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# How to Feel Like a Woman, or Why Punishment Is a Drag

Mary Anne Franks

*University of Miami School of Law*, [mafranks@law.miami.edu](mailto:mafranks@law.miami.edu)

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## How to Feel Like a Woman, or Why Punishment Is a Drag

Mary Anne Franks



### ABSTRACT

If a man in prison says that he was made “to feel like a woman,” this is commonly understood to mean that he was degraded, dehumanized, and sexualized. This association of femininity with punishment has significant implications for the way our society understands not only the sexual abuse of men in prison but also sexual abuse generally. These important implications are usually overlooked, however, because law and society typically regard prison feminization as a problem of gender transposition: that is, as a problem of men being treated like women. In contrast, this Article argues that feminization is punitive for both men and women. It is as unnatural and wrong for women to be degraded, dehumanized, and sexualized under coercive circumstances as it is for men to be. This Article suggests that examining the sexual abuse of men in prisons can help disrupt the persistent and uncritical linking of feminization and women. By reading the sexualized abuse of men in prison as a form of forced feminized performance—a coerced drag—this Article hopes to expose the artificiality and violence of compelled feminization. The proper approach to assessing forced feminization is to focus on its oppressive structure, not on the gender of its victims. When we do so, we can see what all victims along the spectrum of sexual and domestic abuse have in common, and we can form social and legal responses accordingly. The phenomenon of male sexual abuse in prison thus provides a potentially illuminating opportunity to think about the structure and consequences of sexual abuse in general. This is significant not least because social and legal responses to sexual abuse outside of the prison setting—where sexual abuse is generally perpetrated by men against women—are constrained by pernicious gender stereotypes and a massive failure of empathy. Understanding the phenomenon of male prison sexual abuse is thus essential not only for addressing a specific problem in carceral institutions, but also for forcing law and society to consider sexual abuse in a productively counterintuitive way.

### AUTHOR

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## INTRODUCTION

If a man in prison says that he was made “to feel like a woman,” this is commonly understood to mean that he was degraded, dehumanized, and sexualized. This association of femininity with punishment has significant implications for the way our society understands not only the sexual abuse of men in prison but also sexual abuse generally. These important implications are usually overlooked, however, because law and society typically regard prison feminization as a problem of gender transposition: that is, as a problem of men being treated like women.

This Article argues that feminization is punitive for both men *and* women. It is as unnatural and wrong for women to be degraded, dehumanized, and sexualized under coercive circumstances as it is for men to be. This Article suggests that examining the sexual abuse of men in prisons can help disrupt the persistent and uncritical linking of feminization and women. By reading the sexualized abuse of men in prison as a form of forced drag, this Article hopes to expose the artificiality and violence of compelled feminization. The proper approach to assessing forced feminization is to focus on its oppressive structure, not on the gender of its victims. When we do so, we can see what all victims along the spectrum of sexual and domestic abuse have in common, and we can form social and legal responses accordingly. The phenomenon of male sexual abuse in prison thus provides a potentially illuminating opportunity to think about the structure and consequences of sexual abuse in general. This is significant, not least because social and legal responses to sexual abuse outside of the prison setting—where sexual abuse is generally perpetrated by men against women—are constrained by pernicious gender stereotypes and a massive failure of empathy. Understanding the phenomenon of male prison sexual abuse is thus essential not only for addressing a specific problem in carceral institutions but also for forcing law and society to consider sexual abuse in a productively counterintuitive way.

Part I of this Article takes a close look at what male prisoners mean when they say that they were made to feel like women and at why this terminology so often serves as the shorthand for expressing the worst aspects of their carceral experience. Part II details the two ways of reading the claim that to feel like a woman is terrible: either on its face or supplemented by a hidden assumption. The latter reading is the dominant one, and it characterizes the harm of forced feminization as one of gender transposition (a man should not be treated like a woman) whereas the former characterizes the harm as one of subordination and

degradation that can be inflicted upon men or women (no one should be treated like a woman). This Part explains why the dominant reading, which naturalizes the sexual subordination of women and gives force to pernicious gender stereotypes, is flawed not only descriptively but also normatively. This reading also represents a failure of empathy: Instead of recognizing that the sexual abuse of men shares the same structure of domination and coercion as the sexual abuse of women, this reading treats them as separate phenomena that do not inform each other in meaningful ways. To oversimplify, men in prison (exceptionally) experience what women outside of prison (generally) experience. Part III illustrates this by offering an account of the tolerance of sexual abuse of women outside prison and the tolerance of sexual abuse of men in prison, respectively. Part IV investigates the role of imagination and empathy (or failures thereof) in the tolerance of sexual abuse and invites the reader to consider male prisoner rape as a form of forced drag performance that exposes the artificiality and carcerality of feminization.

### I. WHAT IT MEANS TO “FEEL LIKE A WOMAN”

“[T]his is the worst insult, to feel like a woman.”<sup>1</sup> These are the words of a man held captive at Abu Ghraib, a prison notorious for the beating, torture, and humiliation of its inmates. “We are men,” Dhia al-Shweiri explained.<sup>2</sup> “Beatings don’t hurt us; it’s just a blow. But no one would want their manhood to be shattered. [Our captors] wanted us to feel as though we were women, the way women feel . . . .”<sup>3</sup> In this view, echoed by male prisoners around the world, feminization is the worst form of punishment imaginable. In prison parlance, becoming a “bitch” or “wife” means becoming another inmate’s sexual and domestic subordinate, and it is one of the threats new inmates fear most.<sup>4</sup> Rape, in particular, has a unique power to feminize men: “Through the act of rape, the victim is redefined as an object of sexual abuse. He has been proven to be weak, vulnerable, ‘female,’ in the eyes of other inmates.”<sup>5</sup> An inmate and author, Jack

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1. Cathy Hong, *How Could Women Do That?*, SALON (May 7, 2004, 4:51 PM), [http://www.salon.com/2004/05/07/abuse\\_gender](http://www.salon.com/2004/05/07/abuse_gender).

2. *Id.*

3. *Id.*

4. Thus, one of the most common police interrogation tactics against an uncooperative suspect is to raise the specter of male rape in prison. See Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1285 (2011).

5. HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* 7 (2001); see also Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1352 (2011) (describing how the rape of heterosexual men is perceived as “transforming men into women” (internal quotation marks omitted)).

Abbott, wrote that men who are raped in prison typically feel that “it is a great shame and dishonor to have experienced what it feels like to be a woman.”<sup>6</sup> T.J. Parsell, author of *Fish: A Memoir of a Boy in a Man’s Prison*, describes his experiences of sexual assault and abuse in prison as having “stolen my manhood, my identity and part of my soul.”<sup>7</sup>

The equation of sexual punishment with femininity is in fact so familiar that the peculiarity and poignancy of the association is rarely discussed.<sup>8</sup> Prisoners, wardens, reformers, and members of the general public all know what it means when an inmate says that he was treated like a woman. The phrase “make him my bitch” has passed from the prison context into common usage because it is so easily and immediately intelligible. This Article highlights and questions the ease with which society understands femininity as shorthand for the experience of sexual humiliation and assault.

The ready currency of the association is even more striking given that outside the punishment context, linking femininity with subordination (especially sexual subordination) is controversial. Many different groups with ranging motivations resist acknowledging the victimization of women. Antifeminists deny or minimize the violence and discrimination women face. Men’s rights activists, for example, claim that women take advantage of “victim culture” to falsely cry rape at alarming rates,<sup>9</sup> while cultural commentators like Katie Roiphe and Camille Paglia portray women as using victimhood as a way to avoid the consequences of their own poor choices.<sup>10</sup> Feminists, too, are skeptical of the association of women with subordination, though for different reasons. So-called sex-positive or pro-sex feminists criticize so-called dominance feminists for

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6. JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 78* (Vintage Books 1991) (1981).
  7. Carolyn Marshall, *Panel on Prison Rape Hears Victims’ Chilling Accounts*, N.Y. TIMES, Aug. 20, 2005, <http://www.nytimes.com/2005/08/20/politics/20rape.html>.
  8. Recent exceptions are Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011), and SpearIt, *Gender Violence in Prison & Hyper-masculinities in the Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL’Y 89 (2011).
  9. See, e.g., Mark Potok & Evelyn Schlatter, *Myths of the Monosphere: Lying About Women*, INTELLIGENCE REP., Spring 2012, at 20, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/myths-of-the-manosphere-lying-about-women>; Alice Marwick, *Donglegate: Why the Tech Community Hates Feminists*, WIRED (Mar. 29, 2013, 6:30 AM), <http://www.wired.com/opinion/2013/03/richards-affair-and-misogyny-in-tech>; COMMUNITY OF THE WRONGFULLY ACCUSED, <http://www.cotwa.info> (last visited Dec. 30, 2013).
  10. See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006); KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM* (1994); Camille Paglia, Am. Professor of Humanities, Mass. Inst. of Tech., *Talk on the Crisis in the American Universities* (Sept. 19, 1991) (transcript available at <http://gos.sbc.edu/p/paglia.html>).

defining women by their relationship to male violence,<sup>11</sup> and other feminists worry that an emphasis on women's victimization, even when not descriptively inaccurate, perpetuates pernicious stereotypes about women's weakness and need for protection. The feminist objection to associating women with victimization often stems from the concern that such an association might become a self-fulfilling prophecy. In this view, an intense focus on women's potential for victimization may in fact produce women who are timid, fearful, paranoid, and traumatized.<sup>12</sup>

In the context of the male prison experience, however, the conflation of women and sexual subordination is often passed over in silence. This is strange because if the link between women and victimization really were no stronger than between men and victimization, then it would not make sense for men to choose to describe their experiences of sexual humiliation and assault using the shorthand "to feel like a woman." It is even more of a puzzle why this shorthand is immediately intelligible even to prison outsiders. Of the many public responses to Dhia al-Shweiri's statements regarding his treatment at Abu Ghraib, notably absent was any confusion about what he meant when he said that he was made to "feel like a woman."<sup>13</sup> To my knowledge, no official, journalist, scholar, or pundit queried whether what al-Shweiri meant by stating that he felt like a woman was perhaps that he felt equal to a man, or felt admired, or felt powerful.

It is important to take a close look at precisely what *is* meant when a man says he was treated like a woman. In al-Shweiri's case, this meant being forced by guards to strip naked and face a wall: "They made us stand in a way that I am ashamed to describe. They came to look at us as we stood there. They knew this would humiliate us."<sup>14</sup> An inmate interviewed for the Human Rights Watch report on prison rape described how, after being sexually assaulted, he was tormented by the feeling that "everyone [was] looking at me in a sexual way."<sup>15</sup> Another inmate elaborated on his experience of being a prison wife: "Out of fear for my life, I submitted to sucking [a fellow inmate's] dick, being fucked in my ass, and performing other duties as a woman, such as making his bed."<sup>16</sup> To feel

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11. See, e.g., Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 143, 166 (Richard Parker & Peter Aggleton eds., 1999).

12. HALLEY, *supra* note 10, at 346 ("While feminism is committed to affirming and identifying itself with female injury, it may thereby, unintentionally, intensify it.").

13. Hong, *supra* note 1.

14. *Iraqi Prisoner Details Abuse by Americans*, CHINA DAILY (May 3, 2004, 9:14 AM), [http://www.chinadaily.com.cn/english/doc/2004-05/03/content\\_328017.htm](http://www.chinadaily.com.cn/english/doc/2004-05/03/content_328017.htm) (internal quotation marks omitted).

15. HUMAN RIGHTS WATCH, *supra* note 5, at 115.

16. *Id.* at 163.

like a woman, then, includes being stripped naked, leered at, sexually objectified, coerced into giving oral and anal sex, and performing domestic chores.

Furthermore, victims and their advocates claim that these feminized experiences are equivalent to slavery. “In all reality,” said one prison wife of his relationship to his inmate husband, “I was his slave.”<sup>17</sup> The authors of the Human Rights Watch report on prison rape write that inmates who are forced into sexual and domestic obligations are essentially owned by their oppressors:

Forced to satisfy another man’s sexual appetites whenever he demands, they may also be responsible for washing his clothes, massaging his back, cooking his food, cleaning his cell, and myriad other chores. They are frequently “rented out” for sex, sold, or even auctioned off to other inmates, replicating the financial aspects of traditional slavery. Their most basic choices, like how to dress and whom to talk to, may be controlled by the person who “owns” them. Their name may be replaced by a female one. Like all forms of slavery, these situations are among the most degrading and dehumanizing experiences a person can undergo.<sup>18</sup>

Tellingly, in this passage the metaphor for the victim of sexual abuse is first a woman, then a slave, then a woman again, then a slave again, so that the two collapse into each other.

Finally, the forced feminization of men is sometimes perceived as worse than torture or death. Al-Shweiri recounts how under Saddam Hussein’s regime he found himself in Abu Ghraib twice before, “electrocuted, beaten and hung from the ceiling with his hands tied behind his back.”<sup>19</sup> All of this paled in comparison to what he experienced at the hands of his American captors: “‘But that’s better than the humiliation of being stripped naked,’ he said. ‘Shoot me here,’ he added, pointing between his eyes, ‘but don’t do this to us.’”<sup>20</sup>

## II. TWO WAYS OF FEELING LIKE A WOMAN

We see, then, that in the prison context, to be treated like a woman means to be subjected to a spectrum of abuse, from nonconsensual sexual objectification to domestic servitude to sexual assault and veritable slavery. Those who experience such treatment believe it to be, in some cases, worse than torture or

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17. *Id.*; see also ABBOTT, *supra* note 6, at 80 (“[I]f I take a punk, *she is mine*. He is like a slave, a chattel slave. . . . He cleans my cell, my clothing and runs errands for me. Anything I tell him to do, he must do—exactly the way a wife is perceived in some marriages even today.”).

18. HUMAN RIGHTS WATCH, *supra* note 5, at 8.

19. *Iraqi Prisoner Details Abuse by Americans*, *supra* note 14.

20. *Id.*

death. As such, the claim that to feel like or be treated like a woman is terrible seems straightforward. But a significant ambiguity lies at the heart of this claim. One could take the claim, as it were, on its face: It is terrible to be treated like a woman. Alternatively, one could read a presumption into the claim: It is terrible for a *man* to be treated like a woman. While the first reading has significant and radical implications for understanding sexual abuse and gender relations, the second reading actually hampers and distorts our understanding of sexual abuse and gender relations. Unfortunately, the second reading—what I call the gender transposition reading—is the more common and dominant one.

In the gender transposition reading, according to which it is terrible for a man to be treated like a woman, the harm of forced feminization is fundamentally a category error. It assumes that women should be treated like women, and men should be treated like men. Therefore, it is offensive for men to make beds, wear lipstick, and be subjected to catcalls and sexual penetration primarily because it violates gender role expectations, not because those gender roles are themselves suspect. On the surface, this reading might seem innocuous to the reasonable person, if not necessarily convincing. The gender essentialism underlying this view, however, is anything but harmless.

In its most benign version, gender essentialism asserts that men and women are different but equal. Their abilities and duties are ostensibly complementary: Men are expected to work outside the home and participate in public life, while women are expected to raise children and organize the home.<sup>21</sup> The ideology of separate spheres was typified in the notorious 1873 Supreme Court decision *Bradwell v. Illinois*:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .

. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.<sup>22</sup>

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21. See, for example, the gender essentialist views of Jean-Jacques Rousseau. JEAN-JACQUES ROUSSEAU, *EMILE: OR, ON EDUCATION* (Floating Press 2009) (1762). The concept of sexual or biological complementarity similarly assigns biologically-based roles to men and women and has been offered as proof that marriage should be limited to opposite-sex couples. See, e.g., Robert P. George, *What's Sex Got to Do With It? Marriage, Morality, and Rationality*, 49 *AM. J. JURIS.* 63, 77–81 (2004).
22. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (denying Myra Bradwell's application to practice law).

Alexis de Tocqueville found himself greatly impressed by what he considered to be America's unique insistence on separate spheres for men and women:

In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways that are always different. American women never manage the outward concerns of the family or conduct a business or take a part in political life; nor are they, on the other hand, ever compelled to perform the rough labor of the fields or to make any of those laborious efforts which demand the exertion of physical strength.<sup>23</sup>

Gender essentialism involves, at a minimum, a denial of autonomy to both men and women. By asserting that men and women have roles assigned to them by nature and biology, gender essentialism forbids men and women from taking up contrary roles. Why it is that roles supposedly dictated by an unchanging and unchangeable nature must so often be rigidly imposed and regulated, and why so many men and women are nonetheless both willing and able to resist them, is somewhat of a mystery. One might wonder why nature requires so much constant monitoring and disciplining, or why if it is women's natural destiny to become wives and mothers, she is never allowed to leave "the quiet circle of domestic employments."<sup>24</sup>

But even if one were to accept that the roles of men and women are somehow determined (or at least strongly shaped) by nature or biology, the alleged equality of their different stations in life is undermined by the denigration and subordination of women's position to men. As William Blackstone explained the doctrine of coverture, which originated in British law and greatly influenced U.S. law well into the nineteenth century, "[T]he husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."<sup>25</sup> John Stuart Mill observed that the allegedly natural relationship between men and women was one of slavery, and worse still, a slavery that attempted to colonize sentiment as well as body:

Men do not want solely the obedience of women, they want their sentiments. All men, except the most brutish, desire to have, in the woman most nearly connected with them, not a forced slave but a

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23. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 212 (Phillips Bradley ed., Henry Reeve trans., 1945) (1840).

24. *Id.*

25. 1 WILLIAM BLACKSTONE, *COMMENTARIES* 430 (1765) (footnote omitted).

willing one, not a slave merely, but a favourite. They have therefore put everything in practice to enslave their minds.<sup>26</sup>

Accordingly, the harms of gender transposition seem to run principally in only one direction. The fact that women generally benefit from being treated like men, whereas men generally suffer from being treated like women, exposes the fiction behind the concept of separate but equal genders. As a recent *New York Times* article on cross-dressing boys put it, “[G]irls gain status by moving into ‘boy’ space, while boys are tainted by the slightest whiff of femininity.”<sup>27</sup> The article quotes psychologist Diane Ehrensaft on this distinction: “When a boy wants to act like a girl, it subconsciously shakes our foundation, because why would someone want to be the lesser gender?”<sup>28</sup> Girls who exhibit traits more often associated with boys are often referred to as tomboys, a term that can be described as neutral or even positive. The terms for boys who exhibit traits more often associated with girls could not be similarly described.<sup>29</sup> Such a result can be a product only of gender hierarchy, not of mere gender difference.

To take just one stark example of the degradation of femininity and the elevation of masculinity, consider the respective practices of *bacha posh* and *bacha bazi* in Afghanistan. Generally speaking, the status of girls and women in Afghanistan is far lower than that of boys and men. Girls and women have reduced access to educational and employment resources and are subject to often severe restrictions of their personal autonomy relative to boys and men.<sup>30</sup> The practice of *bacha posh*, which means “dressed up as a boy,” grants girls freedom of movement and education that they would not experience as girls.<sup>31</sup> A *bacha posh* can go to school, work outside the home, or be seen in public without a male

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26. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 26–27 (2d ed. 1869); see also PIERRE BOURDIEU, *MASCULINE DOMINATION* (Richard Nice trans., Polity Press 2001) (1998); SIMONE DE BEAUVOIR, *THE SECOND SEX* (H. M. Parshley ed. & trans., Bantam Books 1961) (1949).
27. Ruth Padawer, *What's So Bad About a Boy Who Wants to Wear a Dress?*, N.Y. TIMES, Aug. 8, 2012, <http://www.nytimes.com/2012/08/12/magazine/whats-so-bad-about-a-boy-who-wants-to-wear-a-dress.html>. But cf. SHIRI EISNER, *BI: NOTES FOR A BISEXUAL REVOLUTION* 200 (2013) (quoting Iggy Pop as stating, “I’m not ashamed to dress like a woman because I don’t think it’s shameful to be a woman”).
28. Padawer, *supra* note 27 (internal quotation marks omitted).
29. Terms like sissy and pansy, to say nothing of crude terms for female genitalia, are rarely considered complimentary or even neutral. See R. W. CONNELL, *MASCULINITIES* 79 (2d ed. 2005).
30. See Global Research in Int’l Affairs, *Women in Afghanistan: A Human Rights Tragedy a Decade After September 11*, RAWA NEWS (Nov. 12, 2012), <http://www.rawa.org/temp/runews/2012/11/12/women-in-afghanistan-a-human-rights-tragedy-a-decade-after-september-11.html#ixzz2aYVsXEi4>.
31. Jenny Nordberg, *Afghan Boys Are Prized, So Girls Love the Part*, N.Y. TIMES, Sept. 20, 2010, <http://www.nytimes.com/2010/09/21/world/asia/21gender.html> (internal quotation marks omitted).

chaperone much more easily than if she were known to be a girl.<sup>32</sup> Contrast these experiences with those of boys treated as girls in the practice known as *bacha bazi*. *Bacha bazi*, which literally means “boy for play,”<sup>33</sup> is a 300-year old Central Asian tradition that the U.S. State Department has called a “widespread, culturally sanctioned form of male rape.”<sup>34</sup> The boys involved in *bacha bazi* are often abused children disowned by their families.<sup>35</sup> They wear makeup, women’s clothing, and bells on their feet<sup>36</sup> to perform for audiences of older men, and are then prostituted to the highest bidder.<sup>37</sup> In *bacha bazi*, the feminization of boys results in sexual exploitation and a lowered social status. In *bacha posh*, the masculinization of girls results in increased personal freedom and social status. The effects of gender transposition here, as in most cases, are asymmetrical: To be feminized is to be punished; to be masculinized is to be liberated.<sup>38</sup>

Secondly, and even more importantly, the unspoken corollary of the idea that it is wrong for men to be treated like women is that it is right (or at least not as wrong) for women to be treated like women. This approach necessarily relies on fixed conceptions of what it means to be a man or a woman, and as such, it is a gender essentialist view.<sup>39</sup> While few today would argue outright that it is

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32. *Id.* (“People use bad words for girls,’ [one fifteen-year-old] said. ‘They scream at them on the streets. When I see that, I don’t want to be a girl. When I am a boy, they don’t speak to me like that.’”).
33. Ghaith Abdul-Ahad, *The Dancing Boys of Afghanistan*, GUARDIAN, Sept. 11, 2009, <http://www.theguardian.com/world/2009/sep/12/dancing-boys-afghanistan>.
34. Joel Brinkley, *Afghanistan’s Dirty Little Secret*, S.F. GATE (Aug. 29, 2010, 4:00 AM), <http://www.sfgate.com/opinion/article/Afghanistan-s-dirty-little-secret-3176762.php> (internal quotation marks omitted).
35. Abdul-Ahad, *supra* note 33; Ernesto Londoño, *Afghanistan Sees Rise in Dancing Boys’ Exploitation*, WASH. POST, Apr. 4, 2012, [http://articles.washingtonpost.com/2012-04-04/world/35451705\\_1\\_bacha-bazi-afghans-pashtun](http://articles.washingtonpost.com/2012-04-04/world/35451705_1_bacha-bazi-afghans-pashtun).
36. Abdul-Ahad, *supra* note 33.
37. Rod Nordland, *Afghans Plan to Stop Recruiting Children as Police*, N.Y. TIMES, Jan. 29, 2011, <http://www.nytimes.com/2011/01/30/world/asia/30afghan.html>.
38. Of course, there are limits to what is considered acceptable masculinity in women. Tomboys can be tolerated and even encouraged, but when women and girls attain a level of physical prowess that makes them competitive with men and boys, the social response is very often aggressively negative. See COLETTE DOWLING, *THE FRAILTY MYTH: WOMEN APPROACHING PHYSICAL EQUALITY 198–202* (2000). There can moreover be violent consequences for women and girls who appear or act so convincingly masculine that they threaten the settled gender order. See, for example, the case of Brandon Teena, a transgender man who was raped and killed in 1993 by men when they discovered that he was born female. For details of his case and of the continuing violence against transgender individuals, see Adam Bass, *Telling Brandon Teena’s Story Accurately*, GLAAD (May 5, 2011), <http://www.glaad.org/2011/05/05/telling-brandon-teenas-story-accurately>.
39. See, for example, Freud’s famous assertion that “anatomy is destiny.” SIGMUND FREUD, *The Dissolution of the Oedipus Complex*, in *THE FREUD READER* 661, 661 (Peter Gay ed., W.W. Norton & Co., Inc. 1989). For a critique of gender and race essentialism, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581 (1990).

women's natural fate to be subjected to treatment at the far end of the abuse spectrum (like rape and slavery),<sup>40</sup> many maintain that wearing feminine clothing and makeup is no real burden to women<sup>41</sup> and that sexual objectification is something women have to put up with or even appreciate.<sup>42</sup> Even with regard to rape, some believe that it is worse for a man to experience sexual assault than for a woman to experience the same. "You know that if it is degrading for a woman, how much more for a man," as one inmate put it.<sup>43</sup>

This belief is strongly tied to the heterosexist idea that being sexually penetrated is inherently feminine, so that it is only men who are penetrated by other men who are feminized, not those doing the penetrating.<sup>44</sup> Pierre Bourdieu explains:

Penetration, especially when performed on a man, is one of the affirmations of the *libido dominandi* that is never entirely absent from the masculine libido. . . . [I]n a number of societies homosexual possession is conceived as a manifestation of 'power,' an act of domination (performed as such . . . in order to assert superiority by 'feminizing' the other) and that, understood in this way, . . . it condemned the victim to dishonour and the loss of the status of a complete man and a citizen . . . .<sup>45</sup>

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40. Though some have famously argued exactly this. For example, translations from the influential philosopher Otto Weininger read, "Woman is not free: ultimately, the urge to be raped by man in one or another way always prevails in her; woman is governed by the phallus." SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY* 142 (1994) (quoting Otto Weininger). Weininger's original German reads, "Das Weib ist unfrei: es wird schließlich immer bezwungen durch das Bedürfnis, vom Manne . . . vergewaltigt zu werden; es steht unter dem Banne des Phallus." OTTO WEININGER, *GESCHLECHT UND CHARAKTER* 377 (1904). Presumably Žižek offers his own translation here because the corresponding passage in the English version he cites tellingly leaves out the reference to rape. The original German is even stronger than Žižek's translation, as "immer bezwungen durch das Bedürfnis" is closer to the sense of "conquering need" than a mere "prevailing urge."
41. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (finding that casino policy requiring female, but not male, employees to wear makeup does not "impose[] an unequal burden on women"). For a critical response to such beliefs, see SHEILA JEFFREYS, *BEAUTY AND MISOGYNY: HARMFUL CULTURAL PRACTICES IN THE WEST* 107 (2005).
42. JACKSON KATZ, *THE MACHO PARADOX: WHY SOME MEN HURT WOMEN AND HOW ALL MEN CAN HELP* 71 (2006) (criticizing this view).
43. HUMAN RIGHTS WATCH, *supra* note 5, at 176.
44. Thus, in the prison context, men who are anally penetrated are considered "bitches" or "queers," whereas the perceived masculinity of the men who penetrate them is not undermined, and may indeed even be heightened, by the act. See SpearIt, *supra* note 8, at 103–04.
45. BOURDIEU, *supra* note 26, at 21.

For women to be penetrated against their will may be tragic, this view implies, but it is not *unnatural* in the same way that it is for men to be penetrated.<sup>46</sup> Such a view is expressed in no less of a venerable a source than the Bible, in the Old Testament story of Lot.<sup>47</sup> In Genesis chapter 19, the men of Sodom descend upon the house of Lot when they learn that two (male) angels were sheltering there for the night. They demand that Lot bring the angels out so that the men could rape them. In response, “Lot went out into the doorway to them, and, closing the door behind him, said, ‘No, my friends, do not do anything so wicked. Look, I have two daughters, virgins both of them; let me bring them out to you, and you can do what you like with them.’”<sup>48</sup> Lot offers up his own daughters for rape to spare his male visitors from the same fate. Lot’s actions are not criticized or even questioned in the text, and Lot is in fact spared while the rest of Sodom and Gomorrah burns, suggesting that he acted in a way that pleased God.<sup>49</sup>

The pernicious effects of the gender essentialist reading thus include the normalization of gender stereotypes, the naturalization of women’s status as sex objects for the male gaze, and the comparative trivialization of women’s experiences of sexual assault. It can lead to well-intentioned but problematic reforms, such as the idea that the most effective way to reduce male prison rape is to provide more (presumably heterosexual) conjugal visits.<sup>50</sup> This proposed reform implies that so long as men are provided with supposedly appropriate outlets for their desire for sex and domination (that is, women), they will not seek out supposedly inappropriate outlets (that is, men).<sup>51</sup> If men who are sexually

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46. See, for example, an article in the *New York Times* that suggested that male rape victims experience harms above and beyond those experienced by female rape victims:

Like women, men who are raped feel violated and ashamed and may become severely depressed or suicidal. . . .

But men also face a challenge to their sense of masculinity. Many feel they should have done more to fight off their attackers. Since they may believe that men are never raped, they may feel isolated and reluctant to confide in anyone. Male rape victims may become confused about their sexual orientation or, if gay and raped by a man, blame their sexual orientation for the rape.

Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES, Jan. 23, 2012, <http://www.nytimes.com/2012/01/24/health/as-victims-men-struggle-for-rape-awareness.html>.

47. *Genesis* 19:1–26. I thank Kaimipono Wenger for reminding me of Lot’s story.

48. *Id.* at 19:4–8.

49. *Id.* at 19:15–26.

50. See, e.g., Christopher Hensley et al., *Conjugal Visitation Programs: The Logical Conclusion*, in *PRISON SEX: PRACTICE AND POLICY* 143 (Christopher Hensley ed., 2002); Rachel Wyatt, Note, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J. INT’L L. 579 (2006).

51. This is reflected as well in the theory that it is up to “good women” to constrain men’s behavior and keep them out of prison:

[T]here is, almost without an exception, some unprincipled or abandoned woman, who plays a prominent part in the life of every convict, be it a worthless mother, who poisons by her corrupt example the soul of her children, or a slothful and

objectified, coerced into domestic servitude, and raped in prison “feel like women,” what does that suggest about what women treated this way in prison feel like?<sup>52</sup> For that matter, what do women treated this way outside of prison settings “feel like”?

This is why it matters which view of the claim “to be treated like a woman is terrible” we take. The view that locates the primary harm of forced feminization in gender transposition signals a moment of failed understanding. It is a lost opportunity for empathy and solidarity. It constrains, rather than enlarges, our understanding of what is wrong about sexualized coercion. Only the face-value, literal reading of the claim reveals a deeper insight: If to be treated like a woman means to be objectified, domesticated, and assaulted under coercive conditions, surely it must be terrible for *anyone*, including and perhaps especially women, to be treated like a woman.

This view, of course, requires the rejection of gender essentialism. It means accepting that there are no natural gender roles, only socially constructed expectations and performances.<sup>53</sup> If gender is performance, then there is no natural or necessary correlation between men and masculinity, or women and femininity. Men can perform femininity, and women can perform masculinity. Perhaps more importantly, women can perform femininity (or not), and men can perform masculinity (or not). “One is not born, but rather becomes, a woman,” as Simone de Beauvoir famously wrote.<sup>54</sup>

The antiessentialist view of gender is gaining ground in the law. In *Price Waterhouse v. Hopkins*, the Supreme Court held that certain forms of sex stereotyping can qualify as impermissible sex discrimination.<sup>55</sup> In 1982, Ann Hopkins had secured the largest consulting contract in Price Waterhouse’s history and was the sole woman up for promotion in the firm’s Office of Government Services.<sup>56</sup> She failed to make partner, however, and was advised that she might have been more successful if she had learned to “walk more femininely, talk more

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intemperate wife, who disgusts her husband with his home, a prostitute, whose wants must be satisfied by theft, or a receiver of plunder and spy of opportunities for robberies.

Francis Lieber, *Translator’s Preface* to GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 8–9 (1964).

52. See Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 55–57 (2007).
53. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2d ed. 1999).
54. DE BEAUVOIR, *supra* note 26, at 267.
55. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
56. GEORGE A. AKERLOF & RACHEL E. KRANTON, *IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING* 3–4 (2010).

femininely, dress more femininely, wear makeup and jewelry, and have her hair styled.”<sup>57</sup> The Court found that requiring or expecting women, but not men, to perform in certain professedly feminine ways, could be a form of unlawful sex discrimination.<sup>58</sup> Under an antiessentialist view of gender, it should be evident that either men or women can be coercively feminized. To the extent that we recognize certain forms of feminization as presumptively negative, we should decry such forced feminization wherever and to whomever it occurs.<sup>59</sup>

### III. THE SHARED SUBORDINATION: WOMEN’S NORM, MEN’S EXCEPTION

Men who are forcibly feminized in prison suffer physical, emotional, and psychological harm. Their plight is compounded by the perception that real men do not allow themselves to be sexually abused and by prejudice against prisoners generally (more specifically, the popular belief that prisoners get what they deserve, regardless of the type or severity of their alleged criminal acts). While some aspects of the sexual abuse of men in prison are exacerbated by particular expectations and beliefs about men specifically and prisoners generally, the sexual abuse of women outside prison is its closest analogue. The failure to recognize this shared structure of sexual abuse is harmful to all victims of sexual abuse and constrains law and society’s response to their victimization.

#### A. The Tolerance of the Sexual Abuse and Harassment of Women

The majority of rape victims are female,<sup>60</sup> and 99 percent of all rapists are male.<sup>61</sup> According to the National Crime Victimization Survey, there were

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57. *Id.* (internal quotation marks omitted).

58. *Price Waterhouse*, 490 U.S. at 257–58. *But see* Morvareed Z. Salehpour, *Election 2008: Sexism Edition: The Problem of Sex Stereotyping*, 19 UCLA WOMEN’S L.J. 117, 123 (2012) (“Even in employment law and under Title VII, the protection of women from sex-based stereotyping is not absolute. Several precedents establish that women’s choices of dress and appearance can be legally punished in many situations.” (footnote omitted)).

59. It should be emphasized that this Article focuses only on essentialized and coerced feminization. It is possible for women or men to voluntarily take on the trappings of what society has constructed as feminine, and such choices are not necessarily negative. What is truly voluntary with regard to gender performance, however, is a complex question given how coercive and punitive social and legal norms about gender roles can be.

60. PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT OF JUSTICE, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 13 (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

61. LAWRENCE A. GREENFIELD, U.S. DEPT OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 4 (1997), *available at* <http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf>.

253,560 rapes of female individuals in 2010.<sup>62</sup> One in six women will be a victim of rape or attempted rape in her lifetime;<sup>63</sup> studies focusing on female college students found that their chances of being raped are one in four.<sup>64</sup> Studies estimate that 65 percent of all rapes go unreported.<sup>65</sup> Most states define rape in terms of force as opposed to consent, such that victims who cannot prove that their attackers used physical force in addition to that necessary for sexual penetration are considered not to have been raped under the law.<sup>66</sup> Despite Sir Matthew Hale's famous assertion that rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent,"<sup>67</sup> many women face skepticism, blame, and even violence when they report their assaults.<sup>68</sup> Rape kits are invasive, often painful, and can take up to six hours to complete.<sup>69</sup> Making things worse, an estimated 400,000 untested rape kits are collecting dust in the United States.<sup>70</sup> Two-thirds of all rapes are committed by someone the victim knows,<sup>71</sup> and yet acquaintance rapes are the least likely type of rape to be prosecuted and to yield convictions.<sup>72</sup>

Further along the spectrum of sexual aggression is the problem of sexual harassment in workplaces, schools, and the street. Like rape, sexual harassment can be experienced by both men and women and can be perpetrated by both men and women, but outside of prison, it is most often perpetrated by men against women.<sup>73</sup> While Title VII and Title IX address sexual harassment in workplaces

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62. JANET L. LAURITSEN & MARIBETH L. REZEY, U.S. DEPT OF JUSTICE, NCJ 241656, MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 4 (2013), <http://www.bjs.gov/content/pub/pdf/mpncncvs.pdf>.
  63. TJADEN & THOENNES, *supra* note 60, at 13.
  64. BONNIE S. FISHER ET AL., U.S. DEPT OF JUSTICE, NCJ 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. The study estimated that between one in four and one in five college women experience completed or attempted rape in their college years.
  65. LYNN LANGTON ET AL., U.S. DEPT OF JUSTICE, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010, at 4 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/vnmp0610.pdf>.
  66. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 410 (5th ed. 2009) (citing Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 628–32 (2005)).
  67. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (E. Rider, Little-Britain 1800) (1736).
  68. SUSAN ESTRICH, REAL RAPE 42–56 (1987).
  69. See Milli Kanani Hansen, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 COLUM. HUM. RTS. L. REV. 943, 944 (2011).
  70. Hilary Hylton, *The Dark Side of Clearing America's Rape Kit Backlog*, TIME, Sept. 7, 2013, <http://nation.time.com/2013/09/07/the-dark-side-of-clearing-americas-rape-kit-backlog>.
  71. TJADEN & THOENNES, *supra* note 60, at 46.
  72. See ESTRICH, *supra* note 68, at 10–15; Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 ST. JOHN'S L. REV. 291, 296 (1995).
  73. See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

and schools in theory,<sup>74</sup> the vast majority of discrimination actions fail.<sup>75</sup> Street harassment is even more difficult to regulate.<sup>76</sup> Even though up to 80 percent of women have experienced street harassment,<sup>77</sup> which can include sexual threats and groping, its anonymous and often fleeting nature makes it difficult for women to seek any redress, even in areas that have laws prohibiting such conduct.<sup>78</sup> Studies have shown that women experience fear, anger, and discomfort when they are harassed, effects that often inhibit their personal liberties (including their choice of what to wear and of when and where to walk) and undermine their sense of safety and right to access public spaces.<sup>79</sup>

The Internet and various forms of social media provide yet more ways to subject women and girls to stalking, threats, and other forms of nonconsensual sexual abuse as well as new ways to more effectively disseminate and memorialize such abuse.<sup>80</sup> In the infamous 2013 Steubenville rape case, the assault on the

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74. It is important to note that even the limited possibility of taking sexual harassment to court is of fairly recent vintage: The first federal district court case recognizing sexual harassment as sex discrimination happened in 1976; the Equal Employment Opportunity Commission did not issue its first guidelines on sexual harassment until 1980; and the Supreme Court did not recognize sexual harassment as a form of sex discrimination until 1986. Sex discrimination was not prohibited in educational institutions receiving federal funds until 1972, when Title IX of the Education Amendments was passed, and the first Supreme Court case treating sexual harassment as sex discrimination in an educational institution came down in 1999. See Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 663–65 (2012).
75. See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012) (noting that “less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief”).
76. See Deborah M. Thompson, “*The Woman in the Street: Reclaiming the Public Space From Sexual Harassment*,” 6 YALE J.L. & FEMINISM 313 (1994).
77. See STOP ST. HARASSMENT, <http://www.stopstreetharassment.org> (last visited Dec. 30, 2013) (“Most women (more than 80% worldwide) and LGBTQ+ folks will face gender-based street harassment at some point in their life.”).
78. See *id.*; see also Thompson, *supra* note 76.
79. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 542 (1993) (“[T]he continuation and near-general tolerance of street harassment has serious consequences both for women and for society at large. It inflicts the most direct costs upon women, in the form of fear, emotional distress, feelings of disempowerment, and significant limitations upon their liberty, mobility, and hopes for equality. It also increases distrust between men and women and reinforces rigid gender roles, hierarchy, and the confinement of women to the private sphere. Street harassment thus performs a function as a social institution that is antithetical to the acceptance of women into American public life on terms equal to men.”); Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or “Hey Sexy” and Other Verbal Ejaculations*, 14 COLUM. J. GENDER & L. 91 (2005); see also Katherine Brooks, *Public Art Project Addresses Gender-Based Street Harassment in a Big Way*, HUFFINGTON POST (Oct. 25, 2013), [http://www.huffingtonpost.com/2013/09/06/stop-telling-women-to-smile\\_n\\_3876041.html](http://www.huffingtonpost.com/2013/09/06/stop-telling-women-to-smile_n_3876041.html).
80. See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383 (2009); Danielle Keats Citron, *Law’s Expressive Value in Combating*

sixteen-year-old victim was recorded on cellphone cameras and distributed via text, Twitter, and YouTube.<sup>81</sup> The two teenagers who confessed to raping another teenager, Savannah Dietrich, similarly recorded and distributed footage of their attack.<sup>82</sup> So-called revenge porn—the publication of intimate photographs of (mostly) women and girls without their consent, often by bitter and vengeful ex-partners—is on the rise, facilitated by website operators who claim to be immunized from liability under the Communications Decency Act section 230.<sup>83</sup>

What is worse, a common response to the sexual assault, harassment, and objectification of women and girls is to blame the victim.<sup>84</sup> That is, instead of bemoaning the prevalence and severity of sexual abuse and supporting efforts to make both law and society properly responsive to such abuse, many people criticize women and girls for making choices that men and boys are allowed (and even encouraged) to take without assuming any risk of sexual harm. The prevalence of sexual abuse and harassment of women, the resistance to treating it seriously, and the widespread tendency to place the burden and blame on its victims instead of its perpetrators all testify to a legal and social tolerance of this harm.

Duncan Kennedy writes of what he labels the “tolerated residuum” of sexual abuse. The tolerated residuum does not mean that our society does nothing to develop and enforce formal laws against sexually abusive behavior, but rather that “it is a fantasy to believe that the formal legal rules now in force forbid even a small part of what most people would regard as clearly unjustifiable sexual abuse.”<sup>85</sup> The way that the law defines rape and sexual harassment leaves much

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*Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009); Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011).

81. See Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 16, 2012, <http://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html>.
82. See Abigail Pesta, *Thanks for Ruining My Life*, NEWSWEEK, Dec. 10, 2012, <http://www.newsweek.com/thanks-ruining-my-life-63423>.
83. See Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES, Sept. 23, 2013, <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html>; Caille Millner, *Public Humiliation Over Private Photos*, S.F. GATE (Feb. 10, 2013, 3:21 PM), <http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php#page-1>; see also Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799 (2008); Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1 (2009); *Revenge Porn Sites Like 'Texxxan' and 'Is Anyone Up?': Why Is This Happening?*, HUFFINGTON POST (Jan. 31, 2013, 9:54 AM), [http://www.huffingtonpost.com/2013/01/30/revenge-porn-holly-toupiis-texxxan\\_n\\_2576290.html](http://www.huffingtonpost.com/2013/01/30/revenge-porn-holly-toupiis-texxxan_n_2576290.html).
84. See Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013, 9:42 AM), <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.
85. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1319, 1324 (1992).

room for men<sup>86</sup> to engage in behavior that is wrong but not illegal—for instance, using subtle threats to overcome resistance to sex,<sup>87</sup> or sexually harassing women in ways that do not clearly meet the daunting “severe or pervasive” standard of hostile environment harassment.<sup>88</sup> Moreover, women suffer social and emotional costs by reporting clearly illegal sexual abuse, which deters them from challenging even behavior formally proscribed by law.<sup>89</sup> The lackluster investigation and prosecution of reported crimes of sexual abuse further demonstrate our society’s tolerance of the sexual abuse of women.<sup>90</sup>

What accounts for this widespread tolerance, given that women make up half of the population and only a minority of men directly benefit from sexual abuse (that is, the sexual abusers themselves)? Some theorists have posited that this tolerance stems in part from the reluctance of men to recognize and reject the privileges and benefits they gain by this order of things, even if they do not directly participate in sexual abuse. Susan Brownmiller famously wrote that rape is “nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear,”<sup>91</sup> suggesting that nonrapists, as well as rapists, benefit from constraints that the fear of sexual violence impose on women. While not referring specifically to sexual abuse, the sociologist R.W. Connell similarly noted what he called the patriarchal dividend: “the advantage men in general gain from the overall subordination of women.”<sup>92</sup> Kennedy, for his part, observes that acknowledging the widespread nature of sexual abuse and harassment would expose the degree to which men benefit from this status quo, forcing men and women alike to reevaluate their longstanding positions in society.<sup>93</sup> Kennedy focuses on how the tolerated residuum of abuse structures relations between men and women generally, not just those between actual

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86. As Kennedy acknowledges, rape and sexual harassment are not committed exclusively by men, and victims are not exclusively women; however, the sexual abuse of women by men is the focus of Kennedy’s article. *See generally id.*

87. *Id.* at 1318.

88. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see* 29 C.F.R. § 1604.11(a) (2013).

89. *See Kennedy, supra* note 85, at 1319.

90. *See generally* Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263 (2012) (discussing “rape tolerance”).

91. *See* SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975).

92. *See* CONNELL, *supra* note 29, at 79.

93. *See* Kennedy, *supra* note 85, at 1324 (“The crisis arises because acknowledging the actual prevalence of abuse threatens to undermine the other elements of the gestalt: that abuse is a matter between a small class of abnormal perpetrators and a small class of victims; that apparent instances are often explained by the woman’s behavior; and that the whole practice is of only marginal importance to the patterns of social life. Moreover, as the conventional view begins to fray at the edges, it has become clear that it underestimates not just the evils of the current situation but also the obstacles to changing it, and particularly the male interest in the status quo.”).

perpetrators and victims.<sup>94</sup> In particular, he is interested in how the tolerated residuum both testifies to and produces conflicts of interests between men and women generally and in their intimate relationships with each other as well.<sup>95</sup> Kennedy accepts how many of these conflicts have been described and critiqued by feminists<sup>96</sup> and adds some insights of his own. Men who do not abuse women obtain (consciously or not, ambivalently or not) three kinds of benefits from the actions of abusive men: bargaining benefits, behavioral and psychological benefits, and erotic benefits. But Kennedy maintains that these benefits, in addition to exacting costs from women, are not in fact in men's true self-interest.<sup>97</sup>

First, the bargaining benefits. The fact that a nontrivial number of men abuse women allows men generally to make credible threats of abuse, even if they never actually act on them.<sup>98</sup> Men can thereby use threats to obtain what women might refuse if the specter of violence did not exist. Secondly, the tolerance of abusive men transforms the mere fact that one is not an abuser into a virtue. Abusers alter the baseline of male behavior, creating asymmetrical bargaining effects on men and women.<sup>99</sup> Nonabusers are able to offer women a relatively good deal without having to make any other concession than not to abuse—there is no need, for example, to promise to be faithful or to perform an equal share of housework so long as the man does not abuse his partner.<sup>100</sup> Even more can be made of this benefit if nonabusers are also seen as providing protection against would-be abusers (which has been defined as the male protection racket).<sup>101</sup>

Next, the behavioral and psychological benefit: In a society in which male abuse of women is legally and socially tolerated, the burden of avoiding abuse falls on women.<sup>102</sup> Women, not men, are forced to evaluate their risks of sexual assault or abuse and adjust their behavior accordingly.<sup>103</sup> What to wear, how to

94. *Id.* at 1320 (“[M]en and women gain and lose from the practices of abuse, *whether or not* they themselves are actually abusers or victims.”).

95. *Id.* Although the tolerated residuum of violence against women potentially affects all relationships, this article focuses on its effects on heterosexual relationships.

96. *Id.* at 1310 & n.1 (citing Andrea Dworkin, Shulamith Firestone, Robin Morgan, Catharine A. MacKinnon, Frances Olsen, Elizabeth M. Schneider, and Robin West).

97. *Id.* at 1312.

98. *Id.* at 1327.

99. *Id.* at 1328.

100. A similar point could be made about the tolerated residuum of male infidelity.

101. See, e.g., Susan Griffin, *Rape: The All-American Crime*, in *WOMEN: A FEMINIST PERSPECTIVE* 24, 30 (Jo Freeman ed., 1975); Susan Rae Peterson, *Coercion and Rape: The State as a Male Protection Racket*, in *FEMINISM AND PHILOSOPHY* 360, 368–69 (Mary Vetterling-Braggin et al. eds., 1977).

102. See note 84 and accompanying text.

103. See BROWNMILLER, *supra* note 91; ESTRICH, *supra* note 68.

speak, where to go, whom to marry, whether to marry—all these choices, and many others, are to some extent mediated by the desire to avoid sexual abuse. This takes both a behavioral and psychological toll on women, disciplining them physically and mentally into living circumscribed lives.<sup>104</sup> Men's liberty is not similarly curtailed.

Finally, the erotic benefit: The toleration of men's sexual abuse of women plays a role in the eroticization of domination by both women and men in heterosexual relationships. Psychological and sociological research demonstrates that women who have been sexually abused sometimes respond by exhibiting hypersexual behavior; evidence suggests that a significant number of women who enter the sex industry—an industry considerably dependent on unequal power dynamics between men and women—have been sexually abused.<sup>105</sup> Thus the sexual abuse of women—made possible by male domination of women—can help produce sexual behavior that appears to voluntarily embrace that same domination. Moreover, the disciplinary effects of the tolerated residuum include making women as a group (not merely the actual victims of sexual abuse) submissive, timid, dependent, and weak as compared with men and engendering in women a belief that men's sexual domination of women is inevitable. The specter of sexual violence, conferring power to men and vulnerability to women, casts a long shadow over their configurations of intimacy.<sup>106</sup>

While the tolerated residuum of male sexual abuse of women disproportionately benefits men and burdens women, it exacts erotic costs from both men and women. Kennedy identifies the inhibition of sexual expression as one of those primary losses. The social tolerance of sexual abuse signals to women that there is danger in flirtation, sexy dressing, and taking sexual initiative because it may lead to rape, harassment, or social opprobrium.<sup>107</sup> Though individual

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104. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 47–50 (1998).

105. For studies on the link between childhood sexual abuse and sex work, see Rochelle L. Dalla, *Exposing the "Pretty Woman" Myth: A Qualitative Examination of the Lives of Female Streetwalking Prostitutes*, 37 J. SEX RES. 344 (2000), Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, WOMEN & HEALTH, no. 3, 1998, at 37, and Mirri H. Silbert & Ayala M. Pines, *Early Sexual Exploitation as an Influence in Prostitution*, SOC. WORK, July-Aug. 1983, at 285, 286. For studies on the link between sexual abuse as adults and sex work, see M. Alexis Kennedy et al., *Routes of Recruitment: Pimps' Techniques and Other Circumstances That Lead to Street Prostitution*, 15 J. AGGRESSION, MALTREATMENT & TRAUMA, no. 2, 2007, at 1, 3, 14, and Rebecca Campbell et al., *The Relationship Between Adult Sexual Assault and Prostitution: An Exploratory Analysis*, VIOLENCE & VICTIMS, June 2003, at 299.

106. See Kennedy, *supra* note 85, at 1393. Many similar points and more are eloquently made by Robin West. See, e.g., Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000).

107. Kennedy, *supra* note 85, at 1323–24.

women respond differently to this risk (some act in defiance of it, some are not particularly aware of it, some are simply not interested in these forms of sexual expression), it is reasonable to assume that some women who might want to engage in this kind of sexual expression do not do so out of fear of abuse.<sup>108</sup> Thus, the tolerated residuum has an overall inhibiting effect on women's sexual expression.<sup>109</sup> It is reasonable to think that this social tolerance of sexual abuse likely has some inhibiting effects on men's sexual expression as well, though Kennedy does not explore this directly. Nonabusive men might restrict their sexual behavior in order not to be mistaken for abusive men. They might refrain from making sexual overtures that they would like to make for fear of unintentionally creating a threatening situation.

Implicit in Kennedy's insights about inhibition is the recognition that the social tolerance of sexual abuse fundamentally ambiguates sexual expression.<sup>110</sup> Women who refrain from flirtation or sexy dress or sexual initiative sometimes do so because they are not sure how such expressions will be interpreted—that is, what meaning will be ascribed to them. Will flirting with one man in a bar signal to other men that a woman is interested in sexual banter or sexual activity with all of them? Will dressing in a sexy way suggest that a woman is sexually available, not that she takes pleasure in fashion?<sup>111</sup> Will taking sexual initiative be perceived not as enthusiastic affirmation of desire for her partner but as a sign that she is a “slut”? Likewise, men sometimes refrain from making sexual overtures so as not to be mistaken for an abusive man. Does asking someone on a date signal a sexual interest or a sexual threat? Is sending flowers to a woman's workplace a sign of affection or a sign of stalking?<sup>112</sup>

The social tolerance of abuse does more than ambiguates sexual expression; it also ambiguates sexual desire. Kennedy notes that while the existence of sexual abuse produces “(some) women who are relational, empathic, contextual, submissive, heterosexual and monogamous,” it also produces “(some) women who don't want sex with [men], or want sex only because men want them to want it, and who lie about their feelings about it.”<sup>113</sup> Moreover, if it is true that the basic desire for women to form pair bonds with men is in part fuelled by a need for

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108. *Id.* at 1390.

109. *Id.*

110. For a discussion of the positive uses of ambiguation, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1011–12 (1995).

111. Of course, both could be true.

112. Kennedy, *supra* note 85, at 1324 (“It seems to me that women would benefit enormously if they were free of the actual abuse, free to do the things they now can't risk doing, and free of the generalized fear that is a rational response to the pervasiveness of male violence.”).

113. *Id.* at 1341.

protection—protection mainly from other men—then fear and practicality play some role in their feelings of affection and desire for their partners. Men may well wonder whether, in a world where sexual abuse was an anomaly instead of a frequent and tolerated occurrence, their partners would still be with them. Did his fiancée accept his proposal because she was moved by love, or by the fear of sleeping alone at night? Does she hold his hand in public as a sign of her affection or as a sign to other men to leave her alone? Does she regularly have sex with him out of physical and emotional desire, or from anxiety that he will leave her if she does not, thus depriving her of protection? Of course, the answers to these questions are likely not mutually exclusive. Some combination of desire and fear, spontaneity and strategy, is probably at work in women's (and not just women's) sexual choices. But the social toleration of sexual abuse makes it difficult to discern when women's (and men's) sexual choices are freely made and when they are not—even for women themselves.<sup>114</sup>

Certainly some men and women find this ambiguity itself erotic. It is worth asking, however, whether we would find ambiguity erotic if we no longer lived under conditions of tolerated sexual abuse or whether our eroticization of ambiguity is produced by a resignation to those conditions. Perhaps, as Simone de Beauvoir suggests, society clings to the eroticization of inequality because it cannot imagine a social order without inequality.<sup>115</sup> De Beauvoir indicates that an inability to imagine eroticism without domination is both telling and tragic. The eroticism of domination is a poor substitute for the full-fledged eroticism of equality: “[E]roticism and love would be a free surpassing and not a resignation . . . in a relationship of equal to equal.”<sup>116</sup> It is only with the arrival of true gender equality, she argues, that men and women will discover new, unimagined, truly liberating forms of eroticism. De Beauvoir writes:

The humanity of tomorrow will be living in the flesh and in its conscious liberty; that time will be its present and it will in turn prefer it. New relations of flesh and sentiment of which we have no conception will arise between the sexes . . . when we abolish the slavery of

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114. The concept of false consciousness is controversial among feminists, but Robin West makes a compelling case for its appropriateness in diagnosing women's responses to injury:

[I]t is not just the legal culture which trivializes women's suffering, women do so also. . . . An injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality. Consequently, the victim as well as the perpetrator will transform the pain into *something else*, such as, for example, punishment, or flattery, or transcendence, or unconscious pleasure.

West, *supra* note 106, at 153.

115. DE BEAUVOIR, *supra* note 26, at 740.

116. *Id.* at 762.

half of humanity, together with the whole system of hypocrisy that it implies, then the “division” of humanity will reveal its genuine significance and the human couple will find its true form.<sup>117</sup>

## B. The Tolerance of the Sexual Abuse and Harassment of Men in Prison

It is a well-documented fact that men in prison, like women outside prison,<sup>118</sup> experience widespread sexual violence, sexual humiliation, and sexual harassment.<sup>119</sup> Both prison inmates and prison officials affirm that sexual abuse is rampant in U.S. prisons; some estimates indicating that as many as one in three prisoners have been raped.<sup>120</sup> Even conservative estimates suggest that at least 13 percent of U.S. inmates have been raped in prison.<sup>121</sup> Anecdotal evidence indicates that sexual harassment—including unwanted sexual propositions, touching, and extortion—is pervasive in prison.<sup>122</sup> Accurate statistics on the prevalence of sexual abuse are difficult to obtain because of a combination of chronic underreporting by victims and the reluctance of corrections officials to provide accurate information.<sup>123</sup> The official reaction to sexual abuse in prison is often indifference, and even sometimes encouragement.<sup>124</sup>

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117. *Id.* at 740–41.

118. Women in prison, of course, also suffer sexual violence that is exacerbated by carceral conditions. Moreover, men face sexual assaults in contexts other than prison. This article does not mean to erase either group or to suggest that the particular plights of women sexually assaulted in prison or men sexually assaulted outside of prison are not deserving of close scrutiny. Rather, the focus of this Article is on drawing the connection between sexual abuse experienced by women generally (including in prison) and by men specifically (particularly in prison).

119. See, e.g., NOREEN ABDULLAH-KHAN, *MALE RAPE: THE EMERGENCE OF A SOCIAL AND LEGAL ISSUE* (2008); HUMAN RIGHTS WATCH, *supra* note 5; James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999). For an analysis of how inmates think about prison rape, see MARK S. FLEISHER & JESSIE L. KRIENERT, *THE MYTH OF PRISON RAPE: SEXUAL CULTURE IN AMERICAN PRISONS* (2009).

120. See HUMAN RIGHTS WATCH, *supra* note 5, at 135.

121. Prison Rape Elimination Act, 42 U.S.C. § 15601(2) (2006) (“Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.”); see also Christopher Glazek, *Raise the Crime Rate*, N+1, Jan. 26, 2012, <http://nplusonemag.com/raise-the-crime-rate> (estimating that there are at least 216,000 victims of sexual abuse in penitentiaries).

122. See Capers, *supra* note 4, at 1274–75; Robertson, *supra* note 119.

123. See HUMAN RIGHTS WATCH, *supra* note 5, at 129–39; Robinson, *supra* note 5, at 1317.

124. See HUMAN RIGHTS WATCH, *supra* note 5, at 143–58; Olga Giller, *Patriarchy on Lockdown: Deberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN’S L.J. 659 (2004).

Laws against sexual abuse in prison exist, but like laws against sexual abuse outside of prison, they fail to capture the full spectrum of sexual abuse and<sup>125</sup> are halfheartedly and sporadically enforced.<sup>126</sup> Moreover, the tremendous social and psychological costs of reporting and challenging abuse deters many victims of sexual abuse within prison from speaking out, just as they deter victims of sexual abuse outside of prison.<sup>127</sup> The human rights of prisoners are in theory protected by both domestic and international law, including the Eighth Amendment and binding treaty standards,<sup>128</sup> but prisoners rarely succeed in such claims.<sup>129</sup> The 2003 Prison Rape Elimination Act (PREA) directly addressed the problem of prison rape by establishing a Commission to develop national standards for the elimination sexual abuse in prison.<sup>130</sup> However, as Alice Ristroph and others have observed, the PREA does little to address the actual sexual violence experienced by prisoners.<sup>131</sup> She explains:

It is a mostly hortatory statute, seemingly intended primarily to express condemnation of physically violent sexual aggression . . . [and] 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.”<sup>132</sup>

Like female rape victims, men who are raped are told that they were either asking for it or it did not happen. They are often stigmatized and further victimized if their assaults become public knowledge.<sup>133</sup> Because of this, male victims of rape—like female victims of rape—are discouraged from reporting even extremely violent incidents of sexual assault.<sup>134</sup> Like female rape victims (and pos-

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125. See Dolovich, *supra* note 8, at 12.

126. For an excellent discussion of male rape in prison and the lack of serious attention it receives, see generally Capers, *supra* note 4. See also David Kaiser & Lovisa Stannow, *Prison Rape and the Government*, N.Y. REV. BOOKS, Mar. 24, 2011, <http://www.nybooks.com/articles/archives/2011/mar/24/prison-rape-and-government>. But see Kim Shayo Buchanan, *Engendering Rape*, 59 UCLAL L. REV. 1630 (2012) (arguing that the phenomenon of male-on-male prison rape is exaggerated).

127. See Capers, *supra* note 4, at 1269.

128. HUMAN RIGHTS WATCH, *supra* note 5, at 52.

129. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

130. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972.

131. Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 175–76 (2006).

132. *Id.*

133. See ABDULLAH-KHAN, *supra* note 119; HUMAN RIGHTS WATCH, *supra* note 5, at 7; Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 34 (2010); Robinson, *supra* note 5, at 1353.

134. See HUMAN RIGHTS WATCH, *supra* note 5, at 130–31.

sibly even more so than female rape victims), men are expected to fight off sexual assault, to dismiss or ignore sexual harassment, or to attach themselves (sexually and otherwise) to a strong male who will protect them from other men.<sup>135</sup> Like many women outside of prison, many men in prison find themselves coerced into sexual and domestic servitude as part of the bargain for protection.<sup>136</sup> Romantic attachments made under such conditions leave many men in prison, like women outside of prison, entangled in complex networks of coercion, resignation, and desire.<sup>137</sup>

In other words, there are many similarities between the prevalence and tolerance of sexual abuse against women (generally) on the one hand and male prisoners (specifically) on the other. Are society's reasons for tolerating such sexual abuse also similar? To answer this question, it is necessary to distinguish between prison society and larger society, as the two structures are differently organized and determined.

Within the microcosm of the prison, one can certainly see how the sexual and social benefits to dominant males play a significant role. As Sharon Dolovich and others have observed, sexual violence is used by men to differentiate themselves from and conquer femininity; in all-male environments such as prisons, men must take other men as their targets for this demonstration of hypermasculinity.<sup>138</sup> Dolovich explains:

In society in general, the hypermasculinity imperative to conquer and repudiate the feminine frequently motivates rape, sexual harassment, domestic violence, and other forms of violence against women. In the prison, those men seeking to prove their masculinity vie for possession of weaker inmates—the “women” in this social system—whose utter subordination to them, known to include ongoing sexual access, stands as public proof of their masculine power. In this culture, the performance of rape—the sexual penetration of another inmate defined as female—is a way to shore up the rapist's own claim to maleness and, thus, his status and power in the prison hierarchy.<sup>139</sup>

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135. See *id.* at 7; Buchanan, *supra* note 133, at 29–32.

136. See Spearlt, *supra* note 8, at 118.

137. See Ristroph, *supra* note 131.

138. Dolovich, *supra* note 8, at 16; see also Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785–86 (2000) (“[M]en achieve masculinity at the expense of women: at best by being ‘not a woman,’ at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women. Even in male–male relations, the domination of men over women arguably continues to function: Men in all-male groups often prove their individual and collective manhood by symbolically reducing others in the group to women and abusing them accordingly.”).

139. See Dolovich, *supra* note 8, at 16 (footnote omitted).

Thus, if the gender binary<sup>140</sup> of larger society is replicated within prisons, with some men standing in the place of women, it is reasonable to infer that sexual abuse produces similar bargaining dynamics, along with behavioral, psychological, and erotic benefits, as those described above in the context of larger society. The tolerance of rape within prison society means that dominant men can leverage the threat of sexual and other violence against more vulnerable men, coercing the latter into wildly unequal interactions.<sup>141</sup> It also means that the actions of violent, aggressive men are shielded from discipline and critique, while the responsibility for avoiding sexual abuse is shifted onto potential victims. Finally, this means that violent men can capitalize on the ambiguation of sexual desire under coercive conditions.

The tolerance of the sexual abuse of women is intimately tied to the gender hierarchy that structures noncarceral society. That means it does not apply, or at least not exactly, to single-sex prison populations. The gender hierarchy outside of prison does not depend on the subjugation of male prisoners standing in the place of women—it principally relies on the subjugation of women themselves. The question of why larger society tolerates the sexual abuse of men in prison thus cannot be fully answered with reference to the internal dynamic of prisons. Men outside of prison do not directly experience bargaining, psychological, or erotic benefits from the rape of some men in prison. Thus, the tolerance of sexual abuse in prisons is more likely a product of contempt for prisoners as a whole, inflected with a further contempt for men who are or have been feminized. That is, male prison rape is a phenomenon in which one subgroup of a disfavored and disempowered group oppresses another subgroup of a disfavored and disempowered group—prison rape victims are the most despised and most vulnerable members of a widely despised and vulnerable population.<sup>142</sup>

In a sense, then, as male prisoners vulnerable to sexual violence take the place of women within prison society, prisoners (*all* prisoners, both dominant and subordinated, male and female) are like women in that they are deprived of their ability to be masters over themselves. In his discussion of the development of the U.S. penal system, Mark Kann writes that the emasculation of imprisonment stands in sharp contrast to American revolutionary values of autonomy and independence: “The war for national independence was also a war for personal

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140. *Id.* at 14.

141. *Id.*

142. See generally Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 27–32 (2011) (promulgating the idea that male rape victims in prison are the most traumatized and victimized of the prison population because prison guards refuse to provide protection to “gay,” weak, or effeminate inmates).

independence, what Thomas Paine called ‘manly freedom.’ By contrast, the male inmate was treated like a dependent—like a woman, servant, or child.<sup>143</sup> In the eyes of society, the male prisoner is like the woman—the subordination of both is considered to be deserved, appropriate, or at best, unremarkable.<sup>144</sup>

The key to understanding widespread sexual oppression and subordination, with all the attendant social, political, and erotic consequences, is in seeing the commonality across its various instantiations. That is, the proper response to sexual abuse of men in prison will rise and fall with the proper response to sexual abuse of women outside of prison. The next Part investigates the resistance to seeing this commonality and how such resistance might be overcome.

#### IV. IMAGINATION, EMPATHY, AND THE CARCERAL DRAG

As detailed above, Duncan Kennedy, making critical use of many insights from feminist theory, provides an extensive and compelling account of why men are not invested in shifting from toleration toward enforcement of prohibitions against sexual abuse against women. I argue that one can make an equally compelling account about why society is not generally invested in shifting from toleration to condemnation with regard to the sexual abuse of men in prison. These accounts are not complete, however, without an investigation of the role of imagination and empathy in the social tolerance of sexual abuse. Stated simply, the tolerance of sexual abuse of both women and men is accomplished in large part by a failure of imagination, and hence of empathy. Men’s resistance to empathizing with women regarding sexual abuse not only helps to perpetuate this abuse but also reinforces pernicious gender essentialism and gender stereotypes. If men embraced the opportunity to empathize with the sexual abuse of women by contemplating the epidemic of male rape in prison, thereby identifying with women through a form of carceral drag, our society would stand a far better chance of addressing the root causes of sexual violence and forced feminization regardless of their targets.

##### A. Imagination and Empathy

First, it is necessary to say a few words about the distinction between sympathy and empathy. There is considerable disagreement about the proper

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143. MARK E. KANN, PUNISHMENT, PRISONS, AND PATRIARCHY: LIBERTY AND POWER IN THE EARLY AMERICAN REPUBLIC 8 (2005).

144. Such emasculation and subordination is further complicated by race and class. See Harris, *supra* note 138, at 783.

definitions of sympathy and empathy,<sup>145</sup> and considerable controversy over how much one's gender has to do with the capacity for either.<sup>146</sup> For my part, I take sympathy to mean the capacity to feel sorrow or pity for another person, whereas empathy is the capacity to imaginatively put oneself in the place of another and attempt to feel as they feel.<sup>147</sup> Sympathy maintains the divide between the observer of suffering and the observed; empathy attempts to dissolve it. To put it another way, sympathy is to feel *for* someone's pain, whereas empathy is to feel *with* someone's pain. Empathy allows us to free ourselves from the limitations of our own self-interest, whereas sympathy is merely coextensive with self-interest.<sup>148</sup>

Adam Smith provides a compelling description of empathy in *The Theory of Moral Sentiments*. According to Smith, the faculty of imagination is key to formulating the properly moral response to suffering:

By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, *we enter as it were into his body*, and become in some measure the same person with him, and thence form some idea of his sensations, and even feel something which, though weaker in degree, is not altogether unlike them.<sup>149</sup>

Confusingly, Smith refers to this quality as sympathy. Modern scholars generally agree, however, that what Smith terms sympathy is the modern definition of empathy.<sup>150</sup>

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145. See Douglas Chismar, *Empathy and Sympathy: The Important Difference*, 22 J. VALUE INQUIRY 257 (1988); Stephen Darwall, *Empathy, Sympathy, Care*, 89 PHIL. STUD. 261 (1998); Philippe Fontaine, *Identification and Economic Behavior: Sympathy and Empathy in Historical Perspective*, 13 ECON. & PHIL. 261 (1997); Heidi L. Maibom, *Feeling for Others: Empathy, Sympathy, and Morality*, 52 INQUIRY 483 (2009); Lauren Wispe, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word Is Needed*, 50 J. PERSONALITY & SOC. PSYCHOL. 314 (1986).
146. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Linda Rueckert & Nicolette Naybar, *Gender Differences in Empathy: The Role of the Right Hemisphere*, 67 BRAIN & COGNITION 162 (2008); Loren Toussaint & Jon R. Webb, *Gender Differences in the Relationship Between Empathy and Forgiveness*, 145 J. SOC. PSYCHOL. 673 (2005).
147. My understanding of empathy and imagination is very similar to Martha Nussbaum's. See MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010); MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1997).
148. See Mary Anne Franks, *Lies, Damned Lies, and Judicial Empathy*, 51 WASHBURN L.J. 61, 68–69 (2011).
149. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 13–14 (Ryan Patrick Hanley ed., Penguin Books 2009) (1759) (emphasis added).
150. See KEN BINMORE, NATURAL JUSTICE 115 (2005) (“Adam Smith defined sympathy to be something close to what we would nowadays call empathy . . . .”); JAMES A. VELA-MCCONNELL, WHO IS MY NEIGHBOR? SOCIAL AFFINITY IN A MODERN WORLD 118 (1999).

With regard to the sexual abuse of women, both women and men suffer from a failure of imagination, but they experience such failure differently. Women's failure of imagination with regard to sexual abuse of women is often a story of self-preserving denial.<sup>151</sup> To contemplate the extent to which the toleration of sexual abuse disciplines their behavior, encourages their submissiveness, and shapes their sexual relationships is extremely depressing, perhaps even debilitating.<sup>152</sup> The reluctance of many feminists to ponder the magnitude and influence of sexual violence, discussed above, suggests as much. Moreover, women are motivated to believe that sexual violence is rare or avoidable—especially if they convince themselves that it happens only to certain types of women or in certain kinds of places—because doing so makes them feel safer.<sup>153</sup>

Men's failure of imagination, on the other hand, is somewhat more complicated. One popular belief is that men are simply less capable of empathy generally than women. This belief may reflect an essentialist view of women as naturally more caring and sensitive than men or the view that women are socialized to be more empathetic in patriarchal systems.<sup>154</sup> While there is no compelling evidence for the gender essentialist view, it is plausible that because women are expected to bear a disproportionate burden for the care of others and must learn to anticipate and placate the sudden changes in mood and temper of more powerful people, they might well develop a greater facility for empathy. Some argue that the capacity for empathy has roots in mother-child relations. Nancy Chodorow, for example, posits that men and women's differences in "relational potential" are directly influenced by early mother-child rela-

151. See Rachel M. Calogero & John T. Jost, *Self-Subjugation Among Women: Exposure to Sexist Ideology, Self-Objectification, and the Protective Function of the Need to Avoid Closure*, 100 J. PERSONALITY & SOC. PSYCHOL. 211 (2011).

152. See West, *supra* note 106, at 162 ("A fully justified fear of acquisitive and violent male sexuality . . . permeates many women's—perhaps all women's—sexual and emotional self-definition. Women respond to this fear by *re-constituting* themselves in a way that controls the danger and suppresses the fear.")

153. See Jill Filipovic, *Offensive Feminism: The Conservative Gender Norms That Perpetuate Rape Culture, and How Feminists Can Fight Back*, in YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE 13, 24 (Jaclyn Friedman & Jessica Valenti eds., 2008) ("The 'if only she had . . .' response to rape serves the valuable psychological purpose of allowing other women to temporarily escape that sense of endangerment. If we convince ourselves that we would never have done what she did, that her choices opened her up to assault and we would have behaved differently, then we can feel safe."). Women may also resist confronting the reality of sexual abuse as a way of differentiating status among "kinds" of women. See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 729 (2010) ("[H]ierarchical women have a distinctive interest in stigmatizing rape complainants whose behavior deviates from hierarchical gender norms.")

154. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1999).

tionships.<sup>155</sup> According to Chodorow, mothers view their daughters as like themselves and vice versa, and so the individuation process for girls is more drawn out and less rigorously defined than it is for boys.<sup>156</sup> She explains:

[G]irls tend to remain part of the dyadic primary mother-child relationship itself. This means that a girl continues to experience herself as involved in issues of merging and separation . . . . Girls emerge from this period with a basis for “empathy” built into their primary definition of self in a way that boys do not. Girls emerge with a stronger basis for experiencing another’s needs or feelings as one’s own (or of thinking that one is so experiencing another’s needs and feelings).<sup>157</sup>

On the other hand:

Boys are more likely to have been pushed out of the preoedipal relationship, and to have had to curtail their primary love and sense of empathic tie with their mother. A boy has engaged, and been required to engage, in a more emphatic individuation and a more defensive firming of experienced ego boundaries.<sup>158</sup>

In other words, one of the consequences of the masculine fear of or contempt for femininity may be a lack of empathy.<sup>159</sup>

For the purposes of this Article, I am less interested in whether women demonstrate a particular capacity for empathy than in why men generally do not, or at least why they seem to have little or no capacity for empathy for women’s experiences of sexual abuse. There is of course one obvious reason: Outside of prison, men are far less likely to be victims of sexual abuse than women and thus, often have little raw material to work with when attempting to imagine the experience.<sup>160</sup> Moreover, as many scholars have noted, men in fact benefit from women’s vulnerability to sexual abuse.<sup>161</sup> There may also be additional reasons. As Chodorow suggests, Freud’s theory of sexual development offers some illu-

155. *Id.* at 166 (internal quotation marks omitted)

156. *Id.* at 166–67.

157. *Id.*

158. *Id.*

159. See CONNELL, *supra* note 29, at 20 (describing how, in Chodorow’s influential account, the disruption of boys’ identification with their mothers “results in character structures that emphasize boundaries between people, and lack the need for relationship that is characteristic of women”).

160. “[M]any men are simply oblivious—they do not experience *at all*—external conditions which for women are painful, frightening, stunting, torturous and pervasive—including domestic violence in the home, sexual assault in the street, and sexual harassment in the workplace and school.” West, *supra* note 106, at 149.

161. “[W]omen often find painful the same objective event or condition that men find pleasurable. . . . [A] man may experience as at worst offensive, and at best stimulating, that which a woman finds debilitating, dehumanizing or even life-threatening.” *Id.*

minating insights on this point, even if his ultimate conclusions are dubious.<sup>162</sup> According to Freud, the mother is the first love-object of both boys and girls, but boys learn (through the threat of castration by the father) that the mother is a forbidden sexual object.<sup>163</sup> Boys must repudiate their attachment to the mother so that they may form a new attachment to a proper object—a female, nonmother, sexual object.<sup>164</sup> Boys cannot identify with their mothers beyond the Oedipal stage because to do so would interfere with their sexual attachment to other women. To recall the sense of belonging and identity with their mothers would bring them too close to other, forbidden desires for their mothers, diverting or diluting their attachment to obtainable and proper sexual objects.<sup>165</sup>

Moreover, a boy must strive to be like his father in the post-Oedipal stage because the father is the model of sexual success. The father has access to the mother's sexuality—access that is denied to the boy—and as such has mythic status in his eyes. The boy must follow the male role in order to one day have access to female sexuality. The path to mature male sexuality thus requires a simultaneous rejection of femininity as a subject (as self-identification) and an embrace of femininity as an object (as sexual partner).<sup>166</sup>

If that is so, then the inhibiting impact this process would have on male empathy for women should be obvious. If empathy requires “role-taking,”<sup>167</sup>—an immersion in the perspective of the other—for a man to have empathy for women would be fraught with Oedipal dangers. Moreover, these dangers would be compounded by the related fear of feminization: to identify with women undermines one's masculinity.<sup>168</sup> Disrupting the stability of gender roles even in imagination would bring men into too-close contact with women's experience, running the risk that they might become women themselves.<sup>169</sup>

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162. See SIGMUND FREUD, *THE SEXUAL ENLIGHTENMENT OF CHILDREN* (1963) [hereinafter FREUD, *THE SEXUAL ENLIGHTENMENT OF CHILDREN*]; SIGMUND FREUD, *Feminity, in NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 112 (James Strachey ed. & trans., 1964). My own reading of Freud's theories of psycho-sexual development does not take them literally; I am more inclined to read Freud through Lacan, that is, as offering important insights about the chasm between the structures of masculinity and femininity (structures which do not necessarily map on to biological men and women).

163. See SIGMUND FREUD, *EGO AND THE ID* 26–27 (James Strachey ed., Joan Riviere trans., 1960)(1923).

164. FREUD, *THE SEXUAL ENLIGHTENMENT OF CHILDREN*, *supra* note 162.

165. *Id.*

166. Leslie C. Bell, *The Psychoanalytic Theories of Gender*, in *THE PSYCHOLOGY OF GENDER* 145, 150 (Alice H. Eagly et al. eds., 2d ed. 2004).

167. VELA-MCCONNELL, *supra* note 150, at 118.

168. See BUTLER, *supra* note 53, at 76.

169. See Harris, *supra* note 138, at 786. “Men's need to defend themselves at all costs from being contaminated with femininity can be found in as mundane and seemingly trivial phenomena as

There are, then, many potential obstacles to male empathy for women's experience of sexual abuse. I argue that in lieu of genuine empathy, men's response to the sexual abuse of women generally takes three troubling forms: *pathological* (neither sympathetic nor empathetic), *sympathetic* (but not empathetic), and *superficially empathetic*.

The pathological response, which is neither sympathetic nor empathetic, evaluates information about the sexual abuse of women from the perspective of the perpetrator. This response discounts women's claims of harm in favor of a justification for the behavior, and generally comes from men who themselves engage in such behavior. For example, when confronted with the information that many women find catcalling and sexual propositions from strange men unwelcome, threatening, and disruptive, some harassers respond that these acts are compliments or legitimate attempts at flirtation.<sup>170</sup> This response is firmly grounded in the abuser's perspective, tacitly asserting the supposed truth of catcalling and harassment—based solely on how the harasser himself means it—over and above women's articulation of how they in fact experience these acts. Further along the harm spectrum, this approach becomes classical victim-blaming: If a woman is raped after getting drunk at a fraternity party, for instance, this response focuses not on the blameworthiness of the rapist's actions, but on the blameworthiness of the victim's. The victim's decisions are thoroughly scrutinized—she should not have gone to that kind of party, she should not have had drinks, or she should not have worn what she wore—whereas the rapist's decision to rape is treated as an almost foregone conclusion that requires little or no examination.<sup>171</sup>

The sympathetic approach to sexual abuse, by contrast, maintains that the “only morally plausible attitude toward male sexual abuse of women is to be against it because it is sickening.”<sup>172</sup> This is the response of men who condemn

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children's play and the reluctance of married men to do housework or take care of the children.” *Id.* As a couple of ostensibly comic examples of contagious femininity, consider how the character Chandler on the sitcom *Friends* begins to be more emotional and to apply lip balm as though it were lipstick after he is unwittingly exposed to a women's self-help tape in his sleep, *Friends: The One With the Hypnosis Tape* (NBC television broadcast Mar. 13, 1997), or how school bully Nelson in *The Simpsons* transformed into a weeping ball of emotion after accidentally taking birth control pills, *The Simpsons: O Brother, Where Bart Thou?* (FOX television broadcast Dec. 13, 2009).

170. See MARTHA J. LANGELAN, BACK OFF!: HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS (1993); Jennifer Kesler, *Why, if You Think Women Should Be Flattered by Your Harassment, You Are Stupid*, HATHOR LEGACY (June 6, 2008), <http://thehathorlegacy.com/why-if-you-think-women-should-be-flattered-by-your-harassment-you-are-stupid>.

171. See ESTRICH, *supra* note 68; Jessica Valenti, *Asking for It*, NATION, Jan. 11, 2013, <http://www.thenation.com/blog/172156/asking-it#>.

172. Kennedy, *supra* note 85, at 1314.

rape and sexual harassment and who feel compassion for its victims. This approach, while making no attempt to imagine what it is like for women to experience sexual abuse, does credit women's own representations of such experiences but with some qualifications. Kennedy writes, "[W]hen I say [that male sexual abuse of women] is a horrible thing, I mean horrible *as represented* by people I believe."<sup>173</sup> The qualifying statement "people I believe" underscores the limits of this approach. To be merely sympathetic to sexual abuse means to believe only the representations of those you already find sympathetic. It does not require pondering what narrative or social structures make some women believable and others not, and as such, it does not require any examination of the subtleties and structural power of sexual abuse.<sup>174</sup> This approach allows men to separate supposedly good victims from supposedly bad victims and to regard sexual abuse as a discrete occurrence, one that requires consideration only when a sympathetic woman provides a credible account.<sup>175</sup>

We turn finally to the nonsympathetic, superficially empathetic approach. Unlike the first two approaches, this approach considers—briefly and superficially—what it is like to be the recipient of putatively abusive behavior. This is the source of the assertion that men would be delighted if women catcalled, sexually propositioned, or sexually objectified them. It is not difficult to diagnose the problem with this sentiment. When a man claims that he would be delighted if the roles were reversed in harassment, he is not actually thinking of what it is like to be a woman walking down the street—he is thinking of what it is like to be a man walking down the street, with all the physical security and social privilege that comes with being a man, enjoying the compliments of what must surely be, in this scenario, women he does not find repulsive or threatening. In other words, a man with this response to street harassment is imagining only a formal reversal of roles, holding constant everything about his experience of being a man except for the fact that he is the object of sexual attention.

In some ways, the superficial empathy approach is more pernicious than either the pathological or the sympathetic, as it essentially makes a mockery of the concept of empathy. Rather than using the imagination to evoke a profound understanding of the suffering of another person, as Adam Smith encourages the moral spectator to do,<sup>176</sup> the superficially empathetic approach is a lazy

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173. *Id.*

174. Though I do not in fact think that Kennedy is guilty of mere sympathy, given the complex and nuanced treatment of sexual abuse he offers in *Sexy Dressing*. Kennedy, *supra* note 85.

175. See Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437 (2006).

176. See SMITH, *supra* note 149.

engagement with the imagination, one that minimizes and even ridicules the experience of women.

To truly engage the moral imagination—to exercise genuine, rather than superficial, empathy—one must recognize the privilege of moral imagination itself. We can imagine the suffering of another only when we are not suffering the same way. Why we are not made to suffer the same way, and more importantly, whether our freedom from that suffering comes at the expense of another's suffering, are the questions made visible by the exercise of true empathy.

## B. The Carceral Drag

So how might men be encouraged to empathize with women, given all of the physical, psychological, and emotional obstacles that stand in the way? One potential answer lies in the concept of drag performance.<sup>177</sup> Drag, after all, literally puts men in women's roles.<sup>178</sup> It offers an opportunity for men to imagine what it feels like to be women and for audiences to see men acting out a particular version of femininity. Some theorists maintain that drag can be an insightful or even subversive practice. Judith Butler argues that in its most successful form, "drag implicitly reveals the imitative structure of gender itself—as well as its contingency,"<sup>179</sup> and that it has the potential to "enact and reveal the performativity of gender itself in a way that destabilizes the naturalized categories of identity and desire."<sup>180</sup> Marjorie Garber writes that cross-dressing "offers a challenge to easy notions of binarity, putting into question the categories of 'female' and 'male,' whether they are considered essential or constructed, biological or cultural."<sup>181</sup> Men performing femininity reveals the artificiality of what it means to be recognizably feminine: If men can plausibly play at being women, then femininity must not be natural or biological.

Many feminists are skeptical, however, that drag performance genuinely subverts gender identity or offers instructive observations about the social construction of femininity. Butler herself cautions that "[p]arody by itself is not

177. I restrict my discussion of drag to public performances of drag, not private drag or cross-dressing behavior.

178. Cross-dressing's disruptive potential is suggested by the explicit condemnation of the practice in the Old Testament: "No woman may wear an article of man's clothing, nor may a man put on woman's dress; for those who do these things are abominable to the Lord your God." *Deuteronomy* 22:5. Various sumptuary laws and other regulations also prohibit cross-dressing. See I. Bennett Capers, *Cross Dressing and the Criminal*, 20 *YALE J.L. & HUMAN.* 1, 8–11 (2008).

179. BUTLER, *supra* note 53, at 175 (emphasis omitted).

180. *Id.* at 177.

181. MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 10 (1992).

subversive” and that it is easy for parodic repetitions to “become domesticated and recirculated as instruments of cultural hegemony.”<sup>182</sup> Drag can actually serve to affirm existing gender roles by reducing role reversal to a merely amusing performance, forfeiting the opportunity to engage seriously with underlying structures of gender hierarchy. While drag has the potential to be a subversive act, its practitioners often seem content merely to make women into a laughable spectacle.<sup>183</sup>

This is perhaps nowhere more clear than in what could be called the “casual drag” adopted by many heterosexual men in college skits or for Halloween, revealing at the same time how shallow men’s imagination of women’s experience can be.<sup>184</sup> Put on high heels and pantyhose, wear a wig, speak in a high-pitched voice, sway your hips when you walk: This is what it means to feel like a woman. “Man, I never knew all the stuff you guys had to do!” cries the proverbial football player who has just put a third run in his pantyhose. “It must be really hard to be a chick.”

There may be some important differences between this kind of casual drag and professional drag performances.<sup>185</sup> It is not difficult to get what a football player is doing when he wears a dress. We immediately understand that he is playing at being a woman, and we immediately understand that it works only because the impression is superficial and badly done. For a football player to actually fool us in his woman costume would be disturbing: Men who can genuinely be mistaken for women are not doing it right. This is not necessarily true of formal drag performances, in which presenting a convincing illusion of femininity may in fact be highly valued. Nonetheless, even formal drag performances are primarily comedic,<sup>186</sup> suggesting serious limitations to what men imagine women’s experiences to be.<sup>187</sup>

Drag, then, seems to be at best an exercise in superficial empathy—a selective, frivolous, and most importantly, temporary adoption of the female role.

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182. BUTLER, *supra* note 53, at 176–77.

183. Or as Kelly Kleiman bluntly puts it, “Drag = Blackface.” Kelly Kleiman, *Drag = Blackface*, 75 CHI.-KENT L. REV. 669 (2000).

184. For examples of such exercises in shallow imagination, see Brandyn, *Football Players in Drag, Oh My!*, SPORTS MUSE (Feb. 3, 2012, 5:04 AM), <http://sportsmuseonline.com/content/football-players-drag-oh-my>, and Jessica, *16 Things I Learned From Dressing in Drag: Confessions of a One-Night Crossdresser*, ROCKET NEWS 24 (Nov. 3, 2012), <http://en.rocketnews24.com/2012/11/03/16-things-i-learned-from-dressing-in-drag-confessions-of-a-one-night-crossdresser>.

185. Not least because dressing up as a woman for a skit or for Halloween is usually an activity of heterosexual men, whereas professional drag performance is commonly associated with gay men.

186. See ROGER BAKER, *DRAG: A HISTORY OF FEMALE IMPERSONATION IN THE PERFORMING ARTS* (1994); ESTHER NEWTON, *MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA* 52 (1972).

187. Or what they assume their audience wants to see in a performance of femininity.

For the most important part of any drag performance, casual or formal, is surely its inevitable offstage end: When the man removes the wig, dress, and heels, he casts femininity off in a heap of shimmering fabric. Insofar as femininity remains a mere performance—and a chosen performance at that—its moral instructiveness is severely limited. This kind of drag performance is an exercise in privilege: the privilege of being able to *play at* being vulnerable, rather than just being vulnerable.<sup>188</sup>

Men who are sexually abused in prison do not have this privilege. This makes their performance of femininity not only tragic but also instructive. In prison, as almost nowhere else, some<sup>189</sup> men are forced to act out the script normally reserved for women and do not have the option of exiting the stage. This script includes, but is not limited to, a presumption of perpetual sexual consent, desire, and availability; marked physical vulnerability; institutional indifference to and even encouragement of abuse; incentives to agree to subordination and abuse in exchange for protection against worse subordination and abuse; and victim blaming.<sup>190</sup> Just as it does for women in society at large, this script imposes physical and psychological costs, not least of which are erotic costs. Sexual choices, in particular, are rendered ambiguous in carceral conditions. While not all sex in prison must be considered rape, sexual relations in prison are

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188. Dustin Hoffman, star of the Hollywood movie *Tootsie*, recently revealed how playing the cross-dressing lead produced unexpectedly empathetic consequences. When he first saw himself made up as a woman, he was disappointed by his appearance:

I thought I should be beautiful if I was going to be a woman, I would want to be as beautiful as possible.

It was at that moment I had an epiphany, and I went home and started crying . . . . Talking to my wife, I said I have to make this picture, and she said, "Why?" And I said, "Because I think I am an interesting woman when I look at myself on screen. And I know that if I met myself at a party, I would never talk to that character because she doesn't fulfill physically the demands that we're brought up to think women have to have in order to ask them out." She says, "What are you saying?" And I said, "There's too many interesting women I have . . . not had the experience to know in this life because I have been brainwashed."

Lauren Moraski, *Dustin Hoffman Fights Tears, Gets Emotional Remembering "Tootsie,"* CBS NEWS (July 10, 2013, 2:57 PM), [http://www.cbsnews.com/8301-207\\_162-57593028/dustin-hoffman-fights-tears-gets-emotional-remembering-tootsie](http://www.cbsnews.com/8301-207_162-57593028/dustin-hoffman-fights-tears-gets-emotional-remembering-tootsie) (second alteration in original) (internal quotation marks omitted).

189. The question of which men are more likely to be victimized by sexual abuse and which men are more likely to be perpetrators is a complex issue in itself. I will not fully explore this question here beyond suggesting that men with perceived purportedly feminine characteristics (being physically smaller or weaker, sexually attracted to men, delicate facial features, among other things) are more likely to be singled out for aggression. For more discussion of these factors, see Robinson, *supra* note 5, at 1353, stating, "Traits that make men likely to be punked include youth, slight stature, naiveté, [and] perceived effeminacy."

190. See Buchanan, *supra* note 133, at 23–36.

structured around the (tolerated) threat of violence. That is, sexual choices are negotiated against the background of coercive, carceral conditions, producing a script of lifelong, intimate self-doubt: Against the background of tolerated abuse, how can one know which of his desires are real and which are the product of coercive negotiations? If at some point an inmate complies with abuse to make life more bearable, is he then complicit in that abuse? Does it stop being abuse? Does it mean the inmate brought it upon himself? Did he, in fact, “want it”?

I’ve been sentenced for a D.U.I. offense . . . . When I first came to prison, I had no idea what to expect. Certainly none of this. I’m a tall white male, who unfortunately has a small amount of feminine characteristics. . . . These characteristics have got me raped so many times I have no more feelings physically. I have been raped by up to 5 black men and two white men at a time. I’ve had knives [sic] at my head and throat. . . . [A hearing officer] suggests I find a man I would/could willingly have sex with to prevent these things from happening. . . . He also said there was no where [sic] to run to, and it would be best for me to accept things. . . . I probably have AIDS now. I have great difficulty raising food to my mouth from shaking after nightmares or thinking to [sic] hard on all this . . . . I’ve laid down without physical fight to be sodomized. To prevent so much damage in struggles, ripping and tearing. . . . [I]t caused my heart and spirit to be raped as well. Something I don’t know if I’ll ever forgive myself for.<sup>191</sup>

[An inmate] claimed me as his property and I didnt [sic] dispute it. I became obedient, telling myself at least I was surviving . . . . He publicly humiliated and degraded me, making sure all the inmates and guards [sic] knew that I was a queen and his property. Within a week he was pimping me out to other inmates at \$3.00 a man. This state of existence continued for two months until he sold me for \$25.00 to another black male who purchased me to be his wife.<sup>192</sup>

“You will clean the house,” he said, have my clothes clean and when Im [sic] ready to get my “freak” no arguments or there will be a punishment! I will, he said, let my homeboys have you or Ill [sic] just sale [sic] you off. Do we have an understanding? With fear, misery, and confusion inside me . . . I said yes.<sup>193</sup>

Such a performance should be startling, but it should also be familiar. Our eye is caught by the fact that it is men suffering from the bargaining, behavioral,

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191. HUMAN RIGHTS WATCH, *supra* note 5, at xv (fifth and sixth alterations in original).

192. *Id.* at 93 (alterations in original).

193. *Id.* at 94.

and erotic losses of forced femininity, but what should really hold our attention are those losses themselves.

### CONCLUSION: WHY NO ONE SHOULD FEEL LIKE A WOMAN

It is important to confront the sexual abuse of men in prison not only because it is a particularly shameful feature of current carceral practices. It is also important because it provides a unique opportunity for men to empathize, in a nonsuperficial, nontrivializing way, with women's experience within a social structure largely tolerant of men's sexual abuse of women. Men's carceral experience mirrors women's noncarceral experience perhaps as closely as anything can: To put it in extreme terms, (some) men in prison stand in the place of (some) women in free society.<sup>194</sup> Male sexual abuse of women provides the script for the abuse of men in prison; it is the original that is parodied on the carceral stage. To truly understand male prison sexual abuse—to truly deprive it of its power—it is necessary to uncover its roots in the sexual abuse of women by men in free society.

It is in this sense that incarceration should be viewed as drag, as a performance that genuinely “invert[s] the inner/outer distinction and compel[s] a radical rethinking of the psychological presuppositions of gender identity and sexuality,” one that “enact[s] and reveal[s] the performativity of gender itself in a way that destabilizes the naturalized categories of identity and desire.”<sup>195</sup> Seeing men in the position of women should jar and disturb us but not in a way that leads us to simply denounce the undermining of their masculinity. To merely observe with horror that men are treated like women—to recognize that to be treated “like a woman” is an insult to basic dignity and yet fail to draw the obvious implications of this for the treatment of actual women—naturalizes the sexual abuse of women. Such a response thoroughly misses the lesson of the carceral performance. As performed by men in carceral conditions, the imposition of femininity should appear unnatural, unstable, and insidious. If carceral drag makes anything clear, it is the carceral nature of imposed feminization itself. The confrontation of male sexual abuse in prison should prompt us not to ask why we allow *men* to be treated this way, but why we allow *anyone* to be treated this way, inside or outside of prison.

Serious attention to the abuses suffered by men in prison may help to inspire the political will for real legal and social reform of abusive carceral conditions,

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194. Brownmiller describes male rape in prison as “an acting out of power roles within an all-male, authoritarian environment in which the younger, weaker inmate . . . is forced to play the role that in the outside world is assigned to women.” BROWNMILLER, *supra* note 91, at 258.

195. BUTLER, *supra* note 53, at 177.

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thereby reducing the social tolerance of prison abuse. It could also help to reduce the social tolerance of sexual abuse more generally. It has the potential to help reduce the comfortable distance men may feel with regard to the sexual harassment and assault of women, making them more skeptical about victim-blaming and rape myths and more responsive to the subtle, structural power of sexual abuse. Contemplation of carceral sexual abuse may, in short, increase men's empathy for women's noncarceral experiences of sexual abuse. While it may seem perverse to treat the reality of male prisoner abuse as, among other things, an instructive performance in women's everyday experience, it would be far more perverse to fail to recognize that the harm of imposed femininity lies not in treating men like women but in the nature of imposed femininity itself—in the social script that exploits physical vulnerability, enforces a presumption of sexual consent and availability, blames victims for their own abuse, and introduces inhibition and ambiguity into intimate decisionmaking.