zones" in which "certain legal rules, otherwise regarded as fundamental policies of the larger legal system, are locally suspended").

23. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 383 (1992) (describing male-victim rape as "exceedingly rare").

24. Blackstone famously described same-sex sodomy as "the infamous crime against nature," "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 WILLIAM BLACKSTONE, COMMENTARIES *215. As historian John Boswell has observed, it speaks volumes about the taboo of homosexuality that "[m]urder, matricide, child molesting, incest, cannibalism, genocide, even deicide" *were* named. JOHN BOSWELL, SAME-SEX UNIONS IN PRE-MODERN EUROPE xxiii (1994). For more on this "unnameability trope," see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 954–55 (1989).

25. The title of a recent article in the *National Review* is telling. *See* Eli Lehrer, *Hell Behind Bars: The Crime That Dare Not Speak Its Name*, NAT'L REV., Feb. 5, 2001, at 24.

26. United States v. Volpe, 78 F. Supp. 2d 76, 80 (S.D.N.Y. 1999); *see also* David Barstow, *Officer, Seeking Mercy, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999, at A1; Joseph P. Fried, *Volpe Sentenced to a 30-Year Term in Louima Torture*, N.Y. TIMES, Dec. 14, 1999, at A1; Bob Herbert, *One More Police Victim*, N.Y. TIMES, Aug. 14, 1997, at A31; David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1.

27. Even the term "sodomized" was downplayed in the media. More to the point, "forced sodomy" continues to denote a male victim much the way "rape" denotes a female victim. Part of the goal of this Article is to make the argument that the name of the criminal act should not depend on the sex of the victim. Male-victim rape *is* rape.

28. *See, e.g.*, Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. TIMES (Aug. 9,

Even legal scholars have turned a blind eye to male rape victimization. With few exceptions,[29] scholars writing about rape have either ignored male-on-male rape entirely,[30] confined their discussions to prison rape,[31] or mentioned it only in passing.[32] Susan Estrich, author of *Real Rape,* is typical of the latter.[33] Estrich uses the term "real rape" (think traditional notions of nonconsensual, physically forced rape) to call attention to the criminal justice system's relative indifference to simple rape (think acquaintance or marital rape). But in critiquing this disparate treatment, Estrich reifies another type of hierarchy, reducing male-victim rape to a footnote.[34] One ambition of this Article is to bring male rape out of the footnote and into the body of the text—to render male rape visible. In short, one goal of this Article is to argue that male-victim rape *is* real rape, too.[35]

On a broader level, the goal of this Article goes beyond calling attention to male-victim rape. This Article is also a critique of unjust silence and unjust talk. It is a critique of the unjust silence surrounding male rape victimization that permeates legal scholarship about rape. It is a critique of the unjust talk about the specter of male rape that too often permeates self-defense and provocation cases as well as state-suspect interactions. It is about how re-conceptualizing rape as a gender-neutral crime might help advocates of rape

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2007, 1:11 PM), http://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later (describing the case as a "national symbol of police brutality").

29. There are a few notable exceptions. *See* Elizabeth J. Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293 (1998); Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605 (2009).

30. *See, e.g.*, CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000); MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR: THE SOCIAL COST OF RAPE (1991); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977).

31. *See, e.g.*, Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195 (1999); Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, 29 YALE L. & POL'Y REV. 1 (2010); Sharon Dolovich, *Strategic Segregation in the Modern Prison,* 48 AM. CRIM. L. REV. 1 (2011); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 152 (2006); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1303 (2011); Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561 (2006).

32. *See infra* text accompanying notes 236–40. As Susanne Paczensky has noted, this silence from feminists seems especially troubling. *See* Susanne V. Paczensky, *The Wall of Silence: Prison Rape and Feminist Politics*, *in* PRISON MASCULINITIES 133–36 (Don Sabo et al. eds., 2001).

33. SUSAN ESTRICH, REAL RAPE (1986).

34. *Id.* at 6 n.8.

35. Because the goal is to draw attention to adult male-on-male rape, I put to the side for now the sexual abuse of boys, the prevalence of female-perpetrator/male-victim sexual assault, the prevalence of female-on-female sexual assault, and the prevalence of male-victim rape as a tool of warfare. Rather than reduce these weighty issues to footnotes, I would prefer to leave them to separate articles to receive the attention they deserve.

law reform forge new alliances. And it is about how incorporating the reality of male-victim rape can help us rethink rape law in general.

This Article proceeds as follows. Part I discusses the prevalence of male rape, both in prisons and outside of prisons. Part II explores two areas where the specter of male-on-male rape is talked about: in self-defense and provocation cases asserting what has come to be known as the "gay panic" defense and in "trash talk" during police interrogations. Part III explores the silence that otherwise surrounds male-victim rape, beginning with the common law definition of rape and ending with the especially troubling norm of silence that pervades feminist, queer, and critical race legal scholarship. Finally, Part IV argues that broadening our conception of rape to include male victims can reorient how we think about rape law—in terms of the rape statutes drafted by legislators, in terms of the rape law that is actually enforced by our criminal justice system, and in terms of the very meaning of rape itself.

What connects these four parts is an argument that rape law has been gendered for too long. Originally, it was gendered in a way that tilted the scales to benefit men—men as fathers, men as husbands, and men as rapists. Feminists were right to point out the sexism inherent in traditional rape laws in this country, though many, including Catharine MacKinnon, were wrong to view rape as solely a mechanism of male domination of women.[36] But the real problem is that in arguing for reform, many feminist scholars have inadvertently legitimized and contributed to the very gender distinctions of which they have been so critical.[37] In response to one form of subordination, they have entrenched another. Many rape statutes have been reformed so that they are gender neutral, but the application of those laws is still very much gendered. As a consequence, male victims have suffered. More broadly, the law of rape has suffered. And it shows.

I.
REAL VICTIMS

The first goal of this Article is to bring male sexual victimization out of the margins and, to a certain extent, out of the closet. This goal should be easy, given the prevalence of male sexual victimization. As discussed below, both in and out of prisons, male-victim rape is a daily occurrence. In short, the numbers *are* the argument.

36. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983).

37. This is not to suggest that all feminists resist gender distinctions. "Difference" feminists in fact champion such distinctions. *See generally* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST THEORY 47–83 (1999) (discussing the various schools of feminist legal thought that came of age in the 1980s and their emphasis on difference).

A. Prison Rape

Determining the frequency of rape is notoriously difficult.[38] Even when limited to rapes involving female victims and male perpetrators, there are large variations in collected data. Due largely to underreporting, figures on the commission of rape have shown as much as a five-fold disparity.[39] Indeed, the American Law Institute suggests that rape is likely the most underreported crime of violence.[40] A second problem is definitional. What constitutes rape as a matter of law varies from state to state.[41]

These difficulties are compounded when it comes to ascertaining the frequency of male-on-male prison rape. Because of the fear of being perceived as weak, homosexual, or both,[42] male victims of prison rape are even less likely than women to report sexual assaults.[43] There are definitional hurdles as well. For example, some jurisdictions continue to define rape in gender-specific terms, specifying a female victim or vaginal penetration.[44] The Uniform Crime Reporting Program—administered, until recently, by the F.B.I.—also defines rape as requiring a female victim.[45]

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38. Helen M. Eigenberg, *The National Crime Survey and Rape: The Case of the Missing Question*, 7 JUST. Q. 655 (1990).

39. For example, the National Woman's Study, financed through the Department of Health and Human Services, found that approximately 683,000 individuals were raped during a one-year period. That number was five times higher than the number of rapes reported that same year by the National Crime Victimization Survey. *See* David Johnston, *Survey Shows Number of Rapes Far Higher Than Official Figures*, N.Y. TIMES, Apr. 14, 1992, at A9. Both surveys were higher than the number of rapes actually reported to the police, as reflected in the Uniform Crime Report for that year.

40. MODEL PENAL CODE § 213.1 cmt. (2010).

41. For example, in rape prosecutions, New Jersey no longer requires the element of force beyond that inherent in penetration. *In re* Interest of M.T.S., 609 A.2d 1266, 1276 (N.J. 1992). Kentucky retains unqualified immunity for spouses. KY. REV. STAT. ANN. § 510.035. Alaska provides for qualified immunity. ALASKA STAT. § 11.41.432(a)(2). In California, intercourse procured by fraud will constitute rape. CAL. PENAL CODE § 261(a)(4)(C) (2007). Some states have abolished, or have at least relaxed, the requirement that the victim resist. *See, e.g.*, MICH. COMP. LAWS § 750.520i (2008) ("A victim need not resist . . . ."); People v. Barnes, 731 P.2d 110, 121 (Cal. 1986) (same). This is to say nothing about the variation in how jurisdictions treat the defense of mistake.

42. Sandesh Sivakumaran, *Male/Male Rape and the "Taint" of Homosexuality*, 27 HUM. RTS. Q. 1274, 1289 (2005).

43. King, *supra* note 4, at 67; W. Rideau & B. Sinclair, *Prison: The Sexual Jungle*, *in* MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSION (A.M. Scacco ed., 1982).

44. Alabama, Georgia, Idaho, Indiana, Kansas, Missouri, and North Carolina continue to define first-degree rape in gender-specific language. *See, e.g.*, ALA. CODE §13-A-6-62 (1975) (defining rape as an offense requiring victim "of the opposite sex"); GA. CODE ANN. § 16-6-1 (requiring female victim and that intercourse be "against her will"); IDAHO CODE ANN. § 18-6101 (requiring female victim); IND. CODE § 35-42-4-1 (requiring victim "of the opposite sex"); KAN. STAT. ANN. § 21-3502 (requiring "penetration of the female sex organ"); MO. REV. STAT. § 566.030 (requiring penetration "of the female sex organ"); N.C. GEN. STAT. § 14-27.2 (requiring "vaginal intercourse"). The Model Penal Code also defines rape in gender-specific terms. MODEL PENAL CODE AND COMMENTARIES § 213.1(1)(a); *see also* Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210 (2003) (arguing for, among other things, the revision of the MPC rape provision to

Notwithstanding these hurdles, the data collected thus far suggest that rape and sexual assaults within the male prison system are endemic. Consider studies based on inmate surveys. In a 2000 study of male inmates at several prisons across four states, 21 percent of the inmates reported experiencing pressured or forced sexual contact, and 7 percent of the inmates reported they had been raped.[46] A study of male inmates in Nebraska revealed similar rates of victimization: 22 percent of the male inmates in Nebraska reported pressured or forced sex.[47] Of these, over 50 percent reported being the victim of forced anal sex.[48] A study of prisoners in three Midwestern states found that approximately 20 percent of inmates reported pressured or forced sex, and 10 percent reported they had been raped.[49] These inmate surveys are also consistent with estimates by corrections officers. An "anonymous" survey[50] of corrections officers in one southern state is revealing: the officers estimated that roughly one-fifth of all prisoners were being coerced into sex with other inmates.[51]

In the last several years, more systematic efforts have been made to gather data on the prevalence of male sexual victimization in U.S. prisons. This is largely a result of the passage of the "mostly hortatory"[52] Prison Rape Elimination Act of 2003 ("PREA").[53] PREA, among other things, mandates data collection as a first step to a longer-term and clearly idealistic goal of preventing rape in prison.[54] The data collected to date confirm the prevalence of inmate sexual victimization. Numbers collected by the U.S. Department of Justice indicate that 4.5 percent of inmates report being sexually victimized during the prior twelve months, with inmates at several facilities reporting victimization rates during the last twelve months in excess of 9 percent.[55] Overall, numbers collected by the Department of Justice indicate that 13 percent of all inmates in the United States have been sexually victimized in prison.[56]

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eliminate gendered language).

45. CRIME IN THE UNITED STATES 2009, at 15 (3d ed. 2009).

46. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000).

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

48. *Id.*

49. Janet Anderson, Letter from the Editor, *Prison Rape and Sexual Coercion Behind Bars*, 7 RES. & ADVOC. DIG., May 2005, at 1 (citing the 2000 study by Struckman).

50. The state provided this information to Human Rights Watch on the condition that the name of the state would not be revealed. NO ESCAPE, *supra* note 12, at 33.

51. *Id.*

52. Ristroph, *supra* note 31, at 175.

53. 42 U.S.C. §§ 15601–09 (2006).

54. 42 U.S.C. § 15603(a)–(c) (requiring the Bureau of Justice Statistics to collect data and issue regular reports on prison rape). For a critique of PREA and its likely effect, see Ristroph, *supra* note 31, at 174–76.

55. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES 2007 (2008).

56. Although this Article focuses on adult male victims, the data on the sexual victimization of male youth in juvenile facilities is even more troubling. According to a

These numbers alone support the argument that male-victim rape requires more attention. But in all likelihood, these numbers drastically *understate* the frequency of male rape in prisons. The remainder of this section explains why.

In addition to the reporting hurdles already discussed—the fear of negative perceptions and the definitional issues—there are perceptual hurdles. For example, the prisoner who engages in sex with one individual to avoid physical harm from third-parties may have difficulty squaring his predicament with his preconceived notion of rape.[57] Similarly, when a victim of rape ejaculates or is forced to play a "dominant" role in the sexual act, perhaps by being the recipient of fellatio, he may feel guilt or embarrassment and have difficulty reconciling his role with his perception of a rape victim.[58] In a similar vein, a victim of prison rape may have trouble reconciling his rape with his conceptions of sexuality and masculinity. Contrary to assumptions, it appears that most perpetrators of prison rape identify as heterosexual, engaged in heterosexual sex prior to prison, and return to heterosexual sex after prison.[59] Indeed, within the prison, the aggressor in prison rape is often "viewed as the model of heterosexual masculinity."[60] Likewise, a male rape victim who assumed that rape was something that only happens to women might experience cognitive dissonance, and he might resolve this dissonance by viewing his experience as a physical violation, but not a sexual one.

Department of Justice study released in 2010, approximately 10.8 percent of detained youth reported sexual activity with staff members, and nearly 3 percent reported being sexually victimized by other detained youth. Of the youths victimized by other youth, 81 percent reported being victimized more than once; 32 percent reported being victimized more than ten times; and 43 percent reported being victimized by more than one perpetrator. *Id.*

57. As one commentator notes, much of prison sex is "survival driven." Stephen "Donny" Donaldson, *A Million Jockers, Punks, and Queens*, *in* PRISON MASCULINITIES, *supra* note 32, at 118, 120–25. *See also* Sigler, *By the Light of Virtue*, *supra* note 31, at 569–70 (observing that "strong incentives, such as obtaining protection and avoiding other forms of violence . . . lead some inmates to be coerced into 'consensual' sexual relationships"). There is also evidence that some inmates, in order to avoid being sexually victimized, resort to preemptive aggression by sexually victimizing others. Ristroph, *supra* note 31, at 153–54.

58. The physiological response of an erection and ejaculation during sexual assault is not uncommon, as several studies have revealed. *See, e.g.*, Philip M. Sarrel & William H. Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES OF SEXUAL BEHAVIOR 117, 118 (1982). As two researchers observed:

> A major strategy used by some offenders in the assault of males is to get the victim to ejaculate. This effort may have several purposes. In misidentifying ejaculation with orgasm, the victim may be bewildered by his physiological response to the offense and thus discouraged from reporting the assault for fear his sexuality may become suspect. Such a reaction may serve to impeach his credibility in trial testimony and discredit his allegation of nonconsent. To the offender, such a reaction may symbolize his ultimate and complete sexual control over his victim's body and confirm his fantasy that the victim really wanted and enjoyed the rape.

A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806, 809 (1980).

59. ALAN MCEVOY ET AL., IF HE IS RAPED 12 (2003); King, *Male Rape in Institutional Settings*, *supra* note 11, at 71.

60. Ristroph, *supra* note 31, at 152; *see also* Ian O'Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241, 243 (2004).

In addition, the mere act of reporting rape in the prison system may present risks.[61] Victims of prison rape are, by definition, limited in their ability to extricate themselves from the environment where they were raped. In many circumstances, the perpetrator is not only a fellow prisoner but also the victim's administratively chosen cellmate.[62] There are no rape shelters in prison or readily available rape kits.[63] Prisoners who report being raped often find themselves being victimized again, either by being placed in administrative detention or protective custody,[64] or by their rapists as retaliation for "snitching."[65] Corrections officers may even be complicit in facilitating rapes in order to punish certain prisoners and reward others.[66] More often, corrections officers "blame the victim," dismissing the victim as culpable in having attracted the sexual assault,[67] especially if corrections officers perceive the victim to be gay or bisexual. For example, one survey of 166 corrections officers found that 46.4 percent of the officers believed "inmates deserve rape if they have consented to participate in consensual acts with other inmates."[68]

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61. One study found that only 29 percent of sexually victimized inmates reported their abuse to prison officials. *See* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 75 (1996).

62. NO ESCAPE, *supra* note 12, at 75 ("One relationship that presents a clear danger of sexual abuse . . . is that of cellmates.").

63. CTR. FOR EFFECTIVE PUB. POLICY, THE PRISON RAPE ELIMINATION ACT OF 2003: SUMMARY OF FOCUS GROUP DISCUSSION POINTS 13 (2004) (identifying as a priority the need for evidence collection kits in correctional facilities).

64. Another administrative response might be to transfer the victim to another institution. As Mark Fleisher and Jessie Krienert note, both administrative detentions and transfers can leave an inmate in a worse position. Protective custody usually involves the victim being placed in solitary confinement with twenty-three-hour-a-day lockdown and unable to take advantage of any privileges he previously enjoyed. A transfer usually involves an inmate being perceived as a victim and an easy target for rape and other abuse when he arrives at another institution. *See* MARK S. FLEISHER & JESSIE L. KRIENERT, THE MYTH OF PRISON RAPE: SEXUAL CULTURE IN AMERICAN PRISONS 99 (2009).

65. Terry A. Kupers, *Rape and the Prison Code*, *in* PRISON MASCULINITIES, *supra* note 32, at 111–12. Interviews with inmates resulted in comments such as "they're afraid of being labeled a snitch or something like that," and "you don't [report rape], you wouldn't deal with a rape by telling an officer." Another inmate explained, "Nothing reported; nothing said about it. It's too embarrassing; you're admitting to defeat and can't take care of yourself; you're like a little kid." *Id.* at 121.

66. The allegations made by Eddie Dillard are but one example. Dillard, a prisoner at Corcoran State Prison in California, claimed that his cellmate, a sexual predator serving life without parole, repeatedly raped him. Dillard also accused four guards of purposely transferring him into his rapist's cell with the purpose of punishing him for hitting a guard. Dillard's rapist testified and confirmed the allegations to the state investigator. Tamar Lewin, Editorial, *Little Sympathy or Remedy for Inmates Who Are Raped*, N.Y. TIMES, Apr. 15, 2001, *available at* http://www.nytimes.com/2001/04/15/national/15RAPE.html. Notwithstanding the testimony, the guards were acquitted of playing any role in facilitating the rape. Christian Parenti, *Guarding Their Silence: Corcoran Guards Acquitted of Rape*, *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 234 (Tara Herivel & Paul Wright eds., 2003). *See also* Lehrer, *supra* note 25, at 24 (noting that rape "serves as a prison-management tool" for prison administrators).

67. King, *Male Rape in Institutional Settings*, *supra* note 11, at 69.

68. H. Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers'*

Seeking civil relief, assuming the victim can find a lawyer to take his case, presents its own hurdles.[69] Nor can the victim of prison rape expect the usual criminal justice protections that exist outside of prisons.[70] Prosecutors, faced with limited resources, rarely devote those resources to prosecuting prison violence.[71] These disincentives to reporting prison rape are considerable. As a result, prisons function as zones of underenforcement, where sanctionable and criminal behavior frequently occur without criminal consequences.

At the same time that male inmates face disincentives to report sexual victimization, prison officials have a vested interest in underreporting the occurrence of rape.[72] For example, prison officials in New Mexico stated their systems contained no rape complaints.[73] Similarly, officials in Nevada claimed such incidents were "minimal."[74] In fact, states have reported no and few incidents of inmate sexual violence even while being under public investigation for ongoing sexual violence.[75] Part of this disincentive to reporting is traceable to the possible civil liability prison officials face in suits alleging that officials failed to protect a prisoner from interprisoner abuse. Under the "deliberate indifference" standard articulated in *Farmer v. Brennan*, a prison official's liability for prisoner

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Attitudes Toward Rape in Prison, 69 PRISON J. 39, 48, 50 (1989).

69. *See infra* notes 77 through 78 and accompanying text.

70. For example, in *Butler v. Dowd*, a corrections employee testified that there had been over one hundred reports of sexual assaults at the prison; however, evidence showed that the prison superintendent "had never referred a case of sexual assault for prosecution." Butler v. Dowd, 979 F.2d 661, 667 (8th Cir 1992); *see also* Brenda V. Smith, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, 4 CRIM. L. BRIEF 19, 20 (2008).

71. As one commentator observed:

> Few prosecutors are concerned with prosecuting crimes committed against prisoners; preferring to leave internal prison problems to the discretion of the prison authorities; similarly, prison officials themselves rarely push for the prosecution of prisoner-on-prisoner abuses. As a result, perpetrators of prison rape almost never face criminal charges.

Joanne Mariner, *Deliberate Indifference, State Authorities' Response to Prisoner-on-Prisoner Sexual Abuse, in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR, *supra* note 66, at 232; *see also* Mark Hansen, *Brutal Findings: Prison Rapists Go Unpunished, Victims Go Unrepresented*, A.B.A. J., July 2001, at 16; NO ESCAPE, *supra* note 12, at vii ("Although local prosecutors are nominally responsible for prosecuting criminal acts that occur in prisons, they are unlikely to consider prisoners part of their real constituency."). Unfortunately, both civil and criminal relief are frustrated by evidentiary rules that automatically mark the vast majority of prisoners as untrustworthy because of their felony convictions, a problem I have detailed elsewhere. *See* Bennett Capers [sic], *Crime, Legitimacy,* Our *Criminal Network, and* The Wire, 8 OHIO ST. J. CRIM. L. 459 (2011).

72. Jeremy Bentham imagined the ideal prison as a panopticon, where officials would be able to monitor prisoners at all times. While our prisons move closer to this ideal every day—indeed, increased surveillance is one of the solutions PREA proposes—inmate sexual victimization remains one area where prisons seem to deliberately turn a blind eye. Mariner, *supra* note 71, at 234. As one state corrections official stated: "Regrettably, [rape] is a problem of which we are happier not knowing the true dimensions." *Id.* at 233.

73. NO ESCAPE, *supra* note 12, at 4.

74. *Id.*

75. Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BRIEF, Spring 2008, at 12.

rape is limited.[76] Although 42 U.S.C. § 1983 ostensibly provides a cause of action against state actors for civil rights deprivations, absent intentional wrongdoing on the part of the state actor, the state actor is liable only if he had actual knowledge of substantial risk to a prisoner and disregarded that risk.[77] This legal standard creates an incentive for correctional staff to remain officially unaware of inmate sexual victimization.[78]

The foregoing suggests that data collected to date likely underestimate the frequency of male-victim rape in prisons. Still, even assuming the existing numbers are accurate, they should be cause enough for alarm. Based on Congress's own numbers, "nearly 200,000 inmates now incarcerated have been, or will be, the victims of rape," and the total estimate of "inmates who

76. 511 U.S. 825, 847 (1994) (holding, in the case of a transsexual inmate who was repeatedly beaten and raped by inmates, that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").

77. *Id.* at 841. For more on the "deliberate indifference" standard in the context of male prison rape, see Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference*," 92 J. CRIM. L. & CRIMINOLOGY 127 (2001); James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433 (2003). Numerous cases illustrate the difficulty of prevailing under this standard and the lack of sympathy plaintiff-inmates often receive. *See, e.g.*, Riccardo v. Rausch, 375 F.3d 521, 526–27 (7th Cir. 2004) (reversing award of $1.5 million to inmate who was raped after imploring officials not to be assigned with a particular inmate because he feared for his life; since inmate complained only that he feared for his life, and not that he feared rape, officials did not have actual knowledge of the risk of rape); Butler v. Dowd, 979 F.2d 661, 671 (8th Cir. 1992) (affirming jury award of one dollar each to several plaintiffs who were repeatedly raped in part on the ground that the jury could have concluded that "the plaintiffs' actions, not those of the defendant, were the cause in fact of most of the plaintiffs' injuries"; the court also noted that the plaintiffs had failed to introduce medical evidence that they "were in fact damaged by their experience"); McGill v. Duckworth, 944 F.2d 344, 348, 353 (7th Cir. 1991) (reversing the jury's award of $10,000 to an inmate who was anally raped in the shower by several other inmates because the victim had failed to show that officials had actual knowledge of the risk and because the victim "accept[ed] the risk" of rape when he proceeded to the shower after other inmates had made sexual threats; James v. Tilghman, 194 F.R.D. 408, 412–13 (D. Conn. 1999) (even though the jury accepted inmate's claim that officials acted with deliberate indifference by housing him in a cell with an inmate who other inmates had complained about and who thereafter raped plaintiff, it only awarded one dollar in damages). The *McGill* court noted that "[s]ome level of brutality and sexual aggression among [inmates] is inevitable no matter what the guards do."). *McGill*, 944 F.2d at 348. The Roderick Johnson case, described in the Introduction, ended with a jury verdict in favor of the defendants on all counts. It appears that jurors expected Johnson to demonstrate that he physically resisted his rapists and that he had not previously engaged in consensual homosexual sex. *See* Angela K. Brown, *Jurors Reject Texas Prison Rape Lawsuit*, ASSOC. PRESS, Oct. 18, 2005 (quoting juror who concluded that Johnson was "probably" raped, but wanted evidence from a rape kit for confirmation). Jurors may have also had trouble reconciling the notion that Johnson could be raped with evidence that Johnson had previously engaged in consensual homosexual sex. Robert Crowe, *Prison Workers Not Liable in Lawsuit*, HOUS. CHRON., Oct. 19, 2005, at B7 (noting defense lawyers' references to Johnson's sexuality).

78. Mariner, *supra* note 71, at 234. As one state corrections official stated: "Regrettably, [rape] is a problem of which we are happier not knowing the true dimensions." *Id.* at 233.

have been assaulted in the past 20 years likely exceeds 1,000,000."[79] Even these numbers still obscure the reality of gang rapes and *repeated* victimization.[80] Once victimized, a prison rape victim often "must repay his rapist for the violence perpetrated on him by dedicating himself to serving his assailant's needs for perhaps years thereafter."[81] They also obscure the perpetual fear of being raped that many inmates feel. As the book *If He Is Raped* puts it:

> The reality of prison culture is clear: incarcerated victims of sexual violence live in a continued state of preimpact terror. . . . [P]risoners who are preyed upon by other prisoners experience this terror almost daily. They seldom feel safe. In addition, this terror is induced intentionally rather than by accident. The places where people on the outside feel safest—at home, in the shower, at play, or while asleep—are places where inmates are most vulnerable. There is no respite. In the confines of the prison, victims and predators see one another daily. Even guards and other prison staff, not just fellow prisoners, can be perpetrators.[82]

B. Rape Outside of Prisons

On October 3, 2010, in New York City, several gang members abducted a seventeen-year-old boy who had been trying to join their gang, forced him to confess that he had performed sex acts with a thirty-year old man, and punished him by beating him and sodomizing him with the wooden handle of a plunger. The gang members then located the thirty-year-old man, beat him, and sodomized him with a small baseball bat.[83]

While this incident shocked many, current data suggest that male sexual victimization occurs outside of prisons with far greater frequency than commonly assumed. For example, the most recent National Crime Victimization Survey, released in September 2009, indicates that 39,590 men reported being raped or sexually assaulted in 2008.[84]

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79. 42 U.S.C. § 15601(2) (2006).

80. Approximately two-thirds of prison rape victims are repeatedly raped, many on a daily basis. MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 36–37 (1997). The story of Donald Stephenson is but one example. Arrested for participating in a nonviolent protest in Washington, D.C., Donaldson found himself in a jail where approximately sixty men raped him over a twenty-four hour period. *Id.* at 36. Upon his release, he spent a week in a veteran's hospital undergoing and recovering from rectal surgery. Based on his experience, Donaldson became an advocate against prison rape and founded the organization Stop Prison Rape. *Id.*

81. King, *Male Rape in Institutional Settings*, *supra* note 11, at 68.

82. MCEVOY, *supra* note 59, at 59.

83. Michael Wilson & Al Baker, *Lured into a Trap, Then Tortured for Being Gay*, N.Y. TIMES, Oct. 8, 2010, at A1.

84. Rand, *supra* note 14 (2008 victimization survey). The survey was based on information gathered from a nationally representative sample of U.S. households. Surveyors interviewed 77,852 individuals from 42,093 households.

Other recent data confirm the prevalence of male-victim rape outside of prisons. For example, a community-wide study in Los Angeles found that 7.2 percent of the men surveyed reported at least one incident after the age of 15 where they had been sexually assaulted.[85] Other research, focusing on cases in hospital emergency rooms and rape crisis centers, indicates that between 4 percent and 12 percent of sexual assault victims seeking medical treatment are male.[86] Indeed, research suggests that a significant percentage of male sexual victimization occurs in hypermasculine environments, including fraternities[87] and sports teams.[88] A study based in a clinic serving a population of Navy and Marine Corp men found significant male sexual victimization in the military setting.[89] A more recent study found a 6.7 percent victimization rate among male members of the U.S. Army.[90] This is to say nothing of servicemen abusing male civilians, as the sexualized victimization of many of the male prisoners at Abu Ghraib attests to.[91]

As with rates of sexual victimization within prisons, the data regarding male-victim rape outside of prisons are also likely conservative. The reasons

85. Susan B. Sorenson et al., *The Prevalence of Adult Sexual Assault: The Los Angeles Epidemiologic Catchment Area Project*, 126 AM. J. EPIDEMIOLOGY, 1154, 1158 (1987).

86. *See* Bruce D. Forman, *Reported Male Rape*, 7 VICTIMOLOGY 235 (1982); Patricia A. Frazier, *A Comparative Study of Male and Female Rape Victims Seen at a Hospital-Based Rape Crisis Program*, 8 J. INTERPERSONAL VIOLENCE 64 (1993); Cécile Grossin et al., *Analysis of 418 Cases of Sexual Assault*, 131 FORENSIC SCI. INT'L 125 (2003); Arthur Kaufman et al., *Male Rape Victims: Noninstitutionalized Assault*, 137 AM. J. PSYCHIATRY 221 (1980); Gene R. Pesola et al., *Emergency Department Characteristics of Male Sexual Assault*, 6 ACAD. EMER. MED. 92 (1999); Netti Riggs et al., *Analysis of 1,076 Cases of Sexual Assault*, 35 ANNALS EMER. MED. 358, 358–60 (2000); Lana Stermac et al., *Sexual Assault of Adult Males*, 11 J. INTERPERSONAL VIOLENCE 52 (1996).

87. For example, a surprising number of male-victim sexual assaults, including gang rapes, occur in fraternities, ostensibly as part of hazing rituals. MCEVOY, *supra* note 59, at 13. (discussing gang rapes in the context of hazing); *see also* SCARCE, *supra* note 80, at 51–56 (discussing male sexual victimization in fraternities).

88. Consider a few recent examples. In Ohio, several members of Tallmadge High School football team faced rape charges in connection with the sexual assault of a team member. According to police records, they sodomized a teammate with a foreign object. *See* Tom Gaffney, *Hazing Allegations Overshadow Team: Undefeated Tallmadge Now Six Players Short*, AKRON BEACON J., Oct. 9, 2007, http://www.ohio.com/news/10334312.html. Even more recently, several male teens in Tampa, Florida, were arrested for sodomizing a teammate with a broomstick and a hockey stick. *See* John Couwels, *4 Teens Charged as Adults in Locker Room Sexual Assault Case*, CNN, June 4, 1999, http://www.cnn.com/2009/CRIME/06/04/florida.sexual.assault/index.html; Richard Danielson et al., *Walker Middle School Student Says Bullies Were Targeting Him Since Mid-March*, ST. PETERSBURG TIMES, May 10, 2009, http://www.tampabay.com/news/publicsafety/crime/article999687.ece.

89. Peter F. Goyer & Henry C. Eddleman, *Same-Sex Rape of Nonincarcerated Men*, 141 AM. J. PSYCHIATRY 576 (1984).

90. Martin L. Rosen et al., *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 MIL. MED. 213 (1998).

91. *See, e.g.*, Ian Fisher, *Iraqi Tells of U.S. Abuse, from Ridicule to Rape Threat*, N.Y. TIMES, May 14, 2004, at A1; Duncan Gardham, *Abu Ghraib Abuse Photos 'Show Rape,'* May 27, 2009, THE TELEGRAPH (U.K.), at A1, *available at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html.

for underreporting among men outside of prisons are similar to the reasons for underreporting within the prison system: the taint of homophobia; the fear of appearing weak and hence not masculine; and definitional and perceptual issues.[92]

Additionally, there are underreporting factors unique to nonprison male rape victims.[93] While complaints of prison rape are likely to be dismissed as "par for the course," complaints of male-victim rape outside of the prison context are more likely to be met with disbelief.[94] As one victim of male rape put it, "All men find rape difficult to believe or accept—if [it happened] you must be queer, if you're not queer it can't have happened."[95] There are assumptions about prison rape that are so embedded in the popular culture—jokes about dropping the soap or about a cellmate named "Bubba"[96]—that the specter of prison rape already fits a certain prison "rape script."[97] These assumptions, often racially inflected,[98] have little counterpart outside of the

92. This seems particularly true of male victims who are fondled or otherwise brought to arousal or ejaculation during the assault. King's study of male rape victims indicates that men who were manually fondled during assaults often remained confused and disgusted by their physiological response. Michael B. King, *Male Sexual Assault in the Community*, *in* MALE VICTIMS OF SEXUAL ASSAULT, *supra* note 11, at 5. As with prison rape, most men who sexually assault other men outside of prisons appear to identify as heterosexual. SCARCE, *supra* note 80, at 17. There may also be an additional perceptual issue with respect to sexual assaults outside of prisons. Since straight men do not usually think of their rectal cavities as sexual, they may not think of a forced insertion of a foreign object in the anus as a sexual assault. In such cases, the men may view themselves as assault victims, but not sexual assault victims. *Id.* at 62.

93. A British study of callers to a support group for victims of male rape found that only 11 percent of the callers had reported their assaults to the police. *See* Philip N.S. Rumney, *Police Male Rape and Sexual Assault*, 72 J. CRIM. L. 67, 70 (2008).

94. Tewksbury, *supra* note 15, at 25 (observing that "implicit is the belief that [male] victims anticipate rejection and authorities not to believe them if they should report"). One study examining attrition rates found that allegations of male-victim rape are less likely to be recorded as crimes by the police. This study, which focused on attrition rates in London, England, found that 23 percent of the sexual assault allegations made by females were recorded as "No Crime." By comparison, 41 percent of the sexual assault allegations made by males were recorded as "No Crime." *See* Rumney, *supra* note 93, at 71 (citing DEPUTY COMMISSIONER'S COMMAND, DIRECTORATE OF STRATEGIC DEVELOPMENT AND TERRITORIAL POLICING, PROJECT SAPPHIRE, A REVIEW OF RAPE INVESTIGATIONS IN THE MPS (2005)).

95. King, *Male Sexual Assault in the Community*, *supra* note 92, at 5.

96. "Bubba" even has an entry in the Urban Dictionary. *See* URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=bubba (last visited May 30, 2011) (defining "Bubba" as a "homosexual gay beast who finds men's bums attractive and must rape them" and who loves to "de-virginize prison newbies").

97. Sharon Marcus uses this term to refer to the typical script of a stranger rape. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, *in* FEMINISTS THEORIZE THE POLITICAL 389 (Judith Butler & Joan W. Scott eds., 1992). The term seems equally apt in the male-victim rape context to describe the type of violent rape we associate with prisons.

98. Tellingly, "Bubba" is usually assumed to be black. *See* URBAN DICTIONARY, *supra* note 96 (alternatively describing "Bubba" as a "male in prison, usually black, who is 7+ feet, weighs 350+ pounds of muscle" and as the "muscular black guy in prison that makes others prisoner [sic] into his bitch"); *see also* JAMES HOGSHIRE, YOU ARE GOING TO PRISON (describing prison rapists as "almost all black, while punks [i.e., sex slaves] are almost all white").

prison context where men are assumed to be able to fend for themselves or at least escape.[99] As Michael Scarce observes in *Male on Male Rape*:

> We can easily believe that a child might not be able to defend himself against an adult, but the sexual violation of a man may come as something of a shock, for men have traditionally been expected to defend their own boundaries and limits while maintaining control, especially sexual control, of their own bodies. When this does not occur, when men are raped by other men, society tends to silence and erase them rather than acknowledge the vulnerability of masculinity and manhood.[100]

The fact that reporting agencies are often gendered in name—e.g., Crisis Center for Women—may also function as a barrier to male victimization reporting.[101] Agencies are often unequipped to address male victimization,[102] ill at ease in providing services to male victims, and sometimes explicitly refuse services to male victims.[103] Some agencies may view the mere presence of a male as a barrier to the help they provide to female victims.

If male-victim rape occurs in an environment where homosexuality is stigmatized or penalized, reporting may become even more difficult. Consider again the military context. Because of the military's *Don't Ask, Don't Tell* policy, which until recently mandated the dismissal of any openly gay or bisexual service member,[104] even a heterosexual victim of male sexual assault risked being victimized twice. If he reported the assault, he risked the very real possibility of having his sexuality questioned, possibly leading to dismissal.[105]

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99. Studies suggest that male victims of rape may be judged more harshly precisely because of the assumption that they can defend themselves or escape. *See, e.g.*, Michelle Davies et al., *The Influence of Victim Gender and Sexual Orientation on Judgments of the Victim in a Depicted Stranger Rape*, 16 VIOLENCE AND VICTIMS 607 (2001).

100. SCARCE, *supra* note 80, at 9.

101. *See* Kiran Mehta, *Male Rape Victims: Breaking the Silence*, 13 PUB. INT. L. REP. 93 (2008) (discussing the problem of gendered crisis centers).

102. One study found that only 5 percent of victim services agencies that serve male victims have any programs or services specifically designed for men. *See* P.A. Washington, *Second Assault of Male Survivors of Sexual Violence*, 14 J. OF INTERPERSONAL VIOLENCE 713–30 (1999).

103. Tewksbury, *supra* note 15, at 26.

104. 10 U.S.C. § 654(b) (1994). In fact, gays have historically been barred from serving in the military since World War II. For a discussion of this history, see ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II (1990). DADT was repealed by the Don't Ask, Don't Tell Repeal Act of 2010 Pub. L. No. 111-321, 124 Stat. 3515 (2010). However, the law does not become effective until 60 days after the President, SECDEF, and CJCS report to Congress that changing the law will not adversely affect military readiness. *Id.* A couple of sources have indicated such certification may come by mid-summer. *See, e.g.*, *Pentagon Says Certification on 'Don't Ask, Don't Tell' Likely Mid-Summer*, LGBTQNATION (Sept. 1, 2011, 6:12 PM), http://www.lgbtqnation.com/2011/04/breaking-dod-says-certification-on-dont-ask-dont-tell-likely-mid-summer/.

105. On the difficulties male members of the military face coming forward about sexual assault, see for example, Bill Sizeman, *Military Men Are Silent Victims of Sexual Assault*, VIRGINIAN-PILOT, Oct. 5, 2009, http://hamptonroads.com/2009/10/military-men-are-silent-

Just as the military's ban on openly gay or bisexual servicemen likely inhibited the reporting of male sexual victimization in the military, the existence, until recently, of laws prohibiting sodomy likely had the unintended effect of inhibiting the reporting of male rape victimization. Before 1961, all fifty states had laws criminalizing same-sex sexual intercourse. Moreover, in *Bowers v. Hardwick*[106] in 1986, the Supreme Court gave its imprimatur to those laws, many of which remained extant until 2003 when the Supreme Court reversed *Bowers* in *Lawrence v. Texas*.[107] These laws had particularly grave consequences for gay and bisexual victims of sexual assault. Prior to *Lawrence*, to report an assault in many jurisdictions was to also "turn oneself in" as a violator of the sodomy laws.[108] These laws had consequences for heterosexual victims of same-sex assault as well, since even heterosexual men risked having their sexuality questioned and being deemed criminals.

Because male-victim rape outside the prison context has been largely invisible, the remainder of this section seeks to contextualize nonprison rape. One of the most well known studies of male rape victims outside the prison context was conducted by Michael King, a psychiatrist at the Royal Free Hospital in London.[109] Although over a decade old and based on a small sample of male victims, his findings are illuminating nonetheless. King provided detailed questionnaires to twenty-two men who responded to a call for male assault victims. Each of the men was assured absolute confidentiality.[110] Eight of the men also made themselves available for in-person interviews.[111] The questionnaires and interviews revealed the following:

- The mean age at the time of attack was 26.3 years.
- Ten victims self-identified as gay, four as bisexual, and eight as heterosexual at the time of the assault.
- Four men (two homosexual and two heterosexual) were attacked by complete strangers. Six were assaulted by someone well known to them. Five were assaulted by acquaintances, known for only a few hours. The remainder were sexually assaulted by either someone they met, knew romantically, or by a family member.

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victims-sexual-assault.

106. 478 U.S. 186 (1986).

107. 539 U.S. 558 (2003). Thirteen states had laws criminalizing sodomy at the time. *Id.* at 559.

108. This remained true for gay and bisexual men whatever their sexual practices. As Janet Halley observes, we tend to conflate the act of sodomy with the status of being gay or bisexual, even when such conflation is unwarranted. As she puts it, "in the relation of metonymy, sodomy is to homosexual identity as burglary is to burglars." Janet Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1734 (1993). As such, an admission of gay or bisexual identity could be understood as an admission "of membership in a criminal—or at least criminalizable—class." *Id.* at 1733.

109. *See* King, *Male Sexual Assault in the Community*, *supra* note 92, at 3–8.

110. *Id.*

111. *Id.*

> • Several men were sexually assaulted by someone who held emotional or more formal sway over them. For example, one bisexual married man was attacked by a man who advertised himself as a counselor for married gay men. Another man was sexually assaulted by an Army officer of higher rank.
>
> • Seventeen men were the victims of forced anal intercourse. Three men were victims of attempted anal intercourse. Of the remaining two men, one was forced to perform oral sex on his attacker, and the other was indecently assaulted as part of a physical attack. Five perpetrators attempted to masturbate their victims.
>
> • Twelve men believed they were about to be killed by their attacker. Many reacted to the shock of the assault with frozen helplessness, and still had difficulty understanding why they had been so afraid or unable to escape. Each felt stigma and disbelief following the attack.
>
> • Only two men reported the attacks to the police. The remainder feared that the police would either incorrectly perceive them to be gay, or correctly identify them as gay and respond with homophobia. Although several of the men sought psychological counseling after the attack, they found it difficult to report the attack. Only two of the men seeing psychiatrists revealed the attack to their psychiatrists.[112]

Though King's sample is concededly small and may suffer from a self-selection bias,[113] it suggests that male sexual victimization outside of prisons is as varied and multifaceted as female sexual victimization.[114] But the larger point is this: All of this is rape. All of this is sexual victimization. And all of this happens with far more frequency than we tend to acknowledge, suggesting that male-victim rape is cloaked in silence much the way female-victim rape was cloaked in silence fifty years ago. So here is the question: If men are raped with such frequency, why don't we talk about it? Even as I ask this question, however, a curious answer presses itself: we talk about it all the time.

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112. *Id.*

113. Because of the taint of homophobia, it may be that openly gay men were more willing to come forward than heterosexual men to discuss their sexual victimization, thus skewing the percentage of gay respondents. In addition, King solicited respondents by placing ads in LGBT-interest newspapers as well as in general interest newspapers. This may also have skewed the results. *See id.*

114. *See also* Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. FOR SOC. JUST. 481, 507 (2007) (surveying literature and concluding that "there are marked similarities in the responses of adult men and women to rape"). In addition, at least one court has recognized "[m]ale rape trauma syndrome," relying on scientific consensus that "male victims, both heterosexual and homosexual, exhibit a well defined trauma syndrome similar to and parallel to that found in female victims of rape." People v. Yates, 637 N.Y.S.2d 625, 627, 628 (1995).

II.
UNJUST TALK

Among legal scholars and practitioners, male-victim rape has been largely invisible and rarely discussed. Some of us, however—and here I am referring specifically to those of us involved in the practice of criminal law—talk about male-victim rape a lot. To be clear, we do not talk about it in ways that take seriously the concerns of actual rape victims. When we talk about male rape, for the most part, it is not because we care about male rape or its actual victims. It is because male rape is something we can use strategically. When we talk about male rape, we do so to get what we want. This Part is about how we talk about male rape to our advantage.

There are two areas where talk about male-victim rape is surprisingly common. The first area is in self-defense and provocation cases asserting what has come to be known as the "gay panic" defense. The second area is in "trash" talk from law enforcement officers and prosecutors. Both kinds of talk are problematic. And, as I argue below, both are unjust.

A. "Gay Panic" Talk

In October 1998, Matthew Shepard, an openly gay student at the University of Wyoming, was at the Fireside Lounge Bar when he struck up a conversation with two young men, Aaron McKinney and Russell Henderson.[115] Hours later, the police found Shepard's beaten and bloodied body hanging from a wooden fence about a mile outside of Laramie, Wyoming.[116] McKinney and Henderson were quickly arrested and charged with Shepard's murder.[117] Henderson pleaded guilty.[118] McKinney, on the other hand, went to trial.[119]

Though the judge explicitly barred McKinney from mounting a "gay panic" provocation defense,[120] this was precisely the defense McKinney asserted throughout the trial. In opening statements, defense counsel claimed that it was Shepard's homosexual advance that caused McKinney to react as he did.[121] During the defense case, two other men were called to testify that

115. James Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. TIMES, Nov. 21, 1998, at A9.

116. *Id.*

117. *Id.*

118. *Id.*

119. James Brooke, *Gay Murder Trial Ends with Guilty Plea*, N.Y. TIMES, Apr. 6, 1999, at A1.

120. Decision Letter, State v. McKinney, No. 6381 (Wyo. Dist. Ct., Oct. 30, 1999); *see also* Michael Janoksky, *Gay-Panic Defense Ruled Out*, S.F. CHRON., Nov. 2, 1999, at A3; *Wyoming Judge Bars 'Gay Panic' Defense*, WASH. POST, Nov. 2, 1999, at A7.

121. *See* Partial Transcript of Trial Proceedings in State v. McKinney, No. 6381, at 16–17 (Oct. 11, 1999) (alleging that Shepard "reached over and grabbed [McKinney's] genitals and licked his ear," upsetting McKinney and causing him to respond as he did); *see also* Michael Janofksy, *A Defense to Avoid Execution*, N.Y. TIMES, Oct. 26, 1999, at A1.

Shepard had once made sexual passes at them, prompting one of the men to punch Shepard, knocking him out.[122] In closing arguments, defense counsel again returned to the theme that McKinney had been provoked by Shepard's sexual advance.[123] In the end, the jury acquitted McKinney of first-degree murder, apparently accepting his claim that he reacted with panic and therefore lacked the intention to kill.[124] Instead, they convicted him of felony murder, which dispenses with any mens rea requirement vis-à-vis a homicide.[125]

The Matthew Shepard case is well known, but it is far from an isolated case. According to the F.B.I., there were 1,436 instances of hate crimes against lesbians and gays in 2009.[126] Significantly, "gay panic" has become a common defense strategy in cases involving "heterosexual"[127] men accused of killing or physically assaulting "gay" men.[128] To be clear, the "gay panic" defense is not an independently recognized defense. Instead, like the "battered spouse

122. Partial Transcript of Trial Proceedings in State v. McKinney, *supra* note 121, at 30, 42–45; *see also* Lou Chibbaro, Jr., *'Gay Panic' Defense Used Despite Ban by Judge, Second Witness Says Shepard Made Pass*, WASH. BLADE, Nov. 3, 1999.

123. Partial Transcript of Trial Proceedings in State v. McKinney, *supra* note 121, at 68; *see also* Patrick O'Driscoll, *Jury Begins Deliberations in Slaying of Gay Student*, USA TODAY, Nov. 3, 1999, at A1.

124. Michael Janofsky, *Man Is Convicted in Killing of Gay Student*, N.Y. TIMES, Nov. 4, 1999, at A1.

125. *Id.*

126. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2009 (2010), *available at* http://www2.fbi.gov/ucr/hc2009/data/table_01.html.

127. I put "heterosexual" and "gay" in quotes here because the binary it sets up is often false, because it depends almost entirely on self-identification, and because sexuality is often fluid. In the case involving the killing of Billy Jack Gaither, for example, the two defendants both asserted a "gay panic" defense. *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 493–94 (2008). In fact, there was evidence that Gaither and one of the defendants were in a sexual relationship that the defendant hoped to keep secret and that the defendant had previously slept with other men in secret. *Id.* at 491. Another reason for enclosing "heterosexual" in quotes is that the "gay panic" defense itself was originally used to excuse a defendant who was a latent homosexual. In short, his panic was traceable to his own latent homosexuality. As one court observed, undergirdding the "gay panic" defense was "the idea that a latent homosexual—and manifest 'homophobe'—can be so upset by a homosexual's advances to him that he becomes temporarily insane, in which state he may kill the homosexual." Parisie v. Greer, 705 F.3d 882, 893 (7th Cir. 1983).

128. Lee, *supra* note 127; Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81, 81–82 (1992); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1519, 1542–46 (1989); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 726–32 (1995); Adrian Howe, *More Folk Provoke Their Own Demise (Homophobic Violence and Sexual Excuse)—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence*, 19 SYDNEY L. REV. 336 (1997); Robert Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation,* 80 CALIF. L. REV. 133, 133–34 (1992); Martha C. Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW 30, 35–38 (Susan Bandes ed., 1999); Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 201–03, 210–13 (2000); Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 279, 302 (2001); Duncan Osborne, *The Homosexual Panic Defense: Are Juries Really Buying It?*, LGNY NEWS, Nov. 4, 1999, at 4.

syndrome," it is a particularized strategy used to buttress some other recognized defense. Originally, it was invoked to buttress the recognized defenses of insanity and diminished capacity.[129] It is now invoked to buttress the recognized defenses of provocation and self-defense.[130] Accordingly, a brief discussion of those defenses is helpful. In general, the self-defense doctrine allows a nonaggressor to use force upon another if he reasonably believes such force is necessary to protect himself from the imminent use of unlawful force by another person.[131] The defense allows a defendant to respond with nondeadly force or, if faced with imminent deadly force or the threat of deadly force, to respond with deadly force.[132] The defense functions as a complete defense.[133]

The provocation defense is more limited. It can be invoked only in cases resulting in a homicide.[134] It operates as an excuse rather than as a justification.[135] And it functions solely as a partial defense, permitting a defendant accused of committing intentional murder to mitigate his crime to the lesser offense of voluntary manslaughter in situations where the defendant acted in the "sudden heat of passion" as the result of "adequate provocation."[136] The defense traditionally contains four elements: (1) the defendant must have in fact acted in the heat of passion; (2) the passion must have been the result of adequate provocation; (3) the defendant must not have had a reasonable opportunity to cool off; and (4) there must be a causal link between the

129. For a comprehensive discussion of the historical origins of the "gay panic" defense and its use in the context of insanity and diminished capacity defenses, see Lee, *supra* note 127, at 482–88, 491–99.

130. In fact, in the case of provocation and self-defense, "gay panic" is perhaps a misnomer. While "gay panic" was originally used in insanity and diminished capacity cases to refer to the psychotic reaction of the defendant, in provocation and self-defense cases, by contrast, the term appears to refer more to the defendant's response to a nonviolent sexual advance. For more on this distinction and on why the term "homosexual advance defense" is more accurate, *see* Mison, *supra* note 128, at 134 n.6.

131. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (2001).

132. *Id.* Under the Model Penal Code, deadly force may also be used to avert rape. *See* MODEL PENAL CODE § 3.04(2)(b).

133. DRESSLER, *supra* note 131, at 249.

134. *Id.* at 571.

135. Of course, some scholars have argued that provocation should be thought of as a partial justification, in the sense that we consider the defendants were justified in responding to the wrong of the victim. *See, e.g.*, Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L. J. 197 (2005). While this argument has some merit, the stronger argument is that we mitigate an intentional homicide to manslaughter in recognition of the weakness of the defendant, thus sounding as an excuse defense. For more on this debate, see Joshua Dressler, *Provocation: Partial Justification or Partial Excuse*, 51 MOD. L. REV. 467 (1988); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982).

136. DRESSLER, *supra* note 131, at 571. The Model Penal Code applies a slightly different formulation, mitigating murder to manslaughter if committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." *See* MODEL PENAL CODE § 210.3(1)(b).

provocation, the passion, and the homicide.[137] Under this formulation, a defendant charged with murder can be convicted of the lesser offense of manslaughter so long as a reasonable person in the defendant's shoes would also have been provoked into a heat of passion.[138]

In recent years, it has become common for heterosexual men accused of killing or injuring gay men to claim they acted in self-defense or were provoked because they reasonably feared sexual assault.[139] And it has been common for juries to side with those defendants.[140]

Consider *Schick v. Indiana*.[141] Timothy Schick, the seventeen-year old defendant, claimed that he stomped thirty-eight-year old Stephen Lamie until he heard gurgling sounds coming from his chest and throat and then robbed him, making sure to wipe his fingerprints from Lamie's car.[142] Schick claimed this was because Lamie, whom the defendant met while hitchhiking, had grabbed him around the waist and tried to touch his penis.[143] Later, Schick claimed that Lamie attacked him, knocking him unconscious, and tried to force his penis into his mouth.[144] In short, the defendant recast himself as a victim terrified of sexual assault, provoked into killing his victim. Apparently finding Schick's sexual assault talk persuasive and his fear of sexual assault reasonable, the jury acquitted Schick of murder, convicting him instead of the lesser charge of voluntary manslaughter.[145]

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137. DRESSLER, *supra* note 131, at 571. While the very early common law limited "adequate provocation" to a fixed list of categories—observation of spousal infidelity; an aggressive assault or battery; mutual combat; illegal arrest; and the commission of a serious crime against a close relative, *id.* at 572–73, by the late nineteenth century this limitation had been largely abandoned. Rather, recognizing the "myriad shifting circumstances of men's temper and quarrels," Commonwealth v. Paese, 69 A.2d 891, 892 (Pa. 1908), jurisdictions began to let jurors determine what constitutes adequate provocation.

138. Courts have used various formulations to instruct jurors on determining whether provocation is adequate to reduce an intentional killing to voluntary manslaughter. Formulations include if it "would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder," Addington v. United States, 165 U.S. 184, 186 (1897); if it "might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment," Maher v. People, 10 Mich. 212, 220 (1862); if it is "sufficient to cause an ordinary man to lose control of his actions and his reason," State v. Guebara, 696 P.2d 381, 385 (Kan. 1985); or if it is "calculated to inflame the passion of a reasonable [person] and tends to cause [that person] to act for the moment from passion rather than reason," Dennis v. State, 661 A.2d 175, 179 (Md. Ct. Spec. App. 1995).

139. Lee, *supra* note 127, at 425. This is not to suggest that jurors invariably accept this defense. *See, e.g.*, Commonwealth v. Ewing, 567 N.E.2d 1262 (Mass. App. Ct. 1990) (rejecting defense); State v. Volk, 421 N.W.2d 360 (Minn. Ct. App. 1988) (same); State v. Handy, 419 S.E.2d 545 (N.C. 1992) (same); State v. Oliver, No. 49613, 1985 WL 8138 (Ohio Ct. App. Oct. 17, 1985) (same); State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994) (same).

140. *See* Lee, *supra* note 127, at 478, 512 (observing that "gay panic arguments linked to claims of provocation have been relatively successful" and "resonate with juries").

141. 570 N.E.2d 918 (Ind. Ct. App. 1991).

142. *Id.* at 922.

143. *Id.*

144. *Id.* at 927.

145. *Id.* at 922.

David Mills, another seventeen-year old defendant, also claimed fear of sexual assault to secure an acquittal on murder charges. In *Mills v. Shepard*, David Mills claimed that an older man's attempt to have sex with him by grabbing his privates so provoked him that he beat the older man to death and then robbed him.[146] In short, Mills argued that he had been provoked by the threat of sexual assault. Apparently finding Mill's fear reasonable, the jury rejected murder charges and instead found him guilty of the lesser crime of voluntary manslaughter.

Consider also the trial of Josh Cottrell.[147] Cottrell confessed to beating and strangling a gay man, stuffing his body into a suitcase, and then throwing the suitcase into a lake.[148] Defense counsel argued that Cottrell had "the right to use deadly force" because the victim made a sexual advance.[149] Although the jury was not sufficiently persuaded by the claim of self-defense, the jury was apparently persuaded by the claim of provocation, and it convicted the defendant of only the lesser charge of voluntary manslaughter.[150]

Even more recently, in *People v. Scarborough*,[151] a Michigan jury considered murder charges against twenty-one-year old Steven Willis Scarborough. Scarborough confessed to hitting his sixty-two-year old victim in the head with a baseball bat, knocking him unconscious, dragging the victim down a flight of stairs, stuffing the victim in the trunk of the victim's car, and then driving the car away from the scene and abandoning the car.[152] At trial, the defendant claimed the victim had knocked him out, and, when he awoke, the sixty-two-year old man was sexually assaulting him.[153] Apparently believing this defense, the jury convicted Scarborough of the lesser charge of voluntary manslaughter.[154]

In each of these cases, defendants on trial for harming or killing gay men have benefited by claiming they reasonably feared sexual assault, even when those claims seemed at odds with the facts before the jury.[155] For example, in *Schick v. Indiana*, Schick's subsequent actions—stealing the victim's watch and

146. 445 F. Supp. 1231 (W.D.N.C. 1978).

147. *Twenty Years in Jail: Cottrell Sentenced*, GRAYSON COUNTY NEWS-GAZETTE (KY), http://gcnewsgazette.com/view/full_story/1494261/article-Twenty-years-in-jail--Cottrell-sentenced (last visited May 30, 2011) (access fee required).

148. *Id.*

149. Michael A. Lindenberger, *Cottrell Guilty of Manslaughter*, COURIER-J. (Louisville, KY), Feb. 1, 2005, at B1.

150. *Id.*

151. No. 286545, 2010 WL 99001 (Mich. Ct. App. Jan. 12, 2010).

152. *Id.* at *2; John Agar, *Slaying Trial Leads from Trunk to Texas: FBI Picks up Murder Suspect; Credit Card Theft Also Charged*, GRAND RAPIDS PRESS, Aug. 3, 2007, at A1.

153. *See Verdict in Steven Scarborough Case: Guilty of Voluntary Manslaughter of Victor Manious*, GRAND RAPIDS PRESS, Apr. 10, 2008, http://blog.mlive.com/grpress/2008/04/verdict_in_steven_scarborough.html.

154. *Id.*

155. Indeed, these cases suggest that the narrative of male-on-male rape is so taboo that it can obscure other aspects of the crime that would reveal the flaws in claims of self-defense or provocation.

cigarettes and taking care to wipe his fingerprints from the victim's car[156]—suggest a level of composure at odds with any claim that he was acting in the "heat of passion." In *Mills v. Shepard*, the "gay panic" defense had even less support. Mills's defense was that he was provoked into heat of passion when the victim made a sexual advance.[157] In fact, Mills's own confession included the admission that prior to the sexual advance, he had agreed to engage in sex with the victim in exchange for twenty dollars, had ridden with the victim to a secluded location to engage in sex, and that he attacked the victim, killing him, only after the victim stated that he did not have twenty dollars.[158]

Even more troubling, defendants have also benefited from pretrial prosecutorial discretion[159] to enter into plea deals that take into account defense claims of the fear of sexual assault.[160] Consider a recent case from Washington, D.C. There, instead of pursuing the highest charge, prosecutors charged Robert Lee Hannah with voluntary manslaughter for killing a man outside a gay bar—apparently accepting the argument that he was provoked into beating to death Tony Randolf Hunter because Hunter "touched" him in a sexual way.[161] Working from this already reduced charge of manslaughter, Hannah was able to further plead the case down to misdemeanor assault.[162] By claiming that his actions were excused because he reasonably feared sexual assault, Hannah faced a maximum sentence of 180 days and a $1,000 fine.[163]

As Cynthia Lee has observed, the "gay panic" defense is problematic in several respects.[164] First, "such strategies are problematic because they reinforce and promote negative stereotypes about gay men as sexual deviants and sexual predators."[165] Second, allowance of the defense permits defendants to "capitalize on unconscious bias in favor of heterosexuality that is prevalent in today's heterocentric society."[166] It legitimizes the notion that it is normatively right, or at least normatively excusable, to fear gay men, to view

156. Schick v. Indiana, 570 N.E.2d 918, 921.

157. Mills v. Shepart, 445 F. Supp. 1231, 1234.

158. *Id.* at 1233–34.

159. Prosecutors, of course, have almost unfettered discretion in deciding whether to charge a defendant, what charges to bring against a defendant, and what type of disposition to seek against a defendant. For cogent critiques of this power, see Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1988); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996). Moreover, prosecutors often exercise this discretion based on passion—how much, or how little, a prosecutor cares about a case. For more on this phenomenon, see Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007).

160. Dressler, *When "Heterosexual" Men Kill*, *supra* note 128, at 758 (observing that some prosecutors may offer defendants reduced pleas in response to claims of gay panic).

161. Christopher Mangum, *Guilty Plea in Hunter Case*, ADVOCATE.COM (Sept. 18, 2009, 2:05 PM), http://www.advocate.com/News/Daily_News/2009/09/18/Guilty_Plea_in_Hunter_Case.

162. *Id.*

163. *Id.*

164. Lee, *supra* note 127, at 476.

165. *Id.*

166. *Id.*

gay and bisexual men as predators, and to respond to inchoate sexual advances not just with force, but deadly force.

To be sure, there are other problems with this defense that scholars have missed.[167] And though scholars have proposed banning the "gay panic" defense,[168] other alternatives exist.[169] For the purposes of this Article, however, my larger concern is this dichotomy: at the same time that we talk about the threat of male-victim sexual assault in self-defense and provocation cases, we are silent about male-victim sexual assault in general. At the same time we tell ourselves that men cannot be raped, at least outside the prison context, we tell ourselves that it is reasonable for heterosexual men to fear same-sex rape and to respond with deadly force. In short, we have it both ways.[170]

B. Law Enforcement/Prosecutor "Trash" Talk

There is another instance where talk about male sexual victimization predominates: during the interrogation of suspects, defendants, and uncooperative witnesses. As demonstrated below, this talk is also unjust.

Imagine the police are investigating a gang-related drive-by shooting. The police know which gang is involved and even have an idea of which particular

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167. The defense is also troubling because of the expressive message it sends. By liberally allowing defendants to assert the "gay panic" defense, courts and legislatures in fact legitimize the defense, sending the expressive message that fear of same-sex assault can be reasonable. In addition, it communicates the message that while homosexual conduct may be constitutionally protected under *Lawrence v. Texas*, such conduct should perhaps be kept closeted: men who are attracted to other men look and touch at their own peril.

168. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY 13–14 (2004); *see also* Mison, *supra* note 128.

169. One possible alternative, which I mention here only in broad strokes, would be to borrow from the act/status distinction that is at the foundation of criminal law. *See generally* MICHAEL MOORE, ACT AND CRIME (1993); DRESSLER, *supra* note 131, at 90–96. Provocation defenses predicated on "gay panic" should be allowed when the gravamen of the defense is that the defendant used force in response to something the victim did. However, the defense should be disallowed where the defendant's response was primarily based on the victim's status, rather than on the victim's act. In this respect, a defendant's claim that he was provoked into killing because he feared sexual assault when touched by a gay or bisexual man should be treated the same as a white defendant's claim that he was provoked into killing because he feared contagion when touched by a black man. The court would thus disaggregate the act and the status to determine the merit of the defense. In short, absent threshold evidence objectively pointing to a substantial *act* by the victim to justify the defendant's belief, neither claim should be permitted to go to the jury. A similar formulation could be used in jurisdictions that follow the MPC approach, notwithstanding the fact that the MPC eliminates the requirement of any provocative act. In a MPC jurisdiction, status would be disaggregated from factors used to consider the defendant's "reasonable explanation or excuse."

170. One way we hold these seemingly inconsistent views is by compartmentalizing our roles. As defense lawyers representing heterosexual men accused of harming gay or bisexual men, we play the "fear of rape" card. As scholars responding to such claims, we tend to dismiss them as meritless. As scholars discussing rape, we ignore the threat of male-victim rape outside of the prison context almost entirely. Meanwhile, jurors seem to accept the "fear of rape" card when heterosexual men invoke it as a defense but are arguably skeptical of the claim when invoked by male victims of rape.

gang member or members participated in the actual shooting. However, the police lack probable cause to make an arrest. To further their investigation, the police "invite" one of the gang members in for questioning. Because the suspect has not been charged, the police need not worry about appointing counsel.[171] Likewise, because they intend to make it clear that the suspect is not under arrest, they need not worry about *Miranda* warnings, since technically the suspect is not in custody.[172] The noncustodial interrogation will often include language like this:

> *Shut up and listen! You got one chance to help yourself and tell us who the shooter is, or you'll be the one in the big house touching your toes while Bubba and his friends make you their little bitch, you hear me?*[173]

While there is variation in how this is communicated, the underlying message is the same: don't cooperate, and you will be fucked—literally. Crude, yes. Uncommon, no. Nor are these references to male rape limited to gang cases. Defense lawyers raise the specter of male rape in a narrow set of cases: cases where heterosexual men stand accused of harming gay men and where an assertion of "gay panic" might seem to bolster a self-defense or provocation defense. By contrast, prosecutors and law enforcement officers raise the specter of male rape in a broader range of cases. The specter of male rape is invoked in securities cases[174] as casually as in drug distribution cases, in mail and wire fraud cases as casually as in racketeering cases.[175] The prospect of a date with "Bubba" is leveled at poor defendants and wealthy defendants, minority defendants and nonminority defendants. In a way, the threat of male rape is the great equalizer, an "equal-opportunity" interrogation tool.[176]

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171. The Supreme Court has long read the Sixth Amendment as guaranteeing the right to counsel only if adversary judicial proceedings have commenced against the accused. *See* Moran v. Burbine, 475 U.S. 412, 432 (1986); United States v. Gouveia, 467 U.S. 180 (1984).

172. *Miranda* warnings are required "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). Even where a suspect is the focus of an investigation, the police may interrogate the suspect without *Miranda* warnings so long as a reasonable person in the suspect's situation would have believed that he was not under arrest and was free to leave. Beckwith v. United States, 425 U.S. 341, 350 (1976). In practice, officers can advise suspects that they are not under arrest and are answering questions voluntarily in order to circumvent *Miranda* warnings. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 124–25 (2008).

173. I base this on hundreds of interviews I saw and participated in as a federal prosecutor. Similar statements appear in books about police interrogations. *See, e.g.*, LEO, *supra* note 172, at 205 (describing an interview where the suspect was told he would be raped by a big black man if he did not cooperate).

174. One noteworthy example comes from the Enron corporate fraud case. The California Attorney General made national headlines in 2001 when he said, "I would love to personally escort [Enron CEO Kenneth Lay] to an 8-by-10 cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'" *See* Michael Barone, *Bill Lockyer Is California Dreaming*, WASH. EXAMINER, May 14, 2009, http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Bill-Lockyer-is-California-dreaming-44987157.html.

175. I handled a variety of cases as a federal prosecutor, from drug prosecutions to

Such talk occurs so frequently that it is often taken as a given. But frequency does not equal legitimacy. Such talk should be both unacceptable and inconsistent with our notions of due process.[177]

As far back as *Brown v. Mississippi*,[178] a case involving three African Americans brutalized by sheriff's deputies, the Court has interpreted the Due Process Clause to bar "[c]ompulsion by torture to extort a confession."[179] As the "use of overt physical violence [gave] way to the employment of more subtle kinds of pressure,"[180] the Court extended *Brown* to also bar the threat of force,[181] such as holding a gun to a suspect's head.[182] The threat of force to secure a confession violates due process even where the confession is corroborated or is otherwise trustworthy.[183] Due process is violated even if the threat is based on reality; even a threat to do what police have the discretionary authority to do may violate due process.[184]

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racketeering and securities fraud prosecutions, and saw this interrogation tool used in a wide array of cases.

176. The threat of rape, whether cast as a threat or an offer of protection, is also an assertion of masculinity. This remains true when the threat comes from the police or prosecutors. I am grateful to Frank Rudy Cooper for this observation and his work on police officers and masculinity. *See, e.g.*, Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

177. Although the Supreme Court sought to avoid the indeterminacy of the involuntariness standard by adopting the prophylactic rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), the voluntariness requirement retains vitality. Even where a defendant has knowingly waived his *Miranda* rights, a statement may still be involuntary. As such, the voluntariness requirement exists independently of *Miranda*. *See* LAFAVE ET AL., 2 CRIMINAL PROCEDURE § 6.1(c), at 607–08 (3d ed. 2007).

178. 297 U.S. 278 (1935). Two defendants were laid across chairs and whipped until their backs were "cut to pieces" and they had "confessed"; the third defendant was hung from a tree and whipped until he "confessed." *Id.* at 282.

179. *Id.* at 285. Although *Brown* and the Court's subsequent coerced-confession cases turned on the use of the confessions at trial as triggering a due process violation, the Court has recently indicated that the coercion itself, apart from whether the resulting statement is introduced at trial, can also violate due process. *See* Chavez v. Martinez, 538 U.S. 760 (2003). *See also* DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 445 (2002) (observing from a due process perspective, "two constitutional wrongs apparently exist: obtaining a confession by coercive police conduct, and using that confession at trial"); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1987).

180. OTIS H. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 5–6 (1973).

181. Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

182. Beecher v. Alabama, 389 U.S. 35, 36 (1967).

183. Rogers v. Richmond, 365 U.S. 534, 541 (1961) (ruling that convictions based on coerced confessions must be overturned "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system"); Lisemba v. California, 314 U.S. 219, 236 (1954) (stating that the due process voluntariness requirement is "to prevent fundamental unfairness in the use of evidence, whether true or false"); *see also* Townsend v. Sain, 372 U.S. 293 (1963) (stating that the admission of ostensibly truthful confession obtained through use of truth serum violates due process).

184. In *State v. Phelps*, for example, Nebraska's highest court invalidated a confession made by a rape suspect in response to a warning that, absent an admission that intercourse

Given *Brown* and its progeny, a strong argument can be made that the threat of rape to induce a statement violates due process. Consider *Arizona v. Fulminante*.[185] Fulminante was suspected of murdering his step-daughter and was incarcerated on other charges.[186] A fellow inmate, acting as a police informant, befriended Fulminante and told him that other inmates did not look kindly on child-killers.[187] The informant offered to protect Fulminante from harm if Fulminante told him the truth about the killing.[188] Fulminante did.[189] The Court, however, held that the invocation of harm and concomitant offer to protect from harm was sufficiently coercive to violate due process, requiring suppression of Fulminante's confession.[190]

Taken literally, *Fulminante* would suggest that due process is also violated when law enforcement officers and prosecutors use the indirect threat of male rape to obtain statements or induce pleas.[191] In reality, it is unlikely that a defendant has ever made such a claim. Even Fulminante's claim was based on the threat of physical harm absent protection from the police informant, not sexual harm.[192] Such talk almost invariably remains under the radar, un-discussed, unchallenged, and unjust.[193] This suggests that male-victim rape simultaneously can be a subject of unjust talk and unjust silence. During interrogation, law enforcement officers and prosecutors engage in unjust talk, whereas defense lawyers respond with unjust silence.

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occurred, the suspect would be required to submit to a painful penile swab. Even though the officer's warning was truthful, the court held that the warning, coupled with the description of pain, violated due process. State v. Phelps, 456 N.W.2d 290 (Neb. 1990).

185. 499 U.S. 279 (1991).

186. *Id.* at 282–83.

187. *Id.*

188. *Id.*

189. *Id.* at 283.

190. In so ruling, the Court analogized the case to its earlier decision in *Payne v. Arkansas*, 356 U.S. 560, 564–67 (1958), in which an interrogating officer threatened to leave a suspect to an angry mob outside the jail unless he confessed.

191. The Court has long held that pleas must be voluntary and not the product of threats. *See* Brady v. United States, 397 U.S. 742, 750 (1970) ("[T]he agents of the State may not produce a plea by actual or threatened physical harm or by mental coercions overbearing the will of the defendant."). *See also* John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

192. 499 U.S. at 288 ("[T]he Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.").

193. I have uncovered only one case in which a reference to prison rape was brought into the open. In 2001, the Supreme Court of Canada rejected the extradition request of the United States for four Canadian citizens wanted for defrauding Americans through a telemarketing scheme executed from Canada. Notwithstanding the fact that the United States had presented a prima facie case against the Canadians, the Court concluded that granting the extradition request would violate their rights under the Canadian Charter of Rights in light of statements made by the Assistant U.S. Attorney handling the case. That attorney had threatened, "You're going to be the boyfriend of a very bad man if you wait out your extradition." *See* Cobb v. United States, [2001] 1 S.C.R. 587 (Can.).

There is the larger issue, however. On one hand, defense lawyers talk about the specter of male rape to bolster claims of self-defense and provocation when heterosexual men harm gay men. On the other, prosecutors and law enforcement officers talk about male rape in their interrogation of suspects and defendants. So why have legal scholars been so silent on the issue of male-victim rape? And what might happen when we do talk about male sexual victimization?

III.
UNJUST SILENCE

Notwithstanding its prevalence, actual male rape victimization has long been cloaked in silence. Part of this silence is traceable to the common law definition of rape. At common law, rape was understood to include four basic elements: (1) vaginal intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or a threat of severe bodily harm; and (4) without consent.[194] Though jurists focused on the latter two elements, force and nonconsent, it is the first element that had the effect of not only gendering rape but also rendering male-victim rape invisible, or at least unarticulable.

In fact, all four elements, working in concert, had the effect of laying the foundation for a "rape script"[195] against which all sexual encounters were to be judged. It was against this script that the "rape" of one's wife was, as a matter of law, "not rape."[196] It was against this script that the "rape" of a teenage foster daughter, under threat of returning her to a juvenile detention facility, was, as a matter of law, "not rape."[197] And it was against this script that a defendant's "rape" of his ex-girlfriend, committed shortly after, but not contemporaneous with, the threat to "fix" her face if she did not cooperate, was, as a matter of law, "not rape."[198]

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194. Blackstone defined rape as "carnal knowledge of a woman forcibly and against her will." 4 WILLIAM BLACKSTONE, COMMENTARIES *210. However, it was understood that a defendant could not be guilty of forcing his wife to engage in intercourse, even when such force was accompanied by physical violence. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628–29 (1778); *see also* DIANA H. RUSSELL, RAPE IN MARRIAGE (rev. ed. 1990); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000). The rationales for the exception included the concept that the wife and husband were now legally merged into one person and that, by consenting to marriage, the wife had granted irrevocable consent to sexual intercourse with her husband.

195. As noted earlier, Sharon Marcus uses this term to refer to the typical script of a stranger-rape. *See* Marcus, *supra* note 97. It should be noted that the rape script can be understood as a product of, or a subset of, gender scripts that reward male aggression and female passivity. The literature on gender scripts is rich. One excellent discussion can be found in Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as Quest for Perfect Proxies,* 85 CORNELL L. REV. 1447 (2000).

196. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses*, 54 HASTINGS L. J. 1465 (2003).

197. Commonwealth v. Mlinarich, 542 A.2d 1335 (Pa. 1988) (reversing a rape conviction because threats to recommit the victim to foster care did not satisfy "force" element of rape

This rape script has been so enduring that even after the implementation of numerous reforms in the 1970s and 1980s, which eliminated the force requirement,[199] reduced and eliminated proof on the victim's part of physical resistance,[200] and erected rape shield laws limiting inquiry, at trial, into a victim's sexual history,[201] decision makers still use the script as a yardstick.[202] Police officers,[203] prosecutors,[204] jurors,[205] and judges[206] still use the script to determine, in the *Rashomon*-like world of he said/she said,[207] on what side of the ticket their vote should go: rape or not rape.

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statute; defendant was, however, properly convicted of involuntary deviate sexual intercourse, which does not require force when the victim is a minor).

198. State v. Alston, 312 S.E.2d 470 (N.C. 1984) (reversing a conviction because defendant's use of force was not contemporaneous with the act of sex; victim's "general fear" based on earlier use of force "was not sufficient").

199. *See* DRESSLER, *supra* note 131, at 632–33; Gruber*, Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581*,* 601–02 (2004); *see also* VT. STAT. ANN. tit. 13, § 3252(a)(1) (1997) (criminalizing nonconsensual sex); WISC. STAT. ANN. § 940.225(4) (West 1996); *In re* M.T.S., 609 A.2d 1266 (N.J. 1992) (redefining rape to include nonconsensual sex).

200. For a discussion of how this requirement has changed, *see* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953.

201. *See, e.g.*, FED. R. EVID. 412; Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 56 (2002). Rule 412 makes a distinction between civil and criminal cases and expressly permits evidence of the sexual behavior of an alleged victim in civil cases so long as the probative value of such evidence is not substantially outweighed by "the danger or harm" to the victim. It is telling that in Roderick Johnson's civil suit, which he lost, the defense was allowed to introduce evidence that Johnson was gay. On appeal, the Fifth Circuit also emphasized Johnson's homosexuality. *See* Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004).

202. On the limited impact of these changes on actual prosecutions and convictions, see Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come*, 84 J. CRIM. L. & CRIMINOLOGY 554 (1993); Wallace D. Loh, *The Impact of Common Law and Reform Rape States on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 613 (1980).

203. For a description of the role of police officers in determining whether to pursue rape complaints based on how closely the rape allegation follows a rape script, see ESTRICH, *supra* note 33, at 1–3, 15–17. *See also* Cassia Spohn & Julie Horney, *"The Law's the Law, but Fair Is Fair": Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137 (1991).

204. *See, e.g.*, ESTRICH, *supra* note 33, at 8–9, 18–26.

205. Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 228–29 (1974) (finding most respondents considered stranger rape a far more serious crime than acquaintance rape). In one infamous case, jurors acquitted a defendant charged with abducting a victim at knife-point and repeatedly raping her over a five-hour period, explaining that the victim was at fault for wearing a lace mini-skirt without underwear. *See, e.g.*, *Jury Blames Woman's Clothing in Rape Case*, UNITED PRESS INT'L, Oct. 5, 1989, *available at* http://www.lexis.com (search the "News, All" database for the article title); *Rape Victim to Blame, Says Jury*, DAILY TELEGRAPH, Oct. 6, 1989, at 3; *Jury: Woman in Rape Case "Asked For It,"* CHI. TRIB., Oct. 6, 1989, at 11.

206. Shirley Feldman-Summers & Gayle C. Palmer, *Rape as Viewed by Judges, Prosecutors, and Police Officers*, 7 CRIM. JUST. & BEHAV. 19, 28 (1980); *see also* Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1104–13 (1987).

207. I use the expression "he said/she said" because "he said/he said" rarely proceeds to a jury trial, in part due to the reluctance of male victims to come forward in cases and the reluctance

This script has often rendered the "rape" of a man as "not rape." This was true as a matter of law during the period when rape was defined with reference to gender,[208] but it has also remained true even in the face of gender-neutral statutes.[209] The effect has been a curious one, insofar as the existence of a female victim seems to have become not only a *legal* precondition but also a natural one, and one that is both descriptively accurate and empirically true. There has been another effect as well: because of this gendered script, we often fail to see male rape even in the face of overwhelming evidence of its existence, as the following three examples illustrate.[210]

Consider *State v. Gounagias*, a case from 1915.[211] Gounagias, a Greek immigrant, had the misfortune to become so inebriated while celebrating Greek Easter with a fellow countryman that he lost consciousness.[212] In the words of the opinion, while Gounagias was unconscious, his fellow countryman "committed upon him the unmentionable crime . . . leaving [Gounagias] in a state of semiconsciousness."[213] For three weeks, Gounagias was the subject of "laughing remarks and suggestive gestures" from other Greek immigrants.[214] After three weeks, he armed himself, located the countryman who had committed the "outrage" upon him, and killed him.[215] At trial, the court precluded Gounagias from arguing provocation or introducing evidence about the incident that triggered the shooting. The court's decision was grounded upon the belief that Gounagias could not have acted in the "heat of passion" given the three-week delay between the offense and his response.[216]

Gounagias appears in the Model Penal Code Commentaries[217] and in several criminal law casebooks[218] to illustrate the "heat of passion" requirement

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of law enforcement officers and prosecutors to proceed with such cases.

208. This is not to suggest that male-victim rape always went unpunished. Rather, these crimes, when prosecuted, were treated as crimes of sodomy, not rape, simply because of the gender of the victim. *See* 3 WHARTON'S CRIMINAL LAW § 289 (Charles E. Torcia ed., 15th ed., 1995); *see also* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1860–2003, at 20 (2008).

209. Even now, prosecutors occasionally charge male-victim rape as forced sodomy, even when gender-neutral rape statutes are available. In addition, while most states now have gender-neutral rape statutes, it should be noted that statutory rape statutes remain very much gender-dependent, a practice the Supreme Court upheld in *Michael M. v. Sonoma County*. 450 U.S. 464 (1981).

210. In prior work, I have engaged in a practice I identify as "reading black" to read judicial opinions that are ostensibly race-free to reveal a racialized subtext. *See* I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9 (2006). What I am doing here is similar in some respects, but along an axis of sexuality rather than race.

211. 153 P. 9 (Wash. 1915).

212. *Id.* at 10.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 14.

217. MODEL PENAL CODE AND COMMENTARIES § 210.3.

218. *See, e.g.*, JOSHUA DRESSLER, CRIMINAL LAW 270 (5th ed. 2009); MARKUS D.

in the provocation defense. But the case is also interesting for another reason. The case illustrates how the law often participates in the erasure of male-victim rape. Indeed, in *Gounagias*, this erasure happened at least three times. As an initial matter, the law participated in the erasure of Gounagias's victimization by defining rape with reference to gender, thus rendering the crime against Gounagias as "not rape."[219] Next, the trial court participated in this erasure by precluding the defense from introducing evidence about the sexual victimization, rendering male-victim rape invisible to the jury.[220] Lastly, the appellate court, in affirming the decision, committed an act of erasure. Notwithstanding the fact that the very issue before the court was whether Gounagias's victimization amounted to legally adequate provocation, the word "rape" does not appear in the opinion. The "unmentionable crime"[221] and the "outrage committed by the deceased"[222] refer not to the crime of rape, but to the crime of sodomy, which also remains unnamed.[223] Indeed, a strong argument can be made that the *Gounagias* case illustrates a fourth level of male-victim rape erasure. The case appears in criminal casebooks to illustrate the operation of the provocation defense.[224] It does not appear in criminal casebooks to illustrate the operation, or nonoperation, of the law of rape. Indeed, to the extent male-victim rape is made explicit at all in casebooks, it is usually in the "defenses" section and in context of prison escape cases such as *United States v. Bailey*[225] or *People v. Lovercamp*,[226] in which courts

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DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS 926 (2005); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 413 (7th ed. 2001); KAPLAN, WEISBERG & BINDER, CRIMINAL LAW: CASES AND MATERIALS 349 (6th ed. 2009).

219. At the time, Washington State defined rape to require a "female not the wife of the perpetrator." *See, e.g.*, State v. Powers, 277 P. 373 (Wash. 1929).

220. *Gounagias*, 153 P. at 10–11.

221. *Id.* at 10.

222. *Id.* at 13.

223. Indeed, the failure to name male-victim rape as rape is part of a long history of erasing same-sex intimacy. For an interesting discussion of gay sexuality and naming, see Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be 'Equal*,*'* 97 GEO. L.J. 1155 (2009).

224. *See Gounagias*, 153 P. at 10–11.

225. 444 U.S. 394 (1980) (denying defense where prisoner-escapees did not attempt to surrender to authorities after escaping intolerable prison conditions, notwithstanding evidence that the abusers included the prison guards and that one of the escapees attempted to surrender, but first wanted assurances that he would not be returned to the same facility). In his dissent, Justice Blackmun laid bare the reality of prison life, noting the complaints courts receive daily about the conditions of incarceration, including the prevalence of prison rape, such that the "atrocities and inhuman conditions of prison life in America are almost unbelievable." *Id.* at 421 (Blackmun, J., dissenting). Justice Blackmun noted:

> A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials are either disinterested in stopping abuse of prisoners by other prisoners, or are incapable of doing so given the limited resources society allocates to

acknowledge the pervasiveness of prison rape yet deny defendants either a duress or necessity defense when they attempt to escape such conditions.[227]

The rape script, a product of the common law's gendered definition of rape and its emphasis on penetration,[228] has been so powerful that it has blinded us to rape or sexual assault in one of the most horrendous categories of crimes of the nineteenth and twentieth centuries. Between 1889 and 1918 alone, white mobs lynched on average more than a hundred blacks a year, and this extralegal violence was often accompanied by castration.[229] Even though these lynchings were often in response to perceived sexual crimes against white women and even though the punishment involved the male sexual organ, we have yet to fully recognize that the response—castration—was at its core a sexual crime, a punishment grounded in notions of "just deserts" and *lex talionis*, and a type of "communal rape."[230]

Finally, consider again the Haitian immigrant Abner Louima, whom Officer Justin Volpe sodomized with a broken broomstick in 1997.[231] Were

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the prison system.

Id. Unfortunately, little if anything has changed in the three decades since Justice Blackmun wrote these words.

226. 118 Cal. Rptr. 110 (Cal. Ct. App. 1974) (setting forth additional requirements to be met by escapees seeking to claim duress or necessity, including that the prisoner had no opportunity to resort to the courts, that no force towards prison personnel was used in escape, and that the prisoner immediately reported to authorities after escaping).

227. Courts in effect deny the defenses by erecting an additional hurdle for inmates who claim necessity or duress. The failure to immediately surrender or report to the authorities after escaping intolerable prison conditions is often sufficient to entirely strip the defendant of the defense. This defense stripping occurs even when the sole charge against the defendant relates to his actual escape, rather than his subsequent status as a fugitive. *See, e.g.*, *Bailey*, 444 U.S. at 415 (denying the defense based on the defendant's failure to surrender, notwithstanding the fact that the actual charge against the defendant was limited to his escape). Even more troubling, at the same time that courts have erected additional hurdles for inmates attempting to assert these defenses, courts have lowered and even removed hurdles for "good" defendants. *See, e.g.*, State v. Toscano, 378 A.2d. 755 (N.J. 1977) (permitting the defense for a chiropractor accused of filing false medical claims in response to amorphous threats from a patient's brother, notwithstanding the fact that the chiropractor could have, but did not, contact the authorities and instead responded by moving to another address, changing phone numbers, and applying for a gun permit before participating in the scheme).

228. For a discussion of how absolute this requirement has been, see Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2348–49 (2004); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 189–92 (1993).

229. TRUDIER HARRIS, EXORCISING BLACKNESS: HISTORICAL AND LITERARY LYNCHING AND BURNING RITUALS 23 (1984); NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES 1889–1918, at 7–8 (1919).

230. I am not the first scholar to call for a rethinking of lynching/castration as an inverted sexual encounter between black men and white men. Trudier Harris, for example, has described lynching/castration as "communal rape." *See* HARRIS, *supra* note 229, at 23 (1984); *see also* Robyn Wiegman, *The Anatomy of Lynching*, *in* AMERICAN SEXUAL POLITICS: SEX, GENDER, AND RACE SINCE THE CIVIL WAR 223 (John C. Fout & Maura Shaw Tantillo eds., 1993).

231. United States v. Volpe, 78 F. Supp. 2d 76 (S.D.N.Y. 1999); *see also supra* note 26 and accompanying text.

Louima female, we would readily recognize the crime as rape. Because the victim was male, however, we have trouble recognizing the crime as sexual at all. Again, sexual assault becomes "not sexual assault." Rape becomes "not rape."

It is one thing to note that rape scripts have contributed to rendering male sexual victimization invisible and unspeakable, but my larger concern is that too many of us have acquiesced in this invisibility—or worse, contributed to it.[232]

The role played by feminist scholars in this invisibility is especially troubling. As noted earlier, Susan Estrich, in her oft-cited *Real Rape*, reduces male-victim rape to a footnote.[233] But she is not alone. In a footnote, Michelle Anderson acknowledges male victimization, but declines to address it on the ground that "ninety-nine out of 100 convicted rapists are male and rape victims are overwhelmingly female."[234] Having elsewhere written about underreporting by female rape victims,[235] Anderson fails to consider the even greater likelihood of underreporting by male victims. Ann Cahill, who writes extensively about rape, similarly sidesteps male victims:

> I will regularly refer to assailants as male, and victims as female. . . . [T]hat members of all sexes are theoretical candidates for either role does not justify treating the phenomenon as a sex- or gender-neutral one. The vast majority of the victims are women. To ignore this disproportionality (which, of course, I do not view as natural or biologically necessary) is to misunderstand the phenomenon at the outset.[236]

Other feminists likewise relegate male sexual victimization to a footnote,[237] or fail to address it at all.[238] I, too, have been guilty of this omission.[239]

This relegation of male-victim sexual assault to the margins is also reflected in feminist responses to actual rape. For example, when the 1989 rape of a female Central Park jogger drew national attention, the outrage expressed

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232. Part of this has to do with the belief that male-victim rape occurs almost exclusively in prisons populated with "bad" men getting their "just deserts." They are also disproportionately populated with black, brown, and poor men, adding to our indifference.

233. ESTRICH, *supra* note 33, at 6 n.8.

234. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 947 n.4 (2004).

235. Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907 (2001).

236. Ann J. Cahill, *Sexual Violence and Objectification*, *in* THEORIZING SEXUAL VIOLENCE 14, 16 (Renée J. Heberle & Victoria Grace eds., 2009).

237. *See, e.g.*, Hasday, *supra* note 194, at 1494 n.444; Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585 n.2 (2007); Cory Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437 n.3 (2006).

238. *See, e.g.*, Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263 (2002); Gruber, *supra*, note 199; Note, Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463 (2000).

239. I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010).

by feminist groups was deafening.[240] By contrast, feminist organizations responded to the rape of Abner Louima with silence. For organizations that claim to care about gender equality, this silence is troubling.

Aside from a few exceptions,[241] queer scholars have also acquiesced in the silence around male sexual victimization.[242] For example, Bill Eskridge's influential *GayLaw* includes a discussion of male-perpetrator/female-victim rape, but makes no mention of male-victim rape.[243] The leading casebook on sexuality and the law, *Sexuality, Gender, and the Law*, similarly discusses female-victim rape but not male-victim rape.[244] Other queer law books repeat this omission.[245]

Legal scholars who write about the plight of black men in our criminal justice system have also been unjustifiably silent. Consider, for example, Marc Mauer's *Race to Incarcerate*[246] or Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.[247] The books are deservedly heralded, but they are also silent on the issue of rape in prison. If male-victim rape occurs most frequently in prisons and if black men are disproportionately represented in prisons, then there should be some discussion not only about the

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240. As one commentator put it:

> In 1989, [the National Organization for Women] made the jogger into a symbol of violence against women. Feminists were some of the loudest voices in the swelling chorus of public opinion calling on New York's law enforcement community to find the culprits as swiftly as possible—and were credulous when the confessions came in.

Christine Stolbe, *Big Sister Wants Your DNA*, NAT'L REVIEW, Dec. 11, 2002, *available at* http://www.nationalreview.com/comment/comment-stolba121102.asp.

241. *See, e.g.*, Robinson, *supra* note 31; Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1635–36 (2004) ("[A]dvancing their like-straight arguments . . . lesbian and gay rights advocates completely avoid[] any serious and engaged analysis of the existing problems of sexual abuse, whether cross-sex or same-sex . . . .").

242. This is not to "homosexualize" male-victim rape. Again, most of the perpetrators of male-victim rape identify as heterosexual. Similarly, many of the victims are heterosexual. However, some perpetrators are gay, and, more significantly, many male rape victims are gay or bisexual. Just as date rape occurs among heterosexuals, it occurs among gay men. In the prison context, the men most at risk of being raped tend to be gays and bisexuals. For example, in at least one study, 18.5 percent of gay inmates reported being sexually victimized in prison, compared to 9.8 percent for bisexual or sexually "other" inmates, and 2.7 percent for inmates who identified as heterosexual. *See* DOJ Statistics Special Report, *Sexual Victimization in Local Jails Reported by Inmates, 2007* (June 2008), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1148. For a provocative critique of California's "protective" segregation of gay inmates, see Russell K. Robinson, *supra* note 31.

243. WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (2002).

244. WILLIAM N. ESKRIDGE & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW (2003). Again, this silence may be attributable to the belief that victims of male rape tend to be incarcerated men who are mostly brown or black and thus outside the purview of "model homo families," a term I borrow from Katherine Franke. *See* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics,* 15 COLUM. J. GENDER & L. 236, 239 (2006).

245. *See, e.g.*, DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003).

246. MARC MAUER, RACE TO INCARCERATE (2006).

247. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

mass incarceration of black men in this country but also about the sexual punishments collaterally inflicted on black men.

Lastly, criminal law scholars in general have ignored male-victim rape. For starters, criminal law casebooks and scholars ignore male sexual victimization in their discussions of the rationales for punishment. If retribution requires that the punishment be proportional to the crime and the defendant's blameworthiness, then some discussion is necessary of the "sexual punishments"[248] that are often a collateral consequence of our penal system. If deterrence is predicated on notice, as it must be, then penologists are hindering that goal when they cloak sexual punishments in silence.

All of these scholars no doubt have reasons for not discussing male sexual victimization.[249] For feminist scholars, to acknowledge male sexual victimization would require a reanalysis of many assumptions. It would call into question Catharine MacKinnon's claim that rape is always a mechanism for the male domination of women.[250] It would call into question Susan Brownmiller's assertion that rape is "nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear."[251] It would be to admit that women do not have a monopoly on sexual victimization, and it would call into question other efforts to gender crime, such as feminists' continuing role in the implementation of the Violence Against Women Act ("VAWA")[252] and internationally in the implementation of the Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW").[253]

Admitting the existence of male sexual victimization would require other groups to readjust their thinking. For queer scholars, there may be the concern that opponents of gay rights will use any discussion of male-victim rape as an opening to (re)cast gay men as sexual predators, notwithstanding the fact that most male perpetrators of male-victim rape identify as heterosexual.[254] For example, in his testimony before Congress, General Norman Schwarzkopf used the specter of gay soldiers sexually assaulting heterosexual soldiers as an argument against allowing gay men to serve in the military.[255] In response to a

248. I borrow this term from Alice Ristroph. *See* Ristroph, *supra* note 31.

249. I focus here on legal scholars, but the same questions can be asked of other groups. For example, one could ask why men have been silent about male-victim rape. Or, as Russell Robinson put it to me, "Why are men so committed to masculinity ideals that they erase men who are victimized?" I am indebted to Robinson for raising this point.

250. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 7 SIGNS 515, 544 (1982).

251. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 15 (1975).

252. 42 U.S.C. §§ 13981–14045 (2006).

253. For the argument that gender needs to be removed from CEDAW, see Darren Rosenblum, *Rethinking International Women's Human Rights Through Eve Sedgwick*, 33 HARV. J.L. & GENDER 349 (2010).

254. *See* supra note 59.

255. In his testimony before Congress, General Schwarzkopf invoked the trope of

vote in the U.S. House of Representatives to repeal *Don't Ask, Don't Tell*,[256] this argument was made again.[257] For legal scholars who write about the plight of black men in the criminal justice system, there is the uncomfortable problem that rape itself is perceived to be, however incorrectly, racialized in prisons, with black men more likely to be victimizers and white men more likely to be victims.[258] Finally, for criminal law scholars, especially penologists, to acknowledge the prevalence of male sexual victimization in the prison system, especially to the extent that sexual victimization is perceived to be racialized, would require a radical rethinking of our system of punishments and how sentences should be calibrated.[259] Again, many groups that should be concerned about male-victim rape have been silent. Just to be clear, my objective here is not only to be critical but also to extend an invitation. Quite simply, it is time for more of us to work together to combat rape.

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homosexual predator: "I am aware of instances where heterosexuals have been solicited to commit homosexual acts, and even more traumatic emotionally, physically coerced to engage in such acts." *See Policy Concerning Homosexuality in the Armed Forces, Hearing Held by Senate Armed Services Committee*, 103rd Cong. 593 (1994).

256. David M. Herszenhorn & Carl Hulse, *House Votes to Allow 'Don't Ask, Don't Tell' Repeal*, N.Y. TIMES, May 28, 2010, at A1.

257. *See, e.g.*, Kenneth Harvey, *FRC: DADT Repeal Will Increase Gay Rape*, ADVOCATE.COM (May 27, 2010, 5:00 PM), http://www.advocate.com//News/Daily_News/2010/05/27/FRC_DADT_Repeal_Will_Increase_Gay_Rape (reporting Family Research Council's claim that same-sex sexual assault "would skyrocket" if gays are allowed in the military).

258. *See, e.g.*, Man & Cronan, *supra* note 77, at 158–64; Peter L. Nacci & Thomas R. Kane, *Inmate Sexual Aggression: Some Evolving Propositions, Empirical Findings, and Mitigating Counter-Forces*, 9 J. OFFENDER COUNSELING, SERVICES, & REHABILITATION 1, 7 (1985). For example, according to data collected by the Department of Justice, in 2006 whites made up 72 percent of the prison rape victims, blacks 16 percent, and Hispanics 9 percent. In terms of perpetrators, 49 percent of the perpetrators were identified as black. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2006, at 4 (2007). Whether these numbers accurately reflect the racial make-up of victims and perpetrators is contested. For example, there is anecdotal evidence that prison officials are less likely to credit black rape victims than those who are white. For a sustained critique of the black-perpetrator/white-victim prison narrative and an overview of recent surveys that debunk the narrative, see Buchanan, *supra* note 31.

259. The racial disparity in punishment is well documented. *See, e.g.*, CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 32 (1993); KATHERYN K. RUSSELL, THE COLOR OF CRIME (1998); Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003); Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367, 388–92 (1992); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001). One factor that has not been sufficiently attended to is the role racial assumptions about physical and sexual vulnerability in prison plays in sentencing disparities. Very rarely are such racial assumptions vocalized.

IV.
RETHINKING RAPE

What has motivated this project, at least on one level, is the concern that male-victim rape has been relegated to the footnotes for too long. Despite its frequency, male sexual victimization remains cloaked in silence. To be sure, there has been increased attention paid to prison rape in recent years, in part due to the passage of the Prison Rape Elimination Act in 2003.[260] This attention is miniscule, however, compared to the attention given to the rape of women, and there has been almost no talk of adult male sexual victimization outside the prison context. Indeed, to the extent male sexual victimization outside the prison context is discussed at all, it is outside of legal discourse, and it is usually in the context of unjust talk—talk grounded in the stereotype of gay men as sexual predators used to bolster a self-defense or provocation defense or in "trash talk" by police officers and prosecutors to secure cooperation from suspects and defendants.

With that said, de-marginalizing male-victim rape is only one motivation for this Article. Another driving force has been a series of questions. These questions are the foundation for the normative part of this Article. What happens to rape talk when we broaden the discussion to include male sexual victimization? What happens to the law of rape when we reconceive rape so that it is no longer just a crime men perpetrate against women but rather a crime one person perpetrates against another? What happens when we unthink gender and reconceptualize rape as a nongendered crime?[261] What are the benefits? What are the drawbacks? What are the risks? What are the rewards?

I am convinced that these are questions that deserve colloquy, not soliloquy. What I hope is that this Article can function as a catalyst for a conversation that is long overdue and much needed. Put simply, more attention must be paid to male sexual victimization. This is true of male victimization

260. 42 U.S.C. §§ 15601–09 (2006).

261. I am not the first to ask such questions. Attorney Patricia Novotny asked similar questions several years ago, but she focused on the risks in de-gendering rape, such as "male co-option of the victim category." *See* Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance*, 1 SEATTLE J. SOC. JUSTICE 743, 745 (2003). As this Article hopefully demonstrates, these putative risks pale in comparison to the actual harm suffered by male victims of rape. These actual harms will continue so long as male-victim rape goes unacknowledged, remains sidelined, footnoted, or treated as "separate" from "real rape." Another counter-argument is that even when men rape men, the crime is still gendered because the victim is feminized. Focusing on prisons, one could point to the fact that male rapists often force their male victims to adopt female names and mannerisms. But just because the perpetrator may engage in binary thinking does not mean that we should. When a man rapes another man, it is not simulated male-female rape. It is rape. Even if de-gendering rape goes too far for some, rethinking gender and rape can at least help us better understand how gender subordination and compulsory masculinity occur among men. For more on this dynamic, see Angela Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

outside of prisons, where rape is as hidden as female-victim rape was fifty years ago, and it is true of male sexual victimization in prisons—those zones of underenforcement. Feminists have long made the point that no one asks to be raped, that no one deserves to be raped. Indeed, feminists have been so successful in pressing this point that we have seen a shift in attitudes about rape in recent years.[262] To put it colloquially, we get it: rape is rape, at least when it comes to female victims. What is overdue is an attitudinal shift with respect to all victims. If no one asks to be raped and if no one deserves to be raped, then that applies to men too, including male prisoners, regardless of their crime.

To be sure, there are issues beyond recognizing that sexual assault is a nongendered crime, or strengthening PREA, or rewriting the gender-specific rape statutes that continue to exist in several jurisdictions.[263] There is also the issue of more egalitarian, gender-neutral policing and prosecutions. But that is only the start. If we are going to talk openly and honestly about male sexual victimization, then we must be honest and open about the fact that, notwithstanding the Court's claim that sexual abuse is "not part of the penalty that criminal offenders pay for their offenses against society,"[264] our carceral punishments *are* sexual punishments. And we must be honest and open about the extent to which rape laws, even those laws resulting from feminist reforms in the 1970s, do a disservice not only to male victims of rape but to all victims of rape. All of these points warrant discussion. To begin the conversation, I address three of these issues below.

A. Egalitarian Policing

Despite the fact that male sexual victimization occurs with alarming frequency, both in and outside of prisons, such sexual assaults are almost never prosecuted.[265] To law enforcement officers and prosecutors, such rapes fail to follow the script of "real rape," which requires a female victim. Accordingly, they are too often dismissed as "not rape."[266] Even when perpetrated by strangers and accompanied by violence, decision makers dismiss male-victim rape as "unfounded" and "unsubstantiated" and dismiss real victims as homosexual nonvictims.[267]

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262. *See, e.g.*, Jeannie Suk, *"The Look in His Eyes":* State v. Rusk *and Rape Reform*, *in* CRIMINAL LAW STORIES (Robert Weisberg & Donna Coker eds., 2010) ("Starting in the 1970s, under the influence of feminism, social attitudes [about permissible sexual behavior and rape] changed significantly."), *available at* http://ssrn.com/abstract=1546602; Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 120–21 (2009) (observing that "as a result of campaigns by the women's movement in the 1960s . . . American society's perception of, and attitudes toward, rape and domestic violence underwent a seismic shift.").

263. *See supra* note 44.

264. Farmer v. Brennan, 511 U.S. 825, 857 (1994).

265. *See supra* note 70.

266. *See supra* notes 208–10 and accompanying text.

267. *See* Rumney, *supra* note 93.

All of this has consequences that go beyond the male victim. The paucity of prosecutions reifies the closet, perpetuates the stigma of male-victim rape, and sends the expressive message that some crimes, because of the sex of the victims, are best kept behind closed doors.[268] This, in turn, facilitates a cycle of male victims being unwilling to come forward. It also communicates the fiction that male-victim rape does not happen. If it happened, there would be prosecutions. Because there are no prosecutions, it does not happen. In short, even though most rape statutes have been amended so that their language is gender neutral, our prosecutions continue to be over-determined by gender.

Here, my proposal for addressing this lack of gender neutrality in prosecutions is simple. Indeed, it is on par with efforts feminists took to bring attention to domestic violence and date rape in the 1970s. *First*, we must continue to bring attention to male sexual victimization. This includes the victimization that occurs in prisons as well as the victimization that occurs outside of prisons. *Second*, we must press law enforcement agencies and district attorneys to collect and analyze sexual assault data with attention to the gender of complainants, similar to the collection many agencies already do with respect to race. Such data collection alone is likely to have effects. For example, research has shown that the process of making a factor salient can cause decision makers to become aware of implicit biases[269] and thus allows them to override those biases.[270] *Third*, we must demand an expectation of gender-neutrality in sexual assault prosecutions. This includes sexual assaults that occur both inside as well as outside of prisons.

Some of this can be accomplished through better training. At least one study has found that the police are significantly more likely to treat as unfounded a sexual assault complaint made by a male than by a female.[271] This is unacceptable, especially when evidence suggests change is possible through education and leadership.[272] Some of this can also be accomplished by insisting

268. On the importance of law's expressive function, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 62 U. CHI. L. REV. 591 (1996). On the promulgation of social meaning generally, see Lawrence Lessig, *The Regulation of Social Meaning*, 63 U. CHI. L. REV. 943 (1995).

269. Using implicit association tests (IATs), which measure the speed at which an individual associates a categorical status with a characteristic, social cognition researchers have shown that implicit biases continue to be widespread. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004). As Linda Krieger has noted, "even the well-intentioned will inexorably categorize along racial, gender, and ethnic lines." Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1217 (1995).

270. Research has also shown that making individuals aware of their biases facilitates the process of overriding those biases. *See* Dasgupta, *supra* note 269, at 157.

271. *See* Rumney, *supra* note 93.

272. While studies are far from conclusive, there is certainly evidence to suggest police norms can be modified through training and example. *See, e.g.*, JANET B.L. CHAN, CHANGING

that decision makers at every level—from police officers to prosecutors to juries—engage in switching exercises.[273] As I have suggested elsewhere, imagining what decision would be appropriate for a female victim can aid decision makers in confronting and overriding implicit biases they may have when dealing with a male victim.[274] Similarly, imagining what decision would be appropriate for a nonincarcerated victim can aid a decision maker in overriding biases against incarcerated victims.[275]

One can imagine two probable negative responses to this proposal. The first response would be that male rape victims are often unwilling to pursue criminal prosecutions because of the stigma associated with male sexual victimization. The second is that jurors, as ultimate arbiters of guilt, are unlikely to convict male-on-male rapists. While these are legitimate concerns, neither is sufficient to justify the status quo.

One reason why male victims are often unwilling to pursue criminal prosecutions is because they anticipate the unwillingness of law enforcement officers and prosecutors to take their cases seriously.[276] One way to break this cycle is to make a point of prosecuting cases involving male victims of sexual assault. With respect to the concern that jurors will not convict, my response is threefold. First, this concern ignores the fact that about 83 percent of rape prosecutions are disposed of by pleas.[277] Second, while it may be difficult to secure convictions in some cases, this alone should not be a ground for foregoing a prosecution. The role of the prosecutor is to ensure that justice is done, and this means bringing cases to trial even when conviction is less than guaranteed.[278] Third, this concern ignores the role the criminal law and

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POLICE CULTURE: POLICING IN A MULTICULTURAL SOCIETY (1997).

273. I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1 (2008) (proposing and exploring the benefits of decision makers engaging in a switching, or cross dressing, exercise). This idea builds upon the proposals of Cynthia Lee for analyzing self-defense and provocation cases. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN 12 (2003).

274. Capers, *Cross Dressing and the Criminal*, *supra* note 273, at 24–26 (discussing benefits of "cross gender dressing" in cases involving sexual assault allegations). Kim Buchanan has recently argued that decision makers allow many prison rapists something akin to a "heterosexual defense." These decision makers tolerate, and even reward, sexually aggressive behavior as a way of enforcing norms of masculinity; at the same time, these decision makers often refuse protection to male victims who fail to meet norms of masculinity insofar as they are unable to "man up" and defend themselves. *See* Buchanan, *supra* note 31. My "cross gender dressing" approach would also address this problem.

275. Just Detention International ("JDI") seeks to enlist the public in its crusade against prison rape using a similar "cross dressing" strategy. Its advertising campaign shows images of an identical man. Under the first image is the caption, "Would You Joke Around About This Man Being Raped?" Under the second image, in which the identical man is now in prison garb, the caption asks, "How About Now?" The ad campaign is available at http://www.justdetention.org.

276. *See* Smith, Prosecuting Sexual Violence, *supra* note 70, at 20.

277. BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2004: DISTRIBUTION OF TYPES OF FELONY CONVICTIONS IN STATE COURTS, BY OFFENSE 2004, tbl.4.1, *available at* http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tables/scs04401tab.cfm.

278. Berger v. United States, 295 U.S. 78, 88 (1935) (observing that the prosecutor's

prosecutors can play in shifting or, to borrow from Dan Kahan, "gently nudg[ing]" prevailing norms.[279] Prosecuting male-victim rape communicates that male-victim rape happens, but it also shifts public expectations. Part I of this Article cited damning statistics about the prevalence of male-victim sexual assault. Indeed, I made the observation that the numbers are the argument. But the numbers are damning on the prosecution side, too. Men are being raped every day, yet the number of rape cases that are prosecuted is minuscule. Here, too, the numbers speak for themselves. The first task, then, is to secure gender-neutral policing and gender-neutral prosecutions.

B. Rethinking Sentencing

An honest and open discussion about the prevalence of male-victim sexual assault in the prison system also requires us to rethink our systems of punishment. In short, it is time for judges to consider the reality of prison rape in sentencing.

Judges rarely acknowledge sexual victimization in prison when imposing sentences,[280] but the fact is that judges, for the most part, have the authority to

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interest is "that justice shall be done"); *see also* ABA STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE: THE PROSECUTION FUNCTION § 3-3.9 (3d ed. 1993) (stating a prosecutor should not be deterred from prosecuting cases simply because jurors in his jurisdiction have tended to acquit persons accused of the particular criminal act). Specific steps prosecutors can take to minimize the risk of acquittal include voir dire questions that screen for gender bias that are similar to the instruction that already exists with respect to race. *See, e.g.*, 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 2.01 (Instruction 2-8).

279. Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607–09 (2000) (discussing the "sticky norms" problem that "occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm").

280. There are a few exceptions. *See, e.g.*, United States v. Gonzalez, 945 F.2d 525 (2d Cir. 1991) (affirming sentencing departure for defendant because of the "feminine cast to his face and a softness of features which [would] make him prey to long-term criminals with whom he [would] be associated in prison"); United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990) (affirming departure from sentencing guidelines for "delicate looking young man" based on defendant's vulnerability to sexual attack in prison); United States v. Blarek, 7 F. Supp. 2d 192 (E.D.N.Y. 1998) (granting a departure to defendants who were "homosexual lovers" and whose "sexual proclivity" would be well known to fellow inmates and increase their vulnerability in prison); United States v. Ruff, 998 F. Supp. 1351 (M.D. Ala. 1998) (granting departure to gay defendant with "somewhat effeminate mannerisms" because of his heightened vulnerability to sexual abuse); People v. Insignares, 470 N.Y.S.2d 513 (N.Y. Sup. Ct. 1983) (granting a sentence reduction to defendant who was raped by five other inmates while awaiting sentencing). These exceptions are noteworthy for being so few. This is not to suggest that judges invariably ignore sexual vulnerability. Rather, courts tend to "surreptitiously calibrate sentences" based on their expectations of how particular defendants will experience prison. *See* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 194–95 (2009). Indeed, one of my concerns is that such surreptitious sentencing is influenced by implicit biases about race and class. For example, interviews with judges suggest that many judges believe white-collar defendants experience incarceration differently than other defendants and take this into account in imposing sentence. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 144–50 (1988). One advantage of my proposal is that it would bring

consider this kind of information. While the authority to fashion an appropriate sentence is not without constraints in general, these constraints are not insurmountable.[281] For example, in the federal system, a judge may consider the likelihood of a defendant being abused while in prison in fashioning an appropriate sentence.[282] In addition, judges have traditionally considered sentencing rationales in imposing sentences: incapacitation of the criminal, rehabilitation of the offender, deterrence to the defendant and others, and just desert for the crime committed.[283]

Focusing on deterrence, judges could consider likely sexual victimization in determining what type and length of sentence is necessary to deter the defendant from committing further crimes. In other words, the threat of "sexual punishments" should play a factor in gauging any deterrent effect. Similarly, focusing on retribution, judges could factor in likely sexual victimization in determining "just deserts."[284] For example, sentencing guidelines may recommend a sentence of twelve to eighteen months for a defendant found guilty of tax evasion, but this sentence may only be appropriate if punishment is viewed in the abstract. If a likely collateral consequence of imprisonment is rape, or even the fear of rape, some lesser sentence may be retributively appropriate.[285]

One can imagine the counterarguments, namely that this proposal would lead to uncertainty in sentencing and would vest too much discretion in judges. These counterarguments are not without merit. Part of the reason that Congress enacted the Sentencing Reform Act of 1984—which resulted in the United States Sentencing Guidelines to govern federal sentences—was to address

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such sentencing into the open so that its race and class impact can be studied and minimized.

281. Even though the Sentencing Guidelines discourage federal courts from considering a defendant's youth, physical condition, or appearance in determining whether or not to grant a sentencing departure, U.S.S.G. § 5H1.1, the Guidelines allow courts some leeway to consider such factors in unusual circumstances. Furthermore, even these constraints have lost much of their force. In *United States v. Booker*, the Supreme Court held that requiring judges to adhere to the Sentencing Guidelines would violate the Constitution. 543 U.S. 220, 232–37 (2005). More recently, the Court held that any review of judicial sentences that required judges to adhere to the Guidelines would also raise constitutional concerns. *See* Gall v. United States, 552 U.S. 38, 45 (2007).

282. For example, in *Koon v. United States*, which involved the officers in the Rodney King beating, the Court affirmed a departure under the Sentencing Guidelines based upon "susceptibility to abuse in prison." 518 U.S. 81, 111–12 (1996).

283. *See, e.g.*, Sentencing Reform Act of 1984, Pub. L. No. 98-743, § 211, 98 Stat. 1987, 1989–90 (1984); *see also Blarek*, 7 F. Supp. 2d 192.

284. Of course, it is likely that judges already take the likelihood of sexual victimization into account but do so under the radar, outside of the record. This likely further skews the racial disparity that exists in sentencing, a point I take up *infra* notes 301–04 and accompanying text.

285. *See* Kolber, *supra* note 280 (arguing that any successful justification of punishment must recognize that how punishment is experienced matters to the proper assessment of its severity). Although Kolber focuses on purely subjective variations in how punishment is experienced, such as claustrophobia, he makes clear that his claims apply equally to objective differences in prisoners' experiences, such as sexual assault victimization. *Id.* at 188–89.

disparity, including racial disparity,[286] in the imposition of sentences.[287] Here, given the common misperception that vulnerability to sexual victimization is connected to race,[288] my proposal could even exacerbate the problem of racially disparate sentences rather than reduce the problem. Again, all of these are valid concerns. For many, these concerns are enough to end the discussion.

But consider the short-term and long-term salutary benefits. In the short term, calibrating sentences based on the likelihood of sexual assault accords with how we as a society justify punishment. As Adam Kolber recently observed, retributivists justify punishment with the claim that offenders deserve to suffer for their crimes but with the caveat that the offender's suffering must be proportionate to his offense.[289] As a matter of internal logic, this means that taking account of the differences in the punishment experiences of people—which differences include sexual victimization—is in fact consistent with retributivism. Indeed, such sentencing calibration is necessary to retributivism's coherency. To put it bluntly, a defendant convicted of drug possession might deserve two years' incarceration for his offense, but his punishment is not proportionate to his offense if those two years include being raped four times. Retributivism, if it is to be internally consistent, would suggest that this difference matters and must be taken into account. The same is true if one seeks a consequentialist justification of punishment. As Kolber reminds us,[290] such calibration accords with Jeremy Bentham, who wrote:

> [O]wing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain.[291]

For example, a sentence of two years' imprisonment may be sufficient to deter John Smith from violating the narcotics laws. To the extent we can predict that

286. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, § 5H1.10 (policy statement) (1992). This is not to suggest that the Guidelines have been successful in this regard. *See, e.g.*, Meierhoefer, *supra* note 259, at 388 (concluding that "Race, or factors related to race but not controlled for by this analysis, is a more important factor in sentencing now than it was before."); Mustard, *supra* note 259, at 285 (similar).

287. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, at 2 (2010) (observing that one of Congress's prime objectives was to obtain reasonable uniformity in sentencing by eliminating the wide disparity in sentencing imposed for similar conduct committed by similar offenders).

288. *See* Buchanan, *supra* note 31. In fact, Brenda Smith suggests that one factor that prompted the passage of the Prison Rape Elimination Act was the increase in persons in custody, "in particular, white men," and the resulting public concern for their safety. *See* Smith, *The Prison Rape Elimination Act*, *supra* note 75, at 10.

289. Kolber, *supra* note 280, at 199.

290. *Id.* at 184.

291. JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 182 (Prometheus Books 1988) (1789).

his sentence will also involve being raped, his punishment can no longer be justified as a matter of consequentialism, since it involves an overdeterrent.

My real interest, though, is in the long-term consequences of this proposal. In other words, my aim is true consequentialism that looks to benefit society as a whole. A rash of sentencing departures based on the probability of prison rape may lead to a legislatively-imposed curtailment of sentencing discretion. But given the basis for these departures—the pervasiveness of prison rape—and the public's likely response, it is more probable that legislatures will respond by requiring prison officials to make prisons safer. Indeed, one of the most significant findings of the most recent *National Prison Rape Elimination Commission Report* is that sexual abuse is not an inevitable feature of incarceration.[292] Prisons can be made safe from sexual violence. For example, according to recent statistics collected by the Department of Justice, ten facilities reported rates of sexual victimization of 9.3 percent or greater during a one-year period.[293] During the same period, six facilities reported no incidents of sexual victimization at all.[294] This suggests that reduced sentences from judges could lead to legislative action which might in turn pressure prison officials to make their penal facilities safer.

The concern that my proposal would exacerbate racial disparities in sentencing gives me the most pause, especially given my work on combating racial injustice in the criminal justice system.[295] Due to the fact that judges are likely, however wrongly,[296] to perceive the risk of sexual victimization to be greater for white defendants than for black or Hispanic defendants, there is a real risk that we could see a further skewing of sentences along racial lines. This risk, however, is not insurmountable. It can be addressed and minimized. By keeping track of sentencing departures and race, we can sensitize judges to possible implicit biases so that they can override those biases. Asking judges to engage in race-switching exercises, as I have advocated elsewhere, should also reduce biases.[297] Finally, uncloaking male-victim rape in prisons to reveal its pervasiveness and to disabuse judges of racialized assumptions about its perpetrators and victims can reduce the risk of exacerbating racial disparities in sentencing.

There is another reason that a frank and open discussion about prison rape compels our rethinking the prison system. One consequence of prison rape is

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292. NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 5 (2009).

293. Beck & Harrison, *supra* note 55, at 2.

294. *Id.* It is entirely possible that numbers are exaggerated on both ends, but it is also possible that some facilities are safer than others.

295. *See, e.g.*, I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Capers, *The Unintentional Rapist*, *supra* note 239.

296. *See* Buchanan, *supra* note 31.

297. *See* Capers, *Cross Dressing and the Criminal*, *supra* note 273, at 22–30.

increased risk of HIV infection,[298] which upon reentry into the general population leads to increased HIV infection rates in the general population. As Dorothy Roberts has observed, this has its own social and moral costs.[299]

Lastly, there is the entirely utilitarian concern about rape's effects. For the most part, we have given up on rehabilitating prisoners, in part because recidivism rates appear to belie the claimed effectiveness of correctional rehabilitation.[300] But in a society that cares about the Benthamite notion of ensuring the greater good of society, we should be concerned with what it means to readmit into society individuals whom we have sentenced to lawless zones, zones where their sexual victimization, either through actual rape or fear of rape, is almost certain. In sentencing defendants to prison, we are incarcerating men who violated our criminal laws. But questions need be asked: what type of man exits prison? What does prison teach men about sex? And how is his resocialization, and in turn our society, shaped by his experience in prison and our indifference to it?

C. Real Reform

Perhaps the greatest benefit from acknowledging and discussing the reality of adult male sexual victimization is the benefit that will accrue to rape law. The simple fact is that rape reforms over the last thirty years have not had the effect feminists desired.[301] Efforts at rewriting rape laws have been successful at reducing or eliminating the use of force/responsive resistance requirements, defining rape in terms of the absence *vel non* of consent, and putting the defendant, rather than the victim, on trial by means of rape shield laws. However, the fact remains that law enforcement officers, prosecutors, jurors, and judges are still measuring each rape allegation against a preexisting "real rape" script.[302] For example, in *State in the Interest in M.T.S.*, New Jersey's highest court re-read New Jersey's rape statute as not requiring proof of force beyond the force inherent in penetration itself. That was in 1992. Now, almost twenty years later, there has yet to be a prosecution based on this standard. Law enforcement officers and prosecutors still look for force. Similarly, in states where the resistance requirement has been eliminated and jurors are instructed that a woman need not physically resist, some jurors still

298. According to a recent Bureau of Justice Statistics publication, approximately 1.5 of male inmates in state and federal prisons are HIV positive. BUREAU OF JUSTICE STATISTICS, HIV IN PRISONS 2007–2008, at 1, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf.

299. Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

300. *Cf.* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981); Francis T. Cullen & Paul Gendreau, *The Effectiveness of Correctional Rehabilitation: Reconsidering the "Nothing Works" Debate*, *in* THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY 23 (Lynne Goodstein & Doris L. MacKenzie eds. 1989).

301. *See* Bachman & Paternoster, *supra* note 202.

302. *See supra* notes 195–98 and accompanying text.

look for evidence of resistance in determining guilt or innocence.[303] Finally, even with rape shield laws, jurors judge the accuser's credibility based on looks, including her dress, and measure her against standards of the "ideal" rape victim: white, chaste, and prim.[304]

Part of the reason for the paucity of tangible benefits from rape reform is quite likely attributable to our conceptualization of rape as a gendered crime. Men—and this includes law enforcement officers, prosecutors, jurors, and judges—have been taught that all men are potential rapists. To the extent reforms have been won, they have been won by getting men to think about their wives, sisters, and daughters as potential rape victims. But one consequence of this is that men still do not think of themselves as potential rape victims. Yet this could make all the difference. Put differently, we might make significant progress toward eliminating rape if we had a true "interest convergence"[305] between men and women.

Consider the demand that women offer resistance. How might this expectation change if decision makers knew that men, too, are raped and that many men "freeze" when they are sexually assaulted?[306] In short, how might the resistance expectation change if society realized that men, even "real men," often fail to resist? Similarly, feminists have long argued the force requirement obscures the many other ways in which women are coerced into unwanted sex.[307] Here, again, alliances would be useful in making this point. Being made aware of the nonphysical coercion that occurs in male prisons[308] might help decision makers better understand the nonphysical coercion that women, and men, face outside of prison.

Of course, this is just one benefit to reconceptualizing rape as a crime with both male and female victims. The other benefit is that it exposes the missteps and wrong turns of the feminist movement. In pushing for the rape law reforms of the 1970s and 1980s that cast rape as a gendered crime, feminists inadvertently entrenched the notion that women are victims, to the exclusion of men.[309] In their efforts to eradicate one type of sexism—i.e., the sexism

303. *See* Anderson, *Reviving Resistance*, *supra* note 200.

304. Just as women at times have been held up to an ideal standard of beauty and behavior—during the nineteenth century, white, young, chaste, gender-conforming, and of a particular class—we have understood rape in terms of ideal rape victims and ideal rapists. The likelihood of prosecution and likely outcome have often depended on how closely the actual rape matches our preconceptions of those two ideals. For more about the effect of victim status, see Gary LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985); *see also* Capers, *The Unintentional Rapist*, *supra* note 239.

305. Derrick Bell introduced the concept of interest-convergence three decades ago to explain certain civil rights decisions. Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). The theory seems apposite here.

306. King, *Male Assault in the Community*, *supra* note 92.

307. *See generally* STEPHEN J. SCHULHOFER, UNWANTED SEX 114–67 (1998).

308. For one description of this coercion, see Dolovich, *Strategic Segregation in the Modern Prison*, *supra* note 31, at *11.

309. Janet Halley has been particularly critical of feminists for this shortcoming. As she

inherent in rape laws that treated women as naturally unreliable and thus required corroboration—feminists inadvertently entrenched another type of sexist thinking: the weak female victim, incapable of resisting, and requiring special patriarchal protections. How else to explain the rape shield laws that exist now in almost every state?[310] How else to explain the sexual proclivity character evidence that is often now admissible against accused rapists in sexual assault trials,[311] the complete opposite of the general rule that character evidence is inadmissible in criminal trials?[312] How else to explain the rules prohibiting the identification, by name, of rape victims?[313] These special rules exist in part because feminists have long argued that rape is different because of gender. But rape is not different because of gender. If the goal of feminism is to undo gender, rape reforms have undermined that goal at every turn. Worse still, reformers excluded male victimization to make gendered arguments with the goal of making things better for women. But now it is time, indeed past time, to ask the question: are things really better for women? And how about for men?

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puts it, feminism has trapped itself into always positing the subordination of women by men. One consequence is that feminism "can't see injury to men. . . . It can't see other interests, other forms of power, other justice projects." Brenda Cossman et al., *Gender Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 608 (2003) (exchange between Halley and other feminists). And this, Halley adds, has consequences for thinking about rape:

> So much feminist rape discourse insists on women's object-like status in the rape situation: man fucks woman—subject verb object. Could feminism be contributing to, rather than resisting, the alienation of women from their own agency in narratives and events of sexual violence?

Id. at 610–11.

310. *See* Anderson, *From Chastity Requirement to Sexual License*, *supra* note 203, at 80 (observing that by "the early 1980s, almost every jurisdiction in this country had passed some form of rape shield law"). These rape shield laws ostensibly shield a rape complainant's sexual history on the ground that her history is irrelevant, absent specified exceptions, to the issue of whether or not a rape has occurred. While this goal is laudable, it has had the effect of reinforcing and privileging a rape script that depends on a chaste victim. By prohibiting any discussion of the victim as a sexual being, rape shield laws in effect recast the victim as nonsexual, the proverbial virgin. Consider the rape shield law that exists in New York. Under New York's rape shield law, the shield permits evidence that the victim has been convicted of prostitution. N.Y. Crim. Proc. L. § 60.42[2].

311. For example, at the urging of feminists, Congress added Rule 413 to the Federal Rules of Evidence in 1994. Rule 413 provides that "[in] a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter which is relevant." FED. R. EVID. 413(a). The intent of Rule 413 was to supersede in sex offense cases the restrictive aspects of Rule 404(b) that apply to all other cases. *See* 140 Cong. Rec. 23, 602–03 (1994) (floor statement of the principal House sponsor, Representative Susan Molinari, concerning the prior crimes evidence rules for sexual assault and child molestation cases).

312. FED. R. EVID. 404.

313. *See* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1024 (2008).

CONCLUSION

My ambition in writing this Article has been two-fold: first, to bring male sexual victimization out of the margins, the footnotes, and indeed the closet; and second, to demonstrate that including male sexual victimization in how we conceptualize rape can be helpful in thinking about the law of rape. The broader goal, of course, is about nudging norms so that unwanted sex becomes unacceptable, no matter whether the victim is male or female, incarcerated or otherwise. The broader goal, too, is about rethinking how and what we prosecute when it comes to rape. The end goal, of course, is to completely eliminate rape. The first step is to rethink rape and gender and understand that, while rape is often done by men, it is also done to men. And that this, too, is real rape.