

SEXUAL PUNISHMENTS

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The claim that incarceration is a sexual punishment—the central claim of this Article—may be disputed with respect to both the adjective and the noun. The challenge to the choice of noun is this: any sex, including sexual assaults, that may occur in prison is “not part of the penalty.”¹ Only officially sanctioned deprivations of rights and liberties are properly called “punishment,” and since no prisons officially sanction inmate sex and most officially condemn it, sex in prison is not penal.² In other words, the prison rapist is not an arm of the state.

The challenge to the adjective is this: “sex” in prison is not really “sexual.” The word “sexual” should be reserved to describe a realm of erotic desire and physical gratification, and there is much evidence that the physical interactions and threatened assaults that occur in prison, even the ones that involve genitals, are expressions of dominance and power that have little to do with desire.³ In short, coerced intercourse in prison is violent, inhumane, and illegal—it is not sexual, and it is not punishment.

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¹ “Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). For a detailed discussion of the jurisprudential and political import of the claim that sexual abuse in prison is “not part of the penalty,” see *infra* notes 95-100 and accompanying text.

² As described below, some jurists would go even further and say that *prison itself* is not punishment. The argument is that “punishment” describes only the legal deprivations of rights and liberties. Incarceration, the means by which the state ensures the deprivation of liberty, is only a collateral consequence of punishment, not punishment itself. On this account, prison conditions are not regulated by the Eighth Amendment’s proscription of “cruel and unusual *punishments*.” See *infra* Part II.

³ Many feminist scholars have argued that rape is better understood as an act of violence than as a sexual act. See, e.g., Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN’S L.J. 193, 225 (1987-88) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)) (“Rape does involve sexual organs, and is overwhelmingly a crime of one gender against the other, but it is ludicrous to call it sexual . . .”). Several commentators trace the claim that rape is violence and not sex to SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975). See, e.g., ANN J. CAHILL, *RETHINKING RAPE* 2 (2001) (discussing Brownmiller and subsequent rape scholarship). But see Craig T. Palmer et al., *Is It Sex Yet? Theoretical and Practical Implications of the Debate Over Rapists’ Motives*, 39 JURIMETRICS J. 271, 271-72 (1999) (criticizing the claim that rape is “not sex,” and urging an evolutionary

With specific reference to current American penal practices, this Article defends both the adjective and the noun of the phrase “sexual punishment.” The phrase prompts an array of questions about theory and practice, about concept and strategy. It encourages us to probe the concepts of sexuality and of punishment and the normative claims that pervade those concepts; it encourages us to rethink strategic approaches to the problems of penal and sexual abuse. Should we think of prison rape as a locationally specific instance of rape, a form of sexual assault that happens to occur in prison but is similar to sexual assaults that occur outside of prison? Should we think of prison rape as an intrinsic aspect of the prison rather than a species of rape? Might prison produce certain forms of sexual interaction that differ in fundamental ways from rape (and consensual sex) outside prison walls? Is sex severable from prison: will the right laws and regulations help us eliminate the sexual aspects of incarceration? Would we even want to eliminate the sexual aspects of incarceration? The juxtaposition of sex and punishment, categories imbued with deeply held and deeply contested normative commitments, prompts difficult but important questions.

Some of these questions have discomfoting answers. Most discomfoting, perhaps, is the strong indication that sexual coercion is intrinsic to the experience of imprisonment. Prisoners’ rights advocates on the left and right have labored to show that this is not the case, that we can and should eliminate prison rape even though we have no intention of eliminating the prison.⁴ For much too long, the general attitude toward prison rape was: “That’s just part of the penalty; those criminals deserve whatever they get in prison,” or, only slightly better, “It’s too bad that such rapes occur, but there’s nothing we can do about it.”⁵ To insist now that coerced sex is inherent to incarceration would seem to take a step backward.

explanation of rape that recognizes that, “while numerous motives may be involved in any given rape, sexual motivation is necessary and in some cases sufficient for a rape to occur”).

⁴ See, e.g., Eli Lehrer, *Hell Behind Bars: The Crime that Dare Not Speak Its Name*, NATIONAL REVIEW, Feb. 5, 2001, at 24 (condemning prison rape while recognizing the justice of imprisoning criminals, and noting liberal and conservative efforts to address prison rape); Eli Lehrer, *No Joke: Prison Rape Is Finally Taken Seriously*, NATIONAL REVIEW ONLINE, June 20, 2002, <http://www.nationalreview.com/comment/comment-lehrer062002.asp> (praising federal legislation to reduce prison rape as “a sensible middle-ground solution” that would not “make it harder to run facilities”). The advocacy group Stop Prisoner Rape, a self-defined human rights organization, also supports efforts to eliminate sexual assault through changes in internal prison policy. See About SPR, <http://www.spr.org/en/about.html> (last visited Dec. 8, 2005). For further discussion of apparently bipartisan efforts to eliminate prison rape, see *infra* note 147.

⁵ At a presentation on prison rape to New York University Law students, Stephen Donaldson, then president of Stop Prisoner Rape, was asked, “Isn’t fear of rape a good deterrent to crime? And aren’t prisons supposed to be terrible places? When you talk about using taxpayers’ money for these programs . . . I couldn’t justify that.” See Josh Getlin, “I’m Still Fighting,” L.A. TIMES, May 20, 1994, at E1. A third common response has been,

And yet sex in prison is in many ways a peculiar product of the carceral environment, and far more complicated than the paradigmatic account of prison rape. That account posits predator and prey: a cruel, sadistic perpetrator who manipulates or violently overpowers a vulnerable victim.⁶ Much in that account is true of many prison rapes—there is a great deal of cruelty, sadism, manipulation, violence, and exploitation of vulnerability. At the same time, this account is misleading and radically incomplete. It greatly overemphasizes direct physical violence: most coerced sex in prison is not procured through an act or direct threat of violence.⁷ And the paradigmatic narrative of prison rape does not situate this sexual abuse as a problem of the prison, except to the extent that prisons are blamed for not being prisonly enough: not surveilling enough, not controlling inmates enough, not punishing cruel and sadistic men enough. In the standard account of prison rape, the solution to the problem is to expand and intensify imprisonment.⁸

The prison is so entrenched in our criminal justice system, and its basic legitimacy so unquestioned, that to insist on an account of prison rape that links it to the basic structure of the prison may seem foolish. But even if we take for granted that prisons are here to stay, we should think carefully about the ways in which the institution of mass confinement produces sexual coercion. Sexual coercion in prisons probably can be reduced, but that task will require changes to the character of the prison rather than a mere intensification of imprisonment. Furthermore, to the extent that sexual coercion in prison cannot be eliminated, we should make that fact part of debates about the appropriate use of imprisonment as a penalty.

"How could one man rape another? They must be homosexuals; they must like it." *See, e.g.,* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS Part VIII (2001) [hereinafter NO ESCAPE], available at www.hrw.org/reports/2001/prison (describing a prisoner's report that a prison official told him he "must be gay" for "letting them make you suck dick").

⁶ The epigraph to one recent article exemplifies the standard account of prison rape:

A rough, callused hand encircled his throat . . . 'Holler, whore, and you die,' a hoarse voice warned, the threat emphasized by the knife point at his throat . . . He was thrown on the floor, his pants pulled off him. As a hand profanely squeezed his buttocks, he felt a flush of embarrassment and anger . . . because of his basic weakness . . . A sense of helplessness overwhelmed him and he began to cry, and even after the last penis was pulled out of his abused bleeding body, he still cried . . .

James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 433 (2003) (quoting WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES 73 (1992)) [hereinafter Robertson, *A Clean Heart*].

⁷ See *infra* Part I.

⁸ See *infra* Part III.

Thus, the intersection of sex and punishment prompts new questions and new doubts about the character and consequences of incarceration. But this inquiry is useful not only for the study of punishment, but also for the study of sex and gender, including analyses of sexual inequality. To date, these inquiries have rarely merged: most of the scanty literature on sex and rape among male prisoners makes no mention of the extensive scholarship on non-carceral rape,⁹ and most of that extensive scholarship on rape addresses only rapes of women by men.¹⁰ Prison rape researchers can learn much from feminist investigations of the concepts of force and consent; in all-male prisons, as in free-world heterosexual relationships, coerced sex is only rarely marked by bruises and blood. Furthermore, some feminist accounts of rape may insist too much that rape is something men do to women, and research on prison sex should inform revised accounts of sexual violence. Of course, it is risky, and usually inaccurate, to generalize about rape, and this is not to suggest that heterosexual rape in the free world is easily comparable to same-sex prison rape. Social inequalities between men and women produce unique abuses, and the coercive conditions of incarceration produce different abuses. In fact, a central claim of this Article is that sexual coercion in prison is a distinctive product of the carceral environment. Nevertheless, prison sex researchers can learn much from feminists, and vice versa.

The first part of this Article seeks to detail the sexualized nature of incarceration in the United States. The focus is on male prisoners, who constitute about ninety-three percent of the total American prison population.¹¹ (This does not mean to discount the conditions of women

⁹ One scholar of prison rape embraces insights from feminist legal theory in a recent article, but focuses on feminist analyses of the construction of gender rather than on the specific analysis of rape. See James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 529 (2004). Other scholars have cited feminist theory to explain the motivations of violent rapists, but have neglected or overlooked feminist scholars' insistence that rape is not usually physically violent. See Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 148 (2001-2002) (extending feminist explanations of violence against women to violence against male prisoners). See also *infra* notes 45-46 and accompanying text.

¹⁰ For example, in her noted article and subsequent book on rape, Susan Estrich commented on "the apparent invisibility of the problem of male rape," but declined to address the issue in her own study. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1089 n.1 (1986); SUSAN ESTRICH, *REAL RAPE* 81, 108 n.8 (1987). On the general failure of feminists to concern themselves with male rape, see Susanne V. Paczensky, *The Wall of Silence: Prison Rape and Feminist Politics*, in PRISON MASCULINITIES 133-36 (Don Sabo et al. eds., 2001).

¹¹ "As of December 31, 2004, 104,848 women were held in state and federal prisons - up from 68,468 in 1995. Women constituted 7.0 percent of all inmates - up from 6.1 percent in 1995." Press Release, Bureau of Justice Statistics, Prisoners in 2004 (Oct. 23, 2005), available at <http://www.ojp.gov/bjs/pub/press/p04pr.htm>.

prisoners, a group growing in size and clearly worthy of consideration.)¹² This account of sex in prison is based on a review of quantitative and qualitative empirical studies. But the empirical work is, as is often the case, already shaped by contestable normative assumptions.¹³ Since its inception in the first half of the twentieth century, the study of prison sex has been shaped by researchers' own normative conceptions of gender, sexuality, coercion, and consent. Many early studies assumed sexual intercourse to be invariably a quest for gratification, and they assumed sexual orientation to be fixed and polar.¹⁴ More recent studies are more flexible in their accounts of sex and sexual orientation, but many assume without explanation a clear distinction between coerced and consensual sex.¹⁵ Reviewing the empirical

¹² Prisoner-on-prisoner abuse appears to be much less frequent in women's prisons, but women prisoners are more likely to be sexually abused by corrections officers. See, e.g., Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 868 n.29 (2001) ("Custodial sexual misconduct certainly occurs in men's prisons [but] is far less frequent than its corollary in women's prisons. Furthermore, whereas most sexual assaults on women prisoners are perpetrated by guards and staff, most sexual assaults on male prisoners are committed by fellow prisoners."). For recent social science research on sexual coercion in women's prisons, see Leanne Fiftal Alarid, *Sexual Assault and Coercion Among Incarcerated Women Prisoners: Excerpts from Prison Letters*, 80 PRISON J. 391 (2000); Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67 (1996); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217 (2002).

¹³ The legal academy has recently placed a greater (and in my view welcome) emphasis on "empirical legal studies." It is important to be careful not to accept a simplistic dichotomy between empirical and normative claims, and it is necessary to remember not to fail to investigate the ways in which normative assumptions structure empirical inquiries. On the trend in law school scholarship, see Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools* (Vanderbilt Law Sch. Law & Econ., Working Paper No. 05-20), available at <http://www.ssrn.com/abstract=775864>.

¹⁴ See *infra* notes 43-44 and accompanying text.

¹⁵ As Saum et al. note,

[p]erhaps the most perplexing methodological issue in examining sex frequency and sex type among inmates involves the definitions of the sex-related incidents one is trying to measure. A large majority of studies do not make any effort to define the sexual terminology either to the inmates who are being interviewed or to the readers who must interpret the researchers' findings.

Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 PRISON J. 413, 418 (1995). After observing this weakness of prior studies, Saum et al. present their own research findings on prison sex, including the conclusion that "the preponderance of the activity is consensual sex rather than rape." *Id.* at 427. But, the study authors define "rape" to inmate interviewees simply as "oral or anal sex that is forced on somebody," and consensual sex as "oral or anal sex that is agreed on before the act takes place." *Id.* at 420. Saum et al. "acknowledge that the consensual sex reported by our

work with a critical eye, this Article is an attempt to build a fair description of what we know, what we might know, and what we don't know about prison sex.

This much seems clear: incarceration is sexual to a much greater extent than indicated by measures of violent male prisoner rape. In part, this is because incarceration is so pervasively corporal—it involves state action against the body and state control of the body to a degree unmatched in other political contexts. Consequently, it provides innumerable opportunities for officials to observe and regulate the sexual existences of inmates, and for inmates to observe, regulate, and interact with each other. Incarceration is also coercive, inegalitarian, and hierarchical, not only in terms of the state-prisoner relationship, but also in terms of internal inmate relationships. In this corporal and coercive environment, sexual roles are used to establish and demarcate hierarchies within incarcerated populations.¹⁶ Most importantly, incarceration is total: It regulates prisoners' existences so thoroughly that the only way a prison could avoid reaching prisoner sexuality would be to render prisoners non-sexual beings.¹⁷ In short, incarceration is (partly) sexual, and the sexuality of prison is mostly if not entirely coerced.

Prisons shape the sexual activity that goes on within them, but prisoners' efforts to use law to gain sexual safety inside the prison have, so far, been unsuccessful.¹⁸ This legal failure is due to a conceptual dichotomy between legal punishment and penal practices, and a critique of that dichotomy is the second aim of this Article and the focus of Part II. The punishment/penal practices dichotomy underlies Eighth Amendment

respondents may instead be situations of sexual exploitation," but suggest that more detailed qualitative research would be required to assess this issue. *Id.* at 421.

¹⁶ See *infra* Part I.

¹⁷ See Erving Goffman, *Characteristics of a Total Institution*, in *DEVIANT BEHAVIOR* 464 (Delos Kelly ed., 1984). Federal courts have occasionally remarked on the near-total control of prisoners by their keepers. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting) (noting that prisoners "are members of a 'total institution' that controls their daily existence in a way that few of us can imagine") (citing E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 1-125 (1961)). In *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972), the court remarked that

prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others.

Id. at 550.

¹⁸ See *infra* Part II.

doctrine and leaves prison conditions largely outside the reach of the constitutional prohibition of “cruel and unusual punishments.” Punishments, in U.S. constitutional law, are the abstract deprivations of liberty articulated in statutes and in sentencing orders. The actual manifestations of those abstractions, or real prison conditions, are largely beyond the scope of “punishment” and of the law. The embrace by courts—and by many punishment theorists—of this abstract account of punishment represents an absurd denial of practice. As a theoretical sleight of hand, it obscures the fact that prisoners, like all humans, are embodied beings who live in and experience an empirical, physical world. As a matter of legal practice, it eviscerates the Eighth Amendment by replacing a positive account of punishment with a normative one. Part II addresses the failures of current Eighth Amendment doctrine, but it also notes the limits of doctrine: given that the sexualized character of imprisonment extends beyond violent rapes, even a reformed Eighth Amendment jurisprudence is unlikely to render the prison a non-sexual punishment.

Given the realities of sex in prison, Part III of this Article considers strategies for reform. Surprisingly, and regrettably, current discussions of male prisoner rape have paid little heed to the scholarship on rape law reform by feminists and others over the past thirty years.¹⁹ At least two broad insights of the feminist critique of rape law seem particularly critical in the context of this Article. First, rape reform literature emphasizes that the wrong of rape is a violation of individual autonomy and personal agency.²⁰ Second, attempts to protect sexual autonomy require attention to the context in which sex takes place and sexual choices are made. Importantly, feminist scholars have repeatedly insisted that we should not rely on physical injury or physical resistance to identify violations of sexual autonomy.²¹ Many victims of sexual coercion will give in rather than resist physically, and much coerced sex is not the product of a physical threat at all. Each of these lessons is important to the issue of sexual coercion in prison. Together, these insights suggest that an approach to prison rape that fails to consider the coercive context of the prison is unlikely to serve

¹⁹ Literature addressing rapes of female prisoners, by contrast, tends to be more attentive to feminist scholarship and to the difficult questions that feminists have raised about the definition of rape. See, e.g., Deborah M. Golden, *It's Not All In My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 39-42 (2004) (discussing the definition of rape and citing feminist theorists such as Susan Estrich, Catharine MacKinnon, and Dorothy Roberts). Professor Teresa Miller has used feminist and critical theory to argue for greater privacy protections for both male and female prisoners, especially with respect to searches and surveillance by guards of the opposite sex. See Miller, *supra* note 12; Teresa A. Miller, *Sex & Surveillance: Gender, Privacy, & the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291 (2000).

²⁰ See *infra* notes 167-176 and accompanying text.

²¹ See *id.*

prisoners' interests. Part III examines critically the Prison Rape Elimination Act ("PREA")²² and its approach to reform. Although the Act brings public attention to the most violent prison rapes and may produce marginal improvements, it fails either to recognize the complicated forms of sexual coercion or to address the underlying structural problems with the prison. Prosecutions of prison rapists and increased surveillance in prisons are central to the PREA's reform approach. But sexual coercion in prisons is a product of institutions that discipline and punish; we are unlikely to eliminate such coercion with still more discipline and still more punishment.

I. SEX AND SEXUALITY IN AMERICAN PRISONS

We often use the adjective "sexual" to refer to potentially reproductive activity and the associated human anatomy—sexual intercourse, sexual assault, sexual contact.²³ But we also use the adjective to describe an array of ideas, practices, norms, and identities that bear loose and inconsistent connections to human anatomy. Gender falls within this array of constructs that we typically call sexual. The term "sexual" is used in its ordinary meaning: related to anatomical sex or constructed gender. This is neither to conflate biological sex and gender nor to insist on a rigid dichotomy between them.²⁴ It is clear that we use the adjective "sexual" to describe matters related to both sex and gender: the concept of "sexual discrimination" is a prime example.²⁵ The sexual is a category that sometimes has physical referents—the bodies and particularly the genitalia or external reproductive organs of human beings. But the sexual is not defined exclusively by physical referents; it also captures an array of

²² Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2005).

²³ The Oxford English Dictionary defines "sexual" as "of or pertaining to sex or the attribute of being male or female." THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 582 (1979). "Sex," in turn, is defined as "either of the two divisions of organic beings distinguished as a male and female respectively." *Id.* at 577.

²⁴ Feminist scholarship in the 1970s and 1980s debated the validity and utility of a conceptual distinction between sex and gender. See MOIRA GATENS, *IMAGINARY BODIES: ETHICS, POWER, AND CORPOREALITY* 3 (1996) (noting, and critiquing, the distinction).

²⁵ Under Title VII, sexual discrimination is discrimination "because of sex." Litigants and courts have struggled with this phrase for some time. For a detailed overview of key doctrinal developments as well as an account of the concept of "sexual," see Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (arguing that "sexual" harassment is a disciplinary practice that enforces "gender norms"); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995). The Ninth Circuit recently held that sex discrimination need not be "facially sex-specific" to violate Title VII. *EEOC v. Nat'l Educ. Ass'n*, 422 F.3d 840 (2005) (reversing the grant of summary judgment to defendants in a lawsuit alleging harsh, but not facially sex- or gender-related, behavior by the employer to the female employees).

constructs, identities, and norms that may themselves be related to physical referents only indirectly if at all. Prison is often sexual in the (physical) way that sexual assault is sexual, and it is almost always sexual in the (not necessarily physical) way that sexual harassment is sexual.

One respect in which contemporary imprisonment is a sexual punishment stems from the fact that incarceration is, first and foremost, a physical experience. Prisons rely on the physical limitations of the human body to restrain their captives; prisons restrain effectively because humans cannot slip between narrowly spaced bars, or leap high walls, or survive a spray of bullets.²⁶ Besides being restrained, the prisoner's body is nearly always visible to others and very frequently subject to immediate and direct regulation. The expansion of prison populations that has filled and over-filled penal facilities pushes prisoners' bodies into ever closer proximity to one another.²⁷ Outside of prison, humans do not necessarily think of physical embodiment as a primary or central aspect of individual identity. Inside prison, one cannot ignore one's own physical embodiment or the physical bodies of fellow prisoners.

Embodiment is not equivalent to sexuality, but in practice prison relationships are structured according to the capabilities and functions of prisoners' bodies, including the sexual capabilities and functions of those bodies. The sexualized nature of incarceration is a product not only of prisoners' corporeality, but also of the inevitably inegalitarian character of punishment. Imprisonment is a practice rife with inequalities, not only the obvious inequalities between prison officials and inmates, but also with internal inequalities among the inmate population. Historically and socially,

²⁶ The Supreme Court has emphasized the physical restraint aspect of imprisonment in its Due Process jurisprudence. "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

²⁷ In 2004, state prisons were estimated to be about sixteen percent above capacity and federal prisons were estimated to be thirty-nine percent above capacity. See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2004 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf>. One commentator has read the PREA to suggest that overcrowding may contribute to the incidence of prison rape. See Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed By Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 427 (2005) ("While nothing . . . in the PREA itself points to any potential causes of the high incidence of prison rape, there is some suggest that prison conditions and the uncontrollable prison population growth are partly to blame for prison officials' current inability to curb prison rape") (citing Prison Rape Elimination Act of 2003, 42 U.S.C. § 15606(d) (2004)). In my view, though prison overcrowding almost certainly increases incidents of sexual assault in prison, to read the PREA as recognizing this fact is overly charitable. The PREA's only reference to the analysis of prison population growth appears in a provision establishing grants to "safeguard communities" from released prisoners. See 42 U.S.C. § 15605(b)(2).

sexual differentiation is a way of organizing inequality.²⁸ This is true inside the prison as much as, and perhaps even more than, it is true outside of prison. Not surprisingly, the inequalities of punishment produce (and then become reinforced by) a culture of intense, exaggerated masculinity.²⁹ The experience of imprisonment is a continual assault on one's agency, independence, and self-reliance—traits valuable to persons of any gender, but culturally associated with male strength. In attempts to regain some measure of agency and self-respect, many prisoners will reassert their masculinity by dominating others.

That some prisoners force sexual contact with others has become accepted wisdom in popular culture, though the public reaction to this fact seems to be moving from mirth³⁰ to outrage.³¹ Sexual assault in prison has been the subject of considerable media attention,³² political advocacy³³ and numerous empirical studies. Some researchers estimate that more than one

²⁸ This has been the claim of what is sometimes called the "dominance theory" of feminism. See, e.g., CATHARINE A. MACKINNON, *Feminism UNMODIFIED: DISCOURSES ON LIFE AND LAW* 40 (1987). Whether or not one accepts MacKinnon's suggestion that gender difference should *always* be understood as "a question of power, specifically of male supremacy and female subordination," *id.*, it is clear that sexual and gender differences have often been used to explain and justify inequality.

²⁹ See Don Sabo et al., *Gender and the Politics of Punishment*, in *PRISON MASCULINITIES* 3 (Don Sabo et al. eds., 2001) ("Prison is an ultramasculine world where nobody talks about masculinity.")

³⁰ For a long time, and continuing to some degree today, prison rape has been considered humorous. See, e.g., Sabrina Qutb & Lara Stemple, *Selling a Soft Drink, Surviving Hard Time: Just What Part of Prison Rape Do You Find Amusing?*, S.F. CHRONICLE, June 9, 2002 (describing and critiquing a television commercial for 7-Up that depicts a man distributing the soft drink to inmates; when he drops a can, he refuses to bend over to retrieve it). The rule against bending over is not a creation of advertisers' or popular imagination. See Hans Toch, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* 203 (1992) (quoting an inmate as saying: "I still keep my back to the shower, and I wash my back and watch everything. It's a weird thing, that if you drop something you don't even bend down to pick it up.").

³¹ Barrett Duke, Vice President of Public Policy and Research for the Southern Baptist Ethics & Religious Liberty Commission, stated that, "[w]hile prison rape is often referred to flippantly in television and movies, there is nothing humorous about this barbaric behavior. [. . .] Rape should not be part of the punishment, and it certainly doesn't assist in rehabilitation." Tom Strode, *Law Targeting Prison Rape Signed; Diverse Coalition Backed Measure*, BAPTIST PRESS NEWS, Sept. 8, 2003, available at <http://www.sbcbbaptistpress.org/bpnews.asp?ID=16630>.

³² See, e.g., Editorial, *Sexual Slavery in Prison*, N.Y. TIMES, Oct. 12, 2005, at A22. See Prisoner Rape in the News, <http://www.spr.org/en/news/main.html> (last visited Dec. 23, 2005), for a compilation of news reports.

³³ See *supra* note 4.

in five prisoners will be the victim of a sexual assault while incarcerated,³⁴ but the reported rates vary widely.³⁵ The lack of consensus is not surprising, for prisoners are often unlikely to report assaults and consequently prison rape is a notoriously difficult thing to measure.³⁶ In addition, researchers and prisoners' rights activists often fail to offer a clear and consistent account of consent, so reports on nonconsensual sex do not always make clear what is being measured. Notwithstanding the inadequate information, advocacy groups such as Stop Prisoner Rape have successfully raised public concern about sexual violence in prisons, and in 2003 President Bush signed the Prison Rape Elimination Act.³⁷

Without discounting the importance of these reform efforts, it is important to suggest that the paradigmatic violent rapes are only a small piece of the sexualization of incarceration.

Empirical prison research, limited as it is, and prisoners' own accounts describe a "prison subculture" which "fuses sexual and social roles

³⁴ See, e.g., NO ESCAPE, *supra* note 5; Daniel Lockwood, PRISON SEXUAL VIOLENCE 18 (1980) (reporting that twenty-eight percent of male inmates in two New York prisons had been targets of sexual aggression); Toch, *supra* note 30, at 189-90 (reporting a twenty-eight percent "victimization" rate among a random sample of prisoners from two New York institutions, but apparently including not specifically sexual victimization in this tally).

³⁵ See, e.g., Christine A. Saum, *Sex in Prison: Exploring Myths and Realities*, 75 PRISON J. 413, 427 (1995) (less than one percent of inmates in a Delaware prison claimed to have been raped); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000) (reporting that twenty-one percent of male inmates had been targets of sexual aggression). See also Robert W. Dumond, *Inmate Sexual Assault: The Plague that Persists*, 80 PRISON J. 407, 408 (2000) (reviewing recent research and noting that "[t]he actual extent of prison sexual assault is still unknown. The incidence of inmate sexual victimization is quite variable and difficult to predict. . . ."). For examples of older but still frequently cited studies of prison rape, see LEE BOWKER, PRISON VICTIMIZATION (1980); DONALD CLEMMER, THE PRISON COMMUNITY (1940); ANTHONY M. SCACCO, JR., RAPE IN PRISON (1975); WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS (1982); Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriffs' Vans*, in MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSIONS 107-20 (Anthony M. Scacco, Jr. ed., 1982). Since the older studies have been conducted, the law and practice of imprisonment in America has changed dramatically.

³⁶ See, e.g., Saum, *supra* note 35, at 418. Over-reporting or false reporting is also a possibility.

³⁷ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2005). In July 2005, the Department of Justice released its first report on prison sexual violence pursuant to the PREA. ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT OF 2003: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf>. This report counts only sexual assaults reported to and recorded by corrections officials, a methodology that is (as the report acknowledges) not likely to produce a reliable estimate of the extent of sexual victimization.

and assigns all prisoners accordingly.”³⁸ Over thirty years of prison litigation have produced records of prison life that confirm these accounts.³⁹ Each inmate will probably experience prison as a partly sexual punishment, even if he is neither raped nor rapist. He will receive extensive sexual harassment, and will likely engage in sexual harassment toward others. He will lose all privacy rights, including any semblance of sexual privacy, as his body is monitored, restrained, and regulated. And he will hold a place in a prison hierarchy based on his assignment to a sexual category.

By many accounts, a new male inmate’s first exposure to fellow prisoners is likely to be a first-hand introduction to the sexualized character of incarceration.⁴⁰ As other male inmates get their first glimpse of a new prisoner, they will shout sexual suggestions and speculate about where the new inmate will fit into the sexual hierarchy of the prison: Is he a “top man,” a “wolf,” a “jockey”—a sexual aggressor who will dominate other inmates? Is he at least a “man” who will fight off any inmate who initiates sexual contact? Is he a “fag” or a “queen” who will seek same-sex intercourse with willing partners? Will he become a “punk,” a professedly heterosexual male inmate who initially resists sexual contact but is unable to withstand coercion and eventually submits?⁴¹

³⁸ Stephen Donaldson, *A Million Jockers, Punks, and Queens, Lecture at Columbia University (Feb. 4, 1992)*, in PRISON MASCULINITIES 118 (Don Sabo et al. eds., 2001).

³⁹ See *supra* Part II.

⁴⁰ For accounts of new inmates’ initial contacts with their fellow prisoners, see Toch, *supra* note 30, at 194. He quotes an inmate as saying:

Any new person, they hollered obscenities at them and all sorts of names They told me to walk down the middle of this line like I was on exhibition. . . . They were screaming things like, ‘That is for me’ and ‘This one won’t take long—he will be easy.’ And, ‘Look at his eyes’ and ‘her eyes’ or whatever, and making all kinds of remarks.

Id.; see also *id.* at 198 (quoting another inmate: “Now, each and every inmate goes through a trial period where someone is going to say, ‘I want your ass.’”); NO ESCAPE, *supra* note 5, at Part V; Man & Cronan, *supra* note 9, at 153-54 (recounting an attorney’s observations of Texas prisoners, including that “a prisoner typically would be assaulted on his first day in prison” and “other inmates would observe the attack and evaluate the inmate based on how he responded”).

⁴¹ For recent research on inmate roles and the labels used for various hierarchical classifications, see Tammy Castle et al., *Argot Roles and Prison Sexual Hierarchy*, in PRISON SEX: PRACTICE & POLICY 13 (Christopher Hensley ed., 2002); Christopher Hensley et al., *The Evolving Nature of Prison Argot and Sexual Hierarchies*, 83 PRISON J. 289 (2003) [hereinafter Hensley et al., *Evolving Nature*]. The research presented by Castle et al. suggests that three main sexual roles structure inmate interactions: those who take (or threaten) sex; those who engage in it consensually; and those who have sex forced upon them. But the relative position of certain subcategories may be changing; specifically, inmates who describe themselves as homosexual or bisexual may have attained a higher position in the prison hierarchy than they held when prison sex research began in the first half of the twentieth century. See *id.* at 297-98; see also Castle et al., *supra*, at 18-20.

The centrality of sexually defined roles to prison life has been documented for about as long as research on prison sex has been conducted. The inmate argot has changed little—apparently prisoners have been speaking of punks and wolves for over fifty years.⁴² But what researchers make of this argot has changed over time. Early studies of prison sex approach the subject as one of the psychology of homosexual preferences, distinguishing between “true” homosexuals (who would choose same-sex interactions even if they had opportunities for opposite-sex ones) and “situational” homosexuals (who choose same-sex interactions in desperation after they have been deprived of heterosexual intimacy).⁴³ Many of these older studies advance some form of a “heterosexual deprivation” thesis that assumes that 1) sexual orientation is fixed, 2) most inmates’ fixed orientations are heterosexual, and 3) heterosexual males need regular intercourse or they will suffer “deprivation” and turn to same-sex intercourse as a poor but necessary substitute.⁴⁴

More recent studies of prisoner sex seem to have accepted two critical claims of gender theorists and feminists: first, the claim that sexual

⁴² See, e.g., DONALD CLEMMER, *THE PRISON COMMUNITY* (1940); JOSEPH FISHMAN, *SEX IN PRISON* 81-82 (1934) (detailing terms used by inmates to describe each other’s sexual roles); GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1958).

⁴³ For an overview of early and mid-twentieth century research depicting prison sex as an issue of (true or situational) homosexuality, see Helen M. Eigenberg, *Correctional Officers and their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 *PRISON J.* 415, 418-21 (2000).

⁴⁴ Prisoner sex was viewed as a consequence of “sex starvation.” R. Lindner, *Sexual Behavior in Penal Institutions*, in *SEX HABITS OF AMERICAN MEN* 207 (E. Deutsch ed., 1948). Sexual deprivation rendered the prison “a giant faggot factory.” D. Lee, *Seduction of the Guilty: Homosexuality in American Prisons*, *FACT MAG.*, Nov. 1965, at 57. Legal scholars advocating more prison rape prevention tactics generally dismiss the sexual deprivation thesis and argue that prison rape is simply a matter of violent domination. See, e.g., James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 *AM. CRIM. L. REV.* 1, 14 (1999) (“As the premier act of domination, prison rape is thus transformed into a statement of one’s masculinity and strength: Rape is not primarily motivated by the frustration of sexual needs.”) (internal quotation marks omitted) (quoting Donald J. Cotton & A. Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 *J. PRISON & JAIL HEALTH* 47, 50 (1982)). But many prisoners claim that the absence of opportunities to have consensual sex with non-incarcerated partners does increase the rate of sexual assault. See, e.g., Struckman-Johnson et al., *supra* note 12, at 76 (noting that many inmate participants in a research study believe prison rape is caused by “sexual deprivation”). Several contemporary prison sex researchers advance the sexual deprivation thesis and argue that prisons should increase opportunities for conjugal visits. See CHRISTOPHER HENSLEY, *LIFE AND SEX IN PRISON TO PRISON SEX: PRACTICE & POLICY* (Hensley ed., 2002). To some degree, the debate between deprivation theories and domination theories of prison sex parallels the attraction versus power debate in theories of workplace sexual harassment. See, e.g., Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 *IND. L. J.* 101 (2004).

identities and the significance of those identities are social constructs rather than natural categories based on incontrovertible biological differences,⁴⁵ and second, the claim that sexual differentiation is often a site upon which to ground inequality.⁴⁶ Indeed, the use of differentiated sexual categories to organize hierarchies in exclusively male prison populations gives considerable support to these claims. Distinct sexual roles, especially roles of dominance or submission, among biologically similar persons can hardly be traced to biological distinctions. But it is important to note that the reported constructions of sexuality inside the prison do not always correspond to constructions of sexuality common outside the prison. Prisoners do not view all participants in male-to-male sexual contact as "homosexual."⁴⁷ In prison, masculinity is typically equated with domination.⁴⁸ Accordingly, the aggressor in prison rape is viewed as a model of heterosexual masculinity, and the practice of prison rape actually "reinforces heterosexual norms."⁴⁹ By some accounts, "rampant homophobia coexists with high levels of rape."⁵⁰

Prisoners are sorted into sexually defined categories such as the previously mentioned "jockers," "queens," and "punks"; these categories then structure ongoing inmate interactions.⁵¹ A rape is often "the first act

⁴⁵ See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (1990). The social construction argument is buttressed by empirical research which seems to indicate that sexual preferences are not always rigidly fixed on one or the other side of a hetero/homo dichotomy. Cf. Michael B. King, *Male Rape in Institutional Settings*, in *MALE VICTIMS OF SEXUAL ASSAULT* 67 (Gillian C. Mezey ed., 1992) ("People are capable of a broad range of sexual response . . .").

⁴⁶ See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., Vintage Books 1990) (1978) (describing sexuality as "an especially dense transfer point for relations of power"); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 40 (1987).

⁴⁷ "[T]he typical sexual aggressor does not consider himself to be a homosexual, or even to have engaged in homosexual acts." Davis, *supra* note 35, at 116. See also A. NICHOLAS GROTH & JEAN BIRNBAUM, *MEN WHO RAPE* 123 (1979) (quoting a prison official as saying that, "[i]f you are the sexual penetrator and make no effort to satisfy your sexual partner or bring him to orgasm, then you retain your manhood").

⁴⁸ See Man & Cronan, *supra* note 9, 149-54. If masculinity is equated with dominance, the very experience of being a prisoner, subjected to the control of prison officials, is a constant assault on masculinity, and thus many inmates feel an intense need to reassert their masculinity. See Robertson, *A Clean Heart*, *supra* note 6, at 440-41.

⁴⁹ Ian O'Donnell, *Prison Rape in Context*, 44 *BRIT. J. CRIMINOLOGY* 241, 243 (2004).

⁵⁰ *Id.*

⁵¹ Sexual activity is not the only way in which masculinity is asserted; scholars have noted the importance of sports, body-building, and non-sexual physical violence to prisoners. See, e.g., Don Sabo, *Doing Time, Doing Masculinity: Sports and Prison*, in

in . . . a lengthy drama of conquest and control. For months or even years afterward the victim may be required to provide for the needs of the perpetrator in return for a measure of protection.”⁵² Aggressors often force their victims to clean, do laundry, or even alter their appearances to seem more feminine.⁵³ Some victims are subsequently viewed as property, and are often rented or sold as sexual slaves to other prisoners.⁵⁴ If an accosted inmate successfully resists the would-be aggressor, in contrast, he may gain a measure of respect and relative peace.⁵⁵ Not all aggressors relish their roles; researchers have found a considerable degree of what is sometimes

PRISON MASCULINITIES, *supra* note 29. Pornography and pin-ups can also signal masculinity. Donaldson, *A Million Jockers*, *supra* note 38, at 120 (“A macho gay male who comes into [prison] with considerable fighting ability may attempt to pass as a heterosexual jocker, since the only evidence of heterosexuality required is a pinup on the cell wall.”).

⁵² O'Donnell, *supra* note 49, at 244.

⁵³ Man & Cronan, *supra* note 9, at 151; *see also* Donaldson, *A Million Jockers*, *supra* note 38; NO ESCAPE, *supra* note 5, at Part V (“Forced to satisfy another man’s sexual appetites whenever he demands, [victims] may also be responsible for washing his clothes, cooking his food, massaging his back, cleaning his cell, and myriad other chores.”). A few commentators have noted the ways in which sexual relationships in prison can mimic the gender roles of traditional heterosexual pairings. *See, e.g.*, CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 188 (1999) (“In the big house, layers of collective, individual, and institutional violence act in concert to culturally manufacture prison’s ‘second sex’ and thus reproduce the binary gendered world of the outside.”); Stephen Donaldson, *A Million Jockers*, *supra* note 38.

⁵⁴ *See, e.g.*, NO ESCAPE, *supra* note 5, at Part V (“Prisoners unable to escape a situation of sexual abuse may find themselves becoming another inmate’s ‘property.’ The word is commonly used in prison to refer to sexually subordinate inmates, and it is no exaggeration. . . .” as these inmates “are frequently ‘rented out’ for sex, sold, or even auctioned off to other inmates . . .”); MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 38-39 (1997); King, *supra* note 45, at 68 (noting many victims of sexual assault in prison “later become the ‘property’ of the assailant”) (quoting W. Rideau & B. Sinclair, *Prison: The sexual jungle*, in A CASEBOOK OF SEXUAL AGGRESSION (A.M. Scacco ed., 1982)). In a widely publicized recent trial, a former Texas prisoner alleged that he had been forced to serve as a sexual slave to a prison gang. *See* Adam Liptak, *Inmate Was Considered “Property” of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES, Sept. 25, 2005, at 1:14; Adam Liptak, *Ex-Inmate’s Lawsuit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.

⁵⁵ *See* Daniel Lockwood, *Issues in Prison Sexual Violence*, in PRISON VIOLENCE IN AMERICA 99 (Michael Braswell ed., 2d ed. 1994) (describing research findings that many targets of sexual aggression successfully resist the aggressors).

called preemptive aggression.⁵⁶ “In essence, to avoid being a sexual victim it may be necessary to sexually victimize others.”⁵⁷

Sexual categories are a matrix in which to enforce masculinity and organize inequality. The means by which the hierarchies are produced and reinforced are complex. Discussions of prison rape in contemporary legal scholarship tend to recite graphic tales of physical force and bloody violation,⁵⁸ but by prisoners’ own reports, these tales capture only a fraction of the coerced sexual interactions in prison.⁵⁹ Most empirical researchers also report that sexual assaults accomplished through physical overpowering the victim are not the norm.⁶⁰ Two other patterns are far more common: Repeated sexually harassing threats that do not culminate in a physical assault,⁶¹ and sexual contact that is coerced through some tactic short of the direct exercise of force.⁶² A 2001 Human Rights Watch report found that

overtly violent rapes are only the most visible and dramatic form of sexual abuse behind bars. Many victims of prison rape have never had a knife to their throat. They may have never been explicitly threatened. But they have nonetheless engaged in sexual acts against their will believing they had no choice.⁶³

⁵⁶ See Lockwood, *supra* note 34, at 49 (“Violence can be a simple matter of . . . preemptive self-defense. At a certain point the target begins to believe that the aggressor is on a course escalating toward a forceful attempt at sexual assault. He then fights to alter this self-conceived prediction.”).

⁵⁷ Hensley et al., *Evolving Nature*, *supra* note 41, at 292. Donaldson observed in 1993 that the growing fear of AIDS among inmates might provide a welcome “excuse” for “men” prisoners who did not want to coerce sex from others. Donaldson, *A Million Jockers*, *supra* note 38, at 119.

⁵⁸ See, e.g., Robertson, *A Clean Heart*, *supra* note 6, at 433 (quoting an account of prison rape from WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES 73 (1992)).

⁵⁹ See, e.g., NO ESCAPE, *supra* note 5, at Part V.

⁶⁰ See, e.g., Struckman-Johnson & Struckman-Johnson, *supra* note 35, at 382, 389 (distinguishing between “sexual coercion” and rape, and reporting much higher rates of sexual coercion).

⁶¹ Toch, *supra* note 30, at 188.

⁶² NO ESCAPE, *supra* note 5, at Part I.

⁶³ *Id.* (“Prisoners, including those who had been forcibly raped, all agree that the threat of violence, or even just the implicit threat of violence, is a more common factor in sexual abuse than is actual violence.”)

For targets of sexual aggression, the prison rule (often reiterated to prisoners by corrections officers) is “fight or fuck.”⁶⁴ Some prisoners do fight: many incidents of “non-sexual” prison violence begin with an unwelcome sexual advance.⁶⁵ The suggestion of sexual activity so pervades the prisoner’s experience that even seemingly platonic physical contact is often interpreted sexually (and frequently, met with violence).⁶⁶ But those who end up as the victim of sexual abuse are more often inmates who are unwilling to fight than they are inmates who fought and lost.

Sex coerced through an explicit or implicit threat of violence constitutes rape under most statutory definitions of the crime. The Prison Rape Elimination Act includes in its definition of rape “the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.”⁶⁷ Many prisoners who recognize themselves as vulnerable trade sex for protection—the “punk” seeks out and pairs with a “man,” “Daddy,” or “jockey”⁶⁸—and the PREA definition may

⁶⁴ Toch, *supra* note 30, at 208-09; Davis, *supra* note 35, at 117. In one recent case, a former prisoner alleged that, after he asked prison officials to protect him from rape, the officials told him, “We don’t protect punks on this farm,” and “There’s no reason why Black punks can’t fight and survive in general population if they don’t want to f***.” See Johnson v. Johnson, 385 F.3d 503, 512-13 (5th Cir. 2004).

⁶⁵ Toch notes that

[t]he apparent or superficial object of [inmate] victimization is sexual exploitation, and it is sex that the aggressor most often demands of the victim. But . . . rape is an infrequent event. Though it is possible that the aggressor’s hope springs eternal, irrespective of his past experience, this interpretation is unlikely. It is more likely that the nature of the aggressor’s threat is incidental to his real purpose, which is to be threatening.

Toch, *supra* note 30, at 197-98. For more on sexual harassment in prison, see Robertson, *supra* note 44.

⁶⁶ See Toch, *supra* note 30, at 212 (quoting an inmate who threatened to stab a fellow prisoner after the other prisoner put his arm around the inmate’s shoulders); see also Dan Pens, *Skin Blind*, in PRISON MASCULINITIES, *supra* note 29, at 150 (account by a former prisoner of the taboo on platonic physical contact in all-male prisons).

⁶⁷ 42 U.S.C. § 15609(9)(C) (2005). For a lengthier discussion of the PREA’s definition of rape, see *infra* Part III.

⁶⁸ See Donaldson, *A Million Jockers*, *supra* note 38, at 120. Donaldson argues that existing conceptions of coercion and consent fail to capture the complexities of prison sexual relationships:

[An] area where current dualistic concepts based on legal distinctions fail to address actual prisoner sexuality is that of coercion and consent. Writers divide all sexuality into that which is coerced—rape and other forms of sexual assault—and that which is “voluntary.” But for the passive prisoner in most acts and relationships, the punk, usually neither term applies. I have coined the term “survival driven” as an intermediate category, and I suggest its applicability in other concepts, including heterosexual ones, as well. From the typical punk’s

target such activity. There is every reason to prevent such indirect forms of sexual coercion from occurring, though, as discussed below, there is reason to doubt that the PREA identifies useful ways to accomplish that goal.⁶⁹

This is still not a full account of sex in prison. By prisoners' own direct reports and empirical studies based on interviews or surveys of prisoners, many inmates choose to engage in sexual activity for reasons other than fear of immediate or possible violence. They have sex—again, this is by their own reports—for money, drugs, food, comfort, physical gratification, and love.⁷⁰ It is worth emphasizing, for example, that prisoners distinguish between “punks” (who submit to sex but do not choose it) and “fags” (who actively seek sexual relationships in prison). Here, then, is a crucial problem for policymakers and academics who address prison rape: is all prison sex rape? There is a fine line to walk: on one hand, we do not want to ignore or worse, romanticize, sexual activity that is in fact coerced. On the other hand, prisoners have been stripped of so much control over their own lives that their professed advocates would be perverse to deny prisoners what shreds of agency or control they may retain.

Some scholars and prison officials would insist that no prison sex is fully “consensual.”⁷¹ This claim may have some merit, but it is also too

point of view, none of his passive sexual activity is truly voluntary Many . . . liaisons originate in the aftermath of gang rape or to counter the ever-present threat of gang rape. Prison officials and researchers label such behavior as “consensual.” I, too, would treat it legally the same as consensual activity, but fear on the part of the passive partner is certainly the prime motivation. On the other hand, when a punk hooks up with someone, forming a long-lasting relationship with a protector, often selected by the punk from among multiple contenders, we are clearly dealing with something other than rape or sexual assault.

Id. at 125-26. Donaldson argued that prisons should “legalize nonassaultive sexuality and encourage the formation of stable, mutually supportive pair bonds, while reserving the full weight of administrative attention and punishment for instances of coercion.” *Id.* at 123.

⁶⁹ See *infra* Part III.

⁷⁰ See, e.g., Donaldson, *A Million Jockers*, *supra* note 38, at 122 (“The punks, who retain a desire for an insertive role . . . sometimes reciprocate with one another in a mutual exchange of favors”); Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 422-23 (2000) (prison prostitution for money, food, and drugs); Hensley et al., *Evolving Nature*, *supra* note 41, at 293 (identifying as “canteen punks” prisoners who traded sexual activities for goods and services); *id.* at 297 (some inmates pair into “true love” relationships); Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES, *supra* note 29, at 115 (“There is even consensual sex in prison. Many men find partners, have sex as a sexual outlet in an all-male world, and do not consider themselves gay before or after release There is even affection—sometimes great affection—but this kind of innovation in male intimacy does not attract the kind of media attention that rape receives.”); NO ESCAPE, *supra* note 5, at Part II (prostitution); Saum, *supra* note 15 (consensual sex).

⁷¹ See, e.g., Iman R. Soliman, *Male Officers in Women's Prisons: The Need for Segregation of Officers in Certain Positions*, 10 TEX. J. OF WOMEN & L. 45, 59 (2000)

simplicistic to see all prison sex as equally coerced. Beyond prison walls, the law assumes that most adult sex is consensual as long as nobody complains.⁷² In prison, there are clearly many rapes; there also are reports of instances in which inmates choose to have sex though they could easily abstain.⁷³ And a substantial percentage of sex in prison appears to be sexual encounters of a third kind: sex that is produced by the overwhelmingly coercive environment of prison, sex sought or agreed to under ambiguous circumstances, sex that may constitute prostitution or "sexual extortion," or just a conflicted quest for a measure of safety in an inherently dangerous environment.⁷⁴ Because even egregiously violent prison rapes were so long ignored by free society, it bears reiterating that much of the sexual interaction in prison *is* violent, cruel, and void of comfort, desire, or reciprocity. It is tempting to insist that every instance of prison sex is like this, but prisoners' own accounts suggest otherwise.

The key point here is that sex in prison extends far beyond the violent assault. This, as elaborated in Part III below, complicates attempts to eliminate sexual coercion among inmates; the policies and legal tactics that we use to address non-carceral rape are not necessarily well-suited to the prison. A few further points about sexuality and prison hierarchies are worth noting. First, there appear to be complex relationships between prison sex and more general social inequalities. Several studies have reported racial disparities among the various sexual roles. Aggressors are disproportionately African-American; the targets of sexual aggression are

(quoting a Michigan corrections official as saying, "There's no such thing as consensual sex in prison, period").

⁷² Of course, as the continued controversies over date rape, prostitution, and "unwanted sex" demonstrate, the categories of coercion and consent are not unproblematic even beyond prison walls. Usually, among non-institutionalized adults we draw the line between coerced and consensual sex by allowing victims of coerced sex to identify themselves. For a further discussion of attempts to assess consent in non-carceral sexual relationships, see Part III.

⁷³ See Saum, *supra* note 15, at 427 (characterizing a "preponderance" of sexual activity in prison as consensual); *but see supra* note 15 (noting that Saum and other researchers often fail to define consent). As with rape, consensual sex among inmates is probably underreported—in fact, inmates may be even less likely to report consensual sex than coerced sex. Further complicating attempts to measure consensual sex in prison is the fact that many corrections officers (and doubtless, many researchers) cannot tell whether specific instances of inmate sexual activity are coerced or consensual. See Eigenberg, *supra* note 43, at 429.

⁷⁴ See *supra* note 69. Eigenberg seems to view all sex in exchange for goods or services as "coercive." See *id.* at 429 ("Most of the literature on rape and consensual homosexuality fails to address prostitution at all, and when it is mentioned, the coercive element is rarely discussed."). Whether or not prostitution should be understood as consensual sex, it is not clear that it is in the inmates' interests to prohibit such acts.

disproportionately white.⁷⁵ These disparities appear to be particular to American prisons, although little research has been conducted on prison rape in other countries.⁷⁶ Some scholars have suggested that sex in U.S. prisons must be understood in the context of social inequalities and America's history of race relations.⁷⁷

That sexual roles and corresponding inequalities are central to prison life is also evident in the treatment of openly homosexual prisoners. As sentencing judges have often recognized, such prisoners are likely to be targets of immediate and extensive violent assaults by other inmates. In fact, some trial courts have found the likely abuse of homosexuals in prison to be a basis for downward departure at sentencing,⁷⁸ and some appellate judges have similarly noted the specific vulnerability of homosexual or transsexual prisoners.⁷⁹ It should be noted, however, that normative assessments of sexual orientation appear to be shifting somewhat in the prisons (as they are outside the prisons). While no one would assert that homosexuals have an easy time in prison, research in some prisons suggests that the status of

⁷⁵ See, e.g., NO ESCAPE, *supra* note 5, at Part IV; see also Lockwood, *supra* note 34, at 2 ("In prison, most aggressors are black; most targets are white."). The racial dimensions of prison rape were noted by advocates for the Prison Rape Elimination Act. See, e.g., Eli Lehrer, *Hell Behind Bars: The Crime that Dare Not Speak Its Name*, *supra* note 4 ("The wolves [serial rapists] are almost all black, while punks are almost all white."). Congress included notice of "the frequently interracial character of prison sexual assaults" in the factual findings section of the Prison Rape Elimination Act, 42 U.S.C. § 15601(9) (2005).

⁷⁶ See O'Donnell, *supra* note 49, at 248 (noting that "[w]e know little about the racial dimension of prison violence in the UK," but reporting that one victimization survey found no evidence that black offenders were more likely to commit sexual assaults in prison).

⁷⁷ See, e.g., Gordon J. Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 HOW. J. CRIM. JUST. 267 (1999); E. Megargee, *Psychological Determinants and Correlates of Criminal Violence*, in CRIMINAL VIOLENCE (Marvin E. Wolfgang & Neil Alan Weiner eds., 1982).

⁷⁸ United States v. Blarek, 7 F. Supp. 2d 192, 211-12 (E.D.N.Y. 1998) (vulnerability of two homosexual defendants to abuse in prison warranted downward departures in their sentences); United States v. Ruff, 998 F. Supp. 1351, 1357 (1998) (granting downward departure to an HIV-positive, homosexual defendant based on his vulnerability to sexual victimization in prison); United States v. Shasky, 939 F. Supp. 695 (D. Neb. 1996) (granting downward departure to a homosexual defendant who would be especially vulnerable to abuse in prison). See also United States v. Rabins, 63 F.3d 721, 743-44 (8th Cir. 1995) (noting the high costs of providing health care to HIV-infected prisoners, and suggesting that these costs might serve as the basis for a downward departure in sentencing).

⁷⁹ See, e.g., United States v. Wilke, 156 F.3d 749, 754 (7th Cir. 1998) (district court could consider a prisoner's "sexual orientation and demeanor" as a basis for downward departure based on vulnerability to abuse in prison); Taylor v. Michigan Dep't of Correction, 69 F.3d 76, 87 (6th Cir. 1995) (Wellford, J., dissenting) (describing "feminine mannerisms or homosexual orientation" as information about a prisoner that would "raise a red flag" to prison officials that the prisoner was especially vulnerable to sexual assault).

“fags” in prison has “progressed upwardly to equal that of the wolves.”⁸⁰ There is no indication that transsexual prisoners enjoy a similar increase in status. Such prisoners are usually classified on the basis of their genitalia and, should their genitalia not correspond to their gender identity, subject to substantially increased rates of sexual abuse from fellow inmates.⁸¹

Two other categories of prisoners, and their typical treatment in prison, are worth mentioning here. First, HIV-positive prisoners confront a unique array of challenges and are often subjected to outright discrimination. These inmates are sometimes physically segregated from other prisoners,⁸² required to wear distinctive uniforms or face masks,⁸³ or denied visitation rights or other privileges.⁸⁴ The medical confidentiality rights of all prisoners are circumscribed, but reported cases suggest that HIV-positive inmates have had particular difficulties protecting the privacy of their medical information.⁸⁵ Of course, inmates with HIV and AIDS are faced with an array of other, often more serious challenges, including access to necessary medical care. But most important to the argument here is the fact that, to be identified with this particular disease, associated as it is with sexual activity, bears specific and deleterious consequences for inmates.⁸⁶ Similarly, sex offenders are a distinct and disfavored category within prison populations, subject to heightened abuse from both corrections officers and

⁸⁰ Castle et al., *supra* note 41, at 19; *see also* NO ESCAPE, *supra* note 5, at Part IV.

⁸¹ *See generally* Christine Peek, Comment, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211 (2004).

⁸² *See, e.g.*, Carter v. Lowndes County, 89 Fed. Appx. 439, 441-42 (5th Cir. 2004) (finding that segregation of an HIV-positive prisoner served a “legitimate penological interest”); Camarillo v. McCarthy, 998 F.2d 638 (9th Cir. 1993). *See generally* Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Endemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 314-15 (1992) (discussing courts’ initial deference to prison administrators on the question whether to segregate HIV-positive prisoners).

⁸³ *See* Perkins v. Kansas Dep’t of Corrections, 165 F.2d 803 (10th Cir. 1999); Parker v. Proffitt, 1995 WL 681250 (W.D. Va. July 20, 1995).

⁸⁴ *See* Bullock v. Gomez, 929 F. Supp. 1299 (C.D. Cal. 1996).

⁸⁵ *See, e.g.*, Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999); Baez v. Rapping, 680 F. Supp. 112 (S.D.N.Y. 1988). *See generally* Jin Hee Lee, *Excerpts from a Jailhouse Lawyer’s Manual, Fifth Edition—Chapter 22: AIDS in Prison*, 31 COLUM. HUM. RTS. L. REV. 355, 377-80 (2000).

⁸⁶ At the same time, one benefit of being identified to the prison population as HIV-positive may be a reduced risk of rape. *See* Saum, *supra* note 15, at 425 (noting that some “inmates felt that fear of contracting HIV has curtailed rape or at least made it a less spontaneous act”).

fellow inmates.⁸⁷ By many reports, sex offenders are themselves disproportionately likely to be the target of sexual assault in prison.⁸⁸

This Article has been arguing that sex and sexual identities structure the prison experience in profound ways. There is one further aspect in which prison is inherently sexualized, and this form of sexualization would persist even if all coerced sex and all internal inmate hierarchies were eliminated. Prison is sexualized to the extent that prisoners remain sexual beings, for the internal publicity of the institution precludes almost any degree of privacy. The prison is a “total institution,” a “closed, single-sex society” in which the inhabitants “have essentially all decisions about the structure and content of their daily lives made for them, and they share all aspects of their daily lives.”⁸⁹ All of a prisoner’s outwardly visible being, including any outward manifestations of sexuality, is subject to substantial scrutiny and control by the institution and its inhabitants. All sexual activity, coerced or not, is difficult to conceal from other inmates even on the limited occasions that it is successfully concealed from guards. Even aside from sexual interaction or masturbation, the general absence of bodily privacy contributes to the sexualized atmosphere. Much of the time, prisoners’ bodily functions, including toilet use, showering, and hygiene are visible to corrections officers as well as other prisoners.⁹⁰ Not only are daily bodily functions rendered public, but prison security measures often subject inmates to intrusive examinations such as body cavity searches. (Unsurprisingly, these searches are typically perceived as further assaults on the prisoner’s masculinity.⁹¹) Inevitably, the ways in which corrections

⁸⁷ See Philip H. Witt & Natalie Barone, *Assessing Sex Offender Risk: New Jersey’s Methods*, 16 FED. SENT’G. REP. 170 (2004) (noting that sex offenders are likely to receive abuse and harassment from other inmates in prison).

⁸⁸ Marsha Weissman & Richard Luciani, *Sentencing the Sex Offender: A Defense Perspective*, 150 PLI/CRIM. 259, 272-73 (1989); but see Lockwood, *Issues in Prison Sexual Violence*, *supra* note 55, at 99 (noting and rejecting the “popular notion” that those who commit sex crimes against children are more likely to be raped in prison; “at least according to my research, the crime one commits has little to do with one’s selection as a target”).

⁸⁹ Hensley et al., *Evolving Nature*, *supra* note 41, at 290. See also *supra* note 17 and accompanying text.

⁹⁰ Scatology and sexuality are not the same, but they are closely related, as evidenced by prisoners’ many complaints of surveillance by opposite-sex guards of toilet or shower activities.

⁹¹ See, e.g., TED CONOVER, *NEWJACK: GUARDING SING SING* 135 (Vintage Books 2001) (2000) (“Vivid to me . . . was the refusal of my inmate to submit to a strip-frisk. By refusing this small violation of his privacy, he’d earned himself a big violation. . . . Eventually, it occurred to me that self-respect had required him to refuse.”); LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* 70 (2004) (quoting a prisoner as saying: “They use body cavity searches against the most rebellious, [saying] ‘We’re gonna degrade you to where you don’t want to break the rules.’ The only way I can feel like I’m living and I’m a man is to fight [them] for what I have.”).

officers perceive inmates and the ways in which inmates perceive each other and themselves will be shaped by the widespread lack of privacy in both ordinary personal hygiene and in prison searches.

It is sometimes argued that the modern prison represents a shift in the target or punishment from bodies to souls.⁹² Whatever the aspirations of the criminal justice system vis-à-vis the minds of prisoners, the prison's most immediate form of control is corporal. It operates through direct physical restraint, threats of immediate force, and surveillance of inmates' bodies. A prisoner thus experiences his own embodiment directly and nearly constantly. Furthermore, prisons are realms of very obvious inequalities in which the struggle for status becomes a crucial concern. Masculine norms are continually assaulted and reasserted, and the corporal and inegalitarian aspects of incarceration intersect to create a realm of sexualized power relationships.

II. IMPRISONMENT AS A NON-CORPORAL PUNISHMENT

Notwithstanding prisons' immediate and invasive regulation of bodies, modern incarceration is frequently portrayed as an alternative to "corporal punishments."⁹³ In fact, currently accepted philosophical accounts of punishment's legitimacy often emphasize that modern punishment avoids the physical violence of past penal practices. This Part traces the legal construction of punishment that has rendered the law blind to the sexualized, and indeed the corporal, aspects of incarceration. Prisoners seeking legal remedies for sexual abuse in prison have relied primarily on the Eighth Amendment's prohibition of cruel and unusual punishments.⁹⁴ Most prison sex, however, fails to meet the constitutional conception of "punishment," and so courts often conclude that however cruel or unusual a prison rape may be, the victim cannot recover under the Eighth Amendment. This Part focuses on the failures of Eighth Amendment doctrine, but it is worth noting the limits of that doctrine as well: even if Eighth Amendment law were reformed to recognize more prison rapes as punishment, as this Article argues that it should be, constitutional doctrine is probably incapable of addressing the far more widespread problem of sexual coercion that does not constitute legal rape.

⁹² See discussion of Foucault, *infra* notes 136-142 and accompanying text.

⁹³ See, e.g., GRAEME NEWMAN, JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS (2d ed. 1995) (arguing for corporal punishment as an alternative to imprisonment); see also Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 353 (2001) ("Why should a society replace an administratively simple and intuitively appealing device like corporal punishment with something as elaborate and expensive as the modern prison?").

⁹⁴ The typical Eighth Amendment claim by a prisoner is based on 42 U.S.C. § 1983, which establishes a right of action for any individual deprived under color of law of "rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (2005).

Scholarly discussions of prison as well as legal doctrines tend to deny or ignore the sexualized and corporal character of incarceration. This denial is captured in an oft-repeated five-word phrase: acts of physical violence in prison, including sexual assaults, are “not part of the penalty.” The phrase comes from *Farmer v. Brennan*,⁹⁵ a Supreme Court decision addressing the liability of prison administrators for rapes and physical assaults committed by inmates against a transsexual prisoner.⁹⁶ According to the majority opinion, “Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”⁹⁷ By this claim, the *Farmer* majority clearly meant to establish that violent assaults in prison were cognizable under the Eighth Amendment prohibition of cruel and unusual punishments.⁹⁸ And since the *Farmer* decision, prisoners’ rights organizations have adopted the phrase “not part of the penalty” or similar language to insist on protection of inmates.⁹⁹ The rhetoric may initially seem appealing, but the claim that violence in prison is “not part of the penalty” is both conceptually flawed and, given our constitutional text, strategically unfortunate. As the *Farmer* Court noted, and as Justice Thomas has repeatedly insisted, the text of the Eighth Amendment bans cruel and unusual *punishments*—it does not prohibit all cruel and unusual acts that might be in some way associated with state-inflicted punishment.¹⁰⁰ The *Farmer* majority’s insistence that sexual violence is not part of the penalty has become part of a broader Eighth Amendment jurisprudence based on an overly narrow conception of punishment, one that obscures the details of real prison practices.

The question of whether prison conditions constitute “punishment” arose implicitly in *Rhodes v. Chapman*, the first U.S. Supreme Court decision to confront directly the question of whether the Eighth Amendment

⁹⁵ 511 U.S. 825 (1994).

⁹⁶ See *id.* at 828-31.

⁹⁷ *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

⁹⁸ See *id.* at 832 (stating that the Eighth Amendment requires prison officials to “take reasonable measures to guarantee the safety of the inmates” (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984))).

⁹⁹ Stop Prisoner Rape, the advocacy group described *supra* note 4, uses the following phrase in its email listserv address: notpartofthepenalty@topica.com. Borrowing language from a prison rape survivor, Amnesty International used a similar phrase in the title of a report on sexual abuse of women prisoners. See AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), available at <http://web.amnesty.org/library/Index/engAMR510011999>.

¹⁰⁰ “The Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’” *Farmer*, 511 U.S. at 837. Justice Thomas’s reading of the Eighth Amendment is discussed *infra*.

regulates conditions of confinement.¹⁰¹ On one hand, the *Rhodes* Court stated that many harsh conditions of confinement are not prohibited by the Eighth Amendment, for these conditions are simply “part of the penalty that criminal offenders” must pay.¹⁰² At the same time, the Court found other unpleasant attributes of the prison experience—such as diminished job training and educational opportunities—to be unregulated by the Eighth Amendment precisely because such deprivations “simply are not punishments.”¹⁰³ In short, the Eighth Amendment permits some harsh conditions because they are part of the intended penalty, and the Eighth Amendment permits other harsh conditions because they are *not* part of the intended penalty.

Given this equivocation, it would seem important to clarify what constitutes “punishment” under the Eighth Amendment. The Court has addressed this question in contexts other than the regulation of prison conditions,¹⁰⁴ but has not explicitly stated a rule for assessing whether a condition of incarceration constitutes punishment. Only Justice Thomas (in opinions frequently joined by Justice Scalia) has addressed the issue

¹⁰¹ *Rhodes v. Chapman*, 452 U.S. 337 (1981). The Court had previously considered whether the denial of medical care to a prisoner could violate the Eighth Amendment, *see Estelle v. Gamble*, 429 U.S. 97 (1976), but the *Rhodes* Court apparently distinguished access to medical care from general conditions of confinement. *See Rhodes*, 452 U.S. at 344–45 (“We consider here for the first time the limitation that the Eighth Amendment . . . imposes upon the conditions in which a State may confine those convicted of crimes.”); *but see id.* at 368 (Blackmun, J., concurring) (“Despite the perhaps technically correct observation that the Court is considering here for the first time the limitation that the Eighth Amendment imposes on [the conditions of confinement], it obviously is not writing upon a clean slate.”) (internal quotations omitted). Two years prior to *Rhodes*, the Court had considered Eighth Amendment challenges to conditions of confinement in *Hutto v. Finley*, 437 U.S. 678, 685–86, 689 (1979), but the issues for appellate review involved remedies rather than the scope of the Eighth Amendment.

¹⁰² *Rhodes*, 452 U.S. at 347. “[T]he Constitution does not mandate comfortable prisons.” *Id.* at 349.

¹⁰³ *Id.* at 348.

¹⁰⁴ *See, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2662 (2004) (Scalia, J., dissenting) (“It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely . . . by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.”); *Smith v. Doe*, 538 U.S. 84, 92–96 (2003) (considering whether a retroactive sex offender notification and registration requirement constituted punishment and thus violated the Ex Post Facto Clause); *Bajakajian v. United States*, 524 U.S. 321, 328 (1998) (assessing when a currency forfeiture constituted punishment); *Austin v. United States*, 509 U.S. 602, 619 (1993); *Bell v. Wolfish*, 441 U.S. 520, 535–40 (1979) (evaluating whether restrictions imposed on pretrial detainees constitute punishment); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167–70 (1963) (assessing whether automatic forfeiture of citizenship provisions in immigration laws imposed punishment); *Trop v. Dulles*, 356 U.S. 86, 94–99 (1958) (assessing whether statutory denationalization constituted punishment).

directly.¹⁰⁵ Justice Thomas has argued that punishment is essentially whatever a state government says or intends to be punishment: "States are free to define and redefine all types of punishment, including imprisonment, to include various types of deprivations."¹⁰⁶ Such state-defined punishment is subject to the Eighth Amendment limitation that it must not be "cruel and unusual," but *only* acts falling under the state's own definition of punishment are governed by that limitation.¹⁰⁷ On this account, a punishment is the abstract deprivation of liberty (or life, or property) authorized by a legislature and imposed by a sentencing judge or jury.¹⁰⁸ Particular details of that deprivation not clearly specified by statute or judicial order are not "punishment." One commentator has referred to this approach as a "strictural" definition which equates punishment with "the

¹⁰⁵ See *Overton v. Bazzetta*, 539 U.S. 126, 138-145 (Thomas, J., concurring in the judgment, joined by Scalia, J.); *Farmer v. Brennan*, 511 U.S. 825, 858-859 (1994) (Thomas, J., concurring); *Helling v. McKinney*, 509 U.S. 25, 37-42 (1993) (Thomas, J., dissenting, joined by Scalia, J.); *Hudson v. McMillian*, 503 U.S. 1, 18-19 (1992) (Thomas, J., dissenting, joined by Scalia, J.).

¹⁰⁶ *Overton v. Bazzetta*, 539 U.S. 126, 139 (2003) (Thomas, J., concurring in the judgment).

¹⁰⁷ *Hudson v. McMillian*, 503 U.S. 1, 18-19, 28 (1992) (Thomas, J., dissenting). In his *Hudson* dissent, Justice Thomas suggested that abuse of prisoners may be actionable under legal provisions other than the Eighth Amendment. "In my view, a use of force that causes only insignificant harm may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment." See *id.* at 18; see also *id.* at 28 ("Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation."). As limited as Eighth Amendment protection may be, Justice Thomas has argued that the Eighth Amendment is the only basis for a *constitutional* challenge to a prison sentence. "Prisoners challenging their sentences must, absent an unconstitutional procedural defect, rely solely on the Eighth Amendment." *Overton*, 539 U.S. at 140 (Thomas, J., concurring).

¹⁰⁸ See *Helling*, 509 U.S. at 40 (Thomas, J., dissenting) ("[A]lthough the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment ... support the view that judges or juries—but not jailers—impose 'punishment.'"); *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting) (noting that the Eighth Amendment was historically understood to apply "only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during his incarceration"). Justice Thomas' account of punishment has affirmative as well as negative consequences. That is, a condition of confinement is not punishment if it is not specified by statute or sentencing order, but states are also able to label deprivations of rights and privileges as "punishment" if they so choose. Justice Thomas refers to a state's "prerogative" to define punishment, see *Overton*, 539 U.S. at 141 (Thomas, J., concurring in the judgment), but since punishment is subject to greater limitations than other deprivations, it is unclear why a state would call an imposition or deprivation "punishment" if it could avoid it.

superficial intent of the sentencer, expressed in the language of the sentence as pronounced.”¹⁰⁹

Though no majority has joined Justice Thomas’ view that “punishment” is only those abstract deprivations or impositions prescribed by statutes and sentencing orders,¹¹⁰ the Court’s current Eighth Amendment doctrine goes a considerable distance toward Justice Thomas’ position. Justice Thomas’ approach could be understood as a rule that only if a legislature or sentencing judge intends a given deprivation or imposition as punishment, and documents that intent in a stated pronouncement of sentence, will that deprivation or imposition be subject to the limitations of the Eighth Amendment. Thus, actions by prison officials constitute punishment only when the prison officials act within the discretion implicitly delegated to them by the formal sentence.¹¹¹ A jailer cannot decide *sua sponte* to inflict punishment.¹¹² The approach adopted by a majority of the Court also requires a showing of official intent, but expands the set of intentional actors to include prison officials. “If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify” as punishment subject to Eighth Amendment regulation.¹¹³ Thus, for a challenge to ongoing prison conditions to succeed, the plaintiff prisoner must show a requisite degree of intent on the part of one or more prison officials.¹¹⁴ The necessary intent varies depending on the

¹⁰⁹ Thomas K. Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1613 (1996).

¹¹⁰ Justice Scalia, and only Justice Scalia, has joined several of Justice Thomas’ opinions addressing this issue. See *supra* note 105.

¹¹¹ *Overton*, 539 U.S. at 140, n.* (Thomas, J., concurring in the judgment).

¹¹² *Helling*, 509 U.S. at 40 (Thomas, J., dissenting) (“[J]udges or juries—but not jailers—impose ‘punishment.’”)

¹¹³ *Wilson v. Seiter*, 501 U.S. 294, 300 (1991). The Court’s opinion in *Wilson* was authored by Justice Scalia less than one year before Clarence Thomas joined the Court. It seems unlikely that Justice Scalia would adhere to the *Wilson* holding today. Since Justice Thomas has been on the Court, he has repeatedly stated that conditions of confinement are not “punishment” within the meaning of the Eighth Amendment, and Justice Scalia has frequently joined Justice Thomas’ opinions on this point. See *supra* note 105.

¹¹⁴ In addition to the requisite official intent, a successful Eighth Amendment claim must show that the prisoner suffered some objective harm. See *Wilson*, 501 U.S. at 298 (distinguishing between “the objective component of an Eighth Amendment claim (Was the deprivation sufficiently serious?)” and “the subjective component (Did the officials act with a sufficiently culpable state of mind?)”). In *Hudson v. McMillian*, the Court held that, while “extreme deprivations” are required to satisfy the objective component in the context of a challenge to conditions of confinement, 503 U.S. 1, 9 (1992), “serious injury” is not necessary to satisfy the objective component of an Eighth Amendment excessive-force claim, *id.* at 8-10. Mere “*de minimis* uses of physical force” do not satisfy the objective component of the Eighth Amendment inquiry, but injuries falling between “*de minimis*” and “serious”

context: a challenge to a corrections officer's use of force in response to a prison disturbance must show the officer acted "maliciously and sadistically for the very purpose of causing harm,"¹¹⁵ while other challenges to conditions of confinement must show "deliberate indifference to inmate health or safety."¹¹⁶

In practice, this "deliberate indifference" standard protects prison officials from liability for most inmate-on-inmate assaults. As the Court explained the standard in *Farmer v. Brennan*, a case brought by a transsexual prisoner who was severely beaten and raped by other inmates, "a prison official may be held liable for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."¹¹⁷ The Court rejected Dee Farmer's request for an objective standard that would impose liability if prison officials should have known the risks to a prisoner; instead, the Court insisted on a standard of "actual knowledge"—"the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*"¹¹⁸ A prison official could escape liability, the Court conceded, if he could "show that the obvious escaped him."¹¹⁹ As several commentators have noted, this required showing of actual knowledge has often proven to be an insurmountable hurdle for inmate plaintiffs.¹²⁰

could satisfy that requirement. *See id.* at 9-10. In the specific context of inmate-on-inmate sexual abuse, the objective harm must be "conditions imposing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The *Farmer* Court declined to state the point at which "a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes." *Id.* at 834 n.3.

¹¹⁵ *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

¹¹⁶ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also* *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))).

¹¹⁷ *Farmer*, 511 U.S. at 847.

¹¹⁸ *Id.* at 837 (emphasis added). The *Farmer* Court explicitly adopted the criminal law standard of recklessness, which requires that the defendant disregard a risk of which he or she has *actual* knowledge, rather than the civil standard of recklessness, which is satisfied upon a showing of actual *or constructive* knowledge of the risk. *See id.* at 836-40.

¹¹⁹ *Id.* at 843 n.8.

¹²⁰ *See, e.g.*, NO ESCAPE, *supra* note 5, Part VIII (describing the effects of the actual knowledge/deliberate indifference standard, and noting that it "creates an incentive for correctional officials to remain unaware of problems"); Julie Samia Mair et al., *New Hope for Victims of Prison Sexual Assault*, 31 J.L. MED. & ETHICS 602, 605 (2003) (describing criticism of the actual knowledge component of the deliberate indifference standard, and

In short, Eighth Amendment doctrine's focus on official intent counts very little as "the penalty." It is based on a conception of punishment as (in most cases) a mere deprivation of liberty, and the means by which this deprivation is to be implemented are themselves excluded from the account of "the penalty." This approach allows us to view punishment as non-corporal, for the general pronouncements of sentences by legislatures and judges never touch the prisoner's body. The things that officials do to the prisoner's body to carry out the sentence—the handcuffs, the shackles, the cells—are just collateral consequences.¹²¹ Unless specifically contemplated by statute or sentencing order, these incidental corporal encounters are not themselves "part of the penalty."

This parsing of the concept of punishment is arbitrary and incoherent.¹²² Contemporary punishment is a complex set of practices

noting that "litigation has failed to serve as a tool for protecting many inmates from sexual assault"). For a comprehensive discussion of federal courts' application of the deliberate indifference test in prison rape cases, see Robertson, *A Clean Heart*, *supra* note 6, at 453-73. One recent opinion illustrates especially well the difficulty of satisfying the deliberate indifference standard, and the ease with which prison officials and courts can use that standard to deny prisoner plaintiffs relief. In *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004), the Seventh Circuit reversed a jury award of \$1.5 million in compensatory damages to a prisoner who had been raped by his cellmate. Anthony Riccardo had expressed to at least two different prison officials "fear for his life" if celled with a specific fellow inmate; one of those officials, Lt. Larry Rausch, nonetheless assigned Riccardo to a cell with the inmate of whom Riccardo complained. Two days later, Riccardo's new cellmate forced him to perform oral sex. *Id.* at 525. A jury found that Rausch had subjected Riccardo to cruel and unusual punishment and awarded \$1.5 million in damages. *Id.* at 523. The Seventh Circuit reversed the award, finding that "no reasonable juror could have concluded . . . that Rausch actually recognized that placing [the alleged rapist] and Riccardo together exposed Riccardo to substantial risk." *Id.* at 526. Judge Easterbrook reasoned that, though "it might seem like Rausch had to appreciate the risk," Riccardo's statement of fear for his life did not alert Rausch to the risk of mere sexual assault for the cellmate's personal gratification. *Id.* at 526-27.

¹²¹ The phrase "collateral consequences" is used most frequently in the criminal justice context to refer to formally civil legal burdens imposed on convicted criminals, such as registration requirements, disenfranchisement, and immigration consequences. See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("[C]ollateral sentencing consequences encompass all civil restrictions that flow from a criminal conviction."). Because collateral consequences are classified as civil, not punitive, they are not subject to constitutional restrictions on punishment such as the Ex Post Facto Clause or the Eighth Amendment prohibition of cruel and unusual punishment. The narrow definition of punishment underlying prison law, this Article suggests, renders many aspects of prison similarly "collateral" and beyond the scope of constitutional protection.

¹²² For a critique of the Court's and Justice Thomas' accounts of "punishment" that is somewhat different from the one offered here, see Landry, *supra* note 109. Only a few other commentators have examined the definition of "punishment" in the context of Eighth Amendment prison conditions jurisprudence. See James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates From Serious Harm*, 20 QUINNIPIAC L. REV. 407 (2001)

carried out by a number of official actors and institutions. The use of official intent to circumscribe the category of "punishment," both in the strong version advocated by Justice Thomas and in the weaker version endorsed by a majority of the Court, denies both the complexity of punishment and its status as a set of *practices*. Some penal practices will trigger others: for example, legislative authorizations of sentencing ranges will lead some judges to impose sentences in those ranges; in turn, the judicial imposition of sentences will lead law enforcement officers and prison officials to take defendants to prisons and confine them there; the need to confine and control a large number of inmates will generate a set of practices internal to the prison. With so many different actors and institutions engaged in penal practices, intent standards become simply a means for the state to avoid accountability. Complex institutions act, but they rarely "intend" in the individualistic way contemplated by the Court's Eighth Amendment intent requirements.¹²³

The "penal" status of an act or practice should depend not on specific legislative designation or individual intent, but on whether the act or practice is a necessary element or direct consequence of the state's response to an individual's criminal conviction.¹²⁴ This approach accords with common usage and common understanding (including the common understanding at the time of the Founding¹²⁵): "punishment" is the state

(tracing and critiquing the development of the knowledge and intent requirements of Eighth Amendment "punishment" in federal law); Sara L. Rose, Comment, "*Cruel and Unusual Punishment*" Need Not Be Cruel, Unusual, or Punishment, 24 CAP. U.L. REV. 827 (1995) (critiquing the "deliberate indifference" standard as too broad and arguing that a prison official's disregard of a known risk should not be considered punishment).

¹²³ Whether institutions intend in *any* way is a matter of some debate. Justice Scalia argues that they do not, in order to defend textualism over "legislative intent" as the preferable approach to constitutional interpretation. See Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-18, 29-32 (1997). To pretend that legislative intent "exists," Scalia argues, is "contrary to all reality." See *id.* at 32. See also William D. Araiza, *Courts, Congress, and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199, 222 (2004) (suggesting that "institutional intent" may be "fictional"); but see Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 211-12 (discussing "what it means for an institution to have intent").

¹²⁴ On this account, some legal restrictions that are currently classified as "collateral" (and non-penal) consequences of a criminal conviction, such as felon disenfranchisement or deportation, should be understood as punishment. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (holding that deportation is a "purely civil action" and not punishment). See also *supra* note 121.

¹²⁵ According to Justice Thomas, the Founders considered punishment to be "[a]ny infliction imposed in vengeance of a crime," or "[a]ny pain or suffering inflicted on a person for a crime or offense." *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., concurring) (quoting 2 T. SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780) and 2 N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). It is not entirely clear how Thomas reaches his conclusion that these early American definitions

response to crime.¹²⁶ When a person is sentenced to prison as criminal punishment, the standard and foreseeable conditions of incarceration are part of that punishment. Thus, random aberrations (such as a guard's accidental breaking of an inmate's toe¹²⁷) are not "punishment," but the standard and expected conditions of confinement are certainly "part of the penalty." This account of punishment is positive, not normative; it does not assume that punishment is *a priori* just.¹²⁸ But for the Eighth Amendment to

preclude the inclusion of prison conditions in our modern concept of punishment. The Founders did not mention prisons in the Eighth Amendment, to be sure, but this omission hardly evidences an intent to exclude prison conditions from the definition of punishment: prisons did not really come into being in the United States until after the adoption of the Eighth Amendment. See David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON* 100-16 (Norval Morris & David J. Rothman eds., 1995).

¹²⁶ Were the state action doctrine less confused, it might provide a useful resource for Eighth Amendment analysis—it might be useful to ask with respect to challenges to prison conditions whether the alleged harm is a result of state action. But the state action requirement is famously muddled and widely criticized, see Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (labeling the state action doctrine "a conceptual disaster area"), so suffice it to note that in constitutional contexts beyond the Eighth Amendment and the Equal Protection Clause, official intent is not the sole determinant of whether a violation constitutes "state action." For example, under the "public function" analysis of First Amendment doctrine, an ostensibly private actor performing a public function may be treated as a state actor. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946). And the racially discriminatory use of peremptory challenges by a private litigant has been found to constitute "state action," based in part on the fact that "[b]y their very nature, peremptory challenges have no significance outside a court of law." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). A common criticism of the state action doctrine in the equal protection context is, like the critique of Eighth Amendment doctrine presented here, that it focuses too heavily on intent. See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-35, 1143-44 (1997).

¹²⁷ See *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

¹²⁸ Of course, the distinction between positive description and normative theory is often exaggerated, as noted in Part I, which discusses the empirical scholarship on prison sex. See *supra* note 13; see also Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 261 (questioning "the attempt to divide the entire field of criminal justice into positive and normative branches, with the former offering an ordered explanation for the actual, real-world distribution of punishment and the latter providing ordered propositions for the way criminal sanctions should be allocated"). Nevertheless, it is possible to define punishment in a way that does not presume its normative legitimacy, and the Eighth Amendment, by contemplating the possibility of "cruel and unusual" punishments, clearly assumes such a definition.

make any sense at all, it must entail a positive account of punishment, since a normatively just punishment could never be "cruel and unusual."¹²⁹

Punishment understood positively, the standard and expected conditions of confinement are corporal in many respects, as argued in the first part of this Article. Punishment involves physical restraint, invasions to bodily integrity, and (often but not always) physical pain. Sentencing judges know this, as evidenced by sentencing orders that take into account the impact that the physical deprivations and impositions concomitant to incarceration will have on a particular defendant.¹³⁰ Sentencing commissions seem to recognize the corporal aspects of imprisonment as well, as demonstrated by guidelines that permit departures based on an individual defendant's physical condition.¹³¹ Prison administrators know that incarceration is a corporal punishment,¹³² as do inmates.¹³³ Those involved in key penal practices—all the practices that follow the legislative authorization of criminal sentences—seem to acknowledge uniformly that

¹²⁹ In my view, the phrase "cruel and unusual" necessarily requires a normative assessment, but the term "punishment" should be understood positively. Justice Scalia has read the Cruel and Unusual Punishments Clause in almost exactly the opposite fashion. He has suggested that the phrase "cruel and unusual" means simply, "not authorized by law" or "illegal." See *Harmelin v. Michigan*, 501 U.S. 957, 969-75 (1991) (analyzing historical evidence and concluding that the Cruel and Unusual Punishments Clause contains no proportionality requirement but instead prohibits punishments not authorized by statute or common law). This interpretation renders the inquiry into cruelty and unusualness a positive, empirical one, and also seems to render the Cruel and Unusual Punishments Clause superfluous, since illegal punishments are already, well, illegal. As noted above, Justice Scalia has frequently joined opinions by Justice Thomas that impute to Eighth Amendment "punishment" a fair degree of normative legitimacy. See *supra* note 105 and accompanying text.

¹³⁰ E.g., *Koon v. United States*, 518 U.S. 81, 111-12 (1996) (upholding downward departure in sentence based on "susceptibility to abuse in prison"); *United States v. Gonzalez*, 945 F.2d 525, 527 (2d Cir. 1991) (upholding departure based on defendant's extreme physical vulnerability while in prison).

¹³¹ See, e.g., U.S.S.G. § 5H1.4 (2005) ("[E]xtraordinary physical impairment may be a reason to impose a sentence below the applicable guidelines range.").

¹³² Prison administrators frequently distinguish between the tasks of "custody" and "treatment." The corporal or bodily element of incarceration is part of the custodial task. See, e.g., JOHN J. DIJULIO, JR., *GOVERNING PRISONS* 40 (1987) (discussing prison officials' perceptions of their "custodial" obligations, which require them to—figuratively and sometimes literally—"tie [the] legs" of inmates); RHODES, *TOTAL CONFINEMENT*, *supra* note 91, at 133:

For both custody and treatment workers it is axiomatic that friction between them results from their differential possession of power and knowledge. Custodial staff state as a brute fact of their capacity to inflict punishment: "It's about power." Treatment workers take their stand on psychiatric categories and approaches . . . that sometimes skirt and sometimes support, but are always enmeshed in, custodial power.

¹³³ See *supra* Part I.

punishment entails extensive impositions on, and regulations of, the prisoner's body.

But our constitutional doctrine nevertheless embraces an ephemeral abstraction as the only "punishment" regulated by the Eighth Amendment. Punishment is described negatively—as "legal deprivation"—and not as a series of affirmative acts by state actors. Legal scholars and philosophers may be partly to blame for this gulf between the legal conception of punishment and the reality of penal practices. In striving to legitimate state punishment and to distinguish it from violence, they have carefully defined away the realities of penal practices. For example, consider John Rawls's much-quoted definition of punishment:

[A] person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense. This definition specifies what I shall understand by punishment.¹³⁴

This account of punishment is custom-made for the project of philosophical justification—unsurprisingly, it focuses much more on the procedural constraints that allegedly distinguish punishment from violence than on the sanction itself. To the extent that Rawls describes the sanction, there is only an oblique reference to "legal deprivation." Rawls is not alone: many modern philosophies of "punishment" focus on the processes through which laws are made, obligations are imposed, and guilt is determined.¹³⁵ The sanction at the end of that process tends to drop out of the picture.

The notion that punishment, even in the form of incarceration, is non-corporal can be traced also to apparent ambiguities in the work of Michel Foucault, who is probably the theorist most frequently associated with the study of modern penal practices and their relation to the body.¹³⁶ A superficial reading of Foucault's *Discipline and Punish* would see the

¹³⁴ John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955).

¹³⁵ See, e.g., James F. Doyle, *Justice and Legal Punishment*, in THE PHILOSOPHY OF PUNISHMENT 159-64 (H.B. Acton ed., 1969) (arguing that a theory of punishment must be situated in an account of legitimate legal authority). H.L.A. Hart's definition of punishment is also too abstract to say much about the sanction itself, but at least Hart cautions against building assumptions about normative legitimacy or justification into the definition of punishment. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-6 (1968).

¹³⁶ MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 1977) (1975).

book's entire argument encapsulated in the contrasting penal practices described in the first few pages: in Foucault's first example, a man convicted of regicide is tortured to—and past—death in a public spectacle that vividly displays the vulnerabilities of the human body; in his second example, a set of prisoners follow a regimented schedule of work, study, and prayer that appears to be void of any physical suffering.¹³⁷ The first anecdote could be seen to represent the old way of punishing, which acted directly on the body and exploited its physical vulnerabilities (including but not limited to its susceptibility to pain). The second anecdote illustrates the modern way of punishing, “the gentle way,” an ordering of activity in a certain architectural environment, an effort to discipline souls rather than to hurt or destroy bodies.¹³⁸ And so the lesson that some readers have taken from Foucault is that the prison is the consequence of a turn from the body to the soul, and prison is a “non-corporal” punishment.

There are isolated passages of Foucault's text that support this reading (mostly in the first twenty pages or so of *Discipline and Punish*).¹³⁹ However, it is unlikely that the book as a whole supports the thesis that prison is non-corporal, nor is it probable that Foucault intended to make such an argument. Rather, he is careful to note that “imprisonment—mere loss of liberty—has never functioned without a certain additional element of punishment that certainly concerned the body itself: Rationing of food, sexual deprivation, corporal punishment, solitary confinement . . . It is difficult to dissociate punishment from additional physical pain. What would a non-corporal punishment be?”¹⁴⁰ Even to the extent that incarceration represents an increased focus on the minds of prisoners, Foucault argues, it attempts to reach minds through the close regulation of bodies.¹⁴¹ In fact, it is through the regulation of bodies that prisons construct the souls of prisoners. The practice of incarceration restrains prisoners' bodies; it brings them together in close quarters; it requires officials to watch, touch, and search prisoners' bodies; it provides opportunities for prisoners to watch and touch (and maybe search) each other; it regulates the

¹³⁷ See *id.* at 3-7.

¹³⁸ See *id.* at 104-31.

¹³⁹ Others have noted this ambiguity in Foucault's text. See, e.g., ALAN HYDE, BODIES OF LAW 187 (1997):

Foucault, momentarily forgetting his own methodological prescripts, called [the] disappearance of public executions “a slackening of the hold on the body” and modern penal practice as “non-corporal,” but I think it much more accurate (and perhaps more Foucauldian) to see modern criminal punishment as profoundly holding the body, profoundly corporal.

¹⁴⁰ FOUCAULT, *supra* note 136, at 15-16.

¹⁴¹ See *id.* at 294-95; see generally Foucault's discussion of “Docile bodies,” *id.* at 135-69.

basic functions of prisoners' bodies; and often (but not always or continuously), it inflicts physical pain on those bodies.¹⁴²

We tend to forget all of this when we speak of punishment as "legal deprivation" or in other abstract formulations. Such abstractions have disconnected the legal conception of punishment from the penal practices that the law authorizes and produces. The split between punishment in legal doctrine and actual penal practices is correlated with a denial of the corporal nature of punishment, a denial that has in turn produced a failure to scrutinize the sexual aspects of modern incarceration. To extent that, as a nation, we are concerned about sex in prison, it is rape—and, perhaps, the particularly disturbing notion of same-sex rape—that we worry about. Even to the extent that we have adopted such measures as the Prison Rape Elimination Act, we do not view the incidence of rape or of other sexual domination as a blemish on the institution of punishment. We have instead replaced the positive understanding of punishment in the Eighth Amendment (what the state does in response to crime, be it "justified" or "legitimate" or not) with a normative one.¹⁴³

Turning from punishment generally to speak specifically of prison rape—what if we reformed constitutional doctrine to recognize conditions of confinement as "punishment" regulated by the Eighth Amendment? Would we then be able to eliminate the sexual character of incarceration? Doctrinal reforms would be an important improvement, and they would certainly help the victims of violent sexual assaults in prison show that they had suffered cruel and unusual punishment.¹⁴⁴ But, as emphasized in Part I,

¹⁴² In insisting that incarceration acts on the body, this assumes that there is such a thing as "the body" which exists prior to social or state actions against it. Some contemporary feminist or gender theories question this assumption. See, e.g., JUDITH BUTLER, *BODIES THAT MATTER* (1993). For Butler and some other gender theorists, the political consequence of "the materiality of the body" has been the entrenchment of sex and gender norms based on bodies' (allegedly natural and pre-political) sexes and genders. While sympathetic to the efforts to disrupt such norms, I do not believe that such efforts require a denial of the corporeality of human beings.

¹⁴³ The Supreme Court's approach to prison conditions could be understood as an application to domestic law of international law's doctrine of collateral damage: The state is not liable for foreseeable but not specifically intended harm that results from an otherwise justified inflection of force. See, e.g., Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for Moral High Ground*, 56 AIR FORCE L. REV. 1, 89 (2005) (defining "voluntary collateral damage" as "any anticipated incidental damage or other effect of an attack that is justified under the principle of proportionality").

¹⁴⁴ Reforms to Eighth Amendment doctrine might not be enough to ensure prison rape victims legal success. As Roderick Johnson recently learned, the obstacles to recovery extend beyond the difficulty of showing "deliberate indifference." Johnson's lawsuit against Texas prison officials gained national attention for its vivid (and seemingly well-documented) allegations of abuse and slavery. See Liptak, *Inmate Was Considered "Property,"* *supra* note 54; Liptak, *Ex-Inmate's Suit,* *supra* note 54. Johnson's case prompted a *New York Times* editorial; Editorial, *Sexual Slavery in Prison,* *supra* note 32. Imprisoned for burglary,

the sexual nature of incarceration is not limited to violent sexual assaults. Prison sex is far more complicated than indicated by the image of the brutal rapist and the powerless victim. Even if we begin to recognize prison rapes as cruel and unusual punishment—and if we use legal judgments to compensate victims and reduce the incidence of prison rape—sexual coercion is likely to remain an intrinsic feature of the experience of incarceration. Distinct from the failures of the Supreme Court’s Eighth Amendment doctrine described in this Part, there may exist unavoidable limits on the utility of the Eighth Amendment as a tool to reform prisons: The concept of “cruel and unusual punishment” is probably too blunt an instrument to regulate the prison environment in a manner that will eliminate all coerced sex. Perhaps fortuitously, recent efforts to address sexual assaults in prisons have not centered on the Eighth Amendment, but on the development of better prison administrative policies.

III. POLICING (THROUGH) THE SEXUAL

Notwithstanding the doctrinal evasions of the issue of prison rape, at this moment the nation seems ready to condemn the practice and to look

Johnson was quickly identified by fellow inmates as a “free-world homosexual,” renamed Coco, and classified as the property of a prison gang. See Liptak, *Inmate Was Considered “Property,”* *supra* note 54. For a time, Johnson was “a sort of wife” to one gang member, who forced Johnson to cook, clean, and sexually service him. Later, Johnson would be sold to other gangs and rented out as a prostitute. See Liptak, *Ex-Inmate’s Suit*, *supra* note 54. Johnson repeatedly sought protection from prison officials, to no avail. Liptak, *Inmate Was Considered “Property,”* *supra* note 54 (“Richard E. Wathen, an assistant warden, testified that there was nothing in Mr. Johnson’s seven written pleas for help that warranted moving him to what prison officials call safekeeping . . .”). At trial in federal district court, an inmate witness testified that prison officials “turned a blind eye” to the abuse. *Id.* Nevertheless, in October 2005, a jury in Wichita Falls, Texas found for the defendants on all counts. Mike Ward, *Inmate’s Case Raises Profile of Rapes*, AUSTIN AMERICAN-STATESMAN, Oct. 24, 2005, at A1.

News reports suggest that Johnson lost for some of the same reasons that prosecutions for non-carceral rape fail: there was insufficient evidence of physical resistance, and the victim was “put on trial” so jurors would consider unsavory but irrelevant aspects of the victim’s character. See Angela K. Brown, *Jurors Reject Texas Prison Rape Lawsuit*, ASSOCIATED PRESS, Oct. 18, 2005 (quoting a juror as acknowledging that Johnson “probably” was raped, but criticizing Johnson’s failure to introduce a rape test); *Prison Workers Not Liable in Lawsuit*, HOUSTON CHRON. ONLINE, Oct. 18, 2005, <http://www.chron.com/dispatch/story.mpl/metropolitan/3402785.html> (defense argued that Johnson “wore tight pants and flirted with a corrections officer”); Sarah Etter, *Inmate’s Rape Case Fails, But Silver Lining Found*, CORRECTIONS.COM, Oct. 24, 2005, <http://www.spr.org/en/sprnews/2005/1024-02.htm> (noting that defense lawyers emphasized the lack of physical evidence and alleged that Johnson was simply trying to manipulate prison officials to be moved closer to his lover); *id.* (jurors believed Johnson was using cocaine); Liptak, *Inmate Was Considered “Property,”* *supra* note 54 (quoting testimony from one defendant that Johnson’s rape claims were not credible given Johnson’s failure to resist physically).

for solutions. In fact, the current tide of support for prison rape reform has surprised some prisoners' rights advocates.¹⁴⁵ One noteworthy recent development is the federal Prison Rape Elimination Act of 2003,¹⁴⁶ widely supported by left- and right-wing coalitions.¹⁴⁷ The PREA passed the House and Senate unanimously, and was signed into law by President Bush in 2003.¹⁴⁸ Even since the PREA has become law, popular media has continued to publicize and condemn sexual brutality in prisons.¹⁴⁹ Unfortunately, as noted in Part I, the conception of prison rape that has dominated discussions of the PREA and subsequent media coverage is a conception of a violent, cruel aggressor who physically overpowers a hapless victim. The current "solutions" to prison rape are solutions to a problem that seems to be quite rare, and these proposed solutions are likely to exacerbate the less violent but still deeply coercive sex that is much more characteristic of imprisonment in America.

Let us not exaggerate the likely effects of the PREA.¹⁵⁰ It is a mostly hortatory statute, seemingly intended primarily to express condemnation of physically violent sexual aggression. Rape is defined relatively broadly, as "carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person" in any of three situations:

¹⁴⁵ See, e.g., Julie Samia Mair et al., *New Hope for Victims of Prison Sexual Assault*, 31 J.L. MED. & ETHICS 602, 603 (2003) ("The speed by which Congress passed the Prison Rape Elimination Act is surprising.").

¹⁴⁶ Prison Rape Elimination Act of 2003, Pub. L. No. 109-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601-15609).

¹⁴⁷ See *supra* note 4; Adam Cohen, *Editorial Observer: Charles Colson and the Mission That Began with Watergate*, N.Y. TIMES, July 25, 2005, at A18 (noting that Charles Colson deserves credit for mobilizing evangelical Protestants and their allies in Congress in support of prison reform and the PREA); James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 553-57 (2004) (recounting the history of the PREA and noting evangelical Christians' support for the law); James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act*, 30 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1, 3-8 (2004); Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE, Oct. 1, 2003, <http://www.slate.com/id/2089095/> ("Congressional sponsors of [PREA] included the most improbable political allies, and support for the bill ranged from the ACLU and Human Rights Watch to conservative evangelical organizations.").

¹⁴⁸ See Cohen, *supra* note 147 (noting unanimous Congressional vote); see also *President Signs Prison Rape Reduction Measure*, 12 CORRECTIONS F. 16 (2003).

¹⁴⁹ See, e.g., Christopher Hitchens, *The Scandalous Brutality of U.S. Prisons*, VANITY FAIR.COM, <http://www.vanityfair.com/commentary/content/articles/050912roco02> (last accessed Dec. 9, 2005).

¹⁵⁰ For another critical assessment of the PREA, see Weisberg & Mills, *supra* note 147. See also Robertson, *A Punk's Song*, *supra* note 147, at 556 ("Like other symbolic legislation, [PREA] may have a limited impact.").

"Forcibly or against that person's will," "where the victim is incapable of giving consent because of his or her youth or . . . mental incapacity," or "through the exploitation of the fear or threat of physical violence or bodily injury."¹⁵¹ To eliminate or reduce rape so defined, the PREA mandates data collection, review of existing practices, and the development and eventual promulgation of national rape-prevention standards.¹⁵² The PREA has few, if any, immediate effects on prison administrators. In fact, the statute includes a specific limitation that prohibits the establishment of any national prevention standards that "would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities."¹⁵³

To the extent that the Act does contemplate actual solutions to prison rape, it proposes that we police this form of sexual violence in the ways we police most crime: more punishment and more surveillance. Perpetrators of prison rape are to be prosecuted (the Act suggests a "zero-tolerance" standard¹⁵⁴); and a National Prison Rape Commission is directed to study, among other things, "the feasibility and cost of conducting surveillance, undercover activities, or both, to reduce the incidence of prison rape."¹⁵⁵ The solutions to prison rape, apparently, lie in still more prison (time) and still less privacy.

Indeed, much of the literature on prison rape takes the same approach: build more, and better, panopticons.¹⁵⁶ The new County Jail Number 3 in San Bruno, California, a clover-leaf shaped building that

¹⁵¹ 42 U.S.C. § 15609(9)(A)-(C) (2005).

¹⁵² See § 15603(a)-(c) (setting out data to be collected by the Bureau of Justice, establishing a "review panel on prison rape" within the Bureau of Justice, and mandating regular reports on prison rape); § 15606(a)-(e) (establishing a National Prison Rape Elimination Commission and directing the Commission to develop and promulgate standards for rape prevention).

¹⁵³ § 15607(3). The PREA authorizes \$15,000,000 for each fiscal year from 2004 through 2010 for research on prison rape, see *id.* at § 15603(e), and \$40,000,000 per year for the same period to fund grants to states for inmate protection efforts, see *id.* at § 15605(a), (g).

¹⁵⁴ § 15602 (1).

¹⁵⁵ § 15606(d)(2)(H).

¹⁵⁶ See, e.g., Robertson, *Cruel and Unusual Punishment*, *supra* note 44, at 48 ("[P]rison staff should undertake direct and continuous supervision of inmates. Historically, inmate control has been based on the intermittent surveillance of inmates, and approach that falsely assumes that prison architecture and visual surveillance can control inmates with limited direct supervision by correctional staff."). Robertson's more recent work is less optimistic about surveillance as a solution and more attentive to efforts to restore dignity and a measure of autonomy to prisoners. See Robertson, *A Punk's Song*, *supra* note 147, at 557-62.

evokes Jeremy Bentham's design for the ideal prison, is the result of years of litigation stemming from a 1989 prisoner rape.¹⁵⁷ (Bentham's panopticon was, of course, famously critiqued in Foucault's *Discipline and Punish*.) The new San Bruno jail has four leaves, or "pods," and will place a deputy sheriff in the center of each pod where he can "view all the inmates all the time."¹⁵⁸ Another new San Francisco jail, also built in the panopticon model with funds allotted after the rape lawsuit, is already operating. The "elevated guard station" at the center of one pod is "a bit like the bridge of the Starship Enterprise."¹⁵⁹ From the guard station one can see into each cell, and "[i]nstead of bars, the cell doors [have] large glass windows."¹⁶⁰

Beyond more punishment and increased surveillance, other possible mechanisms to address prison rape identified by the PREA include more careful classification of prisoners to ensure that likely targets are not housed with likely aggressors, better guard training, prisoner education, and victim treatment and counseling.¹⁶¹ Each of these measures is likely to help alleviate the problem of violent rape. That is certainly a problem worth addressing, but as suggested in Part I, it is hardly the most characteristic sexual interaction among inmates. Far more common are non-violent rapes tantamount to what Susan Estrich labeled "simple rape,"¹⁶² as well as sex

¹⁵⁷ See Daniel Brook, *The Problem of Prison Rape*, 2004 LEGAL AFFAIRS 24, 28; cf. *Besk v. City and County of San Francisco*, 1993 WL 181496 (N.D. Cal. 1993) (recording settlement terms between inmate plaintiffs and the administrators of the San Bruno jail).

¹⁵⁸ Carol Pogash, *Jail As Old As Alcatraz, With Own Brand of Infamy, Has Done Its Time*, N.Y. TIMES, Jan. 5, 2004, at A12. Christopher Hitchens sings the praises of the San Francisco jail in a recent article on prison rape. See Hitchens, *supra* note 149. A series of incidents at the old San Bruno jail (where inmates are still being held because the new building is not ready) earlier this year should prompt questions about whether super-surveillance will not produce its own problems. A gay prisoner complained of several incidents of abuse by guards in February and March 2005. The complaints (later corroborated by a second prisoner) accused the guards of making sexually explicit and other inappropriate comments, drawing breasts onto the prisoner's shirt, and using a cell phone camera to take and transmit "tasteless" pictures of the prisoner. Phillip Matier & Andrew Ross, *Gay Inmates' Complaints of Abuse at San Bruno Jail Being Investigated*, S.F. CHRON., May 25, 2005. The San Francisco sheriff subsequently called for an FBI investigation into the abuse allegations. Phillip Matier & Andrew Ross, *Deputy Given Notice for "Failing to Cooperate" in Jail Probe*, S.F. CHRON., July 3, 2005.

¹⁵⁹ Brook, *supra* note 157, at 29.

¹⁶⁰ *Id.* In a recent discussion of prison rape, John Moriarty, inspector general of the Texas Department of Criminal Justice, noted that after an inmate "reported being attacked 200 times . . . we've got a camera on him now 24/7." See Ward, *supra* note 144.

¹⁶¹ 42 U.S.C. § 15606(e)(2) (2005).

¹⁶² SUSAN ESTRICH, REAL RAPE 4-5 (1987) (defining "simple rape" as rape without violence or other aggravating circumstances; a "simple rape" is one "of a single defendant who knew his victim and neither beat her nor threatened her with a weapon").

that may not satisfy any contemporary legal definition of rape but is nonetheless coerced.

That coerced sex is not usually violent is a familiar claim in scholarship addressing the rapes of women by men.¹⁶³ In fact, several key insights of scholarship on non-carceral rape are potentially important to any reform efforts in the prison context. (The following distills only a few relevant themes from an expansive literature—and future scholarship on prison rape should certainly consult the non-carceral rape literature for lessons which this Part overlooks.) Briefly, feminist critiques of rape law of the 1970s and 1980s often began by examining what problems rape laws seemed designed to address—in other words, scholars asked what conceptions of the wrong of rape were implicit in the language and enforcement practices of American rape law. Rape, many commentators argued, was punished not to protect women but to protect men's property rights in women.¹⁶⁴ In part because rape law was not designed or applied to ensure women's safety, the law effectively induced women to seek safety in monogamous pairings.¹⁶⁵ Furthermore, the history of rape law was closely

¹⁶³ See, e.g., Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 128-30 (2001) (arguing that the Violence Against Women Act, sex offender registration statutes, and sexual predator civil commitment statutes "substantially undermine feminist efforts . . . by reinforcing the myth that men who rape are brutish male aggressors," and noting that "only a small portion of rapes involve violence extrinsic to the rape itself") (internal quotation marks omitted).

¹⁶⁴ See, e.g., Susan Brownmiller, *AGAINST OUR WILL* 376 (1975):

[B]y tracing man's concept of rape as he defined it in his earliest laws, we now know with certainty that the criminal act he viewed with horror . . . had little to do with an actual act of sexual violence that a woman's body might sustain. . . . [M]odern legal conceptions of rape are rooted still in ancient male concepts of property.

See also Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1782 (1992) ("Until the twentieth century, . . . female sexual autonomy had little to do with the law of rape. The law instead struck a balance between the interests of males-in-possession and their predatory counterparts."); Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law*, 11 CAN. J.L. & JURIS. 47, 53 (1998) ("[T]he history of the offense of rape expresses a commitment not so much to sexual autonomy as to property rights: its essence was damage to the proprietary value of virginity or chastity to an 'owning' male rather than any recognition of a woman's interest in her own sexual freedom.").

¹⁶⁵ Robin West remarks:

As most women know, being accompanied by a man on the street is the only sure way to avoid street hassling, and in a directly analogous way, being accompanied by a man, through marriage, in life, and in the home, is the 'best way' to avoid more dangerous and damaging forms of sexual assault. This is the sense in which all men, even safe men who would never dream of touching a woman who does not want to be touched, benefit from rape; rape makes the practice of consensual heterosexuality and the institution of marriage desirable measures of safety.

intertwined with history of race relations and racial domination; no one was more likely to be punished severely for rape than a black man accused of assaulting a white woman.¹⁶⁶ One could say that rape law was used to police the sexual—to police virginity, chastity, and monogamy—and to police through the sexual—to enforce gender and racial hierarchies as well as codes of public morality.¹⁶⁷ Under all this policing, women's sexual autonomy was simply not part of the program.

After levying these criticisms against the history and enforcement practices of rape law, scholars proposed a range of reforms. Most commentators agreed that the requirements of force and absence of consent, elements of most rape statutes, effectively prevented many rapists from being convicted, for the use of force was relatively rare and consent was notoriously difficult to assess. "Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape," David Bryden notes, "[b]ut there is no consensus about the rest of the reform agenda."¹⁶⁸ Some scholars proposed abolishing the physical force requirement altogether and clarifying the concept of consent to ensure that "no means no" (and that nonverbal expressions of resistance also mean no).¹⁶⁹ In an alternative approach, men would have an affirmative obligation to secure "clearly communicated" consent before beginning sexual

Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1454 (1993) (internal citations omitted).

¹⁶⁶ See, e.g., Estrich, *supra* note 162, at 6 ("The history of rape in the United States is clearly a history of both racism and sexism. It is impossible to write about rape without addressing racism . . ."). Martha Chamallas has stated that

[o]ne need only recall the famous Scottsboro Boys case and the lynching of Emmett Till to realize that the ideology of racism made it easier for whites to believe the myths that black men were prone to rape and that white women could not voluntarily consent to have sex with black men.

Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 454-55 (2005); see also *id.* (noting reports from social scientists that "stricter sentences are meted out to black defendants and those convicted of raping white women"); Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 364-68 (1993) (describing the "racial construction of rape" and the criminal law's enforcement of that construction).

¹⁶⁷ Along similar lines, Martha Chamallas describes the "traditional view" of sexual conduct as one that regulates non-marital sex to "express[] moral values and maintain[] a morally decent society." Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 781 (1988).

¹⁶⁸ David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000).

¹⁶⁹ See, e.g., Estrich, *supra* note 162, at 102-03; see also Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41 (1993).

intercourse.¹⁷⁰ Still another reform proposal would retain the analogy of rape to a property crime, but would place the property right in a woman's body with the woman herself rather than in a male counterpart.¹⁷¹ This "commodity theory" of rape is based upon the claim that "autonomy" and "consent" are incoherent, unstable concepts that cannot serve as the basis of rape law.

For those concerned with sexual coercion in prisons, one of the most important contributions of feminists writing on rape was the emphasis that the problem is not only "rape"—that conditions of gross inequality lead women to engage in sexual activity that we may not wish to criminalize, but which is surely something less than fully consensual. As argued by Dorothy Roberts, "women engage in unwanted sex . . . [out of] women's desire to please men because of cultural expectations of feminine conduct, and women's economic and emotional dependence on men."¹⁷² Moreover, social expectations and economic dependence may intersect with implicit threats of violence.¹⁷³ Along similar lines, Robin West criticizes the commodity theory of rape for failing to question the conditions of inequality that might induce women to trade away their bodies for reasons other than pleasure or procreation.¹⁷⁴ "[E]ven in the absence of 'duress' emanating from him, there is plenty of duress emanating from the social, cultural, and institutional forces that have influenced her."¹⁷⁵ West argues that, though we may not want to classify sex produced by social or institutional duress as rape, we should certainly not label it legitimate or morally unproblematic:

I am not sure that anyone has thought systematically about what all of these unenjoyed and unpleasant sexual invasions of women's bodies, followed, often enough, with a lot of lies about how great it all was, have done to women's sense of physical

¹⁷⁰ STEPHEN J. SCHULHOFER, UNWANTED SEX 271 (1998) ("Sexual intimacy involves a profound intrusion on the physical and emotional integrity of the individual. . . . For such intrusions actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent."); *see also id.* at 283 (setting forth a model criminal statute for sex offenses that defines consent as "actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration").

¹⁷¹ *See* Dripps, *supra* note 164, at 1789 ("[I]ndividuals have a property right to the use of their bodies If Clyde had stolen Dawn's purse while she slept, instead of her body, the violation of her rights would be similar but less severe."). For a critique of Dripps's proposal, *see* generally West, *supra* note 165.

¹⁷² Roberts, *supra* note 166, at 380.

¹⁷³ *Id.*

¹⁷⁴ *See* West, *supra* note 165, at 1452-58.

¹⁷⁵ *Id.* at 1456.

security, personal competency, self-esteem, and moral integrity. It surely is not unduly harsh to suspect that the cumulative effect has been quite damaging.¹⁷⁶

Which reform proposals are most likely to protect women from rape by men is beyond the scope of this Article; and this Article only ventures guesses as to which approaches will best protect male prisoners from rape. But even if the question of a prescription for reform remains unsettled, several lessons from the analysis of non-carceral rape produced over the past thirty years should not be overlooked.¹⁷⁷ First, an approach to rape that focuses on physically violent assault will leave many victims unprotected. Second, even rare instances of rape, alongside selective prosecution of rapists, can produce a world in which potential victims, aware of their own vulnerability, seek safety by pairing with a protector. (Hence the “punk-man” relationship.)¹⁷⁸ Third, consent is an ambiguous concept, in need of legal specification if nonconsent is to be an element of rape. Fourth, the sexual autonomy of rape victims has historically been overlooked by rape law. And perhaps most importantly, under conditions of inequality, the criminal law is not necessarily the most effective tool to ensure sexual autonomy. (In fact, given the racial history of rape prosecutions in the United States, a primarily punitive approach to prison rape reform may simply ensure that even more black men stay in jail even longer.)¹⁷⁹ Feminist scholars urged attention to social, cultural, and institutional conditions that lead women to have sex they do not really want. Similarly, instead of expanding our reliance on prison as a favored solution to a myriad of problems, we should consider the ways in which prison might *be*, or at least produce, the problem.

The proposals to reduce or eliminate prison rape described at the beginning of this Part can be understood as further efforts to police the sexual, and to police through the sexual; they are clearly not aimed at obtaining for prisoners greater autonomy. Even aside from the PREA and similar reform efforts, prisons police through the sexual in the sense that

¹⁷⁶ *Id.* at 1457.

¹⁷⁷ As noted in the Introduction, this is not to equate heterosexual rape in the free world with same-sex rape in prison. Nevertheless, the construction of binary gender relationships in the prison environment, *see supra* note 53 and accompanying text, and the fact that male victims of prison rape face many of the same legal obstacles that have confronted female rape victims, *see supra* note 144, suggest that prison rape reform needs to be attentive to the insights of feminist analysis of heterosexual rape.

¹⁷⁸ *See supra* note 68 and accompanying text.

¹⁷⁹ *Cf.* Roberts, *supra* note 166, at 387-88 (“[T]he singleminded mission of enhancing individual women’s security by ensuring that offenders are punished conflicts with the antiracist interest in protecting the Black community’s freedom from excessive and biased state power.”).

sexual interaction or sexual norms are a medium through which to ensure discipline. By many reports, officials exploit the hierarchy of sexual roles. In the most extreme cases, they may actually orchestrate a sexual assault.¹⁸⁰ Less egregiously, they simply perpetuate the hierarchy to keep peace, as by appeasing the demands of the most powerful prisoners.¹⁸¹ Prisons may also *punish* through the sexual in the sense that control over an individual's sexual activities may be essential to a thorough punishment of the person. Incarceration as conceived in the United States seeks near-total control of the prisoner, and to allow a realm of privacy that could include consensual, unmonitored sexual intimacy would allow some of the person to escape unpunished.

Reform proposals in the PREA and elsewhere do not attempt to end prison's control of prisoner sexuality; if anything, they seek to expand that control. The PREA is clearly not aimed at protecting sexual autonomy; it carefully avoids any suggestion of permissiveness toward same-sex intimacy in prison. Further, the PREA does not contemplate the measures that prisoners and several activists and researchers have identified as most important to reducing sexual assaults in prison and their devastating consequences: opportunities for conjugal visits; condom distribution;¹⁸² the elimination of regulations against "non-assaultive" sexual relations among prisoners; and most generally, "any measures which can give prisoners a feeling of more control over their own life" without breaching institutional security.¹⁸³

Perhaps even more significantly, the PREA (along with much of the prison reform literature) protects other dearly held normative assumptions about sexual aggression, and, more generally, the appropriate response to

¹⁸⁰ See Christian Parenti, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 182-184 (1999) (describing "the semi-official use of rape as a disciplinary tool"); *id.* at 185 ("[R]ape almost seems like a central part of prison management."); Donald Tucker, *A Punk's Song*, in MALE RAPE, *supra* note 35, at 62. Donald Tucker is the pen name of Stephen Donaldson.

¹⁸¹ See Parenti, *supra* note 180, at 193 ("[G]uards do not unilaterally control prisoners but, rather, broker control with inmates."); Robertson, *A Punk's Song*, *supra* note 9, at 533.

¹⁸² PREA seems carefully drafted to avoid any suggestion of condom distribution. See 42 U.S.C. § 15606(e)(2)(G) (2005) (recommending national standards on "post-rape prophylactic medical measures for reducing the incidence of transmission of sexual diseases") (emphasis added).

¹⁸³ Stephen Donaldson, *Administrative Policy and Prisoner Rape*, STOP PRISONER RAPE, http://www.spr.org/en/stephendonaldson/doc_01_policy.html (last visited Dec. 20, 2005); see also Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. TIMES, Dec. 29, 1993, at A11 (advocating condom distribution); Christopher Hensley et al., *Conjugal Visitation Programs: The Logical Conclusion*, in PRISON SEX, *supra* note 41, at 155-56 (recommending conjugal visits); Struckman-Johnson et al., *supra* note 12, at 76 (reporting that prisoners view conjugal visits as a likely means of reducing sexual coercion in prison).

crime. The PREA assumes a “bad man”¹⁸⁴ (a very, very bad man) account of prison rape: there is a clear aggressor and a clear victim, and the aggressor is an evil and brutal character who deserves still further punishment. Prison rape, like all rape and indeed all crime, is a problem that can be traced to individual agency, to the evil choices of a particular individual. This description of the problem of prison rape and its corresponding solutions do not question, and in fact reassert, the basic logic and legitimacy of the prison.

To identify institutional or structural causes of crime is not to exclude the possibility of agency in the criminal. Nevertheless, a likely reaction to the argument presented here is an accusation that this “excuses” rapists. To be clear: perpetrators of sexual coercion exercise a good deal of choice, even in prison walls. This does not mean that we must insist individual choice is the *exclusive* explanation for sexual coercion in prison. We sometimes equate causation (an empirical issue) with blameworthiness (a normative one). And sometimes we act as though causation/blame were a scarce resource, so that if we identified social or institutional causes of crime we would be forced to diminish the blame that we assign to individual wrongdoers. In fact, moral disapprobation is a normative construct of seemingly infinite capacity. Blame away, but keep in mind the potential drawbacks of primarily punitive responses to prison rape. If we care not only about punishment of sexual coercion but also about its prevention, then we must be attentive to every contributing cause.

And indeed, as detailed in Part I, not every instance of coerced sex has a clear perpetrator, an individual aggressor who is the source of the coercion. A great deal of sex in prisons stems not from a direct exercise or threat of superior physical force, but from a bargain made under the coercive conditions that are intrinsic to prison. Prisoners are denied almost every opportunity for agency, which is why some commentators are reluctant to call any prisoner sex consensual. And it seems impossible to restore a significant measure of agency to prisoners and still maintain security and inflict the pain or harm that we see as essential to punishment. To regulate the most obvious physical coercion, the graphically violent rapes, is an important improvement, but it will not address much of the sex. Or, we could ban sex altogether, which seems fruitless and probably undesirable. In short, it would be very difficult to disaggregate coercive sex from imprisonment.

IV. CONCLUSION

The first two parts of this Article attempt to identify and clarify two problems: Part I seeks to clarify the extent to which the experience of imprisonment in all-male institutions is sexual, and Part II illustrates that

¹⁸⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1987).

contemporary Eighth Amendment doctrine fails to recognize most prison experience—including the sexual aspects of it—as constitutionally regulated “punishment.” In this final Part, where ambitious reform proposals belong, this Article offers little but pessimism. At best, it seems that extensive surveillance and strict control of prisoners could reduce the incidents of physically violent rape, but such measures come at the price of prisoners’ autonomy and may only increase distortions of sexuality within the prison. However we define rape, however we resolve the difficult issues of force and nonconsent, there remains “*the institution of confinement itself.*”¹⁸⁵ In the words of Stephen Donaldson:

[T]his is by far the most important issue, for all the coercion, trauma, the demasculinization, the degradation are inherent in this abomination, with only differences of degree—important as they may be to us inside—between one human zoo and another. Part of that confinement is what confines us to each other, barring us from sexual and emotional contact with those on the Outside. *There is, ultimately, no prison rape issue. There is only the prison issue.*¹⁸⁶

Donaldson wrote these words while in jail in November 1980. Later, after his release, he would lead the organization Stop Prisoner Rape. As Donaldson later seemed to acknowledge, it is probably too extreme to insist that there is literally “no prison rape issue.” But it seems fair to insist that prison rape, alongside all the ambiguously coercive forms of sex that occur in prison, is a prison issue. It is produced by the prison, endemic to it, and certainly unlikely to be remedied by efforts to make the prison still more punitive and still more invasive.

¹⁸⁵ Tucker, *supra* note 180, at 71-72.

¹⁸⁶ *Id.* (paragraph breaks omitted).