

FORCED INTEGRATION OF GAY, BISEXUAL AND TRANSGENDERED INMATES IN CALIFORNIA STATE PRISONS: FROM PROTECTED MINORITY TO EXPOSED VICTIMS

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I. INTRODUCTION

In August of 1993, R.G., a gay middle-aged inmate was transferred to the California state prison system from Los Angeles County Men's Central Jail.¹ During his prison intake interview, R.G. expressed his concern that he would be vulnerable to sexual attacks because he was gay and had been previously gang raped while in jail.² The intake officer was concerned about R.G.'s safety and initially placed him in a solitary cell until another officer moved R.G. into a two-man cell the following night. Immediately upon arriving into his cell, R.G.'s new cellmate grabbed him and flatly stated, "You can do this the easy way, or the hard way," before coercing R.G. into performing oral sex.³ R.G. was soon moved to another block where he was placed in a single cell again for two weeks due to his potential for victimization. However, on January 5, 1994, R.G. was again taken to a two-man cell. His new cellmate explained that he had "bought" R.G. with two caps of weed and two sacks of heroin,⁴ letting R.G. know, "You're my property now."⁵

Unfortunately, stories like R.G.'s are all too common among the incarcerated across the United States. As illustrated by the 2001 Human Rights Watch report, "No Escape: Male Rape in U.S. Prisons," brutal and constant acts of sexual violence within men's jails and prisons are so pervasive that inmates and correctional officers often consider sexual assault to be an inevitable reality of incarceration.⁶ California's jails and prisons are no exception to the dangers of frequent inmate sexual assaults.⁷ Further, the likelihood of an inmate being sexually assaulted has only

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¹ HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 40-41 (2001).

² *Id.* at 41.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 38.

⁶ The belief in the unavoidable nature of male prison rape has traveled beyond the walls of our penitentiaries to take root in pop culture, where the issue is regularly referred to with an "almost obligatory" joking reference. *See id.* at 3.

⁷ *See* Valerie Jenness & Cheryl Maxson, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007).

increased due to rising incarceration rates that have overcrowded California's prisons to unconstitutional levels.⁸ A three-judge panel of a United States district court has recently recognized that the greatly increased risk of prison violence is directly linked to overcrowding and has mandated that California massively reduce its prison population to remedy these constitutional violations.⁹ In the meantime, political disagreement regarding the state's vast budget deficit and its potential effect on unpopular prison funding,¹⁰ along with the Governor's resistance to the recent court order, have hampered any meaningful progress in decreasing the risk of prison violence.¹¹

The Los Angeles County Men's Central Jail ("Men's Central") is the world's largest jail facility,¹² housing the largest share of the county's incarcerated men, with over 6000 inmates (also referred to as "trustees").¹³ The conditions within the fortress are tight and rank for the most part, with little hope of any significant improvement considering the county's economic concerns,¹⁴ as well as the dangerously disproportionate corrections officer-to-inmate ratio.¹⁵ Despite these issues, Men's Central is now only one of a handful of metropolitan jails that provides either voluntary self-segregation, or automatic segregation of homosexual and transgendered inmates from the general population of inmates.¹⁶ Upon arrival at Men's Central, inmates are screened to determine whether they are gay, bisexual, or transgendered ("GBT"). If an inmate is determined to

⁸ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943 (E.D. Cal. 2009) (specifically addressing the effect of prison overcrowding on inmate mental health care) "We recognize the gravity of the population reduction order we issue herein, and we do not intervene in matters of prison population lightly. Nonetheless, when federal court intervention becomes the only means by which to enforce rights guaranteed by the Constitution, federal courts are obligated to act. Without this, all the reservations of particular rights or privileges would amount to nothing." *Id.* at *44, quoting Alexander Hamilton, *The Federalist* No. 78.

⁹ *Coleman*, 2009 U.S. Dist. LEXIS 67943, at *268 (addressing increased rates of violence due to overcrowding in addition to plaintiffs' claims of inadequate prison health care). See also Don Thompson, *Judges Ask Calif. Lawmakers to Fix Crowded Prisons*, S.F. CHRON., February 4, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/02/03/state/n130115S88.DTL&hw=prison+medical+system&sn=001&sc=1000>.

¹⁰ Don Thompson, *Schwarzenegger May Face Contempt of Court*, S.F. CHRON., February 13, 2009, at B-10.

¹¹ Order Rejecting Defendant's Population Reduction Plan, *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, (E.D. Cal. Oct. 21, 2009), <http://www.latimes.com/media/acrobat/2009-10/50008167.pdf>. See also Defendant's Response to Three-Judge Court's October 21, 2009 Order, No. CIV S-90-0520 LKK JFM P (E.D. Cal. Nov. 12, 2009), http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/11-12_Filed-Stamped_Filing.pdf; Bob Egelko, *High Court Rejects State's Prison Edict Appeal*, S.F. CHRON., January 20, 2010, at C-3.

¹² Los Angeles Sheriff's Department, *Men's Central Jail*, www.lasd.org/divisions/custody/mcj/index.html.

¹³ Megan Garvey, *Judge Orders Creation of Central Jail Reform Panel*, L.A. TIMES, June 20, 2006 at B-3. See also Kim Shayo Buchanan, Commentary, *It Could Happen to "You": Pay-to-Stay Jail Upgrades*, 106 MICH. L. REV. FIRST IMPRESSIONS 60 (2007), available at <http://www.michiganlawreview.org/firstimpressions/vol106/buchanan.pdf>.

¹⁴ Molly Hennessy-Fiske, *County Budget is \$22.8 Billion for Next Fiscal Year*, L.A. TIMES, April 21, 2009, at A-5 (citing \$31.6 million in cuts for the Los Angeles County Sheriff's Department, which operates Men's Central).

¹⁵ Buchanan, *supra* note 13, at 60. See also Aparna Kumar, *Inmate Population Topped 2 Million in '02, Report Says*, L.A. TIMES, April 7, 2003, at A-20.

¹⁶ MURRAY D. SCHEEL & CLAIRE EUSTACE, TRANSGENDER LAW AND POLICY INST., MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS BY SAN FRANCISCO COUNTY JAIL 5 (2002), <http://www.transgenderlaw.org/resources/sfprisonguidelines.doc>. See also James Ricci, *Gay Jail Inmates Get Chance to Learn*, L.A. TIMES, April 7, 2004, at B-1.

be GBT, the inmate is classified as a K6G (formerly K-11) inmate. K6G inmates are then housed in one of four units specially designated for their classification.¹⁷ Once transferred from Men's Central to a state prison, however, K6Gs are forced to reintegrate into the general prison population, as California prisons currently do not require that an inmate's GBT status be considered during prison classification.

This Note seeks to evaluate the background and application of administrative segregation of gay, bisexual, and transgendered inmates in Men's Central and the repercussions of introducing previously segregated inmates into the general population of California state prisons. In doing so, this Note will also focus on the social context within which inmate sexual assaults occur, including perceptions of masculinity and sexuality by inmates and officers and the distinctive alternate-social order that has flourished within all-male penitentiaries. Next, this Note will concentrate on current judicial and legislative trends that have developed in response to the growing concern of prison rape as a violation of inmates' Eighth Amendment rights. Finally, this Note will evaluate the recommended courses of action in light of the latest California jurisprudence related to the protection of lesbian, gay, bisexual, or transgender ("LGBT") rights.¹⁸

II. INCARCERATING SEXUAL MINORITIES

The automatic segregation of GBT inmates in Los Angeles County was initiated by court order in 1985,¹⁹ with the aim of protecting this subgroup of the inmate population that faced substantially greater threats of physical violence.²⁰ In order to be classified as K6G, inmates undergo an evaluation interview upon arrival at Men's Central to determine whether they are homosexual, bisexual or transgendered. In the corrections system, gender is determined by genitalia, so that a male-to-female transgendered inmate who has not undergone sexual reassignment surgery will be housed in a men's facility.²¹ Once classified, K6Gs reside in one of four "dorm-style"

¹⁷ Testimony by Mary Sylla, Ctr. for Health Justice, Conditions of Confinement—Access to Physical and Mental Health Care (Dec. 11, 2008), <http://www.healthjustice.net/Other/Testimony%20for%20Romero%20hearing.pdf>. See also UCLA School of Public Health, Partner Services, http://www.ph.ucla.edu/epi/Faculty/Visscher/Epi230/2009/Ramirez_Partner_Services_04-09.ppt (last visited Dec. 30, 2009).

¹⁸ In an effort to be as in-depth as possible, this Note will focus solely on male-to-male sexual assault in men's jails and prisons. The prevalence of sexual assaults involving female inmates is also a critical issue that should not be minimized. For an introductory discussion on the topic of sexual assault against female detainees. See JOCELYN M. POLLOCK, *WOMEN, PRISON & CRIME* 176 (Todd Clear ed., Wadsworth 2002) (1990).

¹⁹ Stipulation and Request for Dismissal: Order, *Robertson v. Block*, No. CIVS82-1442 WPG PX (C.D. Cal. Jul. 17, 1985) [hereinafter *Robertson Stipulation Order*] (dismissing case against defendants without prejudice, contingent on defendants providing the stipulated steps to protect plaintiffs and all other gay inmates), available at www.clearinghouse.net/chDocs/public/JC-CA-0064-0001.pdf.

²⁰ Though initially segregated in a designated ward within the Hall of Justice, GBT inmates are currently housed in Men's Central. *Robertson Stipulation Order*, *supra* note 19.

²¹ CAL. CODE REGS. tit. 15 § 1050(a) (2009). It is important to note that California law requires that inmate housing be considered on the basis, *inter alia*, of sex, though the statute does not define sex. The practice in most of California (including Men's Central) is to determine an inmate's sex based on the presence of male or female genitalia, regardless of the inmate's perceived gender identity. Certain jurisdictions, including San Francisco County, determine sex by the inmate's perceived gender identity, regardless of genitalia. See Transgender Law Center, *California Transgender Law 101* 142–43 (2006), available at http://www.transgenderlawcenter.org/pdf/ca_trans_law_101.pdf.

cellblocks in an isolated wing of the jail complex. Guards monitor the K6G cells around the clock and ensure a relatively stable and safe environment. However, at lights-out, the inmates are left in near pitch-black conditions, making it more difficult for guards to monitor their every move.

In the event that inmates are sentenced to state prison at the conclusion of their court proceedings, the world of incarceration takes a dramatically different turn. California state prisons do not automatically segregate their GBT inmates. In fact, prior to the enactment of California's Sexual Abuse in Detention Elimination Act²² ("SADEA") in 2006, California penitentiaries were not required to take any specific factors into consideration outside of the prison system's normal concerns of gang violence and the type of offense the inmate had perpetrated. The cavalier attitude toward protecting inmates from sexual assault began to change, however, after the release of the Human Rights Watch report in 2001 and the University of California at Irvine ("UC Irvine") report on California correctional facilities in 2007.²³

These reports sparked a national debate that resulted in Congress passing the Prison Rape Elimination Act of 2003 ("PREA"), which in turn led to the SADEA in California. The implementation of the SADEA, which will be discussed in greater depth below, requires that California detention centers utilize objective systems to classify incoming inmates in an effort to house them in a location that minimizes opportunities for sexual assault. In addition, the SADEA establishes protocols for responding to sexual violence, including the investigation and prosecution of sexual abuse cases.²⁴ A few of the primary underlying goals of the SADEA are to:

[M]ake the prevention of sexual abuse in detention a top priority in all state detention institutions . . . [and] to protect the 8th amendment right of inmates and wards to be free from cruel and unusual punishment as guaranteed by the United States Constitution . . . [and] Section 24 of Article 1 of the California Constitution.²⁵

The Human Rights Watch report also highlighted the relationship between sexual assaults in detention centers and rates of incarceration. The rate of incarceration within the United States has grown exponentially in the past forty years, reflecting a dramatic shift in sentencing policies throughout the state and federal criminal systems.²⁶ Along with this striking growth in the inmate population have come harrowing accounts from prison rape survivors about the brutal and often inhuman attacks. This is especially true of California correctional facilities, which collectively houses over 150,000 inmates.²⁷

According to the Human Rights Watch report, a 1982 study of California correctional facilities found that 14% of California inmates were victims of

²² CAL. PENAL CODE § 2635 (2008), 2005 Cal. Stat. Ch. 303 § 3 (effective January 1, 2006).

²³ See *supra* notes 1, 7.

²⁴ CAL. PENAL CODE §§ 2635–2641.

²⁵ 2005 Cal. Stat. Ch. 303 § 2(b), (f)–(g).

²⁶ See HUMAN RIGHTS WATCH, *supra* note 1, at 28.

²⁷ *Id.* at 100.

forced oral or anal sex.²⁸ In contrast, the 2007 study completed by Valerie Jenness and Cheryl Maxson from UC Irvine²⁹ found that less than 5% of general population inmates were victims of sexual assault,³⁰ but that transgendered inmates suffered sexual assault at a rate that was many times higher at 59%.³¹ As a group, “non-heterosexual,” or GBT, inmates suffered sexual assault at an astonishing rate of 67%.³² Aside from sexual orientation, characteristics such as age, body size, being perceived as intellectual or passive, being convicted of a sex crime against a minor, or possessing feminine characteristics also increased an inmate’s chance of being sexually assaulted.³³ Though these additional characteristics often put male inmates at heightened risk of sexual assault, the Bureau of Justice Statistics determined that “sexual orientation was the single most predictive characteristic of who was targeted for sexual assault.”³⁴

The enormous disparity in rates of victimization between heterosexual inmates and GBT inmates cannot simply be explained away as an indication of homophobia. Rather, three major interrelated factors have fostered the steep rise of prison violence over the last few decades: (a) the distinct phenomena of the prison social order; (b) the role of corrections officers in policing and, in some cases, exacerbating sexual violence; and (c) the unprecedented exponential rise in prison overcrowding.

A. SPLINTERED MASCULINITY: A MANUFACTURED SOCIAL HIERARCHY BASED ON POWER AND SUBMISSION

The unique environment of an all-male and highly restricted correctional facility gives rise to an alternate social order to that of the outside world. This atmosphere requires inmates to stand their ground and exhibit a façade of impenetrability against constant threats to their safety and social status.³⁵ As a result, in order for an inmate to prevent losing his current status in the prison hierarchy, it becomes necessary (and at times, desirable) to force other inmates into submission.³⁶ This can take the form of mere physical assaults or, more strikingly, official arrangements known as “hooking up.”³⁷

²⁸ *Id.* at 102.

²⁹ Although the California study discusses the prevalence of sexual victimization among GBT inmates throughout, the report is more focused on the statistics surrounding transgendered inmates specifically.

³⁰ Though it is important to note that the discrepancies in statistics may be due to methodology and reporting rates from victims, as well as definitions of rape, which will be discussed further below.

³¹ Jenness & Maxson, *supra* note 7, at 54.

³² *Id.* at 55. See also Stop Prisoner Rape, *SPR Fact Sheet: LGBTQ Detainees Chief Targets for Sexual Assault in Detention*, available at http://www.justdetention.org/en/factsheets/JD_Fact_Sheet_LGBTQ_vD.pdf.

³³ HUMAN RIGHTS WATCH, *supra* note 1, at 52.

³⁴ Just Detention International, *A Call for Change: Protecting the Rights of LGBTQ Detainees*, <http://justdetention.org/pdf/CFCLGBTQJan09.pdf>.

³⁵ Christopher Hensley, *The Evolving Nature of Prison Argot and Sexual Hierarchies*, 83 THE PRISON JOURNAL 3, 289, 293 (2003). See also Stephen Donaldson, *A Million Jockers, Punks and Queens* in PRISON MASCULINITIES 118–26 (Don Sabo, Terry Kupers, & Willi London, eds., 2001) [hereinafter Donaldson, *A Million Jockers*]. See also This American Life, *Lockup* (May 5, 2006), available at http://www.thislife.org/Radio_Episode.aspx?sched=1131.

³⁶ Hensley, *supra* note 35.

³⁷ *Id.* See also Stephen Donaldson, *Who’s Your Daddy? Hooking Up: Protective Pairing for Punks in VIOLENCE IN WAR AND PEACE: AN ANTHOLOGY* 348–53 (Scheper-Hughes & Burgois eds., 2003).

The American style of incarceration was initially intended to force inmates into solitary conditions, going so far as to restrict groups of inmates from looking at one another even while walking down hallways.³⁸ As prison populations exploded throughout the nineteenth century, these early prisons quickly became overcrowded, resulting in prisoners being housed together.³⁹ The opportunity for socialization between inmates quickly led to the emergence of an alternate social order that closely mirrored the power structures of nineteenth century American society. This resulted in a social hierarchy, in which prisoners who forced other prisoners to submit to them by physical force or threat of force were seen as more masculine and, therefore, more powerful.⁴⁰

Domination did not only take the form of physical assaults, however, as the first publically known accounts of rampant same-sex sex occurring within the nation's prisons were published as early as 1826 by Louis Dwight.⁴¹ At the time, homosexuality had not been conceptualized in the manner in which it is commonly understood today. Rather, the lack of terminology betrayed the social sensibility that considered same-sex sexual acts to be evil and corrupt in nature. This is evidenced by Dwight's writings, in which he stated: "THE SIN OF SODOM IS THE VICE OF PRISONERS, AND BOYS ARE THE FAVORITE PROSTITUTES."⁴²

Though sensationalized with Biblical references, Dwight's observation was rather accurate in regard to the use of "boys" within this hierarchy. Juveniles were initially housed with adult inmates until the creation of the juvenile detention system in the late nineteenth century. During this time, older, more aggressive inmates would "seduce" young inmates into engaging in sexual encounters.⁴³ A young inmate in this situation then became the "kid" or property of the adult inmate. Once juveniles were no longer housed in adult prisons, this position in the hierarchy was designated to the youngest and most vulnerable adult inmates that entered the prisons.

Along with this modified social order came a new lexicon that was understood only by inmates and prison officials. This prison argot captures the nuances of masculinity, or the lack thereof, in the social order through its terms for inmates' sexual roles. Those men who are the most aggressive, and therefore masculine, are the "jockers," "wolves," or "daddies."⁴⁴ These "jockers" tend to pair themselves off with men who are typically heterosexual but are perceived as weak in the prison culture, either because of their timidity, body stature, or effeminate tendencies. Due to their perceived characteristics, these "weaker" men are physically forced, or coerced, into servicing "jockers" sexually—also referred to as being "turned-out."⁴⁵ Once an inmate is "turned out," he is referred to as a

³⁸ REGINA KUNZEL, CRIMINAL INTIMACY 16–20 (2008).

³⁹ *Id.*

⁴⁰ *Id.* at 27.

⁴¹ *Id.*

⁴² See KUNZEL, *supra* note 38, (citing Prison Discipline Society [Boston], *Annual Report of the Board of Managers of the Prison Discipline Society*, vol. 1 at 30 (1826) (capitalization in original)).

⁴³ *Id.* at 27.

⁴⁴ See Hensley, *supra* note 35.

⁴⁵ WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS 3 (1982).

“punk,” “fuckboy,” “catcher,” or “kid.”⁴⁶ There is also a third category of inmates comprised of men who fit into what those in prison view to be the stereotypical homosexual role. These men, “queens” or “fairies,” have particularly effeminate mannerisms and will often wear makeup and take on feminine names.⁴⁷ The resulting hierarchy, then, is topped with “jockers” as the most feared and respected class, followed by “queens” in the middle, and “punks” at the bottom, as the most reviled.⁴⁸

Considering that most “punks” are considered heterosexual before and after their incarceration, their position at the bottom of the prison hierarchy is curious at first glance. However, under the social norms of prison society, “punks” are looked down upon because they have lost their claim to the masculinity they once possessed, and by extension, to their own heterosexuality.⁴⁹ Conversely, the aggressive inmates who actively rape other inmates in no way jeopardize their masculinity. Rather, their active role in penetrating—either orally or anally—another inmate is seen as an affirmation of the rapist’s masculinity. As James Robertson notes, some inmates turn to aggression as their only viable option of asserting their masculinity.⁵⁰

Interestingly, a study of contemporary prison argot has shed light on certain refinements that have taken hold in American prisons. The upper echelon of prison society, “jockers,” has been subdivided into two categories: aggressive and non-aggressive “wolves” (or “jockers”).⁵¹ Aggressive “wolves” have maintained their traditional status at the top of the social hierarchy, whereas non-aggressive “wolves” or “teddy bears” typically do not sexually assault their sex partners.⁵² Rather, they seek out other inmates, usually “queens” or closeted gays, who willingly engage in consensual sex. These inmates are able to maintain their perceived masculinity by solely taking on the active role during sex.⁵³

Additionally, the role of “queen” has been subdivided into “fish” and “closeted-gay.”⁵⁴ In the early stages of the development of the prison argot, the term “fish” was used to denote newcomers to the prison system. Contemporary usage, however, has modified the term to denote what is typically considered the “queen.” In effect, “fish” are the openly homosexual inmates that exhibit particularly overt effeminate characteristics. “Closet-gays” refer to men who are homosexual in nature but who can pass as heterosexual. “Closet-gays” are still distinct from “punks” in that “closet-gays” are not considered to be heterosexual men who were not masculine enough to hold onto their masculinity; rather,

⁴⁶ *Id.*

⁴⁷ *Id.* See also Donaldson, *A Million Jockers*, *supra* note 35, at 118–26.

⁴⁸ *Id.* at 292–93.

⁴⁹ Christopher Man & John Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127, 148–52 (2001).

⁵⁰ James Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 13–14 (1999).

⁵¹ See Hensley, *supra* note 35, at 297.

⁵² *Id.* at 296.

⁵³ *Id.* at 297.

⁵⁴ *Id.*

because of their sexuality, “closet-gays” are perceived to have no genuine masculinity to lose in the first place.

Thus, the new subdivisions in the prison hierarchy are such that aggressive “wolves” and “fish” share parity in terms of respect and placement in the hierarchy. Non-aggressive “wolves” and “closet-gays” rank above the bottom echelon, while “punks” remain at the very bottom.⁵⁵ In his study, Christopher Hensley also notes that “fish” were able to rise in the hierarchy by instilling fear into other prisoners by their highly aggressive, though non-sexual, behavior.⁵⁶

The prison argot also speaks of “relationships,” some consensual, many coerced, in which inmates “hook-up” with another inmate and, in doing so, take on a specific sexual role. Hooking up occurs between two inmates when one inmate (the “jockey,” “wolf,” or “daddy”) buys or comes to an agreement with another inmate (the “punk,” “fuckboy,” “kid,” or “catcher”).⁵⁷ These agreements go beyond a one-time rape and are considered enforceable contracts in which the “kid” provides the “jockey” with sexual gratification, along with any other tasks or chores desired by the “jockey.”⁵⁸ In exchange, the “jockey” protects the “kid” from any trouble, even risking his own life to defend his “kid.”⁵⁹ These agreements are quickly publicized throughout the inmate population, resulting in the “kid” receiving the level of respect that is afforded to his “jockey,” which in turn rests on the “jockey’s” status within the hierarchy of inmates.⁶⁰ The “respect” afforded to the “kid” is relative, in that the “kid” himself does not have the respect of the other inmates, but the inmates will treat the “kid” well so as to avoid any conflict with his “jockey.”

Of course, these agreements are not often made under mutual consent, such as when a “kid” is bought by a “jockey” from another “jockey,” or in some cases through bribing correctional officers.⁶¹ For those inmates who do enter into these agreements, the reality is that although there is an *agreement* to enter into a sexual relationship, these acts are nevertheless done under coercion. GBT, new, or otherwise at-risk inmates face the very real threat of repeated rape and assault if they do not find a “daddy” to offer them protection in exchange for sex.⁶² As one inmate survivor stated, “I had no choice but to hook up with someone that could make [the prison gangs] give me a little respect All open [h]omosexuals are preyed upon and if they don’t chose [sic] up they get chosen.”⁶³ This process also comprises a part of *prisonization*: the process in which new inmates are indoctrinated into the social values and behavioral norms of the prison

⁵⁵ *Id.*

⁵⁶ Hensley, *supra* note 35, at 297. Hensley notes an example of the fear-inducing behavior by “fish” as: “two incidents of fish killing other inmates because the other inmates had referred to them as punks. . . . In addition, fish were also known for their jealousy; consequently, a number of inmates reported that they were scared to engage in sexual activities with the fishes’ sex partners.” *Id.*

⁵⁷ See This American Life, *supra* note 35.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ For an example, see the case of R.G. described in the introductory text to this discussion.

⁶² HUMAN RIGHTS WATCH, *supra* note 1, at 91–92.

⁶³ *Id.* at 71.

system.⁶⁴ A new inmate's chances of survival, then, are highly dependent on how quickly he acclimates to the prison's social order.

The nature of these prison relationships can also vary greatly. In many instances, the "kid" is treated as a mere commodity belonging to the "jocker." Oftentimes, "jockers" will loan out their "kid" to friends as favors, to repay debts, or simply pimp them out to the prison community at large.⁶⁵ One such example is J.D., an inmate who was known for being a poor fighter. J.D. was raped by his physically domineering cellmate and was thereafter sold from inmate to inmate.⁶⁶ After being transferred to another wing for his safety, he was immediately sold to B.T., who also rented him out to other inmates, as well as forcing him to perform menial and degrading tasks.⁶⁷ This common practice is pervasive throughout much, if not all, of the United States. The Human Rights Watch report relays this horrific truth from another inmate:

[M]ost time when a young boy is turned out by a gang, the sole purpose of that is first to fuck the boy[,] especially the young boys, once they finish with the boy they are sold to another prisoner for profit, it's [a] big business selling boys in prisons and gang members control this business. [sic]⁶⁸

On the other end of the spectrum lie agreements in which the roles of the "jocker" and "kid" are maintained, but the "jocker" affords his "kid" a greater amount of respect, and in some cases, affection. T.J. Parsell describes one such relationship in his memoir recounting his experiences in a Michigan prison beginning at the age of seventeen. He recounts how his "jocker," Slide Step, "was kind to me. He smiled a lot, and he always had a twinkle in his eye. At least he did for me, but mostly he was gentle"⁶⁹

Such mutually caring relationships are rare, however, because of the danger that they pose to the "jocker's" masculinity. An inmate must constantly be on guard in order to maintain his masculinity in the eyes of other inmates. If he is seen as becoming soft—by either falling in love with his "kid" or taking on a passive role in sex, even if it is only once—then his status is in danger of being irrevocably lost. "Manhood' . . . is a tenuous condition, as it is always subject to being 'lost' to another, more powerful or aggressive, Man; hence, a Man is expected to 'fight for his manhood.'"⁷⁰

These contractual arrangements became such an integral part of the inmate experience that Stephen Donaldson published a pamphlet aimed at informing new inmates of the risks of prison rape and instructing them on the safest way to maneuver the "hooking up" process.⁷¹ The expertise from the pamphlet is derived from Donaldson's own experiences in jail. In 1973, Donaldson was arrested during a peace protest at the White House and

⁶⁴ See Hensley, *supra* note 35, at 298.

⁶⁵ HUMAN RIGHTS WATCH, *supra* note 1, at 93.

⁶⁶ *Id.* at 94.

⁶⁷ *Id.*

⁶⁸ *Id.* at 95.

⁶⁹ T.J. PARSELL, FISH 115 (Carroll & Graf 2006).

⁷⁰ See Donaldson, *A Million Jockers*, *supra* note 35, at 119.

⁷¹ See Robertson Stipulation Order, *supra* note 19.

charged with trespassing.⁷² During his two-day stay at the local jail, Donaldson was brutally gang raped approximately sixty times while his pleas to guards for his safety went unheeded.⁷³ He eventually passed away in 1996 from AIDS, which he contracted during a prison rape.⁷⁴ Sadly, Donaldson's experiences and the advice given through his pamphlets reflect a reality that is still prevalent over thirty years after his first prison rape.

B. PRISON OFFICIALS' PERCEPTIONS OF INMATE RAPE: SEXUALITY AND MASCULINITY FROM THE EYE OF THE STATE

Correctional officers also play an important role in the occurrence and attempted prevention of sexual assault in prisons. Throughout the twentieth century, many of the steps that prison officials took to deal with violence within male prisons were predicated on the prevailing essentialist philosophy of the time.⁷⁵ This philosophy viewed sexuality as a strictly heterosexual-homosexual binary. The problem with this binary arises when, as we have already seen, men who identify as heterosexual in the outside world perform homosexual sex acts, either willingly or by force. Helen Eigenberg describes how the essentialist philosophy of the twentieth century dealt with this contradiction by focusing on rape and categorizing prostitutes and rapists as "situational homosexuals."⁷⁶ This mainly served to "blur the distinction between consensual sexual acts and coercive ones."⁷⁷ In fact, essentialist authors, such as Donald Clemmer, found situational homosexuals to be a challenging deviation from what was considered the natural heterosexual-homosexual binary. To reconcile the anomaly of "situational" homosexuals, Clemmer often emphasized the extreme pain of sexual starvation in order to explain the reality of heterosexual men partaking in homosexual acts in prison,⁷⁸ as well as the dangerous and seductive qualities of the innate homosexual. Clemmer noted that true, or "constitutional," homosexuals were "infectious foci . . . who spread perversion throughout the community."⁷⁹

It can be quite easy to understand the root of some of the potentially homophobic treatment of inmates by correctional officers by examining the language used in much of this literature. Throughout much of the twentieth century, American sentiments toward sexuality relied heavily on nineteenth century concepts of sin and law, as opposed to the relatively new field of sexology that was developing in Europe at the same time.⁸⁰ In fact, it was not uncommon for American scientists to recoil from any discussion of same-sex sexuality out of a sense of decency. A Kentucky physician,

⁷² Just Detention International, *A Brief History*, http://www.justdetention.org/en/spr_history.aspx.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 *THE PRISON JOURNAL* 4, 415 (2000).

⁷⁶ *Id.* at 418.

⁷⁷ *Id.* at 415.

⁷⁸ *Id.* at 418.

⁷⁹ DONALD CLEMMER, *THE PRISON COMMUNITY*, 264 (1958).

⁸⁰ KUNZEL, *supra* note 38, at 55.

George Monroe, exemplified this attitude when he wrote of the habits of prisoners “that were ‘so abominable, so disgusting, so filthy, and worse than beastly, that the medical profession, from a sense of decency and respect, are loth [sic] to write about them, or even to discuss them with other physicians.’”⁸¹

This reticence on the topic of same-sex sex in prisons began to subside in the 1920s. Joseph Fishman, the nation’s first and only federal inspector of prisons, rejected the widespread denial of “abnormal sexuality” in the prison system.⁸² With the newfound embrace of “modern” sexology, American prison writers began to turn away from the moral view of same-sex sex as sinful to what would evolve into the essentialist view of the hetero-homosexual binary. This binary, in turn, was modified for the “situational” homosexual, thereby providing a scientific account for the sexual behavior that occurred in prisons.⁸³

Of course, the rigidity of the essentialist theory carried within it remnants of the moral disapproval of same-sex sex that was prevalent prior to the rise of sexology. The purpose of the essentialist view was to provide a more scientific and, therefore, objective view of sexuality. In actuality, however, the vociferous disgust toward same-sex sex widely expressed in the nineteenth century was masked behind the façade of an objective, scientific distaste for homosexuality as something that was abnormal, even contagious.

When it came to homosexuality in prisons, then, “true” homosexuals were often disregarded by essentialist authors and derided as “abnormal,” “fags,” and “queens.”⁸⁴ Situational homosexuals, on the other hand, were implicitly coerced into homosexual acts by the very nature of the institution, what one author referred to as a “giant faggot factory.”⁸⁵ As recently as 1989, the essentialist author Nobuhle Chonco, opined that heterosexual “inmates are anxious and have pent-up tension which they have to release.”⁸⁶ Furthermore, much of essentialist literature adopts the prison argot by dismissing victims of rape as “punks” and “turnouts,” thereby implicitly validating the existing prison hierarchy that relies so much on the subjugation of the more vulnerable inmates. Terms such as these are still in widespread use today among both officers and inmates.⁸⁷ With such an emphasis in prison theory on the uncontrollable nature of male sexuality, coupled with the dismissive views of “true” homosexuals, one can easily imagine how the current levels of male-to-male assault have come to be tolerated as a natural state of prison life.

The role that correctional officers play in policing prison rape is complicated by two factors that are directly affected by the legacy of the essentialist view of sexuality. Firstly, officers who are on the lookout to

⁸¹ *Id.* (citing George J. Monroe, *Sodomy—Pederasty*, ST. LOUIS MEDICAL ERA 9, 432 (1899–1900)).

⁸² *Id.* at 57.

⁸³ *Id.* at 58.

⁸⁴ Eigenberg, *supra* note 75, at 418.

⁸⁵ *Id.*

⁸⁶ *Id.* at 419 (emphasis added).

⁸⁷ *See supra* note 20.

prevent rape have difficulty in distinguishing between consensual sexual acts and rape.⁸⁸ Secondly, some officers' disapproval of homosexuality leads them to either blame the victim or even accuse the victim of enjoying the rape.⁸⁹

In a recent study, Helen Eigenberg surveyed correctional officers within the department of corrections of a Midwestern state. From her research, Eigenberg notes that the vast majority of correctional officers defined rape in terms of physical force.⁹⁰ There was more difficulty, however, in distinguishing sexual assault that occurred through coercion, and not sheer physical force. Whereas 95% of the officers surveyed defined physical force as rape, only 64% defined sexual acts in exchange for protection as rape.⁹¹ Furthermore, if the victim exchanged sexual acts for protection, and then demanded cigarettes, only 56% of the officers found that to be rape.⁹²

Fortunately, the officers who fall into the victim-blaming category are in the minority, though it is a sizeable minority.⁹³ In fact, 16% of officers stated that homosexual inmates "deserved" to be raped, while 12% claimed that victims deserved to be raped based on how they acted. The largest percentage of officers claimed that the inmates deserved to be raped if they had previously engaged in consensual sexual acts or took money or cigarettes prior to the sexual acts—23% and 24%, respectively.⁹⁴

The personal views of officers towards women were also indicative of whether or not they would tend to blame the victim or find fewer acts to be coercive. Eigenberg noted that officers with less egalitarian views toward women (as well as officers who condemned homosexuality) were more likely to blame victims.⁹⁵ Conversely, officers who reject victim blaming (and/or have more permissive views on homosexuality) were more likely to include coercive situations within their definition of rape.⁹⁶ Clearly, the attitudes of corrections officers can be determinative in either helping a victim or setting a victim up for continued abuse; but regardless of an officer's helpful attitude, any positive effect is greatly diminished by the consequences of other pervasive systemic issues.

C. BREAKING POINT: THE DANGEROUS CONSEQUENCES OF OVERCROWDING IN CALIFORNIA'S CORRECTIONAL FACILITIES

Over the last three decades California's prison system has seen its inmate population explode from approximately 20,000 in the 1970s, to

⁸⁸ Eigenberg, *supra* note 75, at 421.

⁸⁹ Eigenberg, *supra* note 75, at 422. *See also A Call for Change, supra* note 34; *SPR Fact Sheet, supra* note 32.

⁹⁰ Eigenberg, *supra* note 75, at 422.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 423.

⁹⁴ *Id.*

⁹⁵ Eigenberg, *supra* note 75, at 423.

⁹⁶ *Id.*

approximately 160,000 today.⁹⁷ This eightfold increase greatly exceeded the funding that was made available to the prison system, resulting not only in more inmates being housed in small quarters, but also in program funding becoming near stagnant.⁹⁸ Despite the efforts of state governments and the federal government to fund the prison building boom of the 1990s, the capacity of the nation's prisons has been unable to meet the demand of incoming inmates.⁹⁹ The tide of new and returning inmates has been exacerbated by trends in criminal laws and sentencing statutes requiring longer incarcerations for more offenses, including non-violent offenses.¹⁰⁰ In addition, mandatory minimum sentences require inmates convicted of certain crimes to serve no less than a predetermined amount of prison time, regardless of any mitigating factors.¹⁰¹

Academics, prison officials and courts have already acknowledged the relationship between overcrowding and violence in the nation's prisons.¹⁰² A study cited by the Prison Commission found that "where crowded conditions are chronic rather than temporary . . . there is a clear association between restrictions on personal space and the occurrence of disciplinary violations."¹⁰³ Unfortunately, chronic overcrowding is nearing unmanageable levels "with some state prison systems operating up to 89% over their design capacities, and the federal correctional system at 19% over its rated capacity."¹⁰⁴

Overcrowding in California's correctional facilities has also drastically affected the number of inmates per officer; whereas the nation averages 4.5 inmates per corrections officer, California averages approximately 6.1-6.5 inmates-per-officer.¹⁰⁵ Los Angeles County jails have the most disparate ratios, having faced extremes of 100 inmates-per-officer.¹⁰⁶ Such an imbalance requires correctional officers to devote a much larger amount of time to simply maintaining a fragile sense of order. As a result, officers will

⁹⁷ Craig Haney, *Prison Overcrowding: Harmful Consequences and Dysfunctional Reactions* 1-2, http://www.prisoncommission.org/statements/haney_craig.pdf.

⁹⁸ *Id.* at 2.

⁹⁹ See Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79*. See also *The Prison Rape Elimination Act of 2003*, 32 J. LEGIS 142, 160-62. See generally David Masci, *Prison Building Boom: Should More Money Be Spent on Rehabilitation?*, 9 CONG. Q. 802, 805 (1999).

¹⁰⁰ Michael Tonry & Joan Petersilia, Dep't of Justice, *Prisons Research at the Beginning of the 21st Century*, at 6 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/184478.pdf>.

¹⁰¹ Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 395-96 (2005).

¹⁰² *Id.* at 400, citing *Hutto v. Finney*, 437 U.S. 678, 688 (1978) ("the vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding. . ."). See also, Coleman, *supra* note 8.

¹⁰³ Haney, *supra* note 97 at 3 (citing E. Megargee, *The Association of Population Density, Reduced Space, and Uncomfortable Temperature with Misconduct in a Prison Community*, 5 AMERICAN J. OF COMTY. PSYCHOL. 289, 295 (1977)).

¹⁰⁴ HUMAN RIGHTS WATCH, *supra* note 1, at 29. "Design capacity refers to the number of inmates that planners or architects intended the facility to house, while 'rated capacity' refers to the number of beds assigned by a rating official. Among the most overcrowded prison systems, in 1995, were those of California, Hawaii, Indiana, Iowa, and Ohio." *Id.* at 346, fn. 13 (emphasis added).

¹⁰⁵ California Rehabilitation Oversight Board Minutes at 2 (Jun. 17, 2009), available at http://www.oig.ca.gov/media/crob/board_meeting_minutes/2009-06-17%20Minutes.pdf. See also Assembly Bill Analysis, Comments at 5, Cal. Assembly Bill. 242 (2009).

¹⁰⁶ Stuart Pfeifer & Jessica Garrison, *Sheriff Blames Lack of Staff for Jail Riot*, L.A. TIMES, Feb. 6, 2006, at A-1.

not be able to adequately screen and monitor vulnerable inmates or police problematic inmates that may be more likely to victimize other inmates.¹⁰⁷

The struggle between sufficient funding for expanding correctional facilities and inmate programs and funding for other more politically popular social programs (e.g. education) also adds to the problem. In 2007, Governor Arnold Schwarzenegger signed Assembly Bill 900, which provided that \$7.7 billion would be used to add 53,000 beds to the prison and jail systems.¹⁰⁸ This bill, heralded by the Department of Corrections, was quickly criticized for overlooking the need to spend the little money available to the state on more worthy causes: "Something is clearly wrong when the government's most effective affirmative-action program is the preference people of color receive when entering not college, but the criminal-justice system, and when the state's budget proposes to build up prisons instead of universities."¹⁰⁹ Others question whether California will be financially able to continue relying on imprisonment when tightening budgets continue to squeeze out the needed funding to maintain a growing inmate population.¹¹⁰

In light of the ongoing economic crisis that is currently gripping the nation, California's correctional facilities continue to suffer. Indeed, the courts have recently ordered California to cut its prisoner population down to no more than 137.5% of the system's intended capacity in order to address the gross Eighth Amendment violations caused by overcrowding.¹¹¹ Whether California will ultimately release at least 37,000 inmates to comply with the court's ruling is yet to be determined, as the ruling has been stayed, pending review by the United States Supreme Court.¹¹² In the end, even assuming the release of nearly 40,000 inmates, the pressure on correctional facilities would only be somewhat lessened. The resulting constitutionally acceptable level of overcrowding in the state's prisons would nonetheless impede progress toward achieving effective monitoring and protection of at-risk inmates from sexual assault. Regardless of the outcome of the court-ordered release, California must still take further steps in ensuring that GBT inmates are adequately protected.

¹⁰⁷ Haney, *supra* note 97, at 6.

¹⁰⁸ Press Release, California Department of Corrections and Rehabilitation, Gov. Schwarzenegger Signs Historic Bipartisan Agreement, Takes Important Step Toward Solving California's Prison Overcrowding Crisis (May 2, 2007), available at http://www.cdcr.ca.gov/news/2007_Press_Releases/Press20070503.html.

¹⁰⁹ Maya Harris, *Prison vs. Education Spending Reveals California's Priorities*, S.F. CHRON., May 29, 2007, available at

<http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/05/29/EDGGTP3F291.DTL>.

¹¹⁰ Aparna Kumar, *Inmate Population Topped 2 Million in '02, Report Says*, L.A. TIMES, Apr. 7, 2003, at A-20.

¹¹¹ *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, at *268 (E.D. Cal. 2009).

¹¹² *Schwarzenegger v. Coleman*, 130 S. Ct. 46 (2009) (stay denied pending judicial review). See also *Schwarzenegger v. Plata* (09-416), Summary Disposition, <http://www.supremecourtus.gov/orders/courtorders/011910zor.pdf>, January 19, 2010 (appeal denied for want of jurisdiction, but further order stayed pending judicial review).

III. EVOLVING PERCEPTIONS OF PRISON RAPE IN AMERICAN JURISPRUDENCE AND POLICY

A. DELIBERATE INDIFFERENCE

The interpretation of the Eighth Amendment protection against cruel and unusual punishment has evolved throughout the nation's history, mirroring the ever-changing sensibilities of the public. Thus, the Supreme Court in *Gregg v. Georgia* noted that,

The Court early recognized that 'a principle to be vital, must be capable of wider application than the mischief which gave it birth.' . . . Thus the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'¹¹³

In late 1976, the Court went on to enunciate the "deliberate indifference" test to determine if a prisoner's Eighth Amendment right against cruel and unusual punishment had been violated.¹¹⁴ In *Estelle v. Gamble*, the Court focused narrowly on the necessity of the prison providing medical services to inmates. The plaintiff, an inmate, had injured his back while performing prison work.¹¹⁵ After seeking treatment multiple times from the prison hospital staff, the inmate's injury was still affecting him, leading him to file a complaint against the prison.¹¹⁶ Justice Marshall wrote that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."¹¹⁷

The concept of "deliberate indifference" was refined in the landmark case of *Farmer v. Brennan*.¹¹⁸ In *Farmer*, the respondent inmate alleged that federal prison officials had violated her Eighth Amendment rights due to the officials' indifference to her safety. The inmate in this case, Farmer, was a male-to-female transsexual who had undergone estrogen hormone therapy before and during her incarceration, but was still anatomically male.¹¹⁹ Although Farmer had been repeatedly segregated from the main prison population for both behavior and safety reasons, she was eventually transferred to the general population of another prison. Within two weeks, Farmer was beaten and raped in her cell by another male inmate.¹²⁰

In refining its definition of "deliberate indifference," the Court held that a prison official would be liable under the Eighth Amendment when "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must

¹¹³ *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (citing *Weems v. United States*, 217 U.S. 349, 373, 378 (1910)).

¹¹⁴ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹¹⁵ *Id.* at 98.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 104.

¹¹⁸ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹¹⁹ *Id.* at 828.

¹²⁰ *Id.* at 830.

also draw the inference.”¹²¹ In one respect, the test broadened the focus of the deliberate indifference test laid out in *Gamble* from the inmate’s health to the inmate’s health *and safety*. However, the Court, in effect, made the standard far more difficult for inmates to successfully argue because the inmate must allege—and prove—that the prison official was *subjectively* aware of the substantial risk of harm and chose to disregard it.

The California Constitution similarly guarantees criminal defendants the right to be free from cruel and unusual punishment, in accordance with the Eighth Amendment of the United States Constitution.¹²² This constitutional right, however, is not to be construed as granting *greater* rights than those afforded by the U.S. Constitution,¹²³ requiring us to limit any cruel and unusual punishment analysis to accord with the Eighth Amendment jurisprudence just discussed. As such, California jurisprudence has held that government actors must be subjectively aware of a substantial risk of harm to an inmate, and then willfully disregard that risk.¹²⁴ California courts have noted that, like the federal standard, “[w]hen a prisoner claims that his conditions of confinement—e.g., food, clothing, medical care, . . . or protection against other inmates—are so inadequate that they amount to cruel and unusual punishment under the Eighth Amendment, ‘deliberate indifference’ is the minimum mental state required to constitute a deprivation of rights.”¹²⁵

B. A REAWAKENING OF PUBLIC POLICY TO PROTECT THE HUMAN DIGNITY OF INMATES

1. *Federal Policy*

Despite the high threshold required for inmates to successfully challenge the deliberate indifference of prison officials, public awareness of the severity and pervasiveness of prison rape served as an impetus for policymakers and the courts to address the issue head on. In 2001, the startling revelations of the brutality of prison rape and sexual slavery were detailed in the Human Rights Watch report discussed above.¹²⁶ With relative speed, Congress enacted the PREA that was then signed into law by President George W. Bush.¹²⁷

The goals of the PREA are to, *inter alia*, “(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, [and] (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape.”¹²⁸ In order to achieve its goals, the PREA calls for an annual comprehensive statistical

¹²¹ *Id.* at 837.

¹²² CAL. CONST. art. I, § 24.

¹²³ *Id.*

¹²⁴ *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 523 (1994). *See also* *Lucas v. County of Los Angeles*, 47 Cal. App. 4th 277 (1995).

¹²⁵ *Irwin*, 22 Cal. App. 4th at 520 (citing *Wilson v. Seiter*, 501 U.S. 294, 301–02 (1991)).

¹²⁶ *See* HUMAN RIGHTS WATCH, *supra* note 1.

¹²⁷ Prison Rape Elimination Act of 2003, 42 U.S.C.S. §§ 15601–15609 (LexisNexis 2003).

¹²⁸ *Id.* § 15602 (1–3).

review and analysis on the incidence and effects of prison rape.¹²⁹ Additionally, it established the National Prison Rape Elimination Commission (“NPREC”), which is responsible for analyzing the annual review and offering recommendations for national standards to enhance the “detection, prevention, reduction, and punishment of rape.”¹³⁰

The real world effects of the PREA are yet to be determined. Nearly three years after the enactment of the PREA the Department of Justice released its “Report on Rape in Jails in the U.S.,” which was based on hearings conducted by The Review Panel on Prison Rape.¹³¹ This report confirmed much of what the Human Rights Watch reported in its 2001 report, with the added focus of looking at differences between jails that had the highest and lowest incidences of prison rape.¹³² The panel found that some unique characteristics of correctional facilities with higher incidences of rape included: overcrowding, high turnover rates among correctional officers, failure to ask inmates about sexual orientation during intake, and inadequate training of correctional officers and inmates regarding sexual assault.¹³³ Based on these findings, the panel recommended better assault-avoidance training for inmates, more detailed classification of inmates, and the modernization of surveillance.¹³⁴

The official NPREC report was finally published in June 2009, highlighting the same concerns as earlier studies.¹³⁵ After extensive research that included expert testimony, prison site visits, and two sixty-day public commentary periods, the commission released nine findings on the causes of the prison rape epidemic in the United States. The findings directly relevant to this discussion include the following: (1) sexual assault occurs too often in what should be secured environments; (2) corrections administrators can create a culture within facilities that either promotes safety or tolerates abuse; (3) corrections administrators must do more work to identify vulnerable individuals (including GBT inmates); (4) procedures for reporting abuse must protect victims from retaliation without punishing them with isolation; and (5) victims must be ensured immediate and ongoing access to medical and mental health care and supportive services.¹³⁶

In addition to offering the commission’s findings in its full report, the NPREC took the additional step of providing official standards for the prevention, detection, response, and monitoring of sexual abuse.¹³⁷ Included in these standards is the requirement that community correctional

¹²⁹ *Id.* § 15603.

¹³⁰ *Id.* §§ 15606–15607.

¹³¹ Department of Justice, *Report on Rape in Jails in the U.S.: Based on Public Hearings and Review of Documentary Evidence by The Review Panel on Prison Rape* (December 29, 2008), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_081229.pdf.

¹³² *Id.* at 1, 3.

¹³³ *Id.* at 12–13.

¹³⁴ *Id.* at 19–30. The report also made other recommendations, including the advancement of investigations and prosecutions of incidence of rape. *Id.*

¹³⁵ National Institute of Corrections, *National Prison Rape Elimination Commission Report [and] NPREC Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse* (June 2009), available at <http://www.nicic.org/Library/023812>.

¹³⁶ *Id.* at 1–24.

¹³⁷ *Id.* at 221.

facilities, such as Men's Central, take into account each inmate's vulnerability to sexual assault. As the major studies have unanimously shown GBT inmates to be particularly vulnerable because of their sexual orientation or gender non-conformance (as with transgendered individuals), the standards require intake procedures to include sexual orientation or gender non-conformance in their screening criteria.¹³⁸ Interestingly, the standards do not impose such a requirement on prisons, effectively mirroring the omission in the laws passed by California in 2006, discussed below. Rather, the NPREC standards for prison intake procedures include the "consideration of a detainee's potential vulnerability to sexual abuse."¹³⁹

2. California Policy Follows Suit

Within two years of the enactment of the PREA, California lawmakers began working on a statewide zero-tolerance policy for prison rape. Beginning in 2006 with the passage of the SADEA,¹⁴⁰ California prison officials are required to take steps to help minimize the risk of sexual assault in prison through a more detailed classification procedure during inmate intake.¹⁴⁰ SADEA mandates that prison officials are to determine if an inmate is highly vulnerable to sexual assault, or more likely to commit sexual assault according to considerations of (1) age; (2) whether the inmate is a violent or non-violent offender; (3) whether the inmate served prior time in commitment; [and] (4) whether there is any history of mental illness.¹⁴¹ Unless initiated individually, prison officials need not take sexual orientation or gender identity into consideration. The result is that inmates who were previously segregated, and thereby protected while being held at Men's Central, are now likely to be reintegrated into the general prison population; a practice that guards at Men's Central openly acknowledge sets up homosexual and transgendered inmates for easy victimization in prison.¹⁴²

As previously discussed, the Human Rights Watch and Jenness and Maxson from the UC Irvine both conducted independent studies on the severity of same-sex rape in the country's jails and prisons, with the report of Jenness and Maxson focusing solely on California correctional facilities. In addition to the findings on the pervasiveness of sexual assault, both reports found that in certain cases it was the guards themselves who perpetrated the sexual assault upon the inmate victims, or ignored victims' reports of rape because of the officer's homophobia.¹⁴³ In fact, one such officer candidly reported that a newly arrived prisoner had "almost zero" chance of escaping rape, "unless he's willing to stick somebody with a knife and fortunate enough to have one."¹⁴⁴

¹³⁸ *Id.* at 231–32.

¹³⁹ *Id.* at 221.

¹⁴⁰ See CAL. PENAL CODE § 2635 (2008), Cal. Stats. 2005 Ch. 3 § 3 (AB 550) (effective January 1, 2006).

¹⁴¹ CAL. PENAL CODE § 2636(a)(1)–(4) (2008).

¹⁴² Los Angeles County Men's Central Jail tour, July 2008.

¹⁴³ HUMAN RIGHTS WATCH, *supra* note 1, at 143. See also Jenness & Maxson, *supra* note 7.

¹⁴⁴ HUMAN RIGHTS WATCH, *supra* note 1, at 142.

Attitudes such as the one exemplified by the officer above are a cause for concern when the state, by omitting sexual orientation as a required criterion for consideration, delegates the responsibility of determining whether an inmate's sexual orientation is a risk factor on a case-by-case basis. This will lead not only to inconsistent determinations from officer to officer, but to opportunities for abuse on the part of homophobic or unsympathetic officers.¹⁴⁵

With the implementation of the SADEA, California acknowledges that homosexual and transgendered inmates are at a higher risk of being victimized in the state's correctional facilities. Section 2637(e) of the California Penal Code proscribes prison staff from "discriminat[ing] in their *response* to inmates and wards who are gay, bisexual, or transgendered who experience sexual aggression"¹⁴⁶ Albeit a noble proscription of discrimination when dealing with gay, bisexual, or transgendered inmates that have already been sexually abused, the SADEA provides that the state merely take on *remedial* action only when dealing with GBT inmates.¹⁴⁷ As a result, the previously segregated inmates must first be integrated into the general population, suffer abuse at the hands of another prisoner (or officer), and *then* be able to rely on state officials to provide protection.

The SADEA is, in fact, prospective in the sense that prison officials must actively screen inmates according to the criteria mentioned above (namely, age, type and severity of crime, incarceration history, and mental illness).¹⁴⁸ Inmates that fall into one or more of these categories will be appropriately classified and assigned to units with the intent of preventing possible assaults—either against them or by them. Although some GBT inmates would undoubtedly fall into one or more of the standard categories for consideration, this would merely be coincidental and leave other GBT inmates without such consideration. As such, there is notably no such forward-looking concern for gay and transgendered inmates.

A detailed review of the legislative record leading to the passage of the SADEA does not offer any indication as to why sexual orientation would be omitted from the forward-looking aspects of the bill and included only as a category for remedial protection.¹⁴⁹ Neither the Senate nor Assembly detailed analyses make reference to including sexual orientation; this is so despite both the Senate and Assembly Committees citing "gay" as a characteristic of the "most vulnerable members of the population in custody."¹⁵⁰

¹⁴⁵ See *id.* at 38, 41; *supra* text accompanying notes 2–5 (Recall the case history of R.G. and how certain prison guards dismissed his plea to be segregated for his own safety, even leading to his cell assignment being "bought" by his would-be rapist).

¹⁴⁶ CAL. PENAL CODE § 2637 (e) (emphasis added).

¹⁴⁷ *Id.* Note that the title of this section of the code is "Requirements for protocols for *responding* to sexual abuse." (emphasis added).

¹⁴⁸ *Id.* § 2636(a)(1)–(4).

¹⁴⁹ Assem. B. 550, 2005–2006 Sess. (Cal. 2005).

¹⁵⁰ *Sexual Abuse in Detention Elimination Act: Hearing on Assem. B. 550 Before the S. Comm. on Public Safety*, 2005–2006 Sess. 15 (Cal. June 27, 2005), available at <http://www.leginfo.ca.gov/>; *Assembly Committee on Public Safety: Hearing on Assem. B. 550 Before the Assem. Comm. on Public Safety*, 2005–2006 Sess. 9 (Cal. April 18, 2005), available at <http://www.leginfo.ca.gov/>.

Regardless of the reluctance of some officials to advance protections for GBT inmates, it is important to note that state organizations and many individual officers do concern themselves with the safety of this portion of the inmate population. A good example is the mission statement of the Los Angeles Sheriff's Department, updated by Sheriff Lee Baca, in which one of the agency's Core Values is to "stand against racism, sexism, anti-Semitism, homophobia, and bigotry in all its forms."¹⁵¹ At least one other jurisdiction, San Francisco County, has also taken the initiative to go beyond the minimum standards of the state law in regard to classification of incoming inmates. Although these jurisdictions only govern county jails, their commitment to the safety of all inmates should serve as a model to the state prison system. Unfortunately, the data from the Human Rights Watch and the UC Irvine reports suggest that if state prisons are not mandated to take steps to protect GBT inmates, then these inmates cannot rely on their state custodians to consistently protect them from assault.

IV. GBT INMATE RIGHTS IN LIGHT OF THE CALIFORNIA MARRIAGE CASES

A. ELEVATION TO SUSPECT CLASSIFICATION

The landmark *Marriage Cases* decision by the California Supreme Court altered the face of California's constitutional jurisprudence by overturning Proposition 22, the state's voter initiative ban on same-sex marriage.¹⁵² At its foundation, the Justices' rationale for overturning the marriage ban rested on two grounds: namely, that gays and lesbians had a fundamental right to marry, and that the California Constitution guaranteed gays and lesbians equal protection under the law.¹⁵³ Furthermore, the Court took the bold and unprecedented step of declaring that the "strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation."¹⁵⁴

In its discussion of sexual orientation as a suspect class, the Court noted that gays and lesbians, as a specific subset of the general population, have undoubtedly been subject to history of second-class citizenship and a stigma of inferiority.¹⁵⁵ This is certainly no less true within the prison social order than it is in general society. As such,

[T]he most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain

¹⁵¹ Sheriff Lee Baca, *Los Angeles County Sheriff's Department: About LASD*, <http://www.lasd.org/lasdabout.html>. See also, James Ricci, *Gay Jail Inmates Get Chance to Learn*, L.A. TIMES, April 7, 2004 at B-1.

¹⁵² *In re Marriage Cases*, 43 Cal. 4th 757, 857 (2008).

¹⁵³ *Id.* at 855-58.

¹⁵⁴ *Id.* at 844 ("Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the *basis for biased and improperly stereotypical treatment* and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification." (emphasis added)).

¹⁵⁵ *Id.* at 841.

characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society.¹⁵⁶

In light of the Court's analysis, legislators and the courts should begin to view the disparate treatment of GBT inmates in prisons under a paradigm that takes into account the Court's new standard for statutorily differentiated treatment.

Less than six months after the Court's *Marriage Cases* decision, California voters narrowly passed Proposition 8,¹⁵⁷ which amended the California Constitution to read that "only marriage between a man and a woman" is valid or recognized in California.¹⁵⁸ The issue soon returned to the hands of the California Supreme Court as it considered challenges to the proposition's constitutionality. In its decision to uphold the validity of Proposition 8, the Court noted that the state constitutional rights to privacy, due process, and equal protection were still guaranteed to same-sex couples as set forth in the *Marriage Cases*, "including the general principle that sexual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation are constitutionally permissible only if they satisfy the strict scrutiny standard of review."¹⁵⁹

As such, despite the Court's decision to uphold the constitutionality of Proposition 8, the legal tenets of the *Marriage Cases* discussed in this note are still good law.

B. A FUNDAMENTAL RIGHT TO SAFETY

The California Constitution provides for certain inalienable rights, among which are pursuing and obtaining safety, happiness, and privacy.¹⁶⁰ Of course, once an individual is incarcerated, the inmate's rights and privileges are greatly curtailed. However, despite the reduction and elimination of various rights while incarcerated, inmates do hold onto the most fundamental of rights that are meant to maintain their dignity. As discussed above, the right to be free from cruel and unusual punishment is one such right, as is an inmate's right to due process.¹⁶¹ Another such right, regardless of one's status as a free citizen or incarcerated criminal, is the right to personal safety as guaranteed by the California Constitution.¹⁶²

¹⁵⁶ *Id.* at 843.

¹⁵⁷ Office of the California Secretary of State, Votes for and Against November 4, 2008 State Ballot Measures, http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf.

¹⁵⁸ CAL. CONST. art. I § 7.5. *See also*, California Voter Information Guide, November 4, 2008, *Prop 8: Eliminates Right of Same-Sex Couples to Marry*.

¹⁵⁹ *Strauss v. Horton*, 46 Cal. 4th 364, 412 (2009).

¹⁶⁰ CAL. CONST. § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy," (emphasis added)).

¹⁶¹ *See Farmer v. Brennan*, 511 U.S. 825 (1994).

¹⁶² *See* CAL. CONST. § 1.

“All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety¹⁶³ The true meaning of safety in this sense does not guarantee inmates safety from all harms; such an interpretation would be untenable. In this context, “safety” also does not necessarily refer to the same level of safety that non-inmates are ensured from this provision. Civilians who have never been convicted of breaking the law, for example, generally live life without the constant fear of being assaulted by anyone they may happen to run into on the street. Inmates, on the other hand, lose the comfort of this form of safety by the very environment in which they are confined. The reality of being confined with a population of men with a history of breaking the law, often through violence, leads to a situation in which prison officers cannot guarantee the same level of safety that most civilians enjoy. Yet, this lowered level of safety does not necessitate a loss of all expectations of an inmate’s safety. Because inmates are wards of the state, the state must act as a custodian to ensure a reasonable amount of safety, such as protecting inmates from assault by others.

Thus, regardless of an inmate’s status as being “outside” of the normal social order, the principles of our form of government insist upon the preservation of an inmate’s reasonable right to safety from the violence of others.¹⁶⁴ One’s safety is so fundamental to the continuance of life that the right to it cannot be taken away, though the standards used to gauge the right do change, as mentioned above. The Supreme Court has stated as much in holding that a prison official’s deliberate indifference of a substantial risk of harm violates an inmate’s constitutionally protected right.¹⁶⁵ Though the specific right in *Farmer* was the Eighth Amendment freedom from cruel and unusual punishment, the purpose and spirit of that freedom is to preserve a person’s life and safety. There can be no doubt, then, that safety from brutal and ongoing rape that is incorporated into the prison social order is a fundamental right.

The issue reaches another level of complexity when viewing a person’s right to safety in light of the SADEA, which does not actively infringe upon GBT inmates’ right to safety, but rather endangers the right by its omission. As discussed above, the SADEA conspicuously excludes sexual orientation from the standard list of categories that a corrections officer must consider when determining an inmate’s placement. This is so *despite* the fact that sexual orientation has already been determined to be the single most predictive characteristic of sexual assault victimization in prison.¹⁶⁶

In considering this omission, it is helpful to note that the Court’s equal protection holding in the *Marriage Cases* transcends the typical heterosexual/homosexual binary. Unlike the issue of same-sex marriage, here, the state is not *actively* treating one group (heterosexuals) differently than another (homosexuals). Because of the nature of prison rape, this is not merely an issue of heterosexuals subjugating homosexuals as second-

¹⁶³ *Id.*

¹⁶⁴ *See* *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁶⁵ *Id.*

¹⁶⁶ *See* Just Detention International, *supra* note 34.

class citizens. Rather, under the SADEA, the state is *passively* excluding a class of inmates—based on sexual orientation—that it knows to be especially vulnerable from mandatory consideration for safer cell assignments; and this is done to that class's own detriment.¹⁶⁷

C. LOOKING FORWARD

1. *Include Sexual Orientation in SADEA Classification Procedures*

Looking to the legal principles laid out in the *Marriage Cases* decision, policymakers should consider whether their omission of sexual orientation from the classification system mandated in the SADEA would survive a constitutional challenge under strict scrutiny. Is there a compelling state interest in omitting sexual orientation from being a required consideration when determining the placement of new inmates? Considering the data that has been published in the major reports discussed above, it clearly seems counter-productive to omit a group of vulnerable inmates that have uniformly shown higher rates of being subjected to sexual victimization in prison.¹⁶⁸

Furthermore, chronic issues with the American system of incarceration cannot be used to legitimize the lack of protection for a vulnerable segment of the population. The problems of overcrowding and attracting stable and qualified corrections staff may pose legitimate roadblocks to being able to place every inmate in an appropriate cell assignment. As noted above, American prisons have been chronically overcrowded throughout the twentieth century,¹⁶⁹ and inmate populations have continued to rise exponentially since the 1970s due to changes in criminal laws and sentencing practices.¹⁷⁰ In addition, the economic crises of the early twenty-first century are likely to continue exacerbating the existing practical and legislative challenges to effectively addressing prison overcrowding. Such concerns, however legitimate, cannot be used to rationalize a constitutionally deficient practice.

A more complete classification system that includes sexual orientation as a required criterion would afford GBT inmates more of a safety net in their housing assignments. This should not necessarily result in the *automatic* segregation of GBT inmates. Rather, once sexual orientation is included in the classification procedures, prison officials would be required to assess the full spectrum of characteristics that put inmates at a higher risk of victimization. This type of protocol would also result in a traceable record of why inmates were housed in any particular manner. As such, GBT inmates who clearly should have been housed in either single-cells or protective units, but were wrongfully denied such protection, would be left with a paper trail on which they could rely for use in court, if necessary.

¹⁶⁷ See *id.*; Jenness & Maxson, *supra* note 7.

¹⁶⁸ See HUMAN RIGHTS WATCH, *supra* note 1; Jenness & Maxson *supra* note 7.

¹⁶⁹ See KUNZEL, *supra* note 38.

¹⁷⁰ See Haney, *supra* note 97.

2. Address Chronic Overcrowding in Prison

If policymakers are as committed to ending the epidemic of prison rape as the language of the SADEA suggests, then the groups that are most vulnerable must be protected regardless of extenuating circumstances. Short-term and long-term solutions for the overcrowding problem should be considered, such as building smaller facilities that are more fiscally realistic to construct and operate, or transferring inmates to out-of-state facilities that have space.

Overcrowding may never be solved, though, if lawmakers do not reconsider existing approaches to crime and punishment practices. Lower rates of incarceration for non-violent and minor drug offenses would greatly alleviate the population growth in most prison systems. Likewise, funneling a larger portion of the state's prison funding to treating and rehabilitating those who have been convicted of non-violent and minor drug offenses would undoubtedly contribute to a decrease in the inmate population and inmate recidivism. If this were to occur, people convicted of minor offenses could avoid undergoing *prisonization*,¹⁷¹ thereby avoiding the common situation of minor offenders turning into serious criminals *because* of their incarceration. In the end, such changes would also help avoid the stresses of overcrowding that Professor Craig Haney suggests only serve to increase the likelihood that an inmate will assault other inmates.¹⁷²

3. Prison Officers Must Be Properly Screened and Thoroughly Trained in Preventing, Responding to, and Investigating Incidences of Prison Rape¹⁷³

Correctional officers must be thoroughly screened in order to ensure that the state employs a quality staff of the proper disposition. In order to encourage a higher rate of reporting from rape victims, inmates who are raped in prison must not need to fear ridicule or punishment from prison officers.¹⁷⁴ In the process of recruiting officers, the state should implement a thorough examination of potential applicants, thereby allowing human resource officials to weed out applicants that may show a callous disregard for the sexual victimization of inmates, or who would themselves victimize inmates.

Furthermore, all correctional officers should receive continuing education in the prevention, response, and investigation of incidences of prison rape. Such training should also include instruction on the non-discrimination of GBT inmates, as well as the particular safety concerns of GBT inmates in the prison system.¹⁷⁵

¹⁷¹ Hensley, *supra* note 35, at 298.

¹⁷² Haney, *supra* note 97, at 6.

¹⁷³ Just Detention International, *supra* note 34.

¹⁷⁴ Eigenberg, *supra* note 75.

¹⁷⁵ See Just Detention International, *supra* note 34, at 3.

V. CONCLUSION

The history of sexual violence in America's prisons illustrates why GBT inmates are particularly vulnerable to the violent prison social order. As the concepts of masculinity and power permeated throughout free society in the form of sexism, the all-male prison culture modified the prevailing power structure of the outside world to fit its own needs. Inside prison walls arose a distinct alternate society with its own lexicon and social mores, which served to highlight the one aspect that no prison sentence could take away from these men: masculinity.

Masculinity through violence and coercion has become the staple of all American prison systems. And since inmates have few opportunities to express their masculinity in productive ways while incarcerated, they have turned their attention to each other, eagerly seeking out inmates among them who are in some sense weaker. GBT persons, already persecuted and reviled throughout much of American history, have been an historically easy target for the most aggressive "jockers" in the prison system, leading to significantly higher rates of sexual victimization within the GBT population than the general inmate population.

Because of the brutal reality that incarceration imposes on GBT inmates, jails such as Men's Central attempt to address the problem through automatic segregation. Likewise, policymakers have passed landmark legislation such as the PREA and SADEA to address and, optimistically, eliminate prison rape. However, policymakers have also been reticent to explicitly call for the protection of GBT inmates *prior* to their exposure to danger through the classification and housing assignment process. Ironically, this has led to the Sex Abuse in Detention *Elimination Act* that only explicitly forbids prison officials from discriminating against GBT inmates in *responding* to incidences of prison rape.

Looking at the implementation of the SADEA in light of the *Marriage Cases*, the lack of consideration for sexual orientation in the SADEA should be subject to a strict scrutiny standard of review should it be challenged for failing to meet constitutional muster. Albeit a statute of noble intent, the SADEA must be modified to include sexual orientation in its mandated classification procedures. In this way, the state would take a real step in attempting to reduce the incidence of prison rape perpetrated on a segment of the population that it knows to be especially vulnerable. Additionally, in order to address logistical concerns for adding sexual orientation to the classification process, the state must address issues of overcrowding, either through the construction of more cells for the short-term, or the changing of sentencing practices for the long-term.

Furthermore, corrections officers must be properly screened in order to avoid employing officers who would tend to victimize inmates or ignore their requests for help. Additional and continuing training on preventing, responding to, and investigating incidences of prison rape are also crucial to create and maintain an environment of zero-tolerance for sexual assault in prisons.

