Identity Crises and Incarceration: Preventing Prison Rape by Channeling Expressions of Masculinity

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ABSTRACT

Prison rape is a well-known and widely publicized problem in the American prison system. Even with this high degree of visibility, the problem persists despite correctional officials’ best efforts. These efforts to combat prison rape have focused almost exclusively on preventing the physical act from occurring. While it might seem like a straightforward or obvious approach, this type of strategy does nothing to address why rape is so common among prison inmates. Solutions that merely prevent rape from occurring, without addressing the underlying cause, do nothing to change a cultural environment that rewards sexual assault.

This Article argues that the best way to prevent prison rape is to focus on the gendered causes of rape in prison. The entry into a carceral environment causes an identity crisis by separating the inmate from all the cultural scripts by which he had previously constructed his masculine identity. With few other options at their disposal, male inmates use sexual assault as a tool to establish their masculine identity and to maintain their place in the gendered prison hierarchy. This Article argues that to combat prison rape effectively, new solutions must focus on channeling inmates’ masculine expression. If we give inmates alternative, socially productive tools to establish their masculinity, they will no longer need to rely on rape. This Article concludes that recognizing the gender identity crisis and tailoring solutions to address that crisis is a necessary first step to effectively stopping prison rape.
INTRODUCTION

A man’s claim to his manhood is of the utmost value within prison walls. At the same time, masculinity is a tenuous
concept that always stands the risk of being lost to another more powerful or aggressive man.¹

A real man would rather be dead or beaten to death than submit to another man.²

Despite efforts to combat the problem, rape is all too common in prisons and jails in the
United States. As many as 22% of male inmates report being raped at least once,³ and those
inmates who have been raped once are at a heightened risk of repeated victimization. In the past
25 years, more than 1,000,000 inmates have experienced some form of sexual assault in prison.⁴
As high as these numbers are, they are still likely to dramatically underestimate the prevalence of
prison rape because social norms in prison that value silence and stoicism make obtaining correct
data exceedingly difficult.⁵

The effects of prison rape on the victim are devastating, and can substantially affect his
possibility of rehabilitation. Victims of prison rape typically become more violent, even if they
were previously non-violent,⁷ perhaps in an attempt to demonstrate that they should not be seen

¹ Christopher D. Man & John P. Cronan, Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity
² SpearIt, Gender Violence in Prison & Hyper-Masculinities in the ‘Hood: Cycles of Destructive Masculinity, 37
³ 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, 198 (1999) (“22% of male inmates had been coerced or persuaded into some form of
sexual contact in prisons.”) (citing Cindy Struckman-Johnson et al., Sexual Coercion Reported by Men and Women
in Prison, 33 J. OF SEX RES. 67, 71 (1996)).
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, 199 (1999) (“[T]he social pressures among inmates themselves make it very difficult
to get reliable self-reports of sexual misconduct and rape. Social stigma attached to being a rape victim and fear of
violent consequences for ‘ratting on,’ or naming, assailants keep many inmates from reporting honestly on
surveys.”) (citations omitted).
⁶ See 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, 209 (1999) (“Prison rape also makes its victims more prone to
violence….Even previously non-violent prisoners often turn to violence after having been sexually assaulted.”).
as an easy target. Victims of rape often lose self-esteem and the ability to trust others,\(^8\) and these effects are only exacerbated in the carceral environment. Beyond the emotional harms, victims of rape in prison are also likely to be physically injured.\(^9\) Even when the rape does not explicitly involve physical force, inmate victims are still at risk of contracting HIV or other sexually transmitted illnesses.

Given that the problem of prison rape is relatively widely known, why have prison administrators been unable to effectively decrease its occurrence? This Article argues that the solutions that are either currently proposed or currently in place fail because they do not address the underlying cause of prison rape. Because inmates lose almost all of their resources to perform their gender identity, they rely on a narrow subset of behaviors to prove their manhood: violence and domination over other inmates. Current solutions do nothing to change this gender dynamic, and that’s why they are insufficient. This Article argues that a more nuanced approach to the problem of prison rape, one that is properly focused on the gendered causes of rape in prison and on channeling masculine expressions, is necessary to decrease the value of sexually assaulting other inmates.

The first section of this Article briefly discusses the constitutional requirements that govern the conditions of confinement. Prison and jail officials have an Eighth Amendment obligation to provide humane conditions, taking reasonable steps to assure the safety of inmates.\(^{10}\) The second section analyzes three recent efforts to address the problem of prison rape. While national legislation, segregated units for potential victims, and inmate counseling all seek

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\(^8\) See 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, 208 (1999) (Victims of rape often exhibit “rape trauma syndrome, which most often results in a loss of self-esteem and an inability to trust others.”) (citations omitted).


\(^{10}\) See, *e.g.*, Farmer v. Brennan, 511 U.S. 825, 832 (1994).
to prevent prison rape, these solutions fail to affect a substantive change to the prison gender culture in which rape is an important tool. The third section of this Article analyses the gender and identity issues that are the root cause of sexual violence and physical domination in prison. This section demonstrates that inmates often turn to rape because they have no other means to establish their masculinity and to protect their place in the strict gender hierarchy that dominates prison life. This Article argues that if inmates have other, productive means with which to construct and perform their masculinity, they will no longer need to rely on rape as a tool to construct their gender identities. The last section of this Article briefly gives two proposals for channeling expressions of inmates’ masculinity. While neither proposal is comprehensive, each is an important first step toward reshaping inmates’ gendered interactions. Doing so will channel inmates’ masculinity performance away from violent domination, and will therefore effectively combat prison rape.

I. THE CONSTITUTIONAL MINIMUM: WHAT THE 8TH AMENDMENT REQUIRES

The Eighth Amendment governs the punishment of criminals, but the Supreme Court has interpreted its provisions to also provide minimum standards for prison conditions.11 First, the Court held, in Estelle v. Gamble, that prison officials violate the Eighth Amendment when they are deliberately indifferent to prisoners’ health. In Farmer v. Brennan, the Court clarified that, for prison officials to be held liable, they must have been subjectively aware of a substantial risk to an inmate’s health or safety and yet have failed to act. These cases demonstrate that prison officials are constitutionally required to take reasonable steps to protect the health and safety of inmates. Given the prevalence of prison rape and the clear failure of current solutions to address

the problem, the Eighth Amendment requires prison administrators to take additional, reasonable steps to decrease the risk of prison rape.

In 1976, the Supreme Court decided *Estelle v. Gamble*, holding the 8th Amendment prohibits prison officials from being deliberately indifferent to a prisoner’s serious health problems. The prisoner in *Estelle* had injured his back while he was unloading a truck, which forced the prisoner to visit the prison hospital. Three months after the initial injury, with his health getting worse and his treatment being entirely ineffective, the prisoner sued, arguing that the prison staff’s inability or unwillingness to treat his condition violated his Eighth Amendment rights. The Supreme Court initially noted that while the purpose of the Eighth Amendment was essentially to prohibit torture or barbaric methods of punishment, the Eighth Amendment extends beyond “physically barbarous punishments.” Specifically, the Eighth Amendment prohibits those punishments that “are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’” From that perspective, the Court held, the Eighth Amendment requires prison officials to provide medical care for prisoners, and “deliberate

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13 *Estelle v. Gamble*, 429 U.S. 97, 99 (1976). The doctor diagnosed the prisoner with a back strain and prescribed both rest and medication, but the injury continued to cause the prisoner severe pain. Over the next 3 months, despite the fact that the prisoner saw several different doctors, the prisoner’s condition deteriorated, and he began having blood pressure issues and migraines. *Id.* at 99-100.
15 *Estelle v. Gamble*, 429 U.S. 97, 101 (1976). The District Court dismissed the prisoner’s complaint for failure to state a claim. *Id.* at 99. The Court of Appeals for the 5th Circuit reversed and remanded to the District Court to reinstate the complaint. *Id.* at 98. The prison officials then petition the Supreme Court for certiorari, see 1976 WL 194649 (Apr. 30, 1976), and the Supreme Court granted the petition. 424 U.S. 907 (1976).
16 *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“It suffices to note that the primary concern of the drafters was to proscribe torture(s) and other barbar(ous) methods of punishment.”) (internal quotations) (alterations in original).
indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’”

The Estelle Court clearly established that prison officials may not be deliberately indifferent to a risk of harm faced by prisoners in their facility, which applies to the living conditions inside prisons.21 Recognizing that Estelle had left open several important questions, in 1994 the Supreme Court decided Farmer v. Brennan, articulating the meaning of deliberate indifference and clarifying the responsibilities of prison officials to the prison population.22 The prisoner in Farmer was a transsexual woman23 who claimed that prison officials placed her in the general population even though they knew she was at a heightened risk of sexual assault.24 The District Court granted summary judgment to the prison officials, holding that prison officials violated the 8th Amendment only if they were “reckless in a criminal sense,” requiring actual knowledge of the risk.25 The Seventh Circuit affirmed without opinion.26
The Supreme Court noted at the outset that the Eighth Amendment applies to the living conditions of an inmate’s confinement; while those conditions need not be comfortable, they cannot be inhumane.\textsuperscript{27} The Court went further, holding that the Eighth Amendment imposes a duty on officers to “take reasonable measures to guarantee the safety of inmates,”\textsuperscript{28} which includes protecting prisoners from violence perpetrated by other prisoners.\textsuperscript{29} The Court then turned to the question of what action, or inaction, on the part of correctional officials violates the Eighth Amendment. First, the Court held that the harm alleged must be sufficiently serious or amount to a denial of basic civilized necessities: “For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”\textsuperscript{30} This language is important: the Eighth Amendment requires prison officials to act to prevent a \textit{substantial risk} of serious harm.\textsuperscript{31}

Second, because the Eighth Amendment only prohibits the wanton infliction of pain, prison officials must be “deliberately indifferent” to the safety of the prisoners to violate its terms.\textsuperscript{32} However, this was the main point of contention in the case: what exactly does deliberate indifference mean? On the one hand, the prisoner argued that the objective, civil law recklessness standard should control the Eighth Amendment analysis, which would support a violation even if the prison official did not actually know of the risk to the inmate if a reasonable

\textsuperscript{27} Farmer v. Brennan, 511 U.S. 825, 832 (1994).
\textsuperscript{29} Farmer v. Brennan, 511 U.S. 825, 833 (1994). \textit{See also Wilson v. Seiter}, 501 U.S. 294, 303 (1991) (“Indeed, the medical care a prisoner receives is just as much a ‘condition’ of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and \textit{the protection he is afforded against other inmates.”}) (emphasis added).
official would have known. On the other hand, prison officials argued that the subjective, criminal law recklessness standard should control the Eighth Amendment analysis, supporting a violation only when prison officials fail to act to prevent of harm of which they actually are aware.

The Court noted that the recklessness standard is much lower in the prison conditions context than, for example, in the excessive force context. The Court agreed with the prison officials that deliberate indifference means disregarding a risk of which the official was actually aware. The Court held that because the Eighth Amendment does not explicitly prohibit cruel and unusual conditions, “an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.”

The Court continued to clarify this subjective requirement. This standard does not mean that the prison official has to be aware of a specific threat from a specific inmate against another specific inmate:

The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health, and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.

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33 Farmer v. Brennan, 511 U.S. 825, 836 (1994). The prisoner argued that prison officials violate the Eighth Amendment when they “fail to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.”

34 Farmer v. Brennan, 511 U.S. 825, 837 (1994). This subjective standard would require prison officials to act only if they actively knew of a risk to inmate safety.

35 Farmer v. Brennan, 511 U.S. 825, 835-6 (1994). While excessive force would require the official to be motivated to cause harm or with knowledge that harm will result form his/her actions, “the very high state of mind prescribed [for that context] does not apply to prison condition cases.” Id. at 836 (quoting Wilson v. Seiter, 501 U.S. 294, 302-3 (1991)).


If a prison official is aware of a substantial risk to inmate safety and fails to act to prevent the harm, he has violated the Eighth Amendment. However, if a prison official takes reasonable action to mitigate the risk, s/he has fulfilled his/her Eighth Amendment duty, “even if the harm ultimately was not averted.”39 The Court held that “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”40 Having articulated the standard of care required by the Eighth Amendment, the Court held that the prisoner’s complaint had alleged sufficient facts to withstand a summary judgment motion.41

In the context of prison rape, then, the Eighth Amendment requires prison officials to take reasonable steps to combat inmate-on-inmate sexual assault, but only if they are aware of a risk of sexual assault to inmates. Once prison officials are aware of a substantial risk of sexual assault, the Eighth Amendment requires them to act. Based on the prevalence of rape and sexual assault in prison,42 it is reasonable to assume that prison officials across the nation are already aware that in any carceral environment, there is a significant risk of sexual assault. Even if the prevalence of sexual assault in prisons and jails were not enough to create Eighth Amendment liability, there are certain well-known risk factors that make an inmate particularly vulnerable to sexual assault, including sexual orientation, effeminate demeanor, youth, first offense, and small physical size.43 Accordingly, when an individual enters either a jail or a prison exhibiting many

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43 See Russel K. Robinson, Masculinity as Prison: Sexual Identity, Race, and Incarceration, 99 CAL. L. REV. 1309, 1353 (2011) (“Traits that make men likely to be punked include youth, slight stature, naiveté, perceived effeminacy, serving for the first time in jail, doing time for nonviolent offenses, inexperience in personal combat, having a disability, and the perception of being gay on the outside.”).
or some of these vulnerability factors, prison officials are on notice that the inmate faces a substantial risk of sexual assault. The next section explores three current efforts to reduce the incidence of prison rape and, more importantly, why those efforts ultimately fail to address the underlying causes of sexual assault in prison.

II. THE INSUFFICIENCY OF CURRENT RESPONSES TO PRISON RAPE

The problem of prison rape is not entirely new, nor is it a problem that has gone wholly ignored. This Article argues, however, that the solutions that have recently been introduced are insufficient to address the causes of prison rape. This section discusses three such solutions that are currently in place and, specifically, why those solutions ultimately fail to change a prison culture that encourages violence and sexual assault. The first such solution is the Prison Rape Elimination Act,\textsuperscript{44} which Congress passed in 2003. While the PREA is an important first step, it does not actually include any provisions to combat the prevalence of prison rape. Another solution is to segregate those inmates who are most vulnerable. This section focuses on the K6G unit from the L.A. County Jail as a case study, but the shortcomings of K6G identified in this section apply more broadly to the general idea of segregated units. Finally, this section considers the possibility of psychotherapy as an intervention to combat the underlying cause of prison rape and violence. While this solution gets closer to solving the problem, there are nearly insurmountable practical limitations that disrupt the potential of individual or group counseling. Ultimately, this section concludes that the current approaches to reducing prison rape leave the underlying cause of prison rape, violent hypermasculinity, unchanged.

\textsuperscript{44} Prison Rape Elimination Act, 42 U.S.C. §§ 15601-15609 (2003). Hereinafter, “PREA” or the “Act.”
A. *The Prison Rape Elimination Act – “While they study, rape continues.”*45

The Prison Rape Elimination Act was first introduced to Congress in the summer of 2003 after several high profile studies and protests brought popular attention to the problem of prison rape.46 In creating the PREA, Congress found that “nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.”47 Despite the widespread nature of the problem, however, Congress also found that there is insufficient research into just how common prison rape is,48 that prison staff is generally unprepared to deal with sexual assaults,49 that prison rape generally goes unreported,50 and that prison rape makes inmates more likely to commit violent offenses against both other inmates and staff.51 Although the purposes of the PREA were very broad, the statute focuses primarily on making the prevention of prison rape a priority, developing national standards to track the rates of prison rape, and “increase[ing] the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape.”52

52 42 U.S.C.A. § 15602 (2003). The 9 stated purposes of the act are “to (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; (2) make the prevention of prison rape a top priority in each prison system; (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; (4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities; (5) standardize the definitions used for collecting data on the incidence of prison rape; (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; (7) protect the Eighth Amendment rights of Federal, State, and local prisoners; (8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and (9) reduce the costs that prison rape imposes on interstate commerce.
The PREA’s definitions of jail\textsuperscript{53} and prison,\textsuperscript{54} as well as its definition of rape\textsuperscript{55} (which includes sexual contact against a person’s will, sexual contact when the victim is unable to give consent, as well as sexual contact through the use of the threat of force)\textsuperscript{56} are all very broad.

The substance of the PREA sets forth standards for a comprehensive overhaul of the methods by which data about prison rape are collected\textsuperscript{57} and establishes a Department of Defense review panel to analyze the data that are collected.\textsuperscript{58} Additionally, the Act created the National Prison Rape Elimination Commission,\textsuperscript{59} which the Act charged with conducting “a comprehensive legal and factual study of the penalogical, physical, mental, medical, social, and economic impacts of prison rape in the United States.”\textsuperscript{60} Beyond the increased collection of data, one of the biggest benefits of the PREA is the symbolic message it sends: “In defining punks and other raped inmates as legitimate victims, it counters rape myths that shift blame to the victim….Congress’ passage of the Act signifies that it is not indifferent to the plight of all inmates.”\textsuperscript{61} The PREA is an important step forward, then, because it seeks to clarify the reality of prison rape and it affirms the humanity of the victims.

\textsuperscript{53} 42 U.S.C.A. § 15609(3) (2003) (“The term “jail” means a confinement facility of a Federal, State, or local law enforcement agency to hold (A) persons pending adjudication of criminal charges; or (B) persons committed to confinement after adjudication of criminal charges for sentences of 1 year or less.”).

\textsuperscript{54} 42 U.S.C.A. § 15609(7) (2003) (“The term “prison” means any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government, and includes (A) any local jail or police lockup; and (B) any juvenile facility used for the custody or care of juvenile inmates.”).


\textsuperscript{56} 42 U.S.C.A. § 15609(9) (2003) (defining rape as “(A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.”).

\textsuperscript{57} 42 U.S.C.A. § 15603(a) (2003).

\textsuperscript{58} 42 U.S.C.A. § 15603(b) (2003).

\textsuperscript{59} Hereinafter “NPREC” or the “Commission.”


Despite its symbolic importance, the PREA does not functionally do anything to combat prison rape. In fact, nothing in the PREA actually addresses strategies for stopping prison rape or offers ways to shape prisons to prevent a culture that prizes sexual assault. Additionally, despite authorizing the Attorney General to award grants to states that implement the recordkeeping and data collection mandates, a provision of the Act prevents the Commission from “propos[ing] a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.”\(^6\) In other words, the Act limits the practical solutions that it could potentially produce by placing a funding cap on all proposals from the Commission. Therefore, the Prison Rape Elimination Act seeks to recognize and clarify the underlying problem of prison rape, but it is nevertheless entirely insufficient to actually combat the problem.

**B. Segregated Units: Limited Benefits that Ignore the Causes of Prison Rape**

In contrast to the abstract approach embodied in the PREA, some institutions have take a more direct approach by implementing segregated units. The inmates in these units are segregated based on a very narrow subset of the vulnerability factors: sexual orientation and effeminate characteristics. During the intake process, corrections officials identify inmates who appear to be vulnerable, based on their sexual orientation or gender expression, and those inmates are placed in the segregated units. The segregated inmates are then kept physically and institutionally separate from the general prison population. The purpose of segregating these inmates is simple and clear: preventing sexual assault by separating potential victims from their potential assailants.

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This section explores one such segregated unit, the K6G unit at the Los Angeles County Jail. While this analysis will focus on just the K6G unit, the arguments in favor and against the unit have much broader application. Segregated units may be effective for the purpose they serve, protecting a small group of inmates from sexual assault, but these units are not sufficient to stop prison rape. While some critics have argued that segregated units are unconstitutional, Supreme Court precedent on the issue of prison administration demonstrates that segregated units, even when explicitly based on sexual orientation, do not violate either the Equal Protection or Due Process clauses of the Constitution. However, that segregated units pass constitutional review does not mean that segregated units are the ideal solution. In fact, they are merely the band-aid that covers up, but does not solve the underlying problem: the lack of appropriate channels for inmates to prove and perform their masculinity.

The K6G unit of the L.A. County jail was the result of a settlement between the jail and the ACLU. Part of the settlement was a consent decree that established the basis for K6G, including requirements that inmates who were eligible for the unit would be separated from general population as soon as they entered the jail. The decree also established the two-step process for assignment into K6G; inmates must first self-identify as gay or transgender, and then the classification staff of the unit must conduct a more in-depth interview and observation of the inmate to determine whether the inmate belonged in the unit.

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64 See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 22 (2011); see also Russel K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CAL. L. REV. 1309,1320 (2011). The jail had been segregating gay inmates on its own for some time, but the ACLU challenged the conditions of the unit, alleging that the jail “failed to prevent ‘predators’ form gaining access to the” unit. See Robinson, *Id.* at 1320.
This classification process “is intended to separate inmates who are most in need of protection, using gay identity as a proxy for vulnerability.” The first step in the process occurs in the Inmate Reception Center, through which hundreds of inmates pass each day. The interviews are conducted in a busy room, where all the inmates who have been arrested must wait. During this initial interview with jail classification officers, the officer asks inmates a number of questions to determine the inmate’s security classification. Before any information about the segregated unit is offered, the officers ask the inmate if he is homosexual or transgender. Inmates who answer yes are “immediately directed to sit on a bench directly in view of the custodial staff” and are “given light blue uniforms to signal their need for official monitoring and segregation from the general population.” Once the inmate has been separated, he proceeds to the K6G holding cell to wait for step two.

The central goal of step two is to “determin[e] which detainees are being truthful when they say that they are gay.” This second step focuses on the inmate’s personal history, including “marital status, number of kids, name of current lover, date of last sexual encounter with a women, etc.” as well as the inmate’s “connections to the gay community.” Through this more

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in-depth interview, the classification officers “make their best assessment, all things considered, as to the appropriate classification for each person they interview.” When that best assessment confirms that the inmate is actually gay, then the inmate is assigned to live in the K6G unit.

The K6G unit is physically separate from general population, and it is exclusively inhabited by gay and transgender K6G residents. One notable aspect of K6G inmates’ movement within the jail is that “whenever K6Gs move through the facility for any reason – to pill call, the classroom, the infirmary, the visiting room, or the court line – they must be escorted by a deputy.” Together, these measures mean that interaction between K6G and general population inmates is kept to a minimum, and where such interaction is unavoidable, K6G inmates are under the direct supervision of jail officials.

The most remarkable feature of the K6G unit is how effective it has been at reducing the instances of sexual assault experienced by gay and transgender inmates. In response to Prof. Sharon Dolovich’s questions about the safety of K6G, “the answers given [by K6G inmates] to those questions overwhelming confirm the effectiveness of total segregation as a protective measure.” Especially considering the intense imperative in prison to display exaggerated forms of masculinity, that there is little to no need for K6G inmates to prove their masculinity through

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79 Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 36 (2011) (“When the data that emerge from an interview strongly indicate a gay interviewee, the right decision is to keep that person in K6G.”).
82 See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 24 (2011) (When in the visiting room, for example, K6Gs are seated in the first row of booths, directly in the sight line of the deputies.”) (citation omitted).
84 Discussed in Part III, infra.
sexual assault is evidence that the segregation model can be effective at protecting vulnerable inmates. This is, of course, a great result from the K6G unit, but it simultaneously reveals the inherent limitations of a segregated unit; the segregated population may have a relatively safer place, but the unit does nothing to combat the features of prison culture that facilitate and reward hypermasculinity and, consequently, prison rape. This section next analyzes the potential objections to segregated units and concludes that, even if they are the best solution that currently exists, they do nothing to decrease the threat of sexual assault in the non-segregated population.

The idea of units segregated on the basis of sexual orientation may initially seem constitutionally problematic, but precedent on prison administration demonstrates that the creation of segregated units does not violate any constitutional rights. First, while segregating inmates on the basis of their sexual orientation seems to implicate the Due Process clause, the level of scrutiny applied to classifications based on sexual orientation is low, and therefore prison officials will be able to explain such segregation by reference to an important government interest. Second, while conditioning access to a protected unit on the inmate’s disclosure of his sexual history could implicate the inmate’s right to privacy, the right to privacy is inconsistent with being incarcerated, and the Court has granted prison officials reasonable discretion in such contexts. This section will first analyze the two leading Supreme Court cases addressing the constitutionality of prison regulations, before turning the specific arguments above. This section shows that segregated units are constitutionally permissible; however, as the rest of this Article demonstrates, that does not mean that segregated units are the best solution.

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85 Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 53 (2011) (“In K6G, by contrast [to general population], there is no pressure on residents to prove their masculinity, and thus no risk that those who display ‘feminine’ qualities will be targets of sexual assault. As a consequence, there is no premium on seeming hard or tough, suppressing emotion, or instilling fear in others.”).

86 Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 47 (2011) (The K6G unit “offers powerful evidence that this segregation experiment has succeeded in creating a relatively safe carceral space for otherwise vulnerable people – one in which, in contrast to [general population], vulnerable individuals need not sell themselves to stronger prisoners to be protected from violent assault by (other) predatory inmates.”).
In 1987, the Supreme Court held that prison rules are not subject to the same level of constitutional scrutiny as other state actions implicating the same rights would be. Specifically, *Turner v. Safley* involved a challenge to restrictions on inmate marriage. In its previous prisoner rights cases, the Court established that the relevant analysis was “whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.” The Court noted that it is settled law that “a prison inmate ‘retains those constitutional rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.’”

The Court found that there are many important benefits to marriage that remain despite the inmate’s incarceration that “are sufficient to form a constitutionally protected marital relationship in the prison context.” The Court found that the marriage restriction represented “an exaggerated response” to the interests the prison officials offered, and held the restriction was unconstitutional because it was “not reasonably related to legitimate penological interests.”

The Court returned to the issue of the appropriate level of scrutiny in *Johnson v. California*, holding that not all alleged constitutional violations in prisons are subject to only

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88 Turner v. Safley, 482 U.S. 78, 81-2 (1987). The marriage regulation allowed inmates to marry only if the superintendent of the prison found that there were compelling reasons to allow the marriage, which, in practice, meant only in circumstances of pregnancy or the birth of an illegitimate child. *Id.* at 82. The inmate also challenged restrictions on inmate-to-inmate correspondence. The correspondence restriction permitted inmates to correspond only with inmates who are immediate family members, or with non-family members regarding legal matters. The regulation also permitted correspondence between inmates if “the classification/treatment team of [that] inmate deems it in the best interest of the parties involved,” *Id.* at 81-2, but in practice, inmates could not correspond with non-family inmates.
89 Turner v. Safley, 482 U.S. 78, 87 (1987). There are four factors the Court identified that can be used to evaluate the reasonableness of a prison regulation: whether there is a rational connection between the regulation and the legitimate interest justifying the regulation; whether there are alternatives for exercising the right in question; the extent to which the exercise of the right will impact prison administration, inmates’ liberty and the allocation of scarce resources; and whether the regulation represents an exaggerated response. *Id.* at 89-91.
rational basis review. The Johnson Court ruled that a prison policy of segregating inmates by race to determine their security level should be subject to strict scrutiny, notwithstanding the Turner ruling. The majority first emphasized that the Court has consistently held that all racial classifications by the state are subject to strict scrutiny. However, the Court differentiated the Turner decision, finding that the Turner “reasonable-relationship test only [applies] to rights that are ‘inconsistent with proper incarceration.’” The Court held that because the right to be free from racial discrimination “is not a right that need necessarily be compromised for the sake of proper prison administration,” the deferential Turner standard was inapplicable.

Applying the Turner and Johnson decisions to the prison rape context, it should be clear that neither would prevent a prison from creating a segregated unit for gay and transgender inmates. The Johnson standard is much more likely to apply to a unit like K6G because the right to be free from sexual orientation discrimination is “not a right that necessarily need be compromised for the sake of proper prison administration.” Therefore, segregating inmates on the basis of their sexual orientation is subject only to rational basis review. Even more

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94 The California Department of Corrections (“CDC”) had adopted a policy requiring prison officials to segregate new inmates by race for 60 days to determine their security level. The policy was an “unwritten” one, see Johnson v. California, 543 U.S. 499, 502 (2005), but that did not appear to affect the Court’s analysis.
96 Johnson v. California, 543 U.S. 499, 505 (2005). The Court explained the usual reasons for strict scrutiny, and rejected the CDC’s argument that there is no discrimination because all races are segregated equally. Id. at 506 (“The CDC’s argument ignores our repeated command that ‘racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.’”) (quoting Shaw v. Reno, 509 U.S. 630, 651 (1993)).
98 Johnson v. California, 543 U.S. 499, 510 (2005). Having found that strict scrutiny was the proper standard for the racial discrimination, the Court reversed the 9th Circuit and remanded for further proceedings. Because the 9th Circuit did not rule on whether the classification violated the Equal Protection clause under a strict scrutiny analysis, the Court could not rule on the merits of the constitutional challenge. See Id at 515.
99 Johnson v. California, 543 U.S. 499, 510, 510 (2005). In contrast, for example, a prisoner’s First Amendment rights would be subject to the lower Turner standard because full free speech and free association rights are inconsistent with proper prison administration. See, e.g., Turner v. Safley, 482 U.S. 78, 92 (1987) (“[T]he correspondence rights asserted by respondents…can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike.”).
100 See Romer v. Evans, 517 U.S. 620, 633 (1996) (“By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of
importantly, however, the Supreme Court has explicitly held that “[u]nder rational-basis review, where a group possesses ‘distinguishing characteristics relevant to interests the State has the authority to implement,’ a State's decision to act on the basis of those differences does not give rise to a constitutional violation.”

Therefore, because segregating inmates on the basis of their sexual orientation or gender expression is rationally related to a legitimate government interest, segregated units do not violate the Equal Protection Rights of the inmates involved.

The other constitutional objection, most recently articulated by Prof. Russell Robinson, is that the screening procedure for admittance to a segregated unit infringes the inmates’ constitutional right to privacy. The argument is that because the K6G screening process forces gay inmates to disclose deeply personal information, information they have a right to keep private, to validate their status as a vulnerable gay inmate, the screening process violates those inmates’ right to informational privacy. Assuming there is a fundamental right to informational privacy, this right would be inconsistent with proper prison administration and, therefore, it would be subject only to the deferential Turner standard or reasonableness. Because infringing on prisoners’ privacy rights to protect the most vulnerable inmates is certainly reasonably related to legitimate interests, the K6G screening process does not violate the inmate’s right to privacy.

Despite appearances, units that are segregated on the basis of sexual orientation or gender expression would not run afoul of any constitutional guarantees. However, segregated units do

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disadvantaging the group burdened by the law.”); See also Lawrence v. Texas, 539 U.S. 558, 582 (2003) (striking down a same-sex sex ban because “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).


nothing to make the prison population generally less likely to rape other inmates; they merely remove those most vulnerable to attack without combating the prison environment that encourages sexual assault. Therefore, even if segregated units are constitutionally viable, and even assuming they’re effective, there are still substantial practical limitations of such programs. The most obvious and most detrimental limitation to segregated units is that they will always be underinclusive. Despite the fact that the K6G screening process only segregates gay and transgender inmates, “a host of factors besides being gay or trans increase the vulnerability of male prisoners.”\(^{105}\) Even if a prison or jail were able to identify all those factors that make inmates vulnerable, and segregate all those inmates into a safe unit, that would not eliminate the violence. Removing the most vulnerable inmates from general population would only shift the focus of the strongest inmates from those most inherently vulnerable to those next in line, making previously safe men the new vulnerable population.\(^{106}\)

This section has explored some of the pros and cons\(^{107}\) of using segregated units to combat the problem of prison rape. It has shown that, despite some clear positive effects, segregated units do not actually combat the causes of prison rape. Rather, they protect only the most vulnerable victims, at the cost of shifting the potential attackers’ targets to other inmates.

The next section analyzes a much more direct proposal to prevent prison rape: counseling and


\(^{106}\) Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309, 1314 (2011) (“[B]y removing gay and transgender inmates – but not attending to hegemonic masculine norms in [general population] – the Jail simply shifts victimization, making it more likely that heterosexual and bisexual inmates in [general population] will assume the subordinated roles that otherwise would have been occupied by K6G inmates.”).

therapy. Despite the fact that mental health treatments have the potential to ease the emphasis on hypermasculinity, such interventions are inherently limited by the unofficial prison code of conduct.

C. Counseling – Helping Those Rare Few Who Want to Help Themselves

A third, and much more direct, solution to the problem of prison rape is to employ psychotherapy, either through individual or group counseling, to help inmates learn how to constructively express their emotions. The purpose of therapy, in this context, would be to teach inmates why their current emotional and gender expressions are problematic, and to give them the tools to express themselves in socially productive ways.108 Such programs can, and should, focus on the underlying causes of hypermasculinity, which “may serve short-term goals in prison, but is ultimately unsustainable and ultimately counter-productive.”109 Despite the relative dearth of research into therapy programs in the prison context,110 such programs have the potential for generating positive changes in inmate populations.

Therapeutic programs, which could take place either in an individual or group setting, could employ a number of techniques to help increase the emotional intelligence of inmates. For instance, counseling programs might focus on allowing inmates to “speak honestly and experiment with new, prosocial identities without fear of judgment and ridicule.”111 Often, group therapy programs “create conditions in which men of diverse backgrounds can learn to trust one

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110 See David R. Karp, Unlocking Men, Unmasking Masculinities: Doing Men’s Work in Prison, 18 J. MEN’S STUDIES 63, 68 (2010) (“Surprisingly, given the rise of men’s studies and masculinities research in criminology, almost no attention is given to interventions that help inmates redefine masculinity in a way that will help them succeed upon reentry.”).
another and recognize similar patterns of trauma, need, and dysfunction.”112 One of the points of therapy in prisons is to pinpoint an individual inmate’s emotional issues; the therapist or the group can then work with the inmate on “verbally indentifying feelings and expressing them in healthy ways.”113 Whatever the strategies or techniques an individual counseling program might employ, the underlying goal is to find a way for inmates to learn how to express themselves, their emotions, and their gender identity in a healthy way, rather than through violence.114

Even ignoring the potential financial costs or other limitations of such programs, therapy interventions face substantial practical obstacles that severely decrease their likelihood of being effective. While therapy may attempt to address directly the mental and emotion problems that encourage inmates to rape or assault, they violate major tenets of the prison code, such as the imperatives to suppress weaknesses, to be as independent as possible, and especially to uphold the code of silence.115 The traits that therapy would try to combat are exactly the traits that make therapy problematic in prisons to begin with:

[I]nside and outside of prison men must tear down a certain amount of traditional male socialization if they are to succeed in therapy and in deeply intimate relationships. But the toxic [hyper] masculinity that is rampant in prison serves to intensify the very traits that make therapy problematic in the community, and it serves to increase resistance to psychotherapy and other forms of mental health treatment in prison.116

The failure of inmate therapy to substantively affect sexual violence in prison is therefore not inherent in the therapy itself; the obstacles facing effective counseling are caused by the inmate
culture the programs seek to change. Even assuming therapy programs would be able to recruit inmates, they would need to change the emotional expression of a substantial portion of the inmate population, and likely those inmates at the top of the social/gender hierarchy, to decrease reliance on prison rape as a means of establishing manhood. The counseling solution, then, is similar to the segregation solution in that it has the potential to help small portions of the inmate population but cannot change the larger prison culture.

This section discussed the three recent efforts to address the problem of prison rape and analyzed why those approaches all ultimately fail to change inmates’ reliance on exaggerated forms of masculinity to survive. The Prison Rape Elimination Act is an important symbolic step, but does not actually contain anything concrete to combat prison rape. Segregated units, while constitutionally permissible, provide protection only to a narrow subset of the jail or prison population, and they do so at the cost of shifting vulnerability to the next weakest inmates in general population. And therapy, while more directly addressing the inmates’ emotional needs, faces substantial difficulty both in reaching a large number of inmates and in convincing those inmates to defy the unofficial prison code of conduct. To be clear, this Article does not advocate abolishing any of these proposals; rather this Article argues that additional solutions are necessary to channel inmates’ expression of masculinity away from sexual violence. The next section analyzes the psychology of gender and, specifically, the theoretical reasons that prison masculinity relies so heavily on sexual violence. If inmates have constructive ways to express

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117 See Terry A. Kupers, *Toxic masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. Clinical Psychology 713, 720 (2005) (“[E]ven when these therapists are able to find time and the appropriate context to offer their services, and even when they are able to resolve the problem of confidentiality, they encounter great resistance on the part of prisoners. In addition to the structural obstacles, toxic [hyper] masculinity makes mental health treatment very problematic. Men who go to prison are neither a population that typically resorts to psychotherapy when faced with emotional or relational difficulties nor are they men who are familiar with the ground rules and uses of psychotherapy.”).
their masculinity, they will no longer need to rely so heavily on sexual violence as a tool to establish their gender identity.

III. Prison Masculinity: The Identity Crisis of Incarceration and the Root of Inmate Sexual Violence

As the previous section argued, none of the current proposals to combat sexual violence in prison effectively address the gendered prison culture that makes prison rape a valuable tool for proving one’s identity. These proposals fail because they do not provide alternative means through which members of the inmate population at large can establish their gender identity. This section analyzes the gender theory surrounding masculinity and why the carceral experience alters social norms to create a unique prison masculinity. The section first gives background on masculinity theory and how different expressions of masculinity fit within a gender hierarchy. Next, this section discusses how, by entering a prison or jail environment, an inmate’s options for expressing his masculinity are dramatically narrowed. Finally, this section will argue that, because incarceration limits all inmates’ gender expression, inmates seeking to establish their identity will fall back on the few tools remaining to them: physical aggression and domination of other men. This Article argues that giving inmates alternative avenues for expressing their gender identities will decrease reliance on violence and domination, which can lead to a decrease in the overall instance of prison rape.

A. Performative Gender and Fragile Masculinity

Despite popular belief, there is nothing inherent about what is considered “masculine” and “feminine.” There is also nothing about being male or female that necessarily dictates a person’s gender expression: “masculinity and femininity do not flow mechanically from male or
female biology. Instead, they are instilled by social expectations and by individual decisions to reflect or resist these norms.”

The cultural categories of masculinity and femininity are social constructs that vary across time and across cultures. Most importantly, though, the categories of masculinity and femininity are context specific and often change.

Cultural expectations of how men and women are supposed to behave are adaptive and are dependent on an individual’s interactions with his or her surroundings. A person’s gender identity is developed through “a situational interaction that grows ‘out of social practices in specific structural settings and serves to inform such practices in reciprocal relation.’” In effect, this means that a person’s gendered self-image is fluid, a product of social interactions that reacts to changed circumstances. Different contexts will therefore produce different dominant forms of masculinity or femininity, and will affect how an individual constructs his or her public gender identity.

A person’s public gender identity is established through the display of gendered behaviors and the relative comfort with which the person can perform those behaviors. The combination of personal and public gender identity, then, “is not entirely a matter of social

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119 See Ramon Hinojosa, *Doing Hegemony: Military, Men, and Constructing a Hegemonic Masculinity*, 18 J. Men’s Studies 179, 180 (2005) (“Social identities and notions of self are intimately intertwined with the institutions in which individuals are embedded.”).
123 Yvonne Jewkes, *Men Behind Bars: ‘Doing’ Masculinity as an Adaptation to Imprisonment*, 8 Men & Masculinities 44, 48 (2005) (“All forms of masculinity inevitably involve a certain degree of putting on a ‘manly front,’ and it therefore seems reasonable to consider the outward manifestation of all masculinities as a presentation or performance.”).
structure or personal psychology; it is formed at the interface of the two.”

Gender identity is not inherent, but is “actively constructed as part of an interaction strategy that uses available symbolic and material resources.” Therefore, the pursuit of a particular public gender identity involves the performance of certain gendered behaviors, selected for those behaviors’ inclusion in, and sometimes exclusion from, the dominant norms.

Masculine identities are vulnerable to collapse, and the fear of that collapse pervades masculine gender expression. The vulnerability of masculine identity is caused by the relative ease with which a man can lose his gender status: “No matter how gender conforming a man has been, at any moment, he might ‘slip’ and be perceived as revealing an inner feminine/gay essence, which may be read as erasing his masculine/heterosexual behaviors.”

To protect his masculine status, a man must actively maintain his continued adherence to masculine norms, and “constantly work to maintain [his] status by performing masculine behaviors…avoiding behaviors and spaces that are labeled as feminine and/or gay.” This produces a dynamic in which a man could briefly perform the ideal masculinity, but that does not mean his status atop the social hierarchy is secure; because of its fragility, masculine identity must constantly be proved and defended against emasculating threats.

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128 See Kate Seymour, Imprisoning Masculinity, 7 Sexuality & Culture 27, 45 (2003) (“[M]asculinities far from being natural or inevitable are actively constructed and maintained.”).
B. Hegemonic Masculinity and Gender Hierarchy

The importance of performing the “ideal” masculinity is imbedded in the sociological concept of “hegemony.” The term “hegemonic masculinity” refers to “the dominant notion of masculinity in a particular historical context,” a masculinity that, for whatever reasons, represents men’s aspirations for gender expression. Culturally, a particular form of masculinity is considered “hegemonic” when it represents the “ideal man,” the man who would have the greatest social status. The power of hegemonic masculinity is such that, based on how highly a given culture prizes the particular form of masculinity, one who can perform the hegemonic ideal can achieve “great power if he is seen by others, particularly men, to be the living embodiment of this way of being male.” Hegemonic masculinity also limits the amount of socially permissible expression of masculinity by devaluing those expressions that fail to live up to the particular masculine ideal.

However, that a particular masculinity ideal is “hegemonic” does not mean that it represents the lived experience of most men: “Hegemonic masculinity was not assumed to be normal in the statistical sense; only a minority of men might enact it. But it was certainly normative. It embodied the currently most honored way of being a man, it required all other men to position themselves in relation to it.” Most men fail to live up to the concept of hegemonic

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132 See R. W. Connell & James W. Messerschmidt, Hegemonic Masculinity: Rethinking the Concept, 19 GENDER & SOCIETY 829, 832 (2005) (“Hegemony did not mean violence, although it could be supported by force; it meant ascendancy achieved through culture, institutions, and persuasion.”).
133 See David R. Karp, Unlocking Men, Unmasking Masculinities: Doing Men’s Work in Prison, 18 J. MEN’S STUDIES 63, 65 (2010) (“Hegemonic masculinity is defined as the culturally-prescribed ideal, and therefore, accorded the highest status.”).
masculinity, but that does not negate the concept’s power to control men’s gender expression.\textsuperscript{136} Hegemonic masculinity is necessarily dependent on other forms of masculinity for its social power: “hegemonic masculinity carries no intrinsic meaning without the subordinated versions against which it is pitched.”\textsuperscript{137} By nature, hegemonic masculinity stands in opposition to femininity and especially weaker masculinities,\textsuperscript{138} which helps explain hegemonic masculinity’s social power. Men attempting to perform hegemonic masculinity must avoid all other expressions of masculinity, which in turn reinforces the undesirability of those other masculinities.

Contemporary hegemonic masculinity has a few dominant features, based in part on the total rejection of lower masculinities and femininity; it is “built on two legs, domination of women and a hierarchy of intermale dominance.”\textsuperscript{139} This form of masculinity includes “an inability to express emotions other than anger [and] an unwillingness to admit weakness or dependency.”\textsuperscript{140} This form of masculinity also places great value on “control, independence, heterosexuality, aggressiveness, and a capacity for violence.”\textsuperscript{141} Importantly, a man need not perform each aspect of hegemonic masculinity because “[a]n individual with few resources in

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\item \textsuperscript{136} See, e.g., Terry A. Kupers, \textit{Toxic masculinity as a Barrier to Mental Health Treatment in Prison}, 61 J. Clinical Psychology 713, 716 (2005) (“Hegemonic masculinity is conceptual and stereotypic in the sense that most men veer far from the hegemonic norm in their actual idiosyncratic ways, but even as they do so, they tend to worry lest others will view them as unmanly for their deviations from the hegemonic ideal of a real man.”).
\item \textsuperscript{137} Yvonne Jewkes, \textit{Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment}, 8 MEN & MASCULINITIES 44, 61 (2005).
\item \textsuperscript{138} See, e.g., R. W. Connell & James W. Messerschmidt, \textit{Hegemonic Masculinity: Rethinking the Concept}, 19 GENDER & SOCIETY 829, 832 (2005) (“Hegemonic masculinity was distinguished from other masculinities, especially subordinated masculinities.”). \textit{See also} Ramon Hinojosa, \textit{Doing Hegemony: Military, Men, and Constructing a Hegemonic Masculinity}, 18 J. Men’s Studies 179, 181 (2005) (“[H]egemonic masculinities are configurations of everyday gendered social practice in which individuals construct gender identities in relation and opposition to other men and women.”).
\item \textsuperscript{139} Terry A. Kupers, \textit{Toxic masculinity as a Barrier to Mental Health Treatment in Prison}, 61 J. Clinical Psychology 713, 716 (2005) (emphasis added).
\item \textsuperscript{140} Terry A. Kupers, \textit{Toxic masculinity as a Barrier to Mental Health Treatment in Prison}, 61 J. Clinical Psychology 713, 716 (2005).
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one arena may compensate in another.”

This compensatory aspect, where men who cannot achieve every aspect of hegemonic masculinity can still receive the benefit of trying by emphasizing other hegemonic behaviors, is critical for understanding the problem of inmate sexual violence. Because the gender culture in prisons is largely imported from society at large, hegemonic masculinity in prison becomes those features of masculinity, namely violence and domination, that are still available to inmates.

C. Carceral Identity Crisis and Masculinity Behind Bars

The gender culture in prison is not wholly distinct from the gender culture outside of prison because before inmates were inmates, they learned their gender roles from broad, cultural norms. These free society gender roles heavily influence the gender roles in prison through a process called “importation,” which “is premised on the idea that inmate culture is primarily a reflection of the values acquired on the outside that inmates bring into the institution.”

However, these masculine norms don’t pass through the prison walls unaltered; the masculine norms in prison represent an exaggeration of certain hegemonic masculine values. This happens because in “sites largely dominated by men (such as prison), the desire to be seen as a real man can manifest in an oppressive, violent, and hypermasculine culture.”

Prison

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145 Terry Kupers, The Role of Misogyny and Homophobia in Prison Sexual Abuse, 18 UCLA Women’s L.J. 107, 113 (2010) (“The prison code that reigns in men’s prisons is an exaggeration of the unspoken ‘male code’ on the outside.”).
hypermasculinity emphasizes aggression and violence, as well as dominance and the maintenance of a rigid hierarchy. These hypermasculine values, especially aggression and a willingness to fight, represent the most accessible ways that inmates can assert their masculinity in pursuit of the hegemonic ideal. While other forms of masculinity are possible, the hegemonic ideal in prison is a reproduction of “destructive forms masculinity.”

Ultimately, the prison environment reproduces the hegemonic masculinity norms of larger society, but it produces only a narrow subset of those norms, and places particular emphasis on the domination of other inmates. The question, then, is why? What is it about the prison environment that creates gender norms that so highly prize aggression and violence as a means of control? This Article argues that the cause lies in the destruction of the inmates’ free-world identity, an identity they then rebuild with very limited resources.

Prisons and jails are, by design, meant to keep the officers in complete control over the inmates. The carceral environment strips a prisoner of any sense of power the inmate may have had on the outside. To do so, the initial entry into a prison or jail must reduce the inmate to a dependant status, a position of inferiority. In fact,

147 See, e.g., Yvonne Jewkes, *Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment*, 8 MEN & FEMALE Identities 44, 52 (2005) (“Hegemonic masculinity in prisons, then, is clearly as bound up with aggression and violence as it is on the outside.”).
148 See, e.g., Kate Seymour, *Imprisoning Masculinity*, 7 Sexuality & Culture 27, 45 (2003) (“With its emphasis on discipline, control and hierarchy, the prison is an unequivocally masculine environment, one in which the masculine structures which dominate broader society are intensified and strengthened.”) (citation omitted).
152 Terry Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 122 (2010) (“Prisons are designed to maintain a huge power imbalance, which is build into our society’s notion of punishment.”).
The introduction into the rigors of institutional life...include what sociologists have termed ‘degradation ceremonies’ and ‘mortification rituals’ – the figurative killing of the freeworld identity to make one’s institutional self more malleable, more willing and able to conform to the rules and requirements of jail and prison life, and to do as something less than a fully autonomous person.¹⁵⁵

This process, in attempting to break down the inmate’s independence and autonomy,¹⁵⁶ substantially alters an inmate’s sense of self.¹⁵⁷ The living conditions of any carceral environment fundamentally change the inmate’s identity because “the many official rules governing when to eat, sleep, and otherwise partake of daily life represent ‘a profound threat to the prisoner’s self image because they reduce the prisoner to the weak, helpless, dependent status of childhood.’”¹⁵⁸

By treating inmates as dependent and essentially interchangeable,¹⁵⁹ incarceration represents a profound threat to the inmate’s identity. As one inmate put it, “Just like any man, you want respect. But when you come through these doors, you are nobody but a number.”¹⁶⁰ The threat to a man’s identity is most clearly manifest in how the carceral environment alters his gender identity.

¹⁵⁶ See, e.g., Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195, 197 (1999) (“For many of the almost two million men behind bars, prison means more than just a loss of physical liberty. It is also an acute violation of their physical autonomy.”)
¹⁵⁷ See, e.g., Yvonne Jewkes, *Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment*, 8 MEN & MASCULINITIES 44, 45 (2005) (“Described as a ‘civil death,’ entry into the total institution [of prison] involves being subjected to a series of social and psychological attacks that undermine the sense of self.”) (internal citation omitted)
¹⁵⁹ See, e.g., Craig Haney, *The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement*, 48 AM. CRIM. L. REV. 121, 126 (2011) (“Jail and prison inmates live under conditions that severely diminish their sense of self, imposing institutional practices and employing personnel that categorize, regard, and treat them as if they were utterly interchangeable, devoid of the unique needs, concerns, or talents that make each of us individuals.”).
In no uncertain terms, becoming an inmate is an emasculating experience;\(^{161}\) prisons and jails are the “feared and dreaded place[s] where manhood is cut down. When crossing the boundary into the prison world, it is necessary to leave one’s manhood at the door.”\(^{162}\) By nature of their incarceration, inmates no longer have access to the vast majority of resources or behaviors that men use to perform their masculinity: no heterosexual possibilities, no money, and no choice in clothing.\(^{163}\) The effect of this emasculation, and the crisis of self-identity that comes with it, is that prisoners lose any connection they had to their identity outside of prison, and must reconstruct their personal and gender identities using the limited social scripts they have left.\(^{164}\) Given that any threat to a man’s masculinity requires him to react and prove himself, this process produces an extra strong imperative to prove his masculinity.\(^{165}\) “In many ways, maintaining some semblance of self-esteem in prison requires [men in prison] to do whatever they can in order to become even more ‘failed or fallen.’”\(^{166}\) This produces an environment in which the competition for social identities and masculine status is especially brutal,\(^{167}\) because all male inmates are trying to assert their dominance using very few gender resources. The social environment in prisons and jails is

\(^{161}\) See, e.g., Craig Haney, *The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement*, 48 AM. CRIM. L. REV. 121, 126 (2011) (“Grown men are emasculated and infantilized by the very conditions of their confinement and the way that prisonization erodes their sense of personal autonomy, agency, and efficacy.”).


\(^{163}\) See, e.g., Jenny Phillips, *Cultural Construction of Manhood in Prison*, 2 PSYCH. MEN & MASCULINITY 13, 14 (2001) (“There is a stripping of all symbols and insignia of status and social being. The prisoner is separated from all resources for enacting manhood: women, money, clothing and weapons and access to goods and services. One is ground down into the lowly and homogenized status of inmate.”).

\(^{164}\) See Jenny Phillips, *Cultural Construction of Manhood in Prison*, 2 PSYCH. MEN & MASCULINITY 13, 13 (2001) (“The rapid cutoff from the outside world is followed by a total indoctrination into a separate society behind the walls.”).


\(^{167}\) See, e.g., Craig Haney, *The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement*, 48 AM. CRIM. L. REV. 121, 121 (2011) (“Prisons and jails are places where social identities are fiercely contested and often radically transformed.”).
characterized by danger, deprivation, and subordination. They are stripped of all the external, worldly trappings of status and power. In a sense, there is nothing left to lose but their very manhood. The constricted male role and the ever-present sense of danger contribute toward an augmentation of the display of manhood.\textsuperscript{168}

Regardless of how a particular inmate behaved on the outside, or how he views his own masculinity, carceral environments create a need among inmates to reproduce a hypermasculine identity, based on a very narrow set of masculine norms, to survive.\textsuperscript{169} It is this imperative to produce a dominating masculinity, a masculinity based on the very few social scripts still available to inmates, that this Article argues is the root cause of sexual violence in prison. This Article argues that giving inmates other social scripts to establish their masculinity, constructive and positive social scripts, will decrease the emphasis on violent domination, which will decrease the instance of prison rape.

\textbf{D. Prison (Hyper)Masculinity and Masculine Compensation}

Men in prison are faced with an odd dynamic: the need to perform the hegemonic ideal of masculinity is exceptionally high because of the emasculating nature of prison,\textsuperscript{170} but the markers of masculinity are exceptionally few; “Inside prison, masculinity resources are limited….\[M\]ale inmates seeking interactional confirmation of their masculine status are much less able to exploit the standard cultural markers of hegemonic masculinity.”\textsuperscript{171} It is precisely this lack of masculine resources that causes such fierce competition for social status in the masculine hierarchy in

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\item \textsuperscript{169} David R. Karp, \textit{Unlocking Men, Unmasking Masculinities: Doing Men’s Work in Prison}, 18 J. Men’s Studies 63, 66 (2010) (“Inmates believe it is necessary to present a hypermasculine public façade that may conflict with a more nuanced private self-identity.”).
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prison, but “[d]enied otherwise pro-social (and subsequently useful) outlets and activities, prisoners have been left with few dimensions along which to” construct their masculine status in relation to other inmates. The result is a (prison) masculine ideal that emphasizes concealing weaknesses and dominating other inmates: “the man who feels he cannot get respect in any other way is the one who feels a strong urge to dominate others.” The hegemonic masculinity in prison, and the gender hierarchy that sustains it, is based almost entirely on physical dominance, one of the last remaining markers of masculinity inmates have.

While “dominance, power and control are elemental to the prison system,” prison hypermasculinity also values “conspicuous displays of consumption,” when possible, violent behavior, and distrust of others. Performing these traits is critical in the prison context because “[a]s a response to the label prisoner, with all its connotations of weakness, conformity, and the relinquishing of power, manliness (or a version of it) becomes the primary means of

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172 See, e.g., David R. Karp, Unlocking Men, Unmasking Masculinities: Doing Men’s Work in Prison, 18 J. Men’s Studies 63, 66 (2010) (“In conditions of scarcity, fierce competition for status intensifies the construction and reconstruction of male identity.”). See also Jenny Phillips, Cultural Construction of Manhood in Prison, 2 Psych. Men & Masculinity 13, 13 (2001). (“The harsher the environment, the more accentuated the behavior. The more depleted the resources for augmenting manhood, the higher the stakes for the accrual of honor.”).
174 See David R. Karp, Unlocking Men, Unmasking Masculinities: Doing Men’s Work in Prison, 18 J. Men’s Studies 63, 68 (2010) (“Inmate hierarchies are established using the masculine resources available, primarily by hiding vulnerability and expressing physical dominance over other men.”).
176 Kate Seymour, Imprisoning Masculinity, 7 Sexuality & Culture 27, 43 (2003).
177 Yvonne Jewkes, Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment, 8 Men & Masculinities 44, 57 (2005) (“Also intrinsic to masculine rituals of display are symbols of conspicuous consumption, and although [prison salaries are typically very low] it is nonetheless important to be visibly consuming if their adequacy as a man is to be upheld.”).
178 See, e.g., Terry A. Kupers, Toxic masculinity as a Barrier to Mental Health Treatment in Prison, 61 J. Clinical Psychology 713, 717 (2005) (“Examples of toxic masculine characteristics that are over-represented among prisoners are a tough-guy posture, outbursts of temper, and the tendency to act out troubling impulses rather than to introspect about their meanings and ramifications.”).
179 See, e.g., David R. Karp, Unlocking Men, Unmasking Masculinities: Doing Men’s Work in Prison, 18 J. Men’s Studies 63, 80 (2010) (“Sentenced criminal offenders are incorporated into a homosocial prison culture that values emotional stoicism (wearing a mask), distrust (associations, not friendship), dominance (especially through violence or the threat of it), and stratification (especially by rape and type of crime.”) (emphasis added).
adaptation and resistance.”¹⁸⁰ The importance of appearing manly is an essential component of prison life.¹⁸¹ This importance is due largely to how strictly the prison gender hierarchy is maintained, and the consequences for falling to a subjugated status.¹⁸²

The hierarchy in prison is a rigid one. The most physically dominant control those less physically able, there is a very sharp distinction between successful masculine performance and unsuccessful masculine performance, and the bottom of the hierarchy is deemed “feminine.”¹⁸³ The fear of falling down the social hierarchy to a vulnerable position is what sustains the strict hierarchy and reproduces the need for successful hypermasculine performance.¹⁸⁴ The near-constant threat to men’s masculinity pervades prison culture¹⁸⁵ and makes deviation from hegemonic masculine ideals not just unpopular but dangerous because men in subjugated masculinities are those most likely to be victims of sexual violence.¹⁸⁶

Prison rape is very tightly tied into the construction of gender norms in prison and the maintenance of the gender hierarchy. One of the main reasons rape is so prevalent in prisons is

¹⁸¹ See, e.g., SpearIt, Gender Violence in Prison & Hyper-Masculinities in the ‘Hood: Cycles of Destructive Masculinity, 37 WASH. U.J.L. & POL’Y 89, 106 (2011) (“Males face constant scrutiny to be seen as manly, which makes masculinity important in the life of men. In prison, the importance is highly exaggerated.”).
¹⁸³ See, e.g., Terry Kupers, The Role of Misogyny and Homophobia in Prison Sexual Abuse, 18 UCLA WOMEN’S L.J. 107, 112 (2010) (“The four central elements of the prison code: (1) an “exaggerated dominance hierarchy wherein the toughest men dominate those who are less tough”; (2) “a sharp demarcation between those at the top of the dominance hierarchy and those at the bottom”; (3) “The bottom is defined in terms of the feminine”; (4) “There is a narrowing of personal possibilities, and men are forced to act in hyper-masculine and dominating ways merely to prove they are not feminine.”).
¹⁸⁴ See, e.g., Craig Haney, The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement, 48 AM. CRIM. L. REV. 121, 129 (2011) (“Ironically, as the fear of sexual victimization increases, it leads men to act in hypermasculine ways that make such aggression even more likely to occur.”).
¹⁸⁵ See, e.g., Jenny Phillips, Cultural Construction of Manhood in Prison, 2 PSYCH. MEN & MASCULINITY 13, 15 (2001) (“There is a pervasive element of uncertainty and risk within the inmate society, a perceived need to continually produce evidence of honor and valor, and the avoidance of stigma that could detract from one’s social standing.”).
¹⁸⁶ See, e.g., Jenny Phillips, Cultural Construction of Manhood in Prison, 2 PSYCH. MEN & MASCULINITY 13, 15 (2001) (“There is a pervasive element of uncertainty and risk within the inmate society, a perceived need to continually produce evidence of honor and valor, and the avoidance of stigma that could detract from one’s social standing.”).
because “so many of the factors that are known to produce sexual violence in general appear in such concentrated degrees in jail and prison settings.” However, rape is not just widespread in prison, it is central to the construction of gender identity: “The hallmark of masculinity in prison is the penetration of another male, the premier act of domination…[I]t can be the very epitome of masculinity as it represents validation of the penetrator’s masculinity.” The question, then, is how does rape serve to construct and reinforce the dominant norms in prison? This Article argues that rape is a tool both for maintaining the rigid gender hierarchy and for providing a feminine other against which inmates can define their masculinity. This Article further argues that giving inmates other, constructive ways to express their masculinity, especially in relation to other inmates, will decrease the value of rape as a tool to maintain the gender hierarchy.

E. Prison Rape and Gender Construction

Rape in prison is not limited to sexual access produced by physical force; inmates also suffer from rape through coercion. Even the Prison Rape Elimination Act recognizes that rape may occur in multiple circumstances, including in the absence of overt violence, but the effect

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189 See, e.g., SpearIt, Gender Violence in Prison & Hyper-Masculinities in the ’Hood: Cycles of Destructive Masculinity, 37 WASH. U.J.L. & POL’Y 89, 95 (“[R]ape may occur more subtly, and a prisoner might be raped without resistance in the same way a sleeping victim can be raped — agency may be compromised for a number of reasons, but it does not mean that anything less than rape has occurred.”).
190 42 U.S.C.A. § 15609(9) (2003) (defining rape as “(A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.”).
of the rape is nonetheless the same. This section proceeds under this broader understanding of prison rape.

A person’s identity is generally formed in relation to some opposite, and that is especially true when it comes to the construction of masculinity. Hegemonic masculinity needs “an ‘other,’ an abject status that reminds ‘real men’ of the fate they would experience if they failed to perform the traditional masculine role.” The same dynamic exists “[i]n prisons, as in other spheres of life, [where] the marking of ‘sameness’ and ‘difference’ is crucial to the construction of identity positions.” That there is no “natural” “other” in prison does not negate this phenomenon; in fact, it helps to explain the power of prison rape: “[r]elational power in prison privileges hypermasculine attributes by constructing various male and female roles and then subordinating the latter.” Rape, then, serves to affirm the assailant’s sense of masculinity, while simultaneously redefining the victim as the feminine “other” that hegemonic masculinity requires.

When an inmate is the victim of a sexual assault, he is stripped of any masculine status he may have previously had. Such victims are “vulnerable to rape and other forms of sexual victimization, not merely because of their weakness [and inability to defend against the attack], but because they are regarded as available for emasculation…and, thus, transformed into women

191 Sharon Dolovich, Strategic Segregation in the Modern Prison, 48 AM. CRIM. L. REV. 1, 11-12 (2011) (“Even when sexual access is not physically forced, it is nonetheless often experienced by the victim as a profound violation and thus must also be included along with other forms of sexual victimization under the umbrella term ‘prison rape.’”)
192 See, e.g., Sharon Dolovich, Strategic Segregation in the Modern Prison, 48 AM. CRIM. L. REV. 1, 15 (2011) (“As in society in general, the construction of identity in prison is relational: claims to masculinity are only meaningful in relation to constructions of femininity.”) (internal quotation omitted).
195 James E. Robertson, A Punk’s Song About Prison Reform, 24 PACE L. REV. 527, 535 (2004). See also SpearIt, Gender Violence in Prison & Hyper-Masculinities in the ‘Hood: Cycles of Destructive Masculinity, 37 WASH. U.J.L. & Pol’y 89, 106 (“In a homosocial setting like prison, adherence to gender ideology requires the manufacture of female bodies in order to establish one’s identity as ‘man.’”).
for the purposes of life in prison.” This fallen masculinity is not temporary, either, because “a single instance of penetration could strip an inmate of his masculinity for life. Once lost, the rape victim becomes an immediate target for other potential rapists.” The rape serves to define the victim as the necessary other to hegemonic masculinity, a status worthy of scorn that the rest of the inmates use to define their own masculinity. That comparative construction of masculine status is especially apparent in the dynamic between rapist and rape victim.

While the rape victim is considered a feminine other in the prison gender hierarchy, the rapist cements his position atop the prison social ladder. Importantly, the rape does not make the rapist gay: “[i]n jails and prisons, penetrating another man makes only one of the sexual partners gay; the Man who does the penetrating, or the ‘top,’ maintains his heterosexual and masculine status.” Instead, rape is a critical way for the rapist to establish his masculine identity through domination of others, while simultaneously confirming his position of status and power in prison culture. Rape enhances the rapist’s status in the prison gender hierarchy

198 See, e.g., Kate Seymour, Imprisoning Masculinity, 7 SEXUALITY & CULTURE 27, 44 (2003) “In both practical and symbolic terms male violence, and subsequently prison violence, presents a means of demonstrating contempt for femininity and, simultaneously, of asserting a dominant, shared masculinity.”).
199 See, e.g., Russell K. Robinson, Masculinity as Prison: Sexual Identity, Race, and Incarceration, 99 CAL. L. REV 1309, 1352 (2011) (“Those in prison label such men, heterosexuals who other inmates have compelled into a submissive sexual role through the use of force or the threat of force, as ‘punks’ who are at the absolute bottom of the prison hierarchy.”).
201 See, e.g., Sharon Dolovich, Strategic Segregation in the Modern Prison, 48 AM. CRIM. L. REV. 1, 16 (2011) (“In the prison, those men seeking to prove their masculinity vie for possession of weaker inmates – the ‘women’ in this social system – whose utter subordination to them, known to include ongoing sexual access, stands as public proof of their masculine power. In this culture, the performance of rape – the sexual penetration of another inmate defined as female – is a way to shore up the rapist’s own claim to maleness and, thus, his status and power in the prison hierarchy.”).
because it distances the rapist’s identity from the abject other, while demonstrating the rapist’s ability to physically dominate another inmate.

Prison rape serves both to create the abject other against which prison masculinity is defined and to demonstrate the rapist’s masculinity. It is so pervasive that the threat of being a sexual victim causes inmates to act out violently, to protect themselves from rape and to ensure their own masculine status. The underlying reason why rape is such an instrumental tool for establishing gender and power is that “physical domination of others” is one of the few masculine behaviors that inmates can still access: “With their former modes of expressing masculinity unavailable, inmates resort to rape to signify power…Sexual victimization demonstrates the aggressor’s superior strength and knowledge, while pinpointing the victim as weaker and less knowledgeable.” The isolation, dependence, and utter powerlessness that define the prison experience unintentionally channels inmate’s expression of masculinity into violence, distorting the inmate’s sense of gender expression.

202 See, e.g., Christopher D. Man & John P. Cronan, Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference”, 92 J. CRIM. L. & CRIMINOLOGY 127, 148 (2001/2002) (“The rapist’s sense of manhood is established through the dual process of distancing himself from his conception of femininity and maintaining the hierarchy and social superiority that he equates with masculinity by devaluing the opposite sex.”).

203 See, e.g., Jenny Phillips, Cultural Construction of Manhood in Prison, 13 PSYCH. MENS MASCULINITY 13, 16 (2001) (“Anal sex between inmates can be viewed as a resource for enhancing manhood and for demonstrating physical prowess and control over others…. [T]he penetrator, the dominant sexual role, is displaying an enhanced manhood. However, the recipient role is universally seen as one of submission and diminished manhood.”).

204 See, e.g., Tony Evans & Patti Wallace, A Prison within a Prison? The Masculinity Narratives of Male Prisoners, 10 MENS & MASCULINITIES 484, 487 (2008) (“For many men in prison, the only way to ensure that one does not become a victim is to take on the role of perpetrator. A readiness to use violence confirms one’s manhood.”).


207 See, e.g., Craig Haney, The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement, 48 AM. CRIM. L. REV. 121, 127 (2011) (“[T]hese inverted sexual dynamics in which hypermasculinity is performed through though forced homosexual behavior are a testament to the power of prison to fundamentally change people, to distort and disturb their sexual identities as well as other core aspects of their pre-existing ‘self.’”).
Physical domination through rape represents inmates grasping at straws to try to reconstruct their masculine persona and their gender identity. In prison, there exists “an equilibrium where power is held by those who maintain a hegemonic masculine front, amounting to an abhorrence of femininity (in men as well as women), aggressive homophobia, and a personal code of behavior based on confrontation and force rather than negotiation and respect.” This Article argues that the key to decreasing the instance of prison rape lies in giving inmates other ways with which they can establish their masculine status. The final section of this Article briefly sketches two proposals that give inmates other ways of expressing their masculinity.

IV. PROPOSALS

It is critical that inmates be given other ways to express their masculinity because, given the current dearth of options, “the gender strategies enacted for survival in prison are also criminogenic risk factors that limit inmates’ likelihood of successful societal reintegration. Indeed, successful reentry is rare.” While this is a unacceptable state of affairs, it is not an immutable one, even for those inmates currently in jail or prison. As the previous section discusses, masculinities are socially constructed and can be changed. The anxiety that male

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208 See, e.g., Terry Kupers, The Role of Misogyny and Homophobia in Prison Sexual Abuse, 18 UCLA WOMEN’S LO. J. 107, 114 (2010) (“[T]he domination or diminishing of the other, whether the other is a woman, gay, lesbian, bisexual or transgender person, or a weaker man, is a desperate attempt on the part of some men who feel inadequate to prove to themselves and their buddies that they are really still manly.”).
211 See, e.g., Kate Seymour, Imprisoning Masculinity, 7 Sexuality & Culture 27, 51 (2003) (“Masculine discourses and practices are socially constructed and therefore are adaptive and incorporative; masculinity can be challenged and transgressed.”).
prisoners feel, which causes them to perform a violently dominant form of masculinity, “is only exacerbated by prisoners’ lack of access to healthy, socially productive means to express (and perform) their gender identity.”212 Clearly, then, “the most obvious avenue for reform [is] the provision of more personally healthy and socially constructive ways for all men in custody to assure themselves – and others – of their own manhood.”213

This section proposes two alternatives for enacting masculinity.214 The first proposal is for labor programs that actually provide a reasonable wage and that allow for some measure of supervisory positions (i.e. an internal power structure). The other proposal is to allow inmates some measure of individualization of their uniforms. Both proposals would be treated as a privilege that inmates can lose for bad behavior, and given that privileges in prison are “powerful symbols of the reassertion of autonomy and status,”215 they have great potential to reshape the expression of masculinity in prison. These proposals would allow inmates to establish their masculinity in relation to other inmates, and would allow them to do so without resorting to sexual violence.

A. Prison Labor: A Living Wage with the Chance for Authority

The first proposal is to create a prison labor program that would give inmates three benefits: the chance to learn a skill they can use outside of prison, the opportunity to earn money, and the possibility of some management experience. The idea of labor as central to masculine identity may not be as unquestioned as it used to be, but “[e]ven those men who do not endorse

214 While bodybuilding programs seem like they would fit the description, and bodybuilding is already something that occurs in prisons across the nation, bodybuilding is insufficient to combat the gender dynamics the produce a rape culture in prisons. The reason bodybuilding is insufficient, and the reason why it currently does not decrease instances of prison rape, is because bodybuilding does not directly construct a status in relation to other inmates: “it is a form of protection and preservation of self” but one that is a “solitary…pursuit that entails no relation to other inmates.” Yvonne Jewkes, Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment, 8 MEN & MASCULINITIES 44, 59 (2005).
hegemonic masculinity still see the male role as that of the provider.”\textsuperscript{216} Setting up a program in which men can, symbolically, provide for themselves would give inmates an opportunity to prove their masculinity in prison and change the course of their life upon release.

The exact nature of the business could vary, from manufacturing clothing to plumbing to car repair. The type of business would be one that allows inmates to learn skills they could realistically use outside of prison. For instance, if a program were based in producing t-shirts with printed designs, the inmates could learn how to operate silk-screens, which would give them a skill they can use out of prison.\textsuperscript{217} Or the business could be a garage within the prison, fixing both vehicles associated with the prison or from the community at large, at or near cost.

Whatever specific business model the labor program would follow, it should give inmates the opportunity to learn a skill that they can use to provide for themselves once they get out, which would give them confidence in their masculinity.

Such a business should also have some sort of structure in which inmates could receive promotions based on productivity, quality of work, and good behavior. While the ultimate head of the program should either be employed by the Department of Corrections, or could be a volunteer from outside the prison,\textsuperscript{218} inmates should nevertheless have some opportunity for advancement. Doing so would give them not just a skill, but a sense of responsibility for what they’re doing.\textsuperscript{219} Even more importantly, especially in light of the gender analysis in this Article, having the possibility for promotion based on proper performance would give inmates a different


\textsuperscript{217} See Sam Whiting, \textit{Prisoners at Work: Inmates Learn Silk Screening in For-Profit Partnership Program}, S.F. CHRON., Oct. 24, 1996 (“[I]t helps me because when I hit the street I’ll have a silk-screen trade…I won’t go back out into society the same way I came in here.”) (quoting an inmate who was involved in a t-shirt program at San Quentin).

\textsuperscript{218} Potentially, for some share of the total revenue of the business.

\textsuperscript{219} Sam Whiting, \textit{Prisoners at Work: Inmates Learn Silk Screening in For-Profit Partnership Program}, S.F. CHRON., Oct. 24, 1996 (“The inmates, in addition to saving up a little money for the outside, learn a skill and exhibit responsibility.”).
hierarchy in which to construct their identities, or at least a different means by which inmates achieve status other than violence.

The labor program should also pay the inmates a minimum wage,220 out of the revenue that the business generates. However, the income should not go directly to the inmates. As one experimental program in California did, inmate income should be “managed in trust, and [] used for room and board, a victim restitution fund, inmate family support, taxes and expenses, and a savings account” for the inmate.221 Inmates should have limited access to the savings account while in prison, to spend on food or other non-contraband items,222 but most of the money they earn should go toward their families, or should be saved for inmates’ use upon release. Having the money directed toward the inmate’s family and toward this inmate’s own future would allow the inmate to support his masculine identity by fulfilling the role of the provider, rather than by assuming the role of rapist.

B. Individualized Uniform & Consumption

A second proposal to combat prison rape by channeling expressions of masculinity is to allow inmates to personalize their uniform or their clothing, potentially by using some of the money they earn through prison labor programs. As discussed in the previous section, inmates entering the carceral environment are stripped of their free-world identities and are forced to reconstruct their masculine persona given limited social scripts in prison. Without other options, most inmates are forced to perform violent masculinities. This clothing proposal could have a substantial benefit to inmates because “statements of style may nourish the self and counter

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220 For an example of this, see Sam Whiting, *Prisoners at Work: Inmates Learn Silk Screening in For-Profit Partnership Program*, S.F. CHRON., Oct. 24, 1996 (Inmates working in the program “are paid the minimum hourly wage, $4.75 of $190 for a 40-hour week.”).


222 The next proposal would allow them to spend some of their money on accessories for their uniforms.
feelings of dependency and weakness that incarceration can foster.” Additionally, “intrinsic to masculine rituals of display are symbols of conspicuous consumption.” In this vein, being able to personalize one’s uniform can demonstrate an inmate’s “lifestyle aspirations and [fulfill] the need to signal to the group something of one’s pre-prison identity.” Therefore, allowing inmates to personalize their uniforms would give them one way to establish their masculine persona, without resorting to sexual violence, and even to connect with who they are when they are not in prison.

This does not mean that prisoners should be given free rein to dress however they wish. Often, restrictions on what inmates wear serve important purposes, such as making an inmate’s security classification immediately known to all corrections officials. Even within these limits, inmates should still be allowed to personalize their uniform as a way of expressing their masculine identity. Possible restrictions could include only personalizing certain parts of the uniform (e.g. allowing free choice when it comes to pants, but not tops), or to only wear clothing that is a certain color, to stay within the color-coding of inmates’ security classifications.

Regardless of the necessary restrictions, the inmates should be given some choice when it comes to how they present themselves to the rest of the prison population, inmates and officers included.

A final benefit of this proposal is that it allows inmates to see themselves, and each other, as individuals, rather than the homogenized category of “inmate.” This humanizes the inmates, to

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226 See, e.g., Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 25 (2011) (“To help deputies keep track of who is where, and to ensure that people are where they are supposed to be, detainees’ uniforms are color-coded.”).
themselves, to other inmates, and to staff, in a way that symbolically counteracts the identity – destructive components of becoming a prisoner. Without any personalization, inmates really are “nobody but a number.”\footnote{Jenny Phillips, \textit{Cultural Construction of Manhood in Prison}, 2 PSYCH. MEN & MASCULINITY 13, 21 (2001) (quoting an inmate interview).} If given the opportunity to personalize his uniform to some extent, the inmate will be able to express his identity and masculinity in a way that reaffirms his status as still a person, and not just a number.

\textit{Conclusion}

There is no question that rape is an all-too-common occurrence in prison. Experiencing rape can damage the victim’s self-image and self-esteem, and can even make the victim more violent. However, the current approaches that have been either proposed or implemented fail to address the underlying prison culture that makes rape such a powerful tool of masculine identity construction in prison. Men’s self-image and gender identity, already fragile social constructs, are immediately demolished when they become inmates. This psychic crisis in inmates leaves them with the task of reconstructing a masculine persona, but they no longer have access to most of the behaviors they used on the outside to perform masculinity. Without the vast majority of resources for enacting masculinity, and without any differentiation between inmates on which to base relational status, inmates turn to physical domination and prison rape to create a gender hierarchy that mercilessly punishes transgressions from the hegemonic ideal.

This Article argues new solutions are necessary to make any substantive impact on the occurrence of prison rape. To be clear, this Article does not suggest that prison rape will suddenly vanish if prison administrators shift their focus from segregating vulnerable inmates to channeling expressions of masculinity. Instead, this Article argues that prison administrators should broaden their perspectives and understand how the experience of incarceration causes a
gender identity crisis in inmates. While the programs currently in place, namely segregated units and counseling, are important steps forward, they are not enough. Prison administrators should implement programs that channel masculinity to supplement segregated units and counseling programs. This Article has suggested two such changes, designing a labor program and allowing inmates some individualization of their uniform, but these proposals are not the only possibilities. Whatever other solutions might be proposed to address prison rape, they should focus on the masculine expression of inmates, and should seek to channel such expression into alternative, socially productive means. Doing so will not only give inmates a means by which they can differentiate each other, and themselves, but it will also provide alternative, constructive avenues of performing masculinity. With more options to establish their masculinity through positive behaviors, fewer inmates will need to rely on prison rape to prove their manhood. Together with counseling those who want it and segregating those who need it, this proposal will help prison administrators take a giant leap forward to eliminating prison rape.