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GENDER AND DOMINATION IN PRISON\*

*Terry A. Kupers\*\**

INTRODUCTION

Gender theory has evolved in recent years. The feminist and gay liberation struggles of the 1960s and 1970s were about equal rights, the rights of women in the workplace, and the rights of gays to safety and an equal place at the table. More recently, the entire notion of binary gender identity and binary sexual preference has come into question. There are the two majority designations—male and female, straight and gay. But then, there has emerged a radical interrogation of the binary quality of the debate. What about “bisexuality,” “gender-bending,” “transgender,” “intersex,” and various other forms of fluidity in the discussion of gender and sexuality? There is growing consensus that we need to expand our notions of gender, and we need to struggle for inclusion at all levels.

Gender relations in prison are not separate and apart from gender relations in society-at-large. They are a poignant reflection of society-wide gender relations, but they are magnified and highlighted in bold fashion. If we look at the stereotypes that are encouraged in the gendered prison phenomenon, reflected back to us are caricatures of the actors in society-wide gender relations, relations of power and domination. This formulation can be applied across the categories of gender.

Here I will discuss the situation in men’s and women’s correctional facilities. Next, I will turn my attention to the plight of gay, lesbian, bisexual, transgender, and gender variant prisoners in a prison system where strict conformity with narrow definitions of gender are violently policed. The consequent narrowing of possibilities in prisoners’ lives has dreadful consequences, especially when ex-prisoners return to communities where gender

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expansion enjoys a consensus. There is a movement to accept ex-prisoners back into our communities, and there is a renewed energy in helping ex-prisoners learn about the leaps forward that gender relations have taken in the years they have been “down” (behind bars). But the narrowing of gender possibilities in correctional settings creates a large set of problems for ex-prisoners returning to the community.

### I. GENDER AND POWER IN MEN’S FACILITIES

The prison yard reminds me of a junior high school physical education class. My gym teacher was ex-military, and he taught us the drill: boys behaved a certain way; if you behaved differently (e.g., cry), you were a girl. “I don’t want any damn girls in my class!” The message communicating the hierarchy was clear: there are males on top and males who are inferior or dominated on the bottom, and the more your characteristics and actions make you seem girlish, the lower you are in the pecking order and less manly.

Being a man is not a given; one has to achieve it. I was told that my Bar Mitzvah was about becoming a man. But the dirty secret of male psychology in mainstream USA today is that you can lose your manliness; you can be not a man. Women do not have that problem—they have other problems and I am not suggesting that men’s problems and pains are greater or more deserving of attention than women’s—but there are differences. One difference is that if men do not live up to a certain standard, they are castigated as not a man, not manly; and then there are a series of insults that can be heaped upon the unmanly man. He is a weakling, a chicken, and a wuss; it also gets sexual: he’s a faggot, a punk, a girl. Women are insulted with all kinds of attack. For example, the unstated legal defense template of an accused rapist too often becomes, “It didn’t happen. If it did, it was consensual; and anyway, she’s a slut.” Demean the victim, the survivor. But notice, there is no claim she is not a woman.

In prison, the drama intensifies. A man who does not act tough enough, does not fight hard enough, or is simply young and fair, is likely to be accused of not being a man, or worse, to be raped and taken as a sex slave. It certainly does not happen to every male prisoner. But the fear it might happen motivates prisoners to buff up with weights, master the mean stare, and follow the strict rules of prison culture. The character Naz in the HBO miniseries *The Night Of*, transforms himself at Rikers Island,

during the course of his murder trial, from a slight and timid young man who is naïve about the ways of prison, to a buffed-up, tattooed, head-shaven, crack-smoking, prison tough guy.<sup>1</sup>

I testified during the mitigation phase of a murder trial recently, where this dynamic figured prominently in the possible meting out of a death sentence.<sup>2</sup> Dennis Levis was sixteen when he entered the Arizona Department of Corrections, convicted of armed robbery after he borrowed a friend's gun and demanded a wallet from a local drug dealer.<sup>3</sup> Entering adult prison, he was terrified there would be fights and he would be sexually victimized. He was five feet six inches tall, weighed 140 pounds, and could grow nothing but peach fuzz on his chin. Juveniles were housed in a unit separate from adult prisoners until they turned eighteen, but Mr. Levis was caught with a prison-manufactured knife, a "shank," which he had acquired in case he needed to fight for his honor. He was sent to solitary confinement in the state's super-max security unit, the Special Management Unit ("SMU"), where he remained until he was nineteen. Upon release to an adult prison, he remained fearful of attack. He suffered from some of the known symptoms of long-term solitary confinement including irrational anger, and set about looking for tough men to ally with for protection. He became receptive to the "White Power" ideology popular among skinhead gangs and the prison gang, the Aryan Brotherhood. He explained that he "hung out with gangbangers."<sup>4</sup> They had white supremacy tattoos. Wanting to be "in" with them, he tattooed his chest with the words "White Power." He explained to me, "I'm not a Nazi, and I don't hate Jews," (he says to this Jewish psychiatrist), "but I believe we need to stand up for white power. It's all about race in here. If whites don't stand up they will be mowed down."<sup>5</sup> As he moved closer to the gangs and the gang culture, he began behaving more and more like a gangster. He would do "jobs" for the gang shot-caller, he would go with a couple of gang members to intimidate someone who owed them money, or he would fight someone who said something derogatory about a

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1. THE NIGHT OF (HBO television broadcast July 10, 2016–Aug. 28, 2016).

2. See generally *State of Ariz. v. Dennis Michael Levis*, No. S-0700-CR-2013002559 (Ariz. Super. Ct. Maricopa Cty. 2016).

3. *Id.*

4. *Id.*

5. Interview with Dennis Levis, Maricopa County Jail, Phoenix, Arizona (Aug. 16, 2013).

gang affiliate.<sup>6</sup> In other words, like Naz in *The Night Of*, he became a tough guy and adopted low-life mores.

Dennis was never affiliated with the Aryan Brotherhood, but he was closely enough identified with the broader gang culture that when gang-affiliated prisoners were involved in altercations, he felt honor-bound to stand with them. Also, if he were to walk away from a White Power associate who was in trouble, he firmly believed there would be deadly retaliation. To make a long story short, he was eventually implicated in a prison murder that another gang-affiliated prisoner initiated; he felt he could not walk away, and he was tried for capital murder. Testifying as a mitigation expert witness, I explained to the jury the male code that is hegemonic in prison, including the prohibition on “snitching,” and the requirement that a “stand-up con” stand by a brother in trouble or risk deadly retaliation. I outlined the dynamic of hegemonic masculinity and explained that as a relatively small, slight, and fair juvenile prisoner in an adult facility, Mr. Levis would realistically fear assault and possible rape. I connected his evolving participation in the White Power and gang culture with the dilemma of proving one’s manliness in prison or suffering sexual assault and possibly deadly retaliation. In that sense, he really did not have any attractive choice when his cellmate, an affiliate of the Aryan Brotherhood, got into mortal battle with another prisoner. He could walk away and expect deadly retaliation for abandoning a brother, or he could participate in the killing and eventually stand trial for murder. The jury decided against the death penalty, and instead to sentence him to life without parole.<sup>7</sup>

The unspoken rules of the male prison code include: don’t appear weak, don’t share vulnerable feelings, present a very tough façade, including a menacing glare, don’t relate to prisoners of other races (no matter how multi-racial your life back in the community), absolutely do not snitch, do not talk to staff too much or others might think you are snitching, and stand in solidarity with your race and your “brothers.”<sup>8</sup>

These are the rules for middle school physical education

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6. *Id.*

7. See generally *State of Ariz. v. Dennis Michael Levis*, No. S-0700-CR-2013002559 (Ariz. Super. Ct. Maricopa County 2016).

8. Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. CLINICAL PSYCHOL. 713, 718 (2005) [hereinafter Kupers, *Toxic Masculinity*].

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classes, only magnified, with much more draconian penalties. And they are quite the opposite of the male attributes valued in our post-feminist, gender-expansive culture. Increasingly in a growing community within mass culture, men are admired and rewarded for being compassionate, being able and willing to listen closely, taking care of babies, and honoring women and gays as their equals in every way. Prisoners suppress the very values that the women's movement, the gay liberation movement, and the anti-sexist, anti-homophobic men's movement of the 1980s worked so hard to inscribe into our gender relations. The contrast between the strict prescriptions and proscriptions of male prison culture and gender expansion in the community-at-large raises two important questions: (1) What can the exaggerated and stereotypic gender relations in prison teach us about gender relations in the larger community; and (2) if we are to help prisoners re-join community and society, how can we reverse the worst effects of their years behind bars and the bad habits they learn there?

Dennis, out of necessity, had acquired the unfortunate male characteristics of a tough guy. He exercised compulsively to tighten muscles and prepare to fight. He adopted a mean stare that gave the definite message to other prisoners that he would hurt anyone who tried to mess with him. He learned to dull all sensitivity to the pain of others. Whether as a change in his inward experience or merely as a posture displayed to all others, he learned to look as if he did not care about hurting others, and did not want to hear about their pain. He learned not to expose any weakness, especially the emotional signs such as crying. He learned to "take care of business" on his own, without asking for help. He acted as if he was dependent on nobody but himself, though he situated himself near other toughs of his own race. He never asked for help from staff, fearing that if he did he would be labeled a snitch by other gang-bangers. The fear of snitching is so pervasive that most prisoners tell me they cannot really talk with each other about anything significant, so they become loners in the crowd of prisoners, saying "Hi, how are you?" but little else. They start to lose the capacity to put their emotional experience into words. We see this problem exaggerated in prisoners in solitary confinement for long periods.<sup>9</sup> Not only are they unused to

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9. See generally TERRY A. KUPERS, *SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT* (Univ. of Cal. Press, 2017); Terry A. Kupers, *Isolated Confinement: Effective Method for Behavior Change or*

expressing feelings after long years of training to keep their cards close to their chest to avoid seeming weak, but now in solitary confinement they do not even have anyone to talk to, and the isolation can go on for years.<sup>10</sup> Whether or not the prisoner spends an inordinate amount of time in solitary, he trains himself not to express emotions, not to attend to the feelings of others, and not to share with others too much of what is going on for him. This is a training in patriarchy, and when he eventually returns to the community, the bad habits will be difficult to break.

## II. HEGEMONIC MASCULINITY AND THE DOMINANCE HIERARCHY

Hegemonic Masculinity holds sway over the prison culture. Men violate it at their own peril. I have met sex slaves, prisoners who become the sex slave of a tougher male prisoner—he is the “pitcher,” the sex slave the “catcher”—and as if a pantomime of pre-sixties patriarchal society, the catcher does the laundry and runs errands for the dominant pitcher. Most statistics on prison rape fail to include the men who are having sex with a more dominant prisoner only because their choices are so narrow; if they refused, they would be beaten and raped mercilessly by other prison toughs.<sup>11</sup>

In a previous discussion of this topic, I delineated four obvious structural elements of the male prison code:

1. There is an exaggerated dominance hierarchy wherein the toughest men dominate those who are less tough.
2. There is a sharp demarcation between those at the top of the dominance hierarchy and those at the bottom. At the top are the “real men,” whereas weaklings and “punks” populate the bottom of the hierarchy.
3. “The bottom is defined in terms of the feminine. Whether a man is known as a loser, a weakling, a snitch, a faggot, or a

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*Punishment for Punishment's Sake?*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 213, 214–15 (Bruce Arrigo & Heather Bersot eds., 2013).

10. See generally KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016).

11. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS iv (2001), <https://www.hrw.org/legacy/reports/2001/prison/report.html> [<https://perma.cc/6WKZ-H5SG>] [hereinafter NO ESCAPE]; Katrina C. Rose, *When is an Attempted Rape Not an Attempted Rape? When The Victim is a Transsexual*: Schwenk v. Hartford: *The Intersection of Prison Rape, Title VII and Societal Willingness to Dehumanize Transsexuals*, 9 AM. U. J. GENDER, SOC. POL'Y & L. 505, 510–11 (2001).

punk, he is accused of being less than a man—in other words, a woman . . . . When one man beats up another and sodomizes him, the message is clear: ‘I, the dominant man, have the right and the power to use you, the loser, sexually, as if you were a woman and my slave.’” [sic]

4. There is a narrowing of personal possibilities, and men are forced to act in hyper-masculine and dominating ways merely to prove they are not feminine, they are not anyone’s “punk.” This hyper-masculinity reinforces the misogyny and toxic masculinity that are central to the male prison culture.<sup>12</sup>

Rape is not about sex, it is about power and domination. I can’t claim that insight, which many have had.<sup>13</sup> But it’s true in prison, and in society as a whole. Men use their superior strength to objectify, abuse, and dominate women. And in prison, those with power, on average, use their power to abuse those with less power. In the larger scheme of things, the power of the toughest prisoner and sexual predator is pretty puny, but being the dominant male on the yard or in the cellblock gives one a lot of power in that very tiny world, and there are very limited ways that power can be expressed other than abusing those with less power. The line between the abuser and abused is defined and acted out in terms of gender—the more dominant male rapes the less dominant (or the male officer rapes the powerless female prisoner, see Part III, below). The man dominates the woman. It is also acted out in terms of race, and the individual who is low on the gender dominance hierarchy, as well as the race dominance hierarchy, is in grave danger.<sup>14</sup>

I think this all goes to mitigation. I testified for Dennis Levis in the mitigation phase of his trial, pointing out that his family and everyone who knew him prior to his arrest had testified that he was a good kid, was not mean, and did not want to harm anybody. But then, in prison as a slight sixteen-year-old with peach fuzz on his cheeks, he had to toughen up and become friendly with gang-related toughs in order to avoid victimization and rape. And then,

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12. Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 109–12 (2010) (citing Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111, 115 (Don Sabo, Terry A. Kupers & Willie London eds., Temple Univ. Press 2001) [hereinafter Kupers, *The Role of Misogyny*]).

13. See NO ESCAPE, *supra* note 11; Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263, 294 (2012).

14. See generally BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012).

when the gang-related prison murder occurred, he had to stand by his buddies out of fear that were he to do otherwise, he would certainly be killed in retaliation. In other words, the rigid prescriptions and proscriptions of male prison culture drastically narrowed his options, and I argued that the jury should take all of this into consideration when it came time to decide on the death penalty versus a sentence of life without parole.

### III. GENDER AND SUBSERVIENCE IN WOMEN'S FACILITIES

Unfortunately, the dreadful, gender-based dominance hierarchy that prevails in men's facilities also shapes, constricts, and rationalizes behavior in women's prisons. "Toxic masculinity is the constellation of socially regressive male traits that serve to foster domination, the devaluation of women, homophobia, and wanton violence."<sup>15</sup> In male prisons, toxic masculinity erupts in fights on the prison yard, assaults on officers, and the ugly phenomenon of prison rape.<sup>16</sup> In women's facilities, gendered domination has the effect of making women subservient and subjects them to sexual abuse, the most likely abuser being male staff.<sup>17</sup> And again, as in men's prisons, the attitudes and behaviors women learn in prison ill equip them for a gender expansive and quality life in the community after they are released. With men, I worry lest their toughening and practiced inattention to the feelings of others will prevent them from being in loving, empathic, and mutually dependent intimacies after they return to the community; with women, I worry lest their learned subservience in prison prevents them from knowing and expressing their power after they are released from prison. For both men and women, the danger is that the patterned behaviors they learn in prison will lead them to participate in traditional patriarchal inequities after they are released.

Patriarchy in women's prisons takes the form of infantilizing,

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15. Kupers, *Toxic Masculinity*, *supra* note 8, at 714.

16. Julie Kunselman et al., *Nonconsensual Sexual Behavior*, in *PRISON SEX: PRACTICE AND POLICY* 27 (Christopher Hensley ed., 2002). See generally Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 *PRISON J.* 379 (1964); *What We Do*, JUST DETENTION INT'L, [http://www.justdetention.org/en/learn\\_the\\_basics.aspx](http://www.justdetention.org/en/learn_the_basics.aspx) [https://perma.cc/C2YA-VGGE].

17. See generally HUMAN RIGHTS WATCH, *SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* (Dec. 1996), <https://www.hrw.org/legacy/reports/1996/Us1.htm> [https://perma.cc/8H8U-MQE5].

demeaning, and disempowering women. The very forms of expressing power that were won for women by second wave feminism are reversed in the culture of women's prisons. Women are taught to know their place, and their place is low in the dominance hierarchy. For example, women prisoners are often called "girls." The officer calling the women "girls" might be a man, or a woman. Still, this kind of infantilizing is an expression of the same four structural elements of the male prison code that holds sway in men's prisons,<sup>18</sup> but women officers are trying to attain a position of dominance by mimicking the demeaning attitude of the dominant male officers. In other words, the woman officer who joins the men in demeaning women prisoners is declaring that she is at the top of the hierarchy, and not prone to "weak" feminine proclivities, such as empathizing with, empowering, and caring for her female wards. Of course, there are exceptions, and many women prisoners have told me that the only way they survived imprisonment was with the support and encouragement of women staff members. But more often women tell me how the women staff members treat them as horribly as the male staff, and male staff infantilize them, demand their subservience, and too often sexually assault them.

The history of women's prisons in the United States involves suppressing women's autonomy and agency and teaching them to comply. Subservience is drilled into the woman prisoner. She is taught to passively follow orders, see herself as undeserving of agency and power, and remain silent when she is mistreated or abused. If she protests or demands her rights, there is retaliation in the form of bogus disciplinary write-ups and time in "the hole," or solitary, which is also a form of retaliation against women who report custodial sexual assaults ("custodial" in the sense that the perpetrator is an officer or staff member). Or there are much more subtle forms of retaliation when a woman does not "know her place." A frequent reprisal is a bogus "ticket" (a disciplinary write-up). Approximately sixty-five percent of women prisoners have children; their problems with self-esteem and, too often, depression have much to do with their performance as mothers.<sup>19</sup> In many prisons, when a woman receives a ticket, a part of the punishment is denial of visits. Then she cannot see her children, and this causes

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18. See *supra* Part II.

19. Suzanne Allen, Chris Flaherty & Gretchen Ely, *Throwaway Moms: Maternal Incarceration and the Criminalization of Female Poverty*, 25 *AFFILIA* 160, 160 (2010).

her to feel worse about herself as a mother. The alternative is to accept the subservient role, accept the omnipresent subtle forms of sexual harassment, and thereby protect her visits with her children.

Then there is the omnipresent threat of sexual abuse. An underlying theme throughout my work is that prison rape does not occur without a culture of misogyny that supports it, even encourages it.<sup>20</sup> This culture of misogyny is created and reinforced in myriad ways: the names weaker men are called, such as punk, sissy, girl; the names grown women prisoners are called by officers acting unprofessionally, such as girls; the lewd propositions they hear, such as “Nice tits,” or “I’d like some of that ass, right there;” and pat-down searches that take a little too long, especially those where there is lingering over the breasts and crotch. In most women’s prisons, officers are required to conduct a certain number of pat down searches each shift. For example, women prisoners are suspected of smuggling fruit out of the dining hall for use in their cells later in making “pruno,” a prisoner-manufactured alcoholic beverage, so staff pat-down women leaving the dining hall. Male staff, on average, like to conduct pat searches on young, good-looking women. Thus, young, good-looking prisoners tell me they are searched quite frequently; whereas older, less “attractive” women say they hardly ever get searched.

We have, in the political run-up to the 2016 presidential election, an example of the way a background culture fosters abusive acts against women, and the way cultural misogyny creates fertile ground for sexual abuse. President Donald J. Trump was exposed as a misogynist, talking about grabbing women’s genitals and the women not resisting him.<sup>21</sup> In his defense, he and various reporters and commentators dismissed his foul language and gross objectification of women as “locker-room talk.”<sup>22</sup> Professor Harry Edwards protested that athletes do not talk that way in the locker room, and for Trump to imply they do is to insult athletes.<sup>23</sup> But

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20. Kupers, *The Role of Misogyny*, *supra* note 12.

21. David A. Graham, *Trump Brags About Groping Women*, ATLANTIC (Oct. 7, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-trump-tapes/503417/> [https://perma.cc/F9FG-38XD].

22. Daniella Diaz, *3 Times Trump Defended His ‘Locker Room’ Talk*, CNN POLITICS (Oct. 9, 2016, 11:27 PM), <http://www.cnn.com/2016/10/09/politics/donald-trump-locker-room-talk-presidential-debate-2016-election/> [https://perma.cc/D6XP-NSM8].

23. Harry Edwards, *‘Locker-Room Talk’? Not Like Any I’ve Heard*, S.F. CHRON. (Oct. 10, 2016, 4:39 PM), <http://www.sfchronicle.com/opinion/openforum/>

the discussion of Trump's misogynist utterances is telling on another level. That kind of talk in the locker room, whoever is doing the talking, must play a part in the sexual assaults and domestic violence that are perpetrated by some among the participants in the "locker-room talk." Just so in prison. When officers call adult women "girls" and grope and maul them in the name of pat searches, they are setting the stage for rape and other forms of sexual abuse. They are evolving a culture of misogyny where sexual abuse will inevitably follow.

I do not mean to imply that all prison staff are misogynists, nor that all male staff actually assault women prisoners. A much more frequent violation of women prisoners, practiced almost universally by staff in women's facilities, is complicity by silence as colleagues carry out the abuse. One egregious example is a rape that was reported by a Michigan prisoner while she was appearing on the witness stand during the *Neal v. Michigan DOC* litigation, in which the plaintiffs, 500 women prisoners in the Michigan Department of Corrections, won a settlement of \$100 million.<sup>24</sup> A male officer led a woman down a hallway that was off-limits for prisoners; on the way down the hallway, the officer stopped to chat with a Sergeant who was sitting at a desk. The woman was forced to stand there and wait while the two men chatted. Then the officer led her further down the hallway and into a storage closet where he proceeded to brutally rape her. The officer left her in the closet and returned to his post. The woman got dressed, tried her best to compose herself, and walked back down the hallway to return to her pod. On the way, the Sergeant with whom the Officer had stopped to chat stopped her and commented on her being in a hallway that was off-limits for prisoners.<sup>25</sup>

Why did the Sergeant permit the rape to occur, and why did he not report it, as all policies and decency would require him to do? It is called the "Blue Code," the code of silence among correctional officers (and police).<sup>26</sup> Their unofficial code of conduct prohibits informing on each other. There have been exceptions, whistle-

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article/Locker-room-talk-Not-like-any-I-ve-heard-9961143.php [https://perma.cc/5FBC-7DE7].

24. See *Neal v. Dep't of Corr.*, No. 285232, 2009 Mich. App. LEXIS 182, at \*1 (Mich. Ct. App. Jan. 27, 2009) (per curiam).

25. *Id.* My report here is from my memory of testimony at trial.

26. See generally Gary R. Rothwell & J. Norman Baldwin, *Whistle-Blowing and the Code of Silence in Police Agencies: Policy and Structural Predictors*, 53 *CRIME & DELINQ.* 605 (2007).

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blowers, and there have been correctional officers who report sexual abuse of women prisoners, and even some who testify at trial about it. But they are very rare exceptions. In almost every instance of sexual abuse that I have uncovered in preparation for my expert testimony in civil lawsuits brought by the survivors of prison sexual abuse, there were other officers who knew about the abuse, and in many cases provided alibis for the perpetrators.

The Blue Code, like the background culture of misogyny, is a prerequisite and active ingredient in custodial sexual abuse, the sexual abuse of women by prison staff. But, notice that the culture of correctional officers and the Blue Code are the same as the male prison code, especially the prohibition against snitching. There is something tough, something male and strong, in officers' refusal to inform on each other. It is the same form of toughness and male posturing that is written into the male prisoner's code in the form of the "don't snitch" rule. In fact, in these and other ways, the misogyny that permeates the culture of women's prisons and the Blue Code that protects the perpetrators of custodial sexual abuse are literal expressions of the four structural elements of the male prison code.<sup>27</sup> There is a dominance hierarchy and a stark contrast between those on the top and those on the bottom (e.g., male staff and women prisoners), with the bottom defined in terms of the feminine (in fact, in women's facilities women are literally at the bottom of the heap, and infantilized as "girls" and worse). Lastly, there is a resultant narrowing of personal possibilities in the future for women who experience being at the bottom of the male dominance hierarchy that prevails in both men's and women's prisons.

The narrowing of personal possibilities is quite obvious in women prisoners I have examined while preparing for expert testimony in class action litigation about sexual abuse in women's facilities. In many cases, I discover all the signs and symptoms of posttraumatic stress disorder (PTSD) with lasting disability.<sup>28</sup> But even more troubling is the lasting depression, lethargy, lack of initiative, sense of shame, and diminished self-esteem that I often find in the survivors of sexual abuse in women's prisons. There is sexual abuse. There is the omnipresent dread that sexual abuse

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27. See *supra* Part II.

28. See generally Terry A. Kupers, *Posttraumatic Stress Disorder (PTSD) in Prisoners*, in *MANAGING SPECIAL POPULATIONS IN JAILS AND PRISONS* (Stan Stojkovic ed., Civic Research Inst. 2005).

will happen any minute. And there is silence on the part of staff who are more interested in complying with the Blue Code than they are committed to their professional and ethical duties. All of this, imposed by the prison regimen, exacerbates a certain compliant, passive attitude on the part of the average woman prisoner, and a lack of agency and initiative. The prison regimen imposes all this on women captives. Again, as with men who have great trouble re-entering the community because of the tough guy posture they learned in prison, women ex-prisoners tell me that after being put through the gender training they endured in prison, they find they struggle with a lack of initiative in their daily lives and the feeling that not much is worth doing. In other words, after going through training in patriarchal subservience in prison, they have great difficulty getting back to the tasks that were interrupted by their arrest: feeling powerful and designing a quality life.

#### IV. GENDER VARIANCE AND DREAD

Where men ascribe to an exaggerated notion of masculinity and put a lot of energy into establishing their station in a cruel and violent dominance hierarchy (whether it be the prison yard or the corporate board room), ambiguity in gender identification is not tolerated. I have testified on behalf of two trans-women (individuals with male genitalia who identify as women); one was admitted to a male prison, Folsom Prison in California, because she was pre-operative.<sup>29</sup> In other words, she still had male genitalia even though in every other way she was a woman and had been for years. Because of crowding, she was required to share a cell with a male prisoner. A tough male prisoner “talked nice” to her and convinced her to agree to be in a cell with him (to “cell with him,” as they say in that prison). As soon as she was locked into the cell with him, his personality changed. He became angry and controlling. He began to grope her and then he raped her repeatedly.<sup>30</sup> She complained to one officer who responded, “[W]hat’s the matter[,] . . . you love dick!”<sup>31</sup> The other case

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29. *Giraldo v. Cal. Dep’t of Corr. & Rehab.*, 168 Cal. App. 4th 231, 238 (Cal. Ct. App. 2008).

30. *Id.* at 239.

31. *Giraldo*, 168 Cal. App. at 231 (the author was present in court after testifying as a psychiatric expert for plaintiff. The quotes are paraphrased from the author’s memory); see also Terry A. Kupers, *Rape and the Prison Code*, in *PRISON MASCULINITIES* 111, 116 (Don Sabo, Terry A. Kupers & Willie London eds., Temple Univ. Press 2001).

involved a trans-woman from Latin America who was detained in a private prison that served as a detention facility for I.C.E. (Immigration and Customs Enforcement).<sup>32</sup> She looked like the woman that she was, but again, because she had not yet had surgery to change her genitalia she was detained in a men's detention facility. There, an officer began touching her inappropriately, telling her how she excited him sexually, and then took her into a closet where he sexually assaulted her.

Gender fluidity is highly stigmatized in prison.<sup>33</sup> It is as if the "real men" who are fighting for a place on top of the dominance hierarchy, while demeaning other men who are even slightly feminine, cannot tolerate any degree of ambiguity when it comes to gender. The ambiguity is threatening to these "real men" because it challenges their binary notion that there are only hyper-masculine top dogs and weak, feminized men at the bottom of the pile. The prisoner who does not fit the picture of either type of male prisoner is likely to be attacked and raped. This is the plight of gay men as well as transgender prisoners and men exhibiting all other forms of gender variance. Where there is gender ambiguity, there is great danger. The male/female binary division is absolute. Anyone who challenges it—the non-tough male, the gay man, the trans person—will be attacked, and likely raped. A California study showed that fifty-nine percent of transgender prisoners are sexually assaulted.<sup>34</sup> And that figure is low because only a certain proportion of those who have been assaulted are willing to talk about it or report it, even to a researcher.

Ashley Diamond, a thirty-six year old African-American transgender woman, was incarcerated in men's prisons in Georgia; she was repeatedly raped and denied medical treatment, including the hormones she had been taking for seventeen years.<sup>35</sup> At one point during her ordeal she was placed in punitive solitary

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32. The author has personal recollection of these events but, pursuant to a privileged settlement agreement, cannot disclose the names of those involved.

33. Rose, *supra* note 11, at 510–11.

34. VALERIE JENNESS ET AL., UNIV. CAL. IRVINE: CENTER FOR EVIDENCE-BASED CORRECTIONS, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 30 (2007), [http://ucicorrections.seweb.uci.edu/files/2013/06/PREA\\_Presentation\\_PREA\\_Report\\_UCI\\_Jenness\\_et\\_al.pdf](http://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf) [<https://perma.cc/2CUA-GE5E>].

35. *Ashley Diamond v. Brian Owens, et al.*, SOUTHERN POVERTY LAW CTR., <https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-brian-owens-et-al> [<https://perma.cc/C38A-QHDW>].

confinement for a rule violation: “pretending to be a woman.” The Southern Poverty Law Center sued the Georgia Department of Corrections on her behalf and the litigation was settled in February 2016.<sup>36</sup>

Again, the dreadful reality of sexual assault in prison causes lasting damage to those who are assaulted and raped. And again, the effect is to make re-entry into the community very problematic. Whether the stigmatized male hides his or her gender inclinations to avoid altercation, or expresses them openly and incurs the risk of assault and rape, the repercussions last far beyond the term in prison and make a quality life in the community after release from prison very problematic.

#### V. YOUTH AND SOLITARY CONFINEMENT

The growing number of youths in adult prisons is creating a massive problem for them, their families, and their community. And not surprisingly, the problem centrally involves gender bias and sexual assault. Traditionally, during the age of reform and rehabilitation in the prisons from the 1890s through the 1970s, the juvenile justice system provided a place where juvenile offenders could receive the education and rehabilitation services they would need to turn their lives around and become productive members of the community. The idea was that the adolescent brain is not fully formed; therefore, the adolescent is less culpable for criminal acts and more amenable to education and training that might change his or her ways. A consensus about this difference between juveniles and adults is reflected in a series of Supreme Court decisions that bar across-the-board sentencing of juveniles to life in prison,<sup>37</sup> bar the execution of those who committed murder prior to the age of eighteen,<sup>38</sup> and make the latter decision retroactive (i.e., individuals previously sentenced to death for murders that they committed as juveniles cannot be executed).<sup>39</sup>

An *amicus curiae* brief in *Miller v. Alabama* by the American Psychological Association, the American Psychiatric Association,

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36. *Id.*; Mitch Kellaway, *Black Trans Woman Ashley Diamond Allegedly Assaulted in Ga. Prison Again*, THE ADVOCATE (Jul. 21, 2015, 2:19 PM), <http://www.advocate.com/violence/2015/07/21/ashley-diamond-black-trans-woman-suing-safety-allegedly-raped-ga-prison-again> [<https://perma.cc/YF2F-AKZJ>].

37. *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

38. *Roper v. Simmons*, 543 U.S. 551 (2005).

39. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

and the National Association of Social Workers is very instructive.<sup>40</sup> The three professional organizations argue that juveniles are different than adults and therefore deserve a certain deference in sentencing.

The brief, citing recent research in developmental psychology and the neurosciences, argues that juveniles are “less capable of considering alternative courses of action and avoiding unduly risky behaviors [and] . . . less oriented to the future and the consequences of their often-impulsive actions.”<sup>41</sup> Juveniles are more “susceptible to negative influences and outside pressures, including peer pressure . . . they lack the freedom and autonomy that adults possess to escape such pressures . . . are less capable than adults of mature judgment and decision-making . . . [and] because [they] are still in the process of forming coherent identities,” their crimes reflect the “qualities of youth” more than any “entrenched bad character.”<sup>42</sup> The brief continues, “[r]esearch into adolescent development continues to confirm the law’s intuition that ‘incurability is inconsistent with youth.’”<sup>43</sup>

But since the 1980s, the spirit of reform has given way to a culture of punishment and control in the criminal justice system. As budgets for the social welfare safety net have suffered drastic cuts, juvenile facilities became overcrowded and relatively underfunded.<sup>44</sup> There has been a proliferation of abusive practices such as locking juveniles in solitary or even in cages on the recreation yards, and there has evolved a trend toward trying juveniles as adults and locking them away in adult facilities.

In many states, a judge must consider the merits of the individual case and decide that the youth committed a crime heinous enough to qualify him or her for trial as an adult. But in some states, there is an across-the-board sentencing law requiring all youth at age sixteen (e.g., New York) or seventeen (e.g., Michigan) to be tried as adults, and if convicted, sent to adult prisons. In essence, this development constitutes a dismantling of the juvenile justice system.

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40. Brief for the Am. Psychological Ass’n, Am. Psychiatric Ass’n, & Nat’l Ass’n of Soc. Workers as Amici Curiae Supporting Petitioner, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

41. *Id.*

42. *Id.*

43. *Id.*

44. See generally DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* (Gower Pub. Co. eds., 1985).

There are half-hearted attempts to separate the juveniles in adult prisons from older prisoners. Many departments of corrections have separate cellblocks and yards for under-age prisoners. But the separation is never entirely successful and the youth inevitably come into contact with adult prisoners; in jail awaiting trial, in reception centers, or while being transported. And then, even sitting in a separate space within an adult prison, the youth know that they will be sent out onto the adult general population yard as soon as they turn eighteen. So, just like the adult male prisoner, they buff up, adopt a mean glare, and learn to participate in gladiator fights to prove their manliness, all the while dreading being castigated as a weakling, a faggot, a punk, or a girl, and being raped by a stronger male. This was certainly the story of Dennis Levis.<sup>45</sup>

Solitary confinement is a theme that threads its way through any discussion of gender and prison. In women's prisons, when a prisoner complains she has been sexually assaulted or raped by a member of the staff, she is likely placed in solitary confinement "for her own protection" while the investigation proceeds. Many women prisoners tell me that they decided not to report a sexual assault, or they delayed reporting, because they dreaded being placed in solitary confinement. The Commission that was formed by the Prison Rape Elimination Act heard testimony about this problem. In the standards that were eventually enacted, the Commission included a prohibition against automatically consigning women who complain of sexual assault to solitary confinement.<sup>46</sup> But no such prohibition exists for juveniles who find their way into solitary confinement after entering the adult prison system.

As soon as the youngster enters the prison—especially if he is small, slight, or has peach fuzz instead of whiskers on his cheeks—he is subjected to catcalls such as "nice ass," or "come bunk with me and I'll show you a good time." Even if he is headed for a separate unit for prisoners under the age of eighteen, he passes by a certain number of older prisoners and is subjected to the catcalls. If a juvenile prisoner is not separated from adults in his state, he has to go to the yard and the dayroom with older guys. An older

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45. See *supra* Part I.

46. NAT'L PRISON RAPE ELIMINATION COMM'N, NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 8 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [<https://perma.cc/5UN4-P9JB>].

prisoner will grab his genitals or tell him he is going to find him when the guards are not looking and rape him. Many young prisoners do suffer sexual assaults and rape.<sup>47</sup> But often the youth who does not feel confident about holding his own in prison gladiator fights winds up in solitary confinement, either by asking for protection or by getting into a fight and being written a disciplinary infraction where the punishment is solitary.<sup>48</sup>

According to the male prison code, asking for protection is a sign of weakness, and the youth who asks for protection is branded a weakling and will be subject to attacks from then on throughout his career as a prisoner. Many youths ascribe to the prison code and feel they cannot ask for protection, which would reflect weakness and constitute collaboration with officers. So they devise a plan to get into a fight and be placed in segregation as punishment. Either they fight with another prisoner or they assault an officer. They are given a disciplinary infraction and sent to “the hole,” where they are safely alone in a cell but not viewed by fellow prisoners as weaklings or un-manly men.

I have interviewed quite a few youths in adult prisons whose stories fit this picture. I find them in solitary. Perhaps they suffer from a serious mental illness, which is exacerbated by solitary confinement.<sup>49</sup> Or they may seem relatively stable from a psychiatric perspective. Still, the damaging effects of solitary confinement are heightened when the denizens of solitary are juveniles. The recent death of Kalief Browder, and the settlement of a class-action lawsuit that bars solitary confinement for juveniles at Rikers Island in New York City, provide evidence and scientific research on the harm of solitary for the juvenile population.<sup>50</sup>

Again, as in the case of adult males who buff up to prove their manliness in prison and women who are trained in subservience

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47. See generally NO ESCAPE, *supra* note 11.

48. See TERRY A. KUPERS, *Youth in Isolation, in SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT* (Univ. of Cal. Press, 2017).

49. JAMES GILLIGAN & BANDY LEE, REPORT TO THE N.Y.C. BOARD OF CORRECTION 5 (2013), <http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf> [<https://perma.cc/G3ED-D4H5>].

50. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (Jun. 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/N5LP-NUGF>]; *Testimony Regarding the Treatment of Adolescents in NYC Jails and at Rikers Island*, N.Y. C.L. UNION (Oct. 8, 2014), <http://www.nyclu.org/content/testimony-regarding-treatment-of-adolescents-nyc-jails-and-rikers-island> [<https://perma.cc/4VBW-NQUR>].

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and suffer sexual assaults, the youth who are subjected to gladiator fights, sexual abuse, and solitary confinement suffer lasting psychiatric harm and do not do well when the time comes for them to return to the community.

CONCLUSION: CONSTRICTED POSSIBILITIES FOLLOWING  
RELEASE FROM PRISON

The common denominator in the outcome for these subgroups of prisoners is failure at going straight in the community after they are released. The man who successfully proved his manliness has trouble letting his guard down, trusting, and opening up with intimates in the community. The woman who has been trained in subservience or subjected to sexual abuse has trouble expressing herself, regaining some modicum of her pre-incarceration vitality, and struggling in her relationships to be respected and not abused. The trans woman who was objectified has continuing symptoms of posttraumatic stress disorder, or ongoing shame about events that occurred in prison. And the youth who was raped or subjected to long stints in solitary confinement and lost the opportunity at a critical phase of development to gain the capacities needed to succeed as an adult in the community, is scarred forever by the prison experience. In each case, what happens in prison is the opposite of the kinds of progress in gender relationships that we pride ourselves on in the community-at-large. It is as if the prison experience is, by design and/or effect, a giant patriarchal backlash against the progress of the women's movement, gay liberation struggle, the struggle of the LGTBI community, and the pro-feminist men's movement. In the community we laud the growing consensus on gender expansion that is evolving, whereas in prison it is an entirely other story.

There are differences between the experiences of adult men, adult women, gay, gender variant individuals, and youths in prison. And all of these groups confront themes in common to their gendered experience. The dominance hierarchy I explicated in relation to male prison culture also shapes the culture in women's facilities and much of what happens to LGBT and gender variant juvenile prisoners. The prison dominance hierarchy shapes gender relationships, and does so in a way that causes damage to all prisoners. The pain and suffering of prisoners is worth considering in its own right: the anguish of the man who has to fight to prove he is manly; the dread men feel lest they be raped; the humiliation

experienced by women who are trained in subservience; the shame and petrification of the men and women who are raped; the psychological pain of the youth facing gladiator fights on the adult prison yard or the mortification of solitary confinement. All of these forms of pain and suffering are horrific. Most result from prison conditions, policies and practices that are unconstitutional, and all of these dreadful aspects of prisonization<sup>51</sup> must be ended or reversed.

I have focused on abusive prison staff and prisoners whose capacities are constricted by their stint behind bars. There are other kinds of staff and other kinds of prisoners. But my assignment here is to talk about gender in prison, and I have chosen to utilize the example of prison rape as an ultimate expression of the male dominance hierarchy that prevails in jails and prisons today. There are many very fine correction officers. They try their best to help their wards in whatever way they can. I appreciate their efforts. The problem that lingers about even the most noble of prison staff is the Blue Code. If they do not practice sexual abuse per se, but they stand silently by as their colleague practices blatant sexual abuse, there is entirely unacceptable collaboration.

There are prisoners who do not accept their much-constricted set of options. They want to have some say in how they are treated in prison. Some become self-taught pro se lawyers, a.k.a. jailhouse lawyers, and they litigate the prison conditions they consider unconstitutional. Gabriel Arkles tells the stories of trans prisoners who courageously litigate the injustices they are forced to endure behind bars.<sup>52</sup> Other prisoners take the witness stand in class action litigation, and tell the world about rapes that occur in prison, or very serious mental illness that goes untreated, or the damage

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51. Prisonization, as the social psychologist and prison expert Craig Haney has described it, “involves the incorporation of the norms of prison life into one’s habits of thinking, feeling and acting . . . . The longer persons are incarcerated, the more significant is the nature of their institutional transformation.” Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 65 (Jeremy Travis & Michelle Waul eds., Urban Inst. Press 2003).

52. Gabriel Arkles, Associate Teaching Professor, Northeastern Univ. Sch. of Law, Presentation at the Western New England Law Review Symposium on Gender and Incarceration (Oct. 14, 2016).

wrought by their time in solitary confinement.<sup>53</sup> Still others go on hunger strike.<sup>54</sup> In other words, they fight back, they express their human and civil rights, and they make things happen for the better. I do not mean to overgeneralize the sense of constricted options that I hear about from many prisoners. Many prisoners, encouraged by growing support they are receiving from a progressive community increasingly concerned about their plight, are speaking truth to power in every way they can. This brings reason for renewed hope for an end to the extreme forms of oppression that have been ensconced in our prisons while the public proclaimed we should “lock-em-up-and-throw-away-the-key.”

I have proposed the notion that a male dominance hierarchy prevails in the prisons, and the experiences prisoners have at their station in the hierarchy shape their post-release potentialities. To the extent the ex-prisoner is trapped by the constricted options and possibilities he or she learned in prison, there is the tragic prospect of less than optimal quality of life. To the extent the ex-prisoner can leave entirely behind the unfortunate attitudes and behaviors learned behind bars, he or she can grow by joining the evolving consensus in the community about inclusion of all gender variants and sexual orientations in our midst.

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53. BRENDA V. SMITH, NAT'L WOMEN'S LAW CTR., AN END TO SILENCE: WOMEN PRISONERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCT 7 (1998).

54. REITER, *supra* note 10, at 6–11.