Dear Faculty:

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

Thanks,

Russell Robinson
Governmental "Gaydar": Race, Sexual Identity and Incarceration

Russell K. Robinson

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INTRODUCTION

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


\[^3\] NEW OXFORD AMERICAN DICTIONARY (2009).

\[^4\] This is a slang term for people who are recently out of the closet and new to gay culture. The term has been used in other contexts as well. See Newbie, Wikipedia, http://en.wikipedia.org/wiki/Newbie (defining "newbie" as "a slang term for a newcomer to an Internet activity") (last visited January 28, 2010).
a great body?" “Does he live in a gay neighborhood?” Does he have a “naval ring or Prince Albert?”

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

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

6 In this article, I follow the jail’s usage of the terms “homosexual” and “gay” interchangeably. I recognize, however, that some people take offense at “homosexual” because of the medical connotations it may carry. See David Alan Sklansky, “One Train May Hide Another”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 881 (2008).
7 The unit is designed for transgendered inmates who were born male and transitioned to female identity. Because Los Angeles does not maintain a separate jail unit for female to male transgender or lesbian inmates, I do not discuss women’s prisons. Similarly, my primary focus on gay inmates rather than transgender arises from the fact that the jail does not subject transgender inmates to a “gaydar”-like test, although its screening process for transgender inmates has its own substantial problems, as I will discuss. See, e.g., infra note 108 and accompanying text.
8 Deputy Bart Lanni, who has been in charge of the K6G unit with Deputy Randy Bell for over twenty years, does not recall a single incident of sexual assault in the K6G unit. Interview with Bartholomew Lanni, Deputy Sheriff, Los Angeles County, in Los Angeles (Nov. 16, 2009) [hereinafter Lanni Interview], transcript on file with author, 31. A Department of Justice study
formally forbidden throughout the jail, only inmates in the K6G unit are allowed to possess condoms. Because of the benefits of the K6G unit (and the harsh conditions in the general population) the deputy sheriffs who screen inmates believe that many heterosexual men falsely claim they are homosexual in order to gain access to the unit. Further, they believe that heterosexual and bisexual men pose a threat to the safety of homosexual and transgender inmates because the former are likely to rape the latter. Therefore, the deputies employ a test to determine which of the inmates who identify as homosexual are truly homosexual and send those who flunk the test to the general population.

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

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

suggests that there is a relatively high rate of sexual assault in the Men’s Jail. DOJ Statistics Special Report, Sexual Victimization in Local Jails Reported by Inmates, 2007 (June 2008), available at http://www.ojp.gov/bjs/pub/pdf/svijr07.pdf (hereinafter “Local Jails”). But to date, there are no empirical studies of claims of sexual assault in the K6G unit.

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

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

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

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

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


\textsuperscript{15} See Robinson, Racing the Closet, supra note 14, at 1493.
West Hollywood even though it is one of the whitest and wealthiest neighborhoods in Los Angeles. This focus on West Hollywood is glaringly out of sync with its regulated population in that most inmates are black, Latino and/or poor and live in segregated neighborhoods far from West Hollywood.\textsuperscript{16} Many of these men cannot afford to attend swanky clubs and lack the disposable income necessary to pay $12 for a drink. Moreover, many of them see West Hollywood as a space exclusively for whites. Some gay clubs have been accused of discriminating against men of color,\textsuperscript{17} and scholars have revealed the unwritten rules of racial hierarchy that control many gay social spaces.\textsuperscript{18} Even men who could afford to congregate in West Hollywood may shun the neighborhood because they do not see it as reflecting their identities, including its association with, for example, effeminacy, conspicuous consumption or promiscuity. To provide another example, gay enclaves tend to be hostile to bisexuality.\textsuperscript{19} Studies show that black men and other men of color are more likely to report having had sex with both men and women than white men.\textsuperscript{20} Yet the jail has a policy of excluding men from the unit if they identify as bisexual. Thus, the jail’s assumption that gay men are immersed in the West Hollywood bar and sex scene and categorical exclusion of bisexuals likely produces a disparate racial impact and harms others who depart from hegemonic Gay Identity.\textsuperscript{21}

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

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


\textsuperscript{19} See, e.g., Robinson, \textit{Racing the Closet}, supra note 14, at 1493.

\textsuperscript{20} See infra text accompanying note 372.

\textsuperscript{21} I wish to highlight that one can be “gay” but not “Gay.” I capitalize “Gay Identity” to signify that this is the dominant form of identity in the so-called “gay community.” Yet a man can be open and honest about having sex with men, while rejecting all or part of Gay Identity and culture, without that rejection proving that he is “self-hating” or struggling with “internalized homophobia.”
Moreover, studies show that Black and Latino men who have sex with men ("MSM")\textsuperscript{22} are disproportionately likely not to identify as homosexual or gay.\textsuperscript{23} Even if a man who is generally private about his sexuality identifies as homosexual while in jail in the hopes of being admitted to K6G, the deputies might very well reject him because they require a list of people who can confirm the inmate's sexual orientation. Finally, cultural questions about gay slang and West Hollywood favor men who are out of the closet and culturally connected in a very particular way. Men who are closeted or disconnected from the gay mainstream are less likely to be seen in public at gay pride parades and gay nightclubs, or to use gay slang with friends.

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

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

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

\textsuperscript{23} See infra note 371.

\textsuperscript{24} See generally 10 U.S.C. § 654.


\textsuperscript{27} See, e.g., Carlos Ulises Decena, Profiles, Compulsory Disclosure and Ethical Sexual Citizenship in the Contemporary USA, 11 Sexualities 397 (2008) (criticizing public health scholars for uncritical assumptions about coming out and "internalized homophobia" among black men).
challenges of coming out from the vantage point of those rarely recognized by the gay rights movement: men of color and poor or working class men, which are overrepresented in jail and prison. This project will critically examine the costs and benefits of coming out and show that one cannot broadly assume that all sexual minorities, irrespective of race or class, should always come out, whether in prison or other contexts. The K6G policy assumes that all gay inmates are vulnerable and should come out in order to obtain governmental protection from sexual violence. However, those MSM who are particularly strong and masculine may receive little benefit from coming out to gain access to the K6G unit, but risk all of the burdens of coming out. Moreover, heterosexual men who are young, first time offenders, slight in stature, effeminate and/or disabled are all at higher risk of sexual assault, but are not protected by the K6G policy, and this rule may inspire them falsely to come out as gay.

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

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

\textsuperscript{28} See infra notes 359 & 361. Cf. Johnson v. California, 543 U.S. 499 (2005) (suggesting that California policy of identifying and segregating different racial groups might actually increase racial hostility).
men, including some in the Los Angeles jail system, refuse to identity as gay. Then Part V argues that the K6G policy implicates the right to privacy in that it coerces men to come out and embody a white-inflected Gay Identity. Part VI considers potential reforms to the K6G unit, which would alleviate the governmental pressure to come out.

II. SEX IN PRISON

A. Sexual Hierarchy

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

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

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


31 Id.

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

33 Id. “Men almost always identify as heterosexual (in a few cases bisexual), and the majority of them behave heterosexually before and after confinement.” Donaldson’s articulation of sexual categories varies from sharp and airtight classifications to oblique acknowledgements of rare exceptions to the mapping rules. For instance, he states unequivocally that “a single instance of being penetrated, whether voluntary or not, is universally held to constitute an irreversible ‘loss of manhood.’” Id. But a few sentences later he declares “Men almost always identify as heterosexual (in a few cases bisexual), and the majority of them behave heterosexually before and after
Although a man who previously was regarded as heterosexual is "made gay" through being penetrated, the Man who does the penetrating or the "top," maintains his heterosexual and masculine status.\textsuperscript{34} Some writers even describe the top as an "alpha male," who dominates another man in order to secure his status at the top of the prison hierarchy.\textsuperscript{35} Prison sexual relationships are usually described as deeply gendered and rigid in their definition of the partners' roles.\textsuperscript{36} The Man in the relationship or "protective pairing" is the "daddy," who is supposed to protect the feminized partner, sometimes called the "catcher."\textsuperscript{37} The "catcher" is expected to do domestic chores, such as keeping the cell clean, and is often defined with female pronouns and body parts.\textsuperscript{38} S/he is expected to obey the daddy, even if the daddy trades his catcher out for sex with another Man. In return, the daddy is expected to defend his partner, even at the cost of his life, if necessary. Despite public perceptions that prison sex is inevitably violent, the level of coercion in such relationships varies substantially: "from virtual slavery and complete submission at one end... to a mutually supportive, tender and human exchange of affection at the other."\textsuperscript{39}

Determining the amount of sexual assault and coerced sex in jails and prisons is notoriously difficult.\textsuperscript{40} A recent random sample survey of confinement." \textit{Id.} (emphases added); see also \textit{id.} (stating that there are exceptions to his general description). This suggests that bi and gay identified inmates can, in some cases, be Men.

\textsuperscript{34} \textit{id.}

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

\textsuperscript{36} \textit{See, e.g., Regina Kunzel, Criminal Intimacy: Prison and the Uneven History of Modern Sexuality, 185 (2008).}

\textsuperscript{37} See \textit{id.} at 181-82.

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

\textsuperscript{39} \textit{Kunzel, supra} note 36 at 182 (quoting Donaldson) (internal quotations marks omitted).

\textsuperscript{40} See, e.g., Nancy Wolff, et al., \textit{Measuring Victimization Inside Prisons: Questioning the Questions}, 23 J. INTERPERSONAL VIOLENCE 1343, 1346, 1354 (2008) (revealing how different framings of questions produce different results in surveying inmates about violence and sexual assault). Depending on the study and the particular prison(s) or jail(s) surveyed, sexual assault prevalence rates range from 1 to 40%. \textit{Id.} at 1344. The Prison Rape Elimination Act of 2003 was conceived as a first
prisoners in California found that approximately 4% reported being the victim of sexual assault.\textsuperscript{41} Gay and trans-identified inmates, black inmates, and inmates with disabilities were significantly more likely to report being assaulted.\textsuperscript{42} The 4% figure is likely the floor, not a ceiling, because many inmates are afraid to report abuse. Moreover, the figure does not account for the many types of sexual conduct that involve coercion without rising to the level of sexual assault.

In keeping with the strictly gendered common perception of prison relationships, some writers depict Men as devoid of emotional attachment or intimacy in their sexual relationships.\textsuperscript{43} According to this view, Men top other men for sexual gratification or simply to demonstrate their dominance without attempting to replicate or replace the affective bonds with women enjoyed outside of prison.\textsuperscript{44} As with many prison narratives, however, this story seems to lean heavily on gender stereotypes. It requires overlooking practices that contradict this narrow construction of masculinity.\textsuperscript{45} For instance, Regina Kunzel documents examples of Men entering into de facto same-sex marriages with catchers, which are widely respected as legitimate.\textsuperscript{46} As described by Stephen Donaldson, “long-term prisons exhibit the remarkable phenomenon of two men, both heterosexual by preference and identity, involved in sexually expressed love affairs with each other.”\textsuperscript{47}

Some observers note that there may be a gap between the sexual roles that men are supposed to perform and what they actually do, especially in the context of a long-term relationship.\textsuperscript{48} Just as importantly, Men (and catchers) may obtain emotional sustenance from prison relationships—“the

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

\textsuperscript{42} See id.

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

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

\textsuperscript{45} See id. at 185.

\textsuperscript{46} Id.

\textsuperscript{47} Donaldson, supra note 30, at 121.

\textsuperscript{48} See KUNZEL, supra note 36, at 185-86 (discussing anxieties about Men who eventually kissed their catchers and in time began to “flip-flop” or have mutual anal intercourse, taking turns playing the top role); see also id. at 187-88 (recounting letters in which Men expressed love and devotion to their partners).
Daddy can allow himself to drop the hard mask that he wears outside the relationship and express to his catcher the otherwise suppressed aspects of his humanity, such as caring, tenderness, anxiety, and loneliness.”

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

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

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49 Id. at 121.
50 Id. at 119.
51 See id.
52 See id.
53 See id. at 120 (“The total population of queens and punks is rarely high enough to meet the demand for sexually passive prisoners . . . ”); see also id. (suggesting that Men in maximum security prisons and “[big city jails” are at a high risk of being punked.
54 See, e.g., KUNZEL, supra note 36, at 179 (discussing survey in which half of inmates linked prison rape to the deprivation of access to their wives and girlfriends). Some prisoners identified the dehumanizing conditions of prison as feeding prison rape: “[T]hey treat us like animals . . . Pretty soon we act like that.” Id. In some cases, prisoners, upon reflection, marvel at how incarceration shifted their perceptions of gender: “It’s a hell of a thing to say . . . but before long another man begins to look like a woman to you,” wrote one inmate. Another explained that “the teen-agers and young men with smooth, firm skin and a trace of baby fat merged with our memories of girl friends and wives.” Id. at 184. Donaldson, who was forced to play the catcher role, argued that Men imagined feminine characteristics in their partners in order to preserve their heterosexuality: “for these guys to be turned on and horny doesn’t really require any feminine qualities in you, though the jockers usually prefer to imagine such qualities so they won’t have to think about their attraction as homosexual. That’s why they’ll try to tell you you have feminine qualities even if it’s not true.” To the extent that Men do not perceive their partners as sufficiently feminine, they may coerce feminine performances, making catchers “shave their legs, grow their hair [long], and assume female names.” Id. at 185.
role through use of force or the threat of force. The special disdain reserved for “punxs” seems to stem from their status as unpleasant reminders of the fragility of masculinity. Unlike queens, who are thought of as having a “natural” feminine essence, punks are fallen Men. They signify that a single sexual act can strip a Man of his manhood—and “make him gay.” Traits that make men likely to be singled out to be punked include youth, slight stature, perceived effeminacy, serving for the first time in jail, doing time for nonviolent offenses, inexperience in personal combat, having a disability, and perception that the man was gay on the outside. Although some scholarship and advocacy construct a gay/straight binary which implies that gays are uniquely vulnerable, while straights are generally secure, that claim is highly contestable. Other scholarship claims, for instance, that, “[t]he vast majority of punks are heterosexual by preference and history, though some are gays or bisexuals who rejected the ‘queen’ role but were forced into a passive role anyway.”

55 Id.
56 See, e.g., Eigenberg, supra note 44, 419 (2000).
57 Donaldson, supra note 30, at 185 (“Manhood’ is a tenuous condition, as it is always subject to being ‘lost’ to another, more powerful and aggressive Man . . . .”); see Kunzel, supra note 36, at 156 (discussing “made homosexuals”); id. at 173 (noting belief that rape “makes a woman” out of the victim). One means of reducing the threat to masculinity embodied by punks is to describe them as latently effeminate, which justifies their emasculation and distinguishes them from “true” Men. Id. at 154 (“Many framed [the contempt for punks] in gendered terms, accepting the notion that submission to sexual assault was inherently feminizing in its effects and sometimes communicating a suspicion that it betrayed an internal and shameful effeminacy that existed before the fact.”).
58 See infra text accompanying note 452. Some writers and scholars add whiteness to the list of vulnerable traits. However, these claims tend to rely on anecdotal evidence from white inmates and/or outdated studies with an unreliable empirical foundation. See generally Kim Shayo Buchanan, Our Prisons, Ourselves: Race, Gender and the Rule of Law (forthcoming, 2010, YALE LAW AND POL. REV., draft at 15-16) (canvassing the “serious methodological limitations in all the sources commonly relied upon as evidence of the black-on-white prison rape story”). They also frequently reflect pervasive stereotypes about blackness. See Kunzel, supra note 36, at 174 (recounting scholar’s claim that white rapists “selected a victim with affective and sexual needs in mind, ‘both as a person he can relate to as well as for sexual release. . . .’ [while] ‘the black jock looks upon his white victim purely from the standpoint of validating his masculinity or dominance.’”) (quoting Sacco, Rape in Prison, 62); cf. generally Robinson, Racing the Closet, supra note 14, at 1493 (discussing stereotypes prevalent in discourse on black men who live “on the down low”). A recent and methodologically sound survey of violence in California facilities found that black inmates were more likely to report being victims of sexual assault. See Jenness, supra note 41, at 3. The infrastructure for reporting prison rape may also reflect racial biases, whether conscious or unconscious, that make whites more visible as victims. See Eigenberg, supra note 44, at 422 (noting that officers may be “more apt to believe rape victims who conformed to stereotypical definition of rape victim (i.e., young, White, weak, homosexual and effeminate men”)’); Buchanan, supra, at 48-50.
59 Donaldson, supra note 30, at 119.
The targeting of trans and gay inmates for sexual assault emerges from a broader regime that valorizes an idealized form of masculinity and polices the gender performance of all people. There are numerous ways in which a man can fall from the pedestal of hegemonic masculinity, and identifying or being perceived as gay or transgender is just one route.\textsuperscript{60} A cardinal rule of prison is: "Act hard and avoid any semblance of softness. Do not help the authorities in any way. Do not trust anyone. Always be ready to fight, especially when your manhood is challenged, and act as if you do not mind hurting or even killing someone."\textsuperscript{61} In light of these rules, coming out as gay often marks one as a victim. At least in some jails and contexts, to come out is to invite attack.\textsuperscript{62} The presumption is that gay men and trans women are weak and vulnerable and also sexually available. Because "fags" and "queens" enjoy sex with men (unlike men who resort to sex with men only in the incarceration context) and are imagined as inherently promiscuous, some inmates and staff have difficulty perceiving them as rape victims. In the eyes of some, being gay means a man is always asking for it.\textsuperscript{63} This obviously creates a strong incentive for gay and bisexual inmates to conceal their sexual orientation.\textsuperscript{64} Even a man who was fully "out" before prison might reasonably closet his sexual orientation in order to avoid victimization.\textsuperscript{65} Again, however, this pressure is part of a broader norm. The command "do not trust anyone" requires keeping one's own confidences. "It is dangerous for a prisoner to talk personally. Betrayal is always possible. . . . The newcomer . . . learns very quickly after entering prison not to trust anyone or reveal very much about his personal life."\textsuperscript{66} Disclos-

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

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

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

\textsuperscript{63} See Buchanan, supra note 58, at 29.

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

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

\textsuperscript{66} Sabo, supra note 29, at 11; see also id. (noting that often new inmates "lift weights compulsively, adopt their meanest stare they can muster, and keep their fears and their pain carefully hidden beneath a well-rehearsed tough-guy posture").
ing one’s sexual orientation then is just one of many vulnerability factors that an inmate might choose to withhold in order to avoid discrimination.

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

B. Legal Responses to Sex in Prison

Officially, almost all jails and prisons forbid consensual and coerced sexual activity between male inmates or inmates and guards.67 Such policies, which may be reflected in state law, administrative codes and/or unwritten “house rules,” often fail to draw sharp distinctions between consensual and coerced sex, implying that they are equally reprehensible. Such bans may deter inmates from reporting sexual assault. For example, in a New York case, an inmate, Aaron Umber, accused his cellmate of repeatedly raping him.68 The prison staff not only ruled that the claim was unfounded, they went on to charge Umber with violating the consensual sex ban.69 As in Umber’s case, courts have summarily validated various restrictions on consensual sexual activity in prison and jail as if the question presented was unworthy of serious argumentation.70 Only a handful of cases have addressed whether Lawrence v. Texas71 2003 overruling of Bowers v. Hardwick72 changes the constitutional balance in the prison context.73 In general, the rigor of the constitutional analysis in these opinions is as

68 See, e.g., Umber v. Murphy, 304 A.D.2d 931, 932 (N.Y.A.D. 2003)
69 See id.
cursory as the pre-*Lawrence* cases, and none has held that men in prison or jail have a right to have consensual sex with each other.

Despite pervasive formal bans on sex, there remains a considerable amount of sex in jails and prisons, and enforcement of rules tends to range from uneven to lax. Staff members reveal state awareness of sex in various ways: by helping or hindering relationships, exploiting vulnerabilities due to sexual orientation, and outright expressions of discomfort at pervasive sexual activity. In the first, individual staff members may acquiesce to and/or facilitate transfers to aid inmates who are in a sexual relationship. In other cases, "more homophobic administrators seek to keep a pair as far apart as possible." Second, staff members sometimes use sexuality to manipulate and control inmates. "Corrections officers and prison administrators have been known to threaten to expose prisoners to a greater threat of rape in order to evoke good behavior, to punish, or to squeeze out information . . . [P]risoners report that they have been thrown into cells with known 'booty bandits,' or rapists, and left there as retaliation for having disrespected or hit an officer." Third, government officials, as

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74 See, e.g., *Mayfield*, 832 A.2d at 36 (rejecting *Lawrence* claim because "public correctional institutions can in no way be likened to that 'most private of places, the home,' but failing to consider that incarceration either deprives prisoners of a home or makes prison or jail their temporary home") (quoting *Lawrence*, 539 U.S. at 567).

75 *Lawrence*, properly understood, nonetheless raises serious questions as to whether broad bans on consensual sexual expression between inmates can continue to stand. But I leave that argument for another day.

76 It is very difficult to track official disciplinary actions against inmates for engaging in sexual activity, whether coerced or consensual. Such actions almost never result in published judicial opinions, since the punishments may be relatively minor and prisoners lack resources to protect their rights. Prisons and jails also rarely expose their enforcement (or lack thereof) to public scrutiny. The Prison Rape Elimination Act, which is in the early stages of implementation, is designed to produce more information on rape in prison. See 42 U.S.C.S. §§ 15601-15609 (2003); see *supra* note 40.

77 "When a jocker in a double cell acquires a catcher, he 'persuades' his current cell mate to request a move, the new catcher requests a move in, the catcher's current cell mate is prompted to request that he be moved out, and the administration approves it to keep the peace among all concerned." Donaldson, *supra* note 30, at 124.


79 See *Eisenberg*, *supra* note 44, at 416. According to one study, nearly half of the prison officers surveyed said that certain inmates "deserved" to be raped. See *id.* at 422.

80 *Sabo*, *supra* note 29, at 12; *Kunzel*, *supra* note 36, at 165. In one particularly egregious episode of governmentally incited violence, guards at Corcoran State Prison guards in northern California were charged with setting up fights between rival gangs for sport. They would release the
well as scholars studying prison sexuality, have long expressed anxiety about state culpability in producing so-called “faggot factories.”81 In conclusion, government has responded to sex in jail and prison by coupling sweeping formal bans on sexual activity with on-the-ground state knowledge of and involvement with prohibited sex.

III. THE K6G UNIT

A. Origin

Los Angeles County Central Men’s Jail created the K6G Unit in response to a 1982 ACLU of Southern California lawsuit. Class action Robertson v. Block contested the conditions of confinement for gay and trans inmates in the jail. The County ultimately settled the case, and on July 22, 1985, the district court issued an order to authorize segregated housing to protect “homosexual” inmates.82 The gay press has celebrated the K6G unit and the two officers who oversee the classification of homosexual inmates. Those officers, Deputies Randy Bell and Bart Lanni, have served as grand marshals of the West Hollywood Gay Pride Parade, judged transgender beauty contests, and been featured in the leading gay publication The Advocate.83 Despite this publicity, remarkably little is known about their procedures for deeming inmates to be homosexual. The court order says nothing about the criteria or underlying difficulties of identifying gay inmates. It proceeds as if gay identification is self-evident, referring to “homosexual inmates” 23 times in a mere 7 pages, yet never defining the central category.84 The paragraph that alludes to the screening process states as follows:

Inmates entering Inmate Reception Center are asked if they are homosexual and informed of the availability of homosexual housing. Inmates who state that they are homosexual are immediately transferred to segregated housing units for homosexuals. The classification necessary to

81 See, e.g., Eigenberg, supra note 44, at 418-19.
82 This housing was originally at the Hall of Justice, a separate building from the Men’s Central Jail. It was originally called the “homosexual inmate” unit, and then called the K-11 unit, and is now known as the K6G unit. See Lanni Interview, supra note 8 (transcript on file with author, at 2).
determine if those inmates are suitable for such segregated housing units is
determined by the classification staff at that unit after the entering inmate is
assigned to a housing module.

The order does not indicate what criteria are appropriate in considering
whether an inmate is "suitable" for "homosexual housing." Although the
court might have imagined that this assessment would concern risk factors
other than gay identity, such as whether the inmate has a disqualifying
history of violence or medical problems that require special care, in practice
the jail has developed an elaborate test, which I describe below, for
determining whether an inmate is truly gay.\(^{85}\) The only clear limitation on
the screening process imposed by the court order is that "the classification
process [may not] be used as a disciplinary tool." Perhaps to ensure this
condition, the order guarantees "plaintiffs counsel [sic] and a member of the
gay community" access to the housing unit and permits them to observe the
classification process. The settlement's primary focus is ensuring that
"homosexual inmates" do not receive inferior treatment and services by
virtue of being housed in a separate unit, a frequent problem in segregated
housing.\(^{86}\) Thus, the order establishes specific conditions as to exercise,
meal service, telephones, clothing and hygiene.\(^{87}\) Some of these specific
conditions, however, raise the risk of making "homosexual inmates" more
visible and potentially vulnerable when they travel outside of the special
unit. The order requires inmates to be segregated and surrounded by
"protective cages" when transported on buses.\(^{88}\) In a similar vein, K6G
inmates are currently required to wear powder blue uniforms, while most
other inmates wear dark blue, making the K6G inmates easily identifiable to
staff and inmates who might not otherwise perceive them as gay or trans.\(^{89}\)

\(^{85}\) At present, an arrest for a violent offense does not disqualify inmates for K6G housing, but the
deputies generally assign K6G inmates to different dorms based on the seriousness of the offenses.

\(^{86}\) See Howarth, supra note 67.

\(^{87}\) See Order, supra note 84, at 2.

\(^{88}\) See id. at 5-6. If there are other inmates in protective cages, the jail must seat homosexual
inmates in the front row. See id. at 6.

\(^{89}\) See Lanni Interview, supra note 8. This practice is not provided for in the court order. To the
extent that inmates face discrimination, the court indicated that inmates had access to the jail's general
grievance process in order to complain about problems such as denial of privileges, medical care, or
the classification process. See Order, supra note 84, at 3. In addition, the order authorizes
homosexual inmates who believe the jail has violated the court order to write to the jail's commander
and demand a written response. See id. at 6-7. See id. at 6-7. Finally, the order provided plaintiffs'
counsel and paralegals access to the unit to monitor conditions. See id. at 6.
B. Initial Screening

How does an inmate end up in the K6G unit? After a person is arrested, he or she is typically taken to an inmate reception center ("IRC") for processing. A custody assistant, sitting behind a panel of glass, calls each inmate to a window, directs the inmate to pick up a telephone, and interviews him or her.\textsuperscript{90} Guided by a document called "IRC Classification JICS Security Level Assignment," a custody assistant records various pieces of information about the new inmate, including security assessments, such as violent behavior, "past/present serious institutional behavior," and escape attempts. Shortly after these questions, the form directs the officer to "observe inmate" and determine whether the inmate is "‘Soft.’"\textsuperscript{91} If an officer deems the inmate to be soft he is placed in the separate soft unit without further questioning. However, the jail designates few inmates as soft. While K6G typically houses 300 gay and trans inmates,\textsuperscript{92} the soft unit is "not very big at all," ranging from eight to twenty, depending on the time.\textsuperscript{93}

The next entry directs the officer to ask the inmate, "Are you homosexual?"\textsuperscript{94} This conversation is often conducted in a busy room where other inmates are nearby. Some men refuse to identify as gay because of the lack of privacy.\textsuperscript{95} Despite the directive of the settlement order, the officers do not explain to new inmates that they ask this question because the jail houses homosexual and transgender inmates in a special protective unit. The deputies justify omitting this information because they are concerned about

\textsuperscript{90} See Lanni Interview, supra note 8, at 9-10.
\textsuperscript{91} The form contains no criteria for identifying "soft" inmates.
\textsuperscript{92} See Lanni Interview, supra note 8.
\textsuperscript{93} See Interview #1, transcript on file with author, at 17.
\textsuperscript{94} This question is plainly geared toward sexual orientation, not gender identity. It appears that it matters little how a trans-appearing inmate responds, because trans inmates are identified primarily by sight, not by their self-identification and ability to pass an identity-based test. See Lanni Interview, supra note 8. However, a trans inmate who does not obviously appear trans might not understand that the jail cares about gender identity since the officer asks only about sexual orientation.
\textsuperscript{95} See Lanni Interview, supra note 8, at 7 (discussing gay inmates who did not identify as such because "he was at the [IRC] window, there were too many guys around, the guy's really not comfortable about who he is, so he didn't want to out himself at that time, to the inmates anyway"). Deputy Lanni stated that inmates who fail to identify as gay initially may opt into K6G later. See id. Other interviews, however, suggest that this rarely happens, and that the deputies are skeptical of inmates who try to transfer into K6G from the general population.
inmates falsely claiming they are homosexual. Because of the benefits of the K6G unit, which include a perceived safer environment, educational programs and access to condoms, the deputies believe that many heterosexual men falsely claim they are homosexual in order to gain admission to the unit. Further, they believe that heterosexual and bisexual inmates pose a threat to the safety of homosexual and transgender inmates because the former are likely to take advantage of the latter. Therefore, the officers employ a test to determine which of the inmates who identify as homosexual are truly homosexual and send those who flunk the test back to the general population.

C. The K6G Screening Test

After an inmate identifies as homosexual, he is seated with other gay and trans inmates and inmates who otherwise require special handling. Based on this separation, other inmates might infer that a particular inmate has identified as gay. Eventually, the inmate is directed to an office for questioning by either Deputy Lanni or Deputy Bell—both heterosexual, white, middle-aged men. The original questions were devised by a captain and senior deputy sheriff and a formerly incarcerated gay activist, David Glasscock. Glasscock, who was affiliated with the ACLU, is a white man and was middle-aged when they formulated the questions in the mid-80s. Initially, Glasscock and the senior deputy conducted the interviews,

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96 See Lanni Interview, supra note 8. The form contains no instructions regarding disclosure of the purpose of the homosexual question, and interviewees indicated that “they don’t explain that when they ask that question.” See Lanni Interview, supra note 8, at 4. The question is adjacent to inquiries as to whether the inmate is thinking of killing himself and whether he is taking prescription medication that he needs.

97 The programs provided to K6G inmates (mostly through private non-profit groups) include: drug education, computer literacy, personal relationship and job skills training, academic instruction, including the opportunity to earn a G.E.D., STD Testing, pre and post-release help for HIV+ inmates, legal assistance and advocacy, re-entry assistance, spiritual counseling, and a class on Christian thought.

98 See Lanni Interview, supra note 8 (describing perception that serving one’s sentence in K6G is “easier time”).

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

100 See id. at 10-11 (stating that after questioning “we have all the K6G guys in one area”).

101 See id. at 3. Sometimes, they both interview an inmate. See id. at 13.

102 See id. at 1-2.
but now Deputies Lanni and Bell handle inmate screening. Identifying gay inmates is a full time job for Lanni and Bell. They spend most of their day screening inmates, and they interview approximately 20 inmates a day. Over the years, Lanni and Bell have revised the questions based on their own research into gay culture. Lanni describes them as “self-taught.” Their research includes reading books about gay slang and gay magazines, talking with LGBT staff at the jail, and visiting gay venues. Bell and Lanni attend various gay clubs and bars in the broader Los Angeles metropolitan area and note details, which they use to trip up inmates who say they have been to a bar but cannot accurately provide details about it. Their initial research apparently focused on West Hollywood, a mostly white gay enclave. More recently, they have begun visiting other gay spaces.

Although gay men and transgender women are both subjected to this line of questioning, it is apparently a formality for people who appear transgender. The staff relies heavily on physical appearance to identify

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103 See id. at 4 (“The average is about 19.2, .5.”); id. at 11. They screen “between four and five thousand people a year.” Id.
104 See id. at 23, 25.
105 Id. at 22-26. Deputy Lanni also acknowledged that they initially relied substantially on David Glasscock, the white gay activist who helped formulate the questions. See id. (“Dave had a big influence. . .”).
106 See id. at 21-23.
107 Deputy Lanni indicated that they are familiar with Jewel’s Catch One, which is in the predominantly black Crenshaw district. They have also visited bars in the suburban San Fernando Valley. If an inmate says he has attended gay clubs primarily out of state, the deputies consult a gay travel guide which lists clubs. They might also call gay clubs in a distant city to see if a club mentioned by an inmate, but not in a travel guide, actually exists.
108 See Interview #1, transcript on file with author, at 12 (stating that trans people are subject to the “same process” as gay-identified men, but that “if they’re trans, they’re gonna put ‘em in”); Lanni Interview, supra note 8, at 28 (“[I]t’s not like I’m going to take this transgender person and put them in GP [general population], ‘cause that’s not gonna happen. Right, so I’m not gonna waste 40 minutes of an interview trying to figure out if this person should not be housed in the general population. It’s kind of obvious.”). Deputy Lanni indicated that he relies on signs such as breast implants, long painted nails and eyebrows that are “done really well,” but also that “there are some guys who are very feminine that do not look like women and that identify as trans also.” Id. at 29. He failed to explain how he differentiates between effeminate gay men, who would be subject to the extensive interview, and trans women, who are identified by their gender performance and may not be styled as women (nails, eyebrows, etc.). The reliance on surgical changes and overtly feminine styling appears to disadvantage trans inmates who do not want to or cannot afford to obtain breast implants or happen to be arrested while they are not groomed in an overtly feminine fashion. It seems likely that some such trans women are shunted into the gay category and subjected to the deputies’ questions. Cf. Interview #5, supra note 62, at 10-11 (statement by government employee who provides services to inmates regarding gay man who was mistaken as transgender in San Francisco
transgender inmates, although not all trans people display breast implants or other overtly feminine markers.\textsuperscript{109} The jail does not give trans inmates who do not readily appear as such the opportunity to come out as trans. Intake staff members ask all inmates “are you homosexual?” but not “Are you transgender?” This issue is further complicated by the fact that a trans woman might reasonably reply “no” when asked “are you homosexual?” since she may be attracted to men and view herself as heterosexual.

As compared to trans inmates who are readily identifiable as such, gay-identified men receive more intense, skeptical scrutiny during the interview. The focus of the deputys’ questions is the inmate’s “gay lifestyle.”\textsuperscript{110} The deputys measure gay identity based not on an inmate’s sexual desires or history, but based on his connections to the “gay community.”\textsuperscript{111} Not all men who have had sex with men qualify for K6G; nor do all gay-identified men who lead private lives. A man who had sexual experiences with men during prior incarceration, but does not live a “gay lifestyle” on the outside, does not qualify.\textsuperscript{112} Deputy Lanni further explained: “What I’m looking for, if there’s any documentation where this individual has stated in the past that they were gay or they have a relationship with a male or their partner comes and visits them. Whatever that connection is to the community.”\textsuperscript{113} This seemingly straightforward litmus test fails to account for the mainstream gay community’s exclusion of a great number of potential K6G residents, including men of color, bisexual and low-income inmates.

The deputys’ questions typically fall into one of three categories: gay culture, gay terminology, and coming out experiences. First, they ask about culture in West Hollywood, the primary gay neighborhood in Los Angeles,\textsuperscript{114} and other gay spaces in the Los Angeles area, if the inmate says he

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Jail and trans woman who performed as a gay man in order to avoid assignment to the vulnerable unit).

\textsuperscript{109} See Interview #4, transcript on file with author (statement by trans activist and educator that one cannot always identify a trans person simply by sight).

\textsuperscript{110} See Lanni Interview, supra note 8, at 13 (“What I’m interested in is your lifestyle in the community”). Lanni further explains: “What I’m looking for, if there’s any documentation where this individual has stated in the past that they were gay or they have a relationship with a male or their partner comes and visits them. Whatever that connection is to the community.” Id. at 14.


\textsuperscript{112} See Lanni Interview, supra note 8, at 14 (“I’m not looking for your sexual habit inside a jail. I’m looking for your lifestyle outside of here.”).

\textsuperscript{113} See id. at 14.

\textsuperscript{114} See id. (characterizing entire test as “very like, white, West Hollywood focused”).
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socializes elsewhere. For example, they might ask the inmates to describe the annual gay pride parade, which takes place in West Hollywood. They ask where the Abbey is located. The Abbey is a sprawling, indoor-outdoor lounge in the heart of West Hollywood. The questions sometimes assume frequent bar attendance and awareness of minute details, such as the recent painting of a bar or changes to a sign. Second, they ask inmates to define several terms that they believe to be part of a universal gay vernacular. What is a “size queen”? Define “glory hole.” What is a “Prince Albert”? What is a “bird”? What are “cookies”? Finally, the deputies ask questions about the inmate’s personal life, which are designed to test credibility and provide outside verification of his gay identity. How did your mother react when you came out? Tell me about your first sexual intercourse with a man. Have you ever slept with a woman? This stage of the questioning involves asking the inmates to provide names and phone numbers of a male partner and family members who can confirm the inmate’s gay identity. Deputy Lanni says he uses care in questioning family members so as not to “out” the inmate unwittingly. Even though some inmates say they are not out to their mothers, Deputy Lanni suggests

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115 Id. The questions pertain only to gay spaces. Thus, a gay inmate who says he avoids bars and clubs, or attends only straight bars and clubs, will be disadvantaged.

116 See id.

117 See id. at 15.

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

119 See id. at 20 (stating that deputies read “body language” and look to “the whole package” or, in legal parlance, “the totality of the circumstances”).

120 See id.

121 See id. at 16.

122 Id.

123 See id. at 14-15.

124 See id. at 15 (“Well, for example, I could ask, as a parent, if I called you, ‘Is there any psychiatric history that we need to be aware of, homosexuality, marriages, [etc.]?’”). It is unclear whether these veiled questions are effective in protecting the inmate’s privacy.
otherwise: "[T]ypically, Mom knows. Even if the son hasn’t told her. I’ve
gotten that a hundred times."125

Finally, the deputies also appear to examine the inmate’s physical
appearance to see whether he “acts gay,” holding those with particularly
“straight” features to a harder standard.126 Although Deputy Lanni is quick
to concede that there are masculine gay men127 and there is no “poster child”
for gay identity,128 he looks harder at an inmate’s connection to the gay
community when he lacks “gay” mannerisms.129 Moreover, others who are
familiar with the screening process suggest that men who conform to the
stereotype of an effeminate gay man are more likely to be admitted.130
Further, the deputies admit that they assess gender performance in order
to identify trans inmates and that the line between trans women and effeminate
gay men can be blurry.131 For these reasons, it is difficult to credit Deputy
Lanni’s claim that he does not attend to gender performance.

D. Bisexual Exclusion

An important aspect of the screening process is weeding out bisexuals.
A pre-interview, written questionnaire asks the inmate if he has ever had sex
with a woman, and if so, how recently. The deputies appear to think that
men who live with a wife or female partner are very likely to be heterosex-

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

126 See id. at 17.

127 See id. at 21. Lanni unequivocally affirmed that even a “very masculine, tough, big, strong”
gay man would be admitted to K6G “even if it seems like he’s tough and could take care of himself.”
Id. at 29. By contrast, heterosexual men in the general population who are raped and then perceived
as gay and likely to be further victimized as a result are not eligible for K6G. See id. at 30 (indicating
that protective custody may be available for such and inmate, but not K6G). Protective custody is
often perceived by inmates as punishment because it involves isolation and typically the denial of
services available to the general population (and of course the greater services afforded to K6G
inmates). Moreover, although it is ostensibly protective, such custody can make inmates more
vulnerable to assault by staff. See, e.g., Howarth, supra note 67. Thus, the test draws a strict binary
between gay and straight, with the former being marked as victims in need of protection irrespective
of their characteristics and relationships in the jail, and the former categorically ineligible by virtue of
their sexual orientation.

128 Id. at 17.

129 Id.

130 See, e.g., Interview #1, supra note 108.

131 See supra note 108.
ual or bisexual, even if they claim to have male sexual partners. For example, Deputy Lanni described an incident in which he called an inmate’s home, asking for a male partner, and discovered that he had a fiancé living at the residence along with the alleged male partner. Based on this information, Lanni deemed the inmate a liar and declined to admit him to K6G. When asked directly why he excludes bisexual men, Lanni replied: “[W]e are not in the habit of housing bisexual men, because now we have a situation where I have, again, the guy that’s playing the straight guy in the community. He’s out there, he’s got six kids with his wife and that’s who he goes back to, but when he comes in here, he could be looking to abuse somebody or just get off . . . and I don’t want the K6G guy, the righteous gay male, to become a victim of this guy’s sexual habits. So typically we don’t keep bisexuals [in K6G].” Although Lanni held out the possibility that a married applicant might be a closeted gay man, he implied that this is an artifact of the ‘50s and ‘60s and indicated that he distinguishes duplicitous bisexuals from closeted gay men primarily by relying on his intuition.

The K6G screening process is intended to separate inmates who are most in need of protection, using gay identity as a proxy for vulnerability. The means it employs, however, rely on an exceedingly narrow definition of gay identity and assume that inmates will have no problem coming out to law enforcement during the intake process. This colorblind approach

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132 See id. at 14-15. The deputies consider the presence of female lovers to disqualify men who claim to be gay or at least create a strong presumption against admitting them to K6G. For example, the deputies would credit a mother’s statement that “my kid’s not gay. I’ve seen him with plenty of girls.” Id. at 15.

133 Deputy Lanni stated that the inmate:

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

Id.

134 Id. at 17-18.

135 See id. at 19 (“When you do the interviews and how you’re asking the questions, the guys tell you exactly what it is you need to know. I guess it’s hard to explain to you without you sitting and doing all the interviews.”); see also id. at 21 (referring to men who “fake the whole thing with [heterosexual male friends] about the women during the daytime” but “at night, they’re running over to their partner’s [in] West Hollywood or wherever the partner’s at, and they’re gay”).
ignores numerous ways in which race, class and gender performance complicate the jail’s monolithic conceptions of gay identity and coming out. In Part V, I connect these problems to the Constitution’s right to privacy and the critical scrutiny that courts apply when laws abridge that right. First, let us turn to some of the reasons why men who have sex with men might refuse to identify as gay in society and in the K6G screening process.

IV. STEREOTYPING GAY IDENTITY: WHY SOME MEN REJECT GAY IDENTITY

In this Part, I argue that a major impediment deterring some men, and particularly black and brown men, from identifying as gay is the conflation of homosexual sex and Gay Identity. That is, many people—queer and straight—assume that because a man engages in sex with men, he does or should reflect gay culture. As media images of gay men proliferate, from Brokeback Mountain to Queer Eye for the Straight Guy, and formal legal barriers to gay equality fall as well, we might wonder why men remain in the closet and/or resist identifying as gay. Even some of the most powerful and privileged white men, such as Senator Larry Craig and Governor Jim McGreevey, have clung to the closet. McGreevey’s writings about a secret enclave of married men who meet for sex—“power brokers and backroom operatives and future leaders of America”—suggest that his story is hardly an isolated one. We must look to culture to understand the persistence of the closet in an era that ostensibly offers gay men great freedom.

Ironically, the K6G test’s heavy reliance on gay culture to prevent oppression fails to consider the extent to which gay culture can be wielded as a source of oppression. This Part explains why an MSM inmate asked, “Are you homosexual?” might reasonably say no. I also write the following in

138 Cf. Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. REV. 1467, 1518-19 (2000) (noting that “not all civil rights engagements are court centered. Indeed, many of our most controversial contestations over equality take the form of public discourse—for example, press conferences, rallies, or marches”); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS, 26 (2006) (looking to cultural solutions for civil rights).
order to anticipate the response to the data I present in the next Part, which documents how black and brown MSM diverge from Gay Identity. In short, they are more likely to be bisexual and less likely to be out or gay-identified, involved with the gay community and live in a gay enclave than white men. Some critics may respond that the problem is not the K6G test, but the “deviant” men of color, whose internalized homophobia prevents them from embracing Gay Identity. Without dismissing the role of homophobia, which impacts all men—black, white, in or out, this Part seeks to show that the question cannot be reduced to homophobia and arises in part from the nature of Gay Identity itself.

The idea that gay men and straight men are fundamentally different and can be identified by certain physical markers produced the popular notion of “gaydar.” Beyond the descriptive claim that gay men and straight men are fundamentally different, some make a normative claim that they should differ. The pressure to compel MSM to make themselves identifiable as Gay is problematic. This is so because Gay Identity is not a neutral receptacle. Instead, dominant Gay Identity is quite narrow and particularly likely to repel men who are of color, poor or working class, and those who

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139 See infra text accompanying notes 368-377.

140 See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 780 (1989) (critiquing pro-gay defenders of the importance of sexual identity for “reproduce[ing] the heterosexual view of homosexuality as a quality that, like some characterological virus, has invaded and fundamentally altered the nucleus of a person’s identity”); see also supra text accompanying notes 1-5. The idea of gay difference is clearly reflected in the cable TV series Queer Eye for the Straight Guy, which cast gay men as sophisticated and effeminate assistants to a masculine straight man, who displayed ignorance about feminized things like fashion, grooming, and fine food. No less than three “reality” TV series have been based on the concept of gaydar: Gay, Straight or Taken? (Lifetime); Boy Meets Boy (Bravo); and Playing It Straight (Fox). As indicated by Queer Eye, a number of high-profile gay men participate in perpetuating the idea of gay difference by providing stereotypical performances in various media sources. Examples include the Jack character from Will & Grace and Steven Cojocaru, formerly a fashion consultant for NBC’s Today Show, and “Mr. J” and “Miss J,” judges on Tyra Banks’ America’s Next Top Model. At the other end of the gender spectrum are the “straight acting gays.” In adopting this term to describe themselves, these men reify the belief that most gay men are essentially feminine, but they are the exceptions to the rule. Lance Bass, a former member of the boy band N’Sync famously came out in a People magazine interview in which he described himself as one of “the straight-acting gays. We’re just normal, typical guys. I love to watch football and drink beer.” Marisa Laudadio, Lance Bass, I Feel Like Myself. I’m Not Hiding Anything.” People, August 7, 2009, at 86. Gay-oriented websites have picked up this term and use it to market services to gay men who value masculinity. There is a website for social networking called straightacting.com (as visited on Jul. 16, 2008). Falcon Studios, a leading distributor of gay adult film, recently created a website depicting scenes of “str8” men who have sex with men. See http://str8men.falconstudios.com/ (as visited on Jul. 16, 2008).

141 See, e.g., Robinson, Racing the Closet, supra note 14, at 1477 (critiquing demands by black women that black MSM make themselves identifiable as gay).
hold religious and moral values inconsistent with dominant gay rhetoric. My goal in this Part is to show that Gay Identity, as it is presently configured, is not capacious enough to accurately describe, reflect and appeal to a broad swath of MSM. Thus, Gay Identity should be understood, in jail and in the broader society, as just one identity-based model for MSM.\(^{142}\) This reconfiguration would increase the space for more varied and diverse cultural identities, which would likely appeal to MSM contemplating whether to disclose their sexual interest in men to anyone, much less jail staff.\(^{143}\)

I focus on three particular aspects of Gay Identity that are reflected in the K6G policy but make it a foreign identity\(^{144}\) for many MSM: (1) The expectation that gays are effeminate; (2) the perception that gay men are hypersexual, as compared to heterosexual men; and (3) Gay Identity’s consumptive focus, which assumes a position of relative wealth and an interest in products traditionally associated with women.\(^{145}\) I have written elsewhere that we cannot fully understand the pressures that individuals feel to “cover” their personal preferences and curtail their individual agency unless we look to minority-imposed pressures in addition to those that come from the majority.\(^{146}\) In this context, the three norms are particularly perilous for MSM who experience pressure to conform from both sexual

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\(^{142}\) Cf. Vickie M. Mays et al., HIV Prevention Research: Are We Meeting the Needs of African American Men Who Have Sex with Men?, 30 J. BLACK PSYCHOL. 78, 83 (2004) (“Although mainstream society tends to think of homosexuality as homogenous, it is more accurate perhaps to think of these diverse populations . . . as representing homosexualities.”); See EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290, 301 (1994).

\(^{143}\) Cf. Greta Christina, Loaded Words, in POMOSEXUALS: CHALLENGING ASSUMPTIONS ABOUT GENDER AND SEXUALITY 31, 54 (Carol Queen & Lawrence Schimel eds., 1997) (“If the word bisexual weren’t so loaded, if it were a more neutral word, like Midwesterner or coffee drinker or brunette, she might be more likely to use it, and she might be more comfortable with her own behavior.”).

\(^{144}\) Sonia Katyal has incisively examined the clash between gay identity and local culture in non-Western countries when the LGBT movement has tried to “export identity.” See Sonia Katyal, Exporting Identity, 14 YALE J.L. & FEMINISM 97, 100 (2002) (“[T]he presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought, tends to swiftly unravel when viewed in a cross-cultural framework.”). In this Article, I try to show that the dominant form of gay identity may seem foreign to American men as well, especially men of color.

\(^{145}\) I do not mean to suggest that these three components exhaust prevailing conceptions of gay identity. Nor do I deny that there are counter-norms, especially with respect to masculinity. Nonetheless, I argue that these are three major strands in popular conceptions of gay men.

minorities and heterosexual communities. Pro-gay conceptions of gay identity bear a discomfiting resemblance to anti-gay conceptions.\textsuperscript{147} Although gay men attempt to put their own liberatory spins on these norms, the core descriptive claims are quite similar to those of anti-gay forces. In this Part, I support my claim by focusing on gay men and heterosexual allies’ own descriptions of gay culture. I collectively call these scholars and activists “pro-gay people.”\textsuperscript{148}

A. Effeminacy

The K6G policy’s assumption that all gay men are vulnerable and cannot defend themselves is consistent with a broader cultural view among prison administration and general society that gay men are weak and less masculine than heterosexual men.\textsuperscript{149} In categorically excluding bisexual men, the policy appears to use having sex with women as a proxy for masculinity.\textsuperscript{150} The deputies assume that if a man can penetrate a woman


\textsuperscript{148} With respect to some of the researchers I cite, some people may disagree as to whether they are truly “pro-gay.” As the text suggests at points, I have serious doubts that much of this research advances the interests of gay men. However, in using this term throughout this Article, I rely on how these scholars appear to perceive themselves.


\textsuperscript{150} Some gay men have internalized this broader social norm. See John Weir, \textit{Like a Virgin, in POMOSEXUALS: CHALLENGING ASSUMPTIONS ABOUT GENDER AND SEXUALITY}, at 39 (Carol Queen & Lawrence Schimel, eds., 1997) (commentary by gay man who wanted to sleep with a woman “so I can see myself, even briefly, even just in Nick’s [his male heterosexual friend] eyes, as a man”).

A study of gay and bi-identified men in a special protective custody unit in an unnamed urban jail found that while bisexual men were more likely to identify as masculine, they also reported more pressure to have sex and feeling less safe in jail than did gay inmates in the unit. See Alarid, \textit{supra} note 148, at 89 (“It appears, therefore, that bisexual/heterosexual males are being pressured to have sex by submissive gay men and bisexual/gay men in the special housing unit. . .”). The exclusion of bisexual men and alignment of bisexuals with heterosexuals is baffling in light of broader norms that erase bisexuality by interpreting claims of bisexual male identity as a cover for gay identity. See
(although he may also penetrate men and/or be penetrated by men), he should be able to take care of himself in the jail’s general population. This assumption does not play out in reality. While gay inmates in local jails report a high rate of victimization—18.5%, the rate among bisexual inmates and those who reported “other” sexual identity is quite high as well—9.8% for both. A related assumption is that straight-identified men who seek admission to K6G are likely to be predators who would prey on gay men. The jail holds to this policy even though it admits that some such men are themselves fleeing victimization in the general population. The deputies are as unconcerned with heterosexual victims as they are with gay and trans sexual perpetrators: absent from their analysis is any notion that gay men and transgender women could victimize other gay or trans inmates or the straight men who seek admission to K6G. Further, the policy’s grouping of gay men and transgender women in a single unit suggests that both are seen as fallen Men and may fail to respect the gender identity of trans women. These assumptions make sense against the cultural backdrop, detailed below, which equates gay identity with effeminacy.

To illustrate, the *Encyclopedia of Homosexuality* provides a definition of “gay” that locates effeminacy and promiscuity as hallmarks of gay identity. According to the *Encyclopedia*, the sexual origins of the word

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151 See *Local Jails*, supra note 8, at 6. Heterosexual inmates reported a rate of 2.7%. See id.; see also Christopher Hensley, et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 J. INTERPERSONAL VIOLENCE 595, 602-03 (2003) (survey of 3 prisons in Oklahoma finding that bisexuals were more likely to be targeted than homosexuals).

152 See Lanni Interview, supra note 8.

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


155 The jail maintains a small unit for “soft” men—those who are inexperienced or naïve, one example being a young street preacher—yet it houses gay men with transgender women, rather than the “soft” inmates.

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

157 *Encyclopedia of Homosexuality* 455 (Wayne R. Dynes, ed. 1990). The editors of the *Encyclopedia* allegedly listed a fictitious female as the author of several entries regarding lesbians. See Fialkoff, Francine, *In Reference We Trust?* 58 LIBRARY JOURNAL 120.11 (1995). Indeed, the last
predate its embrace by the U.S. gay rights movement. In the seventeenth century, the word "gay" "began to connote the conduct of a playboy or dashing man about town, whose behavior was not always strictly moral but not totally depraved either." By the nineteenth century, the word had shifted in two critical respects: it was used to refer to women and (not coincidentally) it obtained a derogatory meaning. "Gay" meant "of loose morals, a prostitute." In light of its predecessors, "lothario" and "female prostitute," the emergence of the new meaning of "gay"—"homosexual man"—"could not fail to bear overtones of promiscuity and 'fallen' status." William Eskridge has described the various ways in which the law treated gay men, prostitutes and gender transgressors or "inverts" as related and overlapping forms of sexual deviance calling for legal regulation. This conception of the "invert" posited that a gay man is essentially a "woman trapped inside a man's body ... who sought to express an affect and desire inconsistent with the sex of the body." Despite these overtones, the Encyclopedia asserts that many in the gay rights movement have championed the word "gay."

Various studies reveal pervasive conflation of homosexual orientation and effeminacy. One study found that simply telling college students that the man they viewed on a videotape was a member of a gay student club led them to characterize the target as weaker and more feminine, submissive and unconventional, as compared to the ratings of a control group that viewed the exact same target and videotape. Influential legal scholar Kenji Yoshino writes: "there is clearly an enduring conventional wisdom

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158 An early meaning of "gay" was "high spirited, mirthful." Id.
159 Id. In keeping with this connotation, phrases such as "gay lothario" "gay deceiver" and "gay blade" circulated. Id.
160 Id.
161 Id.
162 See William N. Eskridge, Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946, 82 IOWA L. REV. 1007, 1010 (1997) (stating that "regulations aimed at prostitution were readily applied or adapted to target same-sex intimacy"); id. at 1034 (noting that "male degenerates ... were sometimes called 'harlots' or 'prostitutes' themselves").
163 Kenji Yoshino, Covering, 111 YALE L.J. 769, 845 (2002); see, e.g., Valdés, supra note 146, 45-54; Eskridge, supra note 161, at 1023-24.
164 See ENCYCLOPEDIA OF HOMOSEXUALITY, supra note 157, at 455.
that gender atypicality is a marker for homosexuality.”

He also notes that “[g]ay men are commonly viewed to be more promiscuous than their heterosexual counterparts.” Not only are gay men supposed to be countercultural in their own sexual practices, they are expected to ally with “other ‘deviant’ groups like polygamists or pedophiles.” Yoshino can be read to endorse this correlation between sexual orientation and sexual “deviance” as descriptively true. “Gays can cover by being or by appearing to be monogamous,” he writes. Similarly, “[g]ays can cover by rejecting other ‘deviant’ groups like polygamists or pedophiles.” Yoshino uses the term “cover” to describe “the sociology of assimilation,” the process whereby members of stigmatized groups “tone down a disfavored identity to fit into the mainstream.” Under this rubric, a gay man who behaves monogamously and consistently with masculine norms may be “covering” his more “authentic” gay identity. Yoshino fails to acknowledge, however, that behaving promiscuously and effeminately might very well be performances as well—it’s just that they are probably directed at a gay audience instead of a straight one. In expressing concern only about those who disobey gay cultural norms—those who hew to norms within the gay community are not accused of covering under his rubric—he appears to privilege the dominant gay culture, which disadvantages the many MSM who exist at its margin.

In addition to legal scholars, numerous pro-gay scientists have attempted to bolster gender ideology by proving that gay men are intrinsically

167 Id. at 847.
168 Id. at 846.
169 See FORD, supra note 146, at 71.
170 Id. at 848.
171 Yoshino, supra note 165, at 846.
172 Id. at 784.
173 YOSHINO, supra note 137, at ix.
174 See Yoshino, supra note 165, at 848.
175 Yoshino classifies people who disobey gay culture as “normals” who “have internalized the values of the heterosexual mainstream.” Yoshino, supra note 165, at 839. He fails to acknowledge adequately that MSM might value monogamy or masculinity or “straight” culture (whatever that is) for reasons having nothing to do with covering a stigmatized identity. The presumption that any man who has sex with men and does not subscribe to gay culture is “covering” oversimplifies complex personal decisions and robs men of their agency.
176 For an extended discussion of Yoshino’s scholarship on covering, see generally Robinson, Uncovering, supra note 14.
like women.\textsuperscript{177} Based on their "intersex assumption," scientists study homosexual men for "female-typical brain structures, cognitive profiles, and hormonal measures and responses."\textsuperscript{178} For decades, scientists tried—and failed—to prove that homosexuality in men was caused by low testosterone levels.\textsuperscript{179} But scientists continue to pursue the theory that there is a "male brain" and "female brain" and homosexual men have brains resembling the latter.\textsuperscript{180} Some researchers claim that homosexual men evince "feminized cognitive profiles, specifically decreased visuospatial ability and increased verbal ability," which reflects cultural assumptions that gay men are bad at sports and more likely to enjoy reading.\textsuperscript{181} Although the press tends to trumpet such studies and erase the nuances and contingencies expressed in the actual studies, the studies have suffered grave attacks and sharp questioning from scientists as well as scholars in other disciplines.\textsuperscript{182}

Not to be outdone, psychologists also attempt to identify distinctive traits in gay men. One recent article argues that gay men are identifiable because when they walk, they "sway" like heterosexual women, while lesbians tend to "swagger" like heterosexual men.\textsuperscript{183} Some research focuses on public perceptions of gender non-conformity as a proxy for sexual orientation, which is consistent with my point about the culture’s conflation of gender performance and sexual orientation. But the researchers then go on to try to show that gender non-conformity is an \textit{accurate} proxy for sexual

\textsuperscript{177} See Savin-Williams, supra note 111, at 42 ("Biological theories of homosexuality frequently note its association with gender-atypical behavioral and personality characteristics—‘sissy boys’ and ‘tomboy girls.’").

\textsuperscript{178} \textsc{William Byrne}, \textit{Science and Belief: Psychobiological Research on Sexual Orientation}, in \textsc{Sex, Cells and Same-Sex Desire: The Biology of Sexual Preference}, at 303, 306 (1995) (discussing the “intersex assumption” that “homosexuals manifest a state of sexual differentiation that in some ways is intermediate between heterosexual men and heterosexual women”).

\textsuperscript{179} See id. at 309-10, 336 ("The current consensus is that no causal relationship exists between adult hormonal status and sexual orientation.").

\textsuperscript{180} See id. at 313-330.

\textsuperscript{181} \textit{Id}. at 315-16.

\textsuperscript{182} See generally \textsc{Byne}, supra note 177, (warning against “hasty interpretations of findings based on limited sample sizes, shaky methodologies, and extremely limited knowledge about the functions of particular brain structures and even less knowledge about the biological substrates of the mind”); \textsc{Janet E. Halley}, \textit{Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability}, 46 STAN. L. REV. 503 (1994) (critiquing immutability argument and warning that it may divide LGBT community); \textsc{Edward Stein}, \textit{Born that Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights} 45 (Benjamin N. Cardozo Sch. of Law, Working Paper No. 223, 2008), available at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538}.

\textsuperscript{183} See \textsc{Kerri L. Johnson}, et al., \textit{Swagger, Sway, and Sexuality: Judging Sexual Orientation from Body Motion and Morphology}, 93 J. PERS. & SOC. PSYCHOL. 321 (2007).
orientation. Although they find a statistically significant difference, they gloss the critical issues: (1) how did the researchers select the homosexual targets?; and (2) is their gender performance representative of the broader community of people who have sex with people of the same sex? The danger with such studies is that researchers are likely to draw on people who are openly gay and steeped in gay culture because they are the most accessible and visible.\textsuperscript{184} For instance, a study by Harvard psychologist Nalini Ambady and others was designed to find empirical support for the claim that gay and lesbian people are better than straight people at spotting other gay and lesbian people.\textsuperscript{185} The study entailed 96 undergraduate students judging the sexuality of graduate student targets after viewing them either in still photographs, a one-second video clip or a 10-second video clip.\textsuperscript{186} Across all three conditions, gay men and lesbians were significantly more likely to be perceived as gay than their heterosexual targets.\textsuperscript{187} However, the researchers recruited heterosexual targets from “public service organizations,” while drawing all of the gay and lesbian targets from “graduate student gay and lesbian groups.”\textsuperscript{188} It is hardly surprising that people who are steeped in gay culture reflect the values of that culture, and this makes them identifiable as gay. Selecting targets from gay student unions means necessarily excluding the large population of people who engage in same-sex conduct but do not organize around sexual orientation.\textsuperscript{189} This sizable population is thus excluded from the analysis even though the findings based on the more open and identifiable members of the community will likely be read to support overbroad generalizations about

\textsuperscript{184} See Savin-Williams, supra note 111, at 40 (stating that researchers have “generally ignored one fundamental issue—how homosexuality is defined can determine empirical findings”).


\textsuperscript{186} See id.

\textsuperscript{187} See id. In summarizing the various studies discussed in this article, the authors estimated that the typical judge was accurate in 55% (slightly better than chance) in the still photo condition and 70% in the 10-second video clip condition. See id. at 546.

\textsuperscript{188} See id. at 541; id. at 544 (recruiting targets from gay newspapers in subsequent study).

\textsuperscript{189} See, e.g., Richard J. Wolitski et al., \textit{Self-Identification as “Down Low” Among Men Who Have Sex with Men (MSM) from 12 US Cities}, \textit{10 AIDS & Behav.} 519, 526 (2006) (finding that “DL-identified MSM were less likely to report having had any involvement with the gay community”). The authors acknowledged this limitation. See Ambady, supra note 185, at 546 (“our gay and lesbian targets were recruited primarily from gay and lesbian student organizations and probably were not fully representative of the larger gay and lesbian population”).
the entire class. Criticizing studies such as these, Ritch Savin-Williams has argued that "[t]hose who self-ascripte a gay/lesbian label are neither exhaustive nor representative of those with a same-sex orientation." And as this paper attempts to show, there are raced, classed and gendered patterns to this exclusion. People of color, poor people, and bisexuals are all likely to be underrepresented in mainstream gay organizations, and therefore unlikely to pass a K6G admissions test premised on ties to the "gay community."

B. Promiscuity

Another dominant component of Gay Identity is the expectation that gay men have more sex than heterosexual men and do so in less conventional ways. The K6G test focuses on sexual practices and terminology that are thought to be common to gay men. They are expected to know what a "glory hole" is. An online dictionary of gay slang describes it as "the opening (hole) in a partition between two toilets in a public toilet or men's room in which a penis is inserted and fellated on the other side; usually, the two parties never see each other face to face." In case the foregoing is not

190 I recognize that researchers might find it difficult to identify and recruit targets that choose not to identify as gay. Yet a study by the CDC shows that such people can be identified. See William D. Mosher et al., Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002, 362 Advance Data from Vital & Health Stat., (Nat'l Ctrs. for Health Statistics), Sept. 15, 2005, at 1, 13, (identifying a group of men who described their sexuality as "something else").

191 Savin-Williams, supra note 111, at 40. A related problem represented by the Ambady study is the researchers' failure to reveal the race and socioeconomic class of the targets, which suggests that the researchers lacked awareness that race and class might make a difference. See Ambady, supra note 184, at 541 (reporting age of targets but not race or class). This too obscures a significant potential bias. Members of mainstream LGBT organizations and people who congregate in gay enclaves on campus tend to be white. Despite the likely underrepresentation of people of color, the media and the public are prone to jump to the conclusion that such studies bear lessons for all people who engage in same-sex conduct, not just middle-class white people who strongly identify with gay culture.

192 See Stephen Ellingson & Kirby Schroeder, Race and the Construction of Same-Sex Sex Markets in Four Chicago Neighborhoods, in The Sexual Organization of the City 93, 96 (Edward C. Laumann, et al. eds., 2004) ("Different components of gay culture—from the social rituals of cruising and the use of clothing and mannerisms to signal availability, to definitions of masculinity (e.g., the bronze of the 1970s or the muscular or 'cut' body of the 1990s), to a rich literature of fictional and nonfictional works on what it means to be homosexual—sanction and celebrate a transactional orientation toward sexual partnering.").

clear, it goes on to describe “glory hole sex” as a “quick sexual act with little or no tenderness, a rushed act of sex.” In a related, but more subtle, vein, the K6G test assumes that gay men spend considerable time in nightclubs looking for sexual partners—enough to recall details such as how recently a particular club was repainted and how many bars are in it. An underlying expectation appears to be that gay men congregate in nightclubs and have casual anonymous sex in public places, rather than in committed relationships like heterosexuals. In this respect, the K6G conception of Gay Identity may reflect a 1970’s model rather than the “respectable” image of a committed couple celebrated by marriage equality advocates. In any event, any one-size-fits-all approach to gay identity poses serious problems. Not all MSM regularly attend gay nightclubs. Many men are introduced to homosexuality through meeting a man at work, sports games, community events, or at church. Many go out of their way to avoid the Gay scene and rarely step foot in a club. Further, inmates are sometimes asked to define “size queen” (“a gay male with a sexual preference for partners with large penis [sic],” or “Prince Albert” (“A piercing [sic] on the penis that punctures the urethra and exits through the meatus.”). These questions suggest that gay men are likely to engage in distinct sexual practices that would be unknown to heterosexuals, even though straight men and women have been known to fixate on penis size and to pierce their genitalia. This line of questioning and its underlying presumptions tend to exclude MSM whose sexual practices and life experiences preclude such highly particularized knowledge.

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194 See id.

195 See Lanni Interview, supra note 8, at 2. It is hard to imagine determining whether a man is heterosexual by asking him to describe a particular straight-dominated bar or perhaps a strip club. Such a test would be grossly underinclusive, but that recognition does not extend to gay men.


198 The internet has made it much easier for men to connect with other men while avoiding bars and clubs entirely. See infra note 440.


200 Cf. FORD, supra note 146, at XX (critiquing Yoshino for failing to appreciate that heterosexuals engage in anal sex ).
The expectation that gay men engage in distinct, deviant sexual practices has deep roots and remains a central tenet of Gay Identity and modern homophobia. William Eskridge has written that in the 1920s government efforts to suppress “deviant” sexuality shifted focus from the “invert” to the “homosexual:” “while the former challenged gender and sex roles, the latter was sexually out of control and even predatory.” Regulators considered homosexuality virtually synonymous with uninhibited libido, aggressive promiscuity, and compulsive behavior. Today, although pro-gay and anti-gay people would likely differ as to whether gay men are predatory, many in both camps view them as highly sexual beings who indulge in unconventional sexual practices and accumulate more sexual partners than their straight counterparts. The first gay TV series, *Queer as Folk*, opened in a gay club packed with sweaty, sculpted white men gyrating, popping pills and having sex in a backroom. “Then we hear the voice of the character who will become our guide, our Everyman, say: ‘The thing you need to know is, it’s all about sex.’ This is the main theme... being gay is all about sex.” Law professors David Skover and Kellye Testy assert that the show “consciously and unapologetically assumes the LesbiGay perspective,” as if there were just one view.

One example of unconventional sex is public sex. Michael Warner represents a leading voice arguing that public sex is a special part of gay culture that the law should respect. Warner’s influential book *The Trouble with Normal* argues that “queer life” provides a specific ethical code that counters the pervasive problem of sexual shame. Warner describes this ethic of “dignity in shame” as “begin[ning] in an acknowledgment of all

201 Eskridge, *supra* note 161, at 1054.
202 *See id.* at 1068; *id.* at 1064 (quoting Ohio judge who described “sexual perverts,” a category that was understood to include homosexuals, as “wild ferocious animals”).
203 *See Richard Goldstein, My Big Fat Funky Queer Marriage, Village Voice*, June 15, 2004, at 39 (stating that his boyfriend’s sex partners “could practically fill the Radio City Music Hall” and that their committed relationship permitted his boyfriend to keep “tricking” and Goldstein to have “affairs”); David Nimmons, *The Soul Beneath The Skin: The Unseen Hearts and Habits of Gay Men* 82–90 (2002) (arguing that most gay relationships are not monogamous). The K6G unit essentially flips the predatory stereotype: instead of viewing gay men as inherent predators, it conceives of them as inherent victims. A different stereotype, to be sure, but still harmful.
206 *WARNER, supra* note 195, at 34-35.
207 *Id.* at 36.
that is most abject and least reputable in oneself. Shame is bedrock. . . . At its best, this ethic cuts against every form of hierarchy you could bring into the room.”208 This strident defense of exhibitionist or atypical sexual practices borders on a normative gay mandate that renders “vanilla” gays invisible.

Warner argues that the most sexually marginal people best exemplify the queer ethic he champions. He argues that a queer ethic emerges from the experiences of the “sluts and drag queens and trannies and trolls and women who have seen a lot of life,”209 “the boys who flaunt it as pansies,” those “who don’t come out as happily gay,” “the clones in the so-called gay ghetto, the fist-fuckers and popper-snorters, the ones who actually like pornography.”210 In claiming promiscuity (the “sluts”) and gender nonconformity (the “pansies” and “trannies”) as queer values, Warner’s “queer” argument ultimately bolsters mainstream conceptions of gay men as effeminate and promiscuous. Warner is right to challenge the ascendancy of the “happily coupled,” suburban gays and lesbians as “the worthier pillars of the community” and representative of “the rest of us.”211 But Warner does not stop there. Rather than just repudiating the existing respectability hierarchy, he would install a new, inverted hierarchy. Instead of judging those who engage in the least respectable sexual practices, he suggests, we should shame people who refuse to engage in these practices. Thus, instead of leaving LGBT people free to adopt whatever identity they might like, Warner’s inverted hierarchy would create alternative grounds for policing individual identity, not unlike the K6G test.

Warner’s spirited defense of public sex illustrates the regulatory effects of his conception of queer identity. Warner identifies a “sexual culture of gay men,” which he says includes often-anonymous sex in public

208 Id. at 35.
209 Id. at 36.
210 Id. at 66; see also id. at 68.
211 Id. at 49. In a complementary vein, Devon Carbado has critiqued the mainstream LGBT movement’s preoccupation with representations of “but for” gays in the campaign for legal rights and public respectability. See Carbado, supra note 137, at 1506 (arguing that movement has favored “but for’ gay people—people who, but for their sexual orientation, were perfectly mainstream”). Relatively, Angela Harris has emphasized how much of the push for same-sex marriage threatens to reinforce racial and wealth disparities and consolidate neoliberalism. Angela Harris, From Stonewall to the Suburbs? Toward a Political Economy of Sexuality, 14 WM. & MARY BILL RTS. J. 1539 (2007).
places, such as bathhouses and parks. He argues that “public sexual culture is not just a civil liberty . . . but a good thing, and queer politics should make it a priority.” Relying on Warner’s scholarship, law professor Carlos Ball has argued that courts should extend the right of sexual liberty identified in Lawrence v. Texas to men who have sex in public places.

I am not opposed to arguments for a more public sexual culture, nor do I see much point in police officers using public resources to punish apparently-closeted men like Senator Larry Craig. Nonetheless, I am troubled by arguments that attempt to ground a defense of public sex in gay male culture, or gay male culture in a defense of public sex. Such arguments tend to exaggerate distinctions between queers and straights and overlook the role of law in creating those distinctions. Many straight people also engage in public sex. Warner cites examples of media representations of male-female public sex, including Madonna’s music and episodes of TV sitcoms The Simpsons and Dharma and Greg. It ranks him that the same public that finds these depictions amusing “think[s] there could be no defense for gay men who find one another in out-of-the-way corners of parks.” Yet Warner fails to recognize that his own arguments about “the gay male practice of public sex” and attempts to distinguish it from the

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213 Id. at 113.
216 Such arguments would be less troubling if they were not understood to apply to all gay-identified men or all MSM. That is, Warner could have defended his argument based on the experiences of a particular subset of white, middle class men instead of claiming to represent a universal queer ethic.
217 I know of no empirical studies comparing gays and straights, but examples of heterosexual public sex in popular culture range from the first episode of the critically-hailed HBO series Six Feet Under, in which the central couple Nate and Brenda hooked up in an airport, to the recent George Clooney film Up In The Air, to the #1 Billboard hit “Love in this Club,” in which pop singer Usher celebrates “making love” in a club.
218 See WARNER, supra note 196, at 181-82.
219 Id. at 182.
220 Id. at 177; see also id. (referring to “the sexual cultures of gay men and lesbians”).
“banality of normal heterosexuality”\textsuperscript{221} fuel the perception that “public sex is the special province of gay men.”\textsuperscript{222}

The key distinction between heterosexuals who engage in public sex and MSM who do so is that only the latter were (until very recently) coerced by law into seeking sexual gratification in public places like bathrooms, parks and adult book stores. Historically, state and local government used a constellation of laws to annihilate “the love that dare not speak its name,” attempting to “expunge homosexuality from the nation’s public culture.”\textsuperscript{223} Although the law was incapable of accomplishing its goal, it succeeded in shutting down gay bars and organizations and pushing sex between men underground. Under the repressive regime sanctioned by the Supreme Court in \textit{Bowers v. Hardwick}, gay men were forced to search for sexual fulfillment in the shadows, which often required fleeting, impersonal sex in very risky spaces.\textsuperscript{224} Men did not choose these sexual practices from a menu of legal options for pursuing romantic and sexual pleasure with other men, as they can today. They were channeled into seeking sex in secret. Despite this history of coercion, Warner and company would write into law this history of discrimination and perpetuate the underlying practices.

Black men may be particularly averse to conceptions of gay identity that embrace promiscuity because they add force to the stereotype that black men are hypersexual. Further, black men are more likely to attend church and endorse religious values than white men.\textsuperscript{225} Gay Identity’s incorporation of promiscuity as a central feature thus creates conflict for many black MSM and other MSM who hold to contrary religious or moral values.

\textsuperscript{221} \textit{Id.} at 179.
\textsuperscript{222} \textit{Id.} at 183. Warner’s argument exemplifies a tension that Cathy Cohen has identified in queer advocacy. It toggles between arguing for universality and dismantling sexual categories even as it simultaneously reifies, and sometimes exaggerates, the distinction between “straights” and “queers.” See Cathy J. Cohen, \textit{Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?}, in \textit{BLACK QUEER STUDIES} 21, 21, (E. Patrick Johnson & Mae G. Henderson eds., 2005).
\textsuperscript{223} Eskridge, \textit{supra} note 162, at 1069; Sklansky, \textit{supra} note 6, at 887.
\textsuperscript{224} \textit{See id.} at 1101 (“The outlaw status of male inverted contributed to a sexuality that was furtive, fleeting, and fraught with danger. For some men, the risk became part of the sexual excitement.”).
C. Affluent Consumption

The third component of gay culture that I examine here concerns commercialization and consumption. The K6G test identifies gay men in part by confirming that they spend money at public gay venues, such as nightclubs, adult book stores or other public sex venues that contain glory holes, and gay pride parades (the most local, West Hollywood's, has an entrance fee of $20).226 Inmates who do not spend their money in gay spaces have a harder time proving their sexual identity.227 The jail expects not just that an inmate's consumptive choices reflect a "gay" pattern, but also that they take place in the city's dominant gay neighborhood, West Hollywood, even though it is very expensive. In West Hollywood, the median earnings for workers is $43,454; in LA County, it is $28,576.228

These aspects of the test track broader norms. In general, gay men are identified in part by purchasing commodities that exhibit social affluence and a particular "gay"—often feminized—sensibility.229 Business experts and scholars have fostered a conception of gay men as obsessed with commerce, affluence and self-image.230 These descriptions of gay consumers invariably focus on white, relatively wealthy men in large cities, with little awareness that there are plenty of MSM (and of course queer women) who live outside, and cannot relate to, this rarified orbit.231 For example, the

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227 For example, the deputies sometimes ask “Where do you go out?” See Lanni Interview, supra note 8. An inmate who does not go out—or, even worse, goes to straight-dominated venues—will have a difficult time convincing the deputies that he is gay.
229 Again, this conception of gay men is shared by pro-gay people, including gay men, and anti-gay forces. See Bérubé, supra note 146, at 238 (criticizing the “recent vigorous gay media promotion of the high income, brand-loyal gay consumer market—which is typically portrayed as a population of white, well-to-do, college educated young men” because it “widens the racialized class divisions that the religious right so eagerly exploits”); Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) (arguing that “homosexuals... have high disposable income” and “possess political power much greater than their numbers”).
230 See, e.g., Skover & Testy, supra note 204, at 240 (“American LesbiGay identity cannot be understood apart from commerce.”).
231 M.V. Lee Badgett, Money, Myths and Change 111, 120-21 (2001). Although Skover & Testy acknowledge that poor LGBT people, including many people of color, lack access to this commodified identity, they blithely assume that poor LGBT folks will eventually follow the same
headline of an article in *Broadcasting & Cable* announced: "The gay community has money to burn, but few marketers know how to reach it."\(^{223}\)

The article characterizes LGBT people as "a group comprising as much as 10% of the U.S. population and one with exceptionally high discretionary spending."\(^{223}\) The article focuses on a slender minority who comprise the most affluent, prominent and visible LGBT people yet implies that the entire group has "money to burn."\(^{224}\) Even the term for the idea of a gay market—"the pink dollar"—shows the intersection of effeminacy and consumption and the tendency of the wealthy minority to represent the entire LGBT group.\(^{225}\)

The consumptive nature of gay culture dictates not simply that gay men are more affluent than their heterosexual counterparts, but also that they enjoy particular types of feminized consumption, including a fixation on personal appearance.\(^{226}\) As described by Skover & Testy, gay-themed advertisements depict the "active, freewheeling, and unfettered commercial pursuits of the 'good gay life.'"\(^{227}\) The "gay lifestyle" requires a "buffed out and erotically charged manliness: working out his muscles in the gay gym, working out his energy at the gay disco, working out his stress on the gay cruise, and working out his libido in the gay bathhouse."\(^{228}\) To this descrip-

\(^{222}\) See, e.g., Badgett, supra note 230, at 127; ALEXANDRA CHASIN, SELLING OUT 44 (2000); Nancy A. Rudd, Appearance and Self-Presentation Research in Gay Consumer Cultures: Issues and Impact, in GAYS, LESBIANS AND CONSUMER BEHAVIOR (D. Wardlow, ed., 1996), at 109, 112 ("It is assumed that most gay consumers do not have children and therefore do not have the additional expenses associated with them resulting in a higher level of discretionary income."); id. (noting that "urban white professionals may ... be overrepresented" in marketing studies of gay consumers).

\(^{225}\) "Pink" signifies that gay men are perceived as more feminine than heterosexual men, since social norms dictate that boys wear blue and girls wear pink. See Pink Dollar, Wikipedia, http://en.wikipedia.org/wiki/Pink_dollar (defining "pink dollar" as "a term describing the purchasing power of LGBT individuals in the United States) (last visited January 27, 2010); id. (noting that "[o]ccasionally, the similarly termed 'blue dollar' is used specifically for lesbians."); CHASIN, supra note 233, at 48.

\(^{226}\) See Mandese, supra note 231, at 22 ("[M]edia and marketing circles ... have historically positioned the gay market as being very different—and substantially more affluent—than mainstream."); Badgett, supra note 230, at 113, 115.

\(^{227}\) Skover & Testy, supra note 204, at 241.

\(^{228}\) Id.
tion, I would add that the ideal gay man lives in a gay enclave, such as West Hollywood, which is where the gay gym and gay disco are located.

Some MSM, especially blacks and Latinos, lack the "discretionary income" that is a precondition to this lifestyle. Some are heavily inter-twined with family members and involved in caring for children or other family. They cannot spend money on costly gym memberships and gay cruises; they are just trying to pay the bills. Studies by the Williams Institute at UCLA School of Law suggest that black people in same-sex relationships are more similar to black people in different-sex couples than white same-sex couples or interracial couples with respect to income, education, rates of employment and rates of public assistance. For example, in California, the average income of black same-sex couples is far below that of non-black same-sex couples—$90,365 for non-blacks and $61,434 for blacks. By contrast, the average income of black same-sex couples is only slightly below that of black different-sex couples, which is $65,845. Furthermore, blacks in same-sex relationships diverge from the stereotype of a self-centered gay man interested only in partying, fashion and promiscuous sex. Black same-sex couples in California are much more likely to be raising children: 52% of blacks vs. 32% of whites. Finally, same-sex black couples tend to live in the same neighborhoods as different-sex black couples, rather than residing in West Hollywood or Silverlake. These patterns show that the perception that gay men are or should be affluent overlooks the experiences of many blacks and may make it hard for the latter to identify as gay.

I have argued that hegemonic Gay Identity involves three foundational—and exclusionary—pillars which make it that much harder for inmates of LA Men's Central Jail to gain admission to the K6G unit. Those

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239 See Badgett, supra note 230, at 121 (stating that black men make 74% of white men's average income and black women make 64 percent of that figure); Eric Heinze, Gay and Poor, 38 How. L. J. 433 (1995). Because queer women earn less money than queer men and are more likely to raise children, they are least likely to live a freewheeling lifestyle. See Badgett, supra note 230, at 153-54 (indicating that gay men are half as likely to raise children as straight men, but lesbians are as likely to be mothers as straight women).


241 See id. at 1.

242 See id at 12.

243 See id at 6.
pillars include effeminacy, promiscuity and affluent consumption. The cultural alignment of such traits with gayness both pushes many MSM to the fringes of Gay Identity and helps us understand why they might hesitate to call themselves gay. In the K6G context, such MSM may be every bit as deserving of heightened protections as those who avidly embrace Gay Identity, yet their non-conformity triggers greater skepticism and instills greater vulnerability.

V. THE CONSTITUTIONALLY PROTECTED DECISION WHETHER TO COME OUT

Against the backdrop of Part IV’s contextualization of the K6G test, this Part argues that the test implicates constitutional privacy rights. Contemporary students of constitutional law may be accustomed to thinking of the right to an abortion or the right to marry when they think about the “right to privacy” embodied in the Fourteenth Amendment’s due process clause. Cases such as Roe v. Wade and Loving v. Virginia, however, defined the right to include acts that are quasi-public in nature, yet extremely important to the individual. A more conventional conception of a right to privacy consists of the interest in keeping intimate information from others’ eyes. Thus, the constitutional right to privacy is best understood as encompassing two strands of protection. As the Court explained in Whalen v. Roe, and reiterated in Lawrence v. Texas, the right embraces both “the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions.”

244 For example, a marriage is not simply a private promise between two committed people but also involves making promises to the state and typically alters the couple’s relationships with their families, friends and employers.


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

248 Whalen, 429 U.S. at 600. Moreover, these strands may be understood as independent, meaning that one could prevail under the disclosure of intimate information prong even if she could not satisfy the important decisions prong. See Shuman v. City of Philadelphia, 470 F.Supp. 449, 459 (E.D. Penn. 1979).
In this Part, I argue that the decision whether to come out as gay implicates both lines of protection. I begin with the conventional definition of privacy—the right to keep intimate information from prying eyes—which has received limited attention in the Supreme Court's substantive due process jurisprudence, but substantial analysis in the lower federal courts. Then I move on to well-known Supreme Court precedent, which focuses on reserving certain important personal decisions to the individual.

In describing the constitutional reach of the ordinary conception of privacy, I first discuss a case paralleling K6G in which a law enforcement officer pressured a man to come out, thus violating his constitutional rights. I then explore cases that do not involve coming out as gay, but nonetheless concern governmental intrusions into personal sexual information.

A. Constitutional Precedent

In 1997, Scott Wilinsky, a Minersville, Pennsylvania police officer investigating a potential burglary, stumbled upon two young men in a car with its headlights out. Wilinsky testified that 18-year old Marcus Wayman and his 17-year old companion had been drinking, and after a search turned up condoms, he claimed that they admitted to being gay and in the parking lot to engage in consensual sex. Wilinsky took it upon himself to "lecture" the young men that the Bible opposed homosexuality. Apparently, Wilinsky was acquainted with Wayman's grandfather, because he told Wayman that if he did not tell his grandfather about his homosexuality,

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249 Although the Whalen Court recognized that the individual has a right to avoid governmentally compelled disclosure of certain private facts, the physicians and patients who brought claims in that case failed to show a significant incursion into a private domain. The Whalen plaintiffs challenged a New York health regulation that required doctors to transmit to the state a copy of each prescription for certain drugs that are susceptible to abuse. See id. at 593. The Court rejected the plaintiffs' facial challenge, which claimed that the state's record-keeping regime might impose stigmatic harm on them and deter them from seeking such prescriptions. See id. at 600-604. Not only are disclosures to third parties, such as hospital personnel and insurance companies, routine in the health care context, the Court reasoned, but the state had a careful system for preserving the privacy of the information and criminalized the disclosure of such information to the public. See id. at 594, 602 (describing rules that required destroying prescription information after five years and a computer "surrounded by a locked wire fence and protected by an alarm system").


251 See id. at 192-93.

252 See id. at 193.
Wilinsky would. The Third Circuit recognized that “the Supreme Court has not definitively extended the right to privacy to the confidentiality of one’s sexual orientation” and acknowledged that the Court’s (now overruled) decision in Bowers v. Hardwick gives us pause. Nonetheless, the court understood Bowers to pivot on homosexual acts, while the challenged state action in Sterling concerned homosexual status. Yet it did not see Bowers as precluding “privacy protection for the intensely personal decision of sexual preference.” The court compared the issue of one’s sexual orientation to a teenage girl’s decision to keep her pregnancy private, which it had validated in a recent case. “It is difficult to imagine a more private matter than one’s sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity,” the court ultimately concluded.

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253 See id. Wilinsky arrested them for underage drinking.
254 See id.
256 Sterling, 232 F.2d at 194.
257 See id. at 195. The foundation for this distinction is unclear since the opinion does not reveal exactly what Wilinsky ordered Wayman to tell his grandfather: that he had engaged in or intended to engage in certain acts with his male companion, or that he was a homosexual. It seems likely that someone of Wilinsky’s religious orientation may have believed that the disclosure would have led Wayman to avoid future sex acts with men and perhaps deter him from being a homosexual. Moreover, the companion denied that the men told Wilinsky they were homosexuals. See id. at 192.
258 Id. Judge Stapleton’s partial dissent also pointed out that Bowers was relevant only to the important decision prong of Whalen, not to the disclosure of personal matters prong. See id. at 199 n.1 (Stapleton, J., dissenting). Stapleton’s analysis is more convincing than the majority’s argument. The Fourth Circuit’s broader interpretation of Bowers fails because the decision provided no reasoning. See Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (noting in passing that “the Bowers decision is controlling”). Even if Bowers’ reach extended to both types of privacy claims, Lawrence uprooted it.
259 See id. at 196 (majority opinion) (citing Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000)).
260 See id.; see also Lawrence, 539 U.S. at 567 (referring to “sexual behavior” as “the most private human conduct”). Such cursory analysis is typical of this line of privacy cases, which treat sexuality as obviously private. Courts have not articulated a clear methodology for determining what is private and what is not. They seem to draw on a shared social conception of private domains and also recognize that information generally accessible to the public cannot be private. This latter question plays an important role in adjudicating Fourth Amendment claims, which require a “reasonable expectation of privacy. See Laurence H. Tribe, Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name, 117 HARV. L. REV. 1893, 1941 (2004).
A set of cases involving law enforcement employees’ claims against their employers provides additional support for my argument that governmental pressure to come out implicates the right to privacy. In Thorne v. City of El Segundo, the Ninth Circuit held that the city’s questions about an aspiring police officer’s sexual activities violated her right to privacy. Deborah Thorne was a typist for the city who applied to be a police officer and achieved one of the top scores on the department’s written and oral exam. Nonetheless, the evidence suggested that the city discounted Thorne’s application because of gender stereotypes, including an apparent perception that she had engaged in immoral sexual activity. In response to an employment questionnaire asking whether she had ever been pregnant, Thorne acknowledged that she had had a miscarriage. This admission led to a polygraph examination, in which a male examiner asked for details about the miscarriage, including the identity of the father. When Thorne said that the father was a married police officer with the city, the examiner asked whether she had had sexual relationships with other department personnel and inquired as to whether the miscarriage was actually an abortion.

The court held that these questions invaded core constitutional rights of privacy and association—“appellant’s interest in family living arrange-

Although the Sterling majority and dissent agreed on the private nature of sexual identity, they parted company over whether the right was clearly established at the time of the violation. See Sterling, 232 F.2d at 194. Finding that the right was not clearly established, largely because of Walls, the Fourth Circuit case, the dissent would have granted the defendants qualified immunity. See Sterling 232 F.2d at 200 n. 3 (Stapleton, J., dissenting). Further, the majority held that a threat to disclose private information necessarily violates the right, see id. at 197 (majority opinion) while the dissent asked “whether an officer completed steps reasonably designed to effect disclosure with the intent that disclosure would result,” id. at 199 (Stapleton, J., dissenting); see also id. at 200 (finding that the facts satisfied that test).

These cases diverge from Sterling in that (1) they involve sexuality, but not homosexuality, and (2) the plaintiffs are suing in their capacities as governmental employees, not as citizens. However, Lawrence largely abolished the distinction between heterosexual intimacy and homosexuals' intimacy (with the principal open question being same-sex marriage). As I discuss more fully below, see infra Part V.G, prisoners, like governmental employees, receive reduced constitutional protections in some, but not all, contexts. See Turner v. Safley, 482 U.S. 78 (2009) (applying a standard less than strict scrutiny to free speech and right to marry claims); Pickering v. Bd. of Education, 391 U.S. 563 (1968) (applying lower standard to government employee free speech claims). But see Johnson v. California, 543 U.S. 499 (2005) (holding that strict scrutiny applies to equal protection claim based on racial segregation in California prisons).

261 726 F.2d 459, 471 (9th Cir. 1983).

262 See id. at 462.

263 The Ninth Circuit found that the city applied a double standard, rigorously scrutinizing female candidates, but letting male officers who engaged in the same conduct off the hook. See id. at 468.

264 See id. at 462.

265 See id. at 469-70 & n. 9.
ments, procreation and marriage. Unlike in Sterling, where the government failed to proffer a justification for the privacy invasion, in Thorne, the city prefaced its questionnaire with the claim that it was asking about sex because "psychological sexual problems . . . may form the basis of a deviancy that could materially affect one's ability to properly function as an employee of a law enforcement agency."268 The Ninth Circuit was not persuaded, finding the questions poorly tailored to discover job-related "deviancies."269 In particular, the court was disturbed by the sweeping, standardless discretion that city employees enjoyed in probing applicants' private sexual matters.270 "The City set no standards, guidelines, definitions or limitations, other than the polygraph examiner's own personal opinion, as to what might be relevant to job performance in a particular case."271 The absolute authority of the opinions of Deputies Lanni and Bell in determining authentic Gay Identity warranting admission to K6G is a striking parallel to the logic of this holding.

Shuman v. City of Philadelphia,272 which involved a married male police officer who refused to answer his employer's questions about his affair with an 18-year-old woman, tracks Thorne's rationale and outcome in important respects.273 The policy was similarly standardless, permitting the state to inquire into any matters a particular officer thought immoral,274 and the "tenuous relationship" between Shuman's sexual activity and his job

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267 Id. at 469.
268 Id.
269 See id. at 469-71 (stating that city failed to "introduce evidence that would show that appellant's affair with a police officer before becoming a police officer, herself, affected or could potentially affect her job performance"). The court also found that the questions about an abortion were "totally irrelevant to 'on-the-job-sex.'" Id.
270 See id. at 470 (stating that the "questioning in the area of sexual activity was not regulated in any way. [The examiner] was given free reign to inquire into any area he chose."); see also Nelson v. Nat'l Aeronautics & Space Admin., 530 F.3d 865, 881 (9th Cir. 2008) (deeming government questionnaire soliciting adverse information about employees with broad, vague inquiries insufficiently tailored in light of the right to privacy).
271 Id. at 470.
273 In response to complaints from the young woman's mother, the internal affairs bureau monitored the couple 24 hours a day for about forty days and ultimately tried to force Shuman to answer questions about the relationship. See id. at 452-54.
274 See id. at 455 (stating that "'act of moral turpitude' is not defined anywhere . . . and largely depends upon the personal standards of the particular police commissioner").
performance manifested that the policy was not “narrowly tailored.”[^275]

Further, in finding a constitutional violation, the court cross-referenced cases in which other private information could be susceptible to government abuse, including homosexuality and abortion.[^276]

A final case, *Eastwood v. Department of Corrections*,[^277] is noteworthy because the court characterized the state’s claim that its questions were relevant as resting on stereotype. The case centered on a sexual harassment investigation gone awry. Karen Eastwood, an employee of the Oklahoma department of corrections, told her employer that a fellow employee drugged and sexually assaulted her after a training session.[^278] The employer, however, seemed more interested in investigating Eastwood’s sexual past and protecting the apparent perpetrator. Eastwood alleged that the investigator “forced her to reveal facts about her sexual history” and seemingly incorporated that “embarrassing” information into a campaign of harassment.[^279] The employer considered Eastwood’s sexual history relevant, inferring that if she were sexually experienced, her complaint was likely baseless.[^280] But the Tenth Circuit rejected this line of reasoning as “antiquated.” “[E]veryone has the right to refuse a sexual advance,” it concluded, not just the “sexually innocent.”[^281] *Eastwood* is instructive in that it suggests that the fact that jail officials might genuinely believe that gay culture is relevant to victimization is not dispositive. A court must independently assess the connection between the asserted state interest and the intrusive questions said to advance it.[^282]

A final issue concerns the extent of the intrusion required to show a constitutional violation. In none of these cases did the government literally compel the plaintiff to confess private information. In *Sterling*, Wayman could have taken his chances and hoped that Wilinsky did not out him, and in the government employee cases, the plaintiffs had the option of remaining silent and resigning. Yet the courts recognized that the governmental

[^275]: See id. at 460.
[^276]: See id. at 460 n. 8 & 461.
[^277]: 846 F.2d 627 (10th Cir. 1988).
[^278]: See id. at 629.
[^279]: See id.
[^280]: See id. at 631 n. 2.
[^281]: Id.
[^282]: See id. at 631 (finding that “there exists little correlation between plaintiff’s sexual history and whether she fabricated the story of being sexually molested”).
coercion brought to bear on the right to privacy imposed a substantial burden, and this was sufficient. These precedents suggest that the questioning in the K6G screening process can cross the constitutional line simply by threatening inmates with a substantial deprivation, such as protection from sexual assault.

B. Profound Consequences of Coming Out

Although the K6G screening process may independently violate the right to privacy based on the above reasoning, the nature of the constitutional question is sharpened by considering the life-changing effects that may flow from coming out. Coming out entails not just divulging one’s private sexual practices or desires, frightening enough in the context of jail, but it entails the possibility of radically altering one’s life trajectory. For men of color, coming out also has racial implications. Because gay identity has often been constructed as white, and some voices in communities of color have sought to disown homosexuality, a black man who comes out as gay may be seen as less authentically black or even anti-black. Coming out thus belongs in the small set of highly consequential


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

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

286 See generally Carbado, supra note 137 (critiquing exclusion of people of color in gay rights campaign against military’s “Don’t Ask, Don’t Tell” policy); Bérubé, supra note 146, at 234 (revealing whiteness of dominant gay community); Robinson, Racing the Closet, supra note 14, at 1509-10 (discussing how white men have dominated gay imagery in the media).


288 A common narrative in black popular culture is that black men who have sex with men, especially those who sleep with men and women, are harming the black community. Such men are
personal decisions, such as the decision to terminate a pregnancy, the right to control the upbringing of one’s child, and the right to marry.

C. Unique Characteristics of Coming Out for Men of Color

When the term “coming out” is used in the sexual orientation context, it is typically affixed to the word “gay.” Rarely does one hear about a person coming out as bisexual or some other non-heterosexual identity. This is curious because surveys show that bisexuality is as common as or more common than homosexuality. In discussing coming out and arguing that the decision to come out is of constitutional dimension, I wish to sever it from two common assumptions: (1) The belief that the person coming out is coming into Gay Identity or a “gay lifestyle.” We should understand that one can come out as a wide variety of non-gay sexual identities, some of which explicitly reject key tenets of Gay Identity. (2) The assumption that the only responsible way to manage sexual identity is to come out. According to the conventional narrative, coming out signals linear progress in one’s identity development and acclimating to healthy norms such as practicing safe sex and shedding internalized homophobia. These colorblind assumptions often rest on the experiences of white, affluent males and fail to consider intersecting oppressions, such as the reality that many MSM of color are deeply committed to racial communities and their own racial identities and that assimilating to white Gay norms may alienate them from race-based sources of sustenance. Although many MSM struggle with

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292 Increasingly, people seem to be using coming out to explain a wide array of non-sexual, potentially stigmatizing disclosures, such as coming out as a Republican in legal academia.
293 See Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 Stan. L. Rev. 353, 377-85 (2000) (reviewing studies of self-reports of sexual desire and concluding that “the incidence of bisexuality was greater than or comparable to the incidence of homosexuality” (emphasis omitted)).
294 Cf. Lawrence, 539 U.S. at 578 (noting that case involved “sexual practices common to a homosexual lifestyle”).
Gay Identity, men of color are particularly in need of space to cultivate sexual identities that do not mimic the dominant identity. These alternative sexual identities should be respected in law and in society, instead of being read as simply another way of saying “gay” or as an evasive cover for a uniform Gay identity. They should certainly not be a barrier to protection from discrimination and sexual assault, as is the case with K6G. Thus, as courts recognize the importance of coming out, they should also recognize that a man should have the freedom to define his sexual identity in terms that diverge from the Gay mainstream.

Fortunately, there are a few seeds of this flexibility in the Court’s privacy jurisprudence. The Court has recognized a “freedom to marry or not marry.” On several occasions, it has expressed concerns about state efforts to “standardize” its citizens, by homogenizing children through the public schools or enforcing a fixed family structure on all people. Of course, there are other opinions that show little concern for a right not to conform, and the Court’s privacy cases are hardly a model of clarity. Still, Justice Brennan’s warnings about a “pinched” conception of family should also apply to coming out: the Court can adopt a broad enough understanding to allow diverse forms of sexual identity. It need not write into law the dominant white model. “‘Liberty’ must include the freedom not to conform.” Generally, the Court has recognized that it is for a woman to

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296 For example, an interviewer asked a black community organizer who coined the term “same gender loving” for black sexual minorities whether it was “self-degrading” for him not to “admit to being gay.” http://chumaspirtmagazine.typepad.com/chuma_spirit_magazine/2007/10/in-touch-with-c.html#more (as visited on Sep. 11, 2008). But see Ritch Savin-Williams, Refusing and Resisting Sexual Identity Labels, in ADOLESCENT IDENTITIES, at 67, 74 (Deborah L. Browning, ed., 2007) (“[I]t’s possible not to identify oneself sexually and still embrace one’s sexuality.”).

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


300 See generally Rubenfeld, supra note 140 (demonstrating problems in Court’s use of personhood as a basis for privacy rights).

301 See id. at 141, 145 (Brennan, J., dissenting) (“We are an not an assimilative, homogenous society, but a facilitative, pluralistic one”).

302 See id. at 141.
decide whether to become a mother and also what kind of mother she wants to be.\textsuperscript{303} The same flexibility that applies to the right to be a parent—the right to define one’s own performance of the parental role—should apply to the right to decide whether to come out.\textsuperscript{304} As Jed Rubenfeld has suggested, the state should not be able to standardize sexual identity.\textsuperscript{305} I argue that this principle should apply not simply to state efforts to make gay men identify as straight, but also to state efforts to make MSM identify as gay.

A government mandate to conform to Gay Identity, such as the K6G policy, ignores research findings that suggest that there is a substantial community of non-gay sexual minorities, one which numerically, but not culturally, dwarfs the Gay community.\textsuperscript{306} A recent study by William Mosher asked a nationally representative sample of men and women: “Do you think of yourself as heterosexual, homosexual, bisexual, or something else?”\textsuperscript{307} While 2.3% of men identified as homosexual, a larger group, 3.9%, chose “something else.”\textsuperscript{308} An additional 1.8 percent identified as bisexual, and the same percentage did not answer the question.\textsuperscript{309} "Something else" was particularly popular among men of color. The authors concluded that “[i]t is noteworthy that 7.3 percent of Hispanic or Latino men, and 7.5 percent of black men, reported that their sexual orientation was ‘something else,’ and another 3-4 percent of each group did not report an answer to the question.”\textsuperscript{310} Similarly, a Department of Justice survey found that inmates were just as likely to identify as “other” as they were to identify as “homosexual,” and nearly three times as many inmates identified as bisexual.\textsuperscript{311}

People who reject gay identity and fall into the “something else” camp have developed a variety of little-known names that signify a departure from

\textsuperscript{303} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (joint opinion); Pierce, 268 U.S. at 510, 535 (holding that parent has right to decide how to educate her child).
\textsuperscript{304} Of course there are limits to this individual freedom. One cannot define parent in a way that involves abusing or neglecting her kids and expect to retain her rights.
\textsuperscript{305} See Rubenfeld, supra note 140, at 793, 799-800 (identifying the harm of laws that “harness us to a given seat and direct us down a single, regulated road”).
\textsuperscript{306} See, e.g., Savin-Williams, supra note 111, at 41 (“The majority of individuals attracted to their own sex or engaging in same-sex sexual behavior do not identify as gay.”).
\textsuperscript{307} See Mosher, supra note 189.
\textsuperscript{308} See id.
\textsuperscript{309} See id.
\textsuperscript{310} Id.
\textsuperscript{311} See Local Jails, supra note 8, at 6.
the Gay mainstream. Some are race-based. For instance, community organizer Cleo Manago coined the term “same gender loving” in order to shed the whiteness of the label “gay” and provide an identity for black men. Unlike the view that being gay is all about sex, “same gender loving” places “love” at its core. Others reflect generational changes that are threatening Gay institutions such as the gay bar and enclave. Ritch Savin-Williams has documented the tendency of young men and women of various races to reject the sexual binary as well as labels established by their forbearers and adopt new labels such as “sexual.” He argues that “any idea that adolescent same-sex sexuality is all the same, or that it has predetermined developmental trajectories and consequences, is belied by the life narratives of contemporary teenagers. . . . The notion of there being a single gay identity or lifestyle is, in short, absurd, especially to adolescents.” Some new terms reflect a sense of a fluid identity that goes beyond just having sex with men: “questioning,” “sexual,” “bicurious.” Some assert a heightened commitment to masculinity and rejection of the notion that men who have sex with men are necessarily effeminate and weak: “DL” or “down low,” “homothug,” “g0y.” The Court’s recognition that

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312 See Interview with Cleo Manago, http://chumaspiritmagazine.typepad.com/chuma_spirit_magazine/2007/10/in-touch-with-c.html#more (as visited on Sep. 11, 2008) (“The term SGL or same-gender-loving was created from the Black community to provide SGL Black folks with a way of referencing ourselves that articulated and highlighted ‘loving’ as our intention. That we do and can love needed (and needs) to be noted.”). Manago has helped create organizations in Los Angeles and New York that are deliberately based in black and brown communities and committed to sexual equality but open to whites and heterosexuals too. See http://www.bmsxvn.org/ (last visited January 27, 2010) (“Same gender loving and bi sexual brothers and their allies are invited.”).


314 Savin-Williams, supra note 296, at 85 (“Sexual diversity is becoming normalized, and the gay-straight divide is becoming blurred.”).

315 Id. at 76.

316 A number of LGBT organizations, mostly younger, grass-roots groups, have added “Q” to the LGBT acronym. See LGBT, Wikipedia, http://en.wikipedia.org/wiki/LGBT#cite_note-In-Between_Bodies-6 (last visited January 27, 2010) (cataloguing variants of “LGBT”).

317 See Savin-Williams, supra note 296, at 76.

318 See http://www.facebook.com/event.php?eid=55015910340&ref=mf (facebook page for the Bisexual and Bi-Curious Men’s Group, a Boston-based discussion group “for men who are bisexual or think that they might be”) (last visited January 27, 2010).


320 See ASANTE KAHARI, HOMO THUG (2004).
importance to the individual is a touchstone for the right to privacy, discussed below, suggests that the Court should respect that some MSM feel strongly enough about Gay Identity that they have developed new identities and groups, as documented on the internet and elsewhere, to chart their departure from the gay mainstream.

D. Putting the Precedent Together: The Case for Privacy in K6G

Eisenstadt v. Baird marked a turning point in the Supreme Court's privacy jurisprudence. Earlier decisions had tethered the right to privacy to tradition, protecting conservative institutions such as marriage and childrearing. In Griswold v. Connecticut, the Court held that the state could not bar a married couple from using contraception, but suggested that states could criminalize fornication and adultery consistent with the Constitution. Seven years later, however, Eisenstadt broke ranks by articulating a more capacious understanding of the privacy right: “If the right of privacy means anything,” Justice Brennan declared, “it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” In place of tradition, Eisenstadt installed the importance to the individual (as opposed to a couple) as the primary baseline for determining privacy rights. Eisenstadt thus opened the door for Roe v. Wade’s recognition of the right to terminate a pregnancy, which derives from “the right of a woman to make certain fundamental decisions affecting her destiny.” In reaffirming Roe’s “central holding,” the joint opinion in Planned Parenthood v. Casey stated:

321 See http://www.g0ys.org/ (last visited January 27, 2010) (“The Movement for Guys who feel deep affection for other guys, —but do NOT relate to the term ‘GAY’”).
322 405 U.S. 438 (1972); see also Tribe, supra at note 259.
323 See e.g., Griswold v. Connecticut, 381 U.S. 479 (1965).
324 See id.
325 Eisenstadt, 405 U.S. 438.
326 See Eisenstadt, 405 U.S. 438 (defining core of right to privacy as matters “fundamentally affecting a person”). But see Michael H. v. Gerald D, 491 U.S. 110 (1989) (plurality opinion) (defining privacy rights based on a specific and narrow definition of tradition). At present, it appears that five Justices adhere to Justice Kennedy’s view that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” Lawrence, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (KENNEDY, J., concurring)).
327 Lawrence, 539 U.S. at 565.
These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.\textsuperscript{329}

\textit{Lawrence} extended this reasoning, citing the \textit{Casey} passage above and adding: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."\textsuperscript{330} Justice Kennedy focused on the connection between sexual acts and personal autonomy.\textsuperscript{331} Sodomy statutes, he explained, offend the Constitution by "seek[ing] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."\textsuperscript{332}

Coming out—or deciding not to come out—qualifies as a personal decision "fundamentally affecting a person"\textsuperscript{333} in that coming out can both expose a man to greater discrimination and increase his opportunities for romantic and personal fulfillment. While gay rights advocates and scholars have championed coming out as a celebratory rite of passage that every gay person must pass through, few have sufficiently acknowledged that it carries

\textsuperscript{329} Id. at 851.

\textsuperscript{330} Id. at 574. Some scholars have worried that \textit{Lawrence} re-situates the right in the couple because of the Court's several references to relationships. See, e.g., Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004) ("[T]he Court in \textit{Lawrence} relies on a narrow version of liberty that is both geographized and domesticated . . . \textit{Lawrence} both echoes and reinforces a pull toward domesticity in gay and lesbian organizing."). However, limiting \textit{Lawrence}'s holding to those in committed relationships would be at war with the facts of the case. See Dale Carpenter, The Unknown Past of Lawrence, 102 Mich. L. REV. 1464, 1478 (2004) (revealing that case involved turbulent love triangle with racial overtones). More importantly, I find persuasive Laurence Tribe's argument that, even if the Court is concerned only with committed relationships, it must protect individual sexual encounters because they could eventually lead to long-term relationships. See Laurence H. Tribe, Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name, 117 HARV. L. REV. 1893, 1941 (2004).

\textsuperscript{331} See \textit{Lawrence}, 539 U.S. at 567 ("To say that the issue in \textit{Bowers} was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

\textsuperscript{332} Id.

\textsuperscript{333} 405 U.S. 438.
significant costs as well as benefits. The double-edged nature of this choice betrays its complexity and argues for reserving it to the individual.

Coming out generally increases sexual and romantic opportunity in that it permits open affiliation with other gay men and gay spaces where one may meet potential partners. Men who seek sex while closeted may limit their activity to anonymous internet profiles or clandestine sexual outlets, such as restrooms, public parks and adult book stores. Closeted men who attempt to date or maintain committed relationships may find they are constantly worried about being spotted in public. This is especially likely if the closeted man dates a man who bears more marks of being gay than he does, such as being effeminate or displaying gay fashion sensibilities. For these reasons, it is not uncommon for closeted men to avoid meeting a man in public or at least to restrict his romantic partners to those who are not recognizable as gay. These restrictions significantly decrease the odds that such a man will be able to sustain a long-term relationship with another man. To the extent that he attempts to date a man who is out, the out partner may not accept restrictions on his freedom. He may resent that the partners cannot live together as a couple, that he either cannot meet his partner’s family and friends or must be introduced as a “friend” rather than boyfriend. This tension is enhanced by the widespread belief that men who are not out are self-hating cowards and that a gay man who dates such a man is compromising a central tenet of Gay Identity.

334 See, e.g., SHILTS, supra note 294, at 276-77 (quoting speech by Harvey Milk celebrating coming out as necessary for achieving equal rights). Shilts also portrays gay enclaves as sites of freedom and shelter from homophobia. See, e.g., id. at 160 (claiming that most men in the Castro did not live there by choice, but were driven there by homophobia).

335 See Thomas C. Mills et al., Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in “Gay Ghettos” with Those Living Elsewhere, 91 Am. J. Pub. Health 980, 981 (2001) (finding that MSM who reside in gay enclaves are more likely to be out and to have a domestic partner).


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

338 See SHILTS, supra note 294, at 216 (describing coming out for gays as analogous to becoming born again for Christians)
Coming out also makes it easier for a gay man to have children and form a family unit. It is challenging for a closeted man who is attracted only to men to have a child without disclosing his sexual orientation. Consider Puerto Rican singer Ricky Martin. He had long been rumored to be gay and at times refused to answer questions about his sexual orientation, yet many thought any lingering doubt was resolved when he announced that he had had a child through surrogacy.\textsuperscript{339} The argument is as follows: Why would a handsome, heterosexual man go through the trouble of procuring a surrogate instead of having a child with one of the many single and willing women? Thus, coming out increases the likelihood that a man will engage in life experiences that the Court has deemed fundamental: marriage (or a marriage-like relationship) and parenthood.\textsuperscript{340}

Although coming out creates important new possibilities, it also enables people to inscribe multiple stereotypes upon the speaker’s identity and potentially exposes him to violence. There are various ways in which a man becomes more visible as gay when he comes out. Whereas he may have steadfastly eschewed gay culture while closeted, coming out may give him permission to adopt and display the traits widely associated with gay men, such as effeminacy and fashion consciousness.\textsuperscript{341} Further, even if he does not display these traits—which is certainly the case with many gay men—he is more likely to be found in the company of men who themselves are identifiable as gay. People tend to assume that men who closely associate with gay men are themselves gay, and that two men who spend considerable time alone outside of narrowly defined masculine spaces (e.g., sports events, straight bars) are likely to be gay.\textsuperscript{342}

Several examples from news account of hate crimes illustrate how coming out, or merely being found in gay spaces, increases one’s exposure to

\textsuperscript{339} See http://www.people.com/people/article/0,,20220372,00.html (reporting Martin’s paternity). In the same vein, singer Clay Aiken’s announcement that he impregnated a close friend through ratification insemination was widely regarded as another marker of his gay identity. See http://www.people.com/people/article/0,,20203048,00.html. Of course a man could also become a father by donating to a sperm bank or sleeping with a woman, but these modes offer distinct trajectories—and likely diminished relationships with his children—than having a child alone or with a male partner, since the father would either have no parental rights or share rights with the mother.

\textsuperscript{340} This is not to say that every man should want to partake in these experiences. Deciding whether or not to marry or have kids is, like coming out, ultimately an intensely personal decision.

\textsuperscript{341} See infra Part IV.

homophobia. In 2007, a rash of hate crimes occurred in Capital Hill, Seattle’s main gay enclave, rattling residents who considered it a safe space.\textsuperscript{343} In several of the reported attacks, the assailant asked the target about his sexual orientation before attacking.\textsuperscript{344} Three gay men in a car at a fast food drive-through were confronted by a man who asked “Are you guys queer?” while brandishing a knife.\textsuperscript{345} The men avoided an attack by saying “no.”\textsuperscript{346} In another incident, the target was attacked while wearing a shirt that announced “Queer” on the front and back.\textsuperscript{347}

A report by gay rights group Human Rights Campaign (HRC) detailed similar incidents across the country. In Santa Rosa, California, a man shot out the window of a car that displayed gay pride stickers.\textsuperscript{348} An Illinois State University student was called a “queer” and punched in the face on his walk home. The assailant apparently targeted the straight-identified victim because he was wearing a “shiny rayon shirt that is popular among some gay men in the area.”\textsuperscript{349} These incidents reveal a paradox. While people flock to gay enclaves to insulate themselves from homophobia and express themselves more freely, they might simultaneously make themselves more vulnerable to attack through congregating in gay spaces and marking themselves with gay slogans and clothing. The same phenomenon occurs in K6G, where inmates are at once protected and made an easily-identifiable target for discrimination and hostility from staff and other inmates in the general population.

Another form of homophobia emanates not just from bigots but from many people who are gay and/or consider themselves to be “gay friendly.” As I described in detail in Part IV, many people—whether pro-gay or anti-gay—assume that a man who comes out is living a “gay lifestyle.” This is often thought to entail sex with multiple partners, the absence of childcare obligations, and ample discretionary income for nightlife, shopping and


\textsuperscript{344} See id.

\textsuperscript{345} See id.

\textsuperscript{346} See id.; see also id. (reporting similar incident that resulted in man who identified as gay receiving a “bloody nose, cuts to his chin and forearm, and two black eyes”).

\textsuperscript{347} See id.


\textsuperscript{349} See id. at 21.
travel.\textsuperscript{350} Therefore, a gay man is likely to be treated differently after he comes out, and to the extent that he rejects such stereotypes, he may spend considerable time rebutting the misconceptions of people with whom he interacts.\textsuperscript{351} He may have difficulty searching for a community of queer and straight people who do not view him through the hegemonic lens of Gay Identity.

Finally, even if such a man lived in a bubble of complete acceptance and the absence of stereotyping, he might still grapple with tremendous interpersonal obstacles to coming out. Common impediments to coming out are beliefs about religion and gender. For example, many men have been raised to believe that homosexuality is an “abomination,” and that acting on their desires would damn them to hell.\textsuperscript{352} Men who reject that notion but are religious may still find the characterization of Gay Identity as promiscuous to be alienating and offensive. Further, for many men, coming out as gay would undermine their personal sense of masculinity, which for some is a central organizing principle.\textsuperscript{353} As a result of these momentous effects, I argue that Los Angeles’ decision to make coming out the linchpin for access to the K6G unit raises a potential intrusion into a constitutionally protected, private domain.\textsuperscript{354}

\textsuperscript{350} See supra Part IV.


\textsuperscript{352} Cf. Lawrence, 539 U.S. at 571 (noting that “religious beliefs” have contributed to “powerful voices to condemn homosexual conduct as immoral”).

\textsuperscript{353} See, e.g., Robinson, Racing the Closet, supra note14, at 1477.

\textsuperscript{354} Other costs of coming out flow from hierarchies within the gay community, which range from race, gender performance, disability, age and class to body type and physical attractiveness. The conventional narrative is that coming out produces liberation and self-empowerment, feeling normal rather than “deviant,” and finding a place in a community of likeminded people. Although this narrative holds true for some gay men, these accounts tend to overlook various forms of exclusion and hierarchy that operate among gay men and within the coalition that is “LGBT.” The word “gay community” might be better understood as an aspiration, rather than a reality, at least from the vantage point of many men of color and working class or poor men. Further, insufficient attention has been paid to the ways in which out gay men are unsatisfied with the dominant gay culture. A rare study that considered this issue found that MSM who lived in enclaves and were significantly more involved with gay organizations reported the same level of community alienation as MSM who did not live in a gay enclave. See Mills et al., supra note 335, at 981. (Of course life as a straight-identified man entails various hierarchies as well.)
E. A Personal Decision

An examination of norms in LA County Men’s Jail reveals similar double-edged dynamics of coming out. Perhaps the most challenging aspect of the K6G screening policy is that it both empowers men who want to be out while incarcerated, and burdens those who would prefer not to disclose their sexual conduct. Men who were out before being incarcerated might find it quite difficult to cover their sexuality while in jail. For these men, an additional consequence of incarceration is that they must hide their identities or risk being exposed to sexual violence. For some men, hiding their sexual orientation or “butching up” their gender performance to ward off impressions that they are gay may not be a realistic option. Although an effeminate man might be able to pull this off for an evening or a day, inmates in jail are under constant surveillance by other inmates, deputies and staff. Many men are housed in so-called dorms, where as many as 110 men live in a single room filled with stacks of bunk beds and open bathrooms and showers. As such, they lack private space within which they can drop the mask and be themselves.

On the other hand, there are certainly men who were not out about their sexuality while on the outside and are disinclined to come out while in jail. Studies suggest that black and brown men are particularly likely to fall into this camp. The K6G unit’s offer of protection, however, might tempt such men to come out and burden those who fail to come out. The K6G policy turns on coming out in at least three respects: it requires coming out before incarceration, in order to develop community knowledge and ties necessary to verify Gay Identity; during incarceration, through screening and identification processes; and after incarceration, when the inmate matriculates into prison or is released.

First, as a threshold matter, inmates must come out to an intake officer in order to be considered for the K6G unit. This process typically takes place in a large room where many new inmates are being processed. An inmate might reasonably be perplexed by the “Are you a homosexual?” question—which is provided shorn of context, with no information about the existence of a unit for gay and trans inmates or the reasons why being openly gay might make one vulnerable in the general population. This process assumes that inmates trust law enforcement with sensitive personal information, which seems rather unlikely given the context. Black and

355 See infra text accompanying note 371.
brown men are especially likely to have had negative experiences with law enforcement and to view their sexual practices as nobody's business.356

Although the conversation between the intake officer and the inmate is one-on-one, it is possible that other inmates may overhear the conversation.357 Once an inmate self-identifies as homosexual, he is assigned to a certain area of the intake facility, which further signals his difference from inmates destined for the general population.358 If self-identification were sufficient to guarantee access to the K6G unit and K6G inmates were completely insulated from the general population, this marking might not be worrisome. But that is not the case. Inmates who self-identify, but ultimately flunk the jail’s gaydar test may experience heightened vulnerability in the general population precisely because of the governmentally-elicited disclosure of sexual identity.359 Further, K6G inmates interact with the general population from time to time, while walking down the hall on the way to class, for example. Their powder blue uniforms make clear what the inmate’s demeanor might not reveal. Although the K6G deputys argue that the special color makes it easy for jail staff to identify gay and trans inmates in order to protect them from general population inmates,360 there are reports that jail staff are more likely to harass K6G inmates than general population inmates.361 Several people who work in the jail reported incidents in which staff harassed K6G inmates, calling them “faggots” and feminizing insults such as “bitch.”362 They also recounted a recent incident in which staff ordered transgender K6G inmates to line up against a wall,

356 See supra note 371.

357 See Lanni Interview, supra note 8, at 2.

358 See id.

359 See Interview #7, transcript on file with author (statement by person who works in K6G recounting incident he witnessed).

360 See Interview #1, supra note 108. One might ask why this is necessary. If staff observe one inmate harassing another, why should the color of the uniform determine whether or how the staff intervenes? The assumption, once again, appears to be that gay inmates are inherent victims and general population inmates are invariably perpetrators.

361 See id., (suggesting that staff pose greater threat to K6G inmates than general population inmates); Interview #7, supra note 354; cf. also Alurid, supra note 148, at 87, 89 (finding that 90% of inmates in special unit for gay and bisexual inmates in unnamed large city jail indicated that staff are more disrespectful than straight inmates); Rubenfeld, supra note 140, 777 (stating that “invidious sexual identification” is “often conducted in the name of helping the group at issue”).

362 See Interview #7, supra note 354. In general, “law enforcement remains a notoriously homophobic occupation.” Sklansky, supra note 6, at 932.
strip naked and bend over so the staff could ridicule them. Thus, the labeling of K6G inmates may simultaneously grant them special protections and expose them to specific forms of discrimination.

Moreover, the protections of K6G may be short-lived and ultimately overwhelmed by long-term consequences of coming out. Once one has come out, he often cannot control where the news travels. The average stay in K6G is around 40 days. Many inmates are ultimately convicted of felonies and sentenced to time in a state penitentiary. California prisons lack special units for gay and trans inmates. Thus, the inmate who came out in order to gain admission to K6G will have to fend for himself when thrust into a state prison with inmates who remember him as a K6G inmate. Adverse consequences may also follow the inmate when he is ultimately released from jail or prison. Because the majority of the people that Los Angeles incarcerates come from a subset of black and brown poor neighborhoods, it is quite likely that a K6G inmate will interact with people who overlapped with his period of incarceration and now know that he identified as gay.

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

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363 See id.
364 See id.; see also Interview #5, supra note 62 (statement by person who works in San Francisco jail noting challenges of inmates trying to keep life inside jail separate from life on outside).
365 The deputies describe their questions as a “totality of the factors” test. They have admitted men who claimed to be closeted when they were convinced that they were not heterosexual or bisexual. But when inmates cannot provide names and numbers, this determination seems to rest ultimately on the two officers’ personal intuition.
366 See Lanni Interview, supra note 8 (stating that he looks for proof that inmate led a “gay lifestyle” outside of jail).
F. Racial Impact

The deputies adhere to an essentialist conception of gay identity—something which is present at birth, which reveals itself to one’s mother before the son even comes out, and which makes sex with women extremely unlikely.\(^{367}\) Several studies of MSM in the public health context make clear that the K6G preference for inmates who are out, do not sleep with women and are immersed in gay enclaves visits a special burden on black and Latino inmates. To begin, Black and Latino MSM are less likely to identify as gay than white MSM and more likely to reject conventional sexual identity categories.\(^{368}\) The Mosher survey found that “something else” was much more popular among men of color.\(^{369}\) The authors concluded that “[i]t is noteworthy that 7.3 percent of Hispanic or Latino men, and 7.5 percent of black men, reported that their sexual orientation was ‘something else,’ and another 3-4 percent of each group did not report an answer to the question.”\(^{370}\) Black and Latino men are also less likely to be out about their sexuality in the conventional sense.\(^{371}\) In addition, studies show that black men and Latino men are more likely than white men to report having had sex with both men and women.\(^{372}\) Under the K6G test, this would make a man presumptively bisexual, and excludable, unless he can prove that he is a closeted gay man. Since there really is no way to prove this fact, the

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367 See id. at 14-15 (indicating that presence of female lover disqualifies men for K6G); id. at 17 (“Most of the guys who are gay knew at a very young age.”).

368 See, e.g., Gregorio A. Millett et al., Explaining Disparities in HIV Infection Among Black and White Men Who Have Sex with Men: A Meta-Analysis of HIV Risk Behaviors, 21 AIDS 2083, 2084 (2007) (“Data from several studies overwhelmingly supported the assertion that Black MSM are less likely than White MSM to identify as gay.”).

369 See text accompanying notes note 310.

370 See Mosher, supra note 189.


372 See, e.g., Gary Goldbaum et al., Differences in Risk Behavior and Sources of AIDS Information Among Gay, Bisexual, and Straight-Identified Men Who Have Sex with Men, 2 AIDS & BEHAV. 13, 16 (1998) (finding that black men at MSM public sex venues were more likely to identify as bisexual or straight than white men); Gregorio Millett et al., Focusing “Down Low”?: Bisexual Black Men, HIV Risk and Heterosexual Transmission, J. NAT’L MED. ASS’N, July 2005, at 52S, 53S (“Studies clearly show that black MSM are more likely than MSM of other races and ethnicities to identify themselves as bisexual and to be sexually active.”); Montgomery et al., supra note 29, at 831 (reporting that the following percentages of HIV-positive MSM reported sex with women in the last five years: 34% black, 26% Hispanic, 19% Asian/Pacific Islander, 13% American Indian/Alaska Native, and 13% white).
decision falls to the individual deputy’s intuition, a standardless, subjective method disfavored by courts in right to privacy cases.\textsuperscript{373} Studies indicate that black and Latino men are less likely to feel connected to the dominant gay community. They are less likely to live in gay enclaves,\textsuperscript{374} less likely to join gay-related organizations,\textsuperscript{375} and less likely to read gay media, a source for acquiring gay slang.\textsuperscript{376} At virtually every turn, the K6G test caters to white men and marginalizes blacks and Latinos.\textsuperscript{377}

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

Although the preceding cases provide a firm foundation for the claim that the right to privacy encompasses the decision whether to come out, the Supreme Court has established that prisoners do not necessarily retain all of the rights generally guaranteed to the people. Two principal Supreme Court cases structure the constitutional rights prisoners retain during incarceration: \textit{Turner v. Safley},\textsuperscript{378} and more recently, \textit{Johnson v. California}.\textsuperscript{379}

In \textit{Turner v. Safley},\textsuperscript{380} the Court assessed the constitutionality of legal restrictions on inmate-to-inmate correspondence and inmates’ ability to marry. The Court purported to apply a uniform constitutional standard to these restrictions, but its analysis and conclusions suggest otherwise.\textsuperscript{381} At the outset, it announced that the Eighth Circuit’s application of strict scrutiny was erroneous and that “a lesser standard of scrutiny is appropriate in determining the constitutionality of prison rules.”\textsuperscript{382} The case turned on the application of policies at the Renz Correctional Institution in Missouri. The Court majority upheld the first challenged regulation, concerning inmate-to-inmate mail, but invalidated the marriage regulation. The effect

\textsuperscript{373} See supra text accompanying note 274.

\textsuperscript{374} See Mills et al., supra note 331, at 981 (finding that MSM who reside in gay enclaves are more likely to be white, less likely to identify as bisexual than those who live elsewhere and have higher incomes than MSM who live elsewhere).

\textsuperscript{375} See Millett et al., supra note 366, at 1008.

\textsuperscript{376} See \textit{id.}; Mills, et al., supra note 331, at 980.

\textsuperscript{377} Despite these disparities, the Court requires a showing of intentional discrimination in order to make out a race-based equal protection claim. See, e.g., Washington v. Davis, 426 U.S. 229, 239. Consequently, it is unlikely that such an equal protection challenge would be successful.

\textsuperscript{378} 482 U.S. 78 (1987).

\textsuperscript{379} 543 U.S. 499 (2005).

\textsuperscript{380} 482 U.S. 78 (1987).

\textsuperscript{381} See \textit{Turner}, 482 U.S. at 81.

\textsuperscript{382} See \textit{id.}. 

of the Renz mail policy was that inmates generally could not correspond with inmates in other state facilities unless they were related or were corresponding regarding legal matters.\textsuperscript{383} The Court established that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."\textsuperscript{384}

Although this test initially appears to resemble the rational basis test, the lowest level of constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment, \textit{Turner} provides a meatier, more detailed articulation of its test than the Court has applied in traditional rational basis cases. First, the Court requires a "valid, rational connection" between the prison regulation and a "legitimate and neutral" government objective.\textsuperscript{385} A "second factor" is "whether there are alternative means of exercising the right that remain open to prison inmates."\textsuperscript{386} Third, the Court considers "the impact the accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."\textsuperscript{387} While it acknowledged that "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order," the Court noted that when recognizing a right would have a "significant ripple effect on other inmates and staff, courts must be particularly deferential."\textsuperscript{388} Finally, the court considers whether "obvious, easy alternatives" are available.\textsuperscript{389} When the Court can identify such alternatives, the challenged policy may be an "exaggerated response" to prison concerns.\textsuperscript{390} Although the Court looks into potential alternatives, it made clear that "[t]his is not a 'least restrictive alternative' test [a hallmark of strict scrutiny]. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at \textit{de minimis} cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."\textsuperscript{391}

\textsuperscript{383} \textit{See id.} at 81-2.
\textsuperscript{384} \textit{See id.}
\textsuperscript{385} \textit{Id.} at 89 (quoting \textit{Block v. Rutherford}, 468 U.S. 576, 586 (1984)).
\textsuperscript{386} \textit{Id.} at 90.
\textsuperscript{387} \textit{Id.}
\textsuperscript{388} \textit{Id.}
\textsuperscript{389} \textit{Id.}
\textsuperscript{390} \textit{Id.}
\textsuperscript{391} \textit{Id.} at 91.
Applying this test first to the mail regulation, the Court concluded that "the record clearly demonstrates that the regulation was reasonably related to legitimate security interests." The Court pointed to testimony by prison officials that "mail between inmates can be used to communicate escape plans and to arrange assaults and other violent acts," including among gang members that officials have intentionally separated. Further, the "limited" class of people subject to the regulation (communications to other inmates who were not related or providing legal advice), fact that it did not "deprive prisoners of all means of expression," and the potentially significant "ripple effect" of violence at various institutions supported the regulation's constitutionality. Although the prisoners argued that prison officials could screen inmate-to-inmate correspondence, the Court concluded that this alternative would be very costly and ineffective.

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

Although it noted that the policy's impact on non-inmate citizens might justify the application of strict scrutiny, the Court went on to apply the "reasonable relationship test" and found that, even under this standard, the marriage policy could not stand. The petitioners advanced security and rehabilitation justifications for their policy. Specifically, they argued that "love triangles" among inmates would lead to violent clashes. The Court

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392 Id. at 91.
393 Id. (citing record).
394 Id. at 92.
395 See id. at 93.
396 Id. at 94.
397 Id. at 95 ("Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.").
398 Id. at 97.
rejected this argument because (1) "nothing in the record suggest[s] that the marriage regulation was viewed as preventing such entanglements;" and (2) "[c]ommon sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles; surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one." Further, the Court found that there were "obvious, easy alternatives" that addressed any security concerns, such as a federal policy that allows marriage unless the warden finds the marriage would present a security threat. The asserted concern with inmate rehabilitation was similarly unpersuasive. The rehabilitation justification centered on female inmates, who were said to be vulnerable to abusive relationships with men. Yet the policy "swel[pt] much more broadly" than that, banning marriages by male inmates as well. In addition, the record evidence concerned female relationships with male inmates or ex-felons, which did not explain the ban on female inmates marrying men without criminal backgrounds. The Court found the policy to be both "lopsided" and overbroad in that only marriage requests by females were closely scrutinized, even though there was little evidence that most requests involved an abusive relationship. Although it affirmed prison authorities' right to regulate the time and circumstances of marriage ceremonies, the Court found that the marriage regulation was unconstitutional.

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

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399 Id. at 98.
400 Id.
401 See id. at 97.
402 Id. at 98-9.
403 See id. at 99.
404 In light of Justice O'Connor leading role in shaping the Court's gender equality jurisprudence, see, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), it seems likely that she viewed this justification as in tension with Equal Protection Clause principles. However, in light of the other problems with the policy, Justice O'Connor merely hinted at this additional ground, see Turner, 482 U.S. at 99 (noting that its "lopsided" criticism was "not necessary to the disposition of this case").
405 See id.
a heightened rationality analysis? The Court’s decision to call the test a “reasonable relationship” test, as well as its statement that it requires a “logical connection” that is “not arbitrary or irrational,” bring to mind the rational basis test. But in the end the Turner standard is more rigorous in that it requires the court to base its conclusions on actual evidence in the record, rather than mere conjecture, which has sufficed in many traditional rational basis cases. Moreover, the court must consider several detailed factors that typically play little or no role in rational basis cases. The Court considers whether the policy is a proportionate response to documented concerns or is an “exaggerated response.” A test requiring a mere “logical connection” would be “virtually meaningless,” like the rational basis test, but the Court’s careful parsing of the marriage regulation shows that it was applying a more stringent standard. Justice Stevens accused the majority of applying its standard inconsistently and characterized the disparate outcome as “striking and puzzling.” “When all the language about deference and security is set to one side, the Court’s erratic use of the record to affirm the Court of Appeals only partially may rest on an unarticulated assumption that the marital state is fundamentally different from the exchange of mail.”

Justice Stevens’ interpretation of the majority opinion is persuasive; that is, the majority appears to see one right (right to marry) as more weighty than the other (right to free speech).

The Court’s subsequent decision in Johnson v. California, in which Justice O’Connor again wrote the majority decision, adds support to the

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407 Turner, 482 U.S. at 89, 91.

408 See, e.g., id. at 91 (“The record clearly demonstrates that the regulation was reasonably related to legitimate security interests.”); id. at 98 (“We are aware of no place in the record where prison officials testified that such ready alternatives would not fully satisfy their security concerns.”); id. at 99 (“The rehabilitation concern appears from the record to have been centered almost exclusively on female inmates . . .”) (emphases added). It remains unclear, however, how much evidence Turner requires; the majority and dissent disagreed strongly on this question. See id. at 93 (arguing that Justice Stevens’s partial dissent misconstrues the majority’s standard).

409 Id. at 91.

410 Id. at 112-13 (Stevens, J., concurring in part and dissenting in part).

411 Id. at 100 (Stevens, J., concurring in part and dissenting in part).

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

413 543 U.S. 499 (2005).
context-specific interpretation of Turner. That is, the scrutiny the Court applies to a prison regulation now explicitly depends on the content of the asserted right. In Johnson, the Court reviewed the Ninth Circuit’s decision that a California prison policy imposing temporary racial segregation on new and transferred inmates was constitutional under the Turner standard.\footnote{Id. at 504-5.} The Supreme Court, however, held that the Ninth Circuit erred in applying Turner to Johnson’s suit.\footnote{Id. at 508.} It reiterated prior statements from affirmative action cases that “we... apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”\footnote{Johnson, 543 U.S. 499, 506 (2005) (internal quotation marks omitted) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).} The Court stated that “we have applied Turner’s reasonable relationship test only to rights that are ‘inconsistent with proper incarceration.’”\footnote{Id. at 510 (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).} Race, it announced, is different: “The right not to be discriminated against based on one’s race is not susceptible to the logic of Turner. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment’s ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system.”\footnote{Id. at 510-11.} The Court struggled to distinguish race discrimination from the long list of “fundamental rights” subjected to Turner: freedom of speech, association, access to court, due process, free exercise of religion and of course the right to marry.\footnote{See id.} Justice O’Connor suggested that allowing race discrimination would undermine the legitimacy of the entire justice system. But surely denying due process to prisoners or denying them access to court would cast doubt on the system’s legitimacy as well. Moreover, even as the Johnson majority singled out race-based policies as especially dangerous to the justice system, it refused to impose a complete ban on racial discrimination in prison. To the contrary, it authorized racial discrimination so long as it is supported by a “compelling justification,” as in all other Equal Protection race cases.\footnote{Id. at 515 (“Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts.”).} And it emphasized that the fact that strict scrutiny applies
“says nothing about the ultimate validity of any particular law” because "[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’" 421 It is ironic that in refusing to "undermine our ‘unceasing efforts to eradicate racial prejudice from our criminal justice system,’" the Court quoted McCleskey v. Kemp, which notoriously refused to remedy empirically documented racial prejudice in the administration of the death penalty. 422 If race discrimination is permissible in the distribution of death sentences, one might ask, why not in the distribution of prisoners to cells? Johnson thus carves out an exception from Turner for race, but fails convincingly to distinguish it from the right to marry, among other paramount constitutional rights.

Whether Johnson destabilized Turner’s attempt to curb prisoners’ rights or merely made explicit Turner’s suggestion that different standards apply to different rights, it creates an opening for advocates to press the Court to apply heightened scrutiny to newly recognized substantive due process rights. Even if one is not inclined to go that far, the decision to come out should be understood as related to the right to marry and thus subject to the same level of scrutiny applied in Turner, which appears to be some form of intermediate scrutiny or “rational basis with bite.” 423

The Court’s claim that the right to avoid racial discrimination “is not a right that need necessarily be compromised for the sake of proper prison administration” would seem to apply to sexual orientation and coming out as well. One can read Johnson to acknowledge that race and racial discrimination are not inherent, natural phenomena, but rather social constructions. Thus, prisons can be constructed so that government need not take race into account. Similarly, the concept of gay identity and its corollary of coming out are fairly recent constructions. 424 Just as the Court recognized the risk that the California race policy was reinforcing racial divisions, the K6G policy may perpetuate Gay Identity by promulgating the notion that gay and straight men are fundamentally different and by channeling MSM who would dissent from Gay Identity into the dominant identity. Like the race policy, the K6G policy is an outlier: few jails and prisons take sexual

421 Id. at 514-15 (quoting Adarand v. Pena, 515 U.S. 200 (1995)).
422 Id. at 512 (quoting McCleskey v. Kemp, 481 U.S. 279, 309 (1987)).
orientation into account in such a broad and rigid fashion.\textsuperscript{425} This may suggest that there are alternatives to the K6G policy that would adequately protect gay inmates. In the words of Johnson, the K6G policy may be an "exaggerated response" to the problem of managing sexual orientation in jail. In the end, a court need not follow Johnson in applying strict scrutiny in order to invalidate the K6G policy. Whether the state has a legitimate or important governmental interest in protecting vulnerable inmates or just inmates who are vulnerable on account of sexual orientation, the policy has a tenuous connection to that interest. The policy protects a mere fraction of MSM because it requires them to surmount various hurdles which have little or no connection to the state interest: (1) being out before incarceration; (2) willingness to come out during the intake process, in the absence of \textit{any} explanation as to why they should come out; (3) knowledge of curious information, including obscure slang and the details of bars and clubs; and (4) willingness to share personal information about one's coming out process with law enforcement officers and provide names and numbers of people who can verify one's sexual orientation. Moreover, the policy categorically excludes bisexuals from consideration, despite studies suggesting that they too are targeted for sexual assault based on sexual orientation.\textsuperscript{426} The policy goes astray in taking away from the individual an important personal decision, requiring disclosure of private sexual information, and encouraging identification with a race and class-based sexual identity.

VI. SOLUTIONS

The foregoing has argued that the K6G unit's screening policy pressures MSM inmates to come out and come \textit{into} a white and affluent gay identity. My critique has racial dimensions, in that Gay Identity has been constructed largely from the experiences of a small segment of affluent white men. My argument also extends beyond race. For example, there are

\textsuperscript{425} Cf. National Prison Rape Elimination Commission Report, at 8 ("The Commission also discourages the creation of specialized units for vulnerable groups and specifically prohibits housing prisoners based solely on their sexual orientation or gender identity because it can lead to demoralizing and dangerous labeling."), available at \url{http://www.cybercemetery.unt.edu/archive/nprec/20050820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF} (last visited February 2, 2010).

\textsuperscript{426} See supra text accompanying note 151.
white MSM who do not regularly attend clubs or affiliate with Gay Culture. There are white men who are poor or working class and cannot afford access to the clubs and bars that the jail seems to perceive as the home of all gay men.427

This Part explores some potential prescriptions for reforming the K6G unit. My focus in this brief discussion is more on providing a general overview of possibilities rather than mining the details of incarceration policies. To begin, we must recognize that the K6G unit rests on a troubling assumption: the government tolerates many types of violence and victimization in jail, while singling out for ostensible protection a handful of inmates based on Gay Identity or being perceived as transgender. Moreover, while many assume that violence is inevitable in incarceration settings because of the character of the people who are incarcerated, it seems at least as likely that government produces much sexual behavior, violent and non-violent, in establishing the architecture and conditions of a particular jail or prison. To take a basic example, it is now commonplace that there are some men who engage in sex with men in jail or prison who would not if they were not incarcerated and denied access to women.428 The governmental decision to separate male from female inmates and deny conjugal visits for spouses or other sexual partners predictably creates a demand for inmates who will play the feminine role in sex.429

This Article extends the emphasis of my recent scholarship on revealing structural influences on human interaction.430 This structural focus suggests that we should at least inquire as to whether the K6G decision makers have aimed at the wrong target. Perhaps rather than focusing on inmates and attempting to refine the deputies’ ability to spot MSM, the jail should turn

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

428 Some scholars have called this “situational homosexuality.” See, e.g., Kunzel, supra note 36.

429 In some cases, these policies may enhance the social status of groups vis-à-vis their status outside of prison or jail. In some incarceration settings, male inmates express a strong demand for trans women as sexual partners. This may result in trans women feeling that their gender identity receives greater respect in prison than elsewhere. See Interview #3. At the same time, these policies place heterosexual men and non-Gay MSM in a position they would most likely not encounter outside of prison—being forced to become another man’s “woman.”

its scrutiny inward and ask how its own structures—including the K6G screening process—promote violence and produce victims.

The K6G screening process scrutinizes inmates for signs of Gay Identity, which are used as a proxy for victim status and a need for protection. My analysis has suggested that, even as it screens inmates in order to identify likely victims, the jail creates other victims—including MSM and heterosexual inmates who are enticed by the jail’s promise of protection but fail its gaydar test and are sent to the general population, newly marked as gay-identified. Moreover, a system that essentially requires men in the general population to fend for themselves, whether they are heterosexual or non-Gay MSM, ignores much more victimization than it prevents because most of it does not align with the jail’s preferred identity categories, that is, Gay and trans (and only Gay and trans) = victim; straight = perpetrator.\textsuperscript{431} Note that non-Gay MSM do not even appear in this equation. In a perfect world, the jail would closely scrutinize all of its policies and also explore policies adopted in other jurisdictions that substantially reduce sexual assault by reforming the jail’s structures.\textsuperscript{432} For example, the perception that the risk of inmate-on-inmate assault in K6G is minimal may be because the jail subjects them to greater surveillance and takes greater care in assigning them to different dorms based on security level than it does with respect to the much-larger general population. Prison rape advocates have argued that prisons can substantially reduce sexual assault through measures such as these.\textsuperscript{433} Such reforms, of course, require two things in short supply: financial resources and political will. Thus, although I would strongly support them if I were a legislator, my analysis below assumes that large-scale reforms of LA County Jail are unlikely in the near future. This does not preclude moderate, yet important innovations.

In this section, I discuss some potential alternatives to the K6G policy and analyze each policy’s costs and benefits. First, many readers might be troubled primarily by the racial mismatch evident from the K6G test—it extracts a test from Gay Culture, which was shaped primarily by affluent whites, and then applies it to a mostly black, brown, and poor population.

\textsuperscript{431} The “soft” unit is a caveat to the above equation. However, the numbers of men who qualify for the unit, and the idiosyncratic approach to identifying “soft” men, limit its significance. See supra note 154.

\textsuperscript{432} See, e.g., Buchanan, supra note 58.

\textsuperscript{433} See id.
Again, political reality constitutes an impediment to change. The Supreme Court generally requires more than a showing of disparate racial impact to establish a violation of the Equal Protection Clause, and the Roberts Court is unlikely to relax this rule.\textsuperscript{434} Nonetheless, for policymakers who remain concerned about this problem, one response would be diversifying the jail’s conception of gay culture. The jail could exhaustively canvass gay spaces in black and brown neighborhoods and relegate questions about white gay culture (such as West Hollywood and gay slang) to a minor part of the screening process. Such a test, however, might disadvantage white inmates, who remain a significant portion of the jail’s population. A second option seeks to avoid any racial disadvantage. The jail might create a distinct test for each racial group, asking black men about black gay culture and white men about white gay culture, for instance. In order to be as accurate as possible, the jail may need to hire MSM of the particular racial group to define that group’s culture rather than allow men who are white, heterosexual and middle-aged to define each group’s culture. This policy also contains serious flaws though. Even assuming that blacks could agree on what counts as “black gay culture” and on the subset of group members appointed to determine that culture—\textsuperscript{435} a big if, in my view—it would not account for the fact that there are black men who do not identify with black gay culture. Just as a black person might not enjoy fried chicken or hip-hop, a black MSM might not appreciate the things that many black gay men do (say, Beyoncé), and ought not be penalized for that divergence. Similarly, particular white men might know little of (white) Gay Culture but be more familiar with gay culture among, say, Latinos or Asians.\textsuperscript{436} Therefore, it would be dangerous to require certain racialized knowledge of people based on their racial phenotype. The efforts to refine and diversify the jail’s understanding of gay cultures also do nothing to address two overarching problems with gay culture tests.

First, there are many MSM of all races who do not congregate in the public gay spaces where one is most likely to learn about gay cultures.\textsuperscript{437}

\textsuperscript{434} See, e.g., Washington v. Davis, 426 U.S. 229, 239.
\textsuperscript{435} Cf. YOSHINO, supra note 137, at 124, 125 (2006) (documenting ways in which he is an “accidental Asian,” aligned primarily with white culture).
\textsuperscript{436} See Lance Pollack, et al., Evaluation of the Centers for Disease Control and Prevention’s HIV Behavioral Surveillance of Men Who Have Sex With Men: Sampling Issues, 32 SEXUALLY TRANSMITTED DISEASES, 581, 583 (2005) (finding that about 18% of MSM in San Francisco reported that they did not attend any gay bar or club during a one-year period). This survey likely overstates
MSM who regularly attend clubs appear to be “younger and better educated, are more likely to report full-time employment, and have higher incomes.”\textsuperscript{438} They are also more out, more sexually active and less likely to have a disability.\textsuperscript{439} The paradox of looking to gay bars and gay pride parades to identify Gay men is that an identity purportedly based on private sexual conduct turns instead of associating in public spaces. A man can become an MSM in the privacy of his home, but he is not Gay until he goes to gay bars, reads gay media, and learns about glory holes and Prince Alberts. All of the variations on the jail’s culture test disadvantage MSM who are ensconced in a monogamous relationship and not attending gay bars, and those who simply do not like bars, clubs, or parades. With the rise of the internet and easily accessible websites that offer ample sexual opportunities, gay commentators have expressed concern that the internet is killing the gay bar.\textsuperscript{440} Even a single MSM has fewer incentives today to go to a bar or club because instead of gambling on meeting the right guy at a bar on any given night, he can pinpoint a specific sexual type (say, blond, mid-20s, versatile man with a swimmer’s build and uncut penis) by logging onto Manhunt.com,\textsuperscript{441} men4sexnow.com,\textsuperscript{442} or adam4adam.com\textsuperscript{443} from a laptop computer or pulling up nearby potential sexual partners on his IPhone through a new application called Grindr.\textsuperscript{444}

Second, as Richard Ford has noted, culture changes quickly.\textsuperscript{445} The K6G questions are a testament to the danger of relying on a cultural snapshot at a particular moment and failing to recognize when it falls out of favor. Perhaps at some time most MSM knew what a “bird” and “cookies”

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\textsuperscript{438} Id. at 584.

\textsuperscript{439} See id. These findings are based on one city and should be read with caution.


\textsuperscript{441} http://www.manhunt.net/ (as visited on Dec. 29, 2009) (“Find him in a flash. Tall, short, top, bottom... your man is only a mouseclick away.”).

\textsuperscript{442} http://www.men4sexnow.com/Homepage.cfm?gelid=CJ0gh8zA_J4CFchn5QodXykvKA (as visited on Dec. 29, 2009) (“Where men meet for sex now.”).

\textsuperscript{443} http://www.adam4adam.com/ (as visited on Jan. 25, 2010) (“A club for gay men”).

\textsuperscript{444} http://www.grindr.com/Grindr,iPhone_App/Grindr - Meet Guys_Near_You_on_your_iPhone.html (as visited on Dec. 29, 2009) (“Meet men at home or on the road for free with Grindr for iPhone. No strings attached.”).

\textsuperscript{445} See FORD, supra note 146, at XX.
were, but today they likely do not.\textsuperscript{446} Clubs open and close pretty quickly and even more quickly rise or fall in popularity.\textsuperscript{447} Indeed, the boundary between what counts as “gay and “straight” is fluid and contestable.\textsuperscript{448} Some social commentators claim that the line is blurrier now than ever.\textsuperscript{449}

For these reasons, the policy that I ultimately endorse avoids looking to culture. The reliance on culture is driven by the perception that men must verify their assertions of gay identities; the jail cannot take them at their word. This problem, upon closer inspection, reveals itself to be a product of the particular structures that the jail has installed. As noted above, making the general population safer would substantially reduce the incentives that vulnerable heterosexual men have to seek access to K6G.\textsuperscript{450} The jail actually enhances incentives to lie by providing gay and trans inmates with a host of special programs that are not similarly available in the general population.\textsuperscript{451} The jail’s installation of a crude gay/straight binary makes everything turn on whether the inmate can convince a deputy that he is gay. By contrast, my proposal would take into account all traits that correlate with victimization, with gay/bi identity being just one. The literature on prison rape points to multiple points of vulnerability to sexual assault: youth, slight

\textsuperscript{446} Cf. Douglas Quenqua, \textit{Dude You Are So (Not) Obama}, N.Y. TIMES, Aug. 23, 2009, at ST-1 (claiming that by the time a slang term is memorialized in a dictionary it has lost its exclusionary power and that the internet is reducing the lifespan of slang by quickly making it more widely accessible).

\textsuperscript{447} Anyone who has relied on a gay travel guide to find gay bars in a particular destination knows this. Odds are that by the time the book is published at least some of the bars it identified will have been supplanted by new venues.

\textsuperscript{448} See Colman, supra note 1 (contrasting men who frequent gay pride parades with the increasingly ambiguous styles of other gay men and fashionable straight men); \textit{id.} (“As gay men grow more comfortable shrugging off gay-identified clothing and Schwarzeneggerian fitness standards, straight men are more at ease flaunting a degree of muscle tone seldom seen outside of a \textit{Men’s Health} cover shoot. And they are adopting looks—muscle shirts, fitted jeans, sandals and shoulder bags—that as recently as a year ago might have read as, well, gay.”). For instance, while women have traditionally bought clothes for their male partners, in recent years, men have begun buying their own clothes (69 percent, as of 2004, compared to just 25 percent in 1985). \textit{See id.} Companies are increasingly targeting heterosexual male shoppers and directing at them products once reserved for gay men. \textit{See id.} (discussing racy underwear line 2xist, which has been embraced by heterosexual icons such as Justin Timberlake).

\textsuperscript{449} \textit{See, e.g., id.} (identifying “a new gray area that is rendering gaydar - that totally unscientific sixth sense that many people rely on to tell if a man is gay or straight - as outdated as Windows 2000.”).

\textsuperscript{450} Cf. Lanni interview, supra note 8.

\textsuperscript{451} \textit{See supra note 97.}
stature, perceived effeminacy, serving for the first time in prison, doing time for nonviolent offenses, inexperience in personal combat, having a disability, gay identity, and potentially race.\footnote{See, e.g., Cynthia L. Blitz, et al., Physical Victimization in Prison: The Role of Mental Illness, 31 INT'L J. L. & PSYCHIATRY 385, 389-90 (2008) (survey of 14 prisons in one state finding that male inmates with mental illness reported physical victimization rate 1.6 times higher than similar inmates without mental illness, and that black and Hispanics with mental illness reported higher rate than whites); id. at 603 (noting that literature has consistently found that younger inmates are disproportionately targeted but finding that obese inmates may also be likely victims); JENNESS, supra note 41, at 3 (California survey finding that trans-identified inmates, black inmates, and inmates with disabilities were significantly more likely to report being assaulted); Deanna M. Perez, Individual and Institutional Characteristics Related to Inmate Victimization, XX INT'L J. OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 1, 12 (2009) (survey of inmates in one southeastern state finding that non-white inmates were more likely than whites to report victimization by staff); John D. Wool dredge, Inmate Crime and Victimization in a Southwestern Facility, 22 J. CRIM. JUSTICE 367, 377 (1994) (survey of inmates in one prison in southwestern state finding that younger inmates and Mexican-American inmates reported higher rates of crimes against their persons; the sample of blacks was too small to be analyzed). Not all studies agree. For instance, the Jeness study is unusual in identifying black race as a vulnerable trait, and, contrary to other studies, it did not find that young inmates were more likely to experience sexual assault. This is not to say that a jail cannot arrive at a reasonable consensus as to which traits create vulnerability in its local context. In order to arrive at an answer, decision makers should consider local context, the methodological rigor of conflicting studies and whether older studies reflect present-day realities.} The jail's motivation may have been that it was responding to a lawsuit that happened to focus on "homosexual" inmates, but that fact does not justify a decades-long practice of ignoring inmates who are similarly disadvantaged.\footnote{See supra text accompanying notes 60-66.}

Race presents unique challenges because the Court would likely treat the use of race, even as just one of many factors, as a racial classification and subject it to strict scrutiny. See\textsuperscript{54} Johnson 543 U.S. 499 (2005); Grutter v. Bollinger, 539 U.S. 306, 327 (2003). It is doubtful that the studies on race are advanced enough to withstand strict scrutiny. Older studies suggested that whites are disproportionately targeted for prison rape, but those studies tend to be riddled with empirical flaws and limitations. See Buchanan, supra note 58, at 15-16.

\footnote{The lawsuit and resulting policy are remarkable in that they emerged during an era when courts rarely protected gay rights. At the time, there was no question that sexual orientation did not receive heightened scrutiny under the Equal Protection Clause. Romer v. Evans, 517 U.S. 620, 646 (1996), which was decided over a decade after the ACLU lawsuit was settled, raises the possibility that the Court will apply "rational basis with bite," a form of heightened scrutiny, to at least some sexual orientation classifications. Gay rights lawyers have been pushing courts to apply strict scrutiny to anti-gay laws, with occasional success, but it remains unclear whether the Supreme Court will do so. See Devon Carbado & Russell Robinson, Proposition 8 and "Like Race" Arguments (forthcoming) (claiming that gay activists and scholars arguing for strict scrutiny have not attended to the impact of strict scrutiny on blacks). Those who would continue the policy of providing protection exclusively to gay and trans inmates based on a "quasi-suspect" status must explain why other}
In reducing the importance of sexual orientation and including all empirically supported vulnerability traits, the jail could remove the need for verifying sexual orientation, the central problem with the current K6G policy. A heterosexual man might qualify based on various traits other than sexual orientation and would not see a false claim of gay identity as his only route to protection.\(^{455}\) This intersectional approach would also provide an MSM with multiple routes to protection. He might reasonably choose not to come out, but to rely on his race or youth, for example.

This reform does have resource implications. Although not as financially daunting as broad-based structural reforms to make the entire jail safer, it would considerably expand the K6G unit, especially if all inmates with one vulnerability trait were automatically admitted. In the prison context, the Supreme Court has displayed sensitivity to fiscal and administrative pressures,\(^{456}\) concerns which I find inadequate to justify constitutional violations. Nonetheless, under current law, a court might be more attracted to a Grutter-like\(^{457}\) totality of the factors test in which no single trait guarantees admission, but all factors must be analyzed to compare the inmate’s vulnerability with others in the pool. Under such a system, a jail might reasonably conclude that an inmate possesses one vulnerable trait, but not to a substantial degree—perhaps being slightly smaller in stature than average—and has some countervailing traits that make him less likely to be targeted. Similarly, a claim of gay or bi identity would enable an inmate to be considered for K6G but would not guarantee access. An inmate who is gay or bi, but also masculine and physically strong might not need protection in some jails. San Francisco is a leader in developing progressive emerging identity groups, such as people with disabilities, can be distinguished from a constitutional perspective. Moreover, they must grapple with the fact that the K6G policy utterly fails to protect all inmates who have a homosexual or bisexual orientation, embracing only those who embody a particular, racialized Gay Identity (and only those who are visibly trans). Given the considerable slippage between orientation and identity, it seems erroneous to call the K6G policy a classification based on sexual orientation.

\(^{455}\) Relatedly, the question “Are you homosexual?” should be revised to resemble something like “Have you had sex with a man?” Although this formulation, and virtually any attempt to measure gay identity, has flaws, see generally Savin-Williams, supra note 111 (discussing different outcomes that follow from defining sexual orientation based on identification, sexual behavior or attraction), it would be more appealing to MSM who do not identify as gay and would likely produce more affirmative responses since the class of men who have had sex with men is much larger than the class of men who identify as gay, see id. at 41 (“The majority of individuals attracted to their own sex or engaging in same-sex sexual behavior do not identify as gay.”).

\(^{456}\) See Turner 482 U.S. at 81. But see Johnson 543 U.S. 499 (2005) (applying strict scrutiny, the least deferential standard of review to racial classifications in prison).

correctional policies regarding sexuality in that it has a high number of openly gay staff and makes condoms available to the entire population. Yet it does not paint all gay men with a single brush. It distinguishes very effeminate gay men from other gay men, assigning the former to a vulnerable unit that is primarily trans women and assigning most gay men to the general population. Persons who work in the San Francisco Jail described gay and trans inmates who wielded influence in the general population, complicating overbroad assumptions about vulnerability. Relatedly, interviews revealed stories of gay and trans inmates who resisted the classification schemes said to be for their protection. Some trans women in San Francisco sought assignment to the general population, where their gender identity would be appreciated. In Los Angeles, Deputy Lanni reported that some gay men teach their heterosexual boyfriends in the general population how to appear gay so they can be reunited in K6G. Regardless of the scope of the expanded protection under such a policy, a multi-factor test would better reflect the way in which vulnerability actually operates and relieve the pressure on men to come out. Because it eliminates the verification process, in which inmates have to prove they are Gay, it avoids the reliance on gay culture and its attendant problems as well as the noxious message that gay and trans inmates are inherent victims.

[Conclusion]

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458 See Interview #5, supra note 62, at 4 ("[W]e probably have the highest number of openly gay correctional staff.").

459 See id. at 18 (stating that deputies take into account intersecting factors, such as youth or being a first time offender, in addition to gay identity); id. at 29 ("inmates that are openly gay that are housed in [general population] don't carry themselves [like effeminate gay men]. My experience has been that they make the clear distinction between their identity as a man and their sexual orientation.").

460 See, e.g., id. at 12-13 (discussing trans woman with a lot of connections: "She'll run the whole dorm and everything when she's in there").

461 See Interview #5, supra note 62, at 20-22.

462 See Lanni Interview, supra note 8, at 20.