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Giovanna Shay
Western New England University School of Law, gshay@law.wne.edu

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VIOLENCE AGAINST WOMEN

Giovanna Shay*

In recent years, commentators have paid increasing attention to male sexual victimization and same-sex intimate partner violence. Law professor Bennett Capers has published an article entitled Real Rape Too, focusing on male rape; human rights activists have written about how the human rights community has tended to equate gender violence with violence against women; and the national media has reported on the experiences of male rape victims. At the same time, the LGBTQ rights movement has called for more awareness regarding intimate partner violence in same-sex relationships.

In this symposium piece, I want to reflect on our current moment of transition to more gender-inclusive notions of sexual and intimate partner violence. I’m going to highlight three developments in 2012 that represented that movement: the FBI’s adoption of a gender-neutral

* Professor of Law, Western New England University School of Law. Thanks to Kelly Strader and the Southwestern Law Review for the invitation to participate in this symposium; to Kelly, Kim S. Buchanan, Erin Buzuvis, Bennett Capers, Jennifer Levi, and Sudha Setty for helpful comments on earlier drafts; and to James Ackley, Elliott Hibbler, and Pat Newcombe for fine research assistance.

definition of rape; the debate regarding the reauthorization of the Violence Against Women Act (VAWA); and the promulgation of new Department of Justice (DOJ) regulations under the Prison Rape Elimination Act of 2003 (PREA).

The first important development that I want to consider occurred early in 2012, when the FBI changed its definition of rape to include male victims.\(^5\) Until 2012, the FBI definition tracked the traditional definition of rape, and was gendered: it criminalized “carnal knowledge of a female forcibly and against her will.”\(^6\) The vast majority of American jurisdictions have adopted rape statutes that are (in large measure) gender-neutral,\(^7\) although gendered rape statutes are still on the books in some jurisdictions.\(^8\)

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7. See Russell L. Christopher & Kathryn H. Christopher, The Paradox of Statutory Rape, 87 IND. L.J. 505, 516 & n.88 (2012) (“today statutory rape statutes are gender-neutral with respect to both the class of perpetrators and the class of victims in almost all, if not all, states”); Philip N.S. Rumney, In Defence of Gender Neutrality Within Rape, 6 SEATTLE J. FOR SOC. JUST. 481, n.33 (2007) (stating that all but five states had adopted gender-neutral rape statutes as of 2007); Deborah Denno, Sexuality, Rape, and Mental Retardation, 1997 U. ILL. L. REV. 315, n.152 (1997) (reporting in 1997 that forty-one states had gender-neutral statutes).

8. See, e.g., ALA CODE § 13A-6-61(a)(1) (LexisNexis 2005) (defining first-degree rape in part as opposite-sex intercourse, providing: “A person commits the crime of rape in the first degree if he or she engages in intercourse with a member of the opposite sex by forcible compulsion . . . .”); MD. CODE ANN., Criminal Law § 3-303 (a)(1) (LexisNexis 2012) (defining rape in the first degree in part by reference to female anatomy: “a person may not engage in vaginal intercourse with another by force”); MISS. CODE ANN. § 97-3-71 (West 2011) (defining the crime of assault with intent to ravish as “assault with intent to forcibly ravish any female of previous chaste character.”); N.C. GEN. STAT. § 14-27.2(a)(2) (2011) (defining first-degree rape in part by reference to a female anatomy that “A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force and against the will of the other person.”); IND. CODE ANN. § 35-42-4-1 (LexisNexis 2009) (stating that a person commits rape when that person “knowingly or intentionally has sexual intercourse with a member of the opposite sex” under certain circumstances). Idaho criminalizes a separate crime of “male rape,” IDAHO CODE ANN. § 18-6108 (Supp. 2012) (defined as “the penetration, however, slight, of the
Nonetheless, until the FBI made this change, male rape victims did not count in federal crime statistics.\(^9\) Even if state law rape definitions encompassed male victims, those cases simply were not reported in the Uniform Crime Reports (UCR), which were based on the FBI definition—the ultimate erasure.\(^10\) At a minimum, the change in the FBI statistics signals important recognition of the existence of male victims, and will assist with more accurate reporting.\(^11\)

The second significant episode of 2012 was resolved as this article was being written—it was the Congressional debate regarding the reauthorization of the Violence Against Women Act (VAWA). In April 2012, the Senate passed a reauthorization of VAWA providing funding for projects to serve LGBT communities and prohibiting VAWA-funded services from discriminating on the basis of sexual orientation and gender identity.\(^12\) Republicans in the House stripped language referring specifically to gay and transgender victims from the bill.\(^13\) Although even

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9. Savage, supra note 5.
10. Id.
11. But see Brenda V. Smith, Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions with Men and Boys in Custody, 59 UCLA L. REV. 1690, 1719 (2012) (arguing that the new federal definition of rape—“penetration . . . of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person”—may recognize men as rape victims, but still does not encompass women as perpetrators, because of the penetration requirement).
12. Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. (2011-12) (the Senate bill would have expanded the definition of “underserved populations” to include categories of sexual orientation and gender identity; would have prohibited service providers from discriminating on the basis of sexual orientation and gender identity; and would have funded expansion of programs for those who have not received services because of their sexual orientation and gender identity); Violence Against Women Reauthorization Act of 2011, Report of the S. Comm. on the Judiciary, S. 1925, 112th (2011) (noting that “programs which primarily serve gay men . . . have been denied access to [VAWA] funding in the past because they do not predominantly address violence against women.”) See Jonathan Weisman, Senate Votes to Reauthorize Domestic Violence Act, N.Y. TIMES, Apr. 26, 2012, available at http://www.nytimes.com/2012/04/27/us/politics/senate-votes-to-renew-violence-against-women-act.html.
some House Republicans called on their colleagues to send a more inclusive bill to the White House, the 112th Congress ended without the issue being resolved.14 Shortly before this article went to press, the 113th Congress passed an LGBT-inclusive version of VAWA, which President Obama signed into law in March 2013.15

The third important development that I’d like to highlight is the movement to address sexual violence in prison, including violence against men and boys. This movement has produced the Prison Rape Elimination Act of 2003 (PREA),16 under which new federal regulations were promulgated in May 2012.17 These new regulations—the first national standards ever to address prison sexual violence18—cover men and boys as well as women and girls. They are more protective of female prisoners than male inmates in some respects. Most notably, the new PREA regulations ban cross-gender pat searches of adult women but not adult men.19 However, the regulations are largely gender-neutral, and the process that produced them involved a lot of public attention to male rape survivors’ stories, including from advocacy groups like Just Detention International (JDI)20 and in the report of the National Prison Rape Elimination Commission.21


19. 28 C.F.R. § 115.15 (b) (2012) (providing that, by certain phased-in deadlines, “the facility shall not permit cross-gender patdown searches of female inmates, absent exigent circumstances.”).


PREA requires state corrections systems to report data on prison sexual violence, and this is important for another reason: as Kim Shayo Buchanan recently has pointed out, the statistics undermine “conventional gender expectations.”\(^2\) As Buchanan emphasizes, female staff are the alleged perpetrators in the majority of male prisoners’ reports of sexual abuse,\(^2\) and women prisoners report more abuse by other female inmates than by officers of either gender.\(^2\)

I submit that these three developments—the change in the FBI definition of rape, the debate over VAWA reauthorization, and the promulgation of the new PREA regulations—mark 2012 as a year in which we moved towards more gender-inclusive conceptions of rape and intimate partner violence. Twenty-five years ago, reformers’ project was to “expose fully the sexism of the law,”\(^2\) and stories of institutionalized misogyny and male power dramatized some of the most egregious injustices. Today “governance feminism” has established itself as a prevailing criminal justice paradigm,\(^2\) and feminist law reforms, albeit imperfect and incomplete,\(^7\) have achieved important gains. Today’s reform efforts both

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22. Kim S. Buchanan, Engendering Rape, 59 UCLA L. REV. 1630, 1639 (2012). See also Smith, supra note 11 (“One of the most surprising findings of the [BJS] research [after PREA] was the widespread involvement of female correctional staff in sexual incidents—both with adult and juvenile males in custody.”).

23. Buchanan, supra note 22, at 1638-39 (“In men’s facilities, women generally constitute a minority of correctional staff, yet survey respondents consistently report much higher rates of sexual victimization by women staff than by fellow inmates. More than two-thirds of male victims of staff sexual abuse say that their perpetrators were exclusively women.”). Buchanan also writes, “in spite of stereotypical expectations, correctional authorities investigating allegations of prison rape have often found more ‘substantiated’ cases involving female than male staff.” Id. at 1672. See also Paul Cook, The Dynamics of Sexual Abuse of Male Juveniles by Female Correctional Officers—Myth and Fact, 48 CRIM. L. BULL. 1326, 1333 (2012) (writing that a 2008-2009 Bureau of Justice Statistics study demonstrated that “[i]n the juvenile setting, the males abused by staff were abused almost exclusively by female staff.”).

24. Buchanan, supra note 22, at 1669.


26. JANET HALLEY, SPLIT DECISIONS 20-22 (2006) (providing a critical description of “governance feminism,” stating that “feminism rules. Governance feminism. Not only that, it wants to rule. It has a will to power.”).

build on and question prior feminist reforms, as we move toward more
gender-inclusive approaches to these issues.

It’s no surprise that dominant rape and domestic violence narratives have been about men raping and abusing women. Cases fitting that narrative are still the vast majority of reported cases, although we might ask whether that reflects in part a lack of reporting on behalf of male victims. Some have suggested that more victims of same-sex rape and intimate partner violence will come forward after Lawrence v. Texas, now that there is no longer criminal stigma attached to same-sex sexuality.

Our dominant narratives are not solely the product of empirical realities, however. Legal theorists in the schools of legal realism, cultural studies, cultural cognition, and law and society have long argued that law—along with legal claims and legal arguments—can “construct” social reality. Law and society scholars Austin Sarat and Thomas Kearns

marital rape is still—despite law reforms—not punished as severely as non-marital rape, and suggesting that states should implement reforms similar to those enacted in the domestic violence arena).


29. According to the National Crime Victimization Survey, 1.3 per 1000 women reported that they were sexually assaulted in 2010, compared with 0.1 per 1000 men. JENNIFER L. TRUMAN, CRIMINAL VICTIMIZATION, 2009-10 (2011).

30. Capers, supra note 1, at 1273-74 (writing that the reasons for underreporting of rape among men include “the taint of homophobia; the fear of appearing weak and hence not masculine; and definitional and perceptual issues.”).

31. Id. at 1262 (“[P]rior to the U.S. Supreme Court’s 2003 decision in Lawrence v. Texas invalidating sodomy laws, those who came forward as rape victims risked being prosecuted as criminals in many states.”); Pfeifer, supra note 4. Scholars have made a similar point about opposite-sex rape prosecutions following the abandonment or desuetude of laws criminalizing consensual heterosexual sex. See Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1 (1998) (arguing that traditional rape law doctrine, which may be viewed as misogynist, is better understood when we consider that “[w]e inherited the rape crime from a culture in which rape was only one of two basic categories of heterosexual offenses. The other category of offenses consisted of consensual sexual intercourse outside of marriage—fornication and adultery—in which the man and woman were accomplices.”); Melissa Murray, Marriage as Punishment, 112 COLUM. L. REV. 1, 5 (2012) (describing how “until the mid-twentieth century, marriage played an important role in the adjudication, enforcement, and even definition of the crime of seduction.”).

explain, “[w]e come . . . to see ourselves as law sees us.”33 As we all know, feminist law reform efforts of the latter half of the twentieth century focused on male violence against women,34 and were rooted in dominance feminism, specifically the work of giants such as Catharine MacKinnon.35 It’s not due to numbers alone that we see rape as a tool of male oppression of women.

The “dominant narratives” of rape and domestic violence law have been reinforced by the efforts of reformers who brought claims predicated on violence against women as a type of sex discrimination. Linda Kelly has written of the example of the 1984 case Thurman v. City of Torrington,36 which I discuss regularly with my Gender & Criminal Law students. Tracey Thurman famously sued the town for repeatedly failing to enforce orders of protection against her abusive husband.37 The claim in Thurman was crafted as a gender discrimination claim, alleging that the City had failed to protect “women who have complained of being abused by their husbands . . . .”38 Accordingly, Ms. Thurman’s equal protection claim received an intermediate level of scrutiny.39 As Professor Kelly has argued, although this equal protection argument in Thurman garnered a more
plaintiff-friendly legal standard, it also wholly equated domestic violence with men’s abuse of women.\(^{40}\)

Legal claims casting sexual and intimate partner violence as sex discrimination against women continue to appear in domestic violence advocacy,\(^{41}\) as well as in Title IX proceedings\(^{42}\) and international human rights law,\(^{43}\) eclipsing victimization of men. Although the Violence Against Women Act (VAWA)\(^ {44}\) is gender neutral in its language, its title

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40. Kelly, supra note 35, at 832-36 (2003) (Professor Kelly criticizes the equal protection rationale of Thurman, writing that, in employing a “gender-related” equal protection standard, the court “fail[ed] to leave room for the possibility of female violence,” and argues that, “[h]y tailoring the standard exclusively to battered women, the courts have further reinforced the belief that only women can be the victims of domestic violence.”). See also Ryan Elias Newby, Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide, 22 Hastings Women’s L.J. 113 (2011) (comparing sentences for men and women convicted of spousal homicide in California and concluding that women were more often subject to weapons enhancements, but also more likely to be convicted of lesser included offenses if they could demonstrate their spouse’s prior history of violence).

41. See Erica Franklin, When Domestic Violence and Sex-Based Discrimination Collide: Civil Rights Approaches to Combating Domestic Violence and its Aftermath, 4 DePaul J. for Social Justice 335 (2011) (advocating using claims of sex-based discrimination under the equal protection clause, Title VII, and the Fair Housing Act to help female survivors of heterosexual domestic violence, although recognizing that intimate partner violence occurs in same-sex relationships as well, and that men can be victims). The author explains, “with some exceptions, the civil rights challenges discussed in this Comment apply by their very nature only to female survivors of domestic violence—an inevitable limitation of the approach for which this Comment advocates.” Id. at 339. See also Niji Jain, Engendering Fairness in Domestic Violence Arreasts: Improving Police Accountability Through the Equal Protection Clause, 60 Emory L.J. 1011, 1040 (2011) (developing an equal protection argument to address police non-enforcement of restraining orders by targeting police stereotypes about women).

42. See, e.g., Wendy Murphy, Using Title IX’s “Prompt and Equitable” Hearing Requirement to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus, 40 New Eng. L. Rev. 1007, 1014 (2006) (“Women victims of serious or pervasive sexual and gender harassment had to jump through . . . burdensome hurdles . . . while students reporting even a single verbal slur regarding their race or sexual orientation received immediate and meaningful intervention.”); see also Erin Buzuvis, Court Dismisses Claims in Bully-Suicide Case, Title IX Blog (Jan. 9, 2012, 12:04 PM), http://title-ix.blogspot.com/2012/01/court-dismisses-claims-in-bully-suicide.html (discussing the decision, Estate of Carmichael v. Galbraith, No. 3:11–CV–0622–D, 2012 WL 13568 (N.D. Tex. Jan. 4, 2012), in which the court rejected claims by the survivors of a teen who committed suicide after being bullied, concluding that the decedent had not been targeted “because of sex,” as required by Title IX, despite his tormentors’ use of homophobic slurs such as “fag, queer, homo, and douche.”).

43. See Darren Rosenblum, Unsex CEDAW, or What’s Wrong With Women’s Rights, 20 Colum. J. Gender & L. 98, 107 (2011) (“The drafters of CEDAW sought to situate women’s rights as a preeminent international concern. Women throughout the world confronted sexist institutions, and the drafters’ goals centered on utilizing international human rights law to ameliorate these harms.”) (footnote omitted).

demonstrates its animating focus. Professor Sally Goldfarb writes that the bill’s sponsors were “deeply immersed in an awareness that violence against women is one of the principal ways in which male dominance and female subordination are expressed and perpetuated.” It is for this reason that Professor Capers has described VAWA as an effort to “gender crime.”

These dominant, gendered narratives of rape and domestic violence have imposed certain costs. Some argue that they have reinforced the notion that to be raped or battered is, by definition, a woman’s experience, contributing to male survivors’ feelings of shame and isolation. Others have noted these stories obscure intimate partner violence in LGBT relationships.

An increasing number of theorists have proposed different ways of conceptualizing intimate violence. Angela Harris and Kim Buchanan have employed the term “gender violence,” emphasizing that violent acts affirm...
the offender’s normative masculinity, and can be perpetrated on men as well as women.51 Others, most famously Janet Halley, have called for the left to “take a break from feminism,”52 in order to work outside what Halley describes as an “M>F” anti-subordination framework.53 Halley asks whether feminism has endowed women with the ability to “wield[] the moral code of good sex,” and whether this moralism is in fact “bad for women.”54

By contrast, other commentators have reaffirmed that they are intentionally working from a “violence against women” perspective, and argue that domestic violence remains rooted primarily in male dominance.55 Some assert that men are trying to “co-opt” the label of “victim.”56

51. Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 780 (2000) (using the term “gender violence” to describe “violent acts committed by men . . . as a means of] demonstrating the perpetrator’s manhood,” and arguing that “men as well as women may be its victims.”); Angela P. Harris, Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation, 37 WASH. U. J.L. & POL’Y 13, 17-18 (2011); Kim S. Buchanan, Our Prisons, Ourselves: Race, Gender & the Rule of Law, 29 YALE L. & POL’Y REV. 1, 37 (2010) (explaining that in both prison and the free world, men “use same-sex sexual abuse and harassment to reaffirm that they are straight and manly and that their victims deserve abuse and contempt for being effeminate or gay”); Kim S. Buchanan, E-race-ing Gender: The Racial Construction of Prison Rape, in MULTIDIMENSIONAL MASCULINITIES AND LAW: FEMINIST AND CRITICAL RACE APPROACHES 187, 188-89 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); Christopher N. Kendall, Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse, 49 MCGILL L.J. 877, 918 (2004) (arguing that gay male pornography can reinforce notions of masculinity that rely on violence and that “[g]ay men who batter and abuse their partners have specific ideas about masculinity and what it means to be ‘male.’”).


53. Halley, Queer Theory by Men, supra note 52, at 10 (“[T]o be a feminism in the United States today, a position must posit some kind of subordination as between M and F.”).

54. HALLEY, SPLIT DECISIONS, supra note 26, at 356 (Halley asks us to reimagine a divorce case in which the wife has alleged coerced bondage by the husband, asking: “Can feminism read the case as male subordination and female domination—and still as bad for women?”).

55. See Kathleen J. Ferraro, Woman Battering: More Than A Family Problem, in WOMEN, CRIME, AND CRIMINAL JUSTICE 135, 136-37 (Claire M. Renzetti & Lynne Goodstein eds., 2009) (“The violence against women perspective insists that patriarchy, sexism, and gender inequality are the fundamental conditions under which violence against female partners develops. . . . This chapter is written from the violence against women perspective and uses the term ‘woman battering.’”); see also Hodges, supra note 4, at 331 nn.112-13 (quoting and discussing Demie Kurz, Violence Against Women or Family Violence? Current Debates and Future Directions, in GENDER VIOLENCE: INTER-DISCIPLINARY PERSPECTIVES 443, 447 (Laura L. O’Toole et al. eds., 1997); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 334 (3d ed. 2013).
Against the backdrop of this debate, the prison anti-sexual violence movement may provide a model of a more gender-inclusive approach to reform. The movement that produced the Prison Rape Elimination Act (“PREA”) was led in part by male survivors, and informed from the start by awareness of male rape victims. Passage of the initial PREA legislation in 2003 was not as much a mainstream gay rights movement victory as it was the product of a counter-intuitive alliance including evangelical Christian elements. However, the final Department of Justice (“DOJ”) regulations promulgated under the statute in 2012 were shaped by contributions from free-world LGBT advocacy groups, which included many ground-breaking provisions affecting LGBT prisoners.

The movement that produced PREA is remarkable among law reform movements for its focus on male rape survivors. This is illustrated by the rape survivors’ testimony on the web site for Just Detention International (formerly STOP Prisoner Rape) one of the organizations that was (noting that “[s]ome feminists prefer to use the term ‘woman abuse’ or ‘male battering of women’ to highlight the fact that women are most often the victims of the violence.”).  

56. Patricia Novotny, Rape Victims in the (Gender) Neutral Zones: The Assimilation of Resistance, 1 SEATTLE J. FOR SOC. JUST. 743, 745, 750 (2003) (arguing that “male co-optation of the victim category” may represent a “backlash” against feminist law reform).  

57. See Valerie Jenness & Michael Smyth, The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road From Symbolic Law to Instrumental Effects, 22 STAN. L. & POL’Y REV. 489, 494, 501 (2011) (describing multiple constituencies that contributed to the movement to eliminate prison rape, including the organization Stop Prisoner Rape, and explaining the importance of the testimonials of prison rape survivors).  

58. See Capers, supra note 1, at 1267 (finding that systemic efforts to gather data on male rape resulted from Congress’ passage of the “mostly hortatory” PREA) (quoting Alice Ristroph, Sexual Punishments, 15 COLUM. J. GENDER & L. 139, 175 (2006); see also Terry A. Kupers, M.D., M.S.P., The Role of Misogyny and Homophobia in Prison Sexual Abuse, 18 UCLA WOMEN’S L.J. 107, 108-109 (2010).  

59. Jenness & Smyth, supra note 57, at 503 (describing the role of Prison Fellowship Ministries in the passage of PREA and explaining its involvement in part based on the fact that “the modern evangelical sector has long been committed to controlling sexual behavior and sexuality—especially when it involves same-sex participants.”).  


61. National Standards To Prevent, Detect, and Respond to Prison Rape, Final Rule, 77 Fed. Reg. 119, 37109-110 (June 20, 2012) (to be codified at 28 C.F.R. § 115), available at http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf (describing provisions affecting LGBT inmates and Gender Non-Conforming Inmates, including training for staff, no searches permitted solely to determine genital status; no segregated units for LGBT inmates without a consent decree, judgment, or settlement; requirement that housing for transgender prisoners be determined on a case-by-case basis).
instrumental in getting PREA enacted.\textsuperscript{62} JDI features stories from men and women, including gay and transgender prisoners. One JDI campaign on social media features two pictures of the same young man. In the first photo, he is wearing street clothes and the caption reads, “would you joke around about this man being raped?” In the second, he appears in a prison uniform, and the caption reads, “how about now?”\textsuperscript{63}

The more gender-inclusive nature of the movement to end prison sexual violence may be attributable in large part to the demographics of the incarcerated population,\textsuperscript{64} but also may be reinforced by the nature of available legal claims. Although advocates for women prisoners and for male victims of prison rape often worked separately due to the state-enforced sex segregation of corrections institutions, the Eighth Amendment provides a single legal standard that applies to all sentenced prisoners.\textsuperscript{65} Unlike equal protection or statutory sex discrimination provisions, the Eighth Amendment is not dependent on protected categories or comparators.\textsuperscript{66} Nor is there any ambiguity about whether abuse of gay or transgender prisoners is covered under the Eighth Amendment.\textsuperscript{67} In fact, the prevailing Eighth Amendment standard for failure to protect cases was set in the case of a transgender woman housed in a male facility in \textit{Farmer v. Brennan}.\textsuperscript{68} The \textit{Farmer} standard may be very difficult to meet,\textsuperscript{69} but it does not require a demonstration of sex discrimination.

This does not mean that courts are even-handed in their application of legal standards to prisoners’ cases. Some are less receptive to men’s claims of sexual abuse than to similar claims by women prisoners,\textsuperscript{70} grounding
their Eighth Amendment analysis in evidence of women prisoners’ asserted heightened vulnerabilities. A number of decisions have rejected due process or privacy challenges to female officers’ supervision of male prisoners. One opinion even doubted whether sexual abuse of male prisoners constituted a “physical injury” within the meaning of the Prison Litigation Reform Act (“PLRA”), thereby precluding survivors from seeking money damages.

Moreover, as Kim Buchanan has forcefully pointed out, anti-prison sexual violence commentators and advocates themselves are not immune from the power of our dominant, gendered rape narratives, sometimes perpetuating these narratives even when they are not supported by statistics. Buchanan argues that, despite the fact that data generated by PREA directly counters some of our dominant narratives about the gendered dynamics of rape, these notions remain resistant to change. Indeed, some provisions of the new PREA regulations—most notably the provisions regarding cross-gender pat searches—were limited to women prisoners and juveniles. The DOJ stated that it adopted different cross-

71. See, e.g., Jordan v. Gardner, 986 F.2d 1521, 1525 (9th Cir. 1993) (concluding that random, suspicionless, clothed-body pat searches of female prisoners by male guards violated the Eighth Amendment, in part based on factual findings by the district court “that physical, emotional and psychological differences between men and women ‘may well cause women, and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women.’”).

72. See Levit, supra note 70, at 93. See, e.g., Johnson v. Phelan, 69 F.3d 144, 150-151 (7th Cir. 1995) (rejecting a male pretrial detainee’s Fourth Amendment and due process challenges to observation of naked male prisoners by women officers).


74. Buchanan, supra note 22, at 1678 (noting that, despite the BJS statistics, “official and academic commentators persist in characterizing nonforcible staff-on-inmate sex as ‘romantic’ or harmless.”).

75. Id. at 1673 (“[W]hen researchers encounter surprising, counter-stereotypical results, their explanations reveal interpretive tendencies that reconcile those results with stereotypical expectations.”). Buchanan concludes her article: “The gaps and elisions of prison rape discourse reveal the grip of unexamined gender and racial stereotypes on our understanding of prison rape and of sexual abuse more generally. Prison realities demonstrate that, at least in some circumstances, women may be more sexually aggressive, and men more sexually vulnerable, than conventional gender expectations would predict.” Id. at 1688. See also Smith, supra note 11, at 1692 (“This Article seeks first and foremost to explain why the statistical evidence of abuse of men and boys in custodial settings surprises reformers and disrupts perceived gender norms, and to explain why female correctional workers have sex with men and boys in custody.”).

76. 28 C.F.R. § 115.15 (b) (2012) (providing that, by certain phased-in deadlines, “the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent
gender pat search policies for women because corrections officials feared charges of employment discrimination if they limited female officers’ duties in male facilities, and because of high reported rates of past abuse by women prisoners. Certainly, these justifications can and will be subject to continued debate.

Despite the continued influence of gendered expectations, the anti-prison sexual violence movement has been shaped by male rape survivors to a much greater extent than free-world anti-violence movements. The more gender-inclusive approach of the movement that produced PREA may be a precursor to further free-world trends, particularly more awareness of LGBT victims.

We might ask what larger shifts are driving this transition to more gender-inclusive anti-violence movements. Certainly, a weakening of societal homophobia and growing LGBT rights movements are key components of the new environment. Another powerful force might be increased public attention to abuse of boys in scandals involving institutions like Penn State, the Horace Mann School, and the Catholic Church.

A common denominator to many of these developments, however, is our changing conception of gender, and particularly a growing focus on the construction of masculinities. Masculinities scholars such as Frank Rudy Cooper and Jackson Katz have contributed to an increasing understanding that gender is a “performance”: that male “gender violence” can victimize circumstances.”), 28 C.F.R. § 115.315 (2012) (barring cross-gender pat-down, strip, and visual body cavity searches of juveniles except in exigent circumstances).


78. See LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION 324 (2012) (arguing that the gay rights movement has largely met its goals).


83. See Frank Rudy Cooper, “Who’s the Man?: Masculinities Studies, Terry Stops & Police Training, 18 COL. J. GENDER & L. 671, 684 (2009) (writing that “the field of masculinities studies presumes that men’s behavior is socially constructed” and that “our performances of our
other men;\textsuperscript{84} and that men’s socially-constructed gender roles often mask men’s very real vulnerabilities.\textsuperscript{85} Counter-intuitively, our attention to how male gender roles contribute to male violence also may help us to conceive of men as victims in certain contexts.\textsuperscript{86}

An increasingly flexible conception of gender is not just an academic trend, but a consciousness that increasingly informs popular and youth culture—what the New York Times recently described as “Generation LGBTQIA.”\textsuperscript{87} This attitudinal shift has encompassed a more frank acknowledgment of the possibility of male victimization. For example, the Columbia University “Take Back the Night” march, which previously had a female-only space, went fully “gender-neutral” in 2012.\textsuperscript{88} One student organizer explained, “Men can be survivors as well and it’s good to remind everyone of that.”\textsuperscript{89}

A question that others have posed and that bears further attention is how anti-violence movements can adopt a more inclusive stance toward male and same-sex victims, without producing yet more over-incarceration of poor communities and communities of color.\textsuperscript{90} Feminist efforts to reform rape and domestic violence law have been criticized by some for

84. Harris, supra note 51, at 780.
85. Katz, supra note 83.
86. Dowd et al., supra note 82, at 29 (explaining that “some of that structuring [of masculinity] creates a price, not a privilege; it creates harm, not benefit.”).
89. Id.
90. See Adele M. Morrison, Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory & Practice Meet Criminal Law’s Conventional Response to Domestic Violence, 13 S.CAL. REV. L. & WOMEN’S STUD. 81, 86 (2003) (advocating responses to same-sex domestic violence that are not based solely on criminal law, and arguing that “the better and more productive responses to same-sex domestic violence, which are primarily the product of social service agencies and community-based organizations, are underpinned by queer theory’s concepts of sexuality in general . . . ”). See also Urvashi Vaid, IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS AND THE ASSUMPTIONS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POLITICS 63 (2012) (Arguing that “reducing the over-criminalization of certain communities, sentencing reform, support for better treatment of prisoners, working for an end to rape inside prison affect many LGBT people, and disproportionately affect people of color.”).
relying too much on state power and criminal punishment. a particular concern in an era of unprecedented U.S. incarceration and a persistently racially biased criminal punishment system. An increasing number of commentators have called for anti-violence efforts that are more sensitive to survivors’ autonomy, and rely less on our bloated incarceration system. These important questions are beyond the scope of this brief symposium contribution.

In this piece, I have highlighted some recent markers of our transition to a more gender-inclusive notion of sexual assault and intimate partner violence. The change to a more gender-inclusive approach will have many implications for criminal justice policy and institutions, some of which Professor Kelly Strader and I discussed in a book review that appeared last year. One critical project is to ensure that courts and prosecutors adopt competent and fair practices in cases involving same-sex intimate partner and sexual violence. In future articles, I hope to look more closely at various aspects of how these issues play out in our criminal prosecution system. For today, let’s remember 2012 as a moment of transition in movements against violence, now [including but not limited to] violence against women.


92. See Hope Metcalf, Foreword: When Words Fail: Confronting the Carceral State, 38 WM. MITCHELL L. REV. 1209, 1209 (2012) (discussing ramifications of the fact that 1 in 100 Americans is incarcerated, roughly 2.5 million people on any given day).

93. MICHELLE ALEXANDER, MASS INCARCERATION IN AN AGE OF COLORBLINDNESS 4 (2010).


95. See Gruber, supra note 28, at 653; see also Harris, supra note 51, at 803-804.
