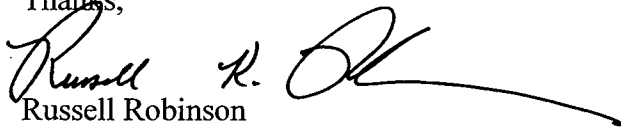


Dear Faculty:

This work in progress draws on interviews that I conducted over the last four months. I anticipate interviewing several additional subjects in the coming months. The UCLA Institutional Review Board (IRB) reviewed my project and authorized the research. As part of the IRB process, I promised to give subjects the opportunity to confirm any quotes or other attributions prior to publication and to request that I not attribute certain sensitive information to them. Because this negotiation process is ongoing, I have not included any names of subjects in this draft, except for Deputy Sheriff Bart Lanni, who placed no restrictions on my use of his interview. I have cited all other interviews based on chronological order (e.g., Interview #1). My conclusions in this draft are tentative, and the draft will likely change as I incorporate more interviews. Therefore, please do not distribute this draft to others or cite it.

Thanks,


Russell Robinson

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Governmental "Gaydar": Race, Sexual Identity and Incarceration

*Russell K. Robinson**

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INTRODUCTION

Within the last few years, the concept of "gaydar" has been featured in popular magazines, newspapers and television shows.¹ The slang term has even penetrated major dictionaries: *Webster's Dictionary* describes gaydar as "the ability of a homosexual to recognize that another person is homosexual."² The *New Oxford American Dictionary* declares gaydar to be the "putative ability of homosexuals to recognize one another intuitively or by means of very slight indications," and refers secondarily to "the similar ability of heterosexuals to discern the homosexuality of others."³ The qualifiers "putative" and "supposed" in several definitions signal that it is far from clear that anyone can actually determine another's sexual orientation by mere observation. This uncertainty has not stopped gay men from writing books that claim to educate "newbies"⁴ as to how to spot other gay men—a critical skill if one is looking for romantic partners of the same sex, while seeking to avoid hostile reactions from straight men. Such expositions tend to devolve quickly into stereotype. One book asks: "Does he walk a 'gay' walk?" "Has he ever pranced over a puddle?" "Does he have

¹ See, e.g., David Colman, *Gay or Straight? Hard to Tell*, N.Y. TIMES, June 19, 2005, available at <http://www.nytimes.com/2005/06/19/fashion/sundaystyles/19GAYDAR.html>; see also David France, *The Science of Gaydar*, N. Y. MAG., available at <http://nymag.com/news/features/33520/>, June 18, 2007. Television series that have invoked the term include *The Office*, *Saturday Night Live*, *Ellen*, and *Buffy the Vampire Slayer*. See Gaydar, Wikipedia, <http://en.wikipedia.org/wiki/Gaydar> (last visited January 28, 2010). No less than three "reality" series have been based on the concept. See *infra* note 140.

² Gaydar, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/gaydar> (last visited January 28, 2010). Wikipedia describes gaydar as, "[T]he reportedly intuitive ability to assess someone's sexual orientation as gay, bisexual, or straight. The function of gaydar relies on usually non-verbal sensory information and intuitions. These include the sensitivity to social behaviors and mannerisms; for instance, acknowledging flamboyant mannerisms, overtly rejecting traditional gender roles, a person's occupation and grooming habits." Gaydar, Wikipedia, <http://en.wikipedia.org/wiki/Gaydar> (last visited January 28, 2010).

³ NEW OXFORD AMERICAN DICTIONARY (2009).

⁴ This is a slang term for people who are recently out of the closet and new to gay culture. The term has been used in other contexts as well. See Newbie, Wikipedia, <http://en.wikipedia.org/wiki/Newbie> (defining "newbie" as "a slang term for a newcomer to an Internet activity") (last visited January 28, 2010).

a great body?” “Does he live in a gay neighborhood?” Does he have a “naval ring or Prince Albert?”⁵

One might rebuff an academic critique of such popular books for lacking a sense of humor and failing to understand that gaydar is merely a light-hearted guessing game. Few people know, however, that government employs a gaydar test, not for fun, but to determine who has access to protection from sexual assault. That is essentially what happens every day in Los Angeles County Men’s Jail, the largest jail in the world. Whether an inmate is raped and/or exposed to HIV may hinge on whether two deputies deem him to be gay or transgender and thus deserving of special treatment. It is not enough that an inmate self-identifies as gay; he must pass the jail’s gaydar test. And the jail’s gaydar test tracks in important respects the stereotypical inquiries listed above.

The Los Angeles County Men’s Jail is unusual in that it maintains a large, special unit set aside specifically for homosexual⁶ men and transgender⁷ inmates. The jail created the segregated “K6G” unit to settle an ACLU lawsuit over the exposure of homosexual and transgender inmates to high risk of sexual assault in the jail’s general population. During initial processing at the jail, a custodial officer asks each new inmate, “Are you homosexual?” The officers do not explain to new inmates that they house homosexual and transgender inmates in a special unit and are asking about sexual identity for that purpose. Inmates who gain access to the K6G unit receive benefits lacking in the general population. They receive educational and rehabilitative services and are perceived to be safer from sexual assault than they would be in the general population.⁸ Although sexual conduct is

⁵ See DONALD F. REUTER, *GAYDAR: THE ULTIMATE GUIDE TO THE GAY SIXTH SENSE* 128-129 (2002).

⁶ In this article, I follow the jail’s usage of the terms “homosexual” and “gay” interchangeably. I recognize, however, that some people take offense at “homosexual” because of the medical connotations it may carry. See David Alan Sklansky, “*One Train May Hide Another*”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 881 (2008).

⁷ The unit is designed for transgendered inmates who were born male and transitioned to female identity. Because Los Angeles does not maintain a separate jail unit for female to male transgender or lesbian inmates, I do not discuss women’s prisons. Similarly, my primary focus on gay inmates rather than transgender arises from the fact that the jail does not subject transgender inmates to a “gaydar”-like test, although its screening process for transgender inmates has its own substantial problems, as I will discuss. See, e.g., *infra* note 108 and accompanying text.

⁸ Deputy Bart Lanni, who has been in charge of the K6G unit with Deputy Randy Bell for over twenty years, does not recall a single incident of sexual assault in the K6G unit. Interview with Bartholomew Lanni, Deputy Sheriff, Los Angeles County, in Los Angeles (Nov. 16, 2009) [hereinafter Lanni Interview], transcript on file with author, 31. A Department of Justice study

formally forbidden throughout the jail, only inmates in the K6G unit are allowed to possess condoms. Because of the benefits of the K6G unit (and the harsh conditions in the general population) the deputy sheriffs who screen inmates believe that many heterosexual men falsely claim they are homosexual in order to gain access to the unit. Further, they believe that heterosexual and bisexual men pose a threat to the safety of homosexual and transgender inmates because the former are likely to rape the latter. Therefore, the deputies employ a test to determine which of the inmates who identify as homosexual are *truly* homosexual and send those who flunk the test to the general population.

The deputies—both heterosexual, white, middle-aged men—interview each inmate who identifies as homosexual during the intake process. Their questions typically fall into one of three categories: gay culture, gay terminology, and coming out experiences. First, they ask about culture in West Hollywood, the primary gay neighborhood in Los Angeles, and other public gay spaces in Los Angeles. Second, they ask inmates to define several terms the deputies believe to be part of a universal gay vernacular. Third, the deputies ask questions about the inmate's personal life, such as his coming out experiences, which are designed to test credibility.⁹ This last step also involves requesting names and phone numbers of family members who can verify the inmate's sexual orientation. In addition to these questions, there is some evidence that the deputies are influenced by the inmate's physical appearance—for instance, whether he "acts gay." Men who conform to the stereotype of gay effeminacy (while not coming off as straight men *acting* effeminate) may be more likely to be admitted.¹⁰

Clearly, the K6G unit raises multiple legal and policy questions about sexual orientation, race and gender in jails and prisons, and this Article does not attempt to address all of them.¹¹ This Article focuses on the tension

suggests that there is a relatively high rate of sexual assault in the Men's Jail. DOJ Statistics Special Report, *Sexual Victimization in Local Jails Reported by Inmates, 2007* (June 2008), available at <http://www.ojp.gov/bjs/pub/pdf/svljri07.pdf> (hereinafter "Local Jails"). But to date, there are no empirical studies of claims of sexual assault in the K6G unit.

⁹ I refer to only male inmates here, because, as this paper discusses later, deputies presume trans women are immediately identifiable and require little verification of authenticity.

¹⁰ See Lanni Interview, *supra* note 8, at 20 (describing men who "cross their legs and make sure the knees are like right here, and then they'll sit like this. They'll have other people braid their hair so they look more effeminate. And this guy couldn't be any straighter and he's the worst gang member. ...").

¹¹ For instance, one could frame the central legal issue as a question of equal protection, focusing on race and/or sexual orientation. A race-based claim would likely fail because of the Supreme

between the the Constitution's right to privacy and the K6G policy's encouragement of men to come out and embody a purportedly universal, but actually white-inflected, gay identity. I employ an intersectional approach to show how a monolithic approach to gay identity overlooks the complex ways in which race, class, sexual identity, and coming out interrelate.¹² I also seek to extend three points made in my prior scholarship. (1) Members of stigmatized groups grapple with identity-based pressure to assimilate imposed not only by the majority, but also by members of their own stigmatized groups.¹³ (2) Government and society have created structures that channel our individual sexual decision making, limiting certain options while valorizing others.¹⁴ (3) We should interrogate dominant systems of sexual classification and pay greater attention to the lives of non-conforming people, who tend to fall through the cracks.¹⁵

The jail's policy of sexual classification creates troubling slippage. Because of the K6G test's focus on gay culture, it is neither necessary nor sufficient for a man to have had sex with men in order to be deemed a homosexual. That is, a man who has had many sexual experiences with men may nonetheless be excluded because he does not sufficiently reflect gay culture. And a man familiar enough with gay culture could gain admission to the unit without ever having had sex with a man. Aside from this imprecision, I home in on two principal and intertwined problems of the K6G screening process: racial/cultural bias, and the requirement that men "come out" as gay in order to receive governmental protection.

First, the K6G screening process, like much gay rights discourse, adopts a monolithic view of gay identity premised on the experiences of white, upper and middle class men. The jail assumes that gay men spend time in

Court's cramped interpretation of the Equal Protection Clause, which generally requires a showing of discriminatory intent. A claim that the policy is sexual orientation discrimination, privileging gays over straights, would have to struggle with a central claim of this article, which is that a policy said to protect gay men in fact extends to a small subset of the group, because of intersecting factors such as race and class.

¹² On intersectionality, see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. I also draw inspiration from Angela Harris' work on anti-essentialism. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

¹³ See Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809 (2007).

¹⁴ See Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787 (2008).

¹⁵ See Robinson, *Racing the Closet*, *supra* note 14, at 1493.

West Hollywood even though it is one of the whitest and wealthiest neighborhoods in Los Angeles. This focus on West Hollywood is glaringly out of sync with its regulated population in that most inmates are black, Latino and/or poor and live in segregated neighborhoods far from West Hollywood.¹⁶ Many of these men cannot afford to attend swanky clubs and lack the disposable income necessary to pay \$12 for a drink. Moreover, many of them see West Hollywood as a space exclusively for whites. Some gay clubs have been accused of discriminating against men of color,¹⁷ and scholars have revealed the unwritten rules of racial hierarchy that control many gay social spaces.¹⁸ Even men who could afford to congregate in West Hollywood may shun the neighborhood because they do not see it as reflecting their identities, including its association with, for example, effeminacy, conspicuous consumption or promiscuity. To provide another example, gay enclaves tend to be hostile to bisexuality.¹⁹ Studies show that black men and other men of color are more likely to report having had sex with both men and women than white men.²⁰ Yet the jail has a policy of excluding men from the unit if they identify as bisexual. Thus, the jail's assumption that gay men are immersed in the West Hollywood bar and sex scene and categorical exclusion of bisexuals likely produces a disparate racial impact and harms others who depart from hegemonic Gay Identity.²¹

Second, the jail makes it extremely difficult for men to be admitted to the K6G unit if they have not publicly "come out" as gay. At a minimum, men must come out to the jail staff in response to the question, "Are you homosexual?" This alone is worrisome because the staff does not explain why they are asking this question, and many men—especially black and Latino men—will not trust law enforcement with this sensitive information.

¹⁶ Although the majority of people in LA County are of color, West Hollywood is 76% white and just 3% black. See 2006-08 US CENSUS AMERICAN COMMUNITY SURVEY, available at www.census.gov. In West Hollywood, the median earnings for workers is \$43,454; in LA County, it is \$28,576. *Id.*

¹⁷ See, e.g., Niels Teunis, *Making Badlands Good: Still confronting racism in the Castro*, available at http://nsrc.sfsu.edu/article/making_badlands_good_still_confronting_racism_castro.

¹⁸ See DWIGHT MCBRIDE, *WHY I HATE ABERCROMBIE AND FITCH*, 122 (2005).

¹⁹ See, e.g., Robinson, *Racing the Closet*, *supra* note 14, at 1493.

²⁰ See *infra* text accompanying note 372.

²¹ I wish to highlight that one can be "gay" but not "Gay." I capitalize "Gay Identity" to signify that this is the dominant form of identity in the so-called "gay community." Yet a man can be open and honest about having sex with men, while rejecting all or part of Gay Identity and culture, without that rejection proving that he is "self-hating" or struggling with "internalized homophobia."

Moreover, studies show that Black and Latino men who have sex with men (“MSM”)²² are disproportionately likely not to identify as homosexual or gay.²³ Even if a man who is generally private about his sexuality identifies as homosexual while in jail in the hopes of being admitted to K6G, the deputies might very well reject him because they require a list of people who can confirm the inmate’s sexual orientation. Finally, cultural questions about gay slang and West Hollywood favor men who are out of the closet and culturally connected in a very particular way. Men who are closeted or disconnected from the gay mainstream are less likely to be seen in public at gay pride parades and gay nightclubs, or to use gay slang with friends.

The K6G unit policy reveals important fissures within the gay community. It suggests that policies that are portrayed as pro-gay may not protect the most subordinated members of the community. On the surface, the K6G policy appears to be an anomaly. Historically, governmental policies have punished men for coming out and thus reinforced the closet. A notorious example is the military’s “Don’t Ask, Don’t Tell” policy, which forbids gay, lesbian and bisexual officers from expressing their sexual orientation.²⁴ In another example, the Supreme Court held that the First Amendment authorized the Boy Scouts of America to fire a gay Scout leader after he came out.²⁵ While gay rights scholars have heaped criticism on these policies,²⁶ none has analyzed K6G, a rare policy that *requires* men to come out as gay in order to receive protection. Although many in the gay community would see this legal pressure to come out as a good thing, I view it with great concern because of its race and class implications and intrusion into the highly personal and consequential decision whether to come out.

Most gay rights scholars who have argued for coming out as a gay norm have based their conclusions on the experiences of white, middle and upper class men.²⁷ By contrast, my project considers the complexities and

²² This term was first adopted by public health scholars and workers who recognized the significant community of men who have sex with men but do not identify as gay.

²³ See *infra* note 371.

²⁴ See generally 10 U.S.C. § 654.

²⁵ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

²⁶ See, e.g., Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 *CARDOZO L. REV.* 1819 (2002); Darren Lenard Hutchinson, “Closet Case”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 *TUL. L. REV.* 81 (2001).

²⁷ See, e.g., Carlos Ulises Decena, *Profiles, Compulsory Disclosure and Ethical Sexual Citizenship in the Contemporary USA*, 11 *SEXUALITIES* 397 (2008) (criticizing public health scholars for uncritical assumptions about coming out and “internalized homophobia” among black men).

challenges of coming out from the vantage point of those rarely recognized by the gay rights movement: men of color and poor or working class men, which are overrepresented in jail and prison. This project will critically examine the costs and benefits of coming out and show that one cannot broadly assume that all sexual minorities, irrespective of race or class, should always come out, whether in prison or other contexts. The K6G policy assumes that all gay inmates are vulnerable and should come out in order to obtain governmental protection from sexual violence. However, those MSM who are particularly strong and masculine may receive little benefit from coming out to gain access to the K6G unit, but risk all of the burdens of coming out. Moreover, heterosexual men who are young, first time offenders, slight in stature, effeminate and/or disabled are all at higher risk of sexual assault, but are not protected by the K6G policy, and this rule may inspire them falsely to come out as gay.

Moreover, although the K6G policy is said to protect gay and trans inmates, it may inadvertently expose them to additional discrimination. There is some evidence that the overt identification and segregation of homosexual inmates, who are required to wear powder blue uniforms, makes it easier for staff and non-K6G inmates to direct homophobic harassment at them.²⁸ Inmates who might otherwise be unidentifiable as gay are made visible and vulnerable by the governmental policy. There is more. If a closeted man came out in jail in order to secure the protections of K6G, he would have to face the consequences of that act once he is transferred to the California prison system, which lacks analogous units for gay and trans inmates. The adverse consequences of coming out might mushroom upon release. The stigmatizing label imposed by K6G might follow him back to his home community, disrupting some of his relationships and potentially threatening his economic livelihood.

The next Part provides a general overview of sexual practices in jails and prisons, which are structured by a sexual hierarchy. Part III offers an explanation of the K6G screening process, as well as the specific questions that constitute the jail's gaydar test. Part IV connects the K6G unit to broader norms that stereotype Gay Identity, aligning it with effeminacy, promiscuity and affluent consumption. These norms help explain why some

²⁸ See *infra* notes 359 & 361. Cf. *Johnson v. California*, 543 U.S. 499 (2005) (suggesting that California policy of identifying and segregating different racial groups might actually increase racial hostility).

men, including some in the Los Angeles jail system, refuse to identify as gay. Then Part V argues that the K6G policy implicates the right to privacy in that it coerces men to come out and embody a white-inflected Gay Identity. Part VI considers potential reforms to the K6G unit, which would alleviate the governmental pressure to come out.

II. SEX IN PRISON

A. *Sexual Hierarchy*

In order fully to understand the context that gave rise to the K6G unit, one must be familiar with the sexual practices in men's jails and prisons and the gender-based hierarchy that structures that sex. In this section, I provide a brief overview of sexual conduct between men in jails and prisons.²⁹ I conclude with a discussion of existing legal regulations, which formally forbid virtually all sexual intercourse, regardless of its location on the continuum between consensual and coerced, while simultaneously permitting and at times encouraging some of the regulated behavior.

At the top of the prison sexual hierarchy is a group that is largely defined by a "successful and continuing refusal to be sexually penetrated."³⁰ In some incarceration contexts, they are called "wolves," "daddies" or "jockers."³¹ In others, they are simply called "Men."³² In jails and prisons, penetrating another man makes only *one* of the sexual partners gay.³³

²⁹ The following description focuses on the sexual/gender hierarchy in incarceration contexts; it is not intended to reflect all hierarchies in such contexts. See Don Sabo et al., *Gender and the Politics of Punishment*, in PRISON MASCULINITIES at 3, 9 (Don Sabo et al., eds, 2001) (describing a social hierarchy, including the following groups [from most powerful to least]: "dominant prisoners," "prisoners with resources," "marginalized prisoners" and "stigmatized prisoners").

³⁰ Stephen "Donny" Donaldson, *A Million Jockers, Punks, and Queens*, in PRISON MASCULINITIES, 118, 118 (Don Sabo et al, eds. 2001).

³¹ *Id.*

³² *Id.* My capitalization of this term follows that of Donaldson, a former inmate who describes the prison hierarchy.

³³ *Id.* "Men almost always identify as heterosexual (in a few cases bisexual), and the majority of them behave heterosexually before and after confinement." Donaldson's articulation of sexual categories varies from sharp and airtight classifications to oblique acknowledgements of rare exceptions to the mapping rules. For instance, he states unequivocally that "a *single instance* of being penetrated, whether voluntary or not, is *universally* held to constitute an irreversible 'loss of manhood.'" *Id.* But a few sentences later he declares "Men *almost always* identify as heterosexual (in a few cases *bisexual*), and the *majority* of them behave heterosexually before and after

Although a man who previously was regarded as heterosexual is "made gay" through being penetrated, the Man who does the penetrating or the "top," maintains his heterosexual and masculine status.³⁴ Some writers even describe the top as an "alpha male," who dominates another man in order to secure his status at the top of the prison hierarchy.³⁵ Prison sexual relationships are usually described as deeply gendered and rigid in their definition of the partners' roles.³⁶ The Man in the relationship or "protective pairing" is the "daddy," who is supposed to protect the feminized partner, sometimes called the "catcher."³⁷ The "catcher" is expected to do domestic chores, such as keeping the cell clean, and is often defined with female pronouns and body parts.³⁸ S/he is expected to obey the daddy, even if the daddy trades his catcher out for sex with another Man. In return, the daddy is expected to defend his partner, even at the cost of his life, if necessary. Despite public perceptions that prison sex is inevitably violent, the level of coercion in such relationships varies substantially: "from virtual slavery and complete submission at one end. . . . to a mutually supportive, tender and human exchange of affection at the other."³⁹

Determining the amount of sexual assault and coerced sex in jails and prisons is notoriously difficult.⁴⁰ A recent random sample survey of

confinement." *Id.* (emphases added); *see also id.* (stating that there are exceptions to his general description). This suggests that bi and gay identified inmates can, in some cases, be Men.

³⁴ *Id.*

³⁵ *See id.* at 121 ("Ownership of a catcher tends to give high status to the Daddy and is often a source of revenue, since the jocker, who is often without substantial income, can then establish himself in the prostitution business."); *id.* at 122 ("aggressive sexual activity is considered to validate masculine status and hence tends to protect the Man from attempts to deprive him of that status"); *id.* (describing "considerable peer pressure to engage in 'masculine' sexual activity" because it buttresses Men's belief that performing the top role does not emasculate a Man). Further, Men who choose *not* to participate in sexual activity may have their masculinity questioned. Donaldson writes: "Before the AIDS crisis, Men (especially blacks and Hispanics) under middle age were traditionally expected to be jockers; if they showed no inclination to demonstrate their manhood through sexual conquest, their status as men would be questioned, which would make them targets for demotion." *Id.* at 119.

³⁶ *See, e.g.,* REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN SEXUALITY, 185 (2008).

³⁷ *See id.* at 181-82.

³⁸ *See id.* at 182; Donaldson, *supra* note 30, at 119 ("[Queens] have 'pussies,' not 'assholes,' and they wear 'blouses,' not shirts.").

³⁹ KUNZEL, *supra* note 36 at 182 (quoting Donaldson) (internal quotations marks omitted).

⁴⁰ *See, e.g.,* Nancy Wolff, et al., *Measuring Victimization Inside Prisons: Questioning the Questions*, 23 J. INTERPERSONAL VIOLENCE 1343, 1346, 1354 (2008) (revealing how different framings of questions produce different results in surveying inmates about violence and sexual assault). Depending on the study and the particular prison(s) or jail(s) surveyed, sexual assault prevalence rates range from 1 to 40%. *Id.* at 1344. The Prison Rape Elimination Act of 2003 was conceived as a first

prisoners in California found that approximately 4% reported being the victim of sexual assault.⁴¹ Gay and trans-identified inmates, black inmates, and inmates with disabilities were significantly more likely to report being assaulted.⁴² The 4% figure is likely the floor, not a ceiling, because many inmates are afraid to report abuse. Moreover, the figure does not account for the many types of sexual conduct that involve coercion without rising to the level of sexual assault.

In keeping with the strictly gendered common perception of prison relationships, some writers depict Men as devoid of emotional attachment or intimacy in their sexual relationships.⁴³ According to this view, Men top other men for sexual gratification or simply to demonstrate their dominance without attempting to replicate or replace the affective bonds with women enjoyed outside of prison.⁴⁴ As with many prison narratives, however, this story seems to lean heavily on gender stereotypes. It requires overlooking practices that contradict this narrow construction of masculinity.⁴⁵ For instance, Regina Kunzel documents examples of Men entering into de facto same-sex marriages with catchers, which are widely respected as legitimate.⁴⁶ As described by Stephen Donaldson, “long-term prisons exhibit the remarkable phenomenon of two men, both heterosexual by preference and identity, involved in sexually expressed love affairs with each other.”⁴⁷ Some observers note that there may be a gap between the sexual roles that men are *supposed* to perform and what they *actually* do, especially in the context of a long-term relationship.⁴⁸ Just as importantly, Men (and catchers) may obtain emotional sustenance from prison relationships—“the

step in producing greater transparency and reliable statistics regarding rape in prison. See 42 U.S.C.S. §§ 15601-15609 (2003).

⁴¹ See VALERIE JENNESS, ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES, Apr. 27, 2007, at 3 (draft on file with author).

⁴² See *id.*

⁴³ See *id.* (“Emotional reciprocity was at least as taboo as sexual reciprocity to those identifying as men in their prison relationships.”).

⁴⁴ *Id.* at 170; *id.* at 174 (“Sexual violence was newly understood to be about anger, aggression, and power, and not about sexual desire, drive or identity.”); see also Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape and Prostitution in Male Prisoners*, 80 PRISON JOURNAL, 415, 418-19 (2000).

⁴⁵ See *id.* at 185.

⁴⁶ *Id.*

⁴⁷ Donaldson, *supra* note 30, at 121.

⁴⁸ See KUNZEL, *supra* note 36, at 185-86 (discussing anxieties about Men who eventually kissed their catchers and in time began to “flip-flop” or have mutual anal intercourse, taking turns playing the top role); see also *id.* at 187-88 (recounting letters in which Men expressed love and devotion to their partners).

Daddy can allow himself to drop the hard mask that he wears outside the relationship and express to his catcher the otherwise suppressed aspects of his humanity, such as caring, tenderness, anxiety, and loneliness."⁴⁹

Although prison relationships may be more reciprocal than some scholars have acknowledged, it remains true that transgender and gay-identified inmates often assume subordinate roles. "Effeminate homosexuals" and transgender inmates are likely to be branded as "queens," since effeminacy is assumed to correlate with being a bottom.⁵⁰ According to some accounts, queens are "highly desirable as sexual partners because of their willingness to adopt 'feminine' traits," yet also "viewed with contempt by the Men and the staff."⁵¹ Queens are valued in part because they are thought closely to approximate what prison denies Men: access to "real" women. But their importance also flows from their limited numbers—1% to 2% percent of the prison population, according to some estimates.⁵² The supply/demand problem incites Men to "turn out" or rape other men and coerce them into becoming "punks."⁵³ If prison denies Men sufficient numbers of women, they will transform Men into women.⁵⁴

At the absolute bottom of the prison hierarchy, according to some accounts, are the "punks," who have been compelled into a submissive sexual

⁴⁹ *Id.* at 121.

⁵⁰ *Id.* at 119.

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.* at 120 ("The total population of queens and punks is rarely high enough to meet the demand for sexually passive prisoners . . ."); *see also id.* (suggesting that Men in maximum security prisons and "[b]ig city jails" are at a high risk of being punked).

⁵⁴ *See, e.g.,* KUNZEL, *supra* note 36, at 179 (discussing survey in which half of inmates linked prison rape to the deprivation of access to their wives and girlfriends). Some prisoners identified the dehumanizing conditions of prison as feeding prison rape: "[T]hey treat us like animals . . . Pretty soon we act like that." *Id.* In some cases, prisoners, upon reflection, marveled at how incarceration shifted their perceptions of gender: "It's a hell of a thing to say . . . but before long another man begins to look like a woman to you," wrote one inmate. Another explained that "the teen-agers and young men with smooth, firm skin and a trace of baby fat merged with our memories of girl friends and wives." *Id.* at 184. Donaldson, who was forced to play the catcher role, argued that Men imagined feminine characteristics in their partners in order to preserve their heterosexuality: "for these guys to be turned on and horny doesn't really require any feminine qualities in you, though the jockers usually prefer to imagine such qualities so they won't have to think about their attraction as homosexual. That's why they'll try to tell you you have feminine qualities even if it's not true." To the extent that Men do not perceive their partners as sufficiently feminine, they may coerce feminine performances, making catchers "shave their legs, grow their hair [long], and assume female names." *Id.* at 185.

role through use of force or the threat of force.⁵⁵ The special disdain reserved for “punks” seems to stem from their status as unpleasant reminders of the fragility of masculinity. Unlike queens, who are thought of as having a “natural” feminine essence, punks are fallen Men.⁵⁶ They signify that a single sexual act can strip a Man of his manhood—and “make him gay.”⁵⁷ Traits that make men likely to be singled out to be punked include youth, slight stature, perceived effeminacy, serving for the first time in jail, doing time for nonviolent offenses, inexperience in personal combat, having a disability, and perception that the man was gay on the outside.⁵⁸ Although some scholarship and advocacy construct a gay/straight binary which implies that gays are uniquely vulnerable, while straights are generally secure, that claim is highly contestable. Other scholarship claims, for instance, that, “[t]he vast majority of punks are heterosexual by preference and history, though some are gays or bisexuals who rejected the ‘queen’ role but were forced into a passive role anyway.”⁵⁹

⁵⁵ *Id.*

⁵⁶ See, e.g., Eigenberg, *supra* note 44, 419 (2000).

⁵⁷ Donaldson, *supra* note 30, at 185 (“‘Manhood’ is a tenuous condition, as it is always subject to being ‘lost’ to another, more powerful and aggressive Man. . . .”); see KUNZEL, *supra* note 36, at 156 (discussing “made homosexuals”); *id.* at 173 (noting belief that rape “makes a woman” out of the victim). One means of reducing the threat to masculinity embodied by punks is to describe them as latently effeminate, which justifies their emasculation and distinguishes them from “true” Men. *Id.* at 154 (“Many framed [the] contempt [for punks] in gendered terms, accepting the notion that submission to sexual assault was inherently feminizing in its effects and sometimes communicating a suspicion that it betrayed an internal and shameful effeminacy that existed before the fact.”).

⁵⁸ See *infra* text accompanying note 452. Some writers and scholars add whiteness to the list of vulnerable traits. However, these claims tend to rely on anecdotal evidence from white inmates and/or outdated studies with an unreliable empirical foundation. See generally Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law* (forthcoming, 2010, YALE LAW AND POL. REV., draft at 15-16) (canvassing the “serious methodological limitations in all the sources commonly relied upon as evidence of the black-on-white prison rape story”). They also frequently reflect pervasive stereotypes about blackness. See KUNZEL, *supra* note 36, at 174 (recounting scholar’s claim that white rapists “selected a victim with affective and sexual needs in mind, ‘both as a person he can relate to as well as for sexual release. . . [while] ‘the black jock looks upon his white victim purely from the standpoint of validating his masculinity or dominance.’”) (quoting Scacco, *Rape in Prison*, 62); cf. generally Robinson, *Racing the Closet*, *supra* note 14, at 1493 (discussing stereotypes prevalent in discourse on black men who live “on the down low”). A recent and methodologically sound survey of violence in California facilities found that black inmates were more likely to report being victims of sexual assault. See JENNESS, *supra* note 41, at 3. The infrastructure for reporting prison rape may also reflect racial biases, whether conscious or unconscious, that make whites more visible as victims. See Eigenberg, *supra* note 44, at 422 (noting that officers may be “more apt to believe rape victims who conformed to stereotypical definition of rape victim (*i.e.*, young, White, weak, homosexual and effeminate men”)); Buchanan, *supra*, at 48-50.

⁵⁹ Donaldson, *supra* note 30, at 119.

The targeting of trans and gay inmates for sexual assault emerges from a broader regime that valorizes an idealized form of masculinity and polices the gender performance of all people. There are numerous ways in which a man can fall from the pedestal of hegemonic masculinity, and identifying or being perceived as gay or transgender is just one route.⁶⁰ A cardinal rule of prison is: "Act hard and avoid any semblance of softness. Do not help the authorities in any way. Do not trust anyone. Always be ready to fight, especially when your manhood is challenged, and act as if you do not mind hurting or even killing someone."⁶¹ In light of these rules, coming out as gay often marks one as a victim. At least in some jails and contexts, to come out is to invite attack.⁶² The presumption is that gay men and trans women are weak and vulnerable and also sexually available. Because "fags" and "queens" enjoy sex with men (unlike men who resort to sex with men only in the incarceration context) and are imagined as inherently promiscuous, some inmates and staff have difficulty perceiving them as rape victims. In the eyes of some, being gay means a man is always asking for it.⁶³ This obviously creates a strong incentive for gay and bisexual inmates to conceal their sexual orientation.⁶⁴ Even a man who was fully "out" before prison might reasonably closet his sexual orientation in order to avoid victimization.⁶⁵ Again, however, this pressure is part of a broader norm. The command "do not trust anyone" requires keeping one's own confidences. "It is dangerous for a prisoner to talk personally. Betrayal is always possible. . . . The newcomer . . . learns very quickly after entering prison not to trust anyone or reveal very much about his personal life."⁶⁶ Disclos-

⁶⁰ See, e.g., KUNZEL, *supra* note 36, at 172 (discussing circumstances in which pacifists were targeted for rape because their politics made them appear weak and their middle-class backgrounds made them appear pampered).

⁶¹ Sabo, *supra* note 29, at 11. Sabo explains the last maxim about appearing ready to kill by noting "this is sometimes the only way to avoid being put in a position of having to hurt or kill." *Id.*

⁶² See, e.g., Buchanan, *supra* note 58, at 29; *but cf.* Interview #5, transcript on file with author (suggesting that it does not necessarily follow that men who are out are victimized).

⁶³ See Buchanan, *supra* note 58, at 29.

⁶⁴ See Interview #5, *supra* note 62, at 4 (stating in San Francisco jails, "there's a very strong inclination for folks not to disclose their sexual identity"). The type of trans inmates who are most likely to make it into K6G—those who display bodily signs of trans identity, such as breast implants—would have a harder time covering these traits and passing as non-trans heterosexuals.

⁶⁵ See Interview #5, *supra* note 62, at 5-6 (noting difficulties of inmates trying to keep life inside jail separate from life on outside).

⁶⁶ Sabo, *supra* note 29, at 11; *see also id.* (noting that often new inmates "lift weights compulsively, adopt their meanest stare they can muster, and keep their fears and their pain carefully hidden beneath a well-rehearsed tough-guy posture").

ing one's sexual orientation then is just one of many vulnerability factors that an inmate might choose to withhold in order to avoid discrimination.

This section has attempted to sketch the hierarchy among jail and prison inmates, which centers on masculinity but does not neatly track a gay/straight binary. I will argue below that K6G's singular focus on gay/trans identity fails to acknowledge that vulnerability cuts across sexual categories. Because the unit's protections are substantially underinclusive and overinclusive of vulnerable prison populations, the K6G policy appears to rest on ideological underpinnings instead of a sound logical foundation.

B. Legal Responses to Sex in Prison

Officially, almost all jails and prisons forbid consensual and coerced sexual activity between male inmates or inmates and guards.⁶⁷ Such policies, which may be reflected in state law, administrative codes and/or unwritten "house rules," often fail to draw sharp distinctions between consensual and coerced sex, implying that they are equally reprehensible. Such bans may deter inmates from reporting sexual assault. For example, in a New York case, an inmate, Aaron Umber, accused his cellmate of repeatedly raping him.⁶⁸ The prison staff not only ruled that the claim was unfounded, they went on to charge Umber with violating the consensual sex ban.⁶⁹ As in Umber's case, courts have summarily validated various restrictions on consensual sexual activity in prison and jail as if the question presented was unworthy of serious argumentation.⁷⁰ Only a handful of cases have addressed whether *Lawrence v. Texas*'⁷¹ 2003 overruling of *Bowers v. Hardwick*⁷² changes the constitutional balance in the prison context.⁷³ In general, the rigor of the constitutional analysis in these opinions is as

⁶⁷ See, e.g., Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 200 (2006) ("In every state, correctional policies prohibit sexual behavior by inmates, whether that conduct is with staff or other inmates."); Eigenberg, *supra* note 44, at 416; see also Joan W. Howarth, *Prisons within Prisons: Gay Prisoners and Protective Custody*, in 2 PRISONERS AND THE LAW 14-3, 14-8, (Ira P. Robbins, ed., 1985).

⁶⁸ See, e.g., *Umber v. Murphy*, 304 A.D.2d 931, 932 (N.Y.A.D. 2003)

⁶⁹ See *id.*

⁷⁰ See, e.g., *id.*; *Askew v. Commonwealth*, 2004 WL 234810, at *2 (Va. App., Feb. 10, 2004).

⁷¹ 539 U.S. 558 (2003).

⁷² 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

⁷³ See *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. 2003); *Askew*, 2004 WL 234810, at *2.

