

Masculinity as Prison: Sexual Identity, Race, and Incarceration

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The Los Angeles County Men's Jail segregates gay and transgender inmates and says that it does so to protect them from sexual assault. But not all gay and transgender inmates qualify for admission to the K6G unit. Transgender inmates must appear transgender to staff that inspect them. Gay men must identify as gay in a public space and then satisfactorily answer a series of cultural questions designed to determine whether they really are gay. This policy creates harms for those who are excluded, including vulnerable heterosexual and bisexual men, men who have sex with men but do not embrace gay identity, and gay-identified men who do not mimic white, affluent gay culture. Further, the policy harms those who are included in that it stereotypes them as inherent victims, exposes them to a heightened risk of HIV transmission, and disrupts relationships that cut across gender identity and sexual orientation. Thus, this Article casts doubt on the claim that the policy is intended to and actually protects gay and transgender inmates. Moreover, it interrogates the Jail's failure to protect many other categories of inmates who have been shown to be vulnerable to sexual assault in jails, including those who are young, first-time offenders and those with disabilities. The Jail's policy ultimately reflects and reinforces problematic social assumptions about masculinity, including the notion that gay men are not "real men."

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This Article goes on to argue that the Jail's screening process implicates the constitutional right to privacy. The Jail encourages inmates to come out as gay and yet fails to protect their disclosure of sensitive sexual information or consider the long-lasting ramifications of coming out in jail. Indeed, the Jail requires K6G inmates to broadcast their sexuality by wearing powder blue uniforms—in contrast to the dark blue uniforms worn by inmates in the Jail's general population. Although the gay rights movement often has portrayed coming out as a duty for every man who has sex with men, this Article illustrates the double-edged nature of coming out, particularly in the violent context of incarceration. Especially for men who are black, Latino, and poor, the decision whether or not to come out should be left to the individual.

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INTRODUCTION

Every day in the world's largest jail, Los Angeles County Men's Jail ("the Jail" or "Los Angeles"), two heterosexual, white deputy sheriffs inspect new inmates to determine whether men who identify as gay are *truly* gay. Inmates identified as such are housed in a segregated unit termed K6G. The deputies determine gay identity largely by testing inmates on perceived norms of gay culture. For example, deputies often expect an inmate to describe accurately bars in West Hollywood, Los Angeles' gay—and predominantly white—neighborhood; define terms such as "glory hole" and "Prince Albert"; and provide names of people, such as his mother, who can confirm his "gay lifestyle." Defenders of this segregated unit claim that gay and transgender inmates are uniquely vulnerable to rape in jail and that the unit protects them.¹

The Jail only recognizes vulnerability in "out" gay men and transgender women. The following stories highlight the experiences of men who were highly vulnerable to rape in jail or prison, yet not one of whom would qualify for protection within the K6G unit. Consider W.H., who was a first-time offender incarcerated for burglary in a Texas prison.² He was African American, small in stature (5 feet 4 inches and 126 pounds), wore thick glasses, and had a soft-spoken demeanor. During a five-week period in 1996, W.H. was violently raped by several prisoners.³

R.M., a Florida prisoner, describes himself as

of slender build and not very muscular, though I am not a bean-pole either. Due to my demeanor and awkwardness (gait, inability to effectively talk as a typical prisoner, etc.) I am targeted for harassment and extortion by other prisoners. I am not homosexual and it has been my resistance to [sexual coercion] that has brought me injury and reproach. . . . When I confronted the administration with the true facts of what was occurring to me, I was told to use violence to solve my problem.⁴

G.C. reports that

[w]hen I first came into Lake Butler [prison] I was being raped by the same person everyday. . . . When I went to speak to the inspector he was also trying to tell me that I was a homosexual. He was making this assumption by the way I was sitting and talking with him in his office. He was telling me that I was bring[ing] on the problem myself, in other words, he was telling me that [it happened] because of the way I look.⁵

1. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 (2011).

2. See JOANNE MARINER, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), available at <http://www.hrw.org/legacy/reports/2001/prison/index.htm>.

3. *Case Histories: "W.H."*, HUMAN RIGHTS WATCH, http://www.hrw.org/legacy/reports/2001/prison/case_histories3.html#wh (last visited June 17, 2011).

4. MARINER, *supra* note 2, at 226.

5. *Id.* at 228.

To qualify for admission into the K6G unit, inmates must come out as gay during the initial intake process and then prove their gay identity to the two deputies who act as gatekeepers. R.G. was locked up in L.A. County Men's Jail, which houses the K6G unit; he was a gay, middle-aged, skinny, African American who was described as a "nerdy intellectual."⁶ Human Rights Watch reports that

[a]lthough R.G. was raped in prison, it was in jail that he suffered the most vicious sexual abuse. The first incident occurred in 1988, when he was confined at a Los Angeles jail for tampering with a vehicle—charges that were later dropped. R.G. was placed in a two-man cell, and on his first night there was awakened at about 1 a.m. by his cellmate and three others. Sticking a sharpened mop bucket handle into the soft skin of his neck, they warned him, "You're going to do what we want or you're going to die." They pulled him off the top bunk, where he had been sleeping, and threw him onto the bottom bunk, where they spent over an hour taking turns orally and anally penetrating him.⁷

R.G., the only person who was gay and the only one who was incarcerated in L.A. County Jail, was not assigned to K6G—either because he did not feel comfortable coming out as gay in the intake process, or because the K6G deputies deemed him not gay. If the other men had been incarcerated in the Jail, they would have been denied access to K6G because the Jail does not consider the traits that made them vulnerable—slight stature, being perceived as fearful, awkward, intelligent, soft-spoken or effeminate—to warrant protection. The rape experiences recounted above also demonstrate that men are not raped solely because they lived a "homosexual lifestyle" outside of jail. Men often are targeted because of traits that are thought to call their masculinity into question, and then others impute homosexuality to them. Therefore, the Jail's exclusive reliance on gay cultural experiences on the outside misapprehends how homosexual identity is constructed on the inside.

The K6G unit is also out of step with the findings of the National Prison Rape Elimination Commission, which the Prison Rape Elimination Act ("PREA") established to provide recommendations for reducing rape in prisons and jails. The Commission's report recommended that facilities consider the following criteria in housing new inmates: "mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate's own perception of vulnerability."⁸

6. *Case Histories: "R.G."*, NO ESCAPE: MALE RAPE IN U.S. PRISONS, http://www.hrw.org/legacy/reports/2001/prison/case_histories2.html#rg (last visited June 17, 2011).

7. *Id.*

8. NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION

By contrast, the Jail reduces this list of vulnerability factors down to sexual orientation (more specifically, gay identity) and transgender identity. Indeed, the Commission's report seems to condemn K6G in urging that "[l]esbian, gay, bisexual, transgender, or other gender-nonconforming inmates . . . not [be] placed in particular facilities, units, or wings solely on the basis of their sexual orientation, genital status, or gender identity."⁹ The Department of Justice, however, recently issued a proposed notice of rulemaking regarding national standards, in which the Department refuses to ban segregated units. The Department cites the K6G unit as the reason for its refusal, noting that "[o]ne commenter discussed the success of the Los Angeles County Jail in housing gay male and transgender prisoners in a separate housing unit."¹⁰ This comment led Department officials to meet with the Jail's officials, who "believe that the occupants of that separate unit are significantly safer than they would be in the general jail population."¹¹

This Article casts doubt on the protection that K6G is said to offer. It shows that the Jail's screening policy constructs gay and transgender identity in a narrow, stereotypical fashion and excludes some of the most vulnerable inmates. In addition, the evidence that I detail suggests that there are harms of inclusion: even for those who make it into K6G, the long-lasting ramifications of coercing inmates to "come out" as gay, including consequences that may follow an inmate to a California prison and upon return to his community, may outweigh the protection the Jail offers.

The Jail's K6G Unit provides a striking case study in how law and society mutually construct and enforce dominant notions of male identities, including gay identity. Moreover, K6G shows that these norms regulate men of various sexual orientations, inside and outside of jail, channeling them into preordained identities. Further, I argue that K6G's exclusionary and racially-inflected construction of gay identity, and the attendant pressure to "come out" and embody the government's version of gay identity, constitute an unconstitutional infringement on the right to privacy.

The Jail's construction of identities works at three levels. First, the Jail reveals its conception of gay men and transgender women as "fallen men" by combining them into a single unit of perceived gender transgressors and then segregating that unit from the men in the general population ("GP"). In justifying this anachronistic segregation, the Jail describes gay men and transgender women as inevitable victims of predatory men in GP. By revealing

COMMISSION REPORT 217, available at http://nprec.us/files/pdfs/NPREC_FinalReport.PDF.

9. *Id.* at 30.

10. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6257 (Feb. 3, 2011); see also Dolovich, *supra* note 1; Letter from Sharon Dolovich to Eric Holder, U.S. Attorney General (May 3, 2010) (on file with author).

11. *Id.*

the wobbly empirical foundation for this claim, I suggest that such descriptive claims mask normative commands.¹²

The Jail, reflecting the broader society's gender stereotypes, requires heterosexual men to assume traditionally masculine traits, including physical aggression, a commitment to denying one's vulnerability, and a refusal to turn to government for protection.¹³ Meanwhile, by designating just a sliver of its population as vulnerable, the Jail may seek to absolve its constitutional responsibility to protect *all* people in its custody.

The K6G unit ultimately serves as a clever decoy.¹⁴ It allows the Jail to portray itself as progressive and gay friendly,¹⁵ while diverting attention from the suffering among the men in GP whose need for protection does not map onto society's gendered understanding of vulnerability. Indeed, by removing gay and transgender inmates—but not attending to hegemonic masculine norms in GP—the Jail simply shifts victimization, making it more likely that heterosexual and bisexual inmates in GP will assume the subordinated roles that otherwise would have been occupied by K6G inmates.

Second, the Jail's test for gay identity constitutes governmental instructions on how gay men should comport themselves if they wish to be recognized and protected by the Jail—a kind of “lessons in being gay.”¹⁶ Again, these rules are not merely descriptive, as I demonstrate how black and brown men diverge from these norms and are penalized for doing so. The government's lessons track key pillars of Gay Identity¹⁷ as reflected in mainstream popular culture, including effeminacy, promiscuity, and affluence. As such, they reflect a narrow race- and class-contingent conception of gay identity, which many men who have sex with men (“MSM”)¹⁸ may reasonably reject. Not surprisingly, a parallel study concludes that “K6G is disproportionately white.”¹⁹

12. Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731, 744 (2008) (internal citations omitted).

13. Michael S. Kimmel, *Masculinity as Homophobia*, in THEORIZING MASCULINITIES 119, 125–26, 132 (Harry Brod & Michael Kaufman eds., 1999) (“Violence is often the single most evident marker of manhood.”).

14. I thank Ali Miller for this point.

15. See Alexander Lara, Note, *Forced Integration of Gay, Bisexual and Transgendered Inmates in California State Prisons: From Protected to Exposed Victims*, 19 S. CAL. INTERDIS. L.J. 589, 608 (2010) (citing Los Angeles Sheriff's Department's “Core Values,” which require it to “stand against racism, sexism, anti-Semitism, homophobia, and bigotry in all its forms”).

16. Regina Kunzel, *Lessons in Being Gay: Queer Encounters in Gay and Lesbian Prison Activism*, 100 RADICAL HIST. REV. 11 (2008) [hereinafter Kunzel, *Lessons*].

17. I capitalize “Gay Identity” to signify that this is the hegemonic form of identity among nonheterosexual men, yet there are many “gay” identities and subcultures. I wish to highlight that one can be “gay” but not “Gay.” A man may be open and honest about having sex with men, while reasonably rejecting all or part of Gay Identity and the culture associated with it.

18. I borrow this term from the public health literature, which developed it to include the vast community of men who have sex with men but do not identify as gay. Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1465 n.3 (2003).

19. Dolovich, *supra* note 1, at 70 n.323. Sharon Dolovich's article concludes that “whites

Third, the Jail's construction of gay, bisexual, and transgender identities reveals the hegemony among people who often are thought to constitute a singular, cohesive "LGBT community." K6G tethers the "G" and the "T," which resonates with the current political understanding of gay and transgender people as members of a natural coalition. K6G simultaneously excludes the "B," however, as it regards bisexual men as essentially heterosexual and inherently aggressive, and thus a threat to the "G" and the "T." The LGBT community's blessing of K6G, both at its inception and more recently in the gay press,²⁰ demonstrates how "LGBT" in theory often translates into "white, affluent, gay, male" in operation.

This Article argues that the Jail's procedures burden the constitutional right to privacy, which includes the decision whether or not to come out as gay. Both the Jail's cramped constructions of identity and its disregard for the right to privacy manifest governmental hostility to nonconformity. In making adherence to the dominant conception of gay identity a condition to protection, the Jail pressures MSM to come out as gay and refuses to respect an individual's right to define his own existence and identity.²¹ This refusal places the Jail's practices in tension with the Constitution's protection of important, life-changing decisions, particularly those concerning the management of one's sexuality. Especially for men who are incarcerated, poor, and of color, coming out should be understood as an intensely complex and personal decision that the Constitution leaves to the individual.

At the outset, the K6G unit should be understood against a backdrop of increasing and severe mass incarceration that disproportionately targets blacks

made up 29.3% of the K6G population as compared with 13.9% of the LA County Jail as a whole." *Id.* She asserts that Latinos appear to be the primary losers in this process, "making up 31.3% of K6G's population and 49.7% of the Jail population as a whole." *Id.* Although this finding of racial bias is consistent with my argument, Dolovich's methodology is flawed. Dolovich does not establish that the statistical counts on the two particular dates on which she relies (June 14, 2010 and March 4, 2011) are representative of the general demographics of the unit and the Jail. By her own admission, the Jail's population is constantly in flux, with many inmates entering and leaving the facility each day. *Id.* at 31 n.167. The optimal methodology for assessing whether the K6G screening test produces a racial disparity would entail surveying all inmates in the Jail who identified as gay and then determining whether there are racial disparities in refusal rates—i.e., were gay-identified blacks or Latinos denied access to K6G at a higher rate than gay-identified whites? Dolovich achieves the definition of "overrepresentation" or "underrepresentation" by comparing the racial composition of K6G members to the racial composition of the Jail population, instead of that of the gay-identified members of the Jail population. The Jail's policy also discriminates among blacks and among Latinos. It privileges racial minorities who affiliate with white, mainstream culture and disadvantages those who do not. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1298 (2000).

20. See *infra* note 49.

21. I do not apply my concerns regarding pressure to come out to transgender inmates. While many MSM may resist identifying as gay, I assume that most transgender inmates want to be recognized and respected as women or an alternative gender identity. Thus, MSM and transgender inmates are not similarly situated with respect to the interest in privacy.

and Latinos.²² Further, race is inextricably intertwined with gender and sexual identity. A central failure of the Jail's screening test is its failure to consider the racial dimensions of Gay Identity, imposing a standard derived from white, affluent experiences on poor black and brown men.

In the remainder of this Introduction, I provide a brief outline of legal rules regarding sexual conduct in prisons and jails and then outline the Article's organization. Officially, almost all jails and prisons forbid consensual and coerced sexual activity between male inmates or between inmates and guards.²³ Such policies—which may be reflected in state law, administrative codes, 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 because prison officials can recharacterize a claim of rape as consensual activity, which is forbidden.²⁴

Courts have summarily validated various restrictions on consensual sexual activity in prison and jail, as if the question presented was unworthy of serious argumentation.²⁵ Only a handful of cases have addressed whether *Lawrence v. Texas*'s²⁶ overruling of *Bowers v. Hardwick*²⁷ changes the constitutional balance in the prison context.²⁸ In general, the rigor of the constitutional analysis in these opinions is as cursory as the pre-*Lawrence* cases,²⁹ and none has held that prisoners have a right to have consensual sex with each other.³⁰

22. See, e.g., Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 515–16 (2009).

23. Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 416 (2000); 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); 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.”).

24. For example, in a New York case, an inmate, Aaron Umber, accused his cellmate of repeatedly raping him. *Umber v. Murphy*, 757 N.Y.S.2d 379, 379–80 (N.Y. App. Div. 2003). Prison staff not only ruled that the claim was unfounded, they went on to charge Umber with violating the consensual sex ban. *Id.*

25. *Id.*; *Askew v. Commonwealth*, No. 0235-03-1, 2004 WL 234810, at *2 (Va. Ct. App. Feb. 10, 2004).

26. 539 U.S. 558 (2003).

27. 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. at 562.

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

29. *Mayfield*, 832 A.2d at 425 (rejecting *Lawrence* because “public correctional institutions can in no way be likened to that ‘most private of places, the home,’” but failing to consider that incarceration either deprives prisoners of a home or makes prison or jail their temporary home) (quoting *Lawrence*, 539 U.S. at 567).

30. *Lawrence*, properly understood, nonetheless raises serious questions as to whether broad bans on consensual sexual expression between inmates can continue to stand, but I leave that argument for another day. A district court in Pennsylvania appears to be the only court to have applied *Lawrence* and rule in favor of defendants. The district court, at the behest of the Third Circuit, ruled that two male partners who were convicted of conspiracy to distribute and possess with intent to distribute methamphetamine could continue to associate after serving their

Despite pervasive formal bans on sex, there remains a considerable amount of sex in many jails and prisons, and enforcement of rules tends to range from uneven to lax.³¹ Staff members reveal state awareness of sex in various ways: (1) by helping or hindering relationships; (2) by exploiting vulnerabilities due to sexual orientation; and (3) by expressing outright discomfort with pervasive sexual activity. First, individual staff members may acquiesce or facilitate transfers, to aid inmates who are in a sexual relationship.³² In other cases, “more homophobic administrators seek to keep a pair as far apart as possible.”³³ Second, staff members sometimes use sexuality to manipulate and control inmates.³⁴

Corrections officers and prison administrators have been known to threaten to expose prisoners to a greater threat of rape in order to evoke good behavior, to punish, or to squeeze out information. . . . [P]risoners report that they have been thrown into cells with known ‘booty bandits,’ or rapists, and left there as retaliation for having disrespected or hit an officer.³⁵

Third, government officials and scholars studying prison sexuality have long expressed anxiety about state culpability in producing homosexuality, with some even calling prisons “faggot factories.”³⁶ Finally, the government acknowledges ongoing sexual conduct by making condoms available in a few isolated

prison terms and during their five-year periods of supervised release. *United States v. Roberts*, Nos. 04-00037-1, 04-00037-2, 2007 WL 2221416 (E.D. Pa. July 31, 2007). The men had lived together for eighteen years, raised a daughter, and, the court concluded, “were in every way a family.” *Id.* at *2. The court noted that one of the partners was seriously ill with AIDS. *Id.* at *4.

31. It is very difficult to track official disciplinary actions against inmates for engaging in sexual activity, whether coerced or consensual. Such actions almost never result in published judicial opinions, since the punishments may be relatively minor and prisoners lack resources to protect their rights. Prisons and jails also rarely expose their enforcement (or lack thereof) to public scrutiny. The Prison Rape Elimination Act, which is in the early stages of implementation, is designed to produce more information on rape in incarceration contexts. 42 U.S.C. §§ 15601–15609 (2006).

32. Stephen “Donny” Donaldson, *A Million Jockers, Punks, and Queens*, in *PRISON MASCULINITIES* 118, 124 (Don Sabo et al. eds., 2001).

33. *Id.*; see also *Women Who “Looked Gay” Segregated at Virginia Prison*, JEZEBEL.COM (Jun. 11, 2009, 11:00 AM), <http://jezebel.com/5286986/women-who-looked-gay-segregated-at-virginia-prison> (describing Virginia women’s prison that created special wing to keep “butch” women from feminine women).

34. See Eigenberg, *supra* note 23, at 416. According to one study, nearly half of the prison officers surveyed said that certain inmates “deserved” to be raped. *Id.* at 422.

35. REGINA KUNZEL, *CRIMINAL INTIMACY* 165 (2010); Don Sabo et al., *Gender and the Politics of Punishment*, in *PRISON MASCULINITIES*, *supra* note 32, at 3, 12. In one particularly egregious episode of governmentally-incited violence, the state charged guards at Corcoran State Prison with setting up fights between rival gangs for sport. They would release opposing gang members into the yard at the same time and shoot inmates who continued fighting after the guards declared a winner. See *id.* at 12.

36. Eigenberg, *supra* note 23, at 418–19 (quoting prison scholars in the 1950s and 60s, grappling with “situational homosexuality”).

jurisdictions—including the K6G unit in Los Angeles—while treating condoms as contraband in most jurisdictions.³⁷ Government has responded to sex in jail and prison by coupling sweeping formal bans on sexual activity with on-the-ground state knowledge of, and sometimes involvement with, prohibited sex.

Part I describes the K6G unit's history and the screening mechanisms for deciding which prisoners are assigned to K6G. Part II considers how law and society construct male identities and connects the K6G unit to these processes, including broader norms around masculinity and femininity that deny that gay men are "real men." These norms help explain why some men, including some in the Los Angeles jail system, refuse to identify as gay. Part III demonstrates the harms that flow from being included in the K6G unit. In Part IV, I discuss the importance of the personal decision whether or not to come out, including its racial implications. Part V argues that the K6G policy infringes the right to privacy in that it pressures men to come out and embody a white-inflected Gay Identity. Finally, Part VI considers potential reforms to the K6G unit, which would alleviate the governmental pressure on inmates to come out and recognize that vulnerability cuts across identity lines.³⁸

37. Mary Sylla, *Prisoner Access to Condoms in the United States—The Challenge of Introducing Harm Reduction into a Law and Order Environment*, Think Piece for Project UNSHACKLE Meeting, The John M. Lloyd AIDS Project at Stony Point Center (May 16, 2008), http://www.champnetwork.org/media/Prisoner_Access_to_Condoms_in_the_United_States-Sylla.pdf (noting that just two prisons and five jails permitted condoms as of May 2008). The Supreme Court addressed prison rape in *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994), which held that prisons do not violate the Eighth Amendment's ban on cruel and unusual punishment unless prison officials knew of and disregarded a substantial risk of serious harm to prisoners. This standard severely limits government responsibility for many of the harmful conditions in jails and prisons, including many instances of prison rape. See generally Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

38. K6G may seem unusual in that it establishes a legal rule requiring inmates to prove that they are gay. The immigration system contains a similar apparatus, however, which suffers from some of the problems that I discuss herein. Alice M. Miller, *Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity*, in *PASSING LINES: SEXUALITY AND IMMIGRATION* 137 (Brad Epps et al. eds., 2005). Under the military's "Don't Ask, Don't Tell" policy, the military required officers they suspected of being gay to prove that they were straight. JANET E. HALLEY, *DON'T* 27, 41 (1999). Recently, the National Center for Lesbian Rights (NCLR) sued the North American Gay Amateur Athletic Association (NAGAAA) for penalizing three San Francisco softball players who failed to prove to NAGAAA's satisfaction that they were gay. See *NCLR Files Suit Challenging Discriminatory Athletic Practices*, NAT'L CTR. FOR LESBIAN RIGHTS (Apr. 20, 2010, 11:00 AM), http://www.nclrights.org/site/PageServer?pagename=press_Apilado_v_NAGAA042010 (last visited June 17, 2011). NCLR's case echoes my critique of the K6G unit. During their interrogation, organization officials required team members to declare whether they were "predominantly attracted to men" or "predominantly attracted to women," with bisexuality not being an option. *Id.* Although the team scrutinized five members, it ultimately determined that the two white members were gay, and the three men of color were straight. *Id.*

I.

THE K6G UNIT

The following description is based on interviews that I conducted with several lawyers, advocates, government employees, former inmates, and others who have interacted with the K6G unit.³⁹

I identified subjects through a three-tier process. First, with the help of research assistants, I conducted a search of public records (newspapers, organizational websites, court documents, and studies) to identify the key organizations involved in the formation of the K6G unit, including the principal players in the litigation that gave rise to the unit. Next, I drew on the knowledge of one of my students, a former intern at the ACLU, who helped identify potential subjects. The ACLU played a central role in creating and overseeing the establishment of the K6G unit. On the basis of these sources, I compiled a list of lawyers, government officials, and community activists who appeared to have played significant roles in the design, implementation, and evaluation of the K6G unit and other related policies. Third, I generated additional names through the interviews of first-wave subjects.

My interviews included an extensive interview with Deputy Bart Lanni, one of the two deputies that determine gay identity in Los Angeles, and jail officials in San Francisco and New York, which routinely used to segregate gay inmates.⁴⁰ Staff members at Just Detention International and the Centers for Health Justice connected me to several people who were formerly incarcerated in the Jail, including some in K6G. Pursuant to IRB regulations, I explained the nature of the project with each potential subject, discussed potential risks and benefits, answered any questions, and gained their informed consent.

A. Origin of the K6G Unit

In 1982, the ACLU of Southern California brought a class action lawsuit alleging that the conditions of confinement in the L.A. County Jail's "homosexual inmate unit" were inadequate.⁴¹ The Jail had segregated gay and transgender inmates on its own initiative for over ten years.⁴²

39. UCLA's Institutional Review Board reviewed and approved my research protocol. The IRB number is G09-07-047-02.

40. Interview with Bartholomew (Bart) Lanni, at 1 (Nov. 16, 2009) (transcript on file with author).

41. Interview with John Hagar, at 6–7 (Jan. 15, 2010) (transcript on file with author) ("The sheriff's department recognized that these inmates needed some form of segregation, even when the lawsuit was filed . . ."). Terry Smerling of the ACLU was lead counsel and filed the lawsuit. After he was appointed to the bench, a volunteer attorney in private practice, John Hagar, took over the case for the ACLU. *Id.* at 2. Hagar, who had no experience with respect to prisons or sexual orientation, oversaw the settlement process. *Id.* at 5.

42. Interview with JoAnne Keatling, Director, Center of Excellence for Transgender HIV Prevention, at 3 (Nov. 2, 2009) (transcript on file with author) (statement by transgender activist and educator recounting her stay in the unit about forty years ago).

The complaint alleged violations of several constitutional provisions, including the Eighth and Fourteenth Amendments, and focused on abuses arising from overcrowding and mixing homosexual inmates with others in holding cells while awaiting court appearances—a practice which was thought to give rise to abuse.⁴³ The ACLU took issue with the Jail’s lack of formal procedures for identifying gay inmates. At the time of the suit, the Jail sometimes relied on nothing more than a deputy’s impression that an inmate “looked gay.”⁴⁴ The ACLU also alleged that the Jail failed to prevent “predators” from gaining access to the homosexual unit.⁴⁵ According to lead attorney John Hagar, “gay inmates were subjected to ridicule, abuse, sexual assault, etc., because of [the Jail’s] structure itself, and the failure of sheriff’s department to protect them.”⁴⁶ The County ultimately settled the case, and on July 22, 1985, the district court issued an order to establish procedures for segregated housing to protect “homosexual” inmates.⁴⁷ Rather than seek to dismantle segregation, the lawsuit sought to alter the procedures governing the unit and establish better protection for gay and transgender inmates, particularly when they came into contact with inmates from GP.

The gay press has celebrated the K6G unit and the two officers who oversee the classification of homosexual inmates. Those officers, Deputies Randy Bell and Bart Lanni, have served as grand marshals of the West Hollywood Gay Pride Parade, judged transgender beauty contests, and been featured in the leading gay publication, the *Advocate*.⁴⁸ Officials from the City of West Hollywood and other gay leaders and activists have overseen the screening process and blessed the K6G unit.⁴⁹

Despite this publicity, the public knows remarkably little about the Jail’s procedures for deeming inmates to be homosexual. The court order says nothing about the criteria or underlying difficulties of determining eligibility for K6G. It proceeds as if gay identification is self-evident, referring to “homosexual inmates” twenty-three times in a mere seven pages, yet never

43. The Jail responded to the lawsuit by moving the homosexual unit from the central jail to an isolated section of the old Hall of Justice jail. *Id.* at 9. In time, however, Jail officials transferred the homosexual unit back to the central jail, where it remains today.

44. Hagar Interview, *supra* note 41, at 24 (noting that different tests were used by different people, and “there was no model”).

45. *Id.* at 7 (discussing concerns about predators).

46. *Id.* at 6.

47. This housing was originally called the “homosexual inmate unit,” and then called the K-11 unit, and is now known as the K6G unit. Lanni Interview, *supra* note 40, at 2.

48. *Id.*; Richard Andreoli, *Angels for Gay Inmates*, *ADVOCATE*, May 25, 2004, at 30.

49. James Ricci, *Gay Jail Inmates Get Chance to Learn*, *L.A. TIMES*, Apr. 7, 2004, at B1 (describing Barry Greenfield, a member of the West Hollywood Public Safety Commission, as an “ardent supporter” of the SMART program, which provides special services to K6G inmates; the Jail named a classroom in K6G after Greenfield); *id.* (noting that “Silver Lake nightclub owner and gay activist Michaeljohn Horn” donated furniture worth \$30,000); *infra* note 77 (discussing gay activist David Glasscock’s influence on screening process).

defining the central category.⁵⁰ The paragraph that alludes to the screening process is as follows:

Inmates entering Inmate Reception Center are asked if they are homosexual and informed of the availability of homosexual housing. Inmates who state that they are homosexual are immediately transferred to segregated housing units for homosexuals. The classification necessary to determine if those inmates are suitable for such segregated housing units is determined by the classification staff at that unit after the entering inmate is assigned to a housing module.⁵¹

The order does not indicate what criteria are appropriate in considering whether an inmate is “suitable” for “segregated housing.” In the face of this silence,⁵² the Jail has developed an elaborate test, which I describe below, for determining whether an inmate is *truly* gay.⁵³

The only clear limitation on the screening process imposed by the court order is that “the classification process [may not] be used as a disciplinary tool.”⁵⁴ Perhaps to ensure this condition, the order guarantees “plaintiffs [sic] counsel and a member of the gay community” access to the housing unit and permits them to observe the classification process.⁵⁵ The settlement’s primary focus is ensuring that “homosexual inmates” do not receive inferior treatment and services by virtue of being housed in a separate unit, a frequent problem in segregated housing.⁵⁶ Thus, the order establishes specific conditions as to exercise, meal service, telephones, clothing, and hygiene.⁵⁷

Some of these specific conditions, however, raise the risk of making “homosexual inmates” more visible and potentially vulnerable when they travel outside of the unit. The order requires inmates to be segregated and surrounded by “protective cages” when transported on buses.⁵⁸ In a similar vein, K6G inmates currently are required to wear powder blue uniforms, while most other inmates wear dark blue uniforms, making the K6G inmates easily identifiable to staff and inmates who might not otherwise perceive them as gay or transgender.⁵⁹ In sum, although the court order approved the existence of a

50. Stipulation and Request for Dismissal: Order, *Robertson v. Block*, No. 82-1442 (C.D. Cal. July 22, 1985).

51. *Id.* at 4–5.

52. Hagar Interview, *supra* note 41, at 31.

53. At present, an arrest for a violent offense does not disqualify inmates for K6G housing, but the deputies generally assign K6G inmates to different dorms based on the seriousness of the offenses.

54. Order, *supra* note 50, at 5.

55. *Id.*

56. Arkles, *supra* note 22, at 537–38.

57. Order, *supra* note 50, at 2.

58. *Id.* at 5–6. If there are other inmates in protective cages, the Jail must seat homosexual inmates in the front row. *Id.* at 6.

59. Lanni Interview, *supra* note 40. The court order does not provide for this practice. To the extent that inmates face discrimination, the court indicated that inmates had access to the Jail’s general grievance process to complain about problems such as denial of privileges, medical care,

segregated “homosexual” unit and established certain conditions, it left the central issue of defining “homosexual” to the Jail’s discretion.

B. Intake Process

All inmates at the Jail are subject to an initial intake process. Depending on how an inmate answers these initial questions, he or she may be referred to the K6G screening process, which attempts to verify gay identity. After a person is arrested, he or she typically is taken to an inmate reception center (“IRC”) for processing. A custody assistant, sitting behind a panel of glass, calls each inmate to a window, directs the inmate to pick up a telephone, and interviews him or her.⁶⁰ Guided by a document called “IRC Classification JICS Security Level Assignment,” a custody assistant records various pieces of information about the new inmate, including security assessments, such as violent behavior, “past/present serious institutional behavior,” and escape attempts. Shortly after these questions, the form directs the officer to “observe [the] inmate” and determine whether the inmate is “soft.”⁶¹ If an officer deems the inmate to be soft he is placed in a separate soft unit without further questioning. Yet, while K6G typically houses around three hundred gay and transgender inmates (the vast majority of whom are classified as gay),⁶² the soft unit is “not very big at all,” ranging from eight to twenty inmates, depending on the time surveyed.⁶³

Next, the Jail asks inmates about their sexual orientation, assuming that gay men will freely volunteer this information. The IRC Classification form directs the officer to ask the inmate, “Are you homosexual?”⁶⁴ Inmates who do not come out as gay in response to this question are ineligible for K6G. Yet, this conversation often is conducted in a busy room where other inmates are nearby. Clearly, some men refuse to identify as gay because of the lack of privacy and

or the classification process. *See* Order, *supra* note 50, at 3. In addition, the order authorizes homosexual inmates who believe the Jail has violated the court order to write to the Jail’s commander and demand a written response. *Id.* at 6–7. Finally, the order provided plaintiffs’ counsel and paralegals access to the unit to monitor conditions. *Id.* at 6. It is unclear how meaningful these remedies are in practice.

60. Lanni Interview, *supra* note 40, at 9–10.

61. The form contains no criteria for identifying “soft” inmates.

62. Lanni Interview, *supra* note 40, at 40–41.

63. Interview with Mary Tiedeman, ACLU of Southern California, at 17 (Sept. 30, 2009) (transcript on file with author).

64. This question is plainly geared toward sexual orientation, not gender identity. It appears that it matters little how a transgender-appearing inmate responds, because officers identify transgender inmates primarily by sight, not by their self-identification and ability to pass an identity-based test. *See* Lanni Interview, *supra* note 40, at 28–29. However, a transgender inmate who does not obviously appear transgender might not understand that the Jail cares about gender identity since the officer asks only about sexual orientation.

the Jail's failure to provide context for this inquiry.⁶⁵ Despite the directive of the settlement order, the officers do not explain to new inmates that they ask this question because the Jail houses homosexual and transgender inmates in a special protective unit. The deputies justify omitting this information because they are concerned about inmates falsely claiming they are homosexual.⁶⁶

Moreover, informants reported several incidents in which officials subjected people who identified as gay or transgender to verbal harassment. For example, one informant reported that "when they'd say, yes, I am gay," the Jail staff would respond, "Well, get over here, you faggot!"⁶⁷ Another inmate who expressed a need for HIV medication was met with the response, "Oh, another one of them faggots is sick."⁶⁸ Staff members have scolded transwomen stating, "You're not a woman; you're a man, so what the hell are you doing with that wig on?"⁶⁹ Informants stated that reports of these incidents travel among people who are frequently incarcerated and inspire some people to deny being gay during intake.⁷⁰

Despite this pressure *not* to identify as gay, the deputies believe that many heterosexual men falsely claim they are homosexual because of the benefits of the K6G unit, which include a perceived safer environment, educational programs, and access to condoms.⁷¹ Further, the deputies believe that

65. See Lanni Interview, *supra* note 40, at 7 (discussing gay inmates who did not identify as such because "he was at the [IRC] window, there were too many guys around, the guy's really not comfortable about who he is, so he didn't want to out himself at that time, to the inmates anyway"). Deputy Lanni stated that inmates who fail to identify as gay initially may opt into K6G later. *Id.* Other interviews, however, suggest that this rarely happens, and that the deputies are skeptical of inmates who try to transfer into K6G from GP. Interview with Christopher Kelley, Health Educator, Jose Carlos Fabian, Prevention Service Director, and Precious Jackson, Women's Program Coordinator, Center for Health Justice, at 24 (Dec. 18, 2009) (transcript on file with author) ("[O]nce you're in general pop it's hard to go to gay. . . . They'll come in general pop the first two times and then they finally are comfortable enough to say I'm gay, and then when they do they look at . . . well, you've been here twice already in general pop; why all of a sudden are you gay?") [hereinafter Kelley et al. Interview].

66. See Lanni Interview, *supra* note 40, at 35–37. The form contains no instructions regarding disclosure of the purpose of the homosexual question, and interviewees indicated that "they don't explain that when they ask that question." See Lanni Interview, *supra* note 40, at 4. The question is adjacent to inquiries as to whether the inmate is thinking of killing himself and whether he is taking prescription medication.

67. Kelley et al. Interview, *supra* note 65, at 18.

68. *Id.*

69. *Id.*

70. *Id.* In light of the lack of privacy and context and expressions of homo- and transgender-phobia, it is striking that Sharon Dolovich would assert that L.A. has made its "best efforts" to encourage inmates to disclose. Dolovich, *supra* note 1, at 73 n.331. Surely the current K6G intake and screening process is not the Jail's best effort.

71. See Lanni Interview, *supra* note 40, at 8 (describing perception that serving one's sentence in K6G is "easier time"); Kelley et al. Interview, *supra* note 65, at 5–6 ("[I]n the general pop[ulation] . . . they don't have access to condoms."). The programs provided to K6G inmates (mostly through private nonprofit groups) include: drug education, computer literacy, personal relationship and job skills training, academic instruction (including the opportunity to earn a G.E.D.), STD Testing, pre- and post-release help for HIV-positive inmates, legal assistance and

heterosexual and bisexual inmates pose a threat to the safety of homosexual and transgender inmates because the former are likely to take advantage of the latter.⁷² 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 back to GP.⁷³

C. The K6G Screening Test

After an inmate identifies as homosexual, deputies seat him with other gay and transgender inmates and inmates who otherwise require special handling. Based on this separation, other inmates might infer that a particular inmate has identified as gay.⁷⁴ Eventually, deputies direct the inmate to an office for questioning by either Deputy Lanni or Deputy Bell—both heterosexual, white, middle-aged men.⁷⁵

The original questions were devised primarily by a senior deputy sheriff, Ernest Cobarrubias, and a formerly incarcerated gay activist, David Glasscock.⁷⁶ Glasscock, who was affiliated with the ACLU, is a white man and was middle-aged when he helped to formulate the questions in the mid-1980s.⁷⁷ Initially, Glasscock was a volunteer, but the County began paying him to “teach Cobarrubias how to identify homosexual inmates.”⁷⁸ Deputies Lanni and Bell took over for Cobarrubias and no longer employ Glasscock or other paid gay consultants.⁷⁹

Identifying gay inmates is a full-time job for Lanni and Bell. They spend most of their day screening inmates, interviewing approximately twenty inmates per day.⁸⁰ Over the years, Lanni and Bell have revised the questions based on their own research into gay culture. Lanni describes himself and Bell as “self-taught.”⁸¹ Their research includes reading books about gay slang and

advocacy, reentry assistance, spiritual counseling, and a class on Christian thought.

72. See Lanni Interview, *supra* note 40, at 17 (referring to “straight” men who are “looking for sex, trying to rip the guys off, trying to look for protection” and distinguishing them from “the guys that are gay. . . . You can connect these individuals right away.”).

73. Kelley et al. Interview, *supra* note 65, at 24 (noting that deputies have sent gay-identified men with visible bruises back to GP because the deputies doubted the inmates’ sexual orientation).

74. *Id.* at 10–11 (stating that after questioning “we have all the K6G guys in one area”).

75. *Id.* at 3. Sometimes, they both interview an inmate. *Id.* at 13; see also Ricci, *supra* note 49, at B1 (describing Bell and Lanni as heterosexual).

76. Patricia Klein Lerner, *Jailer Learns Gay Culture to Foil Straight Inmates: Crime*, L.A. TIMES, Dec. 27, 1990, at 1 (discussing role of senior deputy Ernest Cobarrubias).

77. Lanni Interview, *supra* note 40, at 1–2; Lerner, *supra* note 76, at 1 (reporting Glasscock’s age as 50 in 1990).

78. Lerner, *supra* note 76, at 1.

79. *Id.*

80. Lanni Interview, *supra* note 40, at 4 (“The average is about 19.2, .5 [interviews per day].”); *id.* at 11. They screen “between four and five thousand people a year.” *Id.*

81. *Id.* at 23, 25.

gay magazines, talking with LGBT staff at the Jail, and visiting gay venues.⁸² Lanni and Bell attend various gay clubs and bars in the broader Los Angeles metropolitan area and note details, which they use to trip up inmates who say they have been to a bar but cannot accurately provide details about it.⁸³ Their initial research focused on West Hollywood, a mostly white gay enclave. More recently, they have begun visiting other gay spaces.⁸⁴

Gay-identified men receive intense, skeptical scrutiny during their interviews. The focus of the deputies' questions is the inmate's "gay lifestyle."⁸⁵ The deputies measure gay identity based on an inmate's connections to the gay community, not on his sexual desires or history.⁸⁶ Not all men who have had sex with men, nor gay-identified men who lead private lives, qualify for K6G. A man who had sexual experiences with men during a prior incarceration, but does not live a "gay lifestyle" on the outside, does not qualify for entry into K6G.⁸⁷ This litmus test fails to account for the mainstream gay community's exclusion of many potential K6G residents, including men of color, bisexual men, and low-income men.

The deputies have developed a set of questions and, at their discretion, draw from this list to engage the inmate in conversation.⁸⁸ Apparently, they do not rely on a written list of questions, nor do they ask every inmate the same set of questions. That said, general themes emerge during questioning, with the deputies' questions typically falling into one of three categories: (1) gay culture, (2) gay terminology, and (3) coming out experiences. First, they ask

82. *Id.* at 22–26. Deputy Lanni also acknowledged that they initially relied substantially on David Glasscock, the white gay activist who helped formulate the questions. *Id.* at 23 ("Dave had a big influence . . .").

83. *Id.* at 21–23; Lerner, *supra* note 76, at 1 (describing questions such as "What's the cover charge? Where is it? How is it decorated?").

84. Deputy Lanni indicated that they are familiar with Jewel's Catch One, which is in the predominantly black Crenshaw district. Lanni Interview, *supra* note 40, at 21. They have also visited bars in the suburban San Fernando Valley. Bartholomew (Bart) Lanni, Informal Comments During Facility Tour (Nov. 16, 2009). If an inmate says he has attended gay clubs primarily out of state, the deputies consult a gay travel guide that lists clubs. *Id.* They might also call gay clubs in a distant city to see if a club mentioned by an inmate, but not in a travel guide, actually exists. *Id.*

85. Lanni Interview, *supra* note 40, at 13 ("What I'm interested in is your lifestyle in the community"). Lanni further explains: "What I'm looking for, if there's any documentation where this individual has stated in the past that they were gay or they have a relationship with a male or their partner comes and visits them. Whatever that connection is to the community." *Id.* at 14. MSM who have weak connections to the gay community, such as those who have never had a partner, or whose partner or ex-partner is not out, are disadvantaged by this focus.

86. See Ritch C. Savin-Williams, *Who's Gay? Does it Matter?*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 40, 42 (2006) (discussing competing definitions of gay identity).

87. Lanni Interview, *supra* note 40, at 14 ("I'm not looking for your sexual habit inside a jail. I'm looking for your lifestyle outside of here.").

88. Dolovich contends that it is misleading to describe the screening interview as a "test." She characterizes the questioning as "detective work." Dolovich, *supra* note 1, at 30. In my view, the discretion and lack of transparency in the questioning process, including the fact that deputies can invent questions at will without oversight or verification of the questions' validity, makes the questioning more problematic than a clear, consistently applied test.

about culture in West Hollywood⁸⁹ and other gay spaces in the Los Angeles area, if the inmate says he socializes elsewhere.⁹⁰ For example, they might ask the inmates to describe the annual gay pride parade that takes place in West Hollywood. They ask where the Abbey—a sprawling, indoor-outdoor lounge in the heart of West Hollywood—is located.⁹¹ The questions sometimes assume that all gay persons in Los Angeles frequently attend bars and have an awareness of the minute details of those establishments, such as the recent painting of a bar or changes to a sign.⁹² Second, they ask inmates to define several terms that they believe to be part of a universal gay vernacular: What is a “size queen”? Define “glory hole.”⁹³ What is a “Prince Albert”? What is a “bird”? What are “cookies”?⁹⁴

Finally, the deputies ask questions about the inmate’s personal life, which are designed to test credibility and provide outside verification of his gay identity⁹⁵: “How did your mother react when you came out?”⁹⁶ Tell me about your first sexual intercourse with a man.⁹⁷ Have you ever slept with a woman?”⁹⁸ Some questions assume monolithic gay sexual practices—for instance, that all gay men engage in receptive oral sex and swallow semen.⁹⁹ The deputies sometimes ask “What does semen taste like?”¹⁰⁰ Counterintuitively, describing semen as “delicious” is the wrong answer; “real”

89. See Tiedeman Interview, *supra* note 63, at 5 (characterizing entire test as “very like, white, West Hollywood focused”).

90. Lanni Interview, *supra* note 40, at 14. The questions pertain only to gay spaces. Thus, a gay inmate who says he avoids bars and clubs, or attends only straight bars and clubs, will be disadvantaged.

91. See *id.*

92. See, e.g., Hagar Interview, *supra* note 41, at 16 (listing one question as “What does the dance floor look like?”).

93. See *id.* at 15.

94. See *id.* at 26. Deputy Lanni recognized that this slang may not be known generally to all gay men. See *id.* at 26 (“[S]ome of it is geared towards certain groups and not others, so some people may not know”). He also contrasted his test with “the handkerchief codes years ago,” noting “[t]hat wouldn’t be relevant today.” *Id.* Gay men in the 1970’s wore different colored handkerchiefs to signal the sexual role or practice they sought in a casual sex encounter, such as whether the man wanted to play the “top” or “bottom” role in anal sex. MARTIN P. LEVINE & MICHAEL S. KIMMEL, *GAY MACHO: THE LIFE AND DEATH OF THE HOMOSEXUAL CLONE* 66 (1998). Yet it is far from clear that words like “bird” and “cookies” are significantly more widely known to young MSM today than handkerchief codes.

95. See Lanni Interview, *supra* note 40, at 20, 36 (stating that deputies read “body language” and look to “the whole package” or, in legal parlance, “the totality of the circumstances”).

96. See *id.*

97. See *id.* at 16.

98. *Id.*

99. This assumption reveals ignorance about the diversity of sexual experiences among MSM. Some MSM, particularly a subset of those who identify as tops, do not perform receptive oral sex, and many MSM do not swallow semen because of uncertainty as to whether it could transmit HIV. See Robinson, *supra* note 18, at 1517 n.295 (describing medical uncertainty as to the extent of HIV risk from receptive oral sex).

100. Dolovich, *supra* note 1, at 38 n.192.

gay men “offer more prosaic observations—that it can be salty, for example[,] or that it depends on what the person ate that day.”¹⁰¹

At this stage of the questioning, the deputies ask inmates to provide names and phone numbers of male partners and family members who can confirm the inmate’s gay identity.¹⁰² Deputy Lanni says he uses care in questioning family members so as not to “out” the inmate unwittingly.¹⁰³ Although some inmates say they are not out to their mothers, Deputy Lanni suggests otherwise: “[T]ypically, Mom knows. Even if the son hasn’t told her. I’ve gotten that a hundred times.”¹⁰⁴

To the extent that transgender inmates are subjected to this line of questioning, it is apparently a formality so long as they readily appear transgender.¹⁰⁵ The staff relies heavily on physical appearance at the time of incarceration to identify transgender inmates, although not all transgender people display breast development or other overtly feminine markers when they are arrested.¹⁰⁶ The Jail does not give transgender inmates who do not readily appear as such the opportunity to come out as transgender. Intake staff members ask all inmates, “Are you homosexual?” but not, “Are you

101. *Id.*

102. *See* Lanni Interview, *supra* note 40, at 14–15.

103. *See id.* at 15 (“Well, for example, I could ask, as a parent, if I called you, ‘Is there any psychiatric history that we need to be aware of, homosexuality, marriages, [etc.]?’”). It is unclear whether these veiled questions are effective in protecting the inmate’s privacy.

104. *Id.* at 15. Thus, even if an inmate says he is not out to his mother, the deputy might still ask for her phone number and expect his mother to verify his sexual orientation, which requires the inmate to trust the deputy. *Id.*

105. Tiedeman Interview, *supra* note 63, at 12 (stating that transgender people are subject to the “same process” as gay-identified men, but that “if they’re trans, they’re gonna put ‘em in”); Lanni Interview, *supra* note 40, at 28 (“[I]t’s not like I’m going to take this transgender person and put them in GP [general population], ‘cause that’s not gonna happen. Right, so I’m not gonna waste 40 minutes of an interview trying to figure out if this person should not be housed in the general population. It’s kind of obvious.”). Deputy Lanni indicated that he relies on signs such as breast implants, long painted nails and eyebrows that are “done really well,” but also that “there are some guys who are very feminine that do not look like women and that identify as trans also.” *Id.* at 29. He failed to explain how he differentiates between effeminate gay men, who would be subject to the extensive interview, and transgender women, who are identified by their gender performance and may not be styled as women (nails, eyebrows, etc.). The reliance on surgical changes and overtly feminine styling appears to disadvantage transgender inmates who do not want to or cannot afford to obtain breast implants or happen to be arrested while they are not groomed in an overtly feminine fashion. Spade, *supra* note 12, at 754–55. It seems likely that deputies shunt some such transgender women into the gay category and subject them to their questions. *Cf.* Gonzalez Interview, *infra* note 268, at 10–11 (statement by government employee who provides services to inmates regarding gay man who was mistaken as transgender in San Francisco Jail and transgender woman who performed as a gay man to avoid assignment to the vulnerable unit).

106. Keatling Interview, *supra* note 42, at 2–3 (statement by transgender activist and educator that one cannot always identify a transgender person simply by sight); Spade, *supra* note 12, at 754–55 (discussing the diversity of perspectives among transgender people as to whether changing external gender expression through clothing and hairstyling, for example, is sufficient and whether surgery is desirable).

transgender?” The fact that a transgender woman might reasonably reply “no” when asked “are you homosexual?,” since she may be attracted to men and view herself as heterosexual, further complicates the issue.¹⁰⁷ Although they are governed by disparate standards, both transgender and MSM inmates are subject to a “one-size-fits-all” understanding of their identities.¹⁰⁸

Some who are familiar with the screening process suggest that men who conform to the stereotype of an effeminate gay man or visible transgender woman are more likely to be admitted.¹⁰⁹ The deputies admit that they assess gender performance to identify transgender inmates, and that the line between transgender women and effeminate gay men can be blurry.¹¹⁰ For these reasons, it is difficult to credit Deputy Lanni’s suggestion that he does not attend to gender performance with respect to gay men.¹¹¹

D. Bisexual Exclusion

Excluding bisexuals is an important aspect of the K6G screening process. A preinterview, written questionnaire asks the inmate if he has ever had sex with a woman and, if so, how recently.¹¹² The deputies appear to think that men

107. By contrast, San Francisco has a more comprehensive method of identifying transgender inmates and, indeed, all vulnerable inmates. Registered nurses, who work for the city’s department of health, inspect inmates during intake, and the jail is “hooked into the medical clinics throughout the city,” which enables it to know whether an inmate is receiving hormones or therapy relating to a gender transition. *See* Interview with Eileen Hirst, Chief of Staff, San Francisco Sheriff’s Dept., & Lieutenant Kevin McConnell, Classification Unit Manager, at 5, 7 (Mar. 26, 2010) (transcript on file with author). The jail also identifies some inmates as transgender because they changed their sex on government ID. *Id.* at 10. Although the jail staff do not ask specifically about gay and transgender identity, after asking about several safety issues, such as gang affiliation or enemies in the jail, they ask all inmates, “And is there anything else you want to tell us?” *Id.* at 15. If an inmate was not taking hormones, but indicated that she had just begun to transition to a different gender, the jail would ask medical staff to interview the inmate. *See id.* at 18.

108. Spade, *supra* note 12, at 774.

109. Kelley et al. Interview *supra* note 65, at 24–25 (statement by person who works in K6G recounting incident in which Deputy Lanni concluded that a man in GP might be gay because he was painting his toenails); Tiedeman Interview, *supra* note 63, at 5; Ricci, *supra* note 49, at B1 (recounting statements by Bell and Lanni describing the “flamboyance” of K6G inmates).

110. *See* text accompanying *supra* note 105.

111. As I discuss below, I believe that gender performance is a relevant part of the vulnerability calculus. I worry, however, that the deputies are likely to view white men as more effeminate and in need of protection than men of color, even if viewers of color would assess the men of color differently. *See* Phillip Atiba Goff et al., “Ain’t I a Woman?”: Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 *SEX ROLES* 392, 396, 401 (2008) (finding that white viewers rated black faces as more masculine than similar white faces); Hagar Interview, *supra* note 41, at 18 (description by John Hagar, lead attorney in ACLU lawsuit, of paradigmatic victim for which K6G was designed as blond [i.e., white] and effeminate).

112. Lerner, *supra* note 76, at 1. The exclusion is near categorical. An inmate who identifies as bisexual may be able to convince the deputies that he is actually gay if his sex with women is in the distant past. *See* Kelley et al. Interview, *supra* note 65, at 40. This flexibility

who live with a wife or female partner are very likely to be heterosexual or bisexual, even if they claim to have male sexual partners. For example, Deputy Lanni described an incident in which he called an inmate's home, asking for a male partner, and discovered that he had a female fiancé living at the residence along with the alleged male partner.¹¹³ Based on this information, Lanni deemed the inmate a liar and declined to admit him to K6G.¹¹⁴

When asked directly why he excludes bisexual men, Lanni replied:

[W]e are not in the habit of housing bisexual men, because now we have a situation where I have, again, the guy that's playing the straight guy in the community. He's out there, he's got six kids with his wife and that's who he goes back to, but when he comes in here, he could be looking to abuse somebody or just get off . . . and I don't want the K6G guy, the righteous gay male, to become a victim of this guy's sexual habits. So typically we don't keep bisexuals [in K6G].¹¹⁵

Although Lanni held out the possibility that a married applicant might be a closeted gay man, he implied that this is an artifact of the 1950s and 1960s and indicated that he distinguishes duplicitous bisexuals from closeted gay men primarily by relying on his intuition.¹¹⁶

appears to reflect the popular assumption that many men who identify as bisexual are lying and are actually ashamed about being gay. See Robinson, *supra* note 18, at 1487–88; Benedict Carey, *Straight, Gay or Lying? Bisexuality Revisited*, N.Y. TIMES, July 5, 2005, at F1. If the deputies are not convinced, however, that the inmate is truly bisexual because he has a female fiancée, for example, they will assign him to GP.

113. Lanni Interview, *supra* note 40, at 14–15. The deputies consider the presence of recent female lovers to create a strong presumption against admitting the inmate to K6G. For example, the deputies would credit a mother's statement that "my kid's not gay. I've seen him with plenty of girls." *Id.* at 15.

114. Deputy Lanni stated that the inmate:

[T]old me his partner's name and he says, "Yeah, here's my partner's number." So I dial it as he's sitting there, and so a young lady answers and I go "Excuse me, I'm looking for the partner." She says "I'm sorry, that person isn't here right now." I go "And who am I speaking with?" and then she tells me, and I says, "Do you know this (the guy that I was interviewing)?" and she says, "Yeah, that's my fiancé." Oh. So I go, "Here, hold on. I think he'd like to talk to you." Your fiancée's on the phone.

Id.

115. *Id.* at 17–18. Deputy Bell made a similar statement to the *Los Angeles Times*. Ricci, *supra* note 49, at B1 ("They want to be in the gay-only dorms, Bell said, because they regard them as places where sex is readily available . . ."). Sheriff Block also echoed this rationale in another *Los Angeles Times* article. Lerner, *supra* note 76, at 1 (stating that heterosexuals seek access to K6G for the purpose of "abusing gays and getting them to submit to sexual activity").

116. Lanni Interview, *supra* note 40, at 19 ("When you do the interviews and how you're asking the questions, the guys tell you exactly what it is you need to know. I guess it's hard to explain to you without you sitting and doing all the interviews."); see also *id.* at 21 (referring to men who "fake the whole thing with [heterosexual male friends] about the women during the daytime" but "at night, they're running over to their partner's [in] West Hollywood or wherever the partner's at, and they're gay"). The stereotype that bisexuals are duplicitous enjoys support among gays and straights. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 399 (2000) (discussing "'negative images of bisexuals as fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain 'heterosexual privilege,' [or]

In sum, the K6G screening process is intended to separate inmates who are most in need of protection, using gay identity as a proxy for vulnerability. The means it employs to make this determination, however, rely on an exceedingly narrow definition of gay identity that assumes that inmates will have no problem coming out to law enforcement officials during the intake process. This monolithic conception of sexual identity ignores numerous ways in which race, class, and gender complicate gay identity and coming out.

II.

MASCULINITY AND GAY IDENTITY

This Part seeks to illuminate and trouble the social processes that construct masculinity and position gay men as the opposite of “real men.” This Part also juxtaposes the production of male identities in the broader society with the production of male identities in jails and prisons to reveal the fundamental errors in K6G’s assignment of gay identity.

A. The Production of Masculinity in Mainstream Culture

The K6G policy reflects the social expectation that MSM make themselves identifiable as Gay, which is an extension of gender regulation. While society commands men to be masculine and women to be feminine, it expects MSM to come out as gay and embody gay culture.¹¹⁷ Because most people believe that sexual orientation is intimately interwoven with gender nonconformity, I begin by briefly discussing the construction of gender and its relationship to sexual orientation.

power-hungry seducers who use and discard their same-sex lovers”) (quoting Lisa Orlando, *Loving Whom We Choose*, in *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT* 223, 224 (Lorraine Hutchins & Lani Kaahumanu eds., 1991)).

117. Calls for gay men to come out often are linked to the felt need for political organizing around identity. If gay men do not come out and make themselves visible, the argument goes, they cannot advance important goals of the gay community, such as same-sex marriage and the end of the military’s “Don’t Ask; Don’t Tell” policy. In addition to underestimating the possibility of effecting political change without coming out, such arguments tend to assume a monolithic “gay agenda,” just as they imagine a universal gay subject. See WARREN JOHANSSON & WILLIAM A. PERCY, *OUTING: SHATTERING THE CONSPIRACY OF SILENCE* 3, 7 (1993) (arguing that the closet “makes it hard for those in the vanguard to estimate the true number of their potential followers, to collect valid samples for research, and most important of all, to organize them for political struggle. The need for collective visibility overrules the right of privacy.”). A recent study commissioned by the Human Rights Campaign demonstrates the fractured nature of political interests among LGBT people. See HUMAN RIGHTS CAMPAIGN, *AT THE INTERSECTION: RACE, SEXUALITY AND GENDER* (2010), available at http://www.hrc.org/documents/HRC_Equality_Forward_2009.pdf. Specifically, when LGBT people of color were asked to rank their most important political priorities, many of the “gay” issues privileged by the mainstream gay rights movement, such as same-sex marriage, ranked below guaranteeing racial equality and HIV prevention/treatment, among other race- and class-inflected issues. *Id.* at 11–12.

Critical gender scholars have challenged the popular notion that social distinctions between men and women are based primarily on biological differences. For example, Judith Butler argues that the law does not simply respond to preexisting, natural categories—man, woman, gay, straight. Rather, the law produces these categories and then creates the illusion that they are innate and inevitable.¹¹⁸ Although scholars and judges tend to distinguish between “sex” and “gender,” treating “sex” as biological and “gender” as cultural,¹¹⁹ Katherine Franke argues that this delineation is treacherous.¹²⁰ Courts have repeatedly passed off socially constructed norms as principles rooted in “real” physical differences between men and women.¹²¹ In turn, these decisions recreate and reify social understandings of gender differences as natural and fixed.

A central insight from critical gender scholarship is that masculinity and femininity do not flow mechanically from male or female biology. Instead, they are instilled by social expectations and by individual decisions to reflect or resist these norms, both of which vary over time.¹²² When a doctor perceives that a baby has a penis and declares, “It’s a boy,”¹²³ she assigns him to a social template for regulating male identity. Masculinity is a complex set of social regulations that determine what “real men” can and cannot do. Although masculinity often is a site of privilege, it simultaneously serves as a system of constraint. To set boundaries, masculinity requires an “other,” an abject status that reminds “real men” of the fate they would experience if they failed to

118. JUDITH BUTLER, *GENDER TROUBLE* 25 (1990) (“There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.”); see also Spade, *supra* note 12, at 745.

119. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995).

120. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. PA. L. REV.* 1, 98 (1995).

121. See, e.g., *Nguyen v. United States*, 539 U.S. 69 (2003) (claiming that the fact that women give birth justifies differential treatment of citizen mothers and citizen fathers in immigration law). Consider, for instance, laws that prohibit women from exposing their breasts in public but permit men to reveal theirs. Judicial decisions that legitimate such bans tend to turn not on a close analysis of any physical differences between the average male and female breast, but rather on society’s designation of certain body parts as erogenous zones. Luke Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 *LAW & SEXUALITY* 143 (2009). However, even this social question is blinkered by gendered lenses. Judges deem female breasts erotic and male breasts not erotic by enforcing a heterosexual male perspective and not that of a heterosexual woman, a gay man, or a bisexual man or woman. *Id.* at 153; see also Russell K. Robinson, *Perceptual Segregation*, 108 *COLUM. L. REV.* 1093, 1137–38 (2008) (noting that gender of judge influences resolution in some sex discrimination cases).

122. Franke, *supra* note 120, at 99; Kimmel, *supra* note 13, at 119, 120. For a broader discussion of how law constructs gender, see David B. Cruz, *Disestablishing Sex and Gender*, 90 *CALIF. L. REV.* 997 (2002).

123. Franke, *supra* note 120, at 51.

perform the traditional masculine role. Femininity and Gay Identity simultaneously serve as the necessary foil to heterosexual masculinity.¹²⁴

Men who fail to adhere to masculine norms are perceived as feminine, and femininity is perceived as a sign of Gay Identity.¹²⁵ Yet men and boys can depart from masculine norms in multiple ways that do not reflect traditionally feminine behavior, such as being “slow to develop physically, soft, shy, smart and/or show[ing] insufficient commitment to male peer group structures and values.”¹²⁶ However, such departures can trigger insults that seek to emasculate a man and label him as gay.¹²⁷ Because it is not a birthright, masculinity must be “proved, and no sooner is it proved that it is again questioned and must be proved again.”¹²⁸ Men must constantly work to maintain their status by performing masculine behaviors such as expressing desire for women and avoiding behaviors and spaces that are labeled as feminine and/or gay. As Michael Kimmel asserts, “[h]omophobia is a central organizing principle of our cultural definition of manhood.”¹²⁹

Although heterosexual men must work to maintain their heterosexuality and masculinity, they can never be completely secure in their identities. This is so because social expectations of masculinity place such men under constant surveillance.¹³⁰ No matter how gender conforming a man has been, at any moment, he might “slip” and be perceived as revealing an inner feminine/gay essence, which may be read as erasing his masculine/heterosexual behaviors. Thus, masculinity ironically is always in peril.¹³¹

124. Kimmel, *supra* note 13, at 120.

125. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 36, 72 (1995).

126. David C. Plummer, *The Quest for Modern Manhood: Masculine Stereotypes, Peer Culture and the Significance of Homophobia*, 24 J. ADOLESCENCE 15, 18–19 (2001).

127. *Id.* at 21.

128. Kimmel, *supra* note 13, at 122.

129. *Id.* at 131. A *New York Times* article that popularized the term “man date” illustrates heterosexual men’s fear that others will perceive them as gender nonconforming and gay. Jennifer Lee, *The Man Date*, N. Y. TIMES ONLINE (Apr. 10, 2005, 10:00 AM), http://www.nytimes.com/2005/04/10/fashion/10date.html?_r=1&scp=3&sq=jennifer+lee+the+man+date&st=nyt. The *Times* article describes an outing by Matt and John, friends who chose to visit New York City’s Museum of Modern Art, instead of a conventionally masculine space like a sports events. Their choice created pressure to distance themselves from each other as well as Gay Identity. The friends “semi-avoided each other as they made their way through the galleries and eschewed any public displays of connoisseurship.” *Id.* In a similar vein, straight men attending a movie together commonly leave an empty seat or two between them to signify that they are not “together.” *Id.* Matt also recounted an incident in which he planned to meet his single roommate, Thomas, at an Italian restaurant. Upon arrival, they were “confronted by cello music, amber lights, white tablecloths and a wine list.” They immediately left, opting for a casual fried chicken joint because they were “kind of worried that word might get out. . . . This is weird, and now there is a witness maybe.” *Id.*

130. Kimmel, *supra* note 13, at 128 (“We are under the constant scrutiny of other men. Other men watch us, rank us, grant our acceptance into the realm of manhood.”).

131. Although my focus in this discussion is the relationship between heterosexual

Moreover, even if a man could perfectly represent the masculine ideal, the belief in hidden and authentic gender essences prevents a man from conclusively refuting the suspicion that he is gay. Since people generally have sex in private, society often lacks any personal knowledge that a man it perceives as gay engages in sex with men.¹³² Many consider it rude to ask a stranger or even an acquaintance about his sexual practices or desire when they are not immediately relevant.¹³³ Whether one asks or not, it is common knowledge that many men are not out and will not voluntarily reveal their sexual desire or behavior. These dynamics mean that, while a man can be proved gay or bisexual if he admits to having or desiring sex with men,¹³⁴ he

masculinity and Gay Identity, many gay men also engage in gender surveillance, whether they are trying to determine if a straight-identified man is really gay or inspecting the masculinity of a romantic partner. Studies suggest that many gay men describe themselves as “masculine” and express a preference for a “masculine” partner. See Michael J. Bailey et al., *Butch, Femme, or Straight Acting? Partner Preferences of Gay Men and Lesbians*, 73 J. PERSONALITY & SOC. PSYCH. 960 (1997) (study of personal ads in one Chicago publication finding that “[b]oth gay men’s self-descriptions and their desired partner characteristics were massively biased toward masculine descriptors,” although over half of the ads did not reference gender performance). At the same time, some gay men have internalized the belief and fear that gay men tend to be less masculine than straight men, which requires monitoring potential partners to make sure that they do not “slip” and drop the masculine “façade,” revealing an inner girl. Although this inspection is understandable insofar as gay men ground their identities in attraction to men, and not women, one should be on guard against unrealistic gender expectations and recognize that the search for “perfect” masculinity is futile. Luke Boso, *Disrupting Sexual Categories of Intimate Preference*, 21 HASTINGS WOMEN’S L.J. 59, 78 (2010) (“No one is 100 percent anything.”) (internal quotation marks omitted); Kimmel, *supra* note 13, at 125 (stating that ideal masculinity is “unrealizable”);

132. Cf. Valdes, *supra* note 125, at 72 (arguing that perceptions of gender atypicality “were at least as central to the construction of sexual orientation as the actual commission of same-sex sex acts”); *id.* at 94 (“The enactment of social effeminacy is . . . the substituted symbol for the unseen occurrence of same-sex intimacies . . .”).

133. That said, the gay community’s mantra requiring perpetual outness may embolden people to breach this privacy norm. Society increasingly subjects actors and politicians to scrutiny and even direct questions regarding their sexual orientation. One can google virtually any young male celebrity and the word “gay” and find numerous web pages reporting gossip that the celebrity is gay. Although the media used to consider direct inquiries off-limits, that norm appears to be eroding. See, e.g., Brian Moylan, *The Secret Sex Life of John Travolta*, GAWKER (Nov. 19, 2010, 2:57 PM), <http://gawker.com/#!5685811/the-secret-sex-life-of-john-travolta> (cataloguing tabloid stories on John Travolta’s alleged gay sex exploits in Los Angeles bathhouses); Lindsay Robertson, *Meredith Baxter’s Surreal Today Show “Confession,”* JEZEBEL (Dec. 2, 2009, 11:00 AM), <http://jezebel.com/5417001/meredith-baxter-birneys-surreal-today-show-confession> (recounting how tabloid efforts to out her led actor Meredith Baxter to come out on NBC’s *The Today Show*).

134. To be more specific, a man’s admission that he has had sex with men, or wants to, satisfies the dominant social definition of gay identity. I do not mean to endorse that definition as “true.” Although it is possible that a man would lie about having sex with men, it seems unlikely because being classified as gay requires giving up the privileges of heterosexuality. There are limited contexts in which a man’s admission that he has had sex with a man may not convince most people that he is actually gay. The principal context is of course incarceration. Other potential contexts include adolescence, which may provide grounds for dismissing the sexual experience as experimentation, and pornography, where so-called “gay for pay” actors thrive in

cannot be proved straight.¹³⁵ Even if one were to watch a man have sex with a woman right before his or her eyes, one could not know whether he also has sex with men on the “down low.”¹³⁶

Thus, there is an elusive and perhaps illusory quality to heterosexuality. The very concept assumes that a man has a stable sexual desire for women and would always reject the sexual advances of a man. Yet one can never pin down this essence and manifest it. Despite society’s general ignorance about what people are doing—or not doing—in private and the uncertainty of their future sexual trajectories, it remains committed to classifying people based on sexual orientation. The limited access to concrete evidence of sexual conduct and desire forces society to use various cultural markers as a proxy for same-sex intimacy.¹³⁷

If one believes sexual orientation to be rooted in desire or conduct, there is likely to be slippage between public attributions of Gay Identity and the underlying truth of one’s sexual orientation. Because masculinity must be performed and requires effort, most men will fluctuate in their masculinity over time. A man might come off as masculine and heterosexual on one day or in one context, and as feminine and gay in another. The reliance on public gender performance to mark gay men allows many masculine, gay-identified men to be perceived as heterosexual—whether they intend such perceptions or not—and leads to some heterosexual men being mapped into Gay Identity because of their gender nonconformity. The masculine gay man can correct public perceptions of his sexual orientation by affiliating with more stereotypically gay men, holding himself out as a member of a male couple, or congregating in

part because some viewers believe them to be heterosexual. *See, e.g., Gavin Rossdale Admits to Gay Fling with Singer Marilyn*, HUFFINGTON POST (Oct. 14, 2010, 8:40 AM), http://www.huffingtonpost.com/2010/10/13/gavin-rossdale-admits-to-_n_761413.html (stating that singer Gavin Rossdale, who is married to pop star Gwen Stefani, explained an early affair with a man by saying that he was just 17, and “It’s a part of growing up”); HALLEY, *supra* note 38, at 47 (discussing how the military allowed service members to prove that they were heterosexual and that their engagement with homosexual conduct was a momentary experiment).

135. For a related discussion on the difficulty of proving sexual identity that focuses on the role of bisexuality, see Yoshino, *supra* note 116, at 400–02.

136. *See* Robinson, *supra* note 18, at 1469–78 (critiquing media discourse on black men who live on the “down low”). For some people, desire is the critical determinant, so we would have to know whether the man actually desired either or both his female and male partners. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 300 (1994).

137. *See* Katherine Raymond, *Confessions of a Second Generation . . . Dyke?: Reflections on Sexual Non-identity*, in *POMOSEXUALS: CHALLENGING ASSUMPTIONS ABOUT GENDER AND SEXUALITY* 59 (Carol Queen & Lawrence Schimel eds., 1997) [hereinafter *POMOSEXUALS*] (“[Q]ueer identity—and conversely, homophobia—are often based in large part on factors other than what people actually do in bed.”). Early military policy grappled with the difficulty of identifying male sexual “degenerates” by developing regulations specifying certain supposed physical markers, including traits associated with women. William N. Eskridge, *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 *IOWA L. REV.* 1007, 1053 (1997).

gay spaces—bars, gay pride parades, and so forth. The heterosexual man, however, cannot similarly dispel the suspicion that he is gay.

The next Section describes the cultural markers that serve as a proxy for same-sex intimacy among men. These signs of Gay Identity have two troubling effects. Society forbids heterosexual men from displaying these traits because it has assigned them to gay men, thereby limiting heterosexual men's individual liberty. At the same time, while some gay men reflexively or deliberately embody Gay Identity, other MSM find Gay Identity to be constraining and oppressive. Some of the latter men are perceived as gender-nonconforming because they appreciate and engage in masculinity, which the broader society has wrongly assigned to heterosexual men.¹³⁸

B. Stereotyping Gay Identity

The discussion of Gay Identity in this Section seeks to show that some MSM might understandably reject it for reasons other than internalized homophobia. Gay Identity is not a neutral vessel; it is an amalgam of homophobic stereotypes and largely unsuccessful attempts by pro-gay people to subvert those stereotypes. As such, Gay Identity is quite narrow and particularly likely to repel men who are of color, poor, and/or working class, as well as those who hold religious and moral values inconsistent with dominant gay rhetoric. Gay Identity thus should be understood, in jail and in broader society, as *just one* identity-based model for MSM.¹³⁹

I focus on three particular aspects of Gay Identity that are reflected in the K6G policy and the broader culture, but make it a foreign identity¹⁴⁰ for many MSM: (1) the expectation that gay men are effeminate; (2) the perception that gay men are hypersexual, as compared to heterosexual men; and (3) Gay Identity's consumptive focus, which assumes a position of relative wealth and an interest in products traditionally associated with women.¹⁴¹ These pillars of

138. See Robinson, *supra* note 18, at 1477.

139. Cf. Vickie M. Mays et al., *HIV Prevention Research: Are We Meeting the Needs of African American Men Who Have Sex with Men?*, 30 J. BLACK PSYCHOL. 78, 83 (2004) ("Although mainstream society tends to think of homosexuality as homogenous, it is more accurate perhaps to think of these diverse populations . . . as representing homosexualities."); see LAUMANN, *supra* note 136, at 290, 301.

140. Sonia Katyal has incisively examined the clash between Gay Identity and local culture in non-Western countries when the LGBT movement has tried to "export identity." Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 100 (2002) ("[T]he presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought, tends to swiftly unravel when viewed in a cross-cultural framework."). In this Article, I try to show that Gay Identity may seem foreign to American men as well, especially men of color. Men who live in rural spaces may also have a vexed relationship to Gay Identity, which centers on an urban, affluent perspective.

141. I do not mean to suggest that these three components exhaust prevailing conceptions of gay identity. Nor do I deny that there are counternorms, especially with respect to masculinity. Nonetheless, I argue that these are three major strands in popular conceptions of gay men.

Gay Identity demonstrate that pro-gay conceptions of gay men bear a discomfiting resemblance to anti-gay conceptions, and the two may be mutually reinforcing.¹⁴² Although gay men attempt to put their own liberationist spins on these norms, the core descriptive claims are quite similar to those of anti-gay forces.¹⁴³

I. Effeminacy

The *Encyclopedia of Homosexuality* provides a definition of “gay” that locates effeminacy and promiscuity as hallmarks of Gay Identity.¹⁴⁴ According to the *Encyclopedia*, in the seventeenth century, the word “gay” “began to connote the conduct of a playboy or dashing man about town, whose behavior was not always strictly moral but not totally depraved either.”¹⁴⁵ By the nineteenth century, the word had shifted in two critical respects: it was used to refer to women and, not coincidentally, it obtained a derogatory meaning. “Gay” meant “of loose morals, a prostitute.”¹⁴⁶

In light of its predecessors, “lothario” and “female prostitute,” the emergence of the new meaning of gay as a homosexual man “could not fail to bear overtones of promiscuity and ‘fallen’ status.”¹⁴⁷ William Eskridge has described the various ways in which the law treated gay men, prostitutes, and gender transgressors or “inverts” as related and overlapping forms of sexual

142. Cf. Allan Bérubé, *How Gay Stays White and What Kind of White It Stays*, in THE MAKING AND UNMAKING OF WHITENESS 234, 258 (Birgit Brander Rasmussen et al. eds., 2001) (arguing that gay men “have to confront how we’ve absorbed the antigay lies that we are all wealthy, irresponsible, and sexually obsessed individuals who can’t make personal commitments”); RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 72 (2005) (arguing that many of the components of gay identity advanced by Kenji Yoshino would provoke “angry accusations of stereotyping” “[i]n another context”); Valdes, *supra* note 125, at 36 (“[L]eading members of sexual minority communities embraced and internalized [the] conflation” of sex, gender and sexual orientation).

143. I support my argument by focusing on gay men and heterosexual allies’ own descriptions of gay culture. I collectively call these scholars and activists “pro-gay people.” Some readers may disagree as to whether some of the researchers I cite are truly “pro-gay.” As the text suggests, I have serious doubts that much of this research advances the interests of gay men. However, in using this term, I rely on how these scholars appear to perceive themselves.

I wish to emphasize that I do not argue against effeminacy or for masculinity. Instead, I oppose the conflation of sexual orientation and gender performance, and the identity-related effects of that conflation. People should be free to perform gender as they prefer without the assumption that their gender performance arises from an underlying sex or sexual orientation.

144. ENCYCLOPEDIA OF HOMOSEXUALITY 455 (Wayne R. Dynes ed., 1990). The editors of the *Encyclopedia* allegedly listed a fictitious female as the author of several entries regarding lesbians. Francine Fialkoff, *In Reference We Trust?* LIBRARY J. June 15, 1995, at 58. Indeed, the last name they picked for her, “Gettone,” stands for “token” in Italian. *Id.* Their intent apparently was to mask the “overwhelming gay focus” of the volume. *Id.* Hence, this is another example of a small, unrepresentative group of white males claiming to speak for all LGBT people.

145. ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 144, at 455.

146. *Id.*

147. *Id.*

deviance calling for legal regulation.¹⁴⁸ This conception of the “invert” posited that a gay man essentially is a “woman trapped inside a man’s body . . . who sought to express an affect and desire inconsistent with the sex of the body.”¹⁴⁹ The term “coming out” also has feminine roots. As George Chauncey explains, “[l]ike much of campy gay terminology, ‘coming out’ was an arch play on the language of women’s culture—in this case the expression used to refer to the ritual of a debutante’s being formally introduced to, or ‘coming out’ into, the society of her cultural peers.”¹⁵⁰

Various studies reveal pervasive conflation of homosexual orientation and effeminacy. An early study found that simply telling college students that the man they viewed on a videotape was a member of a gay student club led them to characterize the target as weaker and more feminine, submissive, and unconventional, as compared to the ratings of a control group that viewed the exact same target and videotape.¹⁵¹

A 2009 study found that, despite much progress toward LGBT equality since the initial studies, “stereotypes concerning the masculinity and femininity of gay men and lesbians have remained remarkably consistent over the last 20 years.”¹⁵² In particular, the study found that “gay male targets were actually seen as being just as low in masculinity . . . as heterosexual females.”¹⁵³ Another study found that strong majorities of college students described gay male characteristics as “feminine” (87.8 percent); “emotional” (80.9 percent); “walk like girls” (77.4 percent); “dainty” (76.3 percent); and “limp wristed” (64 percent).¹⁵⁴

Some readers may resist the characterization of these findings as stereotypes and find at least a kernel of truth in the idea that gay men are less masculine than heterosexual men. The challenge in making this descriptive claim is that it is inextricably interwoven with the prevailing system of gender regulation. Because society commands heterosexual men to be masculine, and permits—sometimes, even encourages¹⁵⁵—gay men to be feminine, one

148. See Eskridge, *supra* note 137, at 1010, 1034.

149. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 845 (2002); see, e.g., Eskridge, *Law and the Construction of the Closet*, *supra* note 137, at 1023–24; Valdes, *supra* note 125, 45–54.

150. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 7 (1994).

151. See Theodore Weissbach & Gary Zagon, *The Effect of Deviant Group Membership Upon Impressions of Personality*, 95 J. SOC. PSYCHOL. 263, 264–65 (1975).

152. Aaron J. Blashill & Kimberly K. Powlishta, *Gay Stereotypes: The Use of Sexual Orientation as a Cue for Gender-Related Attributes*, 61 SEX ROLES 783 (2009).

153. *Id.*

154. Stephanie Madon, *What Do People Believe About Gay Males? A Study of Stereotype Content and Strength*, 37 SEX ROLES 663, 677 (1997).

155. See, e.g., *‘Idol’ Reject Sues for \$300 Million—Anti-Gay Allegations*, TMZ.COM (July 27, 2010, 12:25 PM), <http://www.tz.com/2010/07/27/american-idol-sued-ian-benardo> (reporting on lawsuit by American Idol contestant who alleged sexual orientation discrimination, including that the TV show’s producers instructed him to “gay it up”).

cannot know what gay and straight male preferences would be in the absence of this regime.

Influential legal scholar Kenji Yoshino writes: “there is clearly an enduring conventional wisdom that gender atypicality is a marker for homosexuality.”¹⁵⁶ He also notes that “[g]ay men are commonly viewed to be more promiscuous than their heterosexual counterparts.”¹⁵⁷ Not only are gay men supposed to be countercultural in their own sexual practices, they are expected to ally with “other ‘deviant’ groups like polygamists or pedophiles.”¹⁵⁸

One can read Yoshino to endorse this correlation between sexual orientation and sexual “deviance” as descriptively true.¹⁵⁹ “Gays can cover by being or by appearing to be monogamous,” he writes.¹⁶⁰ Similarly, “[g]ays can cover by rejecting other ‘deviant’ groups like polygamists or pedophiles.”¹⁶¹ Yoshino uses the term “cover” to describe “the sociology of assimilation,”¹⁶² the process whereby members of stigmatized groups “tone down a disfavored identity to fit into the mainstream.”¹⁶³ Under this rubric, a gay man who behaves monogamously and consistently with masculine norms may be “covering” his more “authentic” Gay Identity.¹⁶⁴ Yoshino fails to acknowledge, however, that behaving promiscuously and effeminately might be performances as well; it is just that gay men likely direct these performances at a gay audience instead of a straight one. In expressing concern only about those who disobey gay cultural norms—those who hew to norms within the gay community are not accused of covering under his rubric¹⁶⁵—he appears to privilege the dominant gay culture, which disadvantages the many MSM who exist at its margin.¹⁶⁶

In addition to legal scholars, numerous pro-gay scientists have conflated gender and sexuality by attempting to prove that gay men are intrinsically like

156. Yoshino, *supra* note 149.

157. *Id.* at 847.

158. *Id.* at 846.

159. *See* FORD, *supra* note 142, at 71.

160. Yoshino, *supra* note 149, at 848.

161. *Id.* at 846.

162. *Id.* at 784.

163. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS, at ix (2006).

164. *See* Yoshino, *supra* note 149, at 848.

165. Yoshino classifies people who disobey gay culture as “normals” who “have internalized the values of the heterosexual mainstream.” Yoshino, *supra* note 149, at 839. He fails to acknowledge adequately that MSM might value monogamy, masculinity, or “straight” culture (whatever that is) for reasons having nothing to do with covering a stigmatized identity. The presumption that any man who has sex with men and does not subscribe to gay culture is “covering” oversimplifies complex personal decisions and robs men of their agency.

166. For an extended discussion of Yoshino’s scholarship on covering, see generally Russell K. Robinson, *Uncovering* Covering, 101 NW. U. L. REV. 1809 (2007) (reviewing KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006)).

women.¹⁶⁷ Based on their “intersex assumption,” such scientists examine homosexual men, looking for “female-typical brain structures, cognitive profiles, and hormonal measures and responses.”¹⁶⁸ For decades, scientists have tried—and failed—to prove that low testosterone levels cause homosexuality in men,¹⁶⁹ and continue to pursue the theory that there is a “male brain” and “female brain,” with homosexual men’s brains resembling the latter.¹⁷⁰ Although the press tends to trumpet such studies and erase the nuances, these studies have suffered grave attacks and sharp questioning from scientists as well as scholars in other disciplines.¹⁷¹

Not to be outdone, psychologists also attempt to identify distinctive traits in gay men. One recent article argues that gay men are identifiable because when they walk, they “sway” like heterosexual women, while lesbians tend to “swagger” like heterosexual men.¹⁷² The central flaw in such studies is that researchers routinely draw on people who are openly gay and immersed in gay culture because they are the most visible and likely to participate, yet they are not representative.¹⁷³

For instance, psychologist Nalini Ambady led a study designed to find empirical support for the claim that gay and lesbian people are better than straight people at spotting other gay and lesbian people.¹⁷⁴ The study entailed ninety-six undergraduate students judging the sexuality of graduate student targets after viewing them either in still photographs, a one-second video clip or a ten-second video clip.¹⁷⁵ Across all three conditions, gay men and lesbians were significantly more likely to be perceived as gay than were their

167. See Savin-Williams, *supra* note 86, at 42.

168. William Byne, *Science and Belief: Psychobiological Research on Sexual Orientation*, in *SEX, CELLS AND SAME-SEX DESIRE: THE BIOLOGY OF SEXUAL PREFERENCE* 303, 306 (1995).

169. *Id.* at 309–10, 336 (“The current consensus is that no causal relationship exists between adult hormonal status and sexual orientation.”).

170. *Id.* at 313–30.

171. See generally Byne, *supra* note 168, (warning against “hasty interpretations of findings based on limited sample sizes, shaky methodologies, and extremely limited knowledge about the functions of particular brain structures and even less knowledge about the biological substrates of the mind”); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994) (critiquing immutability argument and warning that it may divide LGBT community); Edward Stein, *Born that Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* 45 (Benjamin N. Cardozo Sch. of Law, Working Paper No. 223, 2008), available at <http://ssrn.com/abstract=1104538>.

172. Kerri L. Johnson et al., *Swagger, Sway, and Sexuality: Judging Sexual Orientation from Body Motion and Morphology*, 93 *J. PERS. & SOC. PSYCHOL.* 321 (2007).

173. See Savin-Williams, *supra* note 86, at 40 (stating that researchers have “generally ignored one fundamental issue—how homosexuality is defined can determine empirical findings”).

174. Nalini Ambady et al., *Accuracy of Judgments of Sexual Orientation from Thin Slices of Behavior*, 77 *J. PERS. & SOC. PSYCHOL.* 538, 541 (1999).

175. *Id.*

heterosexual targets.¹⁷⁶ However, the researchers recruited heterosexual targets from “public service organizations,” while drawing all of the gay and lesbian targets from “graduate student gay and lesbian groups.”¹⁷⁷ It is hardly surprising that people steeped in gay culture reflect the values of that culture, and this makes them identifiable as gay. By selecting only targets from gay student unions, the analysis necessarily excluded the sizable population of people who engage in same-sex conduct but do not organize around sexual orientation.¹⁷⁸ Yet, the findings likely will be read to support overbroad generalizations about the entire class.¹⁷⁹

Criticizing studies such as these, Ritch Savin-Williams has argued that “[t]hose who self-ascribe a gay/lesbian label are neither exhaustive nor representative of those with a same-sex orientation.”¹⁸⁰ And as this Article attempts to show, there are race, class, and gender patterns to this exclusion. People of color, poor people, and bisexuals are all likely to be underrepresented in mainstream gay organizations, and therefore disadvantaged by a K6G admissions test premised on ties to the “gay community.”

The in-depth discussion of effeminacy in this Section reflects the sense that it may be the chief stereotype of gay men today. Although effeminacy has long been linked to Gay Identity, it used to be that a traditionally masculine man could have sex with men without being categorized as gay.¹⁸¹ In the early 1900s, it would not strike people as odd that a man would have sex with male

176. *Id.* In summarizing the various studies discussed in this article, the authors estimated that the typical judge was accurate 55 percent of the time (slightly better than chance) in the still photo condition and seventy percent of the time in the ten-second video clip condition. *Id.* at 546.

177. *Id.* at 541, 544.

178. See, e.g., Richard J. Wolitski et al., *Self-Identification as “Down Low” Among Men Who Have Sex with Men (MSM) from 12 U.S. Cities*, 10 AIDS & BEHAV. 519, 526 (2006) (finding that “[down low]-identified MSM were less likely to report having had any involvement with the gay community”). Ambady and her coauthors acknowledged this limitation. Ambady, *supra* note 174, at 546.

179. I recognize that researchers might find it difficult to identify and recruit targets that choose not to identify as gay. Yet, a study by the CDC shows that such people can be identified. William D. Mosher et al., *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, 362 ADVANCE DATA FROM VITAL & HEALTH STAT., (Nat’l Ctrs. for Health Statistics), Sept. 15, 2005, at 1, 13 (identifying a group of men who described their sexuality as “something else”).

180. Savin-Williams, *supra* note 86, at 40. A related problem represented by the Ambady study is the researchers’ failure to reveal the race and socioeconomic class of the targets, which suggests that the researchers lacked awareness that race and class might make a difference. Ambady, *supra* note 174, at 541 (reporting age of targets but not race or class). This too obscures a significant potential bias. Members of mainstream LGBT organizations and people who congregate in gay enclaves on campus tend to be white. Despite the likely underrepresentation of people of color, the media and the public are prone to jump to the conclusion that such studies bear lessons for all people who engage in same-sex conduct, not just middle-class white people who strongly identify with gay culture.

181. CHAUNCEY, *supra* note 150, at 97 (stating that most working class men “considered it unremarkable that a man might [have sex with] a fairy and as little revelatory about his sexual identity as his preference for one kind of woman over another”).

and female partners.¹⁸² Men became gay by engaging in effeminate behavior in public, such as wearing makeup or “camping,” which led onlookers to assume that they played the feminine role in sexual interactions with men.¹⁸³ Men who had sex with men but were masculine were not perceived as gay.¹⁸⁴ Today, the stigma surrounding sex between men has metastasized. Not only are men deemed to be gay by displaying effeminate behavior, but once people learn that a man has sex with men, they impute effeminacy to him irrespective of how he carries himself.¹⁸⁵

2. Promiscuity

Another dominant component of Gay Identity is the expectation that gay men have more sex than heterosexual men and do so in less conventional ways.¹⁸⁶ Although society expects heterosexual men to avoid feminine behavior and purchasing products associated with women (two of the three pillars of Gay Identity), its expectations regarding sexual behavior are more complex. Society conceives promiscuity in heterosexual men differently than in homosexual men. First, the mere fact that a man has sex with men may give rise to a stereotype that he is promiscuous, whereas there is greater recognition of the diversity in sexual practices among heterosexual men. For example, the K6G test assumes that all gay men go to gay bars in search of sexual partners, but one would not make a similar assumption of straight men because many straight men are married and older and not in the bar scene. Second and relatedly, society understands promiscuity in heterosexual men as a phase that men often go through when they are young and hopefully before marriage—not a permanent practice. Third, it often celebrates promiscuity in heterosexual men as a manly rite of passage—“sowing his wild oats.” Society conceives of similar behavior in gay men, like that in women, as likely based in pathology.

The expectation that gay men engage in distinct, deviant sexual practices has deep roots and remains a central tenet of Gay Identity and modern homophobia. Eskridge wrote that, in the 1920s, government efforts to suppress “deviant” sexuality shifted focus from the “invert” to the “homosexual”: “while the former challenged gender and sex roles, the latter was sexually out

182. *Id.* at 13 (“[T]he hetero-homosexual binarism, the sexual regime now hegemonic in American culture, is a stunningly recent creation”).

183. *Id.* at 15.

184. *Id.* at 13 (stating that the requirement of effeminate public behavior “allowed many conventionally masculine men, especially unmarried men living in sex-segregated immigrant communities, to engage in extensive sexual activity with other men without risking stigmatization and the loss of their status as ‘normal men’”).

185. *See supra* text accompanying notes 151–154 (discussing studies on college students’ views of gay men).

186. *See* Stephen Ellingson & Kirby Schroeder, *Race and the Construction of Same-Sex Sex Markets in Four Chicago Neighborhoods*, in *THE SEXUAL ORGANIZATION OF THE CITY* 93, 96 (Edward O. Laumann et al. eds., 2004) (“Different components of gay culture . . . celebrate a transactional orientation toward sexual partnering.”).

of control and even predatory.”¹⁸⁷ Regulators considered homosexuality “virtually synonymous with uninhibited libido, aggressive promiscuity, and compulsive behavior.”¹⁸⁸

Today, although pro-gay and anti-gay people would likely disagree as to whether gay men are predatory, many in both camps view gay men as highly sexual beings who indulge in unconventional sexual practices and accumulate more sexual partners than their straight counterparts.¹⁸⁹ The first gay TV series, *Queer as Folk*, opened in a gay club packed with sweaty, sculpted white men gyrating, popping pills, and having sex in a backroom. “Then we hear the voice of the character who will become our guide, our Everyman, say: ‘The thing you need to know is, it’s all about sex.’ This is the main theme . . . being gay is all about sex.”¹⁹⁰ Law professors David Skover and Kellye Testy assert that the show “consciously and unapologetically assumes *the LesbianGay perspective*,” as if there were just one view.¹⁹¹

One example of unconventional sex is public sex. Queer theorist Michael Warner argues that public sex is a special part of gay male culture that the law should respect. Warner’s influential book *The Trouble with Normal* argues that “queer life” provides a specific ethical code that counters the pervasive problem of sexual shame.¹⁹² Warner describes this ethic of “dignity in shame”¹⁹³ as “begin[ning] in an acknowledgment of all that is most abject and least reputable in oneself. Shame is bedrock. . . . At its best, this ethic cuts against every form of hierarchy you could bring into the room.”¹⁹⁴ This strident defense of exhibitionist or atypical sexual practices borders on a normative gay mandate that renders “vanilla” or “mainstream” gays sellouts.

Warner argues that the most sexually marginal people best exemplify the queer ethic. He argues that a queer ethic emerges from the experiences of the

187. Eskridge, *supra* note 137, at 1054.

188. *Id.* at 1064, 1067 (quoting Ohio judge who described “sexual perverts,” a category that was understood to include homosexuals, as “wild ferocious animals”).

189. See DAVID NIMMONS, *THE SOUL BENEATH THE SKIN: THE UNSEEN HEARTS AND HABITS OF GAY MEN* 82–90 (2002) (arguing that most gay relationships are not monogamous); Richard Goldstein, *My Big Fat Funky Queer Marriage*, VILLAGE VOICE, June 15, 2004, at 39 (stating that his boyfriend’s sex partners “could practically fill the Radio City Music Hall” and that their committed relationship permitted his boyfriend to keep “tricking” and Goldstein to have “affairs”). The K6G unit essentially substitutes the predatory stereotype for one that imagines gay men as inherent victims.

190. Anthony Tommasini, *Looking for a Breakthrough? You’ll Have to Wait*, N.Y. TIMES, Jan. 14, 2008, at 2–3.

191. David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CALIF. L. REV. 223, 235 (2002) (emphasis added).

192. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 34–35 (1999).

193. *Id.* at 36.

194. *Id.* at 35.

sluts and drag queens and trannies and trolls and women who have seen a lot of life,¹⁹⁵ the boys who flaunt it as pansies, [those] who don't come out as happily gay, the clones in the so-called gay ghetto, the fist-fuckers and popper-snorters, the ones who actually like pornography.¹⁹⁶

In claiming promiscuity (the “sluts”) and gender nonconformity (the “pansies” and “trannies”) as queer values, Warner’s “queer” argument ultimately bolsters mainstream conceptions of gay men as effeminate and promiscuous. Warner is right to challenge the ascendancy of the “happily coupled,” suburban gays and lesbians as “the worthier pillars of the community” and representative of “the rest of us.”¹⁹⁷ But Warner does not stop there. Rather than just repudiating the existing respectability hierarchy, he would install a new, inverted hegemony and reinforce the boundary between gay and straight.¹⁹⁸ Instead of judging those who engage in the least respectable sexual practices, he suggests, we should shame people who refuse to engage in such practices.

Black men may be particularly averse to Gay Identity’s embrace of promiscuity because they add force to the stereotype that black men (of all sexual orientations) are animalistic and sexually out-of-control.¹⁹⁹ Further, black men are more likely to attend church and endorse religious values than white men.²⁰⁰ Gay Identity’s incorporation of promiscuity as a central feature thus creates conflict for many black MSM and other MSM who hold contrary religious or moral values.

195. *Id.* at 36.

196. *Id.* at 66, 68.

197. *Id.* at 49. In a complementary vein, Devon Carbado has critiqued the mainstream LGBT movement’s preoccupation with representations of “but for” gays in the campaign for legal rights and public respectability. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1506 (2000) (arguing that movement has favored “‘but for’ gay people—people who, but for their sexual orientation, were perfectly mainstream”). Relatedly, Angela Harris has emphasized how much of the push for same-sex marriage threatens to reinforce racial and wealth disparities and consolidate neoliberalism. See Angela Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2007).

198. Warner’s argument, especially his argument that public sex is central to gay male identity, WARNER, *supra* note 192, at 771–79, exemplifies a tension that Cathy Cohen has identified in queer advocacy. It toggles between arguing for universality and dismantling sexual categories even as it simultaneously reifies, and sometimes exaggerates, the distinction between “straights” and “queers.” See Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, in BLACK QUEER STUDIES 21 (E. Patrick Johnson & Mae G. Henderson eds., 2005).

199. See, e.g., Wilson, *infra* note 556, at 406–07; Robinson, *supra* note 18, at 1472–77.

200. See Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 PUB. OPINION Q. 59, 66 (2003).

3. *Affluent Consumption*

In general, men manifest Gay Identity by purchasing commodities that exhibit social affluence and a particular “gay”—often feminized—sensitivity.²⁰¹ Business experts and scholars have fostered a conception of gay men as obsessed with commerce, affluence, and self-image.²⁰² These descriptions of gay consumers focus on white, relatively wealthy men in large cities, with little awareness that there are plenty of MSM (and queer women) who live outside, and cannot relate to, this rarified orbit.²⁰³ For example, an article in *Broadcasting & Cable* announced that “[t]he gay community has money to burn, but few marketers know how to reach it,” characterizing LGBT people as “a group comprising as much as 10% of the U.S. population and one with exceptionally high discretionary spending.”²⁰⁴

The consumptive nature of gay culture dictates not simply that gay men are more affluent than their heterosexual counterparts, but also that they enjoy particular types of consumption stereotypically associated with women, including a fixation on personal appearance.²⁰⁵ Gay-themed advertisements depict the “active, freewheeling, and unfettered commercial pursuits of the ‘good gay life.’”²⁰⁶ The “gay lifestyle” requires a “buffed out and erotically charged manliness: working out his muscles in the gay gym, working out his energy at the gay disco, working out his stress on the gay cruise, and working out his libido in the gay bathhouse.”²⁰⁷

201. See Bérubé, *supra* note 142, at 238 (criticizing the “recent vigorous gay media promotion of the high income, brand-loyal gay consumer market—which is typically portrayed as a population of white, well-to-do, college educated young men” because it “widens the racialized class divisions that the religious right so eagerly exploits”). See also *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) (arguing that “homosexuals . . . have high disposable income” and “possess political power much greater than their numbers”).

202. See, e.g., Skover & Testy, *supra* note 191, at 240 (“American LesbianGay identity cannot be understood apart from commerce.”).

203. M.V. LEE BADGETT, *MONEY, MYTHS AND CHANGE* 111, 120–21 (2001). Although Skover and Testy acknowledge that poor LGBT people—including many people of color—lack access to this commodified identity, they blithely assume that poor LGBT folks will eventually follow the same “trajectory” as more affluent LGBT people. See Skover & Testy, *supra* note 191, at 243.

204. Joe Mandese, *The Rainbow Connection: The Gay Community Has Money to Burn, but Few Marketers Know How to Read It*, *BROADCASTING & CABLE*, July 25, 2007, at 22. BADGETT, *supra* note 203, at 127; ALEXANDRA CHASIN, *SELLING OUT* 44 (2000); Nancy A. Rudd, *Appearance and Self-Presentation Research in Gay Consumer Cultures: Issues and Impact*, in *GAYS, LESBIANS AND CONSUMER BEHAVIOR* 109, 112 (D. Wardlow ed., 1996) (“It is assumed that most gay consumers do not have children and therefore do not have the additional expenses associated with them resulting in a higher level of discretionary income.”); *id.* (noting that “urban white professionals may . . . be overrepresented” in marketing studies of gay consumers).

205. BADGETT, *supra* note 203, at 113, 115.

206. Skover & Testy, *supra* note 191, at 241.

207. *Id.*

Some MSM, especially blacks and Latinos, lack the “discretionary income” that is a precondition to this “gay lifestyle.”²⁰⁸ Some are heavily intertwined with family members and involved in caring for children or other family. They cannot spend money on costly gym memberships and gay cruises.

Studies by the Williams Institute at UCLA School of Law suggest that black people in same-sex relationships are more similar to black people in different-sex couples than to white same-sex couples or interracial same-sex couples with respect to income, education, rates of employment and rates of public assistance. For example, in California, the average income of black same-sex couples is far below that of nonblack same-sex couples—\$90,365 for nonblacks vs. \$61,434 for blacks.²⁰⁹ By contrast, the average income of black same-sex couples is closer to that of black different-sex couples (\$65,845).²¹⁰

Furthermore, blacks in same-sex relationships diverge from the stereotype of a self-centered gay man interested only in partying, fashion, and promiscuous sex. Black same-sex couples in California are much more likely to be raising children: 52 percent of blacks vs. 32 percent of whites.²¹¹ Finally, same-sex black couples tend to live in the same neighborhoods as different-sex black couples, rather than residing in “gay enclaves” such as West Hollywood or Silverlake.²¹² A Williams Institute study of Latino same-sex couples found similar patterns.²¹³ These racial patterns show that the perception that gay men are or should be affluent and closely connected to the white gay community overlooks the experiences of many blacks and Latinos.

C. *The K6G Screening Test’s Reliance on Gay Identity*

I have argued that Gay Identity is hegemonic and involves three foundational—and exclusionary—pillars: effeminacy, promiscuity, and affluent consumption. The cultural alignment of such traits with gayness both pushes many MSM to the fringes of Gay Identity and sheds light on why they might hesitate to call themselves gay and not feel connected to the gay community.

208. BADGETT, *supra* note 203, at 121 (stating that black men make 74 percent of white men’s average income, and black women make 64 percent of the same baseline figure); Eric Heinze, *Gay and Poor*, 38 HOW. L. J. 433 (1995). Because queer women earn less money than queer men and are more likely to raise children, they are least likely to live a freewheeling lifestyle. BADGETT, *supra* note 203, at 153–54.

209. See GARY GATES & R. BRADLEY SEARS, BLACK SAME-SEX COUPLES IN CALIFORNIA I (2005), available at <http://www.law.ucla.edu/WilliamsInstitute/publications/AfricanAmericanReport.pdf>. These figures combine male and female couples. 55 percent of black same-sex couples were female. *Id.* at 19.

210. *Id.* at 1.

211. *Id.* at 12.

212. *Id.* at 6.

213. See GARY GATES & R. BRADLEY SEARS, LATINO/AS IN SAME-SEX COUPLES IN CALIFORNIA DATA FROM CENSUS 2000 (2005), available at <http://www.law.ucla.edu/williamsinstitute/publications/Latino-as%20in%20same-sex%20couples%20in%20california%20s.pdf>.

The K6G test is problematic precisely because it draws on these pillars and attaches dramatic consequences to the failure to conform to them.

In this Section, I connect the mainstream understandings of masculinity and Gay Identity to norms in jails and prisons. The K6G test mirrors the broader society in that sexual conduct plays a minor role in a project that fixates primarily on gay culture.²¹⁴ This is so because the Jail lacks access to more reliable evidence of a man's sexual orientation: sexual attraction and conduct. The K6G test evidences the broader society's assumption that gay men and straight men's cultural behavior is fundamentally distinct,²¹⁵ and MSM who diverge from gay norms are deviant and in denial of their "true" essence.²¹⁶

The K6G policy's assumption that all gay men are vulnerable and cannot defend themselves is consistent with a broader cultural stereotype among prison administration and general society that gay men are weak and less masculine than heterosexual men.²¹⁷ Several aspects of the K6G policy rest on a stereotype that gay men are not "real men." First, the policy's grouping of gay men and transgender women in a single unit suggests that both are seen as "fallen men," and thus may fail to respect the gender identity of transgender women.²¹⁸ Second, the Jail marks K6G inmates with powder blue uniforms, a "softer" alternative to GP's dark blue.²¹⁹ Third, in excluding bisexual men, the

214. In this respect, K6G parallels the military's "Don't Ask, Don't Tell" policy, which imputed gay status based on behavior such as reading a gay magazine or attending a gay pride parade. HALLEY, *supra* note 38, at 108, 110.

215. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 780 (1989) (critiquing pro-gay defenders of the importance of sexual identity for "reproduc[ing] the heterosexual view of homosexuality as a quality that, like some characterological virus, has invaded and fundamentally altered the nucleus of a person's identity"). The idea of gay difference is clearly reflected in the cable TV series *Queer Eye for the Straight Guy*, which cast gay men as sophisticated and effeminate assistants to a masculine straight man who displayed ignorance about feminine things like fashion, grooming, and fine food. No less than three "reality" TV series have been based on the concept of gaydar: *Gay, Straight or Taken?* (Lifetime); *Boy Meets Boy* (Bravo); and *Playing It Straight* (Fox).

216. Kittiwut Jod Taywaditep, *Marginalization Among the Marginalized: Gay Men's Anti-Effeminacy*, 42 J. HOMOSEXUALITY 1, 20 (2001); see also Robinson, *supra* note 18, at 1477 (critiquing demands by black women that black MSM make themselves identifiable as gay). In the K6G context, Deputy Lanni's contrast of "righteous" gay men with MSM who sleep with men and women draws this distinction.

217. See, e.g., Leanne Fiftal Alarid, *Sexual Orientation Perspectives of Incarcerated Bisexual and Gay Men: The County Jail Protective Custody Experience*, 80 PRISON J. 80, 81 (2000); Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 15–16 (2010).

218. At the time of the lawsuit, neither the ACLU nor the government saw a sharp distinction between gay and transgender. See Hagar Interview, *supra* note 41, at 5–6. The Jail maintains a small unit for "soft" men—those who are inexperienced or naïve, one example being a young street preacher—yet it houses gay men with transgender women, rather than the "soft" male inmates.

219. Clifford Krauss, *Well-Dressed Officer: Navy, Not Powder Blue*, N.Y. TIMES, Oct. 7, 1994, at B3 (noting that New York Police Department "switched from navy to powder blue in

policy appears to use having sex with women as a proxy for masculinity.²²⁰ The deputies assume that if a man can penetrate a woman—although he may also penetrate men and/or be penetrated *by* men—he should be able to take care of himself in GP.²²¹ This assumption does not play out in reality. While 18.5 percent of gay inmates in local jails report being victimized, victimization among bisexual inmates and those who reported “other” sexual identity is quite high as well at 9.8 percent.²²²

1972 to give the force a softer look after race riots that broke out in cities around the country”).

220. *But see* Katyal, *supra* note 140, at 159 (stating that in some countries a gay identity (and love relationships between men) is often viewed as entirely compatible with a heterosexual marriage). Some gay men have internalized this broader social norm. *See* John Weir, *Like a Virgin*, in *POMOSEXUALS*, *supra* note 137, at 39 (commentary by gay man who wanted to sleep with a woman “so I can see myself, even briefly, even just in Nick’s [his male heterosexual friend] eyes, as a man”). An article by Jeffrey Escoffier makes the stunning claim that the gay porn industry has to hire straight men to play the top role because gay men are emotional and can maintain their erections only when they connect emotionally with their sex partners. *See* Jeffrey Escoffier, *Gay-for-Pay: Straight Men and the Making of Gay Pornography*, 26 *QUALITATIVE SOC.* 531 (2003).

A study of gay- and bisexual-identified men in a special protective custody unit in an unnamed urban jail found that while bisexual men were more likely to identify as masculine, they also reported more pressure to have sex and feeling less safe in jail than did gay inmates in the unit. *See* Alarid, *supra* note 217, at 89 (“It appears, therefore, that bisexual/heterosexual males are being pressured to have sex by submissive gay men . . . in the special housing unit.”). K6G’s exclusion of bisexual men and alignment of bisexuals with heterosexuals is baffling in light of broader norms that erase bisexuality by interpreting claims of bisexual male identity as a cover for gay identity. *See* Robinson, *supra* note 18, at 1493–94. By contrast, the K6G deputies appear to view bisexual men as essentially straight men with a penchant for sexually exploiting gay men. *See supra* text accompanying note 115. Some have attempted to justify K6G’s exclusion of bisexuals by arguing that self-identified bisexuals are “really situational homosexuals,” or heterosexual subjects who engage in same-sex activity because of a particular context and not as part of a “gay lifestyle.” Dolovich, *supra* note 1, at 67. Although Dolovich seems to recognize that real bisexuals exist, she appears willing to tolerate their exclusion because she thinks they cannot be distinguished from situational homosexuals. *Id.* at 69.

221. Similarly, Sharon Dolovich stereotypes bisexual men as “hypermasculine,” *id.* at 64, and argues that the admission of bisexual men to K6G would “reintroduce into K6G the notion that anyone associated with femininity is someone to be dominated and forced into submission.” *Id.* at 68. Dolovich wrongly assumes that bisexual men always play the top role during sex with men and are always committed to dominating others. She disregards bisexual men who play the bottom role, including those who are coerced into it. *See* Donaldson, *supra* note 32, at 119 (noting that some punks are “gays or bisexuals who rejected the ‘queen’ role but were forced into a passive role anyway”).

222. *See* BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES 6 (2007)* [hereinafter *LOCAL JAILS*], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf>. Approximately 2.7 percent of heterosexual inmates reported being victimized. *Id.*; *see also* Christopher Hensley et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 *J. INTERPERSONAL VIOLENCE* 595, 602–03 (2003) (survey of three prisons in Oklahoma finding that sexual aggressors were more likely to target bisexuals than homosexuals). The BJS report on prisons and jails for 2008–2009 found that 7.2 percent of “bi-sexual, homosexual, or other” jail inmates reported being victimized by other inmates, and 3.5 percent reported being victimized by staff. BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2008–2009*, at 14 (2010)

A related assumption is that straight-identified men who seek admission to K6G are likely to be predators that would prey on gay men.²²³ The Jail holds to this policy even though it admits that some such men are themselves fleeing victimization in GP.²²⁴ The deputies are as unconcerned with heterosexual *victims* as they are with gay and transgender sexual *perpetrators*.²²⁵ Their assumptions discount the notion that gay men and transgender women could victimize other gay or transgender inmates or the straight and bisexual men who seek admission to K6G.²²⁶ These assumptions make sense against the cultural backdrop, detailed above, which equates Gay Identity with effeminacy.

In a related but more subtle vein, the K6G test assumes that gay men spend considerable time in nightclubs looking for sexual partners—enough to recall details such as how recently a particular club was repainted.²²⁷ An underlying expectation appears to be that gay men congregate in nightclubs and search for casual anonymous sex, rather than committed relationships like heterosexuals.²²⁸

In this respect, the K6G conception of Gay Identity might be said to reflect a 1970s “sexual liberation” model rather than the “respectable” image of a committed couple that marriage equality advocates celebrate.²²⁹ In any event, any one-size-fits-all approach to gay identity poses serious problems. Not all

[hereinafter SEXUAL VICTIMIZATION IN PRISONS] available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>. The rate of inmate-on-inmate abuse in L.A. County Men’s Central Jail (the site of K6G) was 3 percent, while the rate of staff-on-inmate abuse was 2.4 percent. *Id.* at 66.

223. Lanni Interview, *supra* note 40. It is entirely uncertain whether the deputies’ perception that predators seeking admission to K6G is a serious problem has a strong basis in fact. *Cf.* Lerner, *supra* note 76, at 1 (reporting that former senior deputy Cobarrubias, who used to be in charge of screening gay-identified inmates, claimed that “[n]eo-Nazis, gang members, skinheads, Satanists, and so-called ‘homophobes’ have been known to feign homosexuality” to access K6G).

224. For example, gang members who have gotten into trouble with their gang perceive K6G as a safe space. *Id.* The deputies appear to view Gay Identity and gang membership as mutually exclusive, which may reflect another feminizing assumption.

225. Gay and transgender inmates who behave in a predatory fashion in K6G do not forfeit access to K6G; officials simply move them to a disciplinary wing of K6G. Dolovich, *supra* note 1, at 66. By contrast, officials assume heterosexual and bisexual men to be predatory and their good behavior cannot disrupt this construction.

226. MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 75 (1997) (“Some people may believe that gay men could not possibly rape straight men because all gay men are supposedly feminine and physically weak, thus unable to overpower a ‘real man.’”); Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1665 (2004) (discussing abuse in same-sex relationships).

227. Lanni Interview, *supra* note 40, at 2.

228. *See* Lerner, *supra* note 76, at 1 (describing an early question as “What gay bars and bathhouses do you go to?”). Bathhouses are spaces where men can meet other men for anonymous sex. The interview also requires inmates to define terms such as “glory hole.” *See Dictionary of Gay Terms: G*, AARONSGAYINFO.COM, <http://www.aaronsgayinfo.com/AlphaMenu/Gterms.html> (last visited June 19, 2011) (describing glory hole as “the opening (hole) in a partition between two toilets in a public toilet or men’s room in which a penis is inserted and fellated on the other side; usually, the two parties never see each other face to face,” or as a quick sexual act with little or no tenderness, a rushed act of sex.”).

229. *See* WARNER, *supra* note 192, at 49.

MSM want to marry, and not all regularly attend gay nightclubs. Many men first encounter homosexuality through meeting a man at work, sporting events, community events, or at church.²³⁰ Many intentionally avoid the gay scene and rarely step foot in a club.²³¹ Further, asking inmates to define “size queen”²³² or “Prince Albert”²³³ suggests that gay men are likely to engage in distinct sexual practices unknown to heterosexuals, even though straight men and women have been known to fixate on penis size and to pierce their genitalia.²³⁴ This line of questioning and its underlying presumptions tend to exclude MSM whose sexual practices and life experiences preclude such highly particularized knowledge.

The third component of gay culture reflected in K6G’s policies relates to commercialization and consumption. The K6G test identifies gay men in part by confirming that they spend money at public gay venues, such as nightclubs, adult book stores or other public sex venues that contain glory holes, and gay pride parades—the most local, West Hollywood’s, charges \$20 to enter its festival.²³⁵

Inmates who do not spend their money in gay spaces have a harder time proving their sexual identity.²³⁶ The Jail expects not just that an inmate’s consumptive choices reflect a “gay” pattern, but also that they take place in the city’s dominant gay neighborhood, West Hollywood, even though it is expensive and often beyond the means of nonresidents. In West Hollywood, the median income is \$43,454; in greater Los Angeles County, in which West Hollywood sits, the median income is \$28,576.²³⁷ These aspects of the test track broader norms regarding affluent consumption among gay communities.

230. See, e.g., J.L. KING, *ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF “STRAIGHT” BLACK MEN WHO SLEEP WITH MEN* (2004).

231. The Internet has made it much easier for men to connect with other men while avoiding bars and clubs entirely. See *infra* text accompanying notes 564–567.

232. See *Dictionary of Gay Terms: S*, AARONSGAYINFO.COM, <http://www.aarongayinfo.com/AlphaMenu/Sterms.html>, (last visited Jan. 27, 2010) (“a gay male with a sexual preference for partners with large penis [sic]”).

233. See *Dictionary of Gay Terms: P*, AARONSGAYINFO.COM, <http://www.aarongayinfo.com/AlphaMenu/Pterms.html>, (last visited Aug. 26, 2011) (“A peircing on the penis that punctures the urethra and exits through the meatus.”).

234. Cf. FORD, *supra* note 142, at 333 (critiquing Yoshino for failing to appreciate that heterosexuals engage in anal sex).

235. *Los Angeles Gay Pride Parade 2010*, GAYTRAVEL, http://gaytravel.about.com/od/previewsofpridefestivals/qt/LA_Pride.htm, (last visited June 19, 2011).

236. For example, the deputies sometimes ask, “Where do you go out?” Lanni Interview, *supra* note 40. An inmate who does not go out—or, even worse, goes to straight-dominated venues—will have a difficult time convincing the deputies that he is gay.

237. 2006–2008 U.S. CENSUS AMERICAN COMMUNITY SURVEY (ACS), *available at* <http://factfinder.census.gov> (hover over “Data Sets” and select “American Community Service;” then select 2006–2008 data base; then select “Data Profiles” and conduct a “Name Search” for “West Hollywood” and “Los Angeles;” for each, highlight the correct geographic unit and click on the “Show Result” button); see also Charles I. Nero, *Why Are the Gay Ghettoes White?*, in *BLACK QUEER THEORY: A CRITICAL ANTHOLOGY* 228, 230–234 (E. Patrick Johnson & Mae G. Henderson eds., 2005) (documenting the historical process whereby a New Orleans gay enclave

D. Construction of Gender in Prisons and Jails

I now explain the system through which prisons and jails regulate masculinity and reassign inmates' gender and sexual orientation identities.²³⁸ I then detail the multiple ways in which the K6G screening test fails to account for differences in the construction of sexual orientation in jail and in mainstream society.

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."²³⁹ In some incarceration contexts, they are called "wolves," "daddies," or "jockers."²⁴⁰ In others, they are simply called "Men."²⁴¹ In jails and prisons, penetrating another man makes only *one* of the sexual partners gay,²⁴² the Man who does the penetrating, or the "top," maintains his heterosexual and masculine

was formed as a racially-exclusive space).

238. The following description focuses on the gendered hierarchy in many incarceration contexts; it is not intended to reflect all hierarchies in such contexts. See Sabo et al., *supra* note 35, at 9 (describing a social hierarchy, including the following groups [from most powerful to least]: "dominant prisoners," "prisoners with resources," "marginalized prisoners" and "stigmatized prisoners"). I report this description with some hesitation. I have found no published studies describing the masculinity hierarchy inside LA County Men's Jail. Some scholars assume that the general descriptions of prison rape culture in sources such as the book PRISON MASCULINITIES are universal. See Dolovich, *supra* note 1, at 11–19 (describing prison and jail culture in monolithic terms). Although it seems likely that there are differences between jails and prisons, the majority of popular sources focus on prison and do not account for diversity in temporal and geographic contexts. Moreover, descriptions of prison rape culture tend to ignore life experiences that would reveal nuance and a range of gender performances. Regina Kunzel's CRIMINAL INTIMACY does a superb job of thinking critically about prison rape scholarship and excavating nuances that others tend to ignore. For instance, she documents examples of men entering into de facto same-sex marriages, unions which other inmates widely respected as legitimate. *Id.* at 185; see also Kunzel, *Lessons*, *supra* note 16, at 20–22 (discussing efforts by gay prisoners to contest narrow gender identities). 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." Donaldson, *supra* note 32, at 121.

239. Donaldson, *supra* note 32, at 118.

240. *Id.*

241. *Id.* My capitalization of this term follows that of Donaldson, a former inmate who describes the prison hierarchy, and not my own values. A central commitment of this Article is that gender performance should not determine a person's worth or status in the community.

242. *Id.* "Men almost always identify as heterosexual (in a few cases bisexual), and the majority of them behave heterosexually before and after confinement." *Id.* 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 confinement." *Id.* (emphases added) (stating that there are exceptions to his general description). This suggests that bisexual- and gay-identified inmates may, in some cases, be Men.

status.²⁴³ Some writers even describe the top as an “alpha male” who dominates another man to secure his status at the top of the prison hierarchy.²⁴⁴

Prison norms assign some men to the “male” role and others to the “female” role and conceive of those roles in the most traditional, hierarchical, and heteronormative sense. The Man in the relationship is the “daddy,” who is supposed to protect the feminized partner, sometimes called the “catcher.”²⁴⁵ The “catcher” is expected to do domestic chores, such as keeping the cell clean, and often is defined with female pronouns and body parts.²⁴⁶ 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. 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.”²⁴⁷

“Effeminate homosexuals” and transgender inmates are likely to be branded as “queens” and assigned to the catcher role since effeminacy is assumed to correlate with being a “bottom.”²⁴⁸ According to some accounts, queens are “highly desirable as sexual partners because of their willingness to adopt ‘feminine’ traits,” yet are also “viewed with contempt by the Men and the staff.”²⁴⁹ Queens are valued in part because they are thought closely to approximate what prison denies men: access to “real” women. But their

243. *Id.* Although this rule might strike some readers as strange, there is support for it in many cultures. George Chauncey’s work suggests that the rule in jails and prisons may be an extension of norms in working-class communities where, until recently, playing the role of the “top” was not stigmatized so long as a man displays masculinity. See CHAUNCEY, *supra* note 150, at 13, 88; see also Miller, *supra* note 38.

244. Donaldson, *supra* note 32, 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); Kunzel, *Lessons*, *supra* note 16, at 27. Further, others may question the masculinity of Men who choose *not* to participate in sexual activity. 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.” Donaldson, *supra* note 32, at 119. This evidence suggests that one should attend to social pressure to commit rape and recognize that perpetrators may also be victims of a hierarchy that incentivizes them to oppress others. *Cf.* Robinson, *supra* note 18, at 1500 (arguing that a “down low” man may be both perpetrator and victim).

245. *Id.* at 181–82.

246. *Id.* at 182; Donaldson, *supra* note 32, at 119 (“[Queens] have ‘pussies,’ not ‘assholes,’ and they wear ‘blouses,’ not shirts.”).

247. KUNZEL, *supra* note 35, at 182 (quoting Donaldson) (internal quotations marks omitted).

248. *Id.* at 119.

249. *Id.*

importance also flows from their limited numbers; according to some estimates, queens compose only 1 to 2 percent of the prison population.²⁵⁰

This supply and demand problem incites Men to “turn out” or rape other men.²⁵¹ If prison denies men sufficient numbers of feminized prisoners, men who would have raped transgender women or effeminate gay men will “turn out” heterosexual men instead—transforming men into “women.”²⁵² Those in prison label such men, heterosexuals who other inmates have compelled into a submissive sexual role through the use of force or the threat of force, as “punks” who are at the absolute bottom of the prison hierarchy, according to some accounts.²⁵³ Thus, it seems likely that the Jail’s decision to remove gay and transgender inmates from GP, but *not* attend to the hegemonic norms that produce sexual assault, simply shifts vulnerability. In assigning “queens” to K6G, the Jail may create more “punks.”

The unique disdain directed at punks stems from their status as unpleasant reminders of the fragility of masculinity.²⁵⁴ Unlike queens, who prisoners think of as having a “natural” feminine essence, society once regarded punks as “real men.”²⁵⁵ They signify that a single sexual act may strip a person of his manhood—and “make him gay.”²⁵⁶ Whereas heterosexual men in mainstream

250. *Id.* Such estimates are uncertain, in part because of the mismeasure problem noted previously; that is, prison administrators may recognize only those whose transgender status seems “obvious.” Moreover, a jail may have incentives not to identify all transgender inmates. Recognizing its transgender population may incur legal obligations, such as providing for particular health care needs.

251. Donaldson, *supra* note 32, 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).

252. *See, e.g.,* KUNZEL, *supra* note 35, 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 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.” KUNZEL, *supra* note 35, at 184–85. 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.

253. Donaldson, *supra* note 32, at 185.

254. As noted earlier, masculinity is always in peril and requires protection. *See supra* text accompanying note 131.

255. *See, e.g.,* Eigenberg, *supra* note 23, at 419.

256. Donaldson, *supra* note 32, 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 35, at 156 (discussing “made homosexuals”); *id.* at 173 (noting belief that rape “makes a woman” out of the victim).

society face the fear of others perceiving them as feminine and gay, the consequences of such labeling in jail are much more severe. One means of reducing the threat to masculinity that punks embody is to describe them as latently effeminate, which justifies their emasculation and distinguishes them from “true” Men.²⁵⁷ As noted in the Introduction, some have told heterosexual-identified men who complain about prison rape that they invited the attacks, much as female rape victims are blamed for supposedly bringing on their assaults by behaving provocatively. Some rapists even order their victim to ejaculate to persuade him that he enjoyed the incident and that it was consensual.²⁵⁸ Victims may struggle to maintain their heterosexual self-identification in the face of this social attribution of homosexuality.²⁵⁹

Traits that make men likely to be punked include youth, slight stature, naiveté, perceived effeminacy, serving for the first time in jail, doing time for nonviolent offenses, inexperience in personal combat, having a disability, and perception of being gay on the outside.²⁶⁰ The significance of sexual orientation and gender identity in determining victimization depends on how one frames the question. On the one hand, some studies report an alarming prevalence of victimization among gay and transgender-identified inmates. Valerie Jenness

257. Kunzel, *Lessons*, *supra* note 16, 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.”).

258. SCARCE, *supra* note 226, at 60. Victims may also ejaculate in the hopes that it will bring the rape to completion. *Id.* at 61.

259. *Id.* at 59–60.

260. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 8, at 217 (recommending consideration of the following criteria: “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate’s own perception of vulnerability”). See *infra* text accompanying note 575. Some writers and scholars add whiteness to the list of vulnerable traits. However, these claims tend to rely on anecdotal evidence from white inmates or outdated studies with an unreliable empirical foundation. See *generally* Buchanan, *supra* note 217, 55–56 (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 35, 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 A.M. SCACCO, RAPE IN PRISON 62 (1975)); cf. Robinson, *supra* note 18, at 1493 (discussing related 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 than nonblacks to report being a victim of sexual assault. VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES 3, Apr. 27, 2007, at 3 (draft on file with author). The infrastructure for reporting prison rape may also reflect racial biases, whether conscious or unconscious, which make whites more visible as victims. See Eigenberg, *supra* note 23, 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* note 217, at 48–50.

led a study surveying inmates in California prisons and found that 67 percent of the out “non-heterosexual inmates (*i.e.*, gay, bisexual, and other)” reported being victimized,²⁶¹ and over two-thirds of transgender subjects reported being victimized.²⁶² (However, a recent national Department of Justice study found a much lower prevalence among gay and bisexual men and women: 7.2 percent of “bi-sexual, homosexual, or other” jail inmates reported being victimized by other inmates and 3.5 percent by staff.)²⁶³ On the other hand, some sources suggest that the majority of victims are straight men.²⁶⁴ The Jenness study found that almost half of victims were straight. While gays made up roughly one-quarter, the remaining quarter was evenly split between bisexuals and inmates who identified as “other.” Thus, under the K6G model, only one-quarter of these inmates would be potentially eligible for admission.²⁶⁵

The targeting of transgender 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. As the prison rape narratives in the Introduction show, 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.²⁶⁶ 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.”²⁶⁷

In light of these rules of masculinity, coming out as gay may mark one as a victim.²⁶⁸ Because “fags” and “queens” enjoy sex with men—unlike men who

261. JENNESS, *supra* note 260, at 55.

262. *Id.* at 27. A limitation of the transgender finding is that the transgender sample was drawn from a single facility. *Id.* at 13.

263. SEXUAL VICTIMIZATION IN PRISONS, *supra* note 222, at 14.

264. See Donaldson, *supra* note 32, at 119 (“[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.”).

265. JENNESS, *supra* note 260, at 84 tbl.5.

266. See, e.g., KUNZEL, *supra* note 35, 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). This is also true in mainstream society. See *supra* text accompanying note 126.

267. Sabo, *supra* note 32, 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.*

268. See, e.g., Buchanan, *supra* note 217, at 29; *but cf.* Interview with Isela Gonzalez, who provides HIV prevention services at Forensic AIDS Project (Nov. 3, 2009) (transcript on file with author) (suggesting that it does not necessarily follow that gay men who are out are victimized). See Interview with Martin Horn, former Commissioner of Corrections for the City of New York, at 10–11 (July 13, 2010) (describing New York jails during his tenure: “There were guys that people knew that they were gay, but nobody would bother them. There were guys that were gay that were ostentatious, and they managed.”); Interview with Eileen Hirst and Kevin McConnell, *supra* note 107, at 31–32 (stating that most gay inmates do not have problems in GP based solely on their sexual orientation and that homophobic officers tend to support segregating gay inmates).

resort to sex with men only in the incarceration context—and others imagine them as inherently promiscuous, being gay or transgender means one is always asking for sexual attention.²⁶⁹ This obviously creates a strong incentive for gay and bisexual inmates to conceal their sexual orientation, and many do.²⁷⁰ Even a man who was fully “out” before prison might reasonably closet his sexual orientation to avoid victimization.²⁷¹

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.”²⁷² Disclosing one’s sexual orientation then is just one of many vulnerability factors that an inmate might choose to withhold to avoid discrimination.

How common is sexual assault in jail? Determining the prevalence of sexual assault and more subtly coerced sex in incarceration settings is notoriously difficult.²⁷³ A recent random sample survey of prisoners in California found that approximately 4 percent reported being the victim of sexual assault.²⁷⁴ Gay- and transgender-identified inmates, black inmates, and inmates with disabilities were significantly more likely to report being assaulted.²⁷⁵ The 4 percent figure is likely the floor, not a ceiling, because many inmates are afraid to report abuse.

Moreover, one should interpret studies on prison rape with caution. These studies require inmates to disclose information that many may find deeply stigmatizing and that could provoke retaliation if researchers shared such disclosures with prison staff or other prisoners. Although investigators routinely tell inmates that they will keep the information confidential, some inmates will not accept these assurances. Because gay identity is stigmatized in many jails and prisons, it is likely that a considerable number of MSM respondents do not come out to researchers. Public health studies show that

269. See Buchanan, *supra* note 217, at 29.

270. See Gonzalez Interview, *supra* note 268, at 4 (stating that in San Francisco jails, “there’s a very strong inclination for folks not to disclose their sexual identity”).

271. *Id.* at 5–6 (noting difficulties of inmates trying to keep life inside jail separate from life on the outside).

272. Sabo et al., *supra* note 35, at 11 (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”).

273. 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 percent. *Id.* at 1344. The Prison Rape Elimination Act of 2003 was conceived as a first step in producing greater transparency and reliable statistics regarding rape in prison. 42 U.S.C. §§ 15601–15609 (2006).

274. JENNESS, *supra* note 260, at 3.

275. *Id.*

black and Latino MSM are significantly less likely to identify as gay in general.²⁷⁶ It is likely that the law enforcement context, which many experience as racially polarized, makes nonwhite MSM even less likely to come out as gay.

Writing largely in support of the K6G unit, Sharon Dolovich suggests that LGBT inmates are the “chief targets” of prison rape and the “most vulnerable.”²⁷⁷ However, it is difficult to draw this inference from current data. Most studies on sexual assault in prisons or jails do not compare across traits—they compare victimization prevalences between homosexuals and heterosexuals and people with disabilities and people without disabilities, but they do not seek to compare across traits or rank victimization. That is, these figures do not determine whether homosexuals are more vulnerable than people with disabilities or other similarly vulnerable groups. The National Prison Rape Elimination Commission Report lists ten vulnerability factors, but most empirical studies assess an assortment of less than half of these factors.²⁷⁸ The literature has not advanced to the point where one could conclude decisively that (out) gay men are the “most vulnerable” to rape in prison and jail.

In addition, because the broader society and law enforcement construct gay men as weaker and less masculine than heterosexual men, it is probable that out gay men are more likely to admit vulnerability than heterosexual men.²⁷⁹ For many heterosexual men, acknowledging one’s vulnerability would violate a core tenet of masculinity. Because society gives heterosexual and gay men differential permission to express their vulnerability, it substantially limits studies attempting to show a disparity between gay and straight vulnerability to prison rape.

E. Segregating Homosexuality, Purifying Masculinity

The Jail’s designation of gay and transgender identity as the sole site of vulnerability betrays a tension in broader conceptions of sexuality. Eve Kosofsky Sedgwick’s influential *Epistemology of the Closet* argues that “homosexuality as we conceive of it today . . . [is] a space of overlapping, contradictory, and conflictual definitional forces,” which frustrates any attempt to settle on *the* ultimate definition of gay identity.²⁸⁰ The heart of this tension

276. See *infra* note 386.

277. Dolovich, *supra* note 1, at 2, 8. Studies have found alarmingly high rates of assault among groups other than LGBT inmates. See, e.g., JENNESS, *supra* note 260, at 55, 87 tbl.7 (stating that 64.3 percent of victims of sexual assault reported mental health problems before the assault).

278. One of the best surveys asked about race, sexual orientation, age, and disability, but not many of the other vulnerability traits identified by the Commission. JENNESS, *supra* note 260, at 54–55. It is also important to note that many of the studies that report high rates of assault among sexual minorities combine all “non-heterosexuals,” whereas K6G singles out gays and denies protection to those who identify as “bisexual” or “other.”

279. SCARCE, *supra* note 226, at 65.

280. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 45 (1990).

lies in the conviction that “there is a distinct population of persons who ‘really are’ gay”—which Sedgwick calls the “minoritizing” view—and the belief or fear that same-sex desire cannot be accurately or safely contained in a minority identity, but may reside within “apparently heterosexual persons”—the universalizing view.²⁸¹

Sedgwick’s work helps to illuminate the failures in the logic of the K6G screening test as well as the test’s ultimate goal. A key failure is that, in designing a system that requires Deputies Lanni and Bell to ferret out heterosexuals, the Jail has set up an impossible task. As noted earlier, *nothing* can conclusively prove that a man is heterosexual, for the Jail lacks access to his past sexual behavior and his secret desires, rendering the entire foray speculative.²⁸² Deputies Lanni and Bell often claim that the presence of a wife or girlfriend, or even the tattoo of a woman, proves that a man is heterosexual. This is simply not true, since gay men have long formed relationships with women to pass as straight.²⁸³ Ignorance of gay culture does not prove that a man is heterosexual any more than demonstrating that a black man is ignorant of black culture proves that he is white.

But what are the deputies really looking for when they interrogate inmates about their “gay lifestyle”? Why do they seek to identify and exclude heterosexuals seeking protection? There is a danger in trying to impose order on a test that is a hodgepodge of questions developed by several participants over time. To ascribe a single, animating goal to these questions would likely give the Jail too much credit. Nonetheless, Sharon Dolovich attempts to make sense of the questions and extracts from them a “binary, essentializing theory of male sexuality that one either is or is not gay and there is no in between. . . . [w]hat the classification officers seek to determine is whether interviewees are ‘really gay,’ by which is meant that, when they are free, they seek out men and only men for sexual gratification, for romance, and for emotional intimacy.”²⁸⁴ This appears to be a minoritizing test, which seeks to fix homosexuality in a

281. *Id.* at 85; *see also* Katyal, *supra* note 140, at 117 (“By singling out a particular group as ‘homosexuals’ . . . the rest of society remains facially ‘pure’ and unmarred by sexual ambiguity”); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2800–01 (2008). Then Justice Rehnquist (joined by Justice Blackmun) illustrated the homophobic fear of sexual contamination in his dissent from the denial of certiorari in a 1978 case involving the University of Missouri’s refusal to recognize a gay liberation student group. *See Ratchford v. Gay Lib*, 434 U.S. 1080, 1084 (1978) (comparing gay students to people with measles).

282. *See infra* text accompanying notes 130–131.

283. Even if the presence of a wife may reasonably be said to increase the chances that he is heterosexual—in contrast to the never-married 40-year-old man—no one could reasonably regard marriage as conclusive proof.

284. Dolovich, *supra* note 1, at 26. Dolovich provides no support for her claim that emotional intimacy plays an important role in the questioning. The inquiries about nightclubs and “gay slang,” such as glory hole and Prince Albert, seem to imagine particular sexual behavior as the defining trait of gay men.

small segment of the Jail population and deny that the remainder of inmates might engage in homosexuality. Like the K6G test, Dolovich's gloss on the questions proves to be a "somewhat shifting target."²⁸⁵ Later in her article, she claims the officers are *not* trying to "divine an essential truth" as to the inmate's sexual orientation,²⁸⁶ but rather identify "those whose characteristics are likely to lead them to be identified as [fundamentally sexually attracted to men] in GP."²⁸⁷ Elsewhere, she suggests that these inquiries are one and the same—identifying inmates who others are likely to perceive as gay generally will identify inmates who are fundamentally gay in terms of their sexual attraction.²⁸⁸ To the extent that the screening test is underinclusive, Dolovich argues that these omissions are because some men who are essentially gay lack the characteristics that would lead a predator to identify them as gay. Such men, she argues, should not be entitled to access to K6G.²⁸⁹ By contrast, Deputy Lanni asserts that the goal of the deputies' questioning is to identify and include all gay men, not simply those who are effeminate or otherwise conform to a stereotype of gay identity.²⁹⁰ But, for the moment, assume that Dolovich's characterization of the K6G test is a more candid description: the Jail seeks not to include all gay men in K6G, but only those who perform gay identity in such a fashion that they would be targeted. From this perspective, it would make sense to focus the test on a stereotypical version of gay identity.

Even if one accepts Dolovich's gloss on the test, the Jail's policy still contains serious lapses in logic. The root of these lapses is the relationship between gay identity on the inside and gay identity on the outside, and the Jail's failure to understand that both are intertwined with race and class.

The Jail errs in assuming that conduct associated with a "gay lifestyle" on the outside is the only thing that exposes a man to victimization. Dolovich acknowledges that there are many other traits that expose men to victimization,²⁹¹ and her gloss cannot account for the Jail's failure to account for them. The test fails with respect to heterosexual and bisexual men and MSM. With respect to heterosexuals and bisexuals, the test ignores the many traits that make even the most staunchly heterosexual man vulnerable (youth, slight stature, disability, etc.). Moreover, the test ignores the fluidity of gay identity as it is practiced in jail. That a man did not live a "gay lifestyle" will not protect him if he is "punked" because he is naïve or awkward or related to a deputy, as suggested by the prison rape experiences recounted in the

285. *Id.*

286. *Id.* at 36.

287. *Id.* at 64 n.308.

288. *Id.* at 35 ("[W]hat these officers seek is the same thing predators in GP look for . . .").

289. *Id.* at 64 n. 308.

290. Lanni Interview, *supra* note 40, at 17 (stating that there is no "poster child" for gay identity).

291. *See* Dolovich, *supra* note 1, at 64 n.308.

Introduction. Moreover, once a man is raped, other inmates, but not the Jail, will deem him gay and vulnerable to future rapes. In short, the Jail culture embraces a universalizing conception of Gay Identity—any man could be “made gay” under the right circumstances. But the deputies cling to a minoritizing view—looking *outside* rather than *inside* the Jail.

With respect to men who had sex with men on the outside, there is some logic in assuming that out men have made choices that they may have difficulty reversing once incarcerated. That is, once one has come out (or been outed) in his community, he may not be able to put the genie back in the bottle. This is not to say that men who were not out are immune from sexual orientation discrimination while incarcerated. They might possess characteristics, such as effeminacy, that make them targets. Or they might receive letters or visits from a same-sex partner that inadvertently disclose their identities. And it is curious that those who demand that gay men come out would drop that demand and legitimize the closet once a man is incarcerated. But in general, it seems fair to say that out men are more vulnerable than men who were not out, and that the latter will have an easier time hiding their sexual orientation while incarcerated.

However, the K6G policy runs into serious trouble in assuming that there is only one way to be out: frequent club-going, visits to public sex venues, attending gay pride parades, immersion in gay slang from the 1970s, and performing specific sexual roles and acts—i.e., swallowing semen and not enjoying it too much. As I show in Part IV, black, brown, and poor men are particularly likely not to live that lifestyle and to obtain the information assumed to correlate with it. But that does not mean that they were not out in their communities. MSM of color and other MSM have developed multiple identities that mark them as sexual minorities while rejecting Gay Identity and the “gay lifestyle.”²⁹² The Jail fails to understand that there are multiple gay worlds in a single city, and race and class structure them.²⁹³ There are also multiple forms of masculinity, and the fact that an inmate seems masculine to a white, middle-aged man does not mean that someone of his same race and socio-economic status would read him as masculine.

Moreover, the Jail’s masculinity narrative denies the sexual vulnerability that all people experience, especially in a violent and hierarchical institution.²⁹⁴ The Jail is willing to see vulnerability and extend “protection” only in a sliver of cases—the few in which a gay or transgender inmate (that is, a person with a feminized identity) expresses vulnerability and parrots the Jail’s narrow constructions of gay and transgender identities.²⁹⁵ The Jail assigns a mere 2

292. See *infra* text accompanying note 394–403.

293. CHAUNCEY, *supra* note 150, at 3.

294. See generally Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1163 (critiquing legal and social failure to take male rape seriously).

295. Cf. Robinson, *supra* note 18, at 1487 (challenging the “down low” discourse’s refusal to acknowledge that black men—not just black women—can be victims).

percent of its population to K6G (roughly 300 of 6,000 inmates),²⁹⁶ essentially commanding the overwhelming majority of inmates to fend for themselves. Given the K6G deputies' proximity to GP and the process in which GP inmates "turn out" heterosexuals and bisexuals, it is difficult to attribute their disregard for these victims to ignorance.

Therefore, the K6G deputies' insistence on the self-reliance of men in GP and the utter vulnerability of gay and transgender inmates—no matter how masculine, physically intimidating, or well connected in the Jail hierarchy they may be—appears to be an attempt to minoritize not just homosexuality, but also vulnerability. One can understand the deputies' exclusion of formerly heterosexual men who have been raped and "made gay," and their branding of bisexual men and others who seek protection from the violence in GP as predators and "situational homosexuals" (that is, not "real" homosexuals), as awkward attempts to finesse the ringing incoherence in their efforts to define and cabin homosexuality. Moreover, it bears noting that, historically, homophobic quarters have given rise to efforts to define homosexuality,²⁹⁷ and that prisons and jails—including Los Angeles County—sought to identify and isolate homosexuals long before the 1985 ACLU lawsuit and long before anyone could credibly portray government as gay-friendly.²⁹⁸ The Jail maintained segregated male and female "gay" units before the ACLU's intervention, and the abuse that continues today echoes the longstanding subordination that queer and transgender people have faced in jails and prisons.²⁹⁹ Before the Jail marked gay inmates with powder blue uniforms, it identified them with "faggot pins."³⁰⁰

296. See Nina T. Harawa et al., *Sex and Condom Use in a Large Jail Unit for Men Who Have Sex with Men (MSM) and Male-to-Female Transgenderers*, 21 J. HEALTH CARE FOR POOR & UNDERSERVED 1071, 1073 (2010).

297. SEDGWICK, *supra* note 280, at 83–84. See Interview with Eileen Hirst and Kevin McConnell, *supra* note 107, at 31.

298. See, e.g., *Dreibelbis v. Marks*, 742 F.2d 792, 795 (3d Cir. 1984) (upholding prison regulation preventing male prisoners from wearing long hair because it "assists in controlling homosexuality within the correctional institution"); CHAUNCEY, *supra* note 150, at 91 (noting that prisons in New York segregated effeminate homosexuals as early as 1910); Kunzel, *Lessons*, *supra* note 16, at 15 (stating that historically gays have been segregated because prison administrators claimed that they posed a "threat to institutional order and security"). See also AIDS AND THE LAW 14-31 to 14-35 (William H.L. Dornette ed., 2009 supplement) (describing long history of prisons and jails segregating HIV-positive inmates and inmates with AIDS); *Report Says HIV Inmate Segregation in Two U.S. States*, REUTERS (Apr. 14, 2010, 12:05 PM), <http://www.reuters.com/article/2010/04/14/us-usa-health-prisoners-idUSTRE63D38A20100414> (stating that Alabama and South Carolina continue such segregation and Mississippi only recently ended segregation).

299. Kunzel, *Lessons*, *supra* note 16, at 15 (revealing that butch lesbians were held in a "Daddy Tank" in L.A. "under harsh and maximum security conditions" regardless of the charged offense); Interview with JoAnne Keatling, Director, Center of Excellence for Transgender HIV Prevention, transcript on file with author, at 3–4, (Nov. 2, 2009) (statement by transgender activist and educator recounting cramped conditions, lack of access to services and how transgender women in "queens tank" had to walk naked past men in GP to shower about forty years ago).

300. Deputy Sheriff Bart Lanni, Testimony Before the National Prison Rape Elimination Commission (Aug. 19, 2005).

This history and Sedgwick's insights suggest that much more is at stake in K6G than protecting gay and transgender inmates. The Jail may use the K6G screening process to reinscribe the meaning of heterosexual masculinity and its necessary corollary, the abject status of homosexuality. Although the Jail exposes many inmates to danger it seems to reserve a special disdain for those who would attempt to defy the Jail's gendered borders. This includes the MSM who refuses to come out as gay and must fend for himself in GP; the heterosexual who identifies as gay because he needs protection, flunks the gaydar test, and then returns to GP newly stigmatized as gay; and the heterosexual or bisexual inmate whose vulnerability the Jail's removal of gay- and transgender-identified inmates enhances.

III.

HARMS OF INCLUSION IN K6G

Most of this Article raises concerns about the process by which the Jail excludes people from K6G. In this Section, I challenge claims that K6G protects those who are included in the unit.³⁰¹ These countervailing concerns complicate the assumption that all gay and transgender inmates should be in K6G and argue for leaving the decision to the individual, who is in the best situation to weigh the various costs and benefits to him or her.

Not only are there no empirical studies showing that the prevalence of sexual assault is greater in GP than in K6G,³⁰² but there are special harms associated with K6G, which the Jail and other scholars fail to mention. Some such harms stem from the Jail's conception of groups that are typically aligned under the "LGBT" rubric as significantly different and at war. Officials deem

301. I discuss additional harms of inclusion—the consequences of coming out after K6G inmates are transferred to prison or the community—below in Part V.C.

302. Sharon Dolovich argues that her "in-depth qualitative interviews with a random sample of approximately 10% of K6G's residents . . . overwhelmingly confirm the effectiveness of total segregation as a protective measure." See Dolovich, *supra* note 1, at 45. Dolovich's claim is subject to fundamental empirical limitations, including restrictions the Jail imposed. First, the Jail effectively precluded her from asking inmates about coerced or consensual sex with Jail deputies and staff. See *id.* at 59. Second, the study relies heavily on K6G inmate impressions of whether K6G is safer than GP, but these impressionistic responses do not speak to inmates' personal experiences of GP and K6G. To the contrary, it appears that officials assign the vast majority of K6G inmates to K6G upon their initial entry and automatically reassign them to K6G on each return visit. See *id.* at 30 (stating that recidivism rate is about 90–95 percent). Given that many of these inmates likely never personally experienced GP, they cannot fully compare the conditions in K6G with those in GP. By contrast, her subjects' comparison of safety in K6G and the outside (non-Jail) world is telling—the "majority" reported that the outside world is safer than K6G. *Id.* at 45. Finally, the study suffers from selection bias. The author interviewed gay inmates who chose to come out and seek admission to K6G, but not MSM who are assigned to GP, either deliberately, out of ignorance as to why the Jail asks about homosexuality, or because they failed the screening test. Public health studies show that many MSM are not out, and this Article establishes that some sexual minorities choose to be housed in GP. See *infra* note 388. The Dolovich study surveyed only inmates in K6G, and offers scant comparative analysis between K6G and GP.

gay men and transgender inmates presumptive victims and, as such, grant them access to K6G, while framing bisexual inmates as presumptive predators who pose a threat to gay and transgender inmates. The Jail exacerbates already tense relations between the different constituencies that constitute “LGBT.” For example, the Jail teaches gay men to fear bisexuals.³⁰³ Moreover, things that may seem positive on their face—governmental permission to have sex in a unit full of gay men and transgender persons—turn out to be potentially harmful on closer inspection.

Because the Jail permits sex only in K6G,³⁰⁴ the state effectively decides who may have sex with whom and also determines some of the consequences that may follow from that sex, such as contracting HIV. According to a recent study led by Nina Harawa, two-thirds of K6G respondents reported having oral sex, and about half reported having anal sex while in custody.³⁰⁵ The Jail’s segregated structure determines sexual coupling; gay men and transgender women can have sex with each other, but not with bisexual or heterosexual-identified men.³⁰⁶ My prior scholarship argued for greater awareness of structural influences on individual sexual decision making, whether it is the preference for a partner of a particular race or the desire for a long-term committed relationship instead of casual sexual interactions.³⁰⁷ The discussion in this Part seeks to build on this structural focus by exploring a modern example in which the state explicitly restricts sexual partnering and the consequences that follow.³⁰⁸

303. Robinson, *supra* note 18, at 1492–93.

304. Lanni Interview, *supra* note 40, at 34 (“If you take gay men and you put them together, they’re gonna have sex.”).

305. Harawa et al., *supra* note 296, at 1076.

306. This description assumes that the Jail’s classification system is completely effective. In fact, some inmates appear to be quite adept at manipulating the categories. For example, a significant number of heterosexual- and bisexual-identified inmates have been incarcerated in K6G. Harawa et al., *supra* note 296; Interview with Troy Erik, Yvette Winstead, Toni Beasley, Eric Knight, and Kim Dorsey [hereinafter Troy Erik et al. Interview], at 10 (Aug. 20, 2010) (transcript on file with author) (statement of Eric Knight, explaining how he faked being gay to get into K6G).

307. See Robinson, *Structural Dimensions*, *supra* note 281; Robinson, *Racing the Closet*, *supra* note 18. My work joins other scholars who have incisively explored the role of the state in channeling intimate decision making. Elizabeth Emens argued that the state establishes the “architecture of intimacy”—the structural framework that determines romantic opportunity, such as facilitating residential segregation or constructing buildings that are inaccessible to people with disabilities. See Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1382 (2009). Melissa Murray has documented and critiqued the state’s efforts to channel individuals into marriage and regulate sexuality comprehensively through either criminal law or family law. See, e.g., Melissa E. Murray, *Marriage as Punishment*, 112 COLUM. L. REV. (forthcoming 2012) (draft on file with author).

308. Another more commonly discussed explicit state restriction is the sex-based restriction in state and federal laws that refuse to recognize same-sex marriage. See Emens, *supra* note 307, at 1315.

A. Casting Gay and Transgender People as Inherent Victims

The Jail's restrictions on sexual partnering are potentially harmful for three reasons. First, the Jail embraces a stereotype of gay identity and transgender identity in assuming that a heterosexual or bisexual sexual partner would always dominate the gay or transgender partner. Yet, at the same time, the Jail evinces little concern about gay men coercing gay male or transgender sexual partners, or about transgender inmates coercing other transgender inmates or gay men. In the Jail's formulation, gay and transgender inmates are so devoid of masculinity that they cannot threaten others. Conversely, the Jail views heterosexual and bisexual inmates as inherently masculine, which entails dominating gay and transgender inmates, but it displays little concern for the sexual domination that occurs among and between heterosexuals and bisexuals, including the "punking" of heterosexuals. Thus, one of the harms of inclusion may be that the Jail is less attentive to domination among K6G inmates. Further, the Jail's marking of K6G inmates with powder blue uniforms, in contrast to the dark blue worn by those in GP, reinforces the stereotype that gay men are not "real men."

B. Disrupting Sexual Relationships and Denying Sexual Autonomy

Second, the Jail denies K6G inmates autonomy in refusing to listen to the views of gay and transgender inmates as to where they would like to be housed and whether they view bisexuals and heterosexuals as a threat, as desirable sexual partners, or perhaps both. Recall that staff identify transgender inmates by sight and automatically assign them to K6G, and staff do not explain to gay men why they are asking about homosexual identity. Nonetheless, inmates do have preferences, and they do not inevitably favor segregation. A number of people that I interviewed, including former K6G inmates, cited examples of gay and transgender inmates who were knowledgeable about segregation and sought to avoid it, sometimes because they doubted that they would be safer in the segregated unit, sometimes because they were attached to sexual partners in GP, and sometimes because of the culture of the segregated unit.³⁰⁹ Deputy Lanni admitted that some transgender inmates in K6G want "trade"—heterosexual-identified men who embody the "aggressive masculine ideal"—in the unit.³¹⁰ Some K6G inmates teach their heterosexual friends and boyfriends how to appear gay so that they can be assigned to K6G.³¹¹ In a similar vein, a study of an unnamed urban jail that segregates gay and bisexual inmates in a single unit found that the bisexual inmates reported that the gay inmates

309. See Gonzalez Interview, *supra* note 268, at 20; Troy Erik et al. Interview, *supra* note 306, at 16, 32, 45.

310. Lanni Interview, *supra* note 40, at 9.

311. See *id.*; Troy Erik et al. Interview, *supra* note 306, at 10–12 (former inmate Eric Knight, recounting how someone coached him on "acting gay").

pressured them to engage in sex.³¹² Critics might dismiss these inmate preferences as unhealthy because many gay and transgender inmates struggle with substance abuse, have suffered physical abuse, and have performed sex work.³¹³ These are significant concerns, but not all inmates are similarly encumbered, and these concerns do not justify denying gay and transgender inmates all agency.

Moreover, there is ample evidence that nonincarcerated gay and transgender people sometimes find straight and bisexual men attractive and pursue them as sexual partners. Evidence from the broader culture confirms that this jail dynamic is not unusual. George Chauncey has demonstrated that there is a long history of gay men having sex with “normal” men.³¹⁴ Before the invention of the “homosexual” and the “heterosexual,” men who had sex only with men were aware that any man might be open to having sex with a man.³¹⁵

Even today, when most people endorse rigid sexual categories, there are men who contest them.³¹⁶ In a recent notable case, nineteen-year-old Anthony Stancl posed as a female on Facebook to solicit nude photos from over thirty teenage boys. He used the photos to pressure at least seven male schoolmates into having sex with him. He was ultimately sentenced to fifteen years in prison and required to register as a sex offender.³¹⁷

There is an astonishing array of pornographic websites that echo the Stancl case, depicting gay men using coercion to entice straight men into posing naked, masturbating, or having sex with a gay man.³¹⁸ The titles of the

312. See Alarid, *supra* note 217, at 89 (“It appears, therefore, that bisexual/heterosexual males are being pressured to have sex by submissive gay men.”).

313. See Gonzalez Interview, *supra* note 268, at 27.

314. See CHAUNCEY, *supra* note 150, at 13, 16 (discussing how “fairies” and queers” pursued “trade”).

315. *Id.*

316. Some of this sexual interest derives from the impossibility of proving a man heterosexual. See *supra* text accompanying note 135. Making an advance toward an apparently straight man may be a way of testing what his “real” orientation is. That said, in rare cases, a gay man might be upset to learn that his sexual partner is not straight, but actually gay. Luke Boso describes how when he identified as straight and was involved with a woman, he became sexually involved with Nick, a gay man. When Boso began to embrace a gay identity and moved in with Nick, Nick’s sexual interest in him sharply declined. Luke Boso, *Disrupting Sexual Categories*, *supra* note 131, at 78–79.

317. Laurel Walker, *Stancl Gets 15 Years in Prison in Facebook Coercion Case*, MILWAUKEE J.-SENTINEL (Feb. 24, 2010), <http://www.jsonline.com/news/waukesha/85252392.html>.

318. A skeptic might dismiss this trend in pornography as a fantasy with little connection to gay men and transgender women’s actual sexual practices. However, Luke’s Boso personal narrative nicely shows the intersection of “gay for pay” porn and real-life relationships. As noted previously, when Boso met Nick Boso was straight-identified and sexually involved with a woman. Once Boso began a relationship with Nick and came out as gay, Nick turned to pornography featuring “straight jocks” to maintain a sexual interest in Boso. After their relationship ended (because of Nick’s waning sexual interest in Boso), Nick would tell Boso things such as “I’m not interested in gay men. I just don’t usually find them attractive” and “I just want a guy who will use me for sex.” Boso, *supra* note 131, at 78–79.

websites typically tell it all: brokestraightboys.com, seducedstraightguys.com, hisfirstgaysex.com, baitbus.com, and straighthell.net, to name just a few. The practice of depicting gay-straight sexual relationships has become so commonplace that some sites go to great lengths to assure the viewer that they are watching “real” straight men, sometimes including elaborate stories of how the filmmaker manipulated the straight man into performing, usually taking advantage of his financial desperation. Some sites tell the viewer that the performer is married or has a girlfriend, apparently to affirm his heterosexuality.

These sites help explain the logic of the K6G test, which uses sex with a woman as evidence of a heterosexual essence. Although the sites highlighted here depict the gay or transgender sexual partner in the dominant role, many other sites show gay men and transgender women reveling in a submissive role during sex with straight or bisexual men.³¹⁹

Consider, for instance, Damien Crosse and Francisco D’Macho, who established themselves as porn stars in America, fell in love and got married, and then formed a European-based porn site.³²⁰ Among other things, the site features a popular series, “30 Loads of Facial,” in which Crosse or D’Macho perform oral sex on “thirty anonymous straight and bisexual men” who then ejaculate in their mouths. The scenes, directed by Crosse and D’Macho, signify that the men are straight or bisexual, and thus unwilling to broadcast their sexual behavior with men, by only filming them from the neck down. These depictions, which are directed at and embraced by mainstream, relatively privileged populations, complicate the assumption that gay men and transgender women do not desire heterosexual and bisexual-identified men as sexual partners, or that such desire must result from pathology. They show how the “minoritizing” conception of sexual identity—one in which all men who have sex with men are gay—fails fully to explain and contain human sexuality.³²¹ Indeed, it may be that social rules that instruct gay men to desire only other out gay men further eroticize the boundary between gay and straight and tempt people to cross it.³²²

Unlike Jail officials, many gay and transgender inmates do not see straight and bisexual inmates as inherently dangerous. “Transgender people and non-transgender people often have friendships, consensual romantic and sexual relationships, familial relationships (chosen as well as biological), and political alliances with one another behind prison walls. All of these types of

319. See, e.g., TRANNYTROUBLEBLOG, <http://www.trannytroubleblog.com> (offering several scenes in which the transgender woman is submissive, and others where she is dominant).

320. See *Damien Crosse and Francesco D’macho Got Married*, THE SWORD (May 26, 2009) <http://www.thesword.com/index.php/skintrade/2678-damien-crosse-and-francesco-dmacho-got-married.html>.

321. SEDGWICK, *supra* note 280, at 85.

322. See David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 167–68 (1994).

relationships can be tremendous sources of support, solace, and survival skills.”³²³ Therefore, in addition to stereotyping and fragmenting the various identities that society categorizes under the “LGBT” umbrella, the Jail’s policy frustrates opportunities for connections and alliances—sexual and nonsexual—that cut across identity lines. A cost of inclusion is disruption of existing or potential relationships that cross sexual orientation and gender identity lines.

C. Exposing Gay and Trans Inmates to Heightened HIV Risk

The final point that I make in this Section examines differential HIV risk in K6G and GP. The conventional view of K6G, including in the gay community, is that K6G inmates have it relatively easy.³²⁴ Not only are they protected from sexual assault, unlike those in GP, but the deputies conveniently look the other way while the K6G inmates take advantage of multiple opportunities for sex.³²⁵ Further, K6G inmates are the only ones permitted to have condoms and, thus, they are the only inmates who engage in “safe sex.” The actual conditions in K6G are far more complex than this facile narrative.

Unlike most jails, Los Angeles makes condoms available to K6G inmates.³²⁶ Yet, this commendable policy is subject to several important limitations. Just as the Jail offers “protection” from sexual assault to the small group of inmates that it views as feminized, it offers no protection from HIV infection for heterosexual and bisexual inmates. This disparate treatment is consistent with the misguided notion that HIV is a “gay disease.”³²⁷ Los Angeles is an outlier both in providing any condoms and in limiting condoms to gay and trans-identified inmates. Of the two state prison systems (Vermont and Mississippi) and five county jail systems (New York, Philadelphia, San Francisco, Washington DC, and Los Angeles) that provide condoms to inmates, it appears that no other jurisdiction limits distribution based on sexual orientation or gender identity.³²⁸

The Jail’s policies facilitate risky sex in several specific respects: (1) strictly limiting the number of condoms distributed, (2) requiring sex to occur

323. Arkles, *supra* note 22, at 529. As an example of the possible relationships that may form, Arkles discusses the case of Victoria Arrellano, a Mexican transgender woman who became seriously ill in immigration detention. *Id.* at 528. Although the staff callously refused to help her, eighty men, including many heterosexuals, cared for her and protested her treatment until officials finally took Victoria to the hospital. *Id.*

324. *See, e.g.,* Andreoli, *supra* note 48, at 30.

325. *See, e.g.,* Dolovich, *supra* note 1, at 42.

326. *See supra* note 37.

327. *See* Robinson, *supra* note 18, at 1511.

328. Sylla, *supra* note 37, at 3–5. In addition, California authorized a pilot program, which took place in several housing units at the Solano state prison. This program also did not limit access to gay- and transgender-identified inmates. *Id.* at 6. Deprived of condoms, inmates may resort to crude and faulty methods of protection, including “using plastic wrap from their sandwiches, rubber gloves and empty candy wrappers during sex.” Ari B. Bloomekatz, *L.A. County Sheriff Considers Expanding Condom Distribution in Jail*, L.A. TIMES, June 29, 2009, at A3.

in secretive contexts that reduce the likelihood of safe sex, and (3) failing to provide lubricant. First, the Jail permits inmates to receive one condom per week³²⁹—which represents an express governmental decision about how much sex is appropriate. To the extent that inmates want to have intercourse more than once a week or the allocated condom tears, they must engage in sex at their own risk. A recent study showed that three-quarters of respondents acknowledged having some unprotected sex in K6G.³³⁰ Thirty-two percent of inmates who had unprotected sex cited as their reason that the Jail sometimes runs out of condoms, while 13 percent said that they had difficulty obtaining a condom when needed.³³¹

Second, the Jail formally prohibits sex, as required by California law, posting signs in K6G that announce: “[i]t is a felony to have sex while in jail.”³³² Although the Jail does not consistently enforce this ban in K6G, inmates never know when a deputy might decide to invoke the law. This uncertainty, and the fact that inmates are frequently under visual supervision, requires them to make the most of sporadic opportunities for privacy and intimacy, even if the inmate’s weekly condom is not immediately accessible.³³³

Third, the Jail fails to provide lubricant.³³⁴ Although the condoms are lubricated, most people on the outside use additional lubricant. Anal sex without ample lubricant can be painful and entails a greater risk of HIV transmission.³³⁵ Because a lack of lubricant undercuts a condom’s

329. See Harawa et al., *supra* note 296, at 1073 (noting that the Jail, not the Centers for Health Justice, the nonprofit group that distributes condoms with the Jail’s permission, imposes limits on distribution).

330. *Id.* at 1080. This finding is consistent with a 2003 survey, which indicated that 68 percent of respondents who engaged in sex in K6G reported some unprotected sex. *Id.* at 1084. With respect to the 2010 study, although 65 percent of inmates who reported engaging in anal sex while in K6G used a condom at some point, only a quarter *always* used condoms. *Id.* at 1080. The 2010 study suggests that about half of the sex that occurs in K6G is unprotected. *Id.*

331. *Id.* One reason for this difficulty may be that the Jail has just one designated “condom day” per week. *Id.* at 1083. Thus, if an inmate enters K6G on a Monday and condom day is not until Friday, he or she may have to abstain until then, unless he or she can obtain a condom from another inmate. Because of the inconsistent access to condoms, some inmates reported engaging in unprotected sex, and then having a difficult time insisting on using a condom with the same partner, even though condoms became available. *Id.*

332. *Id.* at 1073.

333. *Id.* at 1081 (“Given that sex is against jail rules, interviewees report taking the opportunity when it arises, rather than having planned interludes. This sometimes leads to unprotected encounters.”). As Harawa explains, “[e]ach [unit] contains several rows of bunk beds in close proximity to one another. . . . An elevated custody booth overlooks four dormitories (three K6G units and one GP dormitory) and is staffed by two custody personnel who must walk its length, about 15 feet, to observe activity in the dormitories. Sections can remain obscured from view.” *Id.* At night, deputies are very unlikely to enter the dormitory, in part because of fear for their safety, and inmates frequently construct tents, which permit private sexual activity. *Id.* at 1076.

334. *Id.* at 1073.

335. Robin J. Shattock & John P. Moore, *Inhibiting Sexual Transmission of HIV-1 Infection*, 1 NATURE REVS. MICROBIOLOGY 25, 27 (2003) (stating that any lubrication that

effectiveness, some inmates may not bother using a condom.³³⁶ Harawa concluded that “a substantial portion of this risk [of unprotected sex] is likely preventable through [increased] condom distribution,” and related interventions, such as the distribution of lubricant.³³⁷ In the summer of 2009, the *Los Angeles Times* reported that the Jail was considering doubling the number of condoms distributed in K6G, but it is unclear whether this will actually happen,³³⁸ and there continues to be considerable resistance to distributing condoms to GP.³³⁹

The segregation of gay and transgender inmates, particularly those who are immersed in gay culture and thus able to verify their Gay Identity—coupled with the Jail’s tacit permission to engage in sexual behavior—likely produce a heightened risk of contracting HIV in K6G, despite condom dissemination. In general, HIV prevalence among MSM and male-to-female transgenders is dramatically higher than it is among heterosexual men. It is estimated that MSM are forty-four to eighty-six times more likely to contract HIV than heterosexual men,³⁴⁰ and MSM make up 53 percent of new HIV infections nationally.³⁴¹ Los Angeles estimates that 2.9 percent of recently incarcerated persons are HIV infected, but it does not release statistics on the specific HIV prevalences in K6G or the Men’s Central Jail’s general population.³⁴²

reduces trauma to the mucosal epithelium (the skin of the rectum) is “likely to diminish the chance of infection”); *Reducing the Risk of Getting HIV from Sexual Activities*, S.F. AIDS FOUND. (Aug. 25, 2008), <http://www.thebody.com/content/art2503.html> [hereinafter *Reducing the Risk of Getting HIV*] (“It is important to use a lubricant . . . to reduce friction on the outside of the condom during sexual intercourse. When in doubt, more lubrication should be added.”). Eight percent of respondents in the Harawa study cited the lack of lubricant as a reason not to use condoms. Harawa et al., *supra* note 296, at 1080. If inmates, deprived of proper lubricant, attempt to improvise by using hand lotion or Vaseline, they might reduce pain/trauma to the rectum, but also undermine the ability of the condom to protect them from disease, as oil-based lubricants degrade latex condoms. *See supra*, *Reducing the Risk of Getting HIV*.

336. I do not mean to suggest that the Jail is responsible for all of the unprotected sex that happens in K6G. Even providing unlimited condoms and lubricant would not totally eliminate risky sex. Many people have unprotected sex for reasons irrespective of incarceration conditions. *See* Harawa et al., *supra* note 296, at 1080–81 (respondents cited perceptions of pleasure, excitement, and intimacy regarding unprotected sex).

337. *Id.* at 1085; *see also id.* (encouraging “conjugal visits for inmates regardless of sexual orientation,” increased supervision/visibility, improved HIV education, and staff training regarding sexuality).

338. *See* Bloomekatz, *supra* note 328, at A3.

339. *See* Lanni Interview, *supra* note 40, at 34–35.

340. *See* NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 14 (2010), available at <http://www.whitehouse.gov/files/documents/nhas-implementation.pdf>.

341. *Id.* at 11.

342. CNTY. OF L.A. PUB. HEALTH, AN EPIDEMIOLOGIC PROFILE OF HIV & AIDS 89 (2009), available at http://publichealth.lacounty.gov/wwwfiles/ph/hae/hiv/2009_EpiProfile.pdf. This is consonant with the finding that 1.9 percent of state prisoners are known to be HIV positive. Nina T. Harawa et al., *Using Arrest Charge to Screen for Undiagnosed HIV Infection Among New Arrestees: A Study in Los Angeles County*, 15 J. CORRECTIONAL HEALTH CARE 105, 106 (2009).

The Harawa study offers a revealing glimpse of the sexual practices in the K6G unit. The authors surveyed about one-third of the K6G population, and their sample generally reflected the demographics of the entire K6G unit.³⁴³ HIV prevalence in the sample was 32 percent,³⁴⁴ which is higher than the 19 percent HIV prevalence among MSM in Los Angeles.³⁴⁵

Despite the relatively high prevalence of HIV in gay and transgender populations, there is high demand for gay and transgender sexual partners in most prisons and jails. Since biological women are not generally available, inmates expect gay and transgender inmates to play the feminine role in sex.³⁴⁶ Moreover, the sexual desires of many gay and transgender people cut across sexual identity lines.³⁴⁷ In light of these dynamics, gay and transgender inmates, if they were integrated into GP, would likely not restrict themselves to the small pool of gay and transgender inmates who pass the K6G test (roughly 300) and would likely find some sexual partners among the thousands in GP who identify as heterosexual, bisexual, or perhaps another nongay identity.³⁴⁸

Yet the Jail denies gay and transgender inmates access to GP and thereby rules out the vast majority of potential sexual partners. Instead, it ensures that inmates assigned to K6G will only have sex with other gay and transgender inmates—containing and intensifying the HIV risk. The Jail also makes male-male sex in GP safer by excluding many gay and transgender inmates, who are much more likely to be HIV positive. Although it seems likely that many of the Jail staff would want to reduce sex between heterosexually-identified men, the Jail's policy, in at least one respect, actually makes it safer. Thus, it is unclear whether the Jail segregates gay and transgender inmates to protect them from sexual assault or to protect GP inmates from HIV. In at least some respects, an HIV-negative gay man excluded from K6G may be safer, because he would be more likely to contract HIV if he were assigned to K6G and was sexually active.

IV.

DECIDING WHETHER OR NOT TO COME OUT

When the term “coming out” is used in the sexual orientation context, it is typically affixed to the word “gay.”³⁴⁹ Rarely does one hear about a person

343. See Harawa, *Sex and Condom Use*, *supra* note 296, at 1075.

344. *Id.* at 1077.

345. U.S. Ctrs. for Disease Control & Prevention (CDC), *HIV Prevalence, Unrecognized Infection, and HIV Testing Among Men Who Have Sex with Men—Five U.S. Cities, June 2004–April 2005*, 54 MORBIDITY & MORTALITY WEEKLY REPORT 597, 597–601 (June 24, 2005), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5424.pdf>.

346. See *supra* text accompanying notes 246–248; *infra* text accompanying note 550.

347. See *supra* text accompanying notes 306–313.

348. See Mosher, *supra* note 179, at 13 (discussing people who identified as “something else”).

349. Increasingly, people seem to be using the phrase “coming out” to explain a wide array of nonsexual, potentially stigmatizing disclosures, such as coming out as a Republican in legal

coming out as bisexual, “questioning,” or some other nonheterosexual identity. This is curious because surveys show that bisexuality is as common as or more common than homosexuality.³⁵⁰ In discussing coming out and arguing that the decision to come out is of constitutional dimension, I wish to sever it from two common assumptions: (1) the belief that the person coming out is necessarily *coming into* Gay Identity or a “gay lifestyle”;³⁵¹ and (2) the assumption that the only responsible way to manage sexual identity is to come out.

One can come out as a wide variety of nongay sexual identities, some of which explicitly reject key tenets of Gay Identity.³⁵² According to the conventional narrative, coming out signals linear progress in one’s identity development and acclimating to healthy norms such as practicing safe sex and shedding internalized homophobia.³⁵³

These monolithic assumptions often rest on how white, affluent males see themselves and fail to consider intersecting oppressions, such as the reality that many MSM of color are deeply committed to racial communities and their own racial identities, and that assimilating to white gay norms may alienate them from race-based sources of sustenance. Although many MSM struggle with Gay Identity, men of color are particularly in need of space to cultivate sexual identities that do not mimic the dominant identity. Law and society should respect these alternative sexual identities, instead of reading them as simply another way of saying “gay” or as an evasive cover for a uniform gay

academia.

350. See Yoshino, *Epistemic Contract*, *supra* note 116, at 377–85 (reviewing studies of self-reports of sexual desire and concluding that “the incidence of bisexuality was greater than or comparable to the incidence of homosexuality” (emphasis omitted)).

351. Cf. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (noting that case involved “sexual practices common to a homosexual lifestyle”).

352. See Katyal, *supra* note 140, at 172; Dorie Gilbert Martinez & Stonie Sullivan, *African-American Gay Men & Lesbians: Examining the Complexity of Gay Identity Development*, 1 J. HUMAN BEHAV. SOC. ENV. 243, 246 (1998).

353. See, e.g., JOHANSSON & PERCY, *supra* note 117, at 21–22; RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK* 276–77 (1982); William Eskridge, *A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2440–41 (1997). *But see generally* Marlon B. Ross, *Beyond the Closet as a Raceless Paradigm*, in *BLACK QUEER THEORY*, *supra* note 237, at 162, 176 (2005) (identifying the “claustrophilia” of white queer theory, whose fixation on the closet as master narrative tends to diminish full engagement with race and class); Carlos Ulises Decena, *Profiles, Compulsory Disclosure and Ethical Sexual Citizenship in the Contemporary USA*, 11 *SEXUALITIES* 397, 398, 401 (2008) (critiquing public health scholars for assuming that coming out will cure the public health problems of black MSM); Carlos Ulises Decena, *Tacit Subjects*, 14 *GLQ: J. LESBIAN & GAY STUDS.* 339, 354 (2008) (“[I]t is authoritarian to suggest that everyone need announce his or her identity no matter the complexity.”); Katyal, *supra* note 140, at 130–31 (demonstrating that the United States’ dominant “substitutive” model of sexual orientation does not translate to much of the rest of the world); Martinez & Sullivan, *supra* note 352 (arguing that gay identity models do not incorporate or speak to the experiences of African Americans).

identity.³⁵⁴ They should certainly not be a barrier to protection from sexual assault, as is the case with K6G. Thus, as courts recognize the importance of coming out, they should also recognize that a man should have the freedom to define his sexual identity in terms that diverge from the gay mainstream.

A. Profound Consequences of Coming Out

Coming out can both expose a man to discrimination and increase his opportunities for romantic and personal fulfillment. While gay rights advocates and scholars have championed coming out as a celebratory rite of passage that every gay person must pass through, few have acknowledged sufficiently that it carries significant costs as well as benefits, and that the cost-benefit tradeoff varies from person to person.³⁵⁵ The double-edged nature of this choice reveals its complexity and argues for reserving it to the individual.

Coming out generally increases sexual and romantic opportunity in that it permits open affiliation with other gay men and gay spaces where one may meet potential partners.³⁵⁶ Men who seek sex and are not out may limit their activity to anonymous internet profiles or clandestine sexual outlets, such as restrooms, public parks, and adult book stores.³⁵⁷

Men who are not out and attempt to date or maintain committed relationships may find they are worried constantly about others spotting them in public. This is especially likely if the man dates a man who bears more marks of being gay than he does, such as being effeminate or displaying gay fashion sensibilities. For these reasons, it is not uncommon for men who are not out to avoid meeting a man in public or at least to restrict his romantic partners to those who are not recognizably gay.

354. For example, an interviewer asked a black community organizer who coined the term “same gender loving” for black sexual minorities whether it was “self-degrading” for him not to “admit to being gay.” Phillip Esteem, *In Touch with Cleo Manago*, CHUMA SPIRIT MAGAZINE, http://chumaspiritmagazine.typepad.com/chuma_spirit_magazine/2007/10/in-touch-with-c.html (last visited Jun. 19, 2011). *But see* Ritch Savin-Williams, *Refusing and Resisting Sexual Identity Labels*, in *ADOLESCENT IDENTITIES*, at 67, 74 (Deborah L. Browning ed., 2007) (“[I]t’s possible not to identify oneself sexually and still embrace one’s sexuality.”).

355. *See, e.g.*, SHILTS, *supra* note 353, at 276–77 (quoting speech by Harvey Milk celebrating coming out as necessary for achieving equal rights). Shilts also simplistically portrays gay enclaves as sites of freedom and shelter from homophobia. *Id.* at 160 (claiming that most men in the Castro did not live there by choice, but were driven there by homophobia).

356. Thomas C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in “Gay Ghettos” with Those Living Elsewhere*, 91 AM. J. PUB. HEALTH 981 (2001) (finding that MSM who reside in gay enclaves are more likely to be out and to have a domestic partner).

357. For instance, there are public sites, such as craigslist.org and adam4adam.com, which allow people to post advertisements for sex without displaying any personal photographs or permit the option of displaying photographs of body parts other than faces. David Amsden, *Married Man Seeks Same for Discreet Play*, N.Y. MAG., July 23, 2007, <http://nymag.com/news/features/34985> (describing professional New York City men meeting other men for sex on craigslist.org); James E. McGreevey, *The Making of a Gay American*, N.Y. MAG., Sept. 18, 2006, <http://nymag.com/news/politics/21340> (same in Washington, D.C.).

These restrictions significantly decrease the odds that a man who is not out will be able to sustain a long-term relationship with another man. To the extent that he attempts to date a man who is out, the out partner may not accept restrictions on his freedom. The out partner may resent that they cannot live together as a couple, that he either cannot meet his partner's family and friends or must be introduced as a "friend" rather than boyfriend.³⁵⁸ This tension is enhanced by the widespread belief that men who are not out are self-loathing cowards and that a gay man who dates such a man is compromising a central tenet of Gay Identity.³⁵⁹

Coming out also makes it easier for a gay man to have children and form a family unit. It is challenging, but not impossible, for a man who is not out and is attracted only to men to have a child without disclosing his sexual orientation.³⁶⁰ Consider Puerto Rican singer Ricky Martin. The singer had long been rumored to be gay and at times refused to answer questions about his sexual orientation; many thought that any lingering doubt was resolved when he announced that he had had a child through surrogacy.³⁶¹ The argument for confirming his sexual orientation tracks the following: why would a handsome, heterosexual man go through the trouble of procuring a surrogate instead of having a child with one of the many single and willing women? Moreover, having a partner and children may lead a man to turn to the legal system to ensure that these relationships are protected. For example, such a man may enter into a domestic partnership, civil union, or marriage, if available, which would make it difficult not to come out.

However, the foregoing narrative may not reflect the experiences of many men, especially those who the mainstream romantic market does not value, and those who desire neither marriage nor parenthood. Whenever we talk about

358. This is not to say that there are not a significant number of men who maintain relationships with another closeted man or find a partner who is willing to live with these restrictions.

359. See SHILTS, *supra* note 353, at 216 (describing coming out for gays as analogous to becoming born again for Christians).

360. Carlos Ulises Decena writes about men of color who do not discuss their gay identities with their families and yet bring partners to their parents' homes and engage in other behavior that signifies homosexuality. Decena, *Tacit Subjects*, *supra* note 353, at 352. Decena's scholarship demonstrates the ambiguity of determining whether one is "in" or "out" and the failure of a binary conception of outness. *Id.* at 341–43.

361. Marisa Laudadio, *Ricky Martin Welcomes Twin Boys*, PEOPLE (Aug. 20, 2008, 3:30 PM) <http://www.people.com/people/article/0,,20220372,00.html> (reporting Martin's paternity). In the same vein, the media widely regarded singer Clay Aiken's announcement that he impregnated a close friend through ratification insemination as another marker of his gay identity. David Caplan, *Clay Aiken Is Going to Be a Dad*, PEOPLE (May 29, 2008, 5:00 PM) <http://www.people.com/people/article/0,,20203048,00.html>. Of course, a man could also become a father by donating to a sperm bank or having intercourse with a woman, but these modes offer distinct trajectories—and likely diminished relationships with his child—than having a child alone or with a male partner, since the father would either have no parental rights or share rights with the mother.

coming out, we should ask, “Coming out to what?”³⁶² Does a “community” of welcoming gay men actually exist for the individual given his particular identity and the norms of the market, or are we simply *assuming* its existence?

As I have written elsewhere, an out black middle- or upper-class man may find that his race, class, and outness intersect to shrink his romantic options.³⁶³ While being black tends to reduce his desirability among nonblack men,³⁶⁴ being middle- or upper-class and out may make it harder for him to connect with the many black men who are not out nor middle-class.³⁶⁵ Moreover, coming out and maintaining a committed relationship with another man or having a child may alienate a black or Latino man from his racial community—especially if his partner is white. MSM of color, unlike whites, must balance the interest in coming out with vulnerability to racial discrimination and the need for a support system in communities of color.³⁶⁶

Further, even though coming out may create important new possibilities, it also enables people to inscribe multiple stereotypes upon the speaker’s identity (including effeminacy, promiscuity, and affluence)³⁶⁷ and potentially exposes him to violence. There are various ways in which a man becomes more visible as gay when he comes out. Whereas he may have steadfastly eschewed gay culture before he was out, coming out may give him permission to adopt and display the traits widely associated with gay men, such as effeminacy and fashion consciousness.³⁶⁸ Further, even if he does not display these traits—which is certainly the case with many gay men—he is more likely to be found in the company of men who themselves are identifiable as gay. People tend to assume that men who closely associate with gay men are themselves gay, and that two men who spend considerable time alone outside of narrowly defined masculine spaces (e.g., sports events, straight bars) are likely to be gay.³⁶⁹

Several examples from news accounts of hate crimes illustrate how coming out, or merely being found in gay spaces, increases one’s exposure to homophobia. In 2007, a rash of hate crimes occurred in Capital Hill, Seattle’s

362. Cf. CHAUNCEY, *supra* note 150, at 7 (“Gay people in the prewar years, then, did not speak of *coming out of* what we call the ‘gay closet’ but rather of *coming out into* what they called ‘homosexual society’ . . .”).

363. Robinson, *supra* note 281, at 2788.

364. See, e.g., *id.* at 2813–14 (empirical study of preferences on MSM dating website, which found that black and Asian profiles received significantly fewer emails than white profiles); H. Fisher Raymond & Willi McFarland, *Racial Mixing and HIV Risk Among Men Who Have Sex with Men*, 13 AIDS & BEHAV. 630 (2009) (survey of MSM in San Francisco, which reported that nonblack men ranked black men as the least desirable as romantic partners and the least likely to be part of their friendship networks).

365. Robinson, *supra* note 281, at 2788.

366. Martinez & Sullivan, *supra* note 352, at 250.

367. See *supra* text accompanying notes 144–213.

368. See *supra* Part III.

369. See, e.g., Lee, *supra* note 129.

main gay enclave, rattling residents who considered it a safe space.³⁷⁰ In several of the reported attacks, the assailant asked the target about his sexual orientation before attacking.³⁷¹ A man brandishing a knife confronted three gay men in a car at a fast food drive-through and asked, “Are you guys queer?”³⁷² The men avoided an attack by saying “no.”³⁷³ In another incident, an assailant attacked the target because he wore a shirt that announced “Queer.”³⁷⁴ A report by gay rights group Human Rights Campaign (HRC) detailed similar incidents across the country. In Santa Rosa, California, a man shot at and destroyed the window of a car that displayed gay pride stickers.³⁷⁵ An assailant called an Illinois State University student a “queer” and punched him in the face on his walk home; the assailant apparently targeted the straight-identified victim because he was wearing a “shiny rayon shirt that is popular among some gay men in the area.”³⁷⁶

These incidents reveal a paradox. While people flock to gay enclaves to insulate themselves from homophobia and express themselves more freely, they might simultaneously make themselves more vulnerable to attack by congregating in gay spaces and marking themselves with gay slogans and clothing. The same phenomenon occurs in K6G, where inmates are at once protected and made easily identifiable targets for discrimination and hostility from staff and inmates in GP.

Another form of homophobia emanates not just from bigots but from individuals who are gay or consider themselves to be “gay friendly.” As I described in detail in Part III, many people—whether pro-gay or anti-gay—assume that a man who comes out is living a “gay lifestyle.” Society often thinks of this lifestyle as entailing sex with multiple partners, the absence of childcare obligations, and ample discretionary income for nightlife, shopping, and travel.³⁷⁷ Therefore, a gay man is likely to be treated differently after he comes out and, to the extent that he rejects such stereotypes, he may spend considerable time rebutting the misconceptions of people with whom he interacts.³⁷⁸ He may have difficulty finding a community of queer and straight people who do not view him through the hegemonic lens of Gay Identity.³⁷⁹

370. Kery Murakami, *Attacks Alarm Gay Community*, SEATTLE POST-INTELLIGENCER (Oct. 25, 2007, 3:00 PM), http://www.seattlepi.com/local/336781_gaybashing25.html.

371. *Id.*

372. *Id.*

373. *Id.* (reporting similar incident that resulted in a man, who identified as gay, receiving a “bloody nose, cuts to his chin and forearm, and two black eyes”).

374. *Id.*

375. HUMAN RIGHTS CAMPAIGN, HATE VIOLENCE CONTINUES TO SHOCK THE NATION: HOW MANY MORE MUST DIE BEFORE CONGRESS TAKES ACTION? 14 (2005).

376. *Id.* at 21.

377. *See supra* Part III.

378. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000) (illuminating “shadow work” of stereotype negation).

379. *See* Martinez & Sullivan, *supra* note 352, at 254.

Finally, even if such a man lived in a bubble of complete acceptance and the absence of stereotyping, he might still grapple with tremendous intrapersonal obstacles to coming out. Common impediments to coming out are beliefs about religion and gender. For example, many parents have raised men to believe that homosexuality is an “abomination,” and that acting on their desires would damn them to hell.³⁸⁰ Men who reject that notion but are religious may still find the characterization of gay men as promiscuous to be alienating and offensive. Further, for many men, coming out as gay would undermine their personal sense of masculinity, which for some is a central organizing principle.³⁸¹ As a result of these momentous effects, I argue in Part V that the Jail’s decision to make coming out the linchpin for access to the K6G unit raises a potential intrusion into a constitutionally protected, private domain.³⁸²

B. Racial Impact

The Jail’s deputies adhere to an essentialist conception of gay identity—something that is present at birth, which reveals itself to one’s mother before the son even comes out, and which makes sex with women extremely unlikely.³⁸³ Although this has become the dominant conception of gay identity, largely through the efforts of the gay rights movement, this is a reductive and deeply ahistorical conception and is at odds with the experiences of many black and Latino MSM.

Chauncey’s rich excavation of gay life in New York City during the early twentieth century revealed that the “‘gay world’ actually consisted of multiple social worlds, or social networks, many overlapping but some quite distinct and segregated from others along lines of race, ethnicity, class, gay cultural style, and/or sexual practices.”³⁸⁴

380. Cf. *Lawrence v. Texas* 539 U.S. 558, 571 (2003) (noting that “religious beliefs” have contributed to “powerful voices to condemn homosexual conduct as immoral”).

381. Robinson, *supra* note 18, at 1477. That said, the Bailey study shows that many out gay men continue to value masculinity in themselves and their partners. Bailey, *supra* note 131, at 960.

382. Other costs of coming out flow from hierarchies within the gay community, which range from race, gender performance, disability, age, and class to body type and physical attractiveness. The conventional narrative is that coming out produces liberation and self-empowerment, feeling normal rather than “deviant,” and finding a place in a community of likeminded people. Although this narrative holds true for some gay men, these accounts tend to overlook various forms of exclusion and hierarchy that operate *among* gay men and *within* the coalition that is “LGBT.” The word “gay community” might be better understood as an aspiration, rather than a reality, at least from the vantage point of many men of color and working class or poor men. Further, insufficient attention has been paid to the ways in which out gay men are unsatisfied with the dominant gay culture. A rare study that considered this issue found that MSM who lived in enclaves and were significantly more involved with gay organizations reported the same level of community alienation as MSM who did not live in a gay enclave. See Mills et al., *supra* note 356, at 981. Of course life as a straight-identified man entails various hierarchies as well.

383. Lanni Interview, *supra* note 40, at 14–15 (indicating that the presence of female lover disqualifies men for K6G); *id.* at 17 (“Most of the guys who are gay knew at a very young age.”).

384. CHAUNCEY, *supra* note 150, at 3.

Recent public health studies of MSM make clear that there continue to be vastly different worlds, networks, and ways of being among the group of men that today society has consolidated under the Gay Identity umbrella. Because black, brown, and working class men tend to diverge from Gay Identity, they are likely to flunk the Jail's "Lessons in Being Gay."³⁸⁵ To begin, black and Latino MSM are less likely than white MSM to identify as gay.³⁸⁶

Other studies show that black and Latino men are tangentially connected to Gay Identity and the mainstream gay community. Black and Latino men are less likely than white men to be out about their sexuality in the conventional sense.³⁸⁷ In addition, studies show that black and Latino men are more likely than white men to report having had sex with both men and women.³⁸⁸ Under the K6G test, recent sex with a woman would make a man presumptively bisexual, and excludable, unless he could prove that he is a closeted gay man. Since there really is no way to prove this fact, the decision falls to the individual deputy's intuition. Studies indicate that black and Latino men are less likely to feel connected to the dominant gay community. They are less likely to live in gay enclaves;³⁸⁹ less likely to join gay-related organizations;³⁹⁰

385. Kunzel, *Lessons*, *supra* note 16.

386. Gregorio A. Millett et al., *Explaining Disparities in HIV Infection Among Black and White Men Who Have Sex with Men: A Meta-Analysis of HIV Risk Behaviors*, 21 AIDS 2083, 2084 (2007) ("Data from several studies overwhelmingly supported the assertion that Black MSM are less likely than White MSM to identify as gay."). A Department of Justice survey also indicates a significant community of inmates who rejected conventional sexual categories. Inmates were just as likely to identify as "other" as they were to identify as "homosexual," and nearly three times as many inmates identified as bisexual as homosexual. (The study did not report the racial demographics of the "other" group.). See LOCAL JAILS, *supra* note 222, at 6. Sexuality researchers are struggling to understand why subjects choose "other" or "something else" when given such an option. This group appears to include people who reject traditional categories of sexual orientation, people whose sexuality is evolving, including those beginning to come out, transgender people, and people confused by terms such as "heterosexual."

387. Millett et al., *supra* note 386, at 1008; U.S. CDC, *HIV/STD Risks in Young Men Who Have Sex with Men Who Do Not Disclose Their Sexual Orientation—Six U.S. Cities, 1994–2000*, 52 MORBIDITY & MORTALITY WKLY. REP. 81, 81, 84 (2003).

388. Gary Goldbaum et al., *Differences in Risk Behavior and Sources of AIDS Information Among Gay, Bisexual, and Straight-Identified Men Who Have Sex with Men*, 2 AIDS & BEHAV. 13, 16 (1998) (finding that black men at MSM public sex venues were more likely to identify as bisexual or straight than white men); Gregorio Millett et al., *Focusing "Down Low": Bisexual Black Men, HIV Risk and Heterosexual Transmission*, J. NAT'L MED. ASS'N, July 2005, at 52S, 53S ("Studies clearly show that black MSM are more likely than MSM of other races and ethnicities to identify themselves as bisexual and to be bisexually active."); J.P. Montgomery et al., *The Extent of Bisexual Behaviour in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS CARE 829, 831 (2003) (reporting that the following percentages of HIV-positive MSM reported sex with women in the last five years: 34 percent black, 26 percent Hispanic, 19 percent Asian/Pacific Islander, 13 percent American Indian/Alaska Native, and 13 percent white).

389. Mills et al., *supra* note 356, at 981 (finding that MSM who reside in gay enclaves are more likely to be white, less likely to identify as bisexual than those who live elsewhere and have higher incomes than MSM who live elsewhere).

390. Millett et al., *supra* note 386, at 1008.

and less likely to read gay media, a source for acquiring gay slang.³⁹¹ At virtually every turn, the K6G test caters to the behavioral patterns of white men and marginalizes black and Latino men.³⁹²

MSM who reject Gay Identity have developed a variety of little-known names that signify a departure from the gay mainstream. Some are race-based. For instance, community organizer Cleo Manago coined the term “same gender loving” to shed the whiteness of the label “gay,” providing an identity for black men. Unlike the view that being gay is all about sex, “same gender loving” places “love” at its core.³⁹³ Other names reflect generational changes that are threatening gay institutions, such as the gay bar and enclave.³⁹⁴ Savin-Williams has documented the tendency of young men and women of various races to reject the sexual binary, as well as labels their forbearers established, and adopt new labels such as “sexual.”³⁹⁵ He argues that “any idea that adolescent same-sex sexuality is all the same, or that it has predetermined developmental trajectories and consequences, is belied by the life narratives of contemporary teenagers. . . . The notion of there being a single gay identity or lifestyle is, in short, absurd, especially to adolescents.”³⁹⁶

Some new terms reflect a sense of a fluid identity that goes beyond just having sex with men: “questioning,”³⁹⁷ “sexual,”³⁹⁸ and “bicurious.”³⁹⁹ Some assert a heightened commitment to masculinity and rejection of the notion that MSM are necessarily effeminate and weak: “DL” or “down low,”⁴⁰⁰

391. *Id.*; Mills et al., *supra* note 356, at 980.

392. Despite these disparities, the Court requires a showing of intentional discrimination to make out a race-based equal protection claim. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987). Consequently, it is unlikely that such an equal protection challenge would be successful.

393. See Esteem, *supra* note 354 (“The term SGL or same-gender-loving was created from the Black community to provide SGL Black folks with a way of referencing ourselves that articulated and highlighted ‘loving’ as our intention. That we do and can love needed (and needs) to be noted.”). Manago has helped create organizations in Los Angeles and New York that are deliberately based in black and brown communities and committed to sexual equality, but open to whites and heterosexuals, too. See BMXNY.ORG, <http://www.bmxny.org> (last visited June 19, 2011) (“Same gender loving and bi sexual brothers and their allies are invited.”).

394. See Patricia Leigh Brown, *Gay Enclaves Face Prospect of Being Passé*, N.Y. TIMES (Oct. 30, 2007), <http://www.nytimes.com/2007/10/30/us/30gay.html>.

395. Savin-Williams, *Refusing and Resisting*, *supra* note 354, at 85 (“Sexual diversity is becoming normalized, and the gay-straight divide is becoming blurred.”).

396. *Id.* at 76.

397. A number of LGBT organizations, mostly younger, grass-roots groups, have added “Q” to the LGBT acronym. See *LGBT*, WIKIPEDIA, http://en.wikipedia.org/wiki/LGBT#cite_note-In-Between_Bodies-6 (last visited June 19, 2011) (cataloguing variants of “LGBT”).

398. See Savin-Williams, *Refusing and Resisting*, *supra* note 354, at 76.

399. See FACEBOOK.COM, <http://www.facebook.com/event.php?eid=55015910340&ref=mf> (Facebook page for the Bisexual and Bi-Curious Men’s Group, a Boston-based discussion group “for men who are bisexual or think that they might be”) (last visited June 19, 2011).

400. See Robinson, *supra* note 18, at 1493 (discussing reasons why men adopt “DL” identity); Frank Leon Roberts, *Dancing the ‘Down-low’: ‘Out’ Your Own Way in Black, Gay Clubs*, NEW AMERICA MEDIA (July 19, 2003), http://news.ncnonline.com/news/view_article.html?article_id=523d35625b3fe63f05597be778d8a2b2 (describing black men in the East Bay Area of Northern California who “embraced a low-key, mellow style that lets them admit to

“homothug,”⁴⁰¹ and “g0y.”⁴⁰² The Supreme Court’s recognition that importance to the individual is a touchstone for the right to privacy, discussed below, suggests that the Court should respect that some MSM feel strongly enough about Gay Identity that they have developed new identities and groups to chart their departure from the gay mainstream.

V.

CONSTITUTIONAL IMPLICATIONS OF COMING OUT

This Section argues that the Jail’s procedures for screening inmates, which condition access to K6G on coming out as gay, infringe constitutional privacy rights.⁴⁰³ As the Court explained in *Whalen v. Roe*,⁴⁰⁴ and reiterated in *Lawrence v. Texas*,⁴⁰⁵ the privacy right embraces both “the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions.”⁴⁰⁶ I argue that the decision whether to come out as gay implicates both lines of protection.

I begin with the conventional definition of privacy—the right to keep intimate information from prying eyes—which has received limited attention in the Supreme Court’s jurisprudence, but substantial analysis in the lower federal courts.⁴⁰⁷ Because a recent Supreme Court decision, *NASA v. Nelson*,⁴⁰⁸

same-sex desires without necessarily coming out in the traditional sense. They ‘come out’ as D.L.”).

401. ASANTE KAHARI, HOMO THUG (2004).

402. Compare G0YS.ORG, <http://www.g0ys.org> (last visited June 19, 2011) (“The Movement for Guys who feel deep affection for other guys, —but do NOT relate to the term ‘GAY’”), with CHAUNCEY, *supra* note 150, at 5 (“Many [men] bitterly resented the dominant culture’s insistence that their homosexuality rendered them virtual women and despised the men among them who seemed to embrace an ‘effeminate’ style.”).

403. I recognize some queer scholars contest reliance on privacy doctrine, and that privacy doctrine is subject to important limitations. See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Kendall Thomas, *Beyond Privacy*, 92 COLUM. L. REV. 1431 (1992). My interest in this Article is not in trying to resolve the arguments for or against privacy doctrine. Rather, I deploy it strategically, recognizing that it is one of the few spaces in current constitutional law where applicants to K6G may be able to obtain relief. Sharon Dolovich’s study of K6G purports to show that the K6G policy does not violate the Constitution. However, she errs in reducing potential constitutional objections to an equal protection claim. Dolovich, *supra* note 1, at 82. Her cursory analysis fails to recognize potential substantive due process claims and oddly focuses on a case involving a racial classification.

404. *Whalen v. Roe*, 429 U.S. 589, 600 (1976).

405. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). The opening paragraph of *Lawrence* alludes to both types of privacy: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.” *Id.* at 562.

406. *Whalen*, 429 U.S. at 600.

407. In *NASA v. Nelson*, 131 S. Ct. 746, 756–57 (2011), the Court stated that its prior cases, including *Whalen*, had merely assumed a right to informational privacy. Despite calls from some Justices to rule that the Constitution does not protect such a right, Justice Alito’s majority

suggests that the Court is divided over whether to recognize informational privacy as a right, I focus primarily on Supreme Court precedent reserving certain important personal decisions to the individual.

A. Informational Privacy

In 1997, Scott Wilinsky, a Minersville, Pennsylvania police officer investigating a potential burglary, stumbled upon two young men in a car with its headlights out.⁴⁰⁹ Wilinsky testified that eighteen-year-old Marcus Wayman and his seventeen-year-old companion had been drinking, and after a search turned up condoms, Wilinsky claimed that they admitted to being gay and that they were in the parking lot to engage in consensual sex.⁴¹⁰ Wilinsky took it upon himself to “lecture” the young men that the Bible opposed homosexuality.⁴¹¹ Apparently, Wilinsky was acquainted with Wayman’s grandfather because he told Wayman that if he did not tell his grandfather about his homosexuality, Wilinsky would.⁴¹² Wayman immediately told his companion that he would rather kill himself and, not long after his release from custody, he did.⁴¹³

The Third Circuit recognized that “the Supreme Court has not definitively extended the right to privacy to the confidentiality of one’s sexual orientation” and acknowledged that the Court’s (now overruled) decision in *Bowers v. Hardwick*⁴¹⁴ “gives us pause.”⁴¹⁵ Yet, it did not see *Bowers* as precluding

opinion declined to reach the issue because the briefs did not address this question. *See id.* at 756–57 n.10. Although the *Whalen* Court suggested that the individual has a right to avoid governmentally compelled disclosure of certain private facts, the physicians and patients who brought claims in that case failed to show a significant incursion into a private domain. The *Whalen* plaintiffs challenged a New York health regulation that required doctors to transmit to the state a copy of each prescription for certain drugs that are susceptible to abuse. 429 U.S. at 593. The Court rejected the plaintiffs’ facial challenge, which claimed that the state’s record-keeping regime might impose stigmatic harm on them and deter them from seeking such prescriptions. *Id.* at 600–04. Not only are disclosures to third parties, such as hospital personnel and insurance companies, routine in the health care context, the Court reasoned, but the state had a careful system for preserving the privacy of the information and criminalized the disclosure of such information to the public. *Id.* at 594, 602 (describing rules that required destroying prescription information after five years and a computer “surrounded by a locked wire fence and protected by an alarm system”). The *Nelson* Court similarly found that the information collected by the government for purposes of checking employees’ backgrounds was “subject to substantial protections against disclosure to the public.” 131 S. Ct. at 761–62. These protections, the reasonableness of the underlying questionnaire, and the fact that the government was acting in its sovereign capacity as an employer were sufficient to alleviate any constitutional concerns. *Id.*

408. *Nelson*, 131 S. Ct. 746 (2011).

409. *Sterling v. Minersville*, 232 F.3d 190, 193 (3d Cir. 2000).

410. *Id.* at 192–93.

411. *Id.* at 193.

412. *Id.* Wilinsky arrested them for underage drinking.

413. *Id.*

414. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

415. *Sterling v. Minersville*, 232 F.3d 190, 194 (3d Cir. 2000) Nonetheless, the court understood *Bowers* to pivot on homosexual acts, while the challenged state action in *Sterling*

“privacy protection for the intensely personal decision of sexual preference.”⁴¹⁶ The court compared the issue of one’s sexual orientation to a teenage girl’s decision to keep her pregnancy private, which it had validated in a recent case.⁴¹⁷ “It is difficult to imagine a more private matter than one’s sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity,” the court ultimately concluded.⁴¹⁸

A set of cases involving law enforcement employees’ claims against their employers provides additional support for my argument that governmental pressure to come out implicates the right to privacy.⁴¹⁹ In *Thorne v. City of El Segundo*, the Ninth Circuit held that the city’s questions about an aspiring police officer’s sexual activities violated her right to privacy.⁴²⁰ Deborah Thorne was a typist for the city who applied to be a police officer and achieved one of the top scores on the department’s written and oral exam.⁴²¹ Nonetheless, the evidence suggested that the city discounted Thorne’s application because of gender stereotypes, including an apparent perception that she had engaged in immoral sexual activity.⁴²² In response to an employment questionnaire asking whether she had ever been pregnant, Thorne acknowledged that she had had a miscarriage. This admission led to a polygraph examination, in which a male examiner asked for details about the miscarriage, including the identity of the father.⁴²³ When Thorne said that the father was a married police officer with the city, the examiner asked whether she had had sexual

concerned homosexual status. *Id.* at 195.

416. *Id.* at 195.

417. *Id.* at 196 (citing *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000)).

418. *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (referring to “sexual behavior” as “the most private human conduct”). Such cursory analysis is typical of this line of privacy cases, which treat sexuality as obviously private. Courts have not articulated a clear methodology for determining what is private and what is not. They seem to draw on a shared social conception of private domains and also recognize that information generally accessible to the public cannot be private. This latter question plays an important role in adjudicating Fourth Amendment claims, which require a “reasonable expectation of privacy. See Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1941 (2004).

419. These cases diverge from *Sterling* in that (1) they involve sexuality, but not homosexuality, and (2) the plaintiffs sued in their capacities as governmental employees, not as citizens. However, *Lawrence* largely abolished constitutional distinctions between heterosexual intimacy and homosexuality intimacy—with the principal open question being same-sex marriage. As I discuss more fully below, see *infra* Part V.D, prisoners, like governmental employees, receive reduced constitutional protections in some, but not all, contexts. See *Turner v. Safley*, 482 U.S. 78 (2009) (applying a standard less than strict scrutiny to free speech and right to marry claims); *NASA v. Nelson*, 131 S.Ct. 746, 757–58 (2011); *Johnson v. California*, 543 U.S. 499 (2005) (holding that strict scrutiny applies to equal protection claim based on racial segregation in California prisons).

420. 726 F.2d 459, 471 (9th Cir. 1983).

421. *Id.* at 462.

422. *Id.* at 468.

423. *Id.* at 462.

relationships with other department personnel and inquired as to whether the miscarriage was actually an abortion.⁴²⁴ The court held that these questions invaded core constitutional rights of privacy and association—“appellant’s interest in family living arrangements, procreation and marriage.”⁴²⁵

Unlike in *Sterling*, where the government failed to proffer a justification for the privacy invasion, in *Thorne* the city prefaced its questionnaire with the claim that it was asking about sex because “psychological sexual problems . . . may form the basis of a deviancy that could materially affect one’s ability to properly function as an employee of a law enforcement agency.”⁴²⁶ This justification did not persuade the Ninth Circuit, which found the questions poorly tailored to discover job-related “deviancies.”⁴²⁷ In particular, the sweeping, standardless discretion that city employees enjoyed in probing applicants’ private sexual matters disturbed the court.⁴²⁸ “The City set no standards, guidelines, definitions or limitations, other than the polygraph examiner’s own personal opinion, as to what might be relevant to job performance in a particular case.”⁴²⁹ The absolute, standardless authority of Deputies Lanni and Bell to define gay identity warranting admission to K6G is a striking parallel to the logic of the *Thorne* holding. The Jail provides no formal guidelines for or oversight of this process. Rather, the crucial definitional issues are left to two heterosexual officers’ discretion.

A final case, *Eastwood v. Department of Corrections*,⁴³⁰ is noteworthy because the court characterized the state’s claim that its questions were relevant as resting on stereotype. The case centered on a sexual harassment investigation gone awry. Karen Eastwood, an employee of the Oklahoma Department of Corrections, told her employer that a fellow employee drugged and sexually assaulted her after a training session.⁴³¹ The employer, however, seemed more interested in investigating Eastwood’s sexual past and protecting the apparent perpetrator. Eastwood alleged that the investigator “forced her to reveal facts about her sexual history.”⁴³² The employer considered Eastwood’s sexual history relevant, inferring that if she were sexually experienced, her complaint was likely baseless.⁴³³

424. *Id.* at 469–70 & n.9.

425. *Id.* at 469.

426. *Id.* at 471.

427. *Id.* at 469–71 (stating that the city failed to “introduce evidence that would show that appellant’s affair with a police officer before becoming a police officer, herself, affected or could potentially affect her job performance”). The court also found that the questions about an abortion were “totally irrelevant to ‘on-the-job-sex.’” *Id.*

428. *Id.* at 470 (stating that the “questioning in the area of sexual activity was not regulated in any way. [The examiner] was given free reign to inquire into any area he chose.”).

429. *Id.* at 470.

430. 846 F.2d 627 (10th Cir. 1988).

431. *Id.* at 629.

432. *Id.*

433. *Id.* at 631 n.2.

But the Tenth Circuit rejected this line of reasoning as “antiquated.” “[E]veryone has the right to refuse a sexual advance,” it concluded, not just the “sexually innocent.”⁴³⁴ *Eastwood* is instructive in that it suggests that the fact that jail officials might genuinely believe that an inmate’s “gay lifestyle” is closely related to victimization is not dispositive. A court must independently assess the connection between the asserted state interest and the intrusive questions said to advance it.⁴³⁵

A court adjudicating a privacy claim would also have to consider the extent of the intrusion required to show infringement of the constitutional right. In none of the aforementioned cases did the government literally compel the plaintiff to confess private information. In *Sterling*, Wayman could have taken his chances and hoped that Wilinsky would not out him, and in the government employee cases, the plaintiffs had the option of remaining silent and resigning. Yet, the courts recognized that the governmental coercion brought to bear on the right to privacy imposed a substantial burden, and this was sufficient to show that the officer’s actions infringed the plaintiff’s right to privacy.⁴³⁶ These precedents suggest that the questioning in the K6G screening process can cross the constitutional line by threatening inmates with a substantial deprivation, such as protection from sexual assault.⁴³⁷

The K6G screening questions require the revelation of information which is as private as the information at issue in the cases discussed above: homosexuality, abortion, and heterosexual affairs. Deputies Bell and Lanni ask detailed questions about the inmate’s sexual practices (“When was the last time you slept with a woman?” “Do you pitch or catch?” “What does semen taste like?”).⁴³⁸ In addition, they expect inmates freely to discuss ex-boyfriends and other aspects of their “gay lifestyle,” including their family members’ knowledge of it.⁴³⁹ Moreover, the Jail provides none of the privacy protections that alleviated constitutional concerns in *Nelson* and *Whalen*.⁴⁴⁰ Intake officers ask inmates to identify as homosexual while they are in a line of inmates in a public space. After they come out, officers assign inmates to a seating area that

434. *Id.*

435. *Id.* at 631 (finding that “there exists little correlation between plaintiff’s sexual history and whether she fabricated the story of being sexually molested”); *see also* *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Penn. 1979).

436. *Shuman*, 470 F. Supp. at 457; *Sterling v. Minersville*, 232 F.3d 190, 197 (3d Cir. 2000); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983).

437. *See Zablocki v. Redhail*, 434 U.S. 374, 387 & n.12 (1978) (indicating that laws that “significantly interfere” with protected decisions trigger heightened scrutiny); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* (2d ed. 2005) (stating that the Court considers “directness and substantiality of the interference” with the right, but that the Court has provided “surprisingly little discussion of what constitutes a direct and substantial interference”) (quoting Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1182 (1996)) (identifying an implicit “substantiality threshold”).

438. Dolovich, *supra* note 1, at 38 n.192.

439. *See* Lanni Interview, *supra* note 40, at 13–14.

440. *See supra* note 408.

implies they are gay, and if they pass the K6G test, officers require them to announce perpetually their sexual orientation by wearing distinct powder blue uniforms. As I discuss below, these disclosures may haunt an inmate for years, whether he is sentenced to a California prison or returned to his community.

B. Important Life Decisions

Although the K6G screening process may independently violate the right to privacy based on the above reasoning, considering the life-changing effects that may flow from coming out sharpens the constitutional question. Coming out entails not just divulging one's private sexual practices or desires,⁴⁴¹ which is particularly risky in the context of jail, but it entails the possibility of radically altering one's life trajectory, as discussed in Part IV. Coming out is likely to change how a man views himself, how others view and treat him, and, in the case of a man of color, his racial identity. Because society has often constructed Gay Identity as white,⁴⁴² and some voices in communities of color have sought to disown homosexuality,⁴⁴³ some may see a black man who comes out as gay as less authentically black or even antiblack.⁴⁴⁴ Latino men often face similar pressures. Coming out thus belongs in the small set of highly consequential personal decisions, such as the decision to terminate a pregnancy,⁴⁴⁵ the right to control the upbringing of one's child,⁴⁴⁶ and the right to marry.⁴⁴⁷

Eisenstadt v. Baird marked a turning point in the Supreme Court's privacy jurisprudence.⁴⁴⁸ Earlier decisions had tethered the right to privacy to tradition, protecting conservative institutions such as marriage and childrearing.⁴⁴⁹ In *Griswold v. Connecticut*, the Court held that the state could not bar a married couple from using contraception, but suggested that states could criminalize

441. At a minimum, people assume that a man who says "I am gay" has had sex with men or soon will.

442. See generally Carbado, *supra* note 197 (critiquing exclusion of people of color in gay rights campaign against military's "Don't Ask, Don't Tell" policy); Bérubé, *supra* note 142, at 234 (revealing whiteness of dominant gay community); Robinson, *supra* note 18, at 1509–10 (discussing how white men have dominated gay imagery in the media).

443. See, e.g., Carbado, *supra* note 197, at 1467 (describing such arguments); Dwight A. McBride, *Can the Queen Speak? Racial Essentialism, Sexuality, and the Problem of Authority*, in *BLACK MEN ON RACE, GENDER AND SEXUALITY: A CRITICAL READER* 253 (Devon W. Carbado ed., 1999).

444. A common narrative in black popular culture is that black men who have sex with men, especially those who sleep with men and women, are harming the black community. Some people in the community view such men as one reason why black women lack marriage opportunities and why the traditional, heterosexual black family is endangered. For examples and critiques of this narrative, see generally Robinson, *supra* note 18.

445. See *Roe v. Wade*, 410 U.S. 113 (1973).

446. See *Troxel v. Granville*, 530 U.S. 57 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

447. See *Zablocki v. Redhail*, 434 U.S. 378 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

448. 405 U.S. 438 (1972); see also Tribe, *supra* note 418.

449. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

fornication and adultery consistent with the Constitution.⁴⁵⁰ Seven years later, however, *Eisenstadt* broke rank by articulating a more capacious understanding of the privacy right: “If the right of privacy means anything,” Justice Brennan declared, “it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁴⁵¹ In place of tradition, *Eisenstadt* installed the importance to the individual—as opposed to a couple—as the primary baseline for determining privacy rights.⁴⁵² *Eisenstadt* thus opened the door for *Roe v. Wade*’s recognition of the right to terminate a pregnancy, which derives from “the right of a woman to make certain fundamental decisions affecting her destiny.”⁴⁵³ In reaffirming *Roe*’s “central holding,” the joint opinion in *Planned Parenthood v. Casey*⁴⁵⁴ stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁴⁵⁵

Lawrence extended this reasoning, citing the *Casey* passage above and adding: “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁴⁵⁶ Justice Kennedy focused on the connection between sexual acts and personal autonomy.⁴⁵⁷ Sodomy statutes, he

450. *Id.*

451. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (emphasis in original).

452. *See id.* at 453 (defining core of right to privacy as matters “fundamentally affecting a person”). *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion) (defining privacy rights based on a specific and narrow definition of tradition). At present, it appears that five Justices adhere to Justice Kennedy’s view that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Lawrence v. Texas*, 539 U.S. 558, 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

453. *Lawrence*, 539 U.S. at 565.

454. 505 U.S. 833 (1992).

455. *Id.* at 851.

456. *Id.* at 574. Some scholars have worried that *Lawrence* resituates the right in the couple because of the Court’s several references to relationships. *See, e.g.*, Franke, *Domesticated Liberty*, *supra* note 403 (“[T]he Court [in *Lawrence*] relies on a narrow version of liberty that is both geographized and domesticated. . . . *Lawrence* both echoes and reinforces a pull toward domesticity in gay and lesbian organizing.”). However, limiting *Lawrence*’s holding to those in committed relationships would be at war with the facts of the case. *See* Dale Carpenter, *The Unknown Past of Lawrence*, 102 MICH. L. REV. 1464, 1478 (2004) (revealing that case involved turbulent love triangle with racial overtones). More importantly, I find persuasive Laurence Tribe’s argument that, even if the Court is concerned only with committed relationships, it must protect individual sexual encounters because they could eventually lead to long-term relationships. Tribe, *supra* note 418, at 1941.

457. *Lawrence*, 539 U.S. at 567 (“To say that the issue in *Bowers* was simply the right to

explained, offend the Constitution by “seek[ing] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”⁴⁵⁸

Coming out—or deciding *not* to come out—qualifies as a personal decision “fundamentally affecting a person”⁴⁵⁹ in that it goes to the very definition of self and one’s place in a world in which sexual orientation still matters. Considering the experiences of men on the margins of the gay community should help courts avoid fostering a monolithic conception of coming out and respect the individual’s decision—whether one decides to come out or stay in. Even those who think marriage and childbearing are desirable life goals should recognize the individual’s right to control the timetable and contexts for making those decisions, instead of having the government dictate when one will marry or come out.⁴⁶⁰

Fortunately, there are a few seeds of this flexibility in the Court’s privacy jurisprudence. The Court has long recognized a “freedom to marry or *not* marry.”⁴⁶¹ On several occasions, it has expressed concerns about state efforts to “standardize” its citizens by homogenizing children through the public schools or enforcing a fixed family structure on all people.⁴⁶² Of course, other opinions show little concern for a right not to conform,⁴⁶³ and the Court’s privacy cases are hardly a model of clarity.⁴⁶⁴

Still, Justice Brennan’s warnings about a “pinched” conception of family⁴⁶⁵ should also apply to coming out: the Court can adopt a broad enough understanding to allow diverse forms of sexual identity. It need not write into law the dominant white model. “‘Liberty’ must include the freedom not to

engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

458. *Id.*

459. 405 U.S. 438.

460. *See Murray, supra* note 307.

461. *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (emphasis added). At the same time, the Court has described marriage as “the most important relation in life,” suggesting that it is not completely neutral as to whether people choose to marry. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

462. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (“The Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (rejecting state efforts to “standardize its children by forcing them to accept instruction from public school teachers only”).

463. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6, 130 (1989) (Scalia, J., plurality opinion) (arguing for a specific definition of right and narrow definition of tradition).

464. *See generally Rubinfeld, supra* note 215 (demonstrating problems in the Court’s use of personhood as a basis for privacy rights).

465. *See Michael H.*, 491 U.S. at 141, 145 (Brennan, J., dissenting) (“We are not an assimilative, homogenous society, but a facilitative, pluralistic one”).

conform.”⁴⁶⁶ Generally, the Court has recognized that it is for a woman to decide whether to become a mother and also what kind of mother she wants to be.⁴⁶⁷ The same flexibility that applies to the right to be a parent—the right to define one’s own performance of the parental role—should apply to the right to decide whether, when, and how to come out.⁴⁶⁸ As Jed Rubenfeld has suggested, the state should not be able to standardize sexual identity.⁴⁶⁹ I argue that this principle applies not simply to state efforts to make gay men identify as straight, but also to state efforts to make MSM identify as gay.

C. The K6G Policy and Coming Out

The K6G policy impacts the men who are subject to it in different ways. Perhaps the most challenging aspect of the K6G screening policy is that it both *empowers* men who want to be out while incarcerated, and *burdens* those who would prefer not to disclose their sexual conduct. Men who were out before being incarcerated might find it burdensome to cover their sexuality while in jail. For these men, an additional consequence of incarceration is that they must hide their identities or risk being exposed to sexual violence. That said, the average inmate stays in the Jail for about forty days, which reduces the extent of the burden. Further, many gay men do not conform to gay stereotypes and may easily conceal their sexual orientation.

For other men, however, hiding their sexual orientation or “butching up” their gender performance to ward off impressions that they are gay may not be a realistic option.⁴⁷⁰ Although an effeminate man might be able to pull this off for limited periods, inmates are under constant surveillance by other inmates, deputies, and staff. Many inmates are housed in so-called dorms, where as many as 110 inmates live in a single room filled with stacks of bunk beds and open bathrooms and showers. As such, they lack private space within which they can drop the mask and be themselves.

In addition, there are men who were not out about their sexuality while on the outside and are disinclined to come out while in jail. The K6G unit’s offer of protection, however, might tempt such men to come out. Yet, coming out is not sufficient to guarantee access to K6G. An inmate may come out and thus become newly vulnerable, and yet Deputies Lanni and Bell may turn him away because they do not believe his assertion of gay identity. In other cases, even men who were out before incarceration (either completely or selectively) and

466. *Id.* at 141.

467. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (joint opinion); *Pierce*, 268 U.S. at 510, 535 (holding that parent has right to decide how to educate her child).

468. Of course there are limits to this individual freedom. One cannot define parenting in a way that involves abusing or neglecting her kids and expect to retain her rights.

469. Rubenfeld, *supra* note 215, at 793, 799–800 (identifying the harm of laws that “harness us to a given seat and direct us down a single, regulated road”).

470. Interview with Matt Foreman, at 16 (Nov. 19, 2010) (transcript on file with author).

may struggle to pass as straight in GP may decline to come out during the intake process because of its public nature, the Jail's refusal to explain why staff ask the question, and the homophobic environment during intake. The Jail's policy requires such men to forfeit potential protection from sexual assault even though they reasonably declined to come out.

The K6G policy turns on coming out in at least three respects. It requires coming out: (1) before incarceration, to develop community knowledge and ties necessary to verify Gay Identity; (2) during incarceration, through screening and identification processes; and (3) after incarceration, when the inmate matriculates into prison or is released.

First, the policy effectively requires inmates to have come out before they were incarcerated. The deputies ask inmates to provide names of family and friends who can verify Gay Identity. Although the deputies do not describe this as an absolute requirement,⁴⁷¹ when coupled with the expected knowledge of gay spaces and gay culture, it may pose an insurmountable obstacle to some. The cultural questions about gay slang and West Hollywood favor men who are out of the closet. Men who are not out are less likely to be seen in public at gay pride parades and gay nightclubs and have friends who can teach them gay slang. In short, their failure to have led the expected "gay lifestyle"⁴⁷² before incarceration leaves some MSM at a marked disadvantage.

Second, inmates must come out to an intake officer to be considered for the K6G unit. This process typically takes place in a large room where officers are processing many new inmates. An inmate might reasonably be perplexed by the "Are you a homosexual?" question, which is provided without context, with no information about the existence of a unit for gay and transgender inmates or the reasons why being openly gay might make one vulnerable in GP. This process assumes that inmates trust law enforcement with sensitive personal information, which seems unlikely given the context. Black and brown men are especially likely to have had negative experiences with law enforcement and to view their sexual practices as a private matter.⁴⁷³

Moreover, the Jail does not make the conversation private. Although the conversation between the intake officer and the inmate is one-on-one, it is possible that other inmates may overhear the conversation.⁴⁷⁴ Once an inmate self-identifies as homosexual, he is assigned to a certain area of the intake

471. The deputies take all factors into account, which we might call in legal parlance a "totality of the factors" test. *Cf. id.* at 24, 36. They have admitted men who claimed to be closeted when they were convinced that they were not heterosexual or bisexual. *Id.* at 19. But when inmates cannot provide names and numbers, this determination seems to rest ultimately on the two officers' personal intuition.

472. Lanni Interview, *supra* note 40, at 13–14 (stating that he looks for proof that an inmate led a "gay lifestyle" outside of jail).

473. *See supra* note 388.

474. *See* Lanni Interview, *supra* note 40, at 2.

facility, which further signals his difference from inmates destined for GP.⁴⁷⁵ If self-identification were sufficient to guarantee access to the K6G unit and K6G inmates were completely insulated from GP, this marking might be less troubling. But that is not the case. Inmates who self-identify, but ultimately flunk the Jail’s “gaydar test” may experience heightened vulnerability in GP precisely because of the governmentally-elicited disclosure of gay identity—whether true or false.⁴⁷⁶

Further, K6G inmates interact with GP from time to time—for example, while walking down the hall on the way to class. The powder blue uniforms make clear what the inmate’s demeanor might not reveal.⁴⁷⁷ Although the K6G deputies argue that the special color makes it easy for Jail staff to identify gay and transgender inmates to protect them from GP inmates,⁴⁷⁸ there are reports that deputies and staff are more likely to harass K6G inmates than GP inmates.⁴⁷⁹ Several people who were incarcerated in K6G or work in the Jail reported incidents in which staff harassed K6G inmates, calling them “faggots” and feminizing insults such as “bitch.”⁴⁸⁰ In the reception center, staff have responded to inmates who identify as homosexual by saying, “Well, get over here, you faggot!”⁴⁸¹ Deputies have snatched the wig off a transgender inmate’s head in reception to humiliate her.⁴⁸² Informants also recounted a 2009 incident in which three deputies ordered transgender K6G inmates to line up against a wall, strip naked and bend over so the staff could inspect and ridicule their

475. *Id.*

476. Kelley et al. Interview, *supra* note 65, at 28–29 (stating that “K6[G] [inmates] catch[] hell . . . the correctional officers, the general population; I mean everyone messes with them”).

477. *Id.* at 45 (“The powder blue is the mark. . . . It marks them for anybody going down the hallway.”).

478. See Tiedeman Interview, *supra* note 63, at 5. One might ask why this is necessary. If staff members observe one inmate harassing another, why should the color of the uniform determine whether or how the staff intervenes? The assumption, once again, appears to be that gay inmates are inherent victims and GP inmates are invariable perpetrators. *But see* Kelley et al. Interview, *supra* note 65, at 46 (stating that some transgender women inmates “can fight and some . . . are tough. Don’t let the femininity and glamour fool you.”).

479. Tiedeman Interview, *supra* note 63, at 5 (suggesting that staff pose a greater threat to K6G inmates than GP inmates); see Kelley et al. Interview, *supra* note 65, at 17–18 (same); *cf. also* Alarid, *supra* note 217, at 87, 89 (finding that 90 percent of inmates in special unit for gay and bisexual inmates in an unnamed large city jail indicated that staff are more disrespectful than straight inmates); Rubinfeld, *supra* note 215, at 777 (stating that “invidious sexual identification” is “often conducted in the name of helping the group at issue”).

480. Troy Erik et al. Interview, *supra* note 306, at 5–7 (“[K6G] is still horrible because [deputies] would not treat you with respect”); Kelley et al. Interview, *supra* note 65, at 19. In general, “law enforcement remains a notoriously homophobic occupation.” David Alan Sklansky, “*One Train May Hide Another*”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 932 (2008); see Ricci, *supra* note 49, at B1 (describing “the traditionally macho and bureaucratic [L.A.] Sheriff’s Department culture” and quoting Deputy Bell as describing other deputies as homophobic).

481. Kelley et al. Interview, *supra* note 65, at 18.

482. *Id.*

private parts.⁴⁸³ According to several former inmates, this happens regularly to transgender and gay inmates, although transgender inmates bear the brunt of the abuse because staff members are disturbed and fascinated by their rejection of a male identity.⁴⁸⁴ For example, former inmates say that deputies use security as a pretext, demanding that transgender inmates strip naked randomly so they can ensure that they do not have any contraband in their long hair.⁴⁸⁵

Moreover, while Deputies Lanni and Bell determine Gay Identity, they do not oversee the reception area, the dorms in which K6G inmates spend most of their time, or many interactions between K6G inmates and GP inmates.⁴⁸⁶ Given the lack of consistent oversight, hostile climate,⁴⁸⁷ and lack of privacy, an inmate might reasonably decide not to disclose his gay identity.⁴⁸⁸ Indeed, some inmates who have done time in K6G chose to be assigned to the GP when they returned to the Jail.⁴⁸⁹ This shows that labeling K6G inmates may simultaneously grant them special protections and expose them to specific forms of discrimination.

Third, coming out to gain access to K6G will often entail coming out after one is released from the Jail. Once one has come out, he often cannot control

483. *Id.* at 29–31 (describing deputies as saying, “Crack that ass open! Spread it! Cough!” and “nudging each other, ‘Look at that, look at that ass’”). The three deputies stopped a group of K6G inmates, told the inmates they perceived as gay to move on and then directed their attack at the inmates they perceived as transgender. *Id.* at 31.

484. *See* Troy Erik et al. Interview, *supra* note 306, at 17 (statement of Yvette Winstead, recounting incident from 1995) (“[T]he sheriff would make the queens take off their clothes and walk in front of general populations with their penises, and their breasts, we had to walk through these men—I had tears in my eyes, this guy was just laughing, talking about how big I was, and look at them titties, and I got a shave shadow, and they made us walk through everybody to go around and get our clothes, and we walked all the way back.”). Toni Beasley, who was recently released from K6G, stated that she had experienced or observed transgender inmates being “stripped out” “over twenty times.” *Id.*; *see also* Arkles, *supra* note 22, at 527 (noting that abusive, humiliating searches of transgender people are common in many facilities).

485. Troy Erik et al. Interview, *supra* note 306, at 19.

486. Kelley Interview, *supra* note 65, at 28. That said, when Lanni and Bell learn about homo and transphobic harassment, they do what they can to address it. *Id.* at 30. But they lack supervisory authority over other deputies and are subject to a code that requires loyalty to fellow officers—not unlike the “no-snitching” policy among the jail’s inmates. *Id.* at 34 (stating that the deputy who supervised K6G inmates was removed for being too nice to them).

487. *Id.* at 42 (“Fear starts from the moment they walk through reception, especially for the ones that are new coming through the system.”).

488. The screening process appears to rely on a single moment to fix an inmate’s sexual identity. Whether an inmate does not consider himself to be gay during intake and later develops a gay identity—perhaps because of sex with men in the GP—is too fearful initially to identify as gay, or simply does not intuit that a staff member is asking about his sexual identity because of the K6G unit, it is very hard for him to revisit the question and be reclassified as gay later. *Id.* at 24 (stating that inmates who were assigned to GP have great difficulty convincing deputies that they are gay when they are next incarcerated).

489. *See id.* at 45 (“They identify as being gay and they were placed in the K6 dorms but the next time they came back, they’re like, uh-uh, it’s not safe for me to be in there, because of the deputies.”); *see also* Troy Erik et al. Interview, *supra* note 306, at 29, 31–32 (statement of Troy Erik, who is transgendered but does not have breast implants) (“I chose not to be in K6G” because the deputies are worse than in administrative segregation).

where the news travels. The average stay in K6G is around forty days. Many inmates ultimately are convicted of felonies and sentenced to time in a state penitentiary. California prisons typically lack special units for gay and transgender inmates.⁴⁹⁰ Thus, the inmate who came out to gain admission to K6G will have to fend for himself when thrust into a state prison with inmates who remember him as a K6G inmate. According to one informant, “The bad stuff that happen[s] in the county jail don’t stop once they get to prison. It elevates.”⁴⁹¹

Adverse consequences may follow the inmate not only from facility to facility, but also from facility to community once ultimately released from jail or prison.⁴⁹² Because the majority of the people that Los Angeles incarcerates come from a subset of poor black and brown neighborhoods, it is quite likely that a K6G inmate will interact with people from his or her neighborhood that are simultaneously incarcerated but assigned to GP.⁴⁹³ The Jail features an active rumor mill about gay identification and HIV, which the deputies and Jail staff foster.⁴⁹⁴ The stigma of being outed may imperil the inmate’s relationships with family and friends and undermine his ability to reenter society successfully and avoid crime.⁴⁹⁵ Hence, the “protections” of K6G may be short-lived and the long-term consequences of coming out may ultimately overwhelm them.

D. Special Context of Jail/Prison: What Constitutional Rights Remain?

Although the preceding analysis provides a firm foundation for the claim that the right to privacy encompasses the decision whether or not to come out, the Supreme Court has established that prisoners do not necessarily retain all of the rights guaranteed to the people. Two principal Supreme Court cases determine the constitutional rights that prisoners retain during incarceration: *Turner v. Safley*⁴⁹⁶ and, more recently, *Johnson v. California*.⁴⁹⁷

In *Turner v. Safley*,⁴⁹⁸ the Court assessed the constitutionality of legal restrictions on inmate-to-inmate correspondence and inmates’ ability to marry

490. See Lara, *supra* note 15, at 590.

491. Kelley Interview, *supra* note 65, at 21.

492. For example, just visiting the Centers for Health Justice, a nonprofit group that provides HIV testing and related services, can mark a GP inmate as HIV-infected and gay. *Id.* at 11. If other inmates know such an inmate has sought the Center’s services, they may inform his family or friends outside of jail and punish him physically and socially. *Id.* In addition, the deputies sometimes walk inmates in the GP past the K6G unit, which permits GP inmates to see people they know and learn of their gay identity. *Id.* at 12 (noting that the requirement of powder blue uniforms and mixing of K6G and GP inmates “elevate the stigma”).

493. *Id.* See also Gonzalez Interview, *supra* note 268, at 5 (statement by coordinator of HIV prevention services at Forensic AIDS Project, which provides services to the San Francisco Jail, noting challenges of inmates trying to keep life inside jail separate from life on the outside).

494. See Kelley et al. Interview, *supra* note 65, at 11–12 (stating that deputies and staff participate in gossip about gay identity and HIV and it “spread[s] like wildfire”).

495. *Id.* at 13–14.

496. 482 U.S. 78 (1987).

497. 543 U.S. 499 (2005).

498. 482 U.S. 78 (1987).

at the Renz Correctional Institution in Missouri. The Court purported to apply a uniform constitutional standard to these restrictions, but its analysis and conclusions suggest otherwise.⁴⁹⁹ At the outset, it announced that the Eighth Circuit's application of strict scrutiny was erroneous and that "a lesser standard of scrutiny is appropriate in determining the constitutionality of prison rules."⁵⁰⁰ The Court majority upheld the first challenged regulation concerning inmate-to-inmate mail but invalidated the marriage regulation. The effect of the Renz mail policy was that inmates generally could not correspond with inmates in other state facilities unless they were related or were corresponding regarding legal matters.⁵⁰¹ The Court established that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁵⁰²

This test initially appears to resemble rational basis review ("RBR"), the lowest level of constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Yet, *Turner* provides a meatier, more detailed articulation of its test than the Court has applied in traditional RBR cases. First, the Court requires a "valid, rational connection" between the prison regulation and a "legitimate and neutral" government objective.⁵⁰³ Second, the Court examines "whether there are alternative means of exercising the right that remain open to prison inmates."⁵⁰⁴ Third, the Court considers "the impact the accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."⁵⁰⁵ While it acknowledged that "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order," the Court noted that when recognizing a right would have a "significant ripple effect on other inmates and staff, courts must be particularly deferential."⁵⁰⁶ Finally, the court considers whether "obvious, easy alternatives" are available.⁵⁰⁷ When the Court can identify such alternatives, the challenged policy may be an "exaggerated response" to prison concerns.⁵⁰⁸ Although the Court looks into potential alternatives, it made clear that

[t]his is not a 'least restrictive alternative' test [a hallmark of strict scrutiny]. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid

499. See *Turner*, 482 U.S. at 81.

500. *Id.*

501. *Id.* at 81–82.

502. *Id.*

503. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

504. *Id.* at 90.

505. *Turner*, 482 U.S. at 90.

506. *Id.*

507. *Id.*

508. *Id.*

penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.⁵⁰⁹

Applying this test first to the mail regulation, the Court concluded that “the record clearly demonstrates that the regulation was reasonably related to legitimate security interests.”⁵¹⁰ The Court pointed to testimony by prison officials that “mail between inmates can be used to communicate escape plans and to arrange assaults and other violent acts,” including among gang members that officials have intentionally separated.⁵¹¹ Further, the regulation’s constitutionality was supported because the class of people subject to the regulation was “limited,” the regulation did not “deprive prisoners of all means of expression,” and the failure to regulate inmate correspondence could have produced a “ripple effect” of violence at various institutions by “facilitat[ing] the development of informal organizations that threaten . . . [prison] safety and internal security.”⁵¹² Although the prisoners argued that prison officials could screen inmate-to-inmate correspondence, the Court concluded that this alternative would be very costly and ineffective.⁵¹³

By contrast, the Court invalidated the marriage policy and advanced reasoning that seems more stringent than the scrutiny it applied to the mail policy. Despite being subject to “substantial restrictions as a result of incarceration,” the right to marry survives imprisonment, the Court affirmed.⁵¹⁴ Importantly, *Turner* recognized that the emotional and spiritual dimensions of marriage, as well as its legal benefits, remain critical even when separation disrupts the physical component. These components are “unaffected by the fact of confinement or the pursuit of legitimate corrections goals.”⁵¹⁵ The challenged policy required the superintendent of the prison to approve an inmate’s request to marry, which he generally denied unless pregnancy or birth of a child was involved.

Although it noted that the policy’s impact on noninmates’ interests might justify the application of strict scrutiny, the Court went on to apply the “reasonable relationship test” and found that, even under this standard, the marriage policy could not stand.⁵¹⁶ The petitioners advanced security and rehabilitation justifications for their policy. Specifically, they argued that “love triangles” among inmates would lead to violent clashes. The Court rejected this argument because (1) “nothing in the record suggest[s] that the marriage regulation was viewed as preventing such entanglements;” and (2) “[c]ommon

509. *Id.* at 91.

510. *Id.*

511. *Id.* at 91 (citing record).

512. *Id.* at 92.

513. *Id.* at 93.

514. *Id.* at 94.

515. *Id.* at 95 (“Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.”).

516. *Id.* at 97.

sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles; surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one.⁵¹⁷ Further, the Court found that there were “obvious, easy alternatives” that addressed any security concerns, such as a federal policy that allows marriage unless the warden finds the marriage would present a security threat.⁵¹⁸

The asserted concern with inmate rehabilitation was similarly unpersuasive. The rehabilitation justification centered on female inmates, who were said to be vulnerable to abusive relationships with men.⁵¹⁹ Yet, the policy “swe[pt] much more broadly” than that, banning marriages by male inmates as well.⁵²⁰ In addition, the record evidence concerned female relationships with male inmates or ex-felons, which did not explain the ban on female inmates marrying men without criminal backgrounds.⁵²¹ The Court found the policy to be both “lopsided” and overbroad in that initially, the prison only scrutinized marriage requests by females, even though there was little evidence that most requests involved an abusive relationship.⁵²² Although it affirmed prison authorities’ right to regulate the time and circumstances of marriage ceremonies, the Court ruled the marriage regulation unconstitutional.⁵²³

The outcome in *Turner* raises two important questions. First, are prisoners who assert constitutional rights entitled to mere RBR or a higher standard? Second, does the *Turner* standard fluctuate depending on the context—that is, might some rights (*e.g.*, First Amendment rights) be subject to minimal scrutiny while others (*e.g.*, privacy-based rights) receive a heightened rationality analysis?⁵²⁴

The Court’s decision to call the test a “reasonable relationship” test—as well as its statement that it requires a “logical connection” that is “not arbitrary or irrational”—brings to mind RBR.⁵²⁵ But in the end, the *Turner* standard is more rigorous in that it requires conclusions based on *actual* evidence in the record, rather than mere conjecture, which has sufficed in many traditional

517. *Id.* at 98.

518. *Id.*

519. *Id.* at 97.

520. *Id.* at 98–99.

521. *Id.* at 99.

522. In light of Justice O’Connor’s leading role in shaping the Court’s gender equality jurisprudence, *see, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), it seems likely that she viewed this justification as in tension with Equal Protection Clause principles. However, in light of the other problems with the policy, Justice O’Connor merely hinted at this additional ground for contest. *See Turner*, 482 U.S. at 99 (noting that its “lopsided” criticism was “not necessary to the disposition of this case”).

523. *Turner*, 482 U.S. at 99.

524. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

525. *Turner*, 482 U.S. at 89, 91.

RBR cases.⁵²⁶ Moreover, the court must consider several detailed factors that typically play little or no role in RBR. The court must consider whether the policy is a proportionate response to documented concerns or is an “exaggerated response.”⁵²⁷ A test requiring a mere “logical connection” would be “virtually meaningless,”⁵²⁸ like RBR, but the Court’s careful parsing of the marriage regulation shows that it was applying a more stringent standard.

Justice Stevens accused the majority of applying its standard inconsistently and characterized the disparate outcome as “striking and puzzling.”⁵²⁹ “When all the language about deference and security is set to one side, the Court’s erratic use of the record to affirm the Court of Appeals only partially may rest on an unarticulated assumption *that the marital state is fundamentally different from the exchange of mail.*”⁵³⁰ Justice Stevens’ interpretation of the majority opinion is persuasive; that is, the majority appears to see one right (the right to marry) as more weighty than the other (the right to free speech).

The Court’s subsequent decision in *Johnson v. California*,⁵³¹ in which Justice O’Connor again wrote the majority decision, adds support to *Turner*’s context-specific interpretation. The scrutiny the Court applies to a prison regulation now explicitly depends on the content of the asserted right. In *Johnson*, the Court reviewed the Ninth Circuit’s decision that a California prison policy imposing temporary racial segregation on new and transferred inmates was constitutional under the *Turner* standard.⁵³²

The Supreme Court, however, held that the Ninth Circuit erred in applying *Turner* to *Johnson*’s suit.⁵³³ It reiterated prior statements from affirmative action cases that “we . . . apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly

526. *Id.* at 91 (“*The record* clearly demonstrates that the regulation was reasonably related to legitimate security interests.”) (emphasis added); *id.* at 98 (“We are aware of no place *in the record* where prison officials testified that such ready alternatives would not fully satisfy their security concerns.”) (emphasis added); *id.* at 99 (“The rehabilitation concern appears from the record to have been centered almost exclusively on female inmates.”). Compare with *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (stating that failure to provide evidence or support in the record “has no significance in rational-basis analysis”). It remains unclear, however, how much evidence *Turner* requires; the majority and dissent disagreed strongly on this question. *Turner*, 482 U.S. at 93 (arguing that Justice Stevens’s partial dissent misconstrues the majority’s standard).

527. *Turner*, 482 U.S. at 91.

528. *Id.* at 112–13 (Stevens, J., concurring in part and dissenting in part).

529. *Id.* at 100.

530. *Id.* (emphasis added). One can also read this opinion to turn on the linchpin of security. The Court appeared to perceive a substantial risk that inmates would use correspondence to plan escapes and other illegal activity, while the risk that permitting marriages would lead to violent love triangles seemed far less plausible.

531. 543 U.S. 499 (2005).

532. *Id.* at 504–05.

533. *Id.* at 508.

suspect tool.”⁵³⁴ The Court stated that “we have applied *Turner*’s reasonable relationship test only to rights that are ‘inconsistent with proper incarceration.’”⁵³⁵ Race, it announced, is different:

The right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment’s ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system.⁵³⁶

The Court struggled to distinguish race discrimination from the long list of “fundamental rights” subjected to *Turner*: freedom of speech, association, access to court, due process, free exercise of religion, and of course the right to marry.⁵³⁷ Justice O’Connor suggested that allowing race discrimination would undermine the legitimacy of the entire justice system.

But surely denying due process to prisoners or denying them access to court would cast doubt on the system’s legitimacy as well. Moreover, even as the *Johnson* majority singled out race-based policies as especially dangerous to the justice system, it refused to impose a complete ban on racial discrimination in prison. To the contrary, it authorized racial discrimination so long as a “compelling justification” supported the policy and it was “narrowly tailored,” as in all other Equal Protection race cases.⁵³⁸ And it emphasized that the fact that strict scrutiny applies “says nothing about the ultimate validity of any particular law” because “[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’”⁵³⁹ It is ironic that in refusing to “undermine our ‘unceasing efforts to eradicate racial prejudice from our criminal justice system,’” the Court quoted *McCleskey v. Kemp*, which notoriously *refused* to remedy empirically documented racial prejudice in the administration of the death penalty.⁵⁴⁰ If race discrimination is permissible in the distribution of death sentences, one might ask, why not in the distribution of prisoners to cells? *Johnson* thus carves out an exception from *Turner* for race, but fails convincingly to distinguish it from the right to marry, among other paramount constitutional rights.

Whether *Johnson* destabilized *Turner*’s attempt to curb prisoners’ rights or merely made explicit *Turner*’s suggestion that different standards apply to different rights, it creates an opening for advocates to press the Court to apply strict scrutiny to newly recognized substantive due process rights. Even if one

534. *Johnson*, 543 U.S. at 506 (internal quotation marks omitted) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

535. *Id.* at 510 (quoting *Overton v. Bazetta*, 539 U.S. 126, 131 (2003)).

536. *Id.* at 510–11.

537. *Id.*

538. *Id.* at 515 (“Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts.”).

539. *Id.* at 514–15 (quoting *Adarand v. Peña*, 515 U.S. 200 (1995)).

540. *Id.* at 512 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987)).

is not inclined to go that far, the decision to come out should be understood as related to the right to marry and thus subject to the same level of scrutiny applied in *Turner*, which appears to be some form of intermediate scrutiny or “rational basis with bite.”⁵⁴¹

The Court’s claim that the right to avoid racial discrimination “is not a right that need necessarily be compromised for the sake of proper prison administration” seems to apply to sexual orientation and coming out as well. One can read *Johnson* to acknowledge that race and racial discrimination are not inherent, natural phenomena, but rather social constructions. Thus, society may construct prisons so that government need not routinely take race into account. Similarly, the concept of gay identity and its corollary of coming out are fairly recent constructions.⁵⁴² Just as the Court recognized the risk that the California race policy was reinforcing racial divisions, the K6G policy may perpetuate Gay Identity by promulgating the notion that gay and straight men are fundamentally different and by channeling MSM who would dissent from Gay Identity into the dominant identity. Like the race policy, the K6G policy is an outlier: few jails and prisons attempt to define gay identity and segregate all inmates on that basis. As such, there are alternatives to the K6G policy that would adequately protect gay inmates. The National Prison Rape Elimination Commission, despite considering testimony by Deputy Lanni, opposed “the creation of specialized units for vulnerable groups and specifically prohibits housing prisoners based solely on their sexual orientation or gender identity because it can lead to demoralizing and dangerous labeling.”⁵⁴³ In the words of *Turner v. Safley*, the K6G policy appears to be an “exaggerated response” to the problem of managing sexual orientation in jail.⁵⁴⁴

In the end, a court need not follow *Johnson* in applying strict scrutiny to invalidate the K6G policy. Whether the state has a legitimate or important governmental interest in protecting vulnerable inmates or just inmates who are vulnerable on account of sexual orientation, the policy has a tenuous connection to that interest. The policy protects a mere fraction of MSM because it requires them to surmount various hurdles which have little or no connection to the state interest: (1) being out before incarceration; (2) willingness to come out during the potentially homophobic environment of the intake process, in the absence of *any* explanation as to why they should come out; (3) knowledge of peculiar information, including obscure, outdated slang and the details of bars and clubs;⁵⁴⁵ and (4) willingness to share personal information about one’s coming out process with law enforcement officers, and provide names and

541. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in judgment) (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

542. MICHEL FOUCALT, 1 *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (1978).

543. NAT’L PRISON RAPE ELIMINATION COMM’N REPORT, *supra* note 8, at 8.

544. 482 U.S. 78, 90 (1987)

545. *See supra* text accompanying note 220.

numbers of people who can verify one's sexual orientation. Moreover, the policy typically excludes bisexuals from consideration, despite studies suggesting that they too are targeted for sexual assault based on sexual orientation.⁵⁴⁶ The policy goes astray in taking away from the individual an important personal decision, requiring disclosure of private sexual information, and encouraging identification with a race and class-based sexual identity.

VI. SOLUTIONS

The foregoing has argued that the K6G unit's screening policy pressures MSM inmates to come out and come *into* a dominant gay identity. My critique has racial dimensions in that Gay Identity has been constructed largely from the experiences of a small segment of affluent white men. Yet, my argument extends beyond race. For example, there are white MSM who do not regularly attend clubs or affiliate with the dominant gay culture. There are white men who are poor or working class and cannot afford access to the clubs and bars that the Jail seems to perceive as the home of all gay men.⁵⁴⁷ This Part explores some potential prescriptions for reforming the K6G unit. My focus in this brief discussion is more on providing a general overview of possibilities rather than mining the details of incarceration policies.

To begin, we must recognize that the K6G unit rests on a troubling assumption: the government tolerates many types of violence and victimization in jail, while singling out for ostensible protection a handful of inmates that it deems to be gay or transgender. Moreover, while many assume that sexual violence is inevitable during incarceration because of the character of the people who are incarcerated, it seems at least as likely that government *produces* much sexual behavior—violent and nonviolent—in establishing the architecture and conditions of a particular jail or prison. As Gabriel Arkles notes,

[m]any prisoners are justifiably angry and have little if anything in terms of positive outlets for their anger or ways available to cope with it—other prisoners are a safer target than staff for releasing these feelings. Many imprisoned people are also afraid of the violence in detention and ironically are therefore more likely to engage in it themselves, often in an attempt to forestall being seen as a victim.⁵⁴⁸

To take a basic example, it is now commonplace that some men who engage in sex with men in jail or prison would not if they were not incarcerated and denied access to women.⁵⁴⁹ The government's decision to separate male and

546. See *supra* text accompanying note 220.

547. Access requires not simply paying a price of admission or paying for drinks, which grants mere physical access, but also purchasing the clothing, grooming and gym memberships that signify that one belongs to Gay Identity and is a desirable partner.

548. Arkles, *supra* note 22, at 525.

549. Some scholars have called this "situational homosexuality." Eigenberg, *supra* note 23,

female inmates and deny conjugal visits for spouses or other sexual partners predictably creates a demand for inmates to play the feminine role in sex.⁵⁵⁰

This Article extends the emphasis of my recent scholarship on revealing structural influences on human interaction.⁵⁵¹ This structural focus suggests that we should at least inquire as to whether the K6G decision makers have aimed at the wrong target. Perhaps, rather than focusing on inmates and attempting to refine the deputies' ability to spot MSM, the Jail should turn its scrutiny inward and ask how its own structures—including the K6G screening process—promote violence and produce victims.

The K6G screening process scrutinizes inmates for signs of Gay Identity, which are used as a proxy for vulnerability. My analysis has suggested that, even as it screens inmates to identify likely victims, the Jail creates other victims—including MSM and heterosexual inmates who are enticed by the Jail's promise of protection, but fail its "gaydar test" and are sent to GP, newly marked as gay. Moreover, a system that essentially requires men in GP to fend for themselves, whether they are heterosexual or nongay MSM, ignores much more vulnerability than it prevents because it does not align with the Jail's preferred identity categories—that is, gay and transgender (and *only* gay and transgender) as equal to victim; straight as equal to perpetrator.⁵⁵² Note that nongay identified MSM do not even appear in this equation.

Ideally, the Jail would closely scrutinize all of its policies and also explore policies adopted in other jurisdictions that substantially reduce sexual assault by reforming the Jail's structures.⁵⁵³ For example, the perception that the risk of inmate-on-inmate assault in K6G is minimal may be because the Jail subjects them to greater surveillance and takes greater care in assigning them to different dorms based on security level than it does with respect to the much-larger GP.⁵⁵⁴ Such reforms, of course, require two things in short supply:

at 418–19.

550. In some cases, these policies may enhance the social status of groups *vis-à-vis* their status outside of prison or jail. In some incarceration settings, male inmates express a strong demand for transgender women as sexual partners. This may result in transgender women feeling that their gender identity receives greater respect in prison than elsewhere. Keatling Interview, *supra* note 42, at 6. At the same time, these policies place heterosexual men and non-Gay MSM in a position they would most likely not encounter outside of prison—being forced to become another man's "woman."

551. See Robinson, *Racing the Closet*, *supra* note 18, at 1493; Robinson, *Structural Dimensions*, *supra* note 281, at 2788; see also Elizabeth F. Emens, *Intimate Discrimination*, *supra* note 307. For an insightful argument for constructing accommodations for people with disabilities in a way that cuts across categories rather than reinforcing difference and stigma, see Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

552. The "soft" unit is a caveat to the above equation. However, the numbers of men who qualify for the unit, and the idiosyncratic approach to identifying "soft" men, limit its significance. See text accompanying *supra* note 63.

553. See, e.g., Buchanan, *supra* note 217.

554. Cf. Lanni Interview, *supra* note 40, at 38–39.

financial resources and political will. Nonetheless, I propose interventions that lawmakers have implemented in other jurisdictions, such as New York and San Francisco, which suggests that they are not unrealistic expectations.⁵⁵⁵

In this Part, I discuss some potential alternatives to the K6G policy and analyze each policy's costs and benefits. First, many readers might be troubled primarily by the racial mismatch evident from the K6G test—it extracts a test from mainstream gay culture, which affluent whites primarily shaped, and then applies it to a mostly black, brown, and poor population. The Jail's reliance on extremely white neighborhoods and public spaces to define Gay Identity likely disadvantages men of color who also need protection. For example, gay bars and clubs are often sites of racial exclusion and fetishization.⁵⁵⁶

Despite this racial bias, the Supreme Court generally requires more than a showing of disparate racial impact to establish a violation of the Equal Protection Clause, and the Roberts Court is unlikely to relax this rule.⁵⁵⁷ Nonetheless, for policymakers who remain concerned about this problem, one response is to diversify the Jail's conception of gay culture. The Jail could

555. Sharon Dolovich largely defends the K6G unit. Although she acknowledges many of the problems that I detail and proposes some changes, she claims that the K6G unit is the best that society can expect in light of practical constraints. Dolovich, *supra* note 1, at 78–79. While she concedes that units that do not segregate based on sexual orientation “may be a wiser choice for jurisdictions newly seeking to develop classification schemes,” she cannot bring herself to repudiate the core of Los Angeles's policy. *Id.* at 78 (“if it ain't (that) broke, don't fix it”). This failure appears to stem from her allegiance to the K6G deputies, whom she praises throughout her article. *See, e.g., id.* at 1 n.* (proclaiming that “[Bell and Lanni's] dedication and professionalism are second to none”).

556. For example, the San Francisco Human Rights Commission determined the nightclub Badlands routinely discriminated against potential black patrons by requiring them to show multiple forms of identification. The owner apparently referred to African Americans as “non-Badlands customers.” *See, e.g.,* Niels Teunis, *Making Badlands Good: Still Confronting Racism in the Castro*, NAT'L SEXUALITY RES. CTR. (July 12, 2005), http://nsrc.sfsu.edu/article/making_badlands_good_still_confronting_racism_castro; *see also* Martinez & Sullivan, *supra* note 352, at 248 (recounting one black gay man's experiences with hostility from bartenders and staff at gay bars); Nero, *supra* note 237, at 241 (discussing gay club that “held a celebration of southern plantation life replete with confederate memorabilia and images of black servants”). Scholars have revealed the unwritten rules of racial hierarchy that control many gay social spaces. *See* DWIGHT MCBRIDE, *WHY I HATE ABERCROMBIE AND FITCH*, 122 (2005); Raymond & McFarland, *supra* note 364, at 630; Robinson, *supra* note 281, at 2788; Patrick A. Wilson et al., *Race-Based Sexual Stereotyping and Sexual Partnering Among Men Who Use the Internet to Identify Other Men for Bareback Sex*, 46 J. SEX RESEARCH 399 (2009). I personally witnessed this racial bias in West Hollywood nightlife while working on this Article. A friend told me that black men were flocking to the Abbey, a popular nightclub-lounge in the heart of West Hollywood, late on Sunday nights. I attended with the friend a few weeks later, and by 11:00 p.m., the crowd was at least 80 percent black, a rarity in Los Angeles gay nightlife. The next time that we attended, however, we noticed that the music had changed from hip-hop to top-40 pop songs. When I asked the DJ, a Latino man, if he could play some hip-hop, he replied, “I'm not allowed to.” A few weeks later, one of my research assistants, a white gay man, attended a dinner at which an assistant manager of the Abbey was present. The assistant manager said that “the crowd was very dark” on Sundays, and that the club was switching to karaoke music in response.

557. McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

exhaustively canvass gay spaces in black and brown neighborhoods and relegate questions about white gay culture—such as West Hollywood and gay slang—to a minor part of the screening process. Such a test, however, might disadvantage white inmates, who remain a significant portion of the Jail’s population.

A second option seeks to avoid any racial disadvantage. The Jail might create a distinct test for each racial group, asking black men about black gay culture and white men about white gay culture, for instance. To be as accurate as possible, the Jail may need to look to MSM of the particular racial group to define that group’s culture rather than allow the deputies—white, heterosexual, and middle-aged—to define each group’s culture.

This policy also contains serious flaws, however. Even assuming that blacks could agree on what counts as “black gay culture” and on the subset of group members appointed to determine that culture—a big *if*, in my view—it would not account for the fact that there are black men who do not identify with black gay culture. Just as a black person might not enjoy fried chicken or hip-hop, a black MSM might not appreciate the interests that many black gay men have (say, Beyoncé), and ought not be penalized for that divergence. Similarly, particular white men might know little of (white) gay culture but be more familiar with gay culture among, say, Latinos or Asians.⁵⁵⁸ Therefore, it would be dangerous to require certain racialized knowledge of people based on their racial phenotype.⁵⁵⁹

The efforts to refine and diversify the Jail’s understanding of gay cultures also do nothing to address two overarching problems with gay culture tests. First, there are many MSM of all races who do not congregate in the public gay spaces where one is most likely to learn about gay cultures.⁵⁶⁰ MSM who regularly attend clubs appear to be “younger and better educated, are more likely to report full-time employment, and have higher incomes.”⁵⁶¹ They are also more out, more sexually active, and less likely to have a disability.⁵⁶² All of the variations on the Jail’s culture test disadvantage MSM who are ensconced in a

558. Cf. YOSHINO, *supra* note 163, at 124, 125 (documenting ways in which he is an “accidental Asian,” aligned primarily with white culture).

559. Cf. Philip Goodman, “*It’s Just Black, White, or Hispanic*”: *An Observational Study of Racialized Moves in California’s Segregated Prison Reception Centers*, 42 L. AND SOC’Y REV. 735 (2008) (describing complexity of California prison system’s process for defining racial categories and assigning inmates to a particular race).

560. See Lance Pollack et al., *Evaluation of the Centers for Disease Control and Prevention’s HIV Behavioral Surveillance of Men Who Have Sex with Men: Sampling Issues*, 32 SEXUALLY TRANSMITTED DISEASES, 581, 583 (2005) (finding that about 18 percent of MSM in San Francisco reported that they did not attend any gay bar or club during a one-year period); Martinez & Sullivan, *supra* note 352, at 254. This survey likely overstates the likelihood that MSM attend gay bars because its random-digit dialing methodology focused on the thirteen San Francisco zip codes where gay men are concentrated. Pollack et al., at 582. It entirely overlooked the many men of color who live in the East Bay, where there are few gay bars.

561. Pollack, *supra* note 560, at 584.

562. *Id.* These findings are based on one city and should be read with caution.

monogamous relationship and not attending gay bars, and those who simply do not like bars, clubs, or parades. With the rise of the internet and easily accessible websites that offer ample sexual opportunities, gay commentators have expressed concern that the internet is killing the gay bar.⁵⁶³ Even a single MSM has fewer incentives today to go to a bar or club. Instead of gambling on meeting the “right guy” at a bar on any given night, he can pinpoint a specific sexual type—say, blond, mid-20s, versatile man with a swimmer’s build and uncut penis—by logging onto Manhunt.com,⁵⁶⁴ men4sexnow.com,⁵⁶⁵ or adam4adam.com⁵⁶⁶ from a laptop computer or pulling up nearby potential sexual partners on his iPhone through a new application called Grindr.⁵⁶⁷

Second, as Richard Ford has noted, culture changes quickly.⁵⁶⁸ The K6G questions are a testament to the danger of relying on a cultural snapshot at a particular moment and failing to recognize when it falls out of favor. Perhaps at some time most MSM knew what a “bird” and “cookies” were, but today they likely do not.⁵⁶⁹ Clubs open and close pretty quickly and even more quickly rise or fall in popularity.⁵⁷⁰ Indeed, the boundary between what counts as “gay” and “straight” is fluid and contestable.⁵⁷¹ Some social commentators claim that the line is blurrier now more than ever.⁵⁷²

563. Michael Joseph Gross, *Has Manhunt Destroyed Gay Culture? A Cost-Benefit Analysis of Our Quest to Get Laid*, OUT.COM, <http://out.com/detail.asp?id=24005> (last visited Jan. 27, 2010).

564. MANHUNT, <http://www.manhunt.net> (last visited June 19, 2011) (“Find him in a flash. Tall, short, top, bottom . . . your man is only a mouseclick away.”).

565. MEN4SEXNOW.COM, <http://www.men4sexnow.com> (last visited June 19, 2011) (“Where men meet for sex now.”).

566. ADAM4ADAM.COM, <http://www.adam4adam.com> (last visited June 19, 2011) (“A club for gay men.”).

567. GRINDR.COM, <http://www.grindr.com> (last visited June 19, 2011) (“Meet men at home or on the road for free with Grindr for iPhone. No strings attached.”); see Meredith May, *Gay Men Meet Up Through Grindr App for iPhone*, S.F. CHRON., Mar. 19, 2010, http://articles.sfgate.com/2010-03-19/entertainment/18838701_1_grindr-gay-men-marriage.

568. FORD, *supra* note 142, at 333.

569. Cf. Douglas Quenqua, *Dude You Are So (Not) Obama*, N.Y. TIMES, Aug. 23, 2009, at ST-1 (claiming that by the time a slang term is memorialized in a dictionary it has lost its exclusionary power and that the Internet is reducing the lifespan of slang by quickly making it more widely accessible).

570. Anyone who has relied on a gay travel guide to find gay bars in a particular destination knows this. Odds are that not long after a book’s publication date at least some of the bars it identified will have been supplanted by new venues.

571. See David Colman, *Gay or Straight? Hard to Tell*, N.Y. TIMES, June 19, 2005, <http://www.nytimes.com/2005/06/19/fashion/sundaystyles/19GAYDAR.html> (contrasting men who frequent gay pride parades with the increasingly ambiguous styles of other gay men and fashionable straight men); *id.* (“As gay men grow more comfortable shrugging off gay-identified clothing and Schwarzeneggerian fitness standards, straight men are more at ease flaunting a degree of muscle tone seldom seen outside of a *Men’s Health* cover shoot. And they are adopting looks—muscle shirts, fitted jeans, sandals and shoulder bags—that as recently as a year ago might have read as, well, gay.”). For instance, while women have traditionally bought clothes for their male partners, in recent years, men have begun buying their own clothes (69 percent, as of 2004, compared to just 25 percent in 1985). *Id.* Companies are increasingly targeting heterosexual male shoppers and directing at them products once reserved for gay men. *Id.* (discussing racy

For these reasons, the policy that I ultimately endorse avoids looking to culture. The reliance on culture is driven by the perception that men must verify their assertions of gay identities; the Jail cannot take them at their word. This problem, upon closer inspection, reveals itself to be a product of the particular structures that the Jail has installed. As noted above, making GP safer would substantially reduce the incentives that vulnerable heterosexual men have to seek access to K6G.⁵⁷³ The Jail actually enhances incentives to lie by providing gay and transgender inmates with a host of special programs that are not similarly available in GP and creating the impression that K6G is the only safe space in the Jail.⁵⁷⁴

The Jail's installation of a crude gay/straight binary makes everything turn on whether the inmate can convince a deputy that he is gay. By contrast, my proposal takes into account all vulnerability, with sexual minority or gender identity status just two of several potential factors. The literature on prison rape points to multiple additional traits associated with vulnerability to sexual assault, including youth, slight stature, perceived effeminacy, serving for the first time in prison, doing time for nonviolent offenses, inexperience in personal combat, and having a disability.⁵⁷⁵ There is no sound justification for

underwear line 2xist, which has been embraced by heterosexual icons such as Justin Timberlake).

572. Colman, *supra* note 571 (identifying “a new gray area that is rendering gaydar—that totally unscientific sixth sense that many people rely on to tell if a man is gay or straight—as outmoded as Windows 2000”).

573. Cf. Lanni interview, *supra* note 40.

574. See *supra* note 71.

575. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 8, at 217 (recommending consideration of the following criteria: “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate’s own perception of vulnerability”); JENNESS, *supra* note 260, at 3 (California survey finding that trans-identified inmates, black inmates, and inmates with disabilities were significantly more likely to report being assaulted); Cynthia L. Blitz et al., *Physical Victimization in Prison: The Role of Mental Illness*, 31 INT’L J. L. & PSYCHIATRY 385, 389–90 (2008) (survey of fourteen prisons in one state finding that male inmates with mental illness reported physical victimization rate 1.6 times higher than similar inmates without mental illness, and that black and Hispanics with mental illness reported higher rate than whites); *id.* at 603 (noting that literature has consistently found that younger inmates are disproportionately targeted but finding that obese inmates may also be likely victims); Deanna M. Perez, *Individual and Institutional Characteristics Related to Inmate Victimization*, 54 INT’L J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 378, 390 (2010) (survey of inmates in one southeastern state finding that nonwhite inmates were more likely than whites to report victimization by staff); John D. Wooldredge, *Inmate Crime and Victimization in a Southwestern Facility*, 22 J. CRIM. JUST. 367, 377 (1994) (survey of inmates in one prison in southwestern state finding that younger inmates and Mexican American inmates reported higher rates of crimes against their persons; the sample of blacks was too small to be analyzed); see also Kelley et al. Interview, *supra* note 65, at 15–16 (criticizing Bell and Lanni for refusing to admit to K6G effeminate men who did not pass the gaydar test). Not all studies agree. For instance, the Jenness study is unusual in identifying black race as a vulnerable trait, and, contrary to other studies, it did not find that young inmates were more likely to experience sexual assault. This is not to say that a

singling out gay and transgender inmates and ignoring the other vulnerability factors, especially because they generally reflect a perception of fallen masculinity.⁵⁷⁶ The Jail's motivation may have been that it was responding to a lawsuit that happened to focus on "homosexual" inmates,⁵⁷⁷ but that fact does not justify a decades-long practice of ignoring inmates who are similarly vulnerable but have the "wrong" sexual orientation.⁵⁷⁸

The Jail should remove the need for verifying sexual orientation—the central problem with the current K6G policy—through a policy that reduces the importance of sexual orientation and instead considers all vulnerability traits. A heterosexual man might qualify based on various traits other than sexual orientation and would not see a false claim of gay identity as his only route to protection. This intersectional approach would also provide an MSM with multiple routes to protection. He might reasonably choose not to come out, but to rely on his disability or youth, for example.⁵⁷⁹

To be more specific, I recommend four guidelines for reforming K6G. First, the intake interview should be made private. Instead of standing in a line

jail cannot arrive at a reasonable consensus as to which traits create vulnerability in its local context. To arrive at an answer, decision makers should consider local dynamics and demographics, the methodological rigor of conflicting studies and whether older studies reflect present-day realities.

Race presents unique challenges because the Court would likely treat the use of race, even as just one of many factors, as a racial classification and subject it to strict scrutiny. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *Gruiter v. Bollinger*, 539 U.S. 306, 327 (2003). It is doubtful that the studies on race are advanced enough to withstand strict scrutiny. Older studies suggested that whites are disproportionately targeted for prison rape, but those studies tend to be riddled with empirical flaws and limitations. *See Buchanan*, *supra* note 217, at 15–16.

576. *See supra* text accompanying note 260.

577. This claim is questionable in that the Jail segregated gay inmates before the ACLU lawsuit, *see supra* note 36, based on motives that may not have been entirely benevolent. *Cf.* Interview with Eileen Hirst, *supra* note 107, at 31–32 (suggesting that some new deputies in San Francisco want to segregate gay inmates based on "stigmatism" and "ignorance" and being uncomfortable around gays).

578. The lawsuit and resulting policy are notable in that they emerged during an era when courts rarely protected gay rights. At the time, there was no question that sexual orientation did not receive heightened scrutiny under the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 646 (1996), which was decided over a decade after the ACLU lawsuit was settled, raises the possibility that the Court will apply "rational basis with bite," a form of heightened scrutiny, to at least some sexual orientation classifications. Gay rights lawyers have been pushing courts to apply strict scrutiny to anti-gay laws, with occasional success, but it remains unclear whether the Supreme Court will do so. Those who would continue the policy of providing protection exclusively to gay and transgender inmates based on a "quasi-suspect" status must explain why other emerging identity groups, such as people with disabilities, can be distinguished from a constitutional perspective. Moreover, they must grapple with the fact that the K6G policy utterly fails to protect all inmates who have a homosexual or bisexual orientation, embracing only those who embody a particular, racialized Gay Identity—and only those who are visibly trans. Given the considerable slippage between orientation and identity, it seems misleading to call the K6G policy a classification based on sexual orientation.

579. *See* Interview with Matt Foreman, *supra* note 470, at 16 (citing New York's screening process, which includes an individualized inquiry as to whether the inmate feels vulnerable).

where other inmates can overhear their responses, inmates should be afforded a brief interview in a private room. This setting would make inmates more comfortable disclosing any sources of vulnerability and reduce the chances that such disclosures will be disseminated to other inmates and used against them.⁵⁸⁰ Second, the Jail should use an open-ended inquiry, such as “Is there any reason why you would not be safe in GP?” This framing would not directly inquire about sexual orientation and would alleviate the tension between the Jail’s policy and the right to privacy. It also has the benefit of encouraging discussion of all vulnerability, even that which does not conform to particular traits. A flexible, open-ended question meets inmates where they are rather than requiring them to articulate their vulnerability in a governmentally dictated form.⁵⁸¹ Third, the Jail must examine and combat the culture of prison rape that appears to reign in GP. Jail officials should not be able to use the K6G unit to distract us from the hegemonic norms that it tolerates and manipulates in GP. Fourth, the Jail should adopt a zero-tolerance policy toward homo-, bi- and transphobic discrimination among its staff.⁵⁸² Interviews with persons who were incarcerated in K6G suggest that Jail staff are a greater threat to sexual minority inmates than other inmates.⁵⁸³ For that reason, the Jail should also jettison the requirement that K6G inmates wear powder blue uniforms. Although Deputy Lanni claims that they permit the staff quickly to identify K6G inmates when they are interacting with inmates from GP and protect them,⁵⁸⁴ the evidence suggests that staff are more likely to use the heightened visibility to harass K6G inmates instead of protect them.

These reforms do have resource implications.⁵⁸⁵ They would considerably expand the K6G unit, especially if all inmates with one vulnerability trait were automatically admitted. Certain traits, such as disability, are relatively widespread in jails and prisons.⁵⁸⁶ In the prison context, the Supreme Court has

580. The National Prison Rape Elimination Commission Report is instructive: Not all inmates will feel comfortable answering questions about their sexual orientation, and employees should respect refusals to answer those questions and not press for answers. Inmates who openly identify as gay or bisexual should be asked if they feel that they need heightened protection while incarcerated. Inmates who are transgender or intersex should also be asked if they feel that they need heightened protection. Employees should carefully consider and endeavor to respect the views of gay, bisexual, transgender, and intersex inmates who request or do not want heightened protection. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 8, at 217.

581. Cf. Kimberle 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 (1989) (arguing for policies that provide relief from discrimination without relying on categories).

582. See Arkles, *supra* note 22, at 558.

583. See *supra* text accompanying notes 484–490; see also Arkles, *supra* note 22, at 518.

584. Lanni Interview, *supra* note 40, at 48.

585. See Miller, *supra* note 38, at 140 (noting “floodgates” problem in asylum law).

586. See Interview with Eileen Hirst, *supra* note 107, at 8, 35, 37 (“[N]obody who comes into custody is particularly healthy.”).

displayed sensitivity to fiscal and administrative pressures,⁵⁸⁷ concerns that I find inadequate to justify constitutional violations. Nonetheless, under current law, a court might be more attracted to a *Grutter*-like⁵⁸⁸ totality of the factors test in which no single trait guarantees admission, but all factors must be analyzed to compare the inmate's vulnerability with others in the pool.

Under such a system, a jail might reasonably conclude that an inmate possesses one vulnerable trait, but not to a substantial degree—perhaps being slightly smaller in stature than average—and has some countervailing traits that make him less likely to be targeted. Similarly, a claim of gay or bisexual identity would enable an inmate to be considered for K6G but would not guarantee access. An inmate who is gay or bisexual, but also masculine and physically strong might not need protection in some jails. This policy would also disrupt the masculinity narrative the Jail constructed, in which it treats gay and transgender identity as an automatic marker of weakness, and heterosexual identity obscures vulnerability, effectively requiring the heterosexuals to “man up” and protect themselves.

San Francisco is a leader in developing progressive correctional policies regarding sexuality in that it has a high number of openly gay staff and makes condoms available to the entire population.⁵⁸⁹ Yet, it does not paint all gay men with a single brush.⁵⁹⁰ It distinguishes very effeminate gay men from other gay

587. See *Turner v. Safley*, 482 U.S. 78, 81 (2009). *But see Johnson*, 543 U.S. 499 (2005) (applying strict scrutiny, the least deferential standard of review, to racial classifications in prison).

588. See *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

589. See Interview with Eileen Hirst, *supra* note 107, at 41 (“We were the first major law enforcement agency to actively recruit in the gay community.”). Gonzalez Interview, *supra* note 268, at 4 (“[W]e probably have the highest number of openly gay correctional staff.”). Indeed, San Francisco’s policies have queered the department’s reputation among law enforcement. Heterosexual officers reportedly get heckled by officers from other jurisdictions because of the department’s concern for queer inmates and high number of gay deputies. Interview with Eileen Hirst, *supra* note 107, at 42.

590. The city used to have a gay unit, based strictly on self-identification, but found that it was problematic to lump all gay-identified inmates together. Interview with Eileen Hirst, *supra* note 107, at 24, 39. The “queens tank,” as it was called, “had a lot of predatory problems” and the jail also found that an increasing number of inmates were asking for the housing, which created resource and safety constraints. *Id.*; see also Interview with Martin Horn, former Commissioner of Corrections for the City of New York, at 4–5 (July 14, 2010) (transcript on file with author) (stating that New York’s “gay housing” unit had one of the highest rates of violence). Jail officials refuted the idea that gay and transgender inmates cannot be predatory. Interview with Eileen Hirst, *supra* note 107, at 22–24, 34 (noting that the jail has had cases of male domestic partners who were arrested on domestic violence charges and could not properly have been housed together). They were also quite skeptical that jail staff could accurately identify gay inmates. *Id.* at 2. As noted above, San Francisco jail staff ask all inmates if they have any concerns about their safety. If an inmate says he is concerned about being gay, they ask additional questions and generally assign the gay inmate to their vulnerable unit if he is “openly flamboyant,” which in the jail’s experience, could make him a target for violence. *Id.* at 25. However, the staff would encourage a nonflamboyant gay inmate, who deputies would assign to GP, to contact a deputy if they experience any problems, and the jail has segregated inmates that were harassed. *Id.* at 31, 33; see also Interview with Martin Horn, at 4–5 (explaining that New York dismantled “gay housing” and

men, directing the former to a vulnerable unit made up of primarily transgender women and assigning most gay men to GP.⁵⁹¹ San Francisco Jail employees described gay and transgender inmates who wielded influence in GP, complicating overbroad assumptions about vulnerability.⁵⁹²

Relatedly, interviews revealed several stories of gay and transgender inmates who resisted the classification schemes said to be for their protection.⁵⁹³ Some transgender women in San Francisco sought assignment to GP, where their gender identity would be appreciated.⁵⁹⁴ San Francisco officials described two frequently incarcerated transgender inmates who are “tough” and able to thrive in GP. Speaking of one particular inmate, Lieutenant McConnell stated: “I’ve seen him in tanks full of real prison convicts running a tank . . . he’ll tell you, ‘I’m all woman, but I’m not a punk.’”⁵⁹⁵

In Los Angeles, Deputy Lanni reported that some gay men teach their heterosexual boyfriends in GP how to appear gay so they can be reunited in K6G, and a recent study suggests that some of these straight men succeed.⁵⁹⁶ Regardless of the scope of the expanded protection under such a policy, an individualized assessment and multifactor standard would better reflect the way in which vulnerability actually operates and would relieve the pressure on men to come out. Because it eliminates the verification process, in which inmates must prove that they are Gay,⁵⁹⁷ it avoids the reliance on gay culture and its

replaced it with “escort housing,” which is designed to protect various vulnerable inmates, including “flamboyant” gay men).

591. Interview with Eileen Hirst, *supra* note 107, at 15, 24 (stating that the jail automatically segregates all transgender inmates, but “we have no gay housing”); Gonzalez Interview, *supra* note 268, at 18 (stating that deputies take into account intersecting factors, such as youth or being a first time offender, in addition to gay identity); *id.* at 29 (“inmates that are openly gay that are housed in [GP] don’t carry themselves [like effeminate gay men]. My experience has been that they make the clear distinction between their identity as a man and their sexual orientation.”).

592. Interview with Eileen Hirst, *supra* note 107, at 21–22 (discussing two transgender inmates who thrive in GP); *see also* Interview with Martin Horn, *supra* note 590, at 20 (stating that some flamboyant inmates in New York manage to do okay in GP).

593. Interview with Eileen Hirst, *supra* note 107, at 21–22; Troy Erik et al. Interview, *supra* note 306, at 16 (Yvette Winstead, a transgender woman, recounting how she hid her breasts to be assigned to the gay unit, instead of the transgender unit). This occurred before the jail combined the gay and transgender populations in what is now K6G.

594. Gonzalez Interview, *supra* note 268, at 20–22.

595. Interview with Eileen Hirst, *supra* note 107, at 21.

596. Lanni Interview, *supra* note 40, at 20; Harawa et al., *supra* note 296, at 1078 (reporting that 29 percent of its sample of K6G inmates self-identified as bisexual, 4 percent as heterosexual, 14 percent as “other” and 54 percent as homosexual/gay); *see also id.* at 1076 (finding that, despite the screening question about recent sex with women, “25% [of respondents] reported sex with at least one woman in the six months prior to their current incarceration”). These findings suggest that some inmates have learned how to game the system, gaying up their identities to get into K6G and covering traits that would impede their access to K6G, including sex with women and bisexual identity.

597. Some sort of verification process might be necessary for traits such as disability, which can be evaluated more objectively and reliably than gay identity. Staff members would

attendant problems as well as the noxious message that gay and transgender inmates are inherent victims.

CONCLUSION

This Article makes three central points. First, because the decision whether or not to come out implicates the right to privacy, law should not condition protection on people coming out, at least insofar as there are viable policy alternatives. Second, legal policies help construct masculinity and Gay Identity, reflecting and reinforcing broader cultural conceptions, including the view that gay men are weak and in need of protection. General conceptions of gay men as effeminate, promiscuous, and affluent wield influence even in a context where they would seem out of place. People tend to imagine inmates as mostly black and Latino, poor or working class, and hardened by living in inner cities. This conception is miles away from the dominant portrayal of gay men as effete dandies partying the night away in gay enclaves.⁵⁹⁸ Yet, the Jail uses the latter standard to measure the former.⁵⁹⁹ This speaks volumes in terms of the hegemony of Gay Identity and the limited space for sexual minorities to gain visibility and respect for alternative identities and retain their masculine self-image. It also suggests that heterosexuals have an investment in propagating Gay Identity because it buttresses heterosexual masculinity. Although this Article seeks to illustrate how masculinity norms regulate all men, I do not argue that masculinity is inherently harmful or that we need to abolish it. Gender is such a totalizing force, structuring the way we socialize children from birth and the way that most people experience sexual desire, that I doubt that “gender-free” is attainable or desirable. A more realistic goal is to think critically about gender and seek selectively to intervene and reconstruct certain aspects of it.⁶⁰⁰ The answer, then, is to change the meaning of masculinity and re-align it with values that are constructive.

Third, K6G illustrates a troubling phenomenon: gay and anti-gay forces often advance similar stereotypes of gay men—even though they do so for

need to monitor closely K6G inmates to ensure that they are not predators, but this obligation should apply irrespective of whether K6G contains just gay and transgender inmates or inmates of various sexual orientations and genders who pass a vulnerability test.

598. Lead attorney John Hagar described the paradigmatic victim for which K6G was designed as white and effeminate: “a gay 19-year-old who’s 5-foot 7, he’s very feminine and blond and with a low IQ, he’s going to be in that unit without a doubt.” Hagar Interview, *supra* note 41, at 18.

599. Perhaps the main point of intersection between these two conceptions is that they are both imagined as sexually irresponsible.

600. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 20 (2000); Katrin Bennhold, *In Sweden Men Can Have It All*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html> (discussing how Swedish governmental policies changed the meaning of masculinity by encouraging fathers to take parental leave).

different reasons. For example, gay men have championed the sexual liberation said to flow from gay or queer identity.⁶⁰¹ Given the current legal debate over same-sex marriage, such claims provide grist for anti-gay groups to argue that gay men are promiscuous and unfit for marriage.⁶⁰² Recently, Tim Dean published a book defending the practices of gay men who deliberately or recklessly transmit HIV as a form of “intimate” connection.⁶⁰³ Anti-gay forces can easily spin this practice into proof that gay men prize sexual pleasure more than their own lives. Further, as exemplified by the TV show *Queer Eye for the Straight Guy*, some gay men like to brag about how “fabulous” they are. Jurists such as Justice Scalia can deploy such “fabulosity” to argue that gay men are wealthier than average and politically powerful, thus obviating the need for heightened judicial protection under the Equal Protection Clause.⁶⁰⁴

In a similar vein, anti-gay forces and gay rights advocates might both support K6G. A gay rights activist might believe that K6G protects “righteous gay men” who earn governmental protection by obeying the command to come out and adhering to the gay mainstream.⁶⁰⁵ A homophobe might likewise support K6G because it installs a bright, powder-blue line between “gay” and “straight” and punishes straight men who would seek protection under Gay Identity rather than “manning up” and defending themselves in GP.⁶⁰⁶ Indeed, K6G could be understood as protecting heterosexual men from Gay Identity and such men and their female partners from HIV. The complexities of K6G cast doubt on the “liberation,” “community,” and “protection” that Gay Identity promises not just in jail but also society in general. Although K6G may be an unusually pronounced example of the dangers arising from Gay Identity, scholars should think critically about other prevalent assumptions about sexual orientation and the extent to which they perpetuate homophobia.

601. See, e.g., NIMMONS, *supra* note 189, at 82–90 (arguing that most gay relationships are not monogamous and this is good); Goldstein, *supra* note 189, at 39 (stating that his boyfriend’s sex partners “could practically fill the Radio City Music Hall” and that their committed relationship permitted his boyfriend to keep “tricking” and Goldstein to have “affairs”); see also text accompanying notes 208–210.

602. Darren Lenard Hutchinson, “*Gay Rights*” for “*Gay Whites*”?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1371 (2000) (noting this danger); see also *Homosexuals and Same Sex Marriage*, WPAAG.ORG, <http://www.wpaag.org/Homosexuals%20and%20Same%20Sex%20Marriage.htm> (anti-gay website compiling “Promiscuity Quotes by Homosexuals”).

603. TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2010).

604. *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) (arguing that “homosexuals . . . have high disposable income” and “possess political power much greater than their numbers”); BADGETT, *supra* note 203, at 129, 233 (debunking the claim).

605. I borrow the term “righteous” from Deputy Lanni’s description of the men the jail intends K6G to protect. Lanni Interview, *supra* note 40, at 14.

606. Cf. Ricci, *supra* note 49, at B1 (recounting statements by Bell and Lanni describing the “greater neediness” and “flamboyance” of K6G inmates); Buchanan, *supra* note 217, at 15 (stating that prison staff expect male inmates to “fuck or fight”).