

Engendering Rape

Kim Shayo Buchanan



ABSTRACT

This Article highlights a systematic bias in the academic, correctional, and human rights discourse that constitutes the basis for prison rape policy reform. This discourse focuses almost exclusively on sexual abuse perpetrated by men: sexual abuse of male prisoners by fellow inmates, and sexual abuse of women prisoners by male staff. But since 2007, survey and correctional data have indicated that the main perpetrators of prison sexual abuse seem to be women. In men's facilities, inmates report much more sexual victimization by female staff than by male inmates; in women's facilities, inmates report much higher rates of sexual abuse by fellow inmates than by male or female staff. These findings contravene conventional gender expectations, and are barely acknowledged in contemporary prison rape discourse, leading to policy decisions that are too sanguine about the likelihood of female-perpetrated sexual victimization. The selective blindness of prison rape discourse to counter-stereotypical forms of abuse illuminates a pattern of reasoning I describe as "stereotype reconciliation," an unintentional interpretive trend by which surprising, counter-stereotypical facts are reconciled with conventional gender expectations. The authors of prison rape discourse tend to ignore these counter-stereotypical facts or to invoke alternative stereotypes, such as heterosexist notions of romance or racialized rape tropes, in ways that tend to rationalize their neglect of counter-stereotypical forms of abuse and reconcile those abuses with conventional expectations of masculine domination and feminine submission.

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I am grateful to Scott Altman, Rebecca Brown, Alex Capron, Kimberlé Crenshaw, Adrienne Davis, David Cruz, Mary Dudziak, Ron Garet, Ariela Gross, Melissa Murray, Camille Gear Rich, Russell Robinson, Mike Shapiro, Marc Spindelman, Nomi Stolzenberg, Nancy Staudt, Lara Stemple; the participants in the Duke Law School Culp Colloquium; and the participants in a faculty workshop at the University of Southern California, all of whom provided invaluable feedback that has helped to refine my ideas. I am grateful for the able research assistance of Nick Shapiro and Josh McLeod, and especially for the invaluable research support provided by law librarian Paul Moorman.

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INTRODUCTION

Sociological scholarship, human rights advocacy, and correctional literature form the backdrop for professional understandings of sexual abuse in detention and offer frameworks for policy reform. In support of its goal of developing national standards to prevent prison rape, the Prison Rape Elimination Act of 2003 (PREA)¹ funded extensive research, mandated a series of nationwide surveys of prisoners and ex-prisoners, and established consultations with correctional officials, advocates, former prisoners, lawmakers, and other stakeholders. Lawyers, policymakers, and correctional administrators thus depend on an interdisciplinary body of knowledge to understand the dynamics of the sexual abuse they seek to suppress. But this body of knowledge, which I describe collectively as “prison rape discourse,”² is systematically biased: It tends to highlight forms of abuse that conform to conventional gender expectations, and to ignore or rationalize more common forms of abuse that defy conventional understandings of gender. If prison rape-prevention policy is to be effective, policymakers, scholars, advocates, and correctional administrators must confront unexpected forms of sexual abuse as well as those that are readily predictable in accordance with conventional gender expectations.

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1. 42 U.S.C. §§ 15601–15609 (2006). The PREA mandated, *inter alia*, that the U.S. Attorney General adopt new regulations for the prevention of prison rape, based on a number of PREA-funded surveys and analyses discussed in this Article. The PREA-created National Prison Rape Elimination Commission (NPREC) issued a report and recommendations in 2009. NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT (2009) [hereinafter NPREC REPORT], *available at* <http://www.ncjrs.gov/pdffiles1/226680.pdf>. These reports and further consultations ultimately resulted in the final regulations, which were released as this Article was in press: National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf>.
 2. A note about terminology: In this Article, as in prison rape discourse more generally, “prison rape” is a shorthand for sexual abuse more generally, whether or not it involves force or penetration. “Prison rape” does not refer exclusively to forcible rape. The PREA aims to “standardize the definitions used for collecting data on prison rape,” and authorizes the Bureau of Justice Statistics of the Department of Justice (BJS) to define prison rape for the purpose of statistical review and analysis. 42 U.S.C. §§ 15602(5), 15603(a)(2)(A). In the sexual victimization surveys conducted as part of its PREA-mandated National Prison Rape Statistics Program, the BJS defines “sexual victimization” to include all “nonconsensual” or “unwanted” sexual touching or sexual acts by inmates or staff. The BJS also counts all sex (or sexual touching) between inmates and staff as “victimization” because, it points out, “all sexual contacts between inmates and staff are legally nonconsensual.” ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 231169, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09, at 7 (2010) [hereinafter BECK & HARRISON, PRISONS AND JAILS]. For more detail about definitions, see *infra* Part I.

Beyond its implications for penal policy reform, greater attention to these counter-stereotypical forms of abuse could contribute to scholarly understandings of gender and sexual abuse more generally by revealing gender dynamics that have, until now, been poorly understood. The PREA-mandated sexual victimization surveys consistently indicate that, in jails and prisons, women staff and inmates perpetrate sexual abuse at significantly higher rates than their male counterparts.³ These abuses, however, are barely acknowledged in prison rape discourse. The disproportionate focus of this discourse on male-perpetrated sexual abuse misses an opportunity to unsettle conventional gender expectations, leaving the more surprising forms of sexual abuse unexamined, and largely unknown.

Prison rape discourse focuses almost exclusively on sexual abuse perpetrated by men. A review of this discourse would suggest that, in men's prisons, the threat of rape comes mainly from other inmates,⁴ and that prison rape disproportionately

3. For a detailed discussion of the survey findings, see *infra* Part I.

4. See, e.g., Teresa A. Miller, *Sex Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. C.R. L.J. 291, 296, 300–07 (2000) (portraying prisoners as establishing a hierarchy by raping each other, portraying staff as facilitating such rapes to maintain control, and finding that the greatest danger of sexual violence posed to most incarcerated men is from fellow prisoners, not staff); Alice Ristoph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 148–56 (2006); James E. Robertson, *The Prison Rape Elimination Act of 2003: A Primer*, 40 CRIM. L. BULL. 270, 272 (2004) (“Some PREA proponents fault prison administrators [for prison rape]. . . [B]laming correctional employees tells only half the story. After all, the perpetrators are inmates.”); James E. Robertson, *A Punk’s Song About Prison Reform*, 24 PACE L. REV. 527 (2004) (addressing prison rape as a crime committed by other inmates); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999); James E. Robertson, *Rape Among Incarcerated Men: Sex, Coercion and STDs*, 17 AIDS PATIENT CARE & STDs 423 (2003); James E. Robertson, “Fight or F. . .” and Constitutional Liberty: An Inmate’s Right to Self-Defense When Targeted by Aggressors, 29 IND. L. REV. 339, 343 (1995); see also U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 32, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); ACLU NAT’L PRISON PROJECT & ACLU OF S. CAL., CRUEL AND UNUSUAL PUNISHMENT: HOW A SAVAGE GANG OF DEPUTIES CONTROLS LA COUNTY JAILS (2011), available at http://www.aclu.org/files/assets/78162_aclu_jails_r2_lr.pdf; MARK S. FLEISHER & JESSIE L. KRIENERT, THE CULTURE OF PRISON SEXUAL VIOLENCE 11 (2006) (finding that 9.1 percent of male and female inmates said they were aware of an inmate being raped by a staff member yet analyzing only sexual abuse by inmates); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter HUMAN RIGHTS WATCH, NO ESCAPE]; VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007) (surveying only inmate-on-inmate sexual assault); NPREC REPORT, *supra* note 1; JUST DETENTION INT’L, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf> (citing only examples of sexual violence perpetrated by inmates, and none by staff); STOP PRISONER RAPE, TEXAS UPDATE (2008), available at <http://www.justdetention.org/pdf/TexasUpdate.pdf> (acknowledging that staff also commit sexual abuse, but citing almost exclusively examples of inmate-perpetrated sexual abuse); Shana Abraham, *Male Rape in U.S. Prisons: Cruel and Unusual Punishment*, HUM. RTS. BRIEF, Fall 2001, at 5; 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); Kevin R. Corlew, *Congress Attempts to Shine Light on a Dark Problem: An In-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. L. 157 (2005); Robert W. Dumond, *Inmate Sexual Assault: The Plague That Persists*, 80 PRISON J. 407, 410–11 (2000); Christopher Hensley & Richard Tewksbury, *Wardens' Perceptions of Prison Sex*, 85 PRISON J. 186 (2005) (surveying prison wardens about their knowledge and perceptions of consensual and coercive sex among inmates, but not of sex between inmates and staff); Olga Giller, Note, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN'S L.J. 659, 675 (2004).

In a section on "prison rape," Bennett Capers characterizes perpetrators exclusively as inmates, and staff as complicit in prison rape, not direct perpetrators. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1266–72 (2011). He explains: "In many circumstances, the perpetrator is not only a fellow prisoner but also the victim's administratively chosen cellmate. . . . Corrections officers may even be complicit in facilitating rapes in order to punish certain prisoners and reward others." *Id.* at 1269 (footnotes omitted). He concludes the section by acknowledging that "guards and other prison staff, not just fellow prisoners, can be perpetrators," though he does not discuss any such examples. *Id.* at 1272 (quoting ALAN MCEVOY ET AL., *IF HE IS RAPED* 59 (2003)) (internal quotation marks omitted); see also MELISSA ROTHSTEIN & LOVISA STANNOW, *IMPROVING PRISON OVERSIGHT TO ADDRESS SEXUAL VIOLENCE IN DETENTION* 4 (2009); Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 608–14 (2009) (all examples of "prisoner rape" involve inmate-on-inmate rape, but documenting widespread occurrence of guard-on-inmate rape in the context of armed conflict). This perception continued even after 2007, when the first nationwide and statewide victimization surveys were released, showing that prisoners said they were more often victimized by staff than by inmates. See, e.g., Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 13, 14 n.56 (2010) [hereinafter Buchanan, *Our Prisons, Ourselves*] (noting that sexual abuse by staff is more common than sexual abuse by inmates, but analyzing only sexual abuse by inmates); Kim Shayo Buchanan, *E-race-ing Gender: The Racial Construction of Prison Rape*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (Frank R. Cooper & Ann C. McGinley eds., forthcoming 2012) [hereinafter Buchanan, *E-race-ing Gender*] (challenging the racialization of gendered sexual abuse among inmates in men's prisons); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 11–19 (2011) (discussing "prison rape" exclusively with reference to sexual abuse by inmates, not staff); Tess M.S. Neal & Carl B. Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 PSYCHOL. PUB. POL'Y & L. 284, 287, 292–93 (2010) (attributing men's prison rape to a "prison rape subculture" of compensatory masculinity particular to inmates and administrative toleration of this inmate subculture. In spite of its acknowledgment that staff also commit sexual abuse, none of its reform proposals addresses staff perpetration); Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705 (2010); James E. Robertson, *The "Turning-Out" of Boys in a Man's Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819 (2011) (acknowledging survey findings that staff sexual abuse is more common, but continuing to focus exclusively on inmate-perpetrated sexual abuse); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1350–57, 1388–89, 1404 (2011) (describing institutional complicity in sustaining an inmate culture of masculinity that targets effeminate men for sexual abuse by other inmates); SpearIt, *Gender Violence in Prison and Hyper-masculinities in the Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL'Y 89 (2011) (analyzing only inmate rape while recognizing incidents of sexual abuse by staff); Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111 (2011) (reviewing Dolovich, *supra*) (analyzing prison rape as though it occurred exclusively among inmates); Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119 (2011).

involves tough black men raping weaker whites.⁵ By contrast, a review of prison rape discourse would suggest that, in women's prisons, the main threat of sexual abuse comes from male guards, and is not racialized.⁶ These dynamics seem plausible, in light of common-sense intuitions or popular culture.⁷

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- But see* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 518 (2009) (arguing that staff, rather than inmates, pose the greater threat of sexual abuse of transgender, intersex and gender-nonconforming inmates); Julia Oparah, *Feminism and the (Trans)Gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 263–64 (2009) (noting that sexual violence against transgender and gender-nonconforming inmates is “not limited to sexual assault by other prisoners,” as it “occurs within an environment of objectification and dehumanization generated by the institutionalized sexual violence of the prison regime itself”); Robinson, *supra*, at 1388–89, 1404 (acknowledging instances of staff sexual abuse and suggesting that institutional focus on inmate-perpetrated sexual abuse may distract from the greater problem of sexual abuse by staff).
5. See Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 53 (challenging the racial account of prison rape); Buchanan, *E-race-ing Gender*, *supra* note 4 (same). For recent examples, see JANET I. WARREN ET AL., RISK MARKERS FOR SEXUAL PREDATION AND VICTIMIZATION IN PRISON 128 (2010) [hereinafter WARREN REPORT] (“Prior research has indicated that white inmates, who are diminutive in size, and who are physically attractive are at greater risk for being sexually assaulted while imprisoned.” (citations omitted)); Neal & Clements, *supra* note 4, at 285–86 (claiming that in men's prisons, black inmates are overrepresented as perpetrators and white inmates as victims, and that this “racial tension” associated with rape in men's prisons may not extend to female facilities); Ristroph, *supra* note 4, at 157–58 (asserting that “aggressors are disproportionately African-American; the targets of sexual aggression are disproportionately white”); SpearIt, *supra* note 4, at 114–15 (claiming that “the issue of ‘blacks exclusively raping whites’ is a documented occurrence that dates back to the 1960s” (citation omitted)).
 6. The Office of Inspector General, for example, has noted that “[o]ne misconception about staff sexual abuse of inmates is that it only involves male staff engaging in sexual relations with female inmates.” OFFICE OF THE INSPECTOR GEN., DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 6 (2005); *see, e.g.*, Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 69–86 (2007) [hereinafter Buchanan, *Impunity*] (describing institutional responsibility for sexual abuse of women inmates by male staff); Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 41 (2004) (asserting that “[w]omen are more likely than men to be raped by prison guards or other correctional system employees,” and that “[m]en are more likely to be raped by fellow prisoners”); Kristine Mullendore & Laurie Beaver, *Sexually Abused Women in State and Local Correctional Institutions, 1980–2000*, in WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 5-2 (Russ Immarigeon ed., 2006) (noting that the coercive nature of incarceration “all too often[] results in the sexual abuse of female inmates by their male guards,” but not acknowledging the possibility of sexual threat from other inmates or from female staff); *see also* Special Rapporteur on Violence Against Women, Its Causes and Consequences, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Her Visit to the United States of America, U.N. Doc. A/HRC/17/26/Add.5, at 10–11 (June 1, 2011) (by Rashida Manjoo); U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, *supra* note 4; U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); U.N. Comm'n on Human Rights, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, U.N. Doc. E/CN.4/

1999/68/Add.2 (Jan. 4, 1999); AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001); AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999) [hereinafter AMNESTY INT'L, NOT PART OF MY SENTENCE]; LORI B. GIRSHICK, NO SAFE HAVEN: STORIES OF WOMEN IN PRISON (1999); HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) [hereinafter HUMAN RIGHTS WATCH, ALL TOO FAMILIAR] (detailing specific acts of abuse in prison); HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998) [hereinafter HUMAN RIGHTS WATCH, NOWHERE TO HIDE]; JUST DETENTION INT'L, THE SEXUAL ABUSE OF FEMALE INMATES IN OHIO (2005), available at <http://www.justdetention.org/pdf/sexabuseohio.pdf> (all but one example of sexual abuse of female inmates involved male staff perpetrators); CRISTINA RATHBONE, A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS 42–65 (2005); STOP PRISONER RAPE, STORIES FROM INSIDE: PRISONER RAPE AND THE WAR ON DRUGS 9 (2007) [hereinafter STOP PRISONER RAPE, STORIES FROM INSIDE], available at <http://www.justdetention.org/pdf/StoriesFromInside032207.pdf>; SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM (2007); Agnes L. Baro, *Spheres of Consent: An Analysis of the Sexual Abuse and Sexual Exploitation of Women Incarcerated in the State of Hawaii*, 8 WOMEN & CRIM. JUST. 61 (1997); Avery J. Calhoun & Heather D. Coleman, *Female Inmates' Perspectives on Sexual Abuse by Correctional Personnel: An Exploratory Study*, 13 WOMEN & CRIM. JUST. 101 (2002); Martin A. Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 MARGINS 175 (2002); Lori B. Girshick, *Abused Women and Incarceration*, in WOMEN IN PRISON: GENDER AND SOCIAL CONTROL 95 (Barbara H. Zaitzow & Jim Thomas eds., 2003); Hope H. & Brenda L., "This Is Happening in Our Country": Two Testimonials of Survivors of Prison Rape, 42 HARV. C.R.-C.L. L. REV. 89 (2007); Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79 (2008); Miller, *supra* note 4, at 296; Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861 (2001); Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates to Be Free From Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31, 32–33 (2002); Ashlie E. Case, Case Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309 (2005); Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away With More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203 (2004); Ashley E. Day, Comment, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983*, 38 SANTA CLARA L. REV. 555, (1998); Anthea Dinos, Note, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281 (2001/2002) (discussing the inadequacy of remedies available for custodial sexual abuse); Flyn L. Flesher, Note, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free From Rape*, 13 WM. & MARY J. WOMEN & L. 841 (2007); Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338 (1998); Katherine C. Parker, Note, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 473 (2002) (noting that female correctional officers may also sexually abuse female inmates); Sarah K. Wake, Note, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220 (2006).

As with discourse about sexual abuse in men's prisons, the disproportionate focus on male-perpetrated rape has persisted after the 2007 release of data indicating higher rates of perpetration by women. NPREC noted in 2009 that "[c]ase law, policy, and common perceptions of sexual abuse in correctional facilities have focused on male officers abusing their authority with female prisoners," but argues that "the risks are present whether the officers are female or male. . . . Some of the women

who have joined corrections, like some of the men, are willing to cross the line to use their authority in sexually abusive ways.” NPREC REPORT, *supra* note 1, at 62–63 (footnotes omitted). Nonetheless, nearly all the cases of staff-on-inmate sexual abuse discussed in NPREC’s 213-page report involved male staff abusing women inmates. *See, e.g., id.* at 36–37, 46, 51, 54–55, 62–64, 71, 92, 119, 125–27, 130, 161, 166–68, 175, 179. *But see id.* at 64 (discussing a case of inappropriate video surveillance of newly arrived male prisoners by both male and female staff); *id.* at 125–26 (gender of staff perpetrator not identified). For other examples, see JUST DETENTION INT’L, SUBMISSION TO MS. RASHIDA MANJOO, U.N. SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN: VIOLENCE AGAINST WOMEN IN CUSTODY IN THE UNITED STATES—A NATIONWIDE HUMAN RIGHTS CRISIS (2011), [hereinafter JUST DETENTION INT’L, SUBMISSION TO SPECIAL RAPPORTEUR] available at http://www.justdetention.org/pdf/VAW%20_Rapporteur_submission1.pdf (acknowledging that incarcerated women and girls “frequently are abused by other inmates,” but addressing only sexual abuse perpetrated by male staff); BARBARA OWEN ET AL., GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN’S FACILITIES, PART I OF III: GENDERED VIOLENCE AND SAFETY: IMPROVING SECURITY IN WOMEN’S FACILITIES (2008) [hereinafter OWEN REPORT PART I]; Kelly Ann Cheeseman & Robert M. Worley, *A “Captive” Audience: Legal Responses and Remedies to the Sexual Abuse of Female Inmates*, 43 CRIM. L. BULL. 439, 441 (2010); Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans With Disabilities Act, and the Imperatives of Survivor Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L. 281 (2010); Tanyika Brime, Note, *We Can Do Better: The State of Custodial Misconduct by Correctional Staff in New York*, 15 CARDOZO J.L. & GENDER 303 (2009).

Only one law journal article, a student note, has analyzed women’s perpetration of sexual abuse in men’s prisons. Lauren A. Teichner, Note, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 276–89 (2008) (based on a 2006 report on correctional disposition of “substantiated” sexual abuse (*see infra* note 161), the author challenges judicial recognition of greater privacy rights against cross-gender search and surveillance for female than for male inmates, which she contends is based on an erroneous assumption that men pose a sexual threat to women, but not the reverse). A more recent student note cites the high rates of woman-perpetrated sexual misconduct in men’s prisons in support of an argument against cross-gender supervision. *See* Robyn Gallagher, Note, *Constitutional Law—Cross-Gender Pat Searches: The Battle Between Inmates and Correctional Officers Enters the Courtroom*, 33 W. NEW ENG. L. REV. 567, 599–601 (2011).

In the same vein, academic discussion of juveniles’ susceptibility to sexual victimization in detention tends to assume that staff perpetrators are male. *See, e.g.,* U.S. GOV’T ACCOUNTING OFFICE, GAO/GGD-99-104, REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REPRESENTATIVES, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (1999); Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2665 (2011) (“Girls are all too often subjected to sexual abuse and rape while in prison. Male corrections staff at women’s prisons may use coercive methods to initiate sexual relationships with inmates, or may abuse their position to obtain sexual favors.”).

While several scholars have noted that the disproportionate incarceration of women of color places them at heightened risk of incarceration and thus of custodial sexual abuse, they do not suggest that sexual abuse by male staff is racially targeted. *See, e.g.,* VERNETTA D. YOUNG & REBECCA REVIERE, WOMEN BEHIND BARS: GENDER AND RACE IN US PRISONS (2006); Buchanan, *Impunity*, *supra*; Angela Y. Davis, Essay, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339 (1998); Miller, *supra*, at 873–74; Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225 (2003).

7. Inmate rape in men’s prisons is often the subject of pop culture drama and callous jokes. *See, e.g.,* Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 12; Ristroph, *supra* note 4, at 148 (“That some prisoners

Yet the results of several recent nationwide, methodologically rigorous victimization surveys,⁸ which, I have observed previously, offer “the best available evidence of current patterns of sexual victimization in prison,”⁹ suggest that other, counterintuitive forms of sexual abuse may actually be more common. In men’s facilities, women generally constitute a minority of correctional staff,¹⁰ yet survey respondents consistently report much higher rates of sexual victimization by women

force sexual contact with others has become accepted wisdom in popular culture, though the public reaction to this fact seems to be moving from mirth to outrage.” (footnote omitted); *see also* FLEISHER & KRIENERT, *supra* note 4, at 128–29.

Meanwhile, staff sexual abuse in women’s prisons is often treated as expected, if not inevitable. *See, e.g.*, RATHBONE, *supra* note 6, at 45 (suggesting that male staff may present an “inevitable” risk of sexual abuse in women’s prisons); Mullendore & Beever, *supra* note 6, at 5-1, 5-2 (describing sexual assault as a “generally perceived and expected risk” of incarceration in institutions for women).

8. The first National Inmate Survey (NIS), in 2007, surveyed 23,398 respondents in state and federal prisons and 40,419 in local jails. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 221946, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES, 2007, at 1 (2008) [hereinafter BECK & HARRISON, LOCAL JAILS]. The second NIS, in 2008–2009, surveyed 81,566 respondents in jails, prisons, immigration, military, and Indian detention facilities. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 6. In 2008–2009, the BJS also conducted a nationwide victimization survey of 26,551 incarcerated youth. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 228416, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09, at 2 (2010) [hereinafter BECK ET AL., JUVENILE FACILITIES]. The BJS also recently published the results of a 2008 survey of 18,526 recently paroled former state prisoners. ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, NCJ 237363, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 7 (2012) [hereinafter BECK & JOHNSON, FORMER STATE PRISONERS]. All these surveys used audio-based, computer-assisted, self-administered survey techniques, which social scientists consider to be the ideal methodology for eliciting information about sensitive or stigmatized behavior. Unlike any other surveys before or since, the BJS surveys “used randomized probability samples representative of the entire jurisdiction surveyed; they had large sample sizes and . . . obtained high response rates; they analyzed differences between survey respondents and nonrespondents and weighted their statistical findings accordingly; [and] they used clear and precise questions that defined sexual victimization consistently.” Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 59–60 (footnotes omitted).
9. Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 60. According to Gerald Gaes, “[t]he NIS overcomes all of these problems [of earlier victimization surveys] and many others that are important when measuring sensitive topics especially in a prison environment.” GERALD G. GAES, REPORT TO THE REVIEW PANEL ON PRISON RAPE ON THE BUREAU OF JUSTICE STATISTICS STUDY *SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007*, at 2 (2008); *see also* BECK & HARRISON, LOCAL JAILS, *supra* note 8; BECK & HARRISON, PRISONS AND JAILS, *supra* note 2.
10. For example, in the Federal Bureau of Prisons, women constitute about 27 percent of the workforce. OFFICE OF THE INSPECTOR GEN., THE DEPARTMENT OF JUSTICE’S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF INMATES, at iv, viii (2009), available at <http://www.justice.gov/oig/reports/plus/e0904.pdf>.

staff than by fellow inmates.¹¹ More than two-thirds of male¹² victims of staff sexual abuse say that their perpetrators were exclusively women.¹³

In women's facilities, likewise, survey data show surprisingly high rates of female sexual perpetration. Although, consistent with conventional gender expectations, women respondents say that their staff abusers are overwhelmingly male,¹⁴ incarcerated women also uniformly report that fellow inmates—women—sexually abuse them much more often than male or female staff do.¹⁵

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11. See *infra* notes 40–41 and accompanying text. For example, in the 2007–2008 National Inmate Survey (the most recent available), respondents in men's prisons reported 52.6 percent more sexual abuse by staff than by other inmates. In men's jails, respondents reported 61.5 percent more sexual abuse by staff than by other inmates. These calculations are based on BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 12 tbl.6; see also BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 2 (finding that jail inmates in general reported 25 percent more sexual victimization by staff than by inmates); ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 219414, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 1 (2007) [hereinafter BECK & HARRISON, PRISONS] (finding that prisoners reported 40 percent more sexual abuse by staff than by inmates); BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 25 tbl.14 (reporting similar findings); WARREN REPORT, *supra* note 5, at 21–22. Staff perpetrators of sexual victimization were overwhelmingly reported to be women. See, e.g., BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 7; BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 12 tbl.6, 24 tbls.18–19; BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbls. 6–7. Warren found less “victimization” of male inmates by staff than by inmates, WARREN REPORT, *supra* note 5, at 21–22 (5.9 percent reporting sexual victimization by inmates, and 2.4 percent reported sexual victimization by staff), but, unlike the BJS, Warren excluded “bartered” and “consensual” staff–inmate sex from her definition of “victimization.” Warren found that 17.4 percent of male respondents reported “consensual” sex with staff, and 8.0 percent reported “bartered” sex with staff, in addition to the 2.4 percent reporting staff sexual “victimization.” See *id.* at 22–26 tbls. 2–4. By the BJS definition, this staff–inmate sex would all count as “victimization.” For a discussion of the characterization of staff–inmate sex as “victimization” by staff regardless of whether the inmate was “willing,” see *infra* notes 45–75 and accompanying text.
 12. Because the Federal Bureau of Prisons and most state correctional facilities house transgender inmates on the basis of genital status rather than individual gender identity, not all inmates of men's prisons identify as men, and not all inmates of women's prisons identify as women. See, e.g., Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, MOD. AM., Spring 2009, at 3, 5–6; Oparah, *supra* note 4, at 260; Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000). Although, in this Article, I sometimes use “women” or “men” as a shorthand for persons held in facilities for women or men, a more accurate descriptor would be “persons incarcerated in prisons for men (or women).”
 13. See *infra* note 40.
 14. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 24 (revealing that among victims of staff sexual abuse in women's facilities, 71.8 percent reported only male perpetrators; 9.3 percent reported only women perpetrators; and 18.9 percent reported sexual abuse by both male and female staff); BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbl.7 (reporting similar findings).
 15. See, e.g., BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 12 tbl.6 (showing that in women's prisons, 4.7 percent of inmates reported sexual abuse by other inmates, compared to 2.1 percent who reported sexual abuse by staff; in women's jails, 3.1 percent of inmates reported sexual abuse by other inmates, compared to 1.5 percent who reported sexual abuse by staff); BECK & JOHNSON,

All these findings confound common-sense expectations about gender and prison rape. These expectations are not unique to prison: They pervade our culture. “Most people . . . view the sexual assault of men by women as somewhat implausible,” especially when the man is heterosexual.¹⁶ As Nancy Dowd and Ted Shaw have observed of sexual abuse in the outside world, the “paradigmatic sex offender” is “always a male . . . and the gender of the victim is always female.”¹⁷ Prison rape discourse—which includes my own scholarship¹⁸—is largely consistent with these expectations. By calling attention to forms of abuse that defy conventional gender expectations, this Article seeks to lay the groundwork for an enriched understanding of the role of gender in sexual abuse, and of the institutional features that may tend to suppress or facilitate it.¹⁹

The main stereotype that seems to shape the selective attention of prison rape discourse to expected forms of prison rape is the heterosexist and gendered “sexual script” by which masculinity is understood to dominate femininity, and its corresponding “pervasive societal belief that women are incapable of sexual

FORMER STATE PRISONERS, *supra* note 8, at 25 tbl.14 (among paroled women, 4.8 percent of respondents reported sexual abuse by other inmates, compared to 2.4 percent who reported sexual victimization by staff); *see also* BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 7 tbl.6 (in jails for women, 3.9 percent of respondents reported sexual abuse by other inmates, compared to 1.9 percent who reported sexual abuse by staff); Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 841 (2006) (statewide survey finding that women respondents reported inmate-on-inmate sexual victimization at a rate of 212 per 1000, compared to 76 per 1000 reporting staff-on-inmate staff sexual victimization). But one smaller study did not find higher rates of sexual abuse by staff than by inmates in women’s prisons. *See* WARREN REPORT, *supra* note 5, at 23–24, 26 (finding that 6.6 percent of women inmates reported sexual victimization by other prisoners, (and 3.8 percent reported “bartered” sex with other inmates), compared to a total of 6.5 percent reporting sexual misconduct by staff (2.7 percent reported “sexual victimization” by staff, 1.1 percent reported “bartered” sex with staff, and 2.7 percent reported “consensual” sex with staff)).

16. Michelle Davies & Paul Rogers, *Perceptions of Male Victims in Depicted Sexual Assaults: A Review of the Literature*, 11 AGGRESSION & VIOLENT BEHAV. 367, 372 (2006).
17. Nancy E. Dowd & Ted Shaw, *Men and Sexual Abuse*, in NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 125, 125 (2010).
18. *See, e.g.*, Buchanan, *Impunity*, *supra* note 6 (addressing male-staff-on-female-inmate sexual abuse in women’s prisons); Buchanan, *Our Prisons, Ourselves*, *supra* note 4 (addressing inmate-on-inmate sexual abuse in men’s prisons); Buchanan, *E-race-ing Gender*, *supra* note 4.
19. The prominent role of women guards in the sexual abuse of male inmates at Abu Ghraib prison during the Iraq war, as well as in domestic prisons, suggests that administrative policy and practice, or institutional aspects of incarceration, may foster sexual abuse of inmates by both women and men. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, http://www.newyorker.com/archive/2004/05/10/040510fa_fact. Identification of these institutional features or policies, and of how they might be changed, would require qualitative investigation. To date, conventional gender expectations seem to have shaped academic inquiry into prison sexual abuse, obscuring this important aspect of abuse in detention.

aggression.”²⁰ The sexuality of masculine men is stereotypically associated with aggression, while women and other feminized people—gay and effeminate men and transgender women—are stereotypically associated with sexual passivity.²¹ These expectations are not limited to conservative commentators: Dominance feminists and critical theorists of masculinity have observed that sexual assault may be used to enforce or constitute gender, enhancing the perpetrator’s masculinity while feminizing the victim.²² While many feminist analyses have

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20. Myriam S. Denov, *The Myth of Innocence: Sexual Scripts and the Recognition of Child Sexual Abuse by Female Perpetrators*, 40 J. SEX RES. 303, 308 (2003); *see id.* (“Thinking of a woman as sexually aggressive, or worse, as a sexual offender, is . . . contrary to traditional sexual scripts which are heterosexual and gendered.”); *see also* Davies & Rogers, *supra* note 16, at 368.
21. *See, e.g.*, Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 11 (finding that inmates target gay-identified, weak, and vulnerable inmates for sexual abuse because of their perceived effeminacy); Denov, *supra* note 20, at 312; Kay Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 381–88 (2006) [hereinafter Levine, *No Penis, No Problem*]; Kay Levine, *When Gender Meets Sex: An Exploratory Study of Women Who Seduce Adolescent Boys*, 15 WM. & MARY J. WOMEN & L. 361, 362 (2009) [hereinafter Levine, *When Gender Meets Sex*] (arguing that gendered expectations of statutory rape presume “male exploitation [and] female vulnerability”); Teichner, *supra* note 6, at 276 (noting that a “gender stereotype . . . [that] men are the sexual predators and women are the vulnerable or passive victims . . . prevents the legal system from acknowledging the problem of staff-on-inmate sexual violence perpetrated by female staff against male inmates”); Robinson, *supra* note 4, at 1335–40 (discussing the association between gay and transgender identity and effeminacy and sexual vulnerability); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 160 (1982) (arguing that “men were considered the natural and proper initiators of sex,” while “[w]hat normal women did not, *should* not, do was to initiate sexual contact, to be the sexual aggressor”); Alisa Graham, Note, *Simply Sexual: The Discrepancy in Treatment Between Male and Female Sex Offenders*, 7 WHITTIER J. CHILD & FAM. ADVOC. 145, 146 (2007) (challenging “the myth that women cannot be sexual predators”).
22. *See, e.g.*, Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 190 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 949 (1996). Don Sabo and his coauthors have noted this convention with respect to prison rape in particular: “The act of prison rape is clearly tied to the constitution of intermale dominance hierarchies. Rapes between male prisoners are often described as if they occurred between men and women and in terms of master and slave.” Don Sabo et al., *Gender and the Politics of Punishment*, in PRISON MASCULINITIES 3, 11 (Don Sabo et al. eds., 2001).
- The classic dominance-feminist statement of this position is that of Catharine MacKinnon, who argues that rape is constitutive of masculinity and femininity:
- Rape is a man’s act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman’s experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively temporarily. To be rapable, a position that is social not biological, defines what a woman is.
- CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 178 (1989) (quoting Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, in FEMINISM AND PHILOSOPHY 333, 334 (Mary Vetterling-Braggin et al. eds., 1977)).

challenged the notion that male sexual aggression is natural or normal,²³ this gendered frame remains influential.²⁴

By characterizing the beliefs in male sexual aggression and female vulnerability as “stereotypes,” I do not mean to argue that gendered vulnerability to sexual violence is not real.²⁵ In prison as in many other settings, the vulnerability of women, young people, and effeminate men to sexual abuse by hypermasculine men is all too concrete.²⁶ Rather, my project here is to reveal the ways in which these conventional gendered expectations structure prison rape discourse, highlighting the abuses that conform to gender stereotype, and neglecting or rationalizing the abuses that tend to unsettle them. As Kay Levine has argued in the context of statutory rape, “Instances of abuse perpetrated *by* females, rather than *against* females, become hard for people to see (let alone for feminists to handle).”²⁷

The selective blindness of prison rape discourse to counter-stereotypical abuses illustrates a pattern of reasoning I describe as “stereotype reconciliation.” Stereotype reconciliation describes an unintentional discursive pattern by which unexpected facts are reconciled with conventional gender expectations. When the researchers, advocates, and officials who participate in prison rape discourse encounter

23. See, e.g., Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. CLINICAL PSYCHOL. 713, 716 (2005) (challenging “toxic masculinity,” which is typified by “misogyny, homophobia, greed, and violent domination”); Levine, *No Penis, No Problem*, *supra* note 21, at 102 (challenging “unwritten scripts” and societal “schemas [that] tend to illuminate acts of male perpetration and female victimization while keeping underground the existence of female-perpetrated victimization”); Stemple, *supra* note 4, at 605–06 (questioning human rights challenges to gender and sexual violence that focus exclusively on male violence against women); Williams, *supra* note 21, at 160.
24. See, e.g., Denov, *supra* note 20, at 308 (citing a number of surveys finding that adult-child sexual interactions are viewed as less harmful and abusive when the adult is a woman and the child is a boy than when the genders are reversed, so that most “people are unable to see women as potential sexual aggressors”).
25. Characterization of a belief or expectation as a “stereotype” does not necessarily imply that it is empirically false. As Justice O’Connor recognized in *Nguyen v. INS*, 533 U.S. 53, (2001), the U.S. Supreme Court’s Equal Protection jurisprudence
 has long recognized . . . that an impermissible stereotype may enjoy empirical support and thus be in a sense “rational.” . . . Indeed, the stereotypes that underlie a sex-based classification “may hold true for many, even most, individuals.” But in numerous cases where a measure of truth has inhered in the generalization, “the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn.”
Id. at 89–90 (O’Connor, J., dissenting) (citations omitted).
26. For a sample of the many studies exploring such abuses, see BECK & HARRISON, PRISONS AND JAILS, *supra* note 2; BECK & HARRISON, LOCAL JAILS, *supra* note 8; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, *supra* note 6; HUMAN RIGHTS WATCH, NO ESCAPE, *supra* note 4; HUMAN RIGHTS WATCH, NOWHERE TO HIDE, *supra* note 6; JUST DETENTION INT’L, FACT SHEET: LGBTQ DETAINEES CHIEF TARGETS FOR SEXUAL ABUSE IN DETENTION (2009); Buchanan, *Our Prisons, Ourselves*, *supra* note 4; Dolovich, *supra* note 4; Robinson, *supra* note 4.
27. Levine, *No Penis, No Problem*, *supra* note 21, at 384–85.

counter-stereotypical facts, they tend to ignore them, or to rationalize them by invoking alternative stereotypes, such as notions of romance or of racialized sexual aggression, to reconcile the unexpected facts with the governing stereotype of masculine domination and feminine vulnerability.

An emerging body of scholarship has challenged this stereotype in the related context of statutory rape. Several commentators have noted that gender stereotypes of males as aggressive and women as passive have obscured the coercion and harm involved in women's statutory rape of boys and young men.²⁸ However, as these scholars acknowledge, in the outside world, women's perpetration of sexual abuse (though underreported) is probably less common than sexual abuse by men.²⁹ By contrast, in jails and prisons, sexual abuse perpetrated by women appears to be the norm.³⁰

Part I of this Article sets out the empirical basis for my claim that in prisons, counter-stereotypical abuse is more common than sexual abuse that conforms to conventional expectations. I address the survey methods, definitions used, and the results found in the recent surveys, which reveal surprisingly high rates of sexual abuse committed by women. Because male inmates describe much of their sex with female correctional officers as "willing," I also address questions of coercion and consent in the context of staff-inmate sex. At a minimum, this Part demonstrates that sexual victimization by incarcerated women, and unlawful sexual misconduct by women staff with incarcerated men, constitute significant problems which to date have not been seriously addressed in prison rape discourse or in prison rape policy.

Part II demonstrates how stereotype reconciliation works in prison rape discourse with respect to the form of sexual abuse that most closely corresponds to conventional gender expectations: sexual abuse of women inmates by male staff. When researchers do not find as much evidence of this form of abuse as they expect, they tend to doubt their results, and supplement their own findings with outside sources that more closely conform to stereotypical expectations.

In Part III, I consider forms of sexual victimization that confound gendered interpretation: sexual abuse committed by women, and sexual abuse in which

28. See *id.* at 386; Graham, *supra* note 21, at 156.

29. See, e.g., Denov, *supra* note 20, at 304–08; Levine, *No Penis, No Problem*, *supra* note 21, at 380–83. Levine states that her empirical study of female-perpetrated statutory rape "in no way suggests . . . that female-perpetrated statutory rape is as prevalent as male-perpetrated statutory rape, or that the two types of crime merit similar levels of criminal justice resources, media attention, or public outrage. It simply suggests that statutory rape crimes committed by women, against boys, are worthy of study." Levine, *When Gender Meets Sex*, *supra* note 21, at 363.

30. See *infra* notes 40–44 and accompanying text (showing that females comprise a majority of perpetrators of the most common kinds of sexual abuse in men's and women's prisons).

manly men are the victims. While conventional gender stereotype can be stretched to accommodate sexual violence by criminalized women, sexual abuse by women staff is particularly difficult for conventional gender stereotype to handle, especially when the victims are criminalized men. When surveyors uncover surprising data suggesting that women staff are more likely than men to sexually abuse men and boys in their custody, they tend either to ignore the counter-stereotypical findings, or to reinterpret them in accordance with conventional gendered expectations: Could male inmates be misinterpreting women guards' authorized physical searches³¹ as sexual assault? Another form of stereotype reconciliation is to redefine staff-inmate sex as consensual, "romantic," or even as sexual exploitation of the female guard by the incarcerated man or boy.

In Part IV of this Article, I consider the use of racial tropes as a form of stereotype reconciliation for sexual abuse in men's prisons. Conventional notions of masculinity make it difficult to imagine that tough black or Latino gangsters, murderers or rapists might want sex with each other. Stereotypes of white vulnerability to the hypermasculine black rapist tend to reconcile the fact of sex among incarcerated men with conventional gender expectations. By contrast, when women staff have sex with male inmates, racial tropes are worse than useless for stereotype reconciliation: Racialized gender tropes make it harder, rather than easier, to see or explain the vulnerability of criminalized black men. In prison rape discourse, the forms of abuse that cannot readily be reconciled with conventional gender expectations are almost completely ignored.

31. The physical searches routinely conducted by prison staff are extremely invasive. For a visual representation of a strip search, see *Prison Strip Search Is Sexually Abusive*, ACLU.ORG, <https://www.aclu.org/prisoners-rights-womens-rights/prison-strip-search-sexually-abusive> (last visited July 2, 2012).

A majority of the U.S. Supreme Court recently upheld the routine imposition of a strip search procedure (described by the majority as "close visual inspection while undressed"). Justice Breyer's dissent describes the procedure as follows:

[A] visual inspection of the inmate's naked body. This should include the inmate opening his mouth and moving his tongue up and down and from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his arm pits, lifting his feet to examine the sole, spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar except females must in addition, squat to expose the vagina.

Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1525 (2012) (Breyer, J., dissenting) (citation and internal quotation marks omitted). Cross-gender strip searches are prohibited in all facilities, except for searches conducted by medical practitioners or in "exigent circumstances." The National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,130 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115), ban most cross-gender strip searches, but allow cross-gender "pat" searches of incarcerated men. See *infra* note 97.

I. COUNTER-STEREOTYPICAL ABUSES: EMPIRICS, CONSENT, AND COERCION

A. Statistics and Definitions

Until about 2007, empirical evidence of the prevalence and dynamics of prison rape was relatively scanty, and methodologically unreliable.³² Scholars, policymakers, correctional administrators, and advocates had to rely on this flawed literature and on anecdotal evidence to set their priorities and inform their recommendations for policy reform. In a 2004 meta-analysis of the extant prison sex literature, Gerald Gaes, a senior research scientist with the Bureau of Justice Statistics (BJS), characterized its limitations as follows:

[They] included vague or unclear question wording; lack of detail in the various types of potential sexual victimization; extremely small samples; very low response rates that raised significant questions about bias in the responses; survey methods that are not ideal to elicit responses on sensitive subjects; and long time horizons that produce errors in recall.³³

Moreover, while many earlier studies had attempted to estimate the incidence or prevalence of prison sexual abuse, only one had used a randomly selected probability sample that could represent an entire jurisdiction.³⁴

The Prison Rape Elimination Act of 2003 sought to address these empirical deficiencies. It mandated that the BJS conduct a “comprehensive statistical review and analysis of the incidents and effects of prison rape” by surveying a “random . . . or other scientifically appropriate sample of not less than 10 percent of all Federal, State and county prisons, and a representative sample of municipal prisons.”³⁵ The objectives of the PREA-mandated surveys are to identify the common characteristics

32. See, e.g., GERALD G. GAES & ANDREW L. GOLDBERG, NAT'L INST. OF JUSTICE, PRISON RAPE: A CRITICAL REVIEW OF THE LITERATURE (2004); see also Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 55–57.

33. GAES, *supra* note 9, at 3 (summarizing GAES & GOLDBERG, *supra* note 32).

34. GAES & GOLDBERG, *supra* note 32, at 1 (“It is only with such a sample that we can ever attempt to understand the scope of the problem.”). The only survey that involved a randomly selected sample was likely unreliable because of other irregularities in its methodology. For example, it did not provide “factor, cluster and reliability analyses” to back up the authors’ claims to high reliability for the survey items, did not offer data or statistical evidence in support of its conclusions, and was conducted via in-person interview by “an articulate, black ex-offender.” *Id.* at 13–14; see also Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 56 n.317.

35. 42 U.S.C. § 15603(a)(4) (2006).

of the victims and perpetrators of prison rape, and of the facilities with high incidences of prison rape.³⁶

As a result of surveys mandated, funded, or inspired by PREA, prison rape scholars, advocates, and policymakers now have more data than ever before to understand prison rape, and to shape policy responses to it. These studies provide a trove of evidence about counter-stereotypical sexual abuse. For example, because all the victimization surveys used virtually identical questions for male and female respondents,³⁷ incarcerated people were, by default, asked questions about both counter-stereotypical and stereotype-conforming forms of sexual abuse. The BJS victimization surveys and a statewide survey by health economist Nancy Wolff asked about sexual abuse by both inmates and staff, in facilities for both men and women. In a smaller study, forensic psychiatric researcher Janet Warren asked about “consensual,” bartered, and coerced sex with both staff and other inmates, and about respondents’ involvement in both sexual victimization and predation in facilities for both men and women. By asking the same questions of men and women, the surveyors elicited answers—remarkably consistent across surveys—which raise important questions about the conventional wisdom about the role of gender in prison rape.

As noted in the Introduction, despite the focus of prison rape discourse on fellow inmates as the source of sexual threat in men’s prisons,³⁸ these surveys found that incarcerated men report much higher rates of sexual abuse *by staff* than by fellow inmates,³⁹ and found that a large majority of staff perpetrators of sexual

36. *Id.* §§ 15602(5), 15603(a)(2)(A).

37. See BUREAU OF JUSTICE STATISTICS, NATIONAL INMATE SURVEY: YEAR 1 QUESTIONNAIRE SPECIFICATIONS (2007) [hereinafter BJS, SURVEY YEAR 1]; BUREAU OF JUSTICE STATISTICS, NATIONAL INMATE SURVEY: YEAR 2 QUESTIONNAIRE SPECIFICATIONS (2008–09) [hereinafter BJS, SURVEY YEAR 2]; WARREN REPORT, *supra* note 5, at 2; Wolff et al., *supra* note 15, at 841.

38. See *supra* note 4.

39. Although overall rates of victimization are low, disparities between sexual abuse perpetrated by staff and by inmates are large. See *supra* note 11. For example, the 2008–09 NIS found that, in men’s prisons, 2.9 percent of respondents reported sexual abuse by staff, compared to 1.9 percent who reported sexual abuse by other inmates. In jails for men, the discrepancy was even greater: 2.1 percent reported sexual abuse by staff, compared to 1.3 percent who reported sexual abuse by other inmates. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 12 tbl.6; see also BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbl.6 (finding that 4.2 percent of formerly incarcerated men reported sexual victimization by other prisoners, compared to 5.4 percent who reported sexual victimization by staff); BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 2 (showing that 2.0 percent of all inmates reported sexual abuse by staff, compared to 1.6 percent who reported sexual abuse by other inmates); BECK & HARRISON, PRISONS, *supra* note 11 (revealing that 2.9 percent of all prisoners reported sexual abuse by staff, compared to 2.1 percent who reported sexual abuse by inmates). The 2007 Jails and Prisons Reports (BECK & HARRISON, LOCAL JAILS, *supra* note 8, and BECK & HARRISON, PRISONS, *supra* note 11) do not break down their results by sex of inmate or staff, but

abuse are women. In the most recent National Inmate Survey, more than two-thirds of men who reported sex with staff—68.8 percent—said that their staff perpetrators were exclusively women.⁴⁰ Another 16.3 percent said that both male and female staff had abused them. In total, 85 percent of male inmates who had had sex with staff reported a female perpetrator.⁴¹ In women's prisons, too, the BJS data suggest that women are more likely than men to perpetrate sexual abuse. Although the staff members who have sex with women inmates are overwhelmingly male,⁴² incarcerated women report much higher rates of sexual abuse by other women inmates than by male staff.⁴³ Moreover, incarcerated women also reported much higher rates of sexual coercion by fellow inmates than imprisoned men did.⁴⁴

since men comprise more than 90 percent of the prison population and of the survey samples, these results are likely to closely approximate prevalence rates among male inmates. *See also* Wolff et al., *supra* note 15, at 841 (finding that 4.3 percent of male inmate respondents reported sexual victimization by other inmates, while 7.6 percent reported sexual victimization by staff); WARREN REPORT, *supra* note 5, at 22–26 (finding that 5.9 percent of male respondents reported sexual victimization by other inmates, and 2.4 percent reported “barter[ing]” sex with other inmates for goods or protection). Of Warren’s male inmate sample, 2.4 percent described sex with staff as “victimization,” 8.0 percent reported “bartered” sex with staff, while 17.0 percent considered their sex with staff to be “consensual.” *Id.*

40. *See* BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 24; *see also* BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 7 (reporting that among male victims of staff sexual misconduct, 61.5 percent of male inmates reported only female perpetrators; 14.4 percent reported only male perpetrators, and 13.1 percent reported both); BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbl.7 (reporting that of all former inmates reporting staff sexual misconduct, 78.7 percent were male inmates reporting misconduct by female staff; 6.8 percent were males reporting sexual misconduct by male staff; and 4.6 percent were males reporting sexual misconduct by both male and female staff).

In juvenile facilities, about 95 percent of staff perpetrators of sexual misconduct are reported to be women. BECK ET AL., JUVENILE FACILITIES, *supra* note 8, at 11.

41. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 24 (only 14.9 percent of male victims of staff sexual victimization reported that all their abusers had been men).
42. *See supra* note 14.
43. All nationwide and statewide surveys show that women reported about twice as much (or more) sexual victimization by other inmates than by staff. *See supra* note 15.
44. The BJS observed, in its most recent survey report:

Past BJS surveys of confined prison inmates have consistently found higher rates of inmate-on-inmate victimization among females than males. . . . This difference was found to be statistically independent and largely unexplained by covariation with other demographic characteristics. . . . The reports of former prisoners confirm the large and statistically significant difference between male and female rates of inmate-on-inmate sexual victimization. The rate of inmate-on-inmate sexual victimization among former state prisoners was 3 times higher among females (13.7%) than males (4.2%).

BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 (citation omitted); *see also* BECK & HARRISON, PRISONS AND JAILS, *supra* note 2; Wolff et al., *supra* note 15, at 841 (finding that male inmates reported 43 per 1000 inmate-on-inmate victimizations, compared to women inmates reporting 212 per 1000; male and female inmates reported similar rates of staff-on-inmate sexual victimization (76 per 1000)); WARREN REPORT, *supra* note 5, at 23 tbl.2 (showing that 6.6 percent of women inmates, compared to 5.9 percent of men, reported sexual “victimization” by

Before parsing these findings further, a note about definitions may be useful: In prison, consensual, bartered, and coerced sex are not sharply differentiated. Consensual sex among inmates is not treated by the BJS as sexual abuse, nor should it be.⁴⁵ Prisoners and staff tend to assume, though, that sex bartered for goods or protection is consensual.⁴⁶ Accordingly, “prison rape” as surveyed by the BJS is not limited to forcible rape. Rather, it defines “sexual victimization” to include all forced, pressured, or unwilling “oral, anal, or vaginal penetration; hand jobs; touching of the inmate’s buttocks, thighs, penis, breasts, or vagina in a sexual way; . . . and both willing and unwilling sexual activity with staff.”⁴⁷ Its surveys ask respondents in candid language about sexual touching,⁴⁸ “handjobs,” “oral sex or a blowjob,” and vaginal and anal penetration by the penis or with an object.⁴⁹ If an inmate says he or she has been sexually victimized, the survey asks whether he or she was physically forced, pressured, or “made to feel you had to” engage in these forms of sexual activity.⁵⁰ Finally, the BJS surveys also ask whether the victim was injured and whether she or he sought medical treatment for her or his injuries.⁵¹

The surveys also ask inmates whether they have “willingly” engaged in these sexual activities with members of prison staff, and whether they engaged in such activities with staff who “offered [them] favors or special privileges in exchange for sex or sexual contact.”⁵² While the BJS does not count inmate–inmate sex or touching as “victimization” unless the respondent was forced, threatened, pressured, or “made

other inmates). *But cf.* WARREN REPORT, *supra* note 5, at 24 tbl.3 (revealing that 3.8 percent of women and 2.4 percent of men reported having had “bartered” sex with other inmates).

45. See BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 11 (defining “sexual victimization” by inmates to include only forced, pressured, or unwilling sex with inmates); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 233–34 (2006) (arguing that consensual sex among inmates ought to be allowed).

46. See NPREC REPORT, *supra* note 1, at 113; OWEN REPORT PART I, *supra* note 6, at 4.

47. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 7.

48. BJS, SURVEY YEAR 2, *supra* note 37, at 21 (asking respondents about unwanted touching by inmates or staff of the “butt, thighs or penis” or “butt, thighs, breasts or vagina”).

49. *Id.* at 21–48.

50. The survey further asks about the kind of pressure brought to bear on the inmate. When an inmate says she or he was forced, pressured, or made to feel she or he had to have sex with another inmate, the survey further asks whether she or he was “persuaded or talked into it,” bribed, blackmailed, “given drugs or alcohol to get you drunk or high,” offered protection, settled a debt, threatened with harm, physically restrained, physically harmed or injured, or threatened with a weapon. *Id.* at 38. Where the alleged perpetrator is a staff member, the survey asks about all these forms of pressure, as well as whether the inmate was “offered favors or special privileges,” “offered protection from other inmates,” or “offered protection from another correctional officer.” *Id.* at 45.

51. *Id.* at 38–39, 46.

52. *Id.* at 43.

to feel he or she had to” engage in the sexual activity, the BJS counts staff–inmate sexual activity as “victimization” even if the inmate describes the sex as “willing.”⁵³

B. Gender, Coercion, and Consent in Staff–Inmate Sex

Male inmates who reported staff sexual victimization were much more likely than women inmates to describe at least some of their sex with staff as “willing”; women were much more likely than men to describe at least some of their sex with staff as “unwilling.”⁵⁴ This finding is consistent with conventional gender expectations, which might suggest that men want sex with women in virtually any circumstances, and that heterosexual cannot harm them.⁵⁵ Nonetheless, other survey findings suggest that this convention may not adequately capture what is happening between male inmates and female staff in prisons.

First, the surveys did not find that it was rare for women to report “willing” sex with staff, or for men to report “unwilling” sex with staff: Around 30 percent of currently incarcerated women reported having had sex with staff “without pressure or force,” compared to 56 to 64 percent of men;⁵⁶ among former prisoners, women were equally likely to say that their sex with staff had been “willing”

53. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 7.

54. For example, the BJS found that, among former state prison inmates, 4.8 percent of men said that they had “willing” sex with staff, compared with only 2.6 percent of women. 2.5 percent of women said they had been subjected to “unwilling” sex with staff, compared to only 1.1 percent of men who said so. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbl.6. Likewise, the BJS found that, among current inmates who said they had had sex with staff, men were significantly more likely than women to say that the sex had occurred “without pressure or force.” BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 23 tbl.17.

55. This assumption, for example, is salient in the context of statutory rape when the adult perpetrator is female and the victim is male: Such incidents are often dismissed as harmless or as positive experiences for the boy, and popular coverage of such incidents often features a salacious focus on whether the adult female perpetrator was “hot.” See, e.g., Denov, *supra* note 20, at 311–12; Levine, *No Penis, No Problem*, *supra* note 21, at 385–86; Davies & Rogers, *supra* note 16, at 372; Graham, *supra* note 21, at 156. Gendered stereotypes of male hypersexuality and sexual indiscriminateness may be particularly salient with regard to men who are black or gay (or both), who are also more likely to report sexual victimization by staff. See BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 18 tbls.12, 91 app. tbl.10 (finding that nonstraight (“bi-sexual, homosexual or other”) sexual orientation and black racial ascription are associated with significantly higher risk of sexual victimization by staff); BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 28 tbl.16 (finding that black and multiracial ascription are associated with significantly higher risk of sexual victimization by staff, but finding that in men’s jails and prisons, bisexuals are at significantly higher risk of staff sexual victimization than gay- or straight-identified inmates).

56. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 23 tbl.17.

as that it had been “unwilling;”⁵⁷ and a plurality—42.2 percent—of former prisoners who said they had any “unwilling” sex with staff were men whose perpetrators had been exclusively women.⁵⁸ Furthermore, although most men who said they had sex with female staff described the sex as “willing,” many of these men also said they had been “pressured” into it.⁵⁹

The coercive nature of “willing” sex between women staff and men inmates may not be self-evident—even though, under federal law and in all fifty states, staff–inmate sex is a criminal offense whether the inmate consents to it or not.⁶⁰ As is frequently pointed out in the literature with respect to male guards’ sexual abuse of female inmates,⁶¹ correctional staff wield enormous power over the lives of inmates. They can tell inmates when to get up, when to go to sleep, whether and where they can work or study, where and with whom they will live, and whether and how they may have contact with their families. Staff are authorized to use physical force to subdue inmates when they consider it necessary. Most importantly, staff are empowered to make disciplinary decisions about people in their custody: If a staff member says that an inmate has broken institutional rules, the inmate may be put in solitary confinement (administratively known by the euphemism “segregation”) for an extended period—a traumatic sanction that can lead to mental breakdown so severe that many rape survivors prefer to take their

57. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbl.6 (finding that 2.6 percent of women reported “willing” sex with staff, compared to 2.5 percent who reported “unwilling” sex with staff).

58. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 15 tbl.7.

59. *See infra* note 59. Among male respondents who said they had had sex with staff, 54.8 percent in prisons and 61.7 in jails said that they had ever been “pressured” into it. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 23 tbl.17. The BJS defines “pressured” sex as “incidents in which the perpetrator, without using force, pressured the inmate or made the inmate feel they had to participate.” *Id.* at 9 tbl.3. The number who reported sex with staff under “pressure” greatly exceeded the number who said that any of their perpetrators had been men. In jails, 35.7 percent of men who reported sex with staff said that all or some of their staff perpetrators had been male; in prisons, 31.2 percent of men who reported sex with staff said so. *Id.* at 24 tbl.18. Thus, although the BJS report does not break down reports of sexual pressure by the gender of the staff perpetrator, some of the men who reported sex with women staff did so under pressure at least some of the time.

60. NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (2009), *available at* <http://www.prearesourcecenter.org/sites/default/files/library/50statesurveyofssmlawsfinal2009update.pdf>. NPREC has taken the position that the “power imbalance between staff and prisoners vitiates the possibility of consent.” NPREC REPORT, *supra* note 1, at 123.

61. For a discussion contrasting the treatment of unforced sex involving female staff and male inmates with unforced sex between male staff and female inmates, see *infra* notes 101, 181–185 and accompanying text.

chances in the general population rather than be isolated in solitary confinement.⁶² Moreover, by issuing disciplinary tickets for misconduct or by placing an inmate in segregation (thereby cutting off his or her access to work, educational, and rehabilitative programs), staff can prevent inmates from earning the “good time” that is required to win parole.⁶³ Furthermore, as I have pointed out previously, these staff powers are also effectively unreviewable in court.⁶⁴

An inmate who faces unwanted sexual contact or overtures from a staff member is unlikely to receive institutional protection if he or she asks for it, so most of

62. “Colloquially named ‘ad-seg’ or the ‘hole,’ administrative segregation is also where prisoners viewed as disruptive or violent are sent for punishment and stricter supervision.” Oparah, *supra* note 4, at 265. “In a typical protective custody unit, individuals are placed in maximum-security cells. Privileges are greatly reduced, with as little as an hour a day outside the cell for exercise, extremely limited contact with other prisoners, and reduced or no access to educational or recreational programs.” NPREC REPORT, *supra* note 1, at 79; *see also* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 57–59 (2006); Arkles, *supra* note 4, at 538–39. On the psychological effects of solitary confinement, *see, for example*, NPREC REPORT, *supra* note 1, at 79–80. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 483 (1997); Elisabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT’L L. REV. 71 (2005).

Arkles notes that “[t]wo basic premises can make solitary confinement seem like a reasonable measure to increase safety The first is that that isolation and control, rather than relationships and freedom, reduce violence. The second is that other prisoners rather than facility staff are the primary perpetrators of violence from whom [transgender and other vulnerable] people need protection within detention systems.” Arkles, *supra* note 4, at 517–18 (footnote omitted). Both of these premises, he notes, “are false.” *Id.*; *see also* Robinson, *supra* note 4, at 1404 (“Interviews with persons who were incarcerated in K6G suggest that Jail staff are a greater threat to sexual minority inmates than other inmates.”). Arkles notes that supportive friendships, relationships, and alliances with fellow inmates in the general population are often essential to protection against violence by correctional staff. Placement in solitary confinement against their wishes may expose vulnerable inmates to further violence. Arkles, *supra* note 4, at 518.

63. Oparah, *supra* note 4, at 265.

64. Buchanan, *Impunity*, *supra* note 6, at 86. In *Sandin v. Conner*, 515 U.S. 472 (1995), the Supreme Court denied the existence of any protected liberty interest in not being placed in solitary confinement for thirty days, in part because conditions in punitive segregation were identical to those in “administrative segregation” and “protective custody.” *Id.* at 486. Because prison administrators use solitary confinement for administrative and protective purposes as well as for punishment, punitive placement in solitary confinement did not, the majority held, constitute the kind of “atypical, significant deprivation” which might engage a protected liberty interest. *Id.* Although the Supreme Court mandates periodic administrative review of placement in solitary confinement, *see id.*; *Hewitt v. Helms*, 459 U.S. 460 (1983), the reviews are often perfunctory. *See, e.g.*, Angela A. Allen-Bell, *Perception Profiling and Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged, and Justice Becomes Legally Blind*, 39 HASTINGS CONST. L.Q. 763, 799–802 (2012).

them do not.⁶⁵ According to a recent BJS survey of former state prisoners, when an inmate does report staff sexual misconduct to institutional authorities, the most common institutional response is that *the victim* is “written up” for a disciplinary infraction. More than 46 percent of inmates who reported sexual victimization by staff said they were written up.⁶⁶ The next most common institutional responses also tend to be punitive: 41.2 percent of victims who reported staff sexual misconduct were placed in solitary confinement, 35.2 percent were confined to their cells, and 26.6 percent were reassigned to a more restrictive custody level. 14.5 percent of inmates who reported staff sexual victimization received no institutional response at all.⁶⁷ Their accounts are largely corroborated by official accounts of institutional responses to reports of inmate sexual abuse.⁶⁸ The Office

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65. Obviously, inmates are unlikely to report “willing” sex with staff to correctional authorities: Only 2.5 percent of former inmates who said they had had willing sexual activity with staff reported it. But among those whose sex with staff was “unwilling,” only 20.7 percent reported it. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 30 tbl.17. The BJS asked former inmates why they had not reported staff sexual misconduct. Over 70 percent of nonreporters said they had not reported the sex because it was willing, or because they did not want the staff members to get in trouble. On the other hand, 38.3 percent of nonreporting victims said they were afraid of being punished for making a report, 25.4 percent of nonreporting victims said they were afraid of being charged with making a false report, and 21.9 percent said they thought staff would not investigate. *Id.* at 31 tbl.18. These concerns were well founded. *See infra* notes 66–70 and accompanying text.
66. Other than “Victim spoke to an investigator” (reported by 53.9 percent of reporting victims), which BJS counts as a facility “response” but I do not, the most common institutional response received by victims who reported staff sexual misconduct by staff was “Victim written up,” reported by 46.3 percent. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 31 tbl.19.
67. *Id.* Additionally, 39.1 percent reported that they were offered a transfer to another facility, which they may have experienced as either punitive or protective, depending on their circumstances. *Id.*; *see* OFFICE OF THE INSPECTOR GEN., *supra* note 10, at iv.
68. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 214646, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005, at 8 (2006) [hereinafter BECK & HARRISON, CORRECTIONAL AUTHORITIES, 2005], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca05.pdf> (“The most common response following a reported incident of sexual violence was to place the victim in administrative segregation or protective custody (44%) or to transfer the victim to another facility (11%).”); ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 6 (2007) [hereinafter BECK ET AL., CORRECTIONAL AUTHORITIES, 2006], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf> (similar); (“Among victims of inmate sexual violence reported in the 2006 survey, 40% were placed in administrative segregation or protective custody; 13% were placed in a medical unit; and 16% were transferred to another facility.”); *see also* PAUL GUERINO & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, NCJ 231172, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007–2008, at 23 app. tbl.17 (2011) [hereinafter GUERINO & BECK, CORRECTIONAL AUTHORITIES, 2007–2008], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca0708.pdf> (reporting that 25 percent of victims of “substantiated” incidents of sexual victimization *by staff* were placed in segregation, and 10 percent were transferred; no statistics provided for disposition of reports from victims of “substantiated” sexual victimization *by inmates*).

of the Inspector General acknowledges that “segregation and transfer can have negative effects on the victims and can reduce their willingness to report abuse and to cooperate in investigations,” but federal and state prison officials continue to rely heavily on segregation and transfer in response to inmate reports of sexual abuse.⁶⁹ Thus, when a victim of staff sexual misconduct reports it, most of the time, either the victim is punished, or nothing is done.⁷⁰ The institutional incentives to comply with the sexual desires of a correctional officer are powerful, whether the inmate is attracted to the officer or not.

In the outside world, federal sexual harassment jurisprudence recognizes that the institutional incentives established within schools and workplaces can make voluntary-but-unwelcome sexual touching civilly actionable even though it involves no use of force.⁷¹ Just as our legal system recognizes the coercion that may constrain sexual decisionmaking in these contexts—the implied, “Cooperate and you’ll get an A,” or “Cooperate, or you’ll be fired”—it rightly acknowledges that inmates’ “willing” sex with staff may involve the implied threat: “Cooperate, or you’ll never be paroled.”

This is not to claim that the violence of incarceration necessarily precludes mutual sexual attraction, or even love, between inmates and staff: It is not difficult to imagine that an incarcerated person (male or female) might become attracted to one of the only different-sex potential partners that he or she might encounter for

69. OFFICE OF THE INSPECTOR GEN., *supra* note 10, at iv.

70. The 46.3 percent of reporting inmates who are disciplined, added to the 14.5 percent who receive no response, account for 59.9 percent of all reports. BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 31 tbl.19. The BJS does not report on the degree of overlap between the 46.3 percent who receive a disciplinary “writeup” and the substantial proportion of reporting inmates who report being confined to their cells, placed in solitary confinement, or moved to a higher custody level, but it seems reasonable to assume that at least a few reporting inmates who were subjected to these other sanctions were not also “written up.” *Id.*

71. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986) (establishing sexual harassment as an unlawful employment practice of sex discrimination in violation of Title VII: “[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1989) (finding Title IX violation in case involving repeated “sexual intercourse” between teacher and middle-school student, with no suggestion that sex was forced); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 63, 75 (1992) (finding Title IX violation based on sexual harassment involving “coercive intercourse” between high school teacher and student. No force was alleged; teacher was alleged to have “coerced” the sex by threatening to tell the student’s mother and boyfriend about their “relationship,” *see* Brief for Petitioner, *Franklin*, 503 U.S. 60 (No. 90-918), 1991 WL 526268, at *3).

years.⁷² The dating options of incarcerated people are limited.⁷³ Moreover, sexual desire and pleasure can sometimes thrive in spite of, or because of, steep power disparities.⁷⁴ However, in prison as in the outside world, sexual rejections or romantic disappointments may often result in resentment, anger, or, in the worst case, violence. Where one potential partner is authorized to use force against the other, and has power to extend the other's stay in prison, it is not safe to assume that the incarcerated partner's purported "willingness" to have sex is free and uncoerced.

Thus this Article takes the position that staff-inmate sex is rightly counted as sexual "abuse" or "victimization" even if no force is used, and the inmate seeks or agrees to it. Readers who remain unconvinced of this might nonetheless agree that the gender of the "willing" inmate or staff partner does not resolve questions of consent. It is not safe to assume that staff-inmate sex is necessarily benign when the inmate is a man and the staff member is a woman. Yet, as I note in Part IV, this assumption is quite common in prison rape discourse. It is only in the context of sex between male inmates and female staff that the inmate's presumed willingness is proffered as a reason to ignore or discredit inmates' allegations of sexual abuse.⁷⁵ In any case, the survey data demonstrate that, at a minimum, women staff are taking sexual advantage of incarcerated men and boys to a degree that seems surprising, in light of conventional gender expectations. Regardless of whether it is as coercive as sex between male staff and women inmates, sex between women staff and men inmates warrants more attention than it has received in prison rape discourse to date.

72. Bans on staff-inmate sex may "deprive people of perhaps the single most promising avenue available for securing sexual partners," as Vicki Schultz has observed of prohibitions on workplace dating. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2069 (2003).

73. In light of all the dangers, deprivations, and humiliations of prison life, the dearth of sexual opportunities for incarcerated heterosexuals does not seem to me to be one of the most pressing human rights violations in prison. To the extent that inmates' sexual frustration is identified as a policy priority, a more appropriate, and effective, solution might be to allow conjugal visits with partners or friends (*see, e.g.*, Suk, *supra* note 4, at 118), not to authorize guards to have sex with them.

74. *See, e.g.*, Ian Halley (this author usually writes as Janet Halley), *Queer Theory by Men*, 11 DUKE J. GENDER L. & POLY 7, 37-38 (2004) (advocating a "sex-positive, shame/abjection affirmative, irrationalist" analysis of sexuality divorced from the feminisms of Catharine MacKinnon and Robin West which, Halley argues, unduly emphasize women's sexual subordination to men); Schultz, *supra* note 72, at 2121-28 (noting the ubiquity of dating relationships between supervisors and subordinates).

75. *See infra* notes 101, 181-185 and accompanying text (contrasting discussion of cross-gender staff sexual victimization of male and female inmates).

C. Gender Dynamics of Overt Sexual Coercion

Furthermore, the survey data provide considerable evidence of coercion in both “willing” and “unwilling” sex between staff and inmates of all genders. Conventional gender expectations might suggest that sexual abuse of men by women would be less coercive, less violent, or less harmful than the reverse.⁷⁶ The BJS victimization survey reports present abusers’ use of force and pressure by the gender of the victim, not the perpetrator. However, knowing that prison populations are segregated by gender, we may assume that virtually all inmate perpetrators are (at least by institutional classification) of the same gender as their victims. Similarly, we may draw tentative inferences about staff perpetrators’ gender from data on the gender of victims: Most staff perpetrators in men’s prisons are women, and most staff perpetrators in women’s prisons are men.⁷⁷ If female perpetrators were less violent than male perpetrators, their victims would report lower rates of violence, threats, and injury than were reported by the victims of male perpetrators. The BJS data do not closely fit this assumption.

Firstly, as mentioned above, women inmates are reportedly much more likely than male inmates to sexually victimize each other.⁷⁸ This “large and statistically significant difference” is “statistically independent and largely unexplained by covariation with other demographic characteristics,” and has been consistently found in all BJS surveys to date.⁷⁹ This robust finding defies stereotypes that associate sexual aggression with men and not with women.

Nonetheless, conventional gender expectations might predict that male inmate perpetrators would be more violent than female inmate perpetrators. If so, male victims of inmate-on-inmate sexual abuse would report higher rates of violence, threats, and injury than their female counterparts did. The BJS data partly bear out this expectation: In prisons and jails, male victims of inmate-on-inmate sexual abuse are more likely than their female counterparts to report that they were physically threatened, were offered protection, had sex to settle a debt, were bribed or blackmailed, or were given drugs or alcohol to secure their compliance.⁸⁰

76. See, e.g., Denov, *supra* note 20; Levine, *No Penis, No Problem*, *supra* note 21, at 385–86; Teichner, *supra* note 6, at 277; Graham, *supra* note 21, at 161.

77. Most staff sexual abuse is cross-gender. See *supra* notes 14, 40.

78. See *supra* note 44.

79. See *supra* note 44.

80. See BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 21 tbl.15 (finding that in prisons and jails, men were significantly more likely to report that they were bribed or blackmailed, given drugs, offered protection, offered to settle a debt, or physically threatened; in jails, men were significantly

Women and men reported roughly equal rates of being “persuaded/talked into” unwanted sex.⁸¹ But, contrary to gendered expectations, male and female victims (in prisons, but not in jails) were equally likely to say that they had been physically held down or that their inmate assailants had injured them.⁸²

Similarly, if female staff perpetrators were less violent than male staff perpetrators, female victims of staff sexual abuse (whose staff abusers are mostly male) would report higher rates of violence, threats, and injury than their male counterparts did. Again, the BJS data are only partly consistent with this expectation. Consistent with gender expectations, the majority of incarcerated males who had sex with staff say that the sex occurred “without pressure or force,”⁸³ compared to only about 30 percent of incarcerated women who had sex with staff.⁸⁴ However, not all sex that the BJS characterizes as occurring “without pressure or force” was defined by inmates as “willing.” The BJS definition of “without pressure or force” conflates staff–inmate sex that the inmate says was “willing” with staff–inmate sex that the inmate “exchanged for favors or privileges” offered by the staff member.⁸⁵ Depending on the favors or privileges that were exchanged, the level of coercion involved in such a bargain could range from exploitation that is arguably mutual (for example, sex in exchange for contraband) to very abusive (for example, an inmate having sex in exchange for food, showers, or contact with family members). The BJS reports provide no information about the gender distribution of inmates who characterized sex as “willing” as opposed to bartered, and the National Inmate Survey (NIS) questionnaires did not ask for particulars of the favors or privileges that inmates paid for with sex. It is thus impossible to determine, based on the gender disparity in inmate reports of unpressured, unforced sex, whether there is a gender disparity in the coerciveness of staff–inmate sex.

Moreover, most male and female inmates who reported sex with staff felt that staff had “pressured” them into it. In prisons, women were significantly more

more likely than men to say they had been physically held down or restrained, or that they had been physically harmed or injured).

81. *Id.* (showing that gender differences in being “persuaded/talked into it” were not significant).

82. *Id.* at 22 tbl.16 (showing that in jails, 37.2 percent of men and 8.2 percent of women victimized by other inmates said that they had been physically injured, but that in prisons, the difference between men (20.7 percent) and women (17.2 percent) who said they had been physically injured was not statistically significant).

83. *Id.* at 23 tbl.17 (showing that 64.1 percent of men in prisons and 56.3 percent of men in jails who had sex with staff say it took place “without pressure or force”).

84. *Id.* (showing that 29.8 percent of women who had sex with prison staff and 31.0 percent who had sex with jail staff say it took place “without pressure or force”).

85. *Id.* at 51 app. tbl.3.

likely than men to say they had been “pressured” by staff—81 percent of women as compared to 55 percent of men—but in jails, the gender difference in staff “pressure” was not significant.⁸⁶ In all carceral environments, most inmates, of both sexes, who had had sex with staff said that they were pressured.

Furthermore, contrary to gender expectations, staff perpetrators were as likely to use force against male victims as against women. More than 35 percent of men and women in prison, and about 50 percent of jailed men and women, said that their sex with staff had involved force or threats of force.⁸⁷ Since these percentages are considerably higher than the proportion of male victims who reported any sex with male staff, at least some female staff perpetrators apparently used force or threats of force to have sex with male inmates.

Finally, the BJS data with respect to physical injury caused by staff sexual abuse do not support the conventional gender expectation that women’s sexual abuse of men would be less injurious. In prisons, men and women reported about equal rates of physical injury resulting from staff sexual abuse.⁸⁸ In jails, men (whose staff abusers were mostly women) reported significantly *higher* rates of physical injury resulting from sexual victimization by staff: 17.4 percent of jailed men reported injury from staff–inmate sexual victimization, compared to 7.5 percent of jailed women (whose staff abusers were mostly men).⁸⁹

These findings raise important questions about conventional gender expectations in the context of sexual assault. As mentioned above, only 31 to 36 percent of male victims of staff sexual victimization reported *any* sexual abuse by male perpetrators, and less than a fifth reported that all their staff perpetrators had been male.⁹⁰ Even on the improbable assumption that *all* sex between male staff and male inmates involved force or threats of force, the BJS survey results suggest

86. *Id.* at 23 tbl.17. In jails, 70.1 percent of women who had had sex with staff said that it had been “pressured,” compared to 61.7 percent of men. This gender difference was not statistically significant. *Id.*

87. *See id.* at 23 tbl.17 (showing that in prisons, 35.4 percent of men and 38.8 percent of women said that sex with staff involved force or threats of force and that in jails, 51.4 percent of men and 47.7 percent of women reported that sex with staff involved force or threats of force, differences that were not statistically significant).

88. *See id.* (finding that in prisons, women were considerably more likely than men to say they had been physically injured by staff sexual victimization—19.2 percent of imprisoned women reported such injury, compared to 9.3 percent of imprisoned men—but this difference was not statistically significant).

89. *Id.* Since overall injury rates from staff sexual victimization are low, it is conceivable that all or almost all injuries resulting from staff sexual victimization were inflicted by male staff, and none by female staff, but the data on pressure and force do not point toward this explanation: Women staff are clearly implicated in at least some pressured and forcible sexual victimization. A breakdown of injury statistics by gender of the staff perpetrator could resolve this issue, but none is provided in the BJS report.

90. *See supra* note 40.

that a considerable amount of sex between female staff and male inmates is physically forced, pressured, or demanded in exchange for favors or privileges. The survey data suggest that women are perpetrators of a considerable amount of sexual coercion of male victims, and that some of this coercion is violent.

As the BJS notes in its 2010 study, “Regardless of whether an inmate reported being willing or unwilling, any sexual contact between inmates and staff is illegal; however, the difference may be informative when addressing issues of staff training, prevention, and investigation.”⁹¹ Recommendations for staff training, prevention, and investigation may be inappropriate or even counterproductive if they are based on categorical gendered assumptions, like those visible in prison rape discourse, that staff–inmate sex is by definition willing when the officer is female and the inmate male.

II. STEREOTYPE-CONFORMING ABUSE: MALE STAFF ABUSING FEMALE INMATES

Despite the emergence of empirical evidence showing higher rates of sexual abuse by other inmates than by staff, contemporary literature on women’s prisons continues to focus disproportionately on sexual abuse by staff.⁹² This literature typically cites only examples in which the staff perpetrators are male.⁹³ By contrast, only a handful of surveys or research articles have inquired about sexual abuse by inmates in women’s jails or prisons.⁹⁴

When incarcerated women are guarded by men, the risk of sexual abuse is obvious to most commentators. Cristina Rathbone, for example, suggests: “Perhaps

91. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 7.

92. *See supra* note 6.

93. *See supra* note 6.

94. A 2006 victimization survey by Nancy Wolff and her coauthors surveyed twelve men’s prisons, one sex offender treatment center for men, and one female prison in a single state. Nancy Wolff et al., *Understanding Sexual Victimization Inside Prisons: Factors That Predict Risk*, 6 CRIMINOLOGY & PUB. POL’Y 535, 536 (2007); *see also* Leanne Fiftal Alarid, *Sexual Assault and Coercion Among Incarcerated Women Prisoners: Excerpts From Prison Letters*, 80 PRISON J. 391 (2000); Kimberly R. Greer, *The Changing Nature of Interpersonal Relationships in a Women’s Prison*, 80 PRISON J. 442, 442 (2000) (finding that interviews with women prisoners suggest the primary motivation for sex between inmates is economic manipulation); Christopher Hensley et al., *Inmate-to-Inmate Sexual Coercion in a Prison for Women*, 37 J. OFFENDER REHAB. 77 (2003); Angela Pardue et al., *Sex and Sexuality in Women’s Prisons: A Preliminary Typological Investigation*, 91 PRISON J. 279, 282 (2011) (providing a five-type taxonomy of sexual activity in women’s prisons: “suppressed sexuality, autoeroticism, true homosexuality, situational homosexuality, and sexual violence”); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217 (2002).

there is something inevitable about guard-on-inmate sex when you have a building full of constitutionally disempowered women being ruled over by uniformed male guards.”⁹⁵ Because this risk is so apparent, most commentators urge that institutions should take it into account by banning male staff from contact positions with women prisoners, or by restricting the authority of male correctional officers to search or supervise women.⁹⁶ Thus the 2012 PREA regulations protect women and juvenile detainees, but not men, against physical “pat” searches by staff of the opposite sex.⁹⁷

Qualitative and anecdotal findings suggest that many male staff members do sexually abuse women when allowed this kind of access, and that restricting it may reduce sexual abuse.⁹⁸ Restrictions on cross-gender staffing might have protected many of the approximately two-thirds of female victims whose staff perpetrators were exclusively male.⁹⁹ It would not, however, protect the 28 to 38 percent who were sexually abused either by women only, or by both men and women staff.¹⁰⁰ The conventional gender frame for this problem generates a

95. RATHBONE, *supra* note 6, at 45.

96. See, e.g., NPREC REPORT, *supra* note 1, at 215 (making recommendations on cross-gender staffing); see also Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. Doc. E/3048 (July 31, 1957); Buchanan, *Impunity*, *supra* note 6. Silja Talvi’s chapter on “Abuse Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. Behind the Wall” typifies this narrative approach. TALVI, *supra* note 6, at 54–78. She portrays male staff as the perpetrators and female staff as the solution to custodial sexual abuse. In all her examples, prison staff members who abuse women are male. She quotes Trine Christensen, an Amnesty International human rights researcher:

“[T]here are ways to prevent sexual abuse. . . . Always have men accompanied by women; never allow them to do crossgender pat-downs; never allow them unsupervised access to women’s living quarters. . . . [T]he fact is that when you have situations like this[,] . . . having unsupervised males in female facilities and giving them full access to females at night, or in intimate situations [such as when women] use showers or the bathroom—[these are] situations that are conducive to sexual abuse.”

Id. at 57–58 (some alterations in original) (internal quotation marks omitted).

97. National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,108 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115) (banning cross-gender searches in women’s and juvenile facilities, except in “exigent circumstances or when performed by medical practitioners, in which case the [cross-gender] searches must be documented”).

98. See, e.g., HUMAN RIGHTS WATCH, NOWHERE TO HIDE, *supra* note 6 (“In addition to engaging in sexual relations with prisoners, male officers used mandatory pat frisks or room searches to grope women’s breasts, buttocks and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas.”); NPREC REPORT, *supra* note 1, at 62–63.

99. On the other hand, most state prison systems already restrict cross-gender “pat” searches of women inmates (although the federal system does not). National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. at 37, 132. This new rule would presumably have little effect in those facilities.

100. See *supra* note 14.

solution that responds only to the stereotype-conforming part of the harm, ignoring harms that do not fit the stereotype.

Legal and social commentators readily identify the coercion inherent in sex between male staff and female inmates. When women inmates claim that they are sexually exploiting male staff by exchanging sex for food, goods, contraband, or privileges, many analysts are skeptical. They point out that such an exchange between prisoner and guard is so unequal that it ought not to be understood as truly consensual.¹⁰¹

By contrast, many commentators see it as obvious that women's supervision of male inmates does not pose a similar risk of sexual abuse. For example, the National Prison Rape Elimination Commission (NPREC) notes, "Many experienced corrections professionals believe . . . that women officers have a calming effect in male units."¹⁰² Some observers suggest that the presence of female staff may "humanize" the men's prison environment, so that incarcerated men do not require the protections against cross-gender search that are routinely granted to women.¹⁰³ Thus, as Brenda Smith notes in this Issue, women correctional officers

101. See, e.g., Girshick, *supra* note 6, at 108–10. Girshick notes that officers have access to inmates' files and can find out about inmates' vulnerability and past abuses. As abuse survivors, many inmates are accustomed to sexual exploitation or do not know how to resist or complain about sexual abuse. Additionally, staff may assign an inmate to administrative segregation for displeasing them. Furthermore, the grievance process is "more likely to lead to harassment and retaliation than redress for a wrong done to [the prisoner]." *Id.* at 109. Retaliation may include solitary confinement, being labeled a snitch, being handcuffed for repeated interrogation, repeated cell searches, lost work assignments, and being targeted for disciplinary reports. See also U.N. Comm'n on Human Rights, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, *supra* note 6 (noting that "women prisoners sometimes accept sexual advances to ensure their access to phone calls, visits, or basic supplies such as food, shampoo, or soap"); RATHBONE, *supra* note 6, at 59–62; TALVI, *supra* note 6, at 69 (observing that women in ostensibly willing relationships with male guards "were willing to ignore the obvious fact that they were being taken advantage of in exchange for items they could buy easily and cheaply outside prison gates"); Buchanan, *Impunity*, *supra* note 6, at 56.

102. NPREC REPORT, *supra* note 1, at 63.

103. See *Weatherall v. Canada* (Att'y Gen.), [1993] 2 S.C.R. 872, 878 (upholding constitutionality of cross-gender pat-searches of male prisoners in part on the basis that "[t]he important government objectives of inmate rehabilitation and security of the institution are promoted as a result of the humanizing effect of having women in these positions"); see also NPREC REPORT, *supra* note 1, at 63; LYNN E. ZIMMER, WOMEN GUARDING MEN 151–53 (1986). Brenda Smith points out that institutional defenses to male prisoners' Equal Protection challenges to cross-gender search rely on the stereotypical assumption that "men do not experience trauma, threat, or embarrassment from routine viewing or touching of their bodies by female staff in the same way women inmates would experience that same conduct by male staff." Smith, *supra* note 6, at 274. The PREA regulations' prohibition of cross-gender search for women and young people, but allowing it for incarcerated

become “utility players”¹⁰⁴ assigned to guard both men and women.

Like the legal and social commentary, empirical research on the facts and incidence of prison rape also tends to focus on the kinds of abuse that conform to stereotype, while overlooking the kinds that do not. For example, the extensive research funded by the U.S. Department of Justice pursuant to PREA has included a large study that sought to analyze the gender dynamics of physical and sexual abuse in women’s prisons, and to offer gendered responses to it.¹⁰⁵ In their study, *Gendered Violence and Safety: A Contextual Approach to Improving Security in Women’s Facilities* (the Owen Report), Barbara Owen and her team of researchers sought to “investigate[] the context of gendered violence and safety in women’s correctional facilities,” and concluded that “[t]he data support our original hypothesis that sexual violence is embedded in the broader context of violence and safety and that this context is gender-based. . . . We also suspected that prior victimization often contributes to a cycle of future and repeated victimization among women.”¹⁰⁶

The results of the Owen Report did not support the stereotype-conforming expectation that sexual violence by male staff is one of the most common or pressing forms of violence in prisons for women. This study involved inmate focus groups, which discussed many aspects of violence in women’s prisons. The participants did not identify staff sexual misconduct as one of the most urgent priorities for violence reduction. Rather, the women expressed much more concern about physical harm from inadequate health care, hygiene, and nutrition than from physical or sexual violence.¹⁰⁷ “Staff sexual misconduct was a significant theme in the inmate interviews but most was at the lower end of the continuum, involving verbal and other forms of harassment. . . . Our focus groups with female inmates provided few descriptions of sexual violence perpetrated by

men, enact a similar presumption. National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,310 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

104. Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions With Men and Boys in Custody*, 59 UCLA L. REV. 1690, 1698 (2012).

105. OWEN REPORT PART I, *supra* note 6. A smaller study also explored physical violence among inmates in women’s prisons, and mentioned sexual violence in passing. See M. Dyan McGuire, *Doing the Life: An Exploration of the Connection Between the Inmate Code and Violence Among Female Inmates*, 2011 J. INST. JUST. INT’L STUD. 145 (a qualitative study of the cultural values underlying physical violence in two Missouri women’s prisons based on interviews with fifty-two women).

106. OWEN REPORT PART I, *supra* note 6, at v.

107. “Health concerns eclipsed worries about sexual or physical safety in every focus group and these concerns were related to lack of medical care and cleaning supplies, deteriorating physical plant conditions, substandard food, and the lack of rehabilitative programs. Idleness and an inability to earn money were also said to undermine women’s sense of well-being.” *Id.* at 52–53.

staff.”¹⁰⁸ The main concerns identified by these incarcerated women did not resonate with gender stereotype, and fit uneasily with a research literature that identifies sexual abuse by male staff as a preeminent concern about women’s incarceration.

Rather than presenting this somewhat counter-stereotypical finding at face value, the Owen Report deployed an interpretive shift that helped reconcile its results with stereotypical expectations.¹⁰⁹ On this question, unlike any of the other kinds of violence Owen’s focus groups explored, the Owen Report supplemented its focus group findings with a four-page “content analysis” section appended to its chapter on sexual abuse, which provided what the Report called its “most serious and significant detail about staff sexual misconduct.”¹¹⁰ This section summarized allegations received earlier by prisoners’ rights advocacy group Stop Prisoner Rape (now Just Detention International). In each of the Stop Prisoner Rape examples, if the gender of the staff perpetrator was identified, he was always a man.¹¹¹ In no other chapter (for example, the chapter on physical violence by inmates or staff, or sexual violence among inmates) did the Owen Report supplement its findings with a “content analysis” documenting others’ findings of abuse more severe than that disclosed in its focus groups.

It would be reasonable for Owen and her team to suspect that inmates who had experienced more serious sexual assaults by staff might hesitate to disclose it in the group interviews they conducted. But the incentives for such hesitation would seem to apply as much to sexual assaults by other inmates as by staff. As with sexual abuse by staff, the Owen respondents’ accounts of sexual abuse by other inmates did not suggest high rates of violent rape, and the sexual abuse they did describe tended to take forms that were less severe: “mild forms of sexual coercion, involving flattery, verbal pressure, and unwanted touching,” as well as “[v]erbal threats of sexual violence.”¹¹² Owen’s respondents reported that “[a]t the most

108. *Id.* at 85.

109. As I have noted previously, Wolff used a similar interpretive technique with respect to a different stereotype. Although her own findings were inconsistent with the notion that white inmates of men’s prisons are disproportionately raped by black inmates (she found no statistically significant racial variation in sexual victimization by inmates), she cited two thirty-year-old studies in support of a claim that “inmate-on-inmate sexual victimization has an interracial bias, with victims most likely being White and sexual aggressors most likely being Black.” Wolff et al., *supra* note 15, at 836; *see also* Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 54 n.312.

110. BARBARA OWEN ET AL., GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN’S FACILITIES PART II OF III, FOCUS GROUP METHODOLOGY AND FINDINGS 85 (2008) [hereinafter OWEN REPORT PART II].

111. *See id.*

112. OWEN REPORT PART I, *supra* note 6, at 42.

serious end of the coercion continuum, forced sex occurs. Most women had only heard of rapes or assaults in prison; very few had seen a rape personally.¹¹³ The Owen Report did not supplement these findings with evidence of more severe sexual abuse that had occurred elsewhere, as it had done with sexual abuse by staff.

By contrast, the Owen Report discussion arguably minimized the importance of sexual abuse by inmates, characterizing it as avoidable violence linked to abusive “personal relationships.”¹¹⁴ “Most women indicated that they eventually learned how to avoid these situations and those women known to be sexually aggressive. Accounts of sexual violence between female inmates were almost always grounded in personal relationships, following the pattern of interpersonal violence in the community.”¹¹⁵ In contrast to its enhancement of findings about stereotype-conforming sexual abuse by male staff, the Owen Report spent less than half a page describing the less stereotype-conforming relationship violence it characterized as “the most serious”: sexual abuse committed by fellow inmates.¹¹⁶

Although sexual abuse in men’s facilities is also linked to gender-role expectations¹¹⁷ and correlates strongly with prior victimization,¹¹⁸ no similar empirical study of the gender dynamics of physical or sexual abuse has been conducted in institutions for men.¹¹⁹ As I have argued previously, sociolegal scholarship rarely frames sexual abuse in men’s prisons as a practice of gender role enforcement, focusing more often on stereotypical racial dynamics.¹²⁰ Prison rape discourse

113. *Id.* at 45.

114. *Id.* at 42.

115. *Id.*

116. *Id.* at 45.

117. *See generally* BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 18 tbl.12, 91 app. tbl. 10; Buchanan, *Our Prisons, Ourselves*, *supra* note 4; Sabo et al., *supra* note 22.

118. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 18 tbl.12, 91 app. tbl. 10 (finding that the second-most-powerful predictor of sexual victimization was nonstraight sexual orientation).

119. Physical violence among criminalized men is unremarkable in light of gender stereotypes that frame men, but not women, as aggressive and violent. As Angela Harris has recently observed, “We are familiar with the use of ‘gender violence’ to mean male violence against women. . . . Less well recognized is the fact that male-on-male violence is also gender violence.” Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POLY 13, 16–17 (2011) (footnote omitted).

120. *But see* Buchanan, *Our Prisons, Ourselves*, *supra* note 4 (offering empirical challenge to black-on-white stereotype of sexual abuse among male inmates, and offering critical gender analysis of male inmate sexual abuse); *see also* Robinson, *supra* note 4 (offering critical race and gender analysis of segregation of LGBT inmates as ostensible protection against sexual abuse); Elizabeth F. Emens, *Inside Out*, 2 CALIF. L. REV. CIRCUIT 95 (2011) (a supportive commentary on Robinson, *id.*); Arkles, *supra* note 4 (offering critical gender analysis of sexual vulnerability of transgendered and gender-nonconforming inmates to institutional abuse); Sabo et al., *supra* note 22 (offering critical masculinities analysis of prison sexual abuse).

thus tends to frame women's experiences as gender-not-race, and men's as race-not-gender.

Thus, while scholarship, advocacy, and correctional discourse with respect to staff sexual abuse in women's prisons almost always identify perpetrators' gender as male, this literature does not typically investigate or discuss the racial distribution of abusive male staff or female victims.¹²¹ In contrast to the racialized frame for inmate rape in men's prisons, violence in women's prisons is not typically framed as racially motivated. While many commentators recognize that gender and race structure women's likelihood of imprisonment and inform legal and institutional indifference to their fate while in prison,¹²² race is not generally presented—as it is with sexual abuse in prisons for men—as a factor that influences the abuser's selection of victims.¹²³ To the limited extent that the sociolegal literature has addressed physical violence in women's facilities, race has been largely absent from the analysis.¹²⁴

I am not suggesting here that race ought to be an important focus of prison rape discourse about sexual abuse by staff in women's prisons; the racial data available from the BJS reports do not suggest that race is an important factor

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121. See, e.g., U.N. Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, *supra* note 6; AMNESTY INT'L, *NOT PART OF MY SENTENCE*, *supra* note 6; HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR*, *supra* note 6; HUMAN RIGHTS WATCH, *NO ESCAPE*, *supra* note 4; NPREC REPORT, *supra* note 1. In the rare instances in which the race of a victim is mentioned, she tends to be white. See, e.g., RATHBONE, *supra* note 7, at 42–65 (describing the race of two victims of staff sexual abuse, Denise and Julie, as white, while the race of other victims is unidentified); McGuire, *supra* note 105, at 150.
122. See, e.g., BARBARA BLOOM ET AL., NAT'L INST. OF CORR., *GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS* (2003), available at <http://er.uqam.ca/nobel/k27114/docluce/genderprison.pdf> [hereinafter BLOOM ET AL., *GENDER-RESPONSIVE STRATEGIES*]; BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996) (arguing that poverty, racism, violence, and addiction entrap black women in criminal activity); TALVI, *supra* note 6, at 58; YOUNG & REVIERE, *supra* note 6; Buchanan, *Impunity*, *supra* note 6; Davis, *supra* note 6, at 346 (noting that black women were excluded from carceral efforts to “domesticate” criminalized white women); Miller, *supra* note 6, at 873–74 (noting that racial, class, and sexual identities of incarcerated women and custodial staff may influence their perceptions of privacy).
123. See *supra* note 6. *But see* WARREN REPORT, *supra* note 5, at 146–47 (finding that among women inmates, whites were overrepresented relative to black and other women in all measures of prison sexual activity, including predation, victimization, bartered sex, and consensual sex); Miller, *supra* note 6, at 886–87 (noting that in upstate New York, the cultural meaning of sexual “abuses of authority” is shaped by the contrast between the mainly poor, black, urban women, and the mainly rural, white guards).
124. See, e.g., BLOOM ET AL., *GENDER-RESPONSIVE STRATEGIES*, *supra* note 122, at 25–28, 60, 118–23 (providing no mention of race in discussions of staff sexual misconduct and of policy reforms to address it); WARREN REPORT, *supra* note 5; OWEN REPORT PART I, *supra* note 6; McGuire, *supra* note 105 (offering no racial analysis of physical violence in women's prisons).

driving sexual abuse in jails or prisons for men or women,¹²⁵ although the BJS's 2008 survey of former state prison inmates, did find some significant racial differences among women.¹²⁶ The absence of race from discourse about staff sexual abuse in women's prisons is notable largely because it contrasts with the centrality of race in discussions about sexual abuse by inmates in facilities for men.¹²⁷ The dominant expectation in prison rape discourse has been that race is "not critical to prison culture" among women, while racial and gang identity is "the basis for prison social organization" among men.¹²⁸

The questions asked in the BJS surveys correspond to conventional gendered assumptions about the kinds of sexual abuse that occur in men's and women's prisons. To the extent that the perpetrators of sexual abuse in women's prisons are expected to be male staff, conventional gender expectations provide a presumptive explanation: feminine vulnerability to masculine aggression. On the other hand, because racial violence in prison is typically—and stereotypically—understood

125. The available data on the racial distribution of sexual abuse in women's prisons do not suggest that sexual abuse is often targeted by race. The BJS surveys do not ask inmates about the racial ascription of sexually abusive staff, so racial findings about staff-perpetrated victimization are difficult to interpret. See *infra* note 130. With respect to inmate-on-inmate sexual abuse, the BJS reports on the National Inmate Surveys do not break down their racial findings by gender, leaving racial patterns in women's facilities unclear. See BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 6 tbl.7 (presenting prevalence of sexual abuse by race and gender separately, without breaking down gender findings by race or vice versa); BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 12 tbl.6 (same). But see BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8 (discussed *infra* note 126). Wolff found that race was not a significant predictor of sexual abuse by inmates in the women's prison she studied. Wolff et al., *supra* note 94, at 546–47, 551. Barbara Owen, whose 2008 study of violence in women's facilities asked inmates about racial and gang dynamics, found that although some younger women were involved with gangs, either individually or through their male partners, fights resulted from interpersonal dynamics rather than gang affiliation. Owen also found "an element of racial tension in women's prisons, but by no means to the same degree as in prisons for men." OWEN REPORT PART II, *supra* note 110, at 45.

126. The BJS survey of former state prisoners found no significant racial differences in the prevalence of inmate-on-inmate sexual victimization among women, see BECK & JOHNSON, FORMER STATE PRISONERS, *supra* note 8, at 16 tbl.8. The only significant racial difference in the prevalence of staff-on-inmate sexual victimization was that multiracial women were at higher risk than black, white, Latina or "Other" women. *Id.* The BJS's "final multivariate logistic regression model," though, did reveal significant racial differences in risk of sexual victimization: Controlling for other factors, this analysis found that black women inmates were at significantly lower risk of inmate-on-inmate sexual victimization than were their white, Hispanic, or multiracial counterparts (calculating predicted percent victimization at 2.8 percent for black women, 3.9 percent for white women, 4.6 percent for Latinas and 8.7 percent for women of "two or more races"), and confirmed that multiracial women inmates were at significantly higher risk of sexual abuse by staff, compared to other ethnic groups (6.1 percent, compared to less than 2 percent for all other racialized groups of women). *Id.* at 28 tbl.16.

127. See generally Buchanan, *E-race-ing Gender*, *supra* note 4; Buchanan, *Our Prisons, Ourselves*, *supra* note 4.

128. See, e.g., BARBARA OWEN, "IN THE MIX": STRUGGLE AND SURVIVAL IN A WOMEN'S PRISON 151 (1998).

to involve male inmates, specifically black and Latino criminal gang members,¹²⁹ conventional wisdom would suggest that race is relevant to sexual abuse by inmates. Consistent with these race and gender assumptions, the BJS surveys ask victims of sexual abuse about the perpetrator's racial ascription and Hispanic origin if the perpetrator is a fellow inmate, but do not ask for the race or ethnicity of staff perpetrators.¹³⁰ As a result, if sexual abuse by staff is racialized, the BJS surveys do not allow scholars, advocates, correctional administrators, or policymakers to see its

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129. See *Johnson v. California*, 543 U.S. 499, 502 (2005) (California racially segregated institutions for new or transferred inmates, but not females; its “rationale for this practice is that it [was] necessary to prevent violence caused by racial gangs”); Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners’ Rights, and Violence*, 7 HARV. J.L. & PUB. POL’Y 413, 435 (1984) (attributing prison violence to the rise of racial gangs); Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 127–28 (2008) (arguing that staff enforcement of racial categorization and staff encouragement of racial hostility stoke racial hatred and violence in prisons); James E. Robertson, “Separate but Equal” in Prison: *Johnson v. California and Common Sense Racism*, 96 J. CRIM. L. & CRIMINOLOGY 795 (2006) (challenging the racism of the “common sense” assumption that segregation of men’s prisons will suppress racial violence); Hans Toch & James R. Acker, *Racial Segregation as a Prison Initiation Experience*, 40 CRIM. L. BULL. 466 (2004) (challenging the empirical basis for the assumption that male prisoners cannot live together peacefully unless segregated); Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 LAW & SOC’Y REV. 743 (2002) (comparing the rates of violence in racially segregated and racially integrated double cells in two Texas prisons for men); Ahmed A. White, *The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 767 (2008) (attributing prison violence to racial gangs); Rachel C. Grunberger, Note, *Johnson v. California: Setting a Constitutional Trap for Prison Officials*, 65 MD. L. REV. 271, 294 (2006) (arguing in favor of racial segregation on the basis that black, Latino, and white “[g]ang members in the California prison system routinely murder and rape other prisoners who are not gang members”); SpearIt, Note, *Manufacturing Social Violence: The Prison Paradox & Future Escapes*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 84, 110 (2009) (noting that racial segregation in California men’s prisons “often aids in the construction of super-gangs”); Sarah Spiegel, Note, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261, 2285 (2007) (challenging judicial deference to lockdown and to adverse treatment of “Southern Hispanics” as a method of restraining individual violence at Pelican Bay, a prison for men, as well as the dominant discourse on prison race riots and prison racial violence that frames “prison violence as stemming from the personal prejudices of individual inmates”); *An Update on the California Prison Crisis and Other Developments in State Corrections Policy*, 14 BERKELEY J. CRIM. L. 143, 164 (2009) (noting that, despite *Johnson v. California* and a state desegregation plan, California prisons for men remain racially segregated).
130. BJS, SURVEY YEAR 2, *supra* note 37, at A11–13, D2, F7, F7A, G28a, 29a. The survey inquires into the respondent’s gender, race, and Hispanic origin; the race and Hispanic origin of the inmate assailant; and the gender of the staff perpetrator. But the survey does not inquire into the race or Hispanic origin of the staff perpetrator. No questions are asked about the gender of inmate perpetrators, presumably because prisons and jails are segregated by gender. *Id.*; see also BJS, SURVEY YEAR 1, *supra* note 37, at A5–7, D2, F7–F7a, G18. On the other hand, penal institutions do tend to collect such data. See, e.g., GUERINO & BECK, CORRECTIONAL AUTHORITIES, 2007–2008, *supra* note 68, at 21 app. tbls.13–14 (showing that of “substantiated” perpetrators of staff sexual misconduct, about 63 percent were white; 24 percent were black; 9 percent were Hispanic; and 4 percent identified as Other, including American Indians, Alaska Natives, Asians, Native Hawaiians, and Other Pacific Islanders).

dynamics. I have not been able to find any systematic academic investigation of the racial dynamics of physical or sexual violence in women's prisons. In general, academics, officials, and prison reformers typically analyze what happens to imprisoned women as feminized harm, understood in terms of gender, not race.¹³¹

III. COUNTER-STEREOTYPICAL ABUSE: WOMEN AS PERPETRATORS

Women's perpetration of sexual abuse confounds conventional gender expectations, especially when the victims are men. Essentialized gender stereotypes frame women as passive, rather than aggressive; vulnerable, rather than violent. Racialized gender stereotypes frame black women as stronger, more masculine, more sexual, and more physically aggressive than white women.¹³² Although these stereotypes could plausibly be deployed to portray black women as posing a sexual threat, historian Regina Kunzel has noted that prison sex research has traditionally portrayed the supposed masculinity of black women as alluring, rather than threatening, to white women inmates (who, as working-class criminals, hardly fit idealized norms of femininity themselves).¹³³ Twentieth-century researchers read "white women's desire for black women in particular, as essentially heterosexual,"¹³⁴ asserting that white women "associat[ed] masculine strength and virility with dark color."¹³⁵ In maintaining this heterosexist interpretation of sex

131. *But see* Buchanan, *Impunity*, *supra* note 6; Davis, *supra* note 6; Miller, *supra* note 6; Smith, *supra* note 6; Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 672–74 (2008).

132. *See, e.g.*, Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 540, 550–58 (noting that black women are stereotyped as hypersexual as well as "tough, domineering, emasculating, strident, and shrill"); Philip Atiba Goff et al., "Ain't I a Woman?" *Towards an Intersectional Approach to Person Perception and Group-Based Harms*, 59 SEX ROLES 392, 394 (2008) (finding that black women are perceived as more masculine than white women, and that "stereotypical blackness" is associated with masculinity for both black men and black women).

133. *See, e.g.*, REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 129–32 (2008) (noting that twentieth-century researchers, determined to read women's same-sex sexual activities through a heteronormative lens, interpreted relationships between white and black women as consensual and traditional, with supposedly masculine black women replacing absent white men); *see also* NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE, PRISONS 1800–1935, at 153–54 (1985) (noting that New York prison administrators racially segregated a women's prison to prevent inmates from acting on the "peculiar attraction that has been found to exist between colored and white women in confinement" and prevent "the unfortunate attachments formed by the white women for the negroes" (internal quotation marks omitted)).

134. KUNZEL, *supra* note 133, at 29.

135. *Id.* at 249 n.63.

among incarcerated women, Kunzel notes, these researchers had to disregard what the women had actually said about it. Many of the imprisoned women told researchers they preferred sex with women to sex with men, and, Kunzel observes, they reported far more “pre-prison lesbian experience” than researchers were comfortable acknowledging.¹³⁶ The researchers’ racialized interpretation of the women’s experiences—arguably itself a form of stereotype reconciliation—“tamed [researchers’] anxieties about race mixing and lesbianism,” allowing them to reassure themselves that imprisoned “white women were not really lesbians, for they were attracted to men, for whom Black women temporarily substituted.”¹³⁷

Familiar racialized gender tropes do not frame black women—or any women—as rapists, as they do black men. The notion that black male criminals—stigmatized inside and outside prison as hypermasculine rapists¹³⁸—might be sexually abused by law-enforcing women contravenes every intuition race and gender stereotypes have to offer. I do not argue here that the gender dynamics of sexual abuse by staff are the same in men’s and women’s prisons—or, for that matter, that they are different. The available evidence does not allow us to know what is really going on.

Still, in spite of mounting evidence of female perpetration, Janet Warren recently observed that “[r]esearch on male sexual activity in prisons has primarily focused on sexual coercion whereas the research on female sexual activity in prisons has primarily focused on consensual sex. . . . [I]t is difficult to determine whether these differences in research orientation reflect reality or whether they reflect researchers’ personal attitudes toward sex in prison.”¹³⁹ In this Part, I demonstrate that the gaps and elisions in prison rape discourse conform to conventional gender expectations by obscuring sexual abuse perpetrated by women. Moreover, scholars who acknowledge counter-stereotypical findings seem to rely on unexamined assumptions about romantic relationships to reconcile that abuse with conventional gender expectations.

136. *Id.* at 130. “The best predictor of women’s participation in homosexuality during incarceration, these investigators found, was previous homosexual experience,” contradicting researchers’ conclusions that women’s same-sex sex was “essentially heterosexual.” *Id.* at 131.

137. *Id.* at 29, 128.

138. See, e.g., GAIL BEDERMAN, *MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917*, at 45–76 (1995); Buchanan, *Our Prisons, Ourselves*, *supra* note 4; N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315 (2004).

139. WARREN REPORT, *supra* note 5, at 19.

A. Sexual Abuse by Inmates in Women's Prisons

Despite repeated and consistent survey findings that incarcerated women sexually victimize fellow inmates at much higher rates than men do,¹⁴⁰ academic and correctional literature on sex in women's prisons has tended to focus on consensual sex.¹⁴¹ Despite indications that sex among incarcerated women often involves "subtle coercion and cooptation, the fuzzy gray area between consensual and coerced sex inside of prison,"¹⁴² this literature tends to gloss over sexual coercion unless it is by male staff.

Recently, a few commentators have noted the BJS findings of women's disproportionate involvement as inmate perpetrators of sexual abuse, but they have not explored it. Dyan McGuire, for example, has noted, "While it has historically been assumed that female inmates were non-violent, recent empirical research documenting the existence of significant violence among female inmates makes continued belief in such assumptions untenable."¹⁴³ But McGuire does not analyze the role of gender expectations in obscuring this reality.¹⁴⁴ Just Detention International (JDI), likewise, recently noted that, "women and girls in detention frequently are [sexually] abused by other inmates."¹⁴⁵ However, JDI did not elaborate on the dynamics of this abuse, simply noting that inmate-on-inmate sexual abuse and sexual abuse against nonstraight and gender-nonconforming women were "trends that need to be further examined."¹⁴⁶

Conventional gender expectations do not predict that normal, feminine women would commit sexual abuse, although criminal women might be imagined to be more likely to deviate from that norm than (presumptively law-abiding) female staff are. Conventional gender stereotypes can be stretched to make sense of consensual sex between women inmates: By breaking the law, women prisoners

140. See *supra* note 44.

141. GAES & GOLDBERG, *supra* note 32, at 27; WARREN REPORT, *supra* note 5, at 19 (revealing that research on sexual activity in women's prisons has "primarily focused on consensual sex"); see also Joanna E. Saul, *Of Sexual Bondage: The "Legitimate Penological Interest" in Restricting Sexual Expression in Women's Prisons*, 15 MICH. J. GENDER & L. 349 (2009); Smith, *supra* note 45, at 233 (noting that prisoners' interest in sexual expression is a way to maintain their humanity and some control over a dehumanizing environment).

142. GAES & GOLDBERG, *supra* note 32, at 27; see also WARREN REPORT, *supra* note 5.

143. McGuire, *supra* note 105, at 147. While McGuire's study was primarily concerned with physical violence among women inmates, she noted "a gang rape where the victim was vaginally violated with a variety of instruments." *Id.* at 155.

144. McGuire's study of physical violence among women prisoners mentions only one example of sexual violence. *Id.*

145. JUST DETENTION INT'L, SUBMISSION TO SPECIAL RAPporteur, *supra* note 6, at 5.

146. *Id.* at 1.

have already transgressed traditional gender norms by acting in ways stereotypically associated with men. Their unfeminine criminal behavior is arguably consistent with the notion that such women might also transgress normative gender scripts by having sex with other women.¹⁴⁷ Conventional, heterosexist gender norms do not make it difficult to imagine that criminalized women might be lesbians.¹⁴⁸ Thus, stereotypical understandings do not require that sex among them would have to be forced.

Research touching on sexual abuse among women inmates seems to support the notion that sexual coercion among women is linked to emotional relationships. Nonetheless, the researchers who find that connection neglect or decline to explore it, echoing a longstanding legal tradition of treating relationship violence, and same-sex relationship violence in particular, as less worthy of legal attention or intervention than violence between strangers or platonic acquaintances.¹⁴⁹

Journalist Silja Talvi, for example, interviewed roughly half a dozen women prisoners who experienced pressure to enter a sexual relationship with either a female prison guard or a dominant inmate. Dominant prisoners, she notes, are usually known as “studs” or “aggressive butches,”¹⁵⁰ implying that straight-identified women are disproportionately at risk of sexual abuse by more masculine women. The BJS findings indicate, by contrast, that nonstraight women may be disproportionately victimized by both inmates and staff.¹⁵¹

147. See, e.g., Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 54–55 (1995) (explaining that unfeminine behavior and demeanor are stereotypically conflated with lesbian identity); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 235 (1994) (noting that “sex-inappropriateness and homosexuality[] are virtually interchangeable, and each is readily used as a metaphor for the other”); KUNZEL, *supra* note 133, at 134 (noting that twentieth-century prison sex researchers equated “butch” gender presentation with “natural” lesbian identity).

148. Thus, “lesbian” sex among incarcerated women is a recurrent theme of pornography and of sensationalistic B-movies featuring “obligatory group shower scenes and catfights” exploited for their appeal to a presumed male heterosexual audience. KUNZEL, *supra* note 133, at 138–48, 147.

149. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2150 (1996) (noting historical and contemporary resistance of police, prosecutors, and judges to treating wife beating as a crime); Michelle Aulivola, Note, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 167 (2004) (noting lesser protections accorded to lesbian and gay victims of partner violence); Satoko Harada, Comment, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing a Victim of Same-Sex Domestic Violence*, 41 U. BALT. L.F. 150 (2011).

150. TALVI, *supra* note 6, at 64.

151. The BJS *Former State Prisoners* report found that bisexual women reported significantly higher rates of sexual abuse by other inmates (about 18 percent) than either straight-identified or lesbian women (each about 13 percent). BECK & JOHNSON, *FORMER STATE PRISONERS*, *supra* note 8, at 16 tbl.8. Lesbian and bisexual women reported rates of sexual victimization by staff that were more than double the rates reported by straight-identified women: 8.0 percent for lesbians, 7.5 percent for bisexual

Although Talvi contends that “[w]hen it occurs, female-on-female assault should certainly be taken as seriously as any other type of assault,”¹⁵² she does not describe any such incidents. Instead, she urges, “[I]t must still be emphasized that the vast majority of sexual contact and overt sexual violence in women’s prisons happens when male correctional employees decide to exploit the gender and power differential inherent in a female custodial setting.”¹⁵³ By contrast, Talvi characterizes sexual relationships among prisoners as noncoercive, “tak[ing] the form of supportive camaraderie and intimacy, helping women to survive the prison experience.”¹⁵⁴ While relatively healthy, nonabusive relationships among inmates certainly provide support and comfort to the women who are in them, Talvi provides no information about the circumstances in which her respondents say they were sexually pressured by other women.

Several other commentators share this lack of curiosity about coercion in relationships between incarcerated women. The Owen Report, for example, found that accounts of sexual violence between female inmates were almost always grounded in “personal relationships, following the pattern of interpersonal violence in the community,”¹⁵⁵ but it offered few, if any, illustrations of relationship violence among inmates. In her study of the “inmate code” governing physical violence, Dyan McGuire found that her interview subjects thought that the “primary cause of violence” among incarcerated women was what McGuire called “violence associated with homosexual relationships.”¹⁵⁶ Nonetheless, she omitted relationship violence from her analysis of women inmates’ “normative code,” without explaining why.¹⁵⁷ Similarly, Janet Warren’s 2010 report (the Warren Report)

women, and 3.7 percent for heterosexual women. *Id.*; see also NPREC REPORT, *supra* note 1, at 74 (noting lesbian and bisexual inmates were overrepresented among sexual abuse victims, and that male staff may deliberately target nonstraight women for sexual abuse: NPREC reports that a staff rapist guard told a lesbian inmate she “need[ed] a good man” before raping her).

152. TALVI, *supra* note 6, at 65.

153. *Id.*

154. *Id.* at 64.

155. OWEN REPORT PART I, *supra* note 6, at 42.

156. McGuire, *supra* note 105, at 149.

157. She characterized her study as an effort to identify “the most commonly mentioned causes of violence that appeared to be associated with norms.” *Id.* at 154. Among her interviewees, she found that “Janice Joplin, for example, cited snitching as the primary cause of fights between inmates *after* violence associated with homosexual relationships.” *Id.* at 151 (emphasis added). “Siobhan suggested that *aside from* violence associated with homosexual relationships,” disrespect was also a factor. *Id.* at 149 (emphasis added). Another inmate, Maria, said that “failure to pay for drugs was the primary cause of violence in her prison *aside from* violence associated with homosexual relationships.” *Id.* at 152 (emphasis added). Owen found that women in prison will not intervene in relationship violence—surely a cultural norm that contributes to the persistence of such violence. See OWEN REPORT PART I, *supra* note 6, at 39.

found that sexual behavior in men's and women's prisons—whether predatory, victimized, bartered, or consensual—was associated with what she characterizes as “engagement in a turbulent set of interpersonal relationships that are sexual, aggressive, and occasionally violent.”¹⁵⁸ The finding that relationships among incarcerated women may be more violent and less consensual than stereotype would predict deserves more systematic exploration than it has received so far.

B. Sexual Abuse of Male Inmates by Women Staff

Sex between women staff and incarcerated men is almost entirely absent from prison rape discourse. Many researchers and advocates note that staff members may be *complicit* in sexual abuse by male inmates,¹⁵⁹ and many articles on inmate-on-inmate rape offer some brief discussion of sexual abuse committed by staff, but the staff perpetrators who are described in these accounts are almost always male.¹⁶⁰

For several years, scholars, advocates, and correctional administrators have had access to information that suggested that women might be the usual perpetrators of sexual abuse in men's prisons. For example, in spite of stereotypical expectations, correctional authorities investigating allegations of prison rape have often found more “substantiated” cases involving female than male staff; national data to this effect have been publicly available since 2005.¹⁶¹ Correctional

158. WARREN REPORT, *supra* note 5, at 30.

159. *See, e.g.*, ACLU National Prison Project and ACLU of Southern California, *supra* note 4, 3–8, 16 (reporting on staff perpetration of physical violence and staff facilitation of sexual violence by inmates, but citing only one example of staff perpetration of sexual violence); HUMAN RIGHTS WATCH, *supra* note 4; NPREC REPORT, *supra* note 1, at 46, 69–70, 78–79, 125–26, 129; STOP PRISONER RAPE, STORIES FROM INSIDE, *supra* note 6, at 8 (“Although there are many different prisoner rape scenarios, a majority of male victims are assaulted by one or several fellow inmates, often with the complicity of corrections staff.”); Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79—the Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 150 (2006) (“[S]ome officers were less likely to respond to incidents involving homosexual victims, or involving apparently consensual acts. Some officers even believed that certain inmates deserved to be raped.” (footnote omitted)); Helen M. Eigenberg, *Prison Staff and Male Rape*, in PRISON SEX: PRACTICE AND POLICY 49, 50 (Christopher Hensley, ed., 2002) (characterizing staff as part of the prison rape problem because they facilitate rape by other inmates, and stigmatize the victims); SpearIt, *supra* note 129; *supra* note 4 and accompanying text.

160. *See supra* note 4.

161. A 2004 BJS survey of correctional administrative records revealed surprisingly high levels of female perpetration in allegations of staff sexual misconduct that prison investigators found to be “substantiated.” ALLEN J. BECK & TIMOTHY A. HUGHES, NCJ 210333, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 8 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca04.pdf> (noting that in state prisons, 67 percent of “substantiated” perpetrators of staff sexual misconduct were female, and 69 percent of “substantiated” victims were male, although in jails, “substantiated” cases of staff sexual misconduct were overwhelmingly male-on-female);

administrators, scholars and other commentators would not necessarily infer that a gender imbalance in the minority of incidents that prison officials hear about and deem to be “substantiated” would indicate much about the underlying incidence of sexual abuse.¹⁶² But since the publication of the first methodologically rigorous victimization surveys in 2007 and 2008, the results have consistently pointed to women staff as the main perpetrators of sexual victimization in jails and prisons for men.¹⁶³ Still, until Brenda Smith’s article in this symposium, only one law review article, a student note, has focused primarily on sexual victimization perpetrated by female staff.¹⁶⁴ Instead, when researchers encounter surprising, counter-stereotypical results, their explanations reveal interpretive tendencies that reconcile those results with stereotypical expectations.

The first such interpretive impulse is to ignore or dismiss the findings. Human Rights Watch, for example, has issued two reports on sexual abuse by staff in women’s prisons and one on sexual abuse by inmates in men’s prisons,¹⁶⁵ but none on sexual abuse by staff in men’s prisons, or on sexual abuse perpetrated by women (inmates or staff). In the preface to a 2001 report on men’s prisons, it expressed some skepticism about male inmates’ allegations of sexual abuse by staff: “As to custodial sexual misconduct against male prisoners, we decided not

see also BECK & HARRISON, CORRECTIONAL AUTHORITIES, 2005, *supra* note 69, at 1 (similar); BECK ET AL., CORRECTIONAL AUTHORITIES, 2006, *supra* note 69, at 7 (similar); GUERINO & BECK, CORRECTIONAL AUTHORITIES, 2007–2008, *supra* note 69, at 9 tbl.7 (similar).

162. *But see* Teichner, *supra* note 6, at 280–81 (drawing this inference based on the 2006 report, BECK ET AL., CORRECTIONAL AUTHORITIES, 2006, *supra* note 69, and arguing for greater attention to female-perpetrated staff sexual abuse in men’s prisons). In general, though, prison sexual abuse is widely acknowledged to be underreported. *See, e.g.*, NPREC Report, *supra* note 1, at 102, 118; *see also supra* notes 65–70 and accompanying text. Of the allegations that prison staff do receive, only a tiny percentage—often, less than 15 percent—are deemed by investigators to be “substantiated.” Prison officials deem most prisoner allegations of sexual abuse to be either “unsubstantiated” (unproven), or “unsubstantiated” (false), if they complete their investigations at all. *See, e.g.*, GUERINO & BECK, CORRECTIONAL AUTHORITIES, 2007–2008, *supra* note 69, at 5 tbl.5; BECK ET AL., CORRECTIONAL AUTHORITIES, 2006, *supra* note 69, at 3 tbl.2; BECK & HARRISON, CORRECTIONAL AUTHORITIES, 2005, *supra* note 69, at 3. NPREC reports that substantiation rates in some prison systems are even lower. NPREC REPORT, *supra* note 1, at 117–18. NPREC attributes low substantiation rates to administrative shortcomings and well-founded prisoner fears of exposure and retaliation, adding that there is “no reason to believe” that low substantiation rates reflect a high level of false reporting of sexual abuse. *Id.* at 118. Thus, the BJS reports caution that counts of reported or “substantiated” incidents “reflect variations in definitions, reporting capacities, and procedures for recording allegations, as opposed to differences in the underlying incidence of sexual victimization.” GUERINO & BECK, CORRECTIONAL AUTHORITIES, 2007–2008, *supra* note 69, at 2.

163. *See supra* notes 40–41.

164. *See* Teichner, *supra* note 6.

165. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, *supra* note 6; HUMAN RIGHTS WATCH, NO ESCAPE, *supra* note 4; HUMAN RIGHTS WATCH, NOWHERE TO HIDE, *supra* note 6.

to include that topic within the scope of this report even though some prisoners who claimed to have been subject to such abuse did contact us. An initial review of the topic convinced us that it involved myriad issues that were distinct from the topic at hand, which is complicated enough in itself.¹⁶⁶ In response to its notices seeking input from prisoners, no women alleged sexual abuse by other inmates. Human Rights Watch concluded, “If the problem of prisoner-on-prisoner sexual abuse exists in women’s institutions—a possibility we do not exclude—it is likely to take somewhat different forms than in men’s prisons.”¹⁶⁷ In spite of the release of survey findings confirming the prevalence of these counter-stereotypical forms of prison sexual violence over the past five years, Human Rights Watch has not yet investigated them.

More recently, a few commentators have acknowledged the BJS findings that women staff may be having sex with incarcerated men. Robert Dumond, for example, notes that “the large number of female prison staff responsible for staff sexual misconduct against male inmates” offers “much food for thought,”¹⁶⁸ but, like other observers, offers no analysis of this phenomenon.¹⁶⁹

A second interpretive impulse that tends to reconcile unexpected findings with gendered expectations is to doubt the survey results. The BJS’s initial response to its counter-stereotypical findings about staff sexual abuse was to question them. It reported on the 2007 NIS:

Nearly 62% of all reported incidents of staff sexual misconduct involved female staff with male inmates; 8% involved male staff with female inmates. Female staff were involved in 48% of incidents reported by male inmates who said they were unwilling and in 79% of incidents with male inmates who said they were willing. In an effort to better understand the allegations of staff sexual misconduct, the 2008 NIS will include questions to determine how often sexual contact reported as unwilling occurred in the course of pat downs or strip searches.¹⁷⁰

Could male prisoners be reporting routine physical or strip searches as sexual misconduct?¹⁷¹ The results of the most recent BJS survey suggest that this does

166. HUMAN RIGHTS WATCH, NO ESCAPE, *supra* note 4, at xvi.

167. *Id.* at xvii.

168. Dumond, *supra* note 159, at 158.

169. *Id.*; see also JUST DETENTION INT’L, *supra* note 26; Thompson, *supra* note 4, at 133–34.

170. BECK & HARRISON, LOCAL JAILS, *supra* note 8, at 7.

171. The forms of pat, strip, and body searches that are routinely used in U.S. prisons are excluded by the BJS from its definition of staff sexual misconduct, even though they involve touching that can fairly be regarded as degrading and sexually abusive. See *supra* note 31.

not account for the unexpected findings. In the second NIS, as in the first, male inmates continued to report disproportionate rates of sexual misconduct by female staff, and it was not confined to authorized physical searches. While about 40 percent of male and female victims reported that staff had touched them sexually during a “pat down” (physical search) or strip search, 86 percent of male victims (and 91 percent of female victims) reported sexual touching by staff outside the context of strip or physical search.¹⁷² The BJS reported these findings without comment, but presented them under the heading, “Reports of staff sexual misconduct were linked to strip searches and pat downs.”¹⁷³

Similarly, Dyan McGuire acknowledged the BJS finding that “male inmates are at substantial risk of sexual exploitation by female correctional personnel,”¹⁷⁴ but she reframed the findings in accordance with conventional gender expectations that sexual abuse of men by women is neither likely nor harmful. She cautions that it would be “misleading” to read the BJS data as “impl[ying] that the abuse of male inmates by female guards is a larger or more serious problem than the abuse of female inmates by male guards.”¹⁷⁵ She characterizes women guards’ sexual abuse of male inmates as “qualitatively different” and less serious than sexual abuse of women inmates by male guards, which she characterizes as “confirmed instances of serious rape or forcible sexual assault.”¹⁷⁶ She speculates that sexual abuse by women staff may be overreported,¹⁷⁷ and she claims that male inmates allege minor indignities such as “inappropriate viewing and other ‘passive’ sexual impositions” (even though the BJS surveys ask only about sexual abuse that involves touching).¹⁷⁸ Her only example of a male inmate’s allegation of sexual abuse by female staff is a frivolous claim that “sought to have the federal court fire all of the female guards at his prison alleging that their presence encouraged sexual misconduct by inmates and male guards.”¹⁷⁹ Ignoring the BJS findings that male inmates say they have been forced, pressured, and injured by staff sexual

172. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 24 tbl.19.

173. *Id.* at 24.

174. M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428, 434 (2010).

175. *Id.*

176. *Id.* at 434–35.

177. *Id.* at 434 (“[G]iven the reality of patriarchy in our society, male inmates tend to be far more willing to complain and seek legal redress against female guards than female inmates are against male guards [so that] a larger proportion of female-perpetrated offenses probably make it into the BJS data.”).

178. *Id.* at 435.

179. *Id.*

assailants, McGuire claims that allegations of “rapes or other serious assaults by female guards against male inmates are exceedingly rare, if not non-existent.”¹⁸⁰

A third way some commentators have reconciled sexual abuse by women staff with gendered expectations is to reframe it as consensual sex. As noted in Part II, when male correctional officers have unforced sex with women prisoners, many commentators are quick to point out that the sexual relationship is inherently coercive, as well as illegal.¹⁸¹ For example, NPREC describes a situation in which a male parole officer visited a parolee “to discuss her failure in a drug treatment program, [and] instead requested and had sex with her.”¹⁸² NPREC then points out that parolees are especially vulnerable to correctional exploitation, as they are “typically desperate to avoid being incarcerated.”¹⁸³ “Staff may explicitly or implicitly threaten to revoke an offender’s community status and return them to prison or jail by falsely reporting that the offender has not complied with the terms and conditions of their release,” the NPREC points out, and there are no witnesses.¹⁸⁴

180. *Id.* The results of the second NIS discussed in Part I, *supra*, were likely not available at the time McGuire’s summer 2010 article was being written, and the December 2007 BJS report on the NIS that McGuire cites (BECK & HARRISON, PRISONS, *supra* note 11) does not provide any detail about its findings of staff sexual victimization. Another, more detailed BJS report on the first NIS was available at the time, but McGuire did not cite it: BECK & HARRISON, LOCAL JAILS, *supra* note 8, was published in June 2008. The findings of the 2008 report omitted from McGuire’s article might have raised questions about her characterization of men’s allegations of staff sexual victimization by women as mere complaints of “inappropriate viewing and other ‘passive’ sexual impositions,” not “rapes or other serious assaults.” This survey report found that large numbers of victims reported forcible compulsion by staff: 24.6 percent of victims of staff sexual victimization reported being threatened with harm or a weapon; 22.1 percent were offered protection against other inmates; 15.0 percent were physically held down or restrained, and 11.4 percent said they were physically harmed or injured. *Id.* at 7 tbl.8. Even larger proportions reported nonforcible forms of sexual coercion by staff perpetrators: 52.1 percent of victims of staff sexual victimization said they were bribed or blackmailed, and 24.7 percent reported being given drugs or alcohol to secure their compliance. *Id.*

The omitted 2008 BJS report did not break down these findings by gender of victim or staff perpetrator, but since nearly 90 percent of respondents who reported staff sexual victimization were men, and the sexual activity they reported was overwhelmingly cross-gender (61.5 percent of all victims were men reporting sexual activity with female staff; another 13.1 percent were men alleging sexual activity with both female and male staff), it is likely that the overall patterns reported by BJS were influenced most heavily by reports of sex between female staff and incarcerated men. It seems unlikely, though not impossible, that the relatively small numbers of male-on-female and male-on-male staff sexual victimization could have accounted for all the force and coercion reported to BJS surveyors: 7.7 percent of all victims were women reporting sexual activity with male staff, and another 1.5 percent were women alleging sexual activity with both male and female staff. 14.4 percent of all victims were men reporting sexual activity exclusively with male staff, and 13.1 percent were men reporting sexual activity with both male and female staff. *Id.*

181. See *supra* note 101 and accompanying text.

182. NPREC REPORT, *supra* note 1, at 167–68.

183. *Id.* at 168.

184. *Id.*

By contrast, when the NPREC describes a situation in which “two women officers were arrested for having sexual relations with a man on house arrest,” it notes cautiously that although state law and corrections policy both “deemed the women officers to have supervisory authority,” it was “unclear if either woman had actual supervisory authority over the man.”¹⁸⁵

Some researchers and correctional authorities have succumbed more fully to stereotype, reconciling their findings with conventional gender expectations by characterizing sex between female staff and male inmates as “romantic.” For example, in an early special report pursuant to the PREA, a 2005 nationwide survey of administrative records of prison rape, the BJS featured a headline on the first page: “Half of inmate-on-inmate sexual violence involved physical force or threat of force; two-thirds of staff misconduct was romantic.”¹⁸⁶ This characterization suggested that, while inmate-on-inmate sexual abuse was often violent, staff-inmate sex was generally quite pleasant.

The findings of this survey, however, were more nuanced than the headline suggests. The two-thirds figure applied only to the less than 15 percent of staff sexual misconduct allegations that prison investigators found to be “substantiated.”¹⁸⁷ Moreover, the characterization of staff-inmate sex as “romantic” reflected judgments by staff investigators, not necessarily by the inmates involved.¹⁸⁸

In response to criticism, the BJS wisely rejected this characterization the following year: “To address concerns about the reporting and interpretation of data in the 2005 survey, BJS changed the item related to the nature of the incidents in 2006. The option ‘*Romantic*’ was replaced by ‘*Sexual relationship between inmate and staff appeared to be willing*.’ The options ‘*Other*’ and ‘*Level of coercion unknown*’ were added.”¹⁸⁹ Patricia Caruso, a Director of the Michigan Department of Corrections who was appointed after a federal investigation and settlement of a class action against the Department, also challenges the characterization of staff-inmate sex as romantic or consensual:

“I know that sometimes people feel that parties may be in love or that it is ‘consensual.’ There may be things in the world that fit that criteria. In prison they do not. . . . For a long time, it was more acceptable for

185. *Id.* at 167.

186. BECK & HARRISON, CORRECTIONAL AUTHORITIES, 2005, *supra* note 69, at 1.

187. *Id.* at 9. No comparative statistics were provided for the approximately 85 percent of sexual abuse allegations received by prison staff which were deemed to be “unsubstantiated” or “unfounded.”

188. “In two-thirds of these incidents, correctional authorities determined that staff had a romantic relationship with the inmate.” *Id.* at 9 (citation omitted).

189. *Id.* at 6.

women [than men] to resign and go on with their life. That is not acceptable in this department.”¹⁹⁰

Nonetheless, official and academic commentators persist in characterizing nonforcible staff-on-inmate sex as “romantic” or harmless, especially when women are the perpetrators. In 2010, for example, the Warren Report cited the BJS’s 2005 “romantic” characterization in justifying their decision to count inmate reports of unforced, unbartered sex with staff as “consensual,” even though it is illegal.¹⁹¹ Similarly, in 2010, the Review Panel on Prison Rape responded to the BJS National Youth Survey’s finding that 95 percent of staff sexual abusers were women by asking, “What are the factors that lead female staff to become involved emotionally or sexually with male juveniles?”¹⁹² Articles about sexual abuse of women inmates by male staff, by contrast, tend not to assume that male staffers’ sex with women inmates is necessarily linked to romantic interest or emotional involvement. On the contrary, commentators tend to portray male staff sexual abusers as uncaring.¹⁹³

In 2008, the Department of Justice (DOJ) identified eight “common characteristics of staff perpetrators of jail rape,” which included “Romantically Attracted to Inmate (More Likely to be Female Officer).”¹⁹⁴ In identifying this risk factor, the DOJ relied exclusively on the testimony of correctional administrators from the two jails with the highest and the third-highest surveyed rates of staff-on-inmate sexual victimization in the United States.¹⁹⁵ It is possible that administrators at facilities with high rates of staff-on-inmate victimization are particularly well placed to identify the characteristics of staff who are likely to sexually abuse inmates. On the other hand, it may be that in institutions where administrators believe that staff-on-inmate sex is often “romantic,” it is more likely to occur.

190. NPREC REPORT, *supra* note 1, at 120 (alterations in original) (some internal quotation marks omitted).

191. Warren argues that this characterization is “supported by the research published by the BJS which identifies two thirds of the staff on inmate incidents as being romantic in nature.” WARREN REPORT, *supra* note 5, at 72 (citation omitted). The citation referenced in Warren’s text, *Correctional Authorities, 2006*, does not support her characterization. Since that citation is printed twice in the bibliography, it seems that this is a typographic error, and that Warren intended to refer to *Correctional Authorities, 2005*, which does support this claim.

192. U.S. DEP’T OF JUSTICE, REVIEW PANEL ON PRISON RAPE, REPORT ON SEXUAL VICTIMIZATION IN JUVENILE CORRECTIONAL FACILITIES 35 (2010), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/panel_report_101014.pdf.

193. See, e.g., RATHBONE, *supra* note 6, at 65.

194. U.S. DEP’T OF JUSTICE, REVIEW PANEL ON PRISON RAPE, REPORT ON RAPE IN JAILS IN THE U.S. 10–11 (2008), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_final_report_081229.pdf.

195. *Id.* at 4–5, 11 n.44.

While nonforcible sex between male staff and female inmates is more readily characterized as abusive,¹⁹⁶ conventional gender stereotype can frame women staff as vulnerable to male inmates, rather than the other way around. The U.S. Supreme Court predicted in 1977 that sex offenders and “other inmates, deprived of a normal heterosexual environment, would assault women guards because they [are] women.”¹⁹⁷ More recently, the Warren Report, which treats unforced, unbartered sex between staff and inmates as “consensual,”¹⁹⁸ presented its counter-stereotypical finding that male inmates reported much more sex with staff than women inmates did¹⁹⁹ as evidence that male inmates must have been sexually exploiting women guards, rather than the other way around: “These gender differences . . . underscore the particular vulnerability of female correctional officers to becoming sexually involved with male inmates.”²⁰⁰

Of course, incarcerated men—or women—may seek to exploit sexual relationships with staff “to obtain drugs; use unmonitored phones; communicate with other prisoners while in isolation; learn sensitive information about other prisoners, such as who may be acting as an informant; or access information that could help them escape.”²⁰¹ But although women prisoners’ sexual trades are often framed as exploitation by male staff,²⁰² men prisoners’ sexual trades are more readily framed as security threats. Thus Patricia Caruso, in her effort to “strictly prohibit” sex between female staff and male inmates in Michigan, seems to find it necessary to deploy stereotypes of dangerous, threatening masculinity in order to get prosecutors to take such cases seriously. In her testimony before the NPREC, she stressed the importance of “educating prosecutors and juries about how female staff have helped male prisoners escape, brought dangerous contraband into the facility, and put other prisoners’ lives in danger by sharing confidential information.”²⁰³

The fixity of the notion that men dominate women, and not the reverse, persists even when the sexual misconduct involves an adult woman guard and an incarcerated boy. For example, a 2010 report of the Review Panel on Prison Rape

196. See *supra* notes 101, 181–185 and accompanying text.

197. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977).

198. See *supra* note 191.

199. WARREN REPORT, *supra* note 5, at 25 (finding that 24 percent of male respondents reported “consensual” noncontact sexual interaction with staff, and 17 percent reported “consensual” contact sexual interaction with staff, compared to 14 percent and 3 percent among women respondents, respectively).

200. *Id.*

201. NPREC REPORT, *supra* note 1, at 123.

202. See *supra* note 101.

203. NPREC REPORT, *supra* note 1, at 120.

noted the “high incidence of female staff having inappropriate sexual encounters with male youth offenders,” and it identified “two competing narratives that try to make sense of the data.”²⁰⁴ Both of these narratives frame female correctional officers as emotionally vulnerable to sexual exploitation by sex-hungry criminalized male youth. “One narrative is that sophisticated older youth manipulate young, vulnerable female staff into emotional relationships that evolve into sexual ones. The other narrative is that female staff members who are unable for a variety of reasons to build satisfying personal relationships with men gravitate, by design or by default, to juvenile facilities, where they find young men who are only too ready under the circumstances to enter into relationships with them that have a sexual component.”²⁰⁵ The notion that men (and boys) are threats to women, and that women are not threats to them, is strong enough to overcome not only the power disparity between staff and inmates, but also the disparity between adults and children in their custody.

Women correctional officers are alert to male inmates’ attempts to “con” them into providing sex or contraband by flirting with them.²⁰⁶ The Office of Inspector General, for example, reports a case in which a federal prisoner “seduced the female Executive Assistant because the inmate was the leader of a gang and was looking for an edge in the power struggle with other inmate gangs. The inmate had reported the relationship to authorities in hopes of having his sentence reduced.”²⁰⁷ Moreover, male inmates are reported to sexually harass women staff by masturbating in front of them.²⁰⁸ These realities offer some plausibility to the conventional gendered account of sex between incarcerated men and female guards.

It is also possible that male survey respondents may be lying about sex with female guards. Such an explanation would require some theory as to why they are more likely to lie about sex with women officers than with male officers or inmates, and more likely than women inmates to lie about cross-gender sex with officers. Conventional understandings of gender could provide one such account: Male inmates might fabricate accounts of sex with women staff to aggrandize their masculinity to surveyors, to others in the prison, or to themselves. They might be more willing to disclose sex with female staff than with male staff because it bolsters

204. U.S. DEP’T OF JUSTICE, *supra* note 192, at 35.

205. *Id.*

206. DANAM. BRITTON, AT WORK IN THE IRON CAGE: THE PRISON AS GENDERED ORGANIZATION 138 (2003).

207. OFFICE OF THE INSPECTOR GEN., *supra* note 6, at 6 (footnote omitted).

208. *See* BRITTON, *supra* note 206, at 139–43.

their heterosexual identity, or because they think that the lower status of women officers means that allegations against them are more likely to be believed.²⁰⁹

If conventional gender expectations do not explain the entire disparity, though, another fairly obvious explanation of these counter-stereotypical findings might be that women staff members are actually more likely than men to take sexual advantage of prisoners in their custody. Further research is needed to assess what is happening between women staff and male inmates, but it has not yet been done.

IV. RACE AS STEREOTYPE RECONCILIATION: SEXUAL ABUSE AMONG MEN

As noted above, the discourse of prison rape highlights race in men's prisons, but tends to disregard it in discussions of sexual abuse in prisons for women. The notion of stereotype reconciliation may account for the striking disparity in discursive attention to race in the two contexts.²¹⁰ As shown in Parts II and III, interpretive conventions in prison rape discourse tend to highlight and normalize a heterosexist understanding of sexuality by which males and the masculine dominate females and the feminine. Conventional gender norms supply an intuitive explanation for the sexual vulnerability of women prisoners to male staff, while heterosexist cultural notions about romance and relationship seem to help reconcile women's perpetration of sexual abuse to conventional gender expectations. These cultural intuitions are less useful for stereotype reconciliation of sex among men: Male prisoners are stereotyped as hypermasculine,²¹¹ and a central feature of conventional masculine identity is that it is neither feminine nor gay.²¹² The notion that male inmate rapists are black and their victims are white helps to frame some incarcerated men as vulnerable, reconciling the notion of male victimization to stereotypes that masculine men are perpetrators and not victims.

209. McGuire, *supra* note 174, at 434 (incorrectly attributing this argument to Buchanan, *Impunity*, *supra* note 6).

210. I have argued previously that the discursive focus on black-on-white sexual assault is unwarranted by the empirical data. See Buchanan, *Our Prisons, Ourselves*, *supra* note 4; Buchanan, *E-race-ing Gender*, *supra* note 4.

211. "Popular representations and cultural stereotypes of prisoners as large, menacing Black men or as muscular, tattooed Latinos feed conceptualisations of aggressive masculinity that must be contained within prison walls." Cassandra Shaylor, *Neither Kind Nor Gentle: The Perils of 'Gender Responsive Justice,'* in *THE VIOLENCE OF INCARCERATION* 145, 154 (Phil Scraton & Jude McCulloch eds., 2009); see also Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 76; Harris, *supra* note 119.

212. See, e.g., DOWD, *supra* note 17, at 62 ("The two most common pieces defining masculinity are, at all costs, not to be like a woman and not to be gay."); see also Michael S. Kimmel, *Masculinity as Homophobia*, in *RECONSTRUCTING GENDER: A MULTICULTURAL ANTHOLOGY* 103 (Estelle Disch ed., 3d ed. 2003); Koppelman, *supra* note 147.

Conventional gender stereotype cannot readily make sense of the notion that hypermasculine, nonwhite male criminals might seek consensual sex with each other—that is, that black or Latino tough guys might like men.²¹³ On the other hand, the stereotype of prisoners as violent black murderers and rapists makes it relatively easy to envision that a “dark abyss of sexual predation . . . pervades the culture of men’s prisons.”²¹⁴ Thus historian Regina Kunzel notes that, since the 1970s, academic research on sex in men’s prisons has focused on rape and disregarded consensual sex, to the point that rape has become the “primary” representation of male prison sex.²¹⁵

Most literature on sexual abuse in men’s prisons acknowledges that transgender and gay inmates, those who have been previously victimized, and other men who are considered weak or effeminate face high risk of sexual victimization.²¹⁶ Prison rape scholars tend to treat the vulnerability of these inmates as a given that does not need to be explained.²¹⁷ As Sharon Dolovich observes, “in th[e] hypermasculine culture [of Los Angeles County Men’s Central Jail], gay men and trans women are regarded as female *by definition* and are thus automatic targets for sexual assault . . . This is true even for those gay men who take the dominant sexual role in their consensual sexual relationships.”²¹⁸ Thus prison populations are stereotyped as containing a large number of hypermasculine nonwhite men and a smaller group of vulnerable, effeminate inmates.

213. Robinson, *supra* note 4, at 1344–45 (explaining that low-income black and Latino men do not fit the culturally white schema for gay identity applied for admission to the segregated gay and transgender unit at the Los Angeles Men’s County Jail).

214. Miller, *supra* note 4, at 299.

215. KUNZEL, *supra* note 133, at 188–89; see AULI EK, RACE AND MASCULINITY IN CONTEMPORARY AMERICAN PRISON NARRATIVES 66 (2005); GAES & GOLDBERG, *supra* note 32, at 27; WARREN REPORT, *supra* note 5, at 87 (noting that prior to 2002, only six studies had investigated consensual sex among male inmates).

216. See, e.g., FLEISHER & KRIENERT, *supra* note 4; JUST DETENTION INT’L, *supra* note 26; Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 11; Ristroph, *supra* note 4, at 158–59; Robinson, *supra* note 4; U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, *supra* note 4, ¶¶ 32, 34.

217. See, e.g., JUST DETENTION INT’L, *supra* note 26; Capers, *supra* note 4; Ristroph, *supra* note 4. *But cf.* NPREC REPORT, *supra* note 1, at 73 (attributing the targeting of gay, bisexual, and transgender inmates to the fact that “[m]en’s correctional facilities tend to have very rigid cultures that reward extreme masculinity and aggression and perpetuate negative stereotypes about men who act or appear different,” and noting that staff often erroneously assume that gay or presumed gay inmates consent to sexual abuse). As Jeannie Suk explains, the removal of (presumptively vulnerable) gay and transgender inmates, and not others, from a general population characterized by pervasive physical and sexual violence, redistributes the risk of rape from nonstraight inmates to other vulnerable inmates, without articulating a defensible reason as to why it is preferable that straight-identified, rather than gay or transgender inmates, should be subjected to this risk. Suk, *supra* note 4, at 114–15.

218. Dolovich, *supra* note 4, at 18 (footnote omitted).

Accordingly, as with sexual violence in women's prisons, prison rape discourse tends to address the sexual abuse of gay and transgender inmates in ways that are attentive to gender, but are not usually integrated with a critical race analysis.²¹⁹ With the important exceptions of Russell Robinson and Julia Oparah,²²⁰ academic research that addresses the sexual abuse of gay and transgender inmates tends to not analyze it in terms of racialization.²²¹ Gay and transgender identity is stereotypically marked as white.²²² Even straight-identified white men are stereotyped as effeminate by comparison with black criminals.²²³ Racial stereotype can fill in the gaps for which gender stereotype cannot account.

Like criminals, male prison guards are stereotyped as hypermasculine,²²⁴ but unlike most prisoners, they are not necessarily stereotyped as nonwhite. Their identity as law enforcers confers upon their violence a legitimacy that is not accorded to violence by inmates.²²⁵ Academic or correctional discussion of sexual abuse by staff, whether in men's or women's prisons, generally does not address the staff member's race, perhaps in part because no BJS data is available about the race of

219. See, e.g., Arkles, *supra* note 4; Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599 (1998); Richael Faithful, (*Law*)*Breaking Gender: In Search of Transformative Gender Law*, 18 AM. U. J. GENDER SOC. POL'Y & L. 455 (2010); Rosenblum, *supra* note 12 (focusing on issues of gender placement, medical treatment for gender identity disorder, and segregation of transgender inmates); Sydney Tarzwell, Note, *The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2006). *But see* Oparah, *supra* note 4; Julia Sudbury, *Maroon Abolitionists: Black Gender-Oppressed Activists in the Anti-Prison Movement in the U.S. and Canada*, MERIDIANS, Spring 2009, at 1.

220. Robinson, *supra* note 4; Oparah, *supra* note 4.

221. Sharon Dolovich, for example, describes the gay- and trans-friendly atmosphere of K6G in nonracial terms, and contrasts it with the racialized violence and gang politics of the general population, which she describes as "a notoriously volatile and even dangerous institution in which severe over-crowding, coupled with racial divisions imposed and rigidly policed by the prisoners themselves, frequently leads to riots or other forms of violence." Dolovich, *supra* note 4, at 20 (footnotes omitted); *see also id.* at 11–19, 48–54.

222. Robinson, *supra* note 4, at 1315.

223. See BEDERMAN, *supra* note 138, at 86; Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 784 (2000).

224. Dana Britton asks,

Imagine a prison guard. Whom do you see? If you are like most people, the vision in your mind's eye is probably that of a hulking man in uniform carrying a nightstick or even a gun. Perhaps you imagine him as brutal and sadistic; at the very least, you see someone who would be able to deal easily with unruly inmates, to meet violence with violence, to "bang heads" if necessary.

BRITTON, *supra* note 206, at 1.

225. See Buchanan, *Our Prisons, Ourselves*, *supra* note 4, at 44 (noting that lawbreaking and law enforcement are both stereotyped as hypermasculine, but only law-enforcing violence is socially legitimized); Harris, *supra* note 223, at 780 (arguing that both lawbreaking and law-enforcing violence are gendered practices which are used to demonstrate "the perpetrator's manhood").

staff perpetrators. Conventional stereotype does not readily accommodate the possibility that male prison inmates might be especially vulnerable to rape by their keepers, nor that staff would be unusually inclined to commit it. Where, as with sexual abuse of male inmates by staff, widely held cultural intuitions (such as race or romance) do not help to reconcile sexual abuse with conventional gender expectations, the abuse is largely ignored. I have been able to find no article that focuses primarily on the sexual abuse of male inmates by staff.

Moreover, maleness, prior sexual victimization, black racial ascription, and (in prisons, but not in jails) nonstraight sexual orientation are all significant predictors of sexual victimization by staff.²²⁶ It thus seems that male victims of staff sexual abuse may disproportionately be (or be seen as) weak, gay or effeminate black men. These data are in many ways inconsistent with racialized gender stereotypes that frame black criminals as violent and threatening, and raise many questions that researchers and commentators have not answered. Who is doing what to whom? Within men's or women's prisons, are the victims of male perpetrators similar to victims of female perpetrators? Do their abusers target them for similar reasons? Stereotype might suggest that male staff would target less masculine victims, while female staff might have "romantic" liaisons with more masculine male prisoners—or be conned into sex with them. But we cannot assess these stereotypical intuitions against reality until researchers, advocates, and correctional observers uncover more information about the counter-stereotypical abuses that have yet to be thoroughly investigated.

CONCLUSION

The prominence of race in the discourse of male inmate rape, and its absence from discourse about other forms of prison sexual abuse, highlights the degree to which conventional gender expectations establish the priorities and boundaries of prison rape discourse. When male correctional officers sexually abuse female inmates, conventional gender expectations can make sense of the abuse without supplementation by other cultural tropes: Where race and romance are not useful, they are not prominent. On the other hand, race is especially salient in prison rape discourse where it is helpful in reconciling sexual abuse with conventional gender expectations. By contrast, neither racial tropes nor heterosexist assumptions about romance can easily reconcile women employees' sexual abuse of male inmates with

226. BECK & HARRISON, PRISONS AND JAILS, *supra* note 2, at 91 app. tbl.10.

conventional gender expectations. In prison rape discourse, male inmates' self-reported vulnerability to female staff is largely ignored—even though it seems to be the most common form of prison sexual abuse.

Victimization survey data raise questions about gendered understandings of prison rape, but they cannot answer them. It is, as yet, impossible to know how the dynamics of women's sexual abuse of inmates (of either gender) differ from sexual abuse perpetrated by men. The dearth of qualitative investigation and critical analysis leaves little empirical knowledge to guide policy intervention. The gaps and elisions of prison rape discourse leave policymakers with little to rely on apart from common-sense intuitions, which, judging from the current state of the discourse, are likely to be both stereotypical and inaccurate.

Since the body of knowledge about prison rape conforms closely to racialized gender expectations, it presents a real risk that policy solutions may reflect a bias toward addressing sexual harms that conform to gender stereotype, and disregarding the sexual harms that defy understanding in conventional gendered terms. A fuller exploration of the policy effects of this stereotype-conforming bias is beyond the scope of this Article, but I conclude with a few observations about some of them. Many policy proposals rely on gendered tweaks to carceral business as usual, based on unexamined assumptions that only women and effeminate men need protection, and that only masculine staff and inmates pose a sexual threat. For example, policy reforms designed to address staff sexual abuse tend to focus on the gendered assignment of search and surveillance responsibilities among staff, on the assumption that male staff pose the greatest risk to incarcerated women.²²⁷ Similarly, many reformers and correctional administrators have recommended the segregation of gay and transgender inmates into protective housing within men's jails and prisons.²²⁸ This could arguably help to protect

227. See *supra* note 96 and accompanying text; see also National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,310 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115) (allowing cross-gender searches of male inmates, but not female inmates).

228. For example, although NPREC recommended against automatic segregation of inmates based on their sexual orientation, gender identity or genital status, see NPREC REPORT, *supra* note 1, at 80, the Department of Justice proposed in its February 2011 draft PREA regulations that institutions be permitted to do this. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6257 (Feb. 3, 2011), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf. Fortunately, the 2012 final rules forbid institutions to maintain segregated units for LGBTI (lesbian, gay, bisexual, transgender or intersex) inmates (except where they are required to do so by court order), and forbid the automatic placement of LGBTI-identified inmates in such units solely on the basis of their sexual orientation or gender identification. National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. at 37,110, 37,152, 37,153. Instead, LGBTI inmates' housing assignments, like those of other inmates, must be made "on a case-by case basis." *Id.* at 37,110, 37,152–54. If followed, this rule will require changes at many

them against the risk of inmate rape,²²⁹ but it does nothing to protect them against the greater risk of sexual abuse by correctional officers or other staff.²³⁰

facilities: For decades, many prisons have adopted segregation of gay and transgender inmates into separate housing as a way of protecting them against sexual abuse by male inmates. *See, e.g., Johnson v. Johnson*, 385 F.3d 503, 512–13 (5th Cir. 2004) (upholding denial of summary judgment for defendants on a gay black man’s challenge to his exclusion in a Texas prison from the “safekeeping” unit, which houses “inmate[s who are] at risk of victimization, ha[ve] enemies in the population, ha[ve] a history of homosexuality, or possess[] other characteristics that mark the offender as vulnerable to predation”); *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1444–45 (9th Cir. 1991) (describing an official policy whereby “young and tender” and “passive homosexual” detainees needed protection and were kept in separate units, while “aggressive homosexual” prison rapists were placed in the general population pursuant to the assumption that “heterosexual inmates could protect themselves”); KUNZEL, *supra* note 133, at 204–05 (discussing the segregation of butch women into a punitive “Daddy Tank” at a Los Angeles women’s jail in the early 1970s); Dolovich, *supra* note 4, at 19–43 (describing segregation of gay and transgender inmates in the K6G unit of Los Angeles Men’s County Jail); Robinson, *supra* note 4 (challenging and critiquing segregation of gay and transgender inmates in the K6G unit); Assoc. Press, *Va. Women’s Prison Segregated Lesbians, Others: Institution Managers Accused of Harassment, Violating Prisoners’ Rights*, MSNBC.COM (June 6, 2009, 4:53 PM), http://www.msnbc.msn.com/id/31209719/ns/us_news-crime_and_courts/t/va-womens-prison-segregated-lesbians-others (describing segregation of “inmates who had loose-fitting clothes, short hair or otherwise masculine looks, sending them to a unit officers derisively dubbed the ‘butch wing’” in order to “split up relationships and curb illegal sexual activity” at the Fluvanna Correctional Center for Women).

229. *See* Dolovich, *supra* note 4, at 45 (noting that her “in-depth qualitative interviews with a random sample of approximately ten percent of K6G’s residents . . . overwhelmingly confirm the effectiveness of total segregation as a protective measure”). *But see* Robinson, *supra* note 4, at 1361 (challenging evidentiary basis for assumption that gay and transgender inmates are safer in segregated housing, and noting additional harms caused by segregation based on sexual orientation or transgender identity). Jeannie Suk questions why gay-identified inmates would be assumed not to pose the risk of abusiveness toward each other that straight-identified inmates do. Suk, *supra* note 4, at 115–16; *see also* Robinson, *supra* note 4, at 1363. Russell Robinson also points out that the distinctive powder-blue uniforms assigned to inmates in the gay and transgender wing at Los Angeles Men’s County Jail (LAMCJ) identify the segregated inmates in ways that may “out” them when they are later spotted by former jail inmates in state prisons or in the community. *Id.* at 1383.
230. Gabriel Arkles, for example, initially “assumed that naturally trans people, particularly trans women in men’s facilities, would prefer the ‘safety’ of protective custody over the dangers of general population,” but discovered that, of the incarcerated trans people he worked with, “including trans women in men’s prisons who had been beaten, raped, and/or stabbed by other prisoners in the past, most (but not all) have *not* wanted to be placed in protective custody.” Arkles, *supra* note 4, at 537. He notes that the solitary confinement of “protective” custody isolates gay and transgender inmates from the help of friends and allies in the general population. He offers an anecdote in which a group of male inmates in the general population defended a transgender prisoner against sexual assault by another inmate, and another in which fellow inmates in the general population organized a successful mass protest to force prison officials to allow an HIV-positive transgender inmate to receive medical care. *Id.* at 527–28. KUNZEL, *supra* note 133, at 211–12, also documents a radical inmate organization that defended “gay and other vulnerable inmates from sexual harassment and violence” and “worked to release gay prisoners from protective custody and helped integrate them safely into the general population.”

Lori Girshick observes that all the transgender and gender-nonconforming inmates she interviewed in women’s prisons opposed segregation of gay and transgender prisoners, in part because of “the complete access staff would have to harass and abuse them.” Lori Girshick, *Out of Compliance:*

Furthermore, the “gender-responsive strategies” proposed for women’s incarceration²³¹ more generally emphasize women’s vulnerability to sexual abuse by male staff,²³² but this rather traditional, feminized frame for governing incarcerated women²³³ may underrate the risk of sexual abuse by other inmates.

Masculine-Identified People in Women’s Prisons, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 189, 203 (Eric A. Stanley & Nat Smith eds., 2011).

231. The authors of the seminal *Gender-Responsive Strategies* report advocate a “gender-responsive” penology for women, but not for men. BLOOM ET AL., *GENDER-RESPONSIVE STRATEGIES*, *supra* note 122. Its basic premise is that “the current correctional system is not gender neutral but is responsive to male inmates,” *id.* at 113, betraying an unfortunate assumption that contemporary correctional practices are appropriate for incarcerated men. *See, e.g.*, Shaylor, *supra* note 211, at 153–54 (noting that the “masculinist approach” of mainstream penology “does not benefit men in prison any more than women or transgender people,” and advocating an abandonment of this approach). Advocates of gender-responsiveness define it in a rather traditional way, framing women lawbreakers as less violent, less criminally responsible, more vulnerable, and more attached to their families than men. The “Guiding Principles” of gender responsiveness assert that “gender makes a difference,” so that “[a]n effective system for female offenders [must be] structured differently from a system for male offenders.” BLOOM ET AL., *GENDER-RESPONSIVE STRATEGIES*, *supra* note 122, at ix, 78. The guiding principles affirm that women offenders pose a “low risk to public safety”; they need “an environment based on safety, respect, and dignity”; correctional supervision of women offenders must “[a]ddress . . . substance abuse, trauma, and mental health” issues; and that “relationships, especially those with their children” are more important to incarcerated women, so that policies and programs for women must be “relational and promote healthy connections to children, family, significant others, and the community.” *Id.* at 78–79. The authors do not explain why safety, respect, dignity, mental health treatment, and relationships with family, friends, or children should be understood as needs unique to women and not shared by men.

Correctional authorities have embraced gender responsiveness as a policy touchstone for women’s incarceration. *See, e.g.*, CAL. DEPT OF CORR. & REHAB., *PILOT STUDY REPORT: FEMALE OFFENDER PROGRAMS AND SERVICES (FOPS): RISK AND NEEDS ASSESSMENT OF WOMEN OFFENDERS IN CALIFORNIA PRISONS: AN EVALUATION OF COMPAS REENTRY AND NIC’S GENDER-RESPONSIVE APPROACH 2* (2008) (noting California’s establishment of a “Gender Responsive Strategies Commission (GRSC) to assist in the development of a Master Plan for female offenders” and seeking to develop a gender-responsive classification tool for incarcerated women); OHIO DEPT. OF REHAB. AND CORR., *BEST PRACTICES TOOL-KIT: GENDER-RESPONSIVE STRATEGIES* (2006) (identifying gender-responsive correctional “best practices”); Myrna R. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, CRIM. JUST., Spring 2005, at 4 (advising on gender-responsive penal administration). Abolitionist and academic critics have denounced gender-responsive prison reform as paternalistic and essentialist, and as an excuse for unwarranted expansion of women’s incarceration. *See, e.g.*, Rose Braz, *Kinder, Gentler, Gender Responsive Cages: Prison Expansion Is Not Prison Reform*, WOMEN, GIRLS & CRIM. JUST., Oct./Nov. 2006, at 87; Cynthia Chandler, *The Gender-Responsive Prison Expansion Movement, in INTERRUPTED LIFE: EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES* 332 (Rickie Solinger et al. eds., 2010); Kelly Hannah-Moffatt, *Losing Ground: Gendered Knowledges, Parole Risk, and Responsibility*, 11 SOC. POL. 363 (2004); Shaylor, *supra* note 211.

232. *See, e.g.*, BLOOM ET AL., *GENDER-RESPONSIVE STRATEGIES*, *supra* note 122, at 12, 25–27 (characterizing women’s “vulnerability to staff sexual misconduct” as a “gender-based difference” between incarcerated women and men).
233. *See generally* Kelly Hannah-Moffatt, *Gendering Dynamic Risk: Assessing and Managing the Maternal Identities of Women Prisoners, in GENDERED RISKS* 229, 237–41 (Kelly Hannah-Moffatt & Pat

Because staff members seem to commit more sexual abuse than inmates do, and because neither men nor women can be presumed safe, neither intensified staff surveillance powers nor gendered tweaks to search and surveillance responsibilities can be trusted, on their own, to make prisoners safer. To effectively address sexual abuse by staff, policymakers and administrators need to make more fundamental institutional changes, such as reevaluating the routine use of physical, strip, and body cavity searches, and introducing meaningful external monitoring and accountability.

The gaps and elisions of prison rape discourse reveal the grip of unexamined gender and racial stereotypes on our understanding of prison rape and of sexual abuse more generally. Prison realities demonstrate that, at least in some circumstances, women may be more sexually aggressive, and men more sexually vulnerable, than conventional gender expectations would predict. Greater attention to the counter-stereotypical dynamics of prison rape could unsettle conventional gender expectations, illuminating our understanding of the dynamics of race, gender, and violence in the outside world as well as in prison.

O'Malley, eds. 2007) (noting that "gender-responsive" risk assessment tends to punish women who fail to conform to traditional stereotypes of femininity and maternity).