

# ARTICLES

## STRATEGIC SEGREGATION IN THE MODERN PRISON

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## INTRODUCTION

In corrections circles, it is well recognized that people who are gay or transgender<sup>1</sup> face heightened vulnerability to sexual victimization behind bars.<sup>2</sup> Although accurate statistics on prison rape are notoriously difficult to generate,<sup>3</sup> recent research confirms this dynamic. A 2007 study conducted in the California prison system found that “67 percent of inmates who identified as LGBTQ reported having been sexually assaulted by another inmate during their incarceration, a rate that was 15 times higher than the inmate population overall.”<sup>4</sup> Recent Bureau of Justice Statistics findings suggest similarly disproportionate rates of assault for LGBTQ detainees in juvenile facilities, with “[y]outh with a sexual orientation other than heterosexual” reporting sexual victimization at a rate almost ten times higher (12.5%) than that reported by heterosexual youth (1.3%).<sup>5</sup> The title of a recent publication by the advocacy group Just Detention International (formerly Stop Prisoner Rape) crisply captures the point: *LGBTQ Detainees Chief Targets for Sexual Abuse in Detention*.<sup>6</sup>

1. The term “transgender” denotes people whose gender identity does not match their birth sex. Throughout this Article, I use the term “trans women” to refer to people who were born biologically male but who self-identify and self-present as women.

2. As Human Rights Watch observed in its 2001 report on male rape in American prisons, “gay inmates are much more likely than other inmates to be victimized in prison . . . .” HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 52 (2001), available at <http://www.hrw.org/legacy/reports/2001/prison/>. The report goes on to note that “many gay inmates—even those who are openly gay outside of prison—carefully hide their sexual identities while incarcerated . . . because inmates who are perceived as gay by other inmates face a very high risk of sexual abuse.” *Id.* at 57. On the particular vulnerability of transgenders, see *infra* note 4.

3. See, e.g., GERALD G. GAES & ANDREW L. GOLDBERG, NAT’L INST. OF JUSTICE, PRISON RAPE: A CRITICAL REVIEW OF THE LITERATURE 1–2 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213365.pdf> (discussing the various difficulties associated with studying the problem of prison sexual victimization, including the “stigmatization associated with sexual victimization”).

4. *LGBTQ Detainees Chief Targets for Sexual Abuse in Detention*, JUST DETENTION INTERNATIONAL, Feb. 2009, at 1 (citing Valerie Jenness et al., Center for Evidence-Based Corrections, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007)). This same team of researchers found that “59% of [California’s] transgender population reported sexual victimization as compared to 4% of the general prison population.” Valerie Jenness, *The Victimization of Transgender Inmates* (2006), available at [ucicorrections.seweb.uci.edu/. . . /Victimization%20of%20Transgender%20Inmates.ppt](http://ucicorrections.seweb.uci.edu/. . . /Victimization%20of%20Transgender%20Inmates.ppt), slide 14.

5. BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09, Jan. 2010, at 1. The increased rate of victimization experienced by LGBT detainees reflected in these figures is consistent with what is known about the culture of juvenile facilities. Anecdotal evidence suggests that these findings actually underreport the overall incidence of sexual assault in juvenile detention.

6. See *supra* note 4.

Gay men and trans women<sup>7</sup> are not the only people vulnerable to sexual victimization in men's prisons and jails.<sup>8</sup> But their assigned place in the prison sexual hierarchy makes them almost automatic targets for such abuse.<sup>9</sup> For this reason, many carceral facilities around the country routinely house gay men and trans women separately from the general population (GP). Often, this segregation takes the form of protective custody, a classification that typically involves isolation in "a tiny cell for twenty-one to twenty-four hours a day[.]"<sup>10</sup> the loss of access to any kind of programming (school, drug treatment, etc.),<sup>11</sup> and even deprivation of basics like "phone calls, showers, group religious worship, and

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7. See *supra* note 1. At present, most prisons and jails in the United States follow the practice of classifying detainees according to their genitalia, which means that preoperative trans women are housed with men. See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). For strong criticism of this policy, see Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1219, 1247–48 (2004); Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522–24 (2000); STOP PRISONER RAPE & ACLU NATIONAL PRISON PROJECT, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS 7 (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf> (last visited Mar. 6, 2011). The U.S. Department of Justice has proposed a national standard on which, "[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems." See National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6281 (Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115) (Att'y Gen. regulations proposed pursuant to PREA) (§ 115.42 (c)) [hereinafter National Standards].

8. I return to this important point below. See *infra* Part III.B. Among the criteria known to increase the vulnerability of male inmates are "mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), [and] prior sexual victimization . . ." NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 217 (June 2009) (Appendix B: NPREC Standards—Adult Prisons and Jails: SC-1) [hereinafter COMMISSION REPORT]; see also Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 164–75 (2001) (identifying a range of factors known to correlate with vulnerability to sexual victimization in men's carceral facilities, including age, projecting "feminine characteristics," physical size, and being a new inmate who is "unfamiliar with the game").

9. For more on the prison sexual culture, and on the place of gay men and trans women in that culture, see *infra* Part I.

10. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 538 (2009).

11. As Arkles explains, lack of access to such programming can carry with it serious hardships for people behind bars:

For one, it is one of the only ways to interrupt hours of deadening boredom with some sort of activity. For another, certain programs can help build skills to increase the chance of success once released. For another, while typically prisoners are only paid pennies an hour for their labor, these programs are virtually the only way to earn money to use in the commissary to buy such luxuries as shampoo, toothpaste, cigarettes, or stamps. Finally, participation in certain programs can be mandatory to make parole or an early release date. Even when not mandatory, successful participation in prison programs is generally regarded as a very favorable factor in parole decisions.

*Id.* at 542.

visitation . . . .”<sup>12</sup> Such conditions, even if increasing a person’s protection from sexual assault—a proposition some commentators challenge<sup>13</sup>—force vulnerable prisoners into the cruel position of having to choose between personal safety and the satisfaction of other basic and urgent human needs, above all, those of community and fellow human contact.

There is, however, a notable exception to this national trend. In the Los Angeles County Jail—the biggest jail system in the country—officials have found a way to increase the personal security of gay men and trans women detainees without forcing them to choose between safety and community. For more than two decades, the L.A. County Sheriff’s Department (the Department), which runs the County’s jail system, has been systematically separating out the gay men and trans women admitted to the L.A. County Jail (the Jail) and housing them wholly apart from GP.<sup>14</sup> As a consequence of this segregated unit—long known as “K11” but recently officially rechristened “K6G”<sup>15</sup>—gay men and trans women detained in the Jail are relatively free from the sexual harassment and forced or coerced sexual conduct that can be the daily lot of sexual minorities in other men’s carceral facilities.<sup>16</sup>

In the summer of 2007, following a lengthy negotiation with both the UCLA IRB and the Jail’s command staff, I spent over seven weeks conducting research in the Jail.<sup>17</sup> During that time, I observed the operation of K6G and the Jail more generally,<sup>18</sup> sat in on K6G classification interviews, spent countless hours in the officer’s booth overlooking the K6G dorms, and had many informal conversations

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12. *Id.* at 541 (explaining that “people who find themselves in segregation . . . typically find their rights and ‘privileges’ dramatically restricted”). As one federal court put it, summing up the situation, protective custody brings the loss of “adequate ‘recreation, living space, educational and occupational rehabilitation opportunities, and associational rights . . . .” Rosenblum, *supra* note 7, at 530 (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987)).

13. *See generally* Arkles, *supra* note 10.

14. In corrections, prisons and jails serve distinct purposes. Prisons provide long-term housing, typically for sentenced offenders serving terms of longer than one year, although the precise cut-off can vary by state. Jails only hold sentenced prisoners serving short terms, typically less than one year. In addition, jails house individuals awaiting trial but denied bail, convicted offenders awaiting sentencing, and prisoners sent from state or federal prison to serve as witnesses in trials, whether their own or those of others. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579, n.76 (2003). The role of jails in providing housing for detainees with court dates explains why jails are typically situated adjacent to courthouses, although L.A. County is so large that most Jail inmates with court dates have to be bused from the Jail to their respective courthouses.

15. This name change was apparently necessitated by a new computer system that was only able to count up to “K10.” To avoid confusion, in this Article, I refer to the unit by its current designation of “K6G.”

16. Those sexual minorities housed in women’s prisons also face a heightened risk of sexual abuse in custody. *See* COMMISSION REPORT, *supra* note 8, at 74. In this Article, I focus on the vulnerability of sexual minorities in men’s prisons.

17. For a description of the research design, see Methodological Appendix, *infra*.

18. This enterprise was made possible by Chief Alex Yim, who generously allowed me open access to all parts of the facility.

with unit residents, custody officers, and other staff.<sup>19</sup> I also conducted one-on-one interviews, structured around a 176-question instrument,<sup>20</sup> with a random sample of K6G residents.<sup>21</sup> In all, I interviewed thirty-two residents,<sup>22</sup> almost ten percent of the unit's population at the time,<sup>23</sup> a process yielding fifty-one hours' worth of audio recordings.<sup>24</sup>

This Article draws on that original research<sup>25</sup> to provide an in-depth account of the K6G unit. The aim is both descriptive and evaluative—to describe the mechanics of the program and its implications for residents, and to assess the weight of possible objections to the program's design and to the undertaking as a whole. As I show, L.A. County has managed to create a surprisingly safe space for the high-risk populations K6G serves. That it has done so in a carceral system that is severely overcrowded and notoriously volatile makes the success of the program even more remarkable.

There is, however, no getting around it: with K6G, L.A. County is engaged in a process of state-sponsored, identity-based segregation. Although this program

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19. I took lengthy field notes each day and then dictated the notes at night, when what I had seen was still fresh in my mind.

20. I developed this instrument with the help of my colleague, Joe Doherty. It is attached as Appendix B.

21. In the course of identifying my sample, I met with a number of K6G residents who, for reasons of mental illness, developmental disability, or other psychological incapacities, were not able to engage in the interview process. These individuals were excluded from my sample. In addition, because I do not speak Spanish and because the substance of the interviews was sensitive enough that introducing a translator would have risked complicating and even compromising the interview process, my sample also did not include dorm residents who did not speak English. Despite this latter constraint, which might have seemed to threaten the racial diversity of my sample, the racial profile of my interviewees wound up matching fairly closely the racial profile of K6G itself, as indicated in the table below.

	<b>My sample</b>	<b>Make-up of K6G</b>
Black	39.4%	36.5%
White	27.3	29.3
Latino	30.3	31.3
other	2.89	3.03

22. I consented and commenced the interview process with 33 subjects, but one subject proved to be developmentally disabled, an incapacity that had not been evident during the consent process. In that case, I terminated the interview without completing the questionnaire.

23. Interviewees were assigned random interview numbers. The interviews were recorded and later transcribed. Most interviews encompassed multiple audio-files, which were saved—and therefore transcribed—alphabetically, with the sequence restarting each day. Citations to these interview transcripts will be referenced hereinafter in the following manner: Int. # (Interviewee number), at file # (i.e. A–G) page # (transcript page reference); e.g., Int. 46, at C3.

24. These recordings were subsequently transcribed. I thank the UCLA Academic Senate, the UCLA Dean's Office, Harvard Law School, and Georgetown University Law Center for their generous support of this costly enterprise.

25. UCLA IRB # G07-01-106-03.

would most likely survive a constitutional challenge,<sup>26</sup> it nonetheless puts government officials in the business of intruding into the most private and intimate details of detainees' lives in order to determine whether they meet the Department's definition of "homosexual."<sup>27</sup> Worse still, it engages state officers in a process of openly labeling certain individuals as sexual minorities—with color-coded uniforms, no less.<sup>28</sup>

These concerns are serious ones, and point to admittedly troubling aspects of the K6G program.<sup>29</sup> They are, however, insufficient grounds to reject the enterprise. Given the current state of the American carceral system—overcrowded,<sup>30</sup> understaffed, volatile and often violent,<sup>31</sup> frequently controlled from the inside by prison gangs and other powerful prisoners<sup>32</sup>—there is at present no prospect for risk-free reform. If K6G provides gay men and trans women in the L.A. County Jail with safer and more humane conditions of confinement, the question we should be asking is not whether the program ought to be allowed, but what it would take to

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26. For further discussion of this point, *see infra* Part III.C.

27. The consent decree that created K6G explicitly stipulated "homosexual inmates" as the population to be served. For further discussion on the issues this label raises, *see infra* Part II.C.2, III.B. Because those who are transgender are typically readily apparent, the need to identify trans women does not carry the same unappealing prospect of state intrusion into detainees' private lives.

28. *See* discussion *infra* Parts II.B & III.A.

29. For further discussion, *see id.*

30. Over the past four decades, the population of America's prisons and jails has soared from approximately 360,000 to over 2.3 million people. *See* THEODORE L. DORPAT, *CRIMES OF PUNISHMENT: AMERICA'S CULTURE OF VIOLENCE* 55 (2007) ("In 1970, there were about 200,000 Americans in prison."); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *REPORT TO THE NATION ON CRIME AND JUSTICE* 104 (2d ed. 1988) (reporting that the number of jail inmates reached 160,863 in 1970); THE PEW CTR. ON STATES, *ONE IN 100: BEHIND BARS IN AMERICA* 2008, at 5 (2008) ("With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258."). As of January 1996, thirty-six states and the District of Columbia were under court order to reduce overcrowding in some or all of their prisons. *See* NATIONAL PRISON PROJECT, *STATUS REPORT: STATE PRISONS AND THE COURTS* 1 (1996). By the end of 2000, 310 prisons nationwide were operating under such a court order, and "courts had placed population caps on forty-four prisons." LYNN S. BRANHAM, *CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS* 621 (6th ed. 2002). And by the end of 2001, 33 states, the District of Columbia, and the federal system were housing prisoners in jails and other facilities because of overcrowding. *See* PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2002*, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p02.pdf>. In California, as of 2006, over 15,000 incarcerated people were sleeping in prison common areas "such as prison gymnasiums, dayrooms, and program rooms." Arnold Schwarzenegger, Governor, State of Cal., *Prison Overcrowding State of Emergency Proclamation* (Oct. 14, 2006). In the fall of 2006, California Governor Arnold Schwarzenegger declared a "Prison Overcrowding State of Emergency," noting that overcrowding creates an "increased, substantial risk of violence, and greater difficulty controlling large inmate populations." *Id.*

31. *See, e.g.*, Sharon Bernstein & Richard Winton, *Sheriff to Move Violent Inmates*, L.A. TIMES, Feb. 8, 2006, at A1; Megan Garvey & David Pierson, *More Rioting Erupts at Jails*, L.A. TIMES, Feb. 9, 2006, at A1; Stuart Pfeifer, *Inmate's Death Is Ruled a Homicide*, L.A. TIMES, Dec. 12, 2006, at B1; Stuart Pfeifer, *Crowding Problems Grow as Jail Sits Vacant*, L.A. TIMES, Oct. 16, 2007, at B3 (reporting 15 people killed in Los Angeles County jails since 2000).

32. *See* Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 55-61 (1987) (describing the ways gangs dominate prison life); Peter M. Carlson, *Prison Interventions: Evolving Strategies to Control Security Threat Groups*, 5 CORR. MGMT. Q., Winter 2001, at 10 (stating that gangs present an enormous problem for inmate management).

maintain the protection it provides while minimizing the dangers posed whenever the state authorizes differential treatment on the basis of identity.

The more vexing question is whether the K6G program is one that other jurisdictions ought to seek to emulate. As I argue in what follows, given its success, this model should be available as a tool in the toolkits of officials seeking to reduce the incidence of victimization in their facilities. Whether prison administrators elsewhere will find it an appropriate model for their jurisdictions is an open question. Carceral facilities differ widely as to the profiles of their populations (in size, racial and ethnic mix, gang culture, etc.), mission (whether jail, prison, juvenile detention, etc.), institutional culture, and physical structure and design. These differences among facilities mean that, as with any program goal, one size will not fit all.<sup>33</sup> Moreover, given the risks of a segregated approach like K6G,<sup>34</sup> many jurisdictions may conclude that the possible harms outweigh the benefits.

Yet one thing is clear: even where the K6G model seems, as in L.A. County, to meet the needs of a given institution, this approach can never be sufficient. Although K6G succeeds in keeping its residents relatively safe, its admission criteria are sorely underinclusive, excluding even people who, although neither gay nor trans, are nonetheless liable to victimization in GP.<sup>35</sup> Plainly, all detainees known to face a risk of abuse in custody must be protected.<sup>36</sup> The key policy question is whether there may be grounds for dividing K6G's target populations even from other vulnerable groups. The National Prison Rape Elimination Commission (the Commission), created by Congress through the Prison Rape Elimination Act of 2003 (PREA),<sup>37</sup> made recommendations in its final report suggesting a

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33. Cf. CHAD R. TRULSON & JAMES W. MARQUART, *FIRST AVAILABLE CELL: DESEGREGATION OF THE TEXAS PRISON SYSTEM* 215 (2009) (noting that “[n]o two prison systems are alike” and, therefore, that racial desegregation “must be a system-specific process” taking into account “the total environment in which a particular prison system is situated”).

34. See *infra*, Part III.A.

35. See *supra* note 7.

36. The state's legal obligation to protect vulnerable prisoners from sexual assault stems both from the Eighth Amendment to the United States Constitution, see *Farmer v. Brennan*, 511 U.S. 825 (1994), and from federal law, see the Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. §§ 15601–09 (2003); National Standards, *supra* note 7. See also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 910–23 (2009) (arguing that the state has a moral obligation to protect prisoners from serious physical and psychological harm).

37. See 42 U.S.C. § 15606. Among other things, Congress directed the Commission to “carry out a comprehensive legal and factual study of the penological [sic], physical, mental, medical, social, and economic impacts of prison rape in the United States,” 42 U.S.C. § 15606 (d)(1); hold public hearings on these issues, 42 U.S.C. § 15606 (g); and submit a report to the Attorney General and the Secretary of Health and Human Services containing “recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape.” 42 U.S.C. § 15606 (e)(1). The Commission submitted its final report in June 2009. See COMMISSION REPORT, *supra* note 8. PREA also directed the Attorney General to promulgate a “final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape.” 42 U.S.C. § 15607 (a)(1). In January 2011, the Attorney General issued a Notice of Proposed Rulemaking and called for notice and comment. See National Standards, *supra* note 7, at 6248. The comment period closed in April 2011, see *id.*, and the final rule is expected in 2012.

negative answer to this question.<sup>38</sup> Concerned about the “demoralizing and dangerous” effects of the L.A. County model,<sup>39</sup> the Commission advanced an approach that did not distinguish among at-risk groups.<sup>40</sup> This unified strategy has much to commend it, not least that it mitigates many of the troubling aspects of state-sponsored identity-based segregation. For this and other reasons,<sup>41</sup> the Commission’s approach will in most cases be preferable. Still, there may be reason to regret the widespread adoption of a unified model, which could come at the cost of some of the more humane and appealing aspects of life in K6G and result in a direct loss of some of its benefits.<sup>42</sup>

Certainly, no single strategy will be without its dangers and drawbacks. Prisons are an ugly business, and the problems they pose—including prison rape—admit of no easy fix. Indeed, to await such a fix would be to consign some of the most vulnerable people behind bars to the worst forms of suffering and abuse. K6G merits attention not because it is a perfect program, but because with it, L.A. County has created a relatively safe space for people who would otherwise be at great risk of victimization. Understanding how the program works day-to-day helps to explain its remarkable success. Equally important, it sheds light on the causes of prison sexual violence in general, as well as what, given the current realities of the American carceral system, is required to guard against it.

K6G also bears a close look for a further, unexpected reason: there is a lot to learn from this unit about incarceration more broadly. Although K6G shares many of the features of any custody situation, life in the K6G dorms differs in notable ways from life in GP. Through this contrast, a study of K6G exposes some important and troubling aspects of the carceral enterprise, including the role of the hypermasculinity imperative in constructing the social order in men’s prisons; the role of gangs in defining the carceral experience; the relationship between racial tensions and the fear of victimization in custody; the social services function of the American carceral system; and even what humane prison conditions might look like. It turns out, in short, that people who care about understanding prisons and making them safer and more humane may have much to gain from studying a small, unorthodox, and entirely unrepresentative unit in a massive, overcrowded,

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38. See COMMISSION REPORT, *supra* note 8, at 80.

39. *Id.*

40. The Commission’s proposed standards provided that all inmates be screened on arrival (and at “all subsequent classification reviews”) to assess their risk of being victimized or a victimizer. *Id.* at 217. To ensure accurate assessments, these determinations were to be individualized. For the criteria stipulated for consideration when “screen[ing] male inmates for risk of victimization,” see note 9 above. By contrast to the long list of criteria provided in the case of male inmates, the Commission included just two criteria to consider in “screen[ing] female inmates for risk of sexual victimization: prior sexual victimization and the inmate’s own perception of vulnerability.” *Id.* DOJ’s proposed standards do not distinguish between men and women, and add just one further consideration to the list: “[w]hether the inmate is detained solely on civil immigration charges.” National Standards, *supra* note 7, at 6280–81 (§ 1154.41 (c)(10)).

41. See discussion *infra* Part III.B.

42. See, e.g., *infra* Part II.D.2 (discussing the gang politics in GP and the absence of such politics in K6G).



decaying, dangerous, and otherwise wholly traditional carceral facility.

This Article proceeds as follows. Part I explains the special vulnerability of gay men and trans women to sexual victimization in men's carceral facilities, focusing in particular on the prison culture of hypermasculinity in which men struggle to prove their manhood, often by sexually victimizing those culturally defined as female. Part II examines L.A. County's K6G program. It describes the mechanisms of its operation, including the policies by which K6Gs are kept separate from GPs and the classification process by which gay men and trans women are identified for placement in the unit. This Part closes by making the case for the program's success in keeping its target populations relatively safe. In the course of doing so, it describes the gang politics that govern life in L.A. County's GP dorms and the role these politics play in prompting even some men who know themselves not to satisfy K6G's classification criteria to pretend to be gay to try to get access to the unit. Part III then addresses three objections that might be raised to the K6G enterprise. Part III.A considers the anti-segregationist objection, which would condemn as "demoralizing and dangerous" any official policy of separating groups along identity lines.<sup>43</sup> Although this section finds this objection insufficient to justify abandoning the K6G project, it identifies a number of concerns on which the anti-segregationist view sheds light, which anyone committed to the safe housing of K6G's target populations must take seriously. Part III.B turns to a cluster of objections that challenge K6G's admissions criteria as underinclusive. Some of these objections are shown to be unpersuasive, but at least one—the concern that K6G still leaves unprotected many vulnerable individuals who are neither gay nor trans—points to the limits of the K6G model in protecting all at-risk prisoners from sexual victimization. The most salient question proves to be whether institutions ought to have a single unit for all at-risk prisoners, or whether it may sometimes make sense to separate K6G's target populations even from other vulnerable groups. Part III.B ultimately argues that a unified approach such as that recommended by the Commission represents the better default option, although it emphasizes the dangers that would still attend such a strategy. At the same time, Part III.B cautions against any efforts to dismantle K6G and maintains that wide differences among carceral facilities mean that under some circumstances, two separate segregation units may represent the wiser option. Part III.C addresses a final objection: that, even should prison administrators in L.A. County or elsewhere wish to follow a K6G model, they would be precluded from doing so on constitutional grounds. As Part III.C shows, this notion is based on a misunderstanding of governing law, specifically the 2005 case of *Johnson v. California*.<sup>44</sup> Part IV concludes by identifying the factors that account for the relative success of

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43. COMMISSION REPORT, *supra* note 8, at 80.

44. 543 U.S. 499 (2005).

K6G, and considers the extent to which other jurisdictions might be able to replicate that success by implementing K6G-type programs of their own.

The aim of this project is in part ethnographic. In this Article, I explore the strategy developed in L.A. County for keeping gay men and trans women separate from GP. In a companion piece, I describe daily life in K6G and contrast it with the experience of life in GP.<sup>45</sup> Especially given the subject matter, there is an inherent danger in such an undertaking—that of seeming to endorse and thus to legitimate what is being described. Certainly, there is much to disturb in what I have to report. I describe a prison sexual culture in which the strong prey on the weak and gain status and power through the domination and abuse of fellow human beings. I describe a set of racial dynamics the governing principles of which are totally antithetical to prevailing socio-political norms of racial equality and mutual respect. And I describe state practices that enable and even collude in the perpetuation of this culture and these dynamics. Even the official steps taken to alleviate the worst effects of these conditions may strike some readers as both sorely insufficient and objectionable in themselves. To make matters worse, I offer validation—albeit equivocal—of existing strategies in the Jail, which may seem only further to legitimate the cultural and institutional dynamics that necessitate those strategies. To the extent that my own motives and commitments are genuinely in question, all I can do is state up front that I too regard with abhorrence much of what I describe and fervently wish things were otherwise. As I see it, however, no widespread change will occur unless the reality of what goes on in detention is brought to light and understood in all its complexity and ugliness.

But the charge of legitimation has a political dimension to which assertions of good faith are an insufficient answer. Indeed, from this political perspective, assertions of good faith reflect a naïveté that can be as dangerous as open collusion. The objection here is that by engaging in a conversation about reform, one risks normalizing the cultural dynamics—in this case, the prison culture of hypermasculinity—that policy initiatives like K6G are designed to address, thereby only further entrenching a penal system that is illegitimate at its core.<sup>46</sup>

There may well be something to this concern. It is arguable, for example, that once decades of judicial pressure forced states like Alabama, Louisiana, and Texas

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45. See Sharon Dolovich, *Two Theories of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail* (draft copy on file with the author).

46. At its most extreme, this objection leads into absurdity, calling to mind arguments made by hard-line Bolsheviks in the early twentieth century against worker protections such as a minimum wage, a forty-hour work-week, and improvements to workplace safety on the grounds that any move to improve the daily lives of paid laborers would only dull their appetite for revolution. See, e.g., VLADIMIR ILYICH LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM* 22 (Resistance Books 1999 (1917)) (arguing that imperialism provides capitalists with “superprofits” from the cheap labor and raw materials available in colonized countries, allowing them to “bribe” workers at home with higher wages, a shortened work-week, etc., thereby forestalling revolution in the most developed economies). But one could also see this challenge in a less extreme light, as a wholly reasonable worry that to tinker around the edges of a fundamentally corrupt system, thereby mitigating its worst offenses, risks only strengthening the seeming legitimacy of the whole carceral enterprise.

to address conditions of the sort that led an Arkansas district court to characterize that state's prison system as "a dark and evil world completely alien to the free world,"<sup>47</sup> it became more difficult for claims as to the harms incarceration inflicts to gain traction.<sup>48</sup> This is a risk of reform efforts in any context, and everyone must make their own calculations as to the right course. For myself, the alleviation of immediate suffering is the greater imperative—hence the instant undertaking, and my endorsement in what follows of imperfect half-measures.

### I. PRISON RAPE, HYPERMASCULINITY, AND THE FEMINIZATION OF VICTIMS

To understand why gay men and trans women are at a heightened risk of victimization behind bars, it is first necessary to understand the phenomenon of prison rape more generally. The notion of "prison rape" typically summons images of the violent gang rape of a lone defenseless prisoner. And indeed, this horror is often enough the experience of vulnerable people behind bars. But such a rape, or the mere threat of it, also functions as a disciplining mechanism,<sup>49</sup> the means by which weaker individuals are forced into a relationship in which they occupy a subordinate and even abject position vis-à-vis stronger prisoners, who effectively "own" them.<sup>50</sup> Among other indignities, this slave-like status routinely demands that weaker prisoners accede to sexual penetration by their owners or anyone else to whom they are directed. Even when sexual access is not physically forced, it is

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47. *Hutto v. Finney*, 437 U.S. 678, 681 (1978) (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

48. This effect is arguably evident in *Rhodes v. Chapman*, a 1981 Eighth Amendment case challenging the practice of double-celling (ie, housing two men in tiny cells (here, 55 square feet) designed for a single person) in the Southern Ohio Correctional Facility (SOCF). See *Rhodes v. Chapman*, 452 U.S. 337 (1981). In *Rhodes*, the Supreme Court rejected this constitutional claim, despite the unanimous conclusion of expert witnesses that "a long-term inmate must have to himself, at the very least, 50 square feet of floor space . . . in order to avoid serious mental, emotional, and physical deterioration." *Id.* at 371 (Marshall, J., dissenting). Judging from the majority opinion, what most moved the Court was the trial court's finding that SOCF, less than ten years old, was "unquestionably a top-flight, first-class facility." *Id.* at 341. Even Justice Brennan, whose concurrence emphasized the continued obligation of the federal courts to enforce the Eighth Amendment in the prison conditions context, extolled, among other things, the relative newness of the facility; the adequacy of the furnishings, plumbing, lighting, and food; the availability of contact visits; and the "modern, well-stocked library." *Id.* at 365 (Brennan, J., concurring). SOCF was arguably among the fruits of the federal district court-led prison reform movement of the late 1960s and 1970s, which mitigated many of the worst features of American prisons, not only in the South, but around the country. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 51–143 (2000) (describing in detail federal court cases that led to extensive prison reforms in a number of jurisdictions, including Arkansas and Texas). Given SOCF's relative humanity compared with the prisons that went before it, it would be no wonder if the Court were to hesitate to condemn conditions in that facility, even were they certain to cause some inmates "serious mental, emotional and physical deterioration." *Rhodes*, 452 U.S. at 371 (Marshall, J., dissenting). Something of the same effect may be feared in the prison rape context; if this worst of all penal abuses is mitigated, will it blunt the political will to condemn the carceral project for its many other, albeit less obviously horrific, harms?

49. Craig Haney, *The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement*, 48 AM. CRIM. L. REV. 121, 129 (2011) (reporting that "countless prisoners [have described to him] the way they can 'feel' the threat of rape 'in the air' around them, or have heard frightening accounts of it taking place, even if they have not seen it themselves or been directly victimized").

50. See *infra* note 55.

nonetheless often experienced by the victim as a profound violation and thus must also be included along with other forms of sexual victimization under the umbrella term “prison rape.”<sup>51</sup>

As in society in general, sexual assault in men’s prisons can take many forms,<sup>52</sup> from verbal harassment and unwanted touching to coerced sexual contact and forcible rape.<sup>53</sup> In the prison context, however, verbal sexual harassment is often used in a strategic way, to alert the target that he has been singled out for more serious sexual victimization<sup>54</sup> and may soon face a forcible rape. In many cases, that rape comes quickly, marking the victim—now labeled a “punk”—as the property of their attacker, to be kept in a state of what amounts to sexual slavery for the use of the assailant and his associates, or sold to other prisoners for this purpose.<sup>55</sup> In other cases, the harassment serves as advance warning of an attack to come, giving targets a short time to take defensive action. Prisoners who are put on notice in this way—the relatively lucky ones—have two options. Those able to defend themselves can choose to fight back against the attack when it comes. A person who successfully repels efforts at forcible rape—especially if the attackers are seriously injured in the attempt—may succeed in deterring others from any

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51. As one incarcerated person, quoted in a Human Rights Watch report, put it, “[a] prisoner that is engaging in sexual acts, not by force, is still a victim of rape because I know that deep inside this prisoner do not want to do the things that he is doing but he thinks that it is the only way that he can survive.” HUMAN RIGHTS WATCH, *supra* note 2, at 52; see also Stephen “Donny” Donaldson, *A Million Jockers, Punks, and Queens*, in PRISON MASCULINITIES 118, 125 (Don Sabo, Terry A. Kupers & Willie London eds., 2001) (“From the typical punk’s point of view, none of his passive sexual activities is truly voluntary, since, if he had his own way he would not need to engage in them.”). The Prison Rape Elimination Act (PREA) has been criticized for focusing on violent rape at the expense of the coerced sex that more typically occurs in the context of protective pairings. See, e.g., Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 146, 175–76 (2006). What these critiques overlook is that reducing the incidence of violent assault is crucial to protecting vulnerable prisoners from all unwanted sex, since without the threat of violent rape, the pressure to enter into a protective pairing would necessarily be reduced.

52. The dynamics described in what follows do not exist to the same extent in all prisons and jails. But they are sufficiently common and recognizable to affect life to some degree in most if not all men’s carceral facilities, and thus to allow for a generalized description.

53. See James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 9–11 (1999) (explaining that inmate-on-inmate sexual harassment in prison ranges from verbal harassment to sexual propositions, sexual coercion—which “occurs when an inmate pressures another inmate to pay a debt via a sexual act”—and physical harassment, which can include “[k]issing, [t]ouching, or [f]ondling [i]ntimate [b]ody [a]reas”).

54. *Id.* at 15 (“Sexual harassment of another inmate . . . communicates aggressive intentions.”).

55. See Donaldson, *supra* note 51, at 119 (explaining that punks are, “for all practical purposes, slaves [who] can be sold, traded, and rented or loaned out at the whim of their ‘Daddy’”); see also JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 180 (1997) (explaining that after a prisoner is raped, he “becomes a slave in the fullest sense of the term.”); Adam Liptak, *Ex-Inmate’s Suit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1 (describing one prisoner’s experience in a Texas prison, where for eighteen months, as a sex slave to a gang, he was “forced into oral sex and anal sex on a daily basis,” “bought and sold[,]” and “rented . . . out” for sex for the benefit of the gang); HUMAN RIGHTS WATCH, *supra* note 2, at 71–72 (“Victims of prison rape, in the most extreme cases, are literally the slaves of the perpetrators. . . . They are frequently ‘rented out’ for sex, sold, or even auctioned off to other inmates . . .”).

subsequent efforts to “punk” him. Sometimes the target may have to fight more than once, at risk of great physical harm.<sup>56</sup>

Those on notice of an attack who lack the capacity to protect themselves may instead choose to “hook up” with a more powerful prisoner in a protective pairing. As already noted, this protection is not free: the cost to the weaker inmate (or “catcher”<sup>57</sup>) includes providing his protector (or “Daddy”<sup>58</sup>) with regular sexual access as well as other “wifely” services, “such as doing laundry, making the bunk, keeping the cell clean, and making and serving coffee.”<sup>59</sup> Catchers may also be expected to provide sexual access to the friends or associates of their protectors, and may be rented out for this purpose—i.e., prostituted—with their protector keeping the profits. Such pairings can thus consign the weaker person to an experience of serial sexual violation by his owner or others. To enter into such a relationship means that a person is no longer his “own man,” but will, for all intents and purposes, belong to someone else for the duration of his incarceration.<sup>60</sup> In the worst cases, the subordinate party will be consigned to sexual slavery.<sup>61</sup> Given these stakes, vulnerable prisoners may try to resist the pressure to enter a protective pairing. But typically, any such resistance does not last long. As Stephen Donaldson chillingly put it, “[u]sually, a rape or two is sufficient to persuade an unattached catcher to pair off as soon as possible.”<sup>62</sup>

Whatever method is used to force the victim to submit to sexual penetration, once this aim is accomplished, the victim is redefined in the prison culture as a “punk.”<sup>63</sup> This experience of being “punked” will signify only the beginning of his

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56. Those who fight back under such circumstances also risk disciplinary sanction and further criminal charges. For an apt critique of this catch-22, see James E. Robertson, “*Fight or F . . .*” and *Constitutional Liberty: An Inmate’s Right To Self-Defense When Targeted By Aggressors*, 29 IND. L. REV. 339 (1995).

57. Donaldson, *supra* note 51, at 119–20.

58. *Id.* at 118–19. Other ethnographic accounts label the men in this position as “wolves” or “jockers.” See, e.g., Peek, *supra* note 7, at 1227.

59. Donaldson, *supra* note 51, at 120.

60. It bears noting that, notwithstanding the often coerced nature of these relationships, genuine feelings of affection and even love may arise between the parties. See T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN’S PRISON* 112–13 (2006) (recounting an episode during his incarceration in a Michigan prison, in which “Slide Step,” the stronger inmate with whom he had entered into a protective pairing relationship, told Parsell of his “having [developed] feelings for him”).

61. See Wilbert Rideau, *The Sexual Jungle*, in *LIFE SENTENCES* 73, 75 (Wilbert Rideau & Ron Wikberg eds., 1992) (explaining that “[t]he act [of rape] redefines [the victim] as a ‘female’ in this perverse subculture, and he must assume that role as the ‘property’ of his conqueror or whoever claimed him and arranged his emasculation.”).

62. Donaldson, *supra* note 51, at 121. This assumes, of course, that the victim of such a rape retains the power to choose, and does not automatically come to be regarded as the property of his rapist.

63. See Peek, *supra* note 7, at 1226. According to some accounts of the prison sexual subculture, those people—generally trans women or gay men—who voluntarily assume a female identity are known not as punks, but as “queens,” and enjoy a slightly higher status in the prison pecking order, “probably because [queens] are considered desirable sexual partners, and because punks are condemned for lacking the courage to defend themselves and their masculinity.” *Id.* at 1228. But, as a practical matter, the difference in status means little, as

sexual victimization<sup>64</sup>; as even the federal courts have recognized, “[o]nce raped, an inmate is marked as a victim and is subsequently vulnerable to repeated violation.”<sup>65</sup> “Through the act of rape,” in other words, “the victim is redefined as an object of sexual abuse,” and will in all likelihood retain that role through the entirety of his incarceration.<sup>66</sup>

To outside observers, prison life can seem like a dog-eat-dog state of nature. Yet the sexual victimization of weaker prisoners by more powerful ones in fact takes place within a highly organized social system, in which power is allocated and exercised along surprisingly conventional lines. As with intimate relationships in society in general, the defining scripts are gendered: in men’s prisons, as in the free world, men dominate women.<sup>67</sup>

Given that the state rigidly divides prison populations along gender lines, with men and women typically housed in entirely separate facilities, the claim that rape in men’s prisons is a gendered phenomenon may seem an odd one. But “male” and “female” are not essential truths. They are instead culturally ascribed aspects of social identity. That in men’s prisons there are no “women” as conventionally defined does not mean that there are no gendered relationships. It simply means that for purposes of this particular cultural model, some prisoners must be designated as female.

Why this pressure towards a gender binary? Here, an observation made by Gresham Sykes in his classic prison ethnography, *Society of Captives*, may shed some light. Sykes observed that “[a] society composed exclusively of men tends to generate anxieties in its members concerning their masculinity.”<sup>68</sup> In such a context, the “competition” among men that is endemic in American culture reaches a heightened pitch, so that its typical features become exaggerated. These features, which Frank Rudy Cooper associates with the “hegemonic model of U.S. masculinity,”<sup>69</sup> are both familiar and destructive even in society more generally. As

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both punks and queens are at the mercy of their “protectors,” obliged at the risk of physical harm to do their bidding. *See id.* at 1228–29.

64. *See* Ristroph, *supra* note 51, at 152–53 (2006) (explaining that “[a] rape [in prison] is often ‘the first act in a lengthy drama of conquest and control.’” (quoting Ian O’Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241, 244 (2004))).

65. *Schwenk v. Hartford*, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) (noting that “[t]he victims of these attacks are frequently called female names and terms indicative of gender animus like ‘pussy’ and ‘bitch’ during the assaults *and thereafter*”) (emphasis added).

66. HUMAN RIGHTS WATCH, *supra* note 2, at 54.

67. *See* CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1st ed., 1989). As MacKinnon succinctly puts it, “Man fucks woman; subject verb object.” *Id.* at 124. *See also* Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111 (2011) (exploring the implications of this gendered structure for both K6G and GP).

68. Robertson, *supra* note 53, at 13 (1999) (quoting GRESHAM SYKES, SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 71 (First Princeton Classic ed. 2007)). As Robertson observes, “[i]mprisonment represents more than a loss of freedom; it also diminishes you as an adult male.” *Id.* at 12.

69. *See* Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies*, *Terry Stops*, and *Police Training*, 18 COLUM. J. GENDER & L. 671, 687 (2009); *see also* MICHAEL S. KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY (1996).

Cooper describes it, the American man on this hegemonic model has four distinct features. First, he is “concerned with how other men rate him” as to his own masculinity level.<sup>70</sup> Second, he is “chronically insecure that he has not sufficiently proved that he is as masculine as he should be.”<sup>71</sup> Third, he is driven to compete with other men “to outdo [them] in collecting indicia of manhood.”<sup>72</sup> Fourth and finally, men in this competition must “[repudiate] that model’s contrast figures,” among them “women [and] gays.”<sup>73</sup> As Cooper explains, the hegemony of this model manifests itself in a compulsion to “hypermasculinity” on the part of those who are “denied the stature of the normative man . . . .”<sup>74</sup> Displays of hypermasculinity—“the exaggerated demonstration of the features associated with maleness”—compensate for a failure to “meet the masculine cultural ideal.”<sup>75</sup> Cooper offers “weight-lifting, bragging about sexual exploits, and homophobic jokes” as examples of “hypermasculine behaviors” in society at large.<sup>76</sup>

As those familiar with prison life will readily recognize, this account translates directly into the prison context,<sup>77</sup> where the imperative exists among incarcerated men to “be hard and tough, and [not] show weakness.”<sup>78</sup> The archetype of the stoic, weightlifting, muscle-bound prisoner has its origins in this dynamic.<sup>79</sup> In prison, however, displays of strength and toughness alone are not sufficient proof of masculinity for men anxious about others’ perceptions of their gender identity. As in society in general, the construction of identity in prison is relational: claims to masculinity are “only meaningful in relation to constructions of femininity.”<sup>80</sup> Would-be men must therefore struggle against and ultimately vanquish the seemingly feminine in themselves and—to clearly make the point—in others as well.<sup>81</sup> In the absence of other socially productive means to prove their manhood

70. Cooper, *supra* note 69, at 687.

71. *Id.* at 688 (“Manhood is a relentless test of how close you are to the ideal. . . . [M]en are constantly suffering from anxiety that other men will unmask them as insufficiently manly.”).

72. *Id.*

73. *Id.* at 689. Cooper observes that “racial minorities” also function as contrast figures for a hegemonic masculinity for which the standard is not only middle-class, “early middle-aged,” and heterosexual, but also white. *Id.*

74. *Id.* at 691.

75. *See id.*

76. *Id.* at 692. Cooper also notes that, “[b]ecause homoerotic desire is depicted as feminine desire, the repudiation of homosexual men is a necessary component of hegemonic masculinity.” *Id.* at 690.

77. This same exaggerated masculinity imperative also defines life among the street gangs of South Central L.A. *See CRIPS AND BLOODS: MADE IN AMERICA* (PBS television broadcast May 12, 2009) (interviewing gang members attesting to the need to purge their affect of any signs of feeling or sensitivity in order to protect themselves from being judged as weak and consequently vulnerable to victimization by other gang members).

78. Derrick Corley, *Prison Friendships*, in *PRISON MASCULINITIES* 106 (Don Sabo et al. eds., 2001).

79. Don Sabo, *Doing Time, Doing Masculinity: Sports and Prison*, in *PRISON MASCULINITIES* 61, 65 (Don Sabo et al. eds., 2001). Indeed, in men’s prisons, muscles are arguably “the sign of masculinity.” *Id.* (quoting BARRY GLASSNER, *BODIES: WHY WE LOOK THE WAY WE DO (AND HOW WE FEEL ABOUT IT)* 192 (1988)).

80. SUE LEES, *RULING PASSIONS: SEXUAL VIOLENCE, REPUTATION AND THE LAW* 105 (1997).

81. *See* Cooper, *supra* note 69, at 690 (“Most of all, masculinity is the repudiation of femininity.”).

(business, politics, family, “cars and the like”<sup>82</sup>), the sexual domination of women becomes the method of choice.<sup>83</sup> In society in general, the hypermasculinity imperative to conquer and repudiate the feminine frequently motivates rape, sexual harassment, domestic violence, and other forms of violence against women.<sup>84</sup> In the prison, those men seeking to prove their masculinity vie for possession of weaker inmates—the “women” in this social system—whose utter subordination to them, known to include ongoing sexual access, stands as public proof of their masculine power. In this culture, the performance of rape—the sexual penetration of another inmate defined as female—is a way to shore up the rapist’s own claim to maleness and, thus, his status and power in the prison hierarchy. As one prison official put it:

[s]ex and power go hand-in-hand in prison . . . . Deprived of the normal avenues, there are very few ways in prison for a man to show how powerful he is—and the best way to do so is for [him] to have a [sex] slave, another who is in total submission to him.<sup>85</sup>

In this social system, anyone who can be perceived as at all feminine is assigned the subordinate “woman’s” role. As Christopher Man and John Cronan note, “[i]n many ways, an inmate’s aura of femininity can overlap with his age and size, as younger and smaller inmates are often perceived as more feminine than older inmates.”<sup>86</sup> The same is true of anyone who comes across as weak and defenseless;

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82. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 441 (2003).

83. As feminist theorists have argued, in society in general, rape or the threat of rape is a central mechanism by which men—especially those men insecure about their own relative social position—reaffirm their masculine self-image. See Man & Cronan, *supra* note 8, at 148 (explaining that rape can symbolize “the act of putting women ‘back in their place.’” and that “rapists are often men who feel threatened by the fear that women or a particular woman may achieve equality or superiority over them”). In a setting in which prisoners lack other effective means for this reaffirmation, rape or the threat thereof becomes the “premier” means for demonstrating one’s “masculinity and strength.” Robertson, *supra* note 53, at 14.

84. See *supra* note 83.

85. Rideau, *supra* note 61, at 75 (quoting C. Paul Phelps, then-secretary of the Louisiana Department of Corrections). That the sexual penetration of one man by another could work to reinforce the masculine image of one of the participants may seem strange given that, generally speaking, men who have sex with other men are regarded in mainstream culture as homosexual themselves—and thus equally perceived as not “real men.” But this puzzle is resolved once it is recognized that in prison, those who take the passive sexual position or who perform oral sex on other men are regarded in the prison not as men at all. See Man & Cronan, *supra* note 8, at 167–68 (“By raping someone perceived as feminine, an inmate can assert his dominance without thinking of himself as a homosexual and, thereby, securing his male identity. Thus, the inmate redefines seemingly homosexual activity as a heterosexual activity.”). As was explained by Human Rights Watch in its 2001 report about male rape in U.S. prisons, most prison rapists continue to view themselves as heterosexual since the victim is “substituting” for a woman. HUMAN RIGHTS WATCH, *supra* note 2, at 70 (“[T]he crucial point is not that the [aggressor is] having sex with a man; instead it is that they are the aggressor, as opposed to the victim—the person doing the penetration, as opposed to being the one penetrated. Indeed, if they see anyone as gay, it is the victim (even where the victim’s clear sexual preference is for heterosexual activity).”).

86. Man & Cronan, *supra* note 8, at 166.



hence the vulnerability of the shy,<sup>87</sup> the physically or mentally disabled, or anyone who is a first-time or non-violent offender and, thus, unlikely to be savvy to the ways of the prison or to have friends or allies on the inside to protect him. Prisoners who are weak and defenseless are vulnerable to rape and other forms of sexual victimization, not merely because of their weakness, but because they are regarded as available for emasculation—or, in prison parlance, for being “turned out”—and, thus, transformed into women for purposes of life in the prison.<sup>88</sup> No wonder men in prison work so strenuously to “be hard and tough, and [not] show weakness.”<sup>89</sup> Viewed in this light, the felt imperative to perform a gendered ideal of “hypermasculinity” is a rational response. Desperate not to be victimized themselves, male prisoners do all they can to avoid any behaviors that might suggest qualities associated with femininity: passivity, expressing emotion, sensitivity, kindness, etc. In short, fear of rape motivates displays of hypermasculinity among prisoners wishing to avoid being “turned out” themselves.<sup>90</sup>

This brings us to the special vulnerability of gay men and trans women in this

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87. “[I]nmates who look scared, shy, or nervous face immediate danger because they exude signs of weakness. Similarly, inmates who talk too much, thinking that it is the only way to fit in, may be perceived as nervous and become targets of rape.” *Id.*

88. This effect can be accomplished through rape, which may be violent but which need not be, “as it is easy enough for several prisoners to overcome a single victim simply by holding him in place.” HUMAN RIGHTS WATCH, *supra* note 2, at 86. Alternatively, aggressors seeking to force the target into the passive sexual role may resort to a method referred to by some—one hopes ironically—as “seduction.” See Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 420 (2000). Here, the aggressor seeks out a possible target—someone who appears alone and nervous or scared, and who therefore may be too trusting of anyone who shows him kindness. The aggressor approaches the target, offering cigarettes, food, drugs, alcohol, or anything the target may be induced to accept. The aggressor will then demand payment for the proffered goods from the target, despite the fact that the initial offer was made without a hint of the need for repayment. When no payment is forthcoming, the aggressor and any co-conspirators in the plot will threaten the target with physical violence unless he allows them sexual access. See *id.* at 420; see also HUMAN RIGHTS WATCH, *supra* note 2, at 88 (noting that this process is “best called coercion” and explaining that “the victim is usually tricked into owing a favor”).

89. Corley, *supra* note 78, at 106.

90. As Wilbert Rideau puts it in a chilling passage:

The act of rape in the ultramasculine world of prison constitutes the ultimate humiliation visited upon a male, the forcing of him to assume the role of a woman. It is not sexual and not really regarded as “rape” in the same sense that society regards the term. In fact, it isn’t even referred to as “rape.” In the Louisiana penal system, both prisoners and personnel generally refer to the act as “turning out,” a nonsexual description that reveals the nonsexual ritualistic nature of what is really an act of conquest and emasculation, stripping the male victim of his status as a “man.” The act redefines him as a “female” in this perverse subculture, and he must assume that role as the “property” of his conqueror or whoever claimed him and arranged his emasculation.

Rideau, *supra* note 61, at 75.

This set of cultural norms is reinforced not only by prisoners, but also by guards. Prisoners at risk of rape who seek protection from correctional officers (COs) often report receiving the age-old advice of “fuck or fight”—that is, to fight their aggressors or suffer the consequences. Robertson, *supra* note 53, at 33. When, for example, Roderick Johnson sought protection from COs from the repeated rapes he suffered as the “sexual slave” of prison gangs, he was “repeatedly told . . . that he either had to fight off his attackers or submit to being used for sex.” *Johnson v. Johnson*, 385 F.3d 503, 513 (5th Cir. 2004) (reporting that classification officers allegedly made

system.<sup>91</sup> In the twisted logic of the prison sexual hierarchy, the act of rape—of forcing a weaker prisoner into the sexually passive role—is itself the moment of gender redefinition, the point at which that person is “turned out” and becomes newly classified as female. But in the case of gay men and trans women, there is no need for any moment of gender redefinition, since in this hypermasculine culture, gay men and trans women are regarded as female *by definition* and are thus automatic targets for sexual assault. It is as though they have already been “turned out” by virtue of their sexual orientation/gender identity. As James Robertson puts it, the prison sexual code defines gay men and trans women as “fair game.”<sup>92</sup> This is true even for those gay men who take the dominant sexual role in their consensual sexual relationships.<sup>93</sup>

In this cultural system, trans women, who self-identify and self-present as women, become obvious targets.<sup>94</sup> The same is true of gay men with “stereotypically feminine characteristics.”<sup>95</sup> As for gay men who are placed in GP, they must do everything possible to conceal their sexual orientation toward other men, since to be outed is to become an immediate mark for sexual victimization. Again, gay men and trans women are not the only victims of this “perverse subculture.”<sup>96</sup> But, for the reasons just explored, they are its most ready victims, which explains why

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statements to the effect that “[prisoners] need to get down there and fight or get you a man,” and “[t]here’s no reason why Black punks can’t fight and survive in general population if they don’t want to f\*\*\*” *Id.*)

91. See, e.g., Call for Change: Protecting the Rights of LGBTQ Detainees, STOP PRISON RAPE 1, 7 (Aug. 2006), <http://www.champnetwork.org/media/callchange.pdf> [hereinafter Call for Change] (stating that LGBTQ detainees continue to be “dramatically overrepresented” among the victims of sexual assault behind bars); HUMAN RIGHTS WATCH, *supra* note 2, at 70 (“[I]nmates who are perceived as gay by other inmates face a very high risk of sexual abuse.”); see also WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 18 (1982) (presenting data suggesting that forty-one percent of homosexual inmates reported having been sexually victimized behind bars); Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 116 (2010) (discussing a study that found that fifty-nine percent of trans women in California prisons experienced some form of sexual assault in the previous year); SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, *supra* note 5, at 11 (reporting that “[y]outh with a sexual orientation other than heterosexual reported significantly higher rates of sexual victimization by another youth (12.5%) compared to heterosexual youth (1.3%).”).

92. Robertson, *A Clean Heart and an Empty Head*, *supra* note 82, at 464; see also Man & Cronan, *supra* note 8, at 166 (explaining that in prison, “an inmate who is openly gay or who is a transvestite or a pre-operational transsexual . . . is a clear target of sexual aggression”).

93. Donaldson, *supra* note 51, at 120.

There is no niche in the prisoner structure for a sexually reciprocal or masculine-identified gay man such as we see in our androphilic communities. In a rural jail or minimum-security prison, he may succeed in fending off [the pressure to take the passive sexual role], but in any other confinement environment, the entire institution would be against him and he would have to survive repeated combat.

*Id.*

94. See Peek, *supra* note 7, at 1229 (“[B]ecause of the nature of the prison hierarchy, an entering transgender inmate can either choose to act submissive or be beaten into submission, and more often than not, sex is coercive for them on some level.”).

95. Man & Cronan, *supra* note 8, at 166.

96. Rideau, *supra* note 61, at 75.

members of these groups are “dramatically overrepresented” among the victims of sexual assault behind bars.<sup>97</sup>

This environment is a hellish one for anyone tagged as weak and therefore open to definition as female. For this reason, all individuals who are subject to ongoing sexual victimization in prison must be protected. The issue is how best to do so. The L.A. County approach is to separate gay men and trans women from all other at-risk populations.<sup>98</sup> In what follows, I examine L.A. County’s K6G program in detail, describing the mechanics of the unit’s operation and the day-to-day experience of its residents. I also report data regarding the relative safety of K6G, and describe the gang culture that dominates the Jail’s GP unit, the absence of which in K6G in part explains that unit’s appeal. This discussion will be confined as much as possible to description, deferring until Part III consideration of likely objections to the K6G approach.

## II. THE ORIGINS, MECHANICS AND EFFECTS OF L.A. COUNTY’S K6G UNIT

### A. *Origins*

L.A. County is home to the biggest Jail system in the country.<sup>99</sup> On any given day, it houses more than 19,000 people<sup>100</sup> in 8 facilities, with 166,000 people on average cycling through each year.<sup>101</sup> The biggest facility in this system is Men’s Central, a decaying, old-style jail with an average daily count of almost 5,000 prisoners, making its population bigger than that of most prisons and even many prison systems.<sup>102</sup> Men’s Central is a mix of dormitories and cellblocks designed in the linear fashion familiar from prison movies. There are also scores of infirmary cells in the medical wing, and rows of single-man cells used for

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97. Call for Change, *supra* note 91, at 7.

98. Unfortunately, in Los Angeles County, protection of the remaining groups of likely victims—infelicitously labeled “softs”—is at present sorely inadequate. But there is nothing to prevent the Department from committing to also providing meaningful protection for those falling within this designation. With K6G, the Department has shown itself capable of creating safe spaces for the most vulnerable prisoners, and there is no reason that it could not make good on its obligation to protect all vulnerable prisoners, whether in K6G or in some other designed unit. For more on this issue as regards L.A. County, *see infra* Part III.B.

99. Unless otherwise noted, the content of this and the following sections is based on information learned or observations made during the course of my research.

100. The average daily count for the L.A. County Jail system was 19,373 in 2007, 19,570 in 2008 and 19,008 in 2009. Interview with Sgt. Sandra Petrocelli, L.A. Sheriff’s Department, in L.A., Cal. (Jan. 20, 2010).

101. *See* Personal Communication, Sgt. Steve Suzuki, L.A. Sheriff’s Department, in L.A., Cal. (April 15, 2011) (on file with the author) (providing data indicating that between 2001 and 2010, the average annual admissions rate in the L.A. County Jail was approximately 166,000, and that in 2005, the year with the decade’s highest number of admissions, 182,471 people were admitted to the Jail).

102. *See supra* note 14 (explaining the differences between prisons and jails).

disciplinary segregation, for protective custody, and to house the “K10s,” those detainees whose profiles suggest they cannot be housed safely with others.

Most of the housing, whether minimum, medium, or maximum security,<sup>103</sup> is designated as “general population.” Once classified as GP, detainees can be sent to any unit in the Jail system corresponding to their security level.<sup>104</sup> But as with all carceral facilities, L.A. County also has units set aside for groups of prisoners in need of specialized housing. There are designated units for veterans, for people with serious medical needs or physical disabilities,<sup>105</sup> and for those who are deaf, developmentally disabled, or seriously mentally ill.<sup>106</sup> And there is also, occupying three dormitories in Men’s Central, a segregation unit that houses all gay men and trans women prisoners. That L.A. County should take particular steps to protect these last two populations may not be surprising, given its relatively high numbers of gay and transgender residents as compared with other counties nationwide.<sup>107</sup> But there are other factors that make the existence of such a program in the Jail unlikely, to say the least. The L.A. County Jail system is not only enormous; it is also a notoriously volatile and even dangerous institution in which severe overcrowding,<sup>108</sup> coupled with racial divisions imposed and rigidly policed by the prisoners themselves,<sup>109</sup> frequently leads to riots or other forms of violence.<sup>110</sup> The management challenges posed by this set of conditions are considerable, and one might reasonably expect to find little by way of official protection of gay male and trans women prisoners, who are often the first to be victimized in crowded and

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103. These classifications are intended to indicate the level of danger prisoners are thought to pose and thus the level of restrictions thought necessary to be placed on their movement and living conditions during their detention.

104. There is, of course, a prior classification based on gender. In the L.A. County Jail system, women are presently held at the Central Regional Detention Facility (CRDF). All other facilities house men only.

105. Members of this group are housed in the medical wing.

106. Those detainees who are seriously mentally ill are housed in the Twin Towers Correctional Facility, directly adjacent to Men’s Central Jail. Twin Towers is the newest facility in the L.A. County Jail system.

107. Although several metropolitan areas, including the San Francisco Bay Area, outrank the Los Angeles metro area by the estimated percentage of LGBT inhabitants, only the New York City metro area has a larger estimated gay, lesbian, and bisexual population (568,903) than that of greater Los Angeles (442,211). See GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 1–2, 7 (Oct. 2006), available at <http://escholarship.org/uc/item/8h08t0zf>.

108. In 2006, a federal district judge held that overcrowding in the L.A. County Jail system had led to a variety of unconstitutionally inhuman conditions of confinement. See *Rutherford v. Baca*, No. CV 75-04111 DDP, 2006 WL 3065781, at \*1 (C.D. Cal. Oct. 27, 2006). In 2007, that same judge found that overcrowding had led to 24,000 instances of “floor-sleeping,” whereby detainees were forced to sleep on the floor of the jail due to insufficient bed space. See *Thomas v. Baca*, 514 F. Supp. 2d 1201, 1215 (C.D. Cal. 2007).

109. For more on these racial divisions and their impact on Jail conditions, see *infra* Part II.D.2.

110. See, e.g., Richard Winton & Sharon Bernstein, *More Violence Erupts at Pitchess: Black and Latino Inmates Clash at the North County Jail, Leaving 13 Injured*, L.A. TIMES, Mar. 1, 2006, at B1. There is an argument to be made that the high degree of control exercised over prisoners by the leadership of the various racial groupings also ensures a level of order and stability that could not otherwise be maintained in such an overcrowded, understaffed facility. Indeed, this may be the reason that officials work with this culture rather than trying to disrupt it.

chaotic facilities. Yet for more than two and a half decades, L.A. County has operated a separate housing unit designed to segregate these groups from GP.

This unit, long known as “K11” and now called “K6G,”<sup>111</sup> has been operating in its current form since 1985. Prior to 1985, there was some effort to keep homosexual prisoners segregated from the general population, with one housing module in the Jail set aside for their exclusive use.<sup>112</sup> However, these efforts were partial at best. Those housed in this unit were denied access to many of the basic privileges GPs enjoyed as a matter of course, including vocational and educational programming, visitation, medical and mental health care,<sup>113</sup> and access to the law library. Those detainees wanting access to these basic entitlements were thus forced to forgo housing in the “homosexual” module and take their chances in GP.<sup>114</sup> And, still more troubling, the haphazard nature of the program created many opportunities for GPs to gain access to the unit, making its residents vulnerable to attack from the inside.

This early program thus suffered from profound design flaws. On the one hand, it lacked controls for ensuring that only homosexuals<sup>115</sup> were admitted to the unit.<sup>116</sup> As a consequence, all a would-be predator needed to do to gain access to

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111. See *supra* note 15 (explaining the name change).

112. This module was the 3500 unit of Men’s Central Jail. See First Amended Complaint for Declaratory and Injunctive Relief at 3, *Robertson v. Block*, No. 82 1442 WPG (Px) (C.D. Cal. Apr. 12, 1982) [hereinafter Complaint].

113. See *id.* at 9.

114. This was apparently what happened in the case of James Rumph, one of the named plaintiffs in the lawsuit brought against the Jail by the ACLU of Southern California on behalf of all gay male inmates. See *infra*. According to the Plaintiffs’ First Amended Complaint, Rumph, who “was housed for more than five months in the [homosexual] module for his own protection,” was transferred to GP without “a notice or hearing of any kind.” Complaint, *supra* note 112, at 8. In their answer to the Complaint, defendants maintained that Rumph was *not* transferred to module 2500 (apparently a GP unit) against his will, but that 2500 was the designated housing unit for all “inmates who are defending their criminal action *in propria persona* and who have [a] court order requiring that they be given access to the privileges and materials available to inmates of module 2500.” Answer of Defendants to First Amended Complaint at 2–3, *Robertson v. Block*, No. 82 1442 WPG (Px) (C.D. Cal. May 11, 1982) [hereinafter Answer]. According to the defendants, Rumph’s transfer to 2500 was the automatic result of his “affirmatively [seeking] a court order granting him *pro per* status which required his housing in module 2500.” *Id.* at 3. Reading between the lines, it becomes clear that the Jail made no provision for law library access for those homosexuals defending themselves *pro se* apart from housing them with the other *pro pers* in a GP dorm.

115. I realize that using terms like “homosexual” and “gay” in the way I do risks implying both some truth of the matter as to who is “really” gay and the possibility of meaningfully separating out those who “are” gay from those who are not. The formulations employed thus court charges of both essentializing and oversimplifying the inherently fluid and even mercurial character of same-sex attraction. Even as to those men who self-identify as gay, there is a danger inherent in any effort to distinguish on the basis of sexual identity: that of equating characteristics stereotypically associated with a given identity with the identity itself, thereby making invisible those who, although they do self-identify, lack those characteristics conventionally associated with gay men. See Russell Robinson, *Masculinity as Prison: Race, Sexual Identity, and Incarceration*, 99 CAL. L. REV. 101, 215 (forthcoming 2011) (draft on file with the author). I address these concerns in more detail in Part III.B. For now, I adopt the constructions employed by the Jail, the ACLU lawyers who eventually brought suit challenging the conditions I describe, and the consent decree discussed in the text.

116. As will be explained more fully, see Part II.C.1-2, that situation contrasts sharply with the present situation, which is modeled on the procedure created by the consent decree entered into by jail officials and the

potential victims was to aver his homosexuality on entrance to the Jail.<sup>117</sup> On the other hand, no efforts were made to keep gay detainees separate from GP detainees when they were outside the dorms. This meant that gay prisoners were still vulnerable to predation during the admissions process, in the court-line holding cells, or in transit to and from court, the infirmary, the visiting room, or elsewhere in the facility.<sup>118</sup>

In 1982, in response to this situation, the ACLU brought a lawsuit on behalf of all “homosexual inmates,”<sup>119</sup> challenging these conditions.<sup>120</sup> The result was a July 1985 consent decree establishing the terms of the K6G program that exists today. Among other things, the agreement provided that dorm residents would have access to exercise,<sup>121</sup> telephones,<sup>122</sup> visitation and medical care,<sup>123</sup> as well as “regular access to library services” and “equal access to educational and vocational training programs.”<sup>124</sup> It stipulated that residents of the segregation unit would be separated out as soon as possible after their arrival at the Inmate Reception Center (IRC),<sup>125</sup> and, further, that they would be kept separate “on

ACLU of Southern California on behalf of their clients. *See* Stipulation and Request for Dismissal Order at 4–5, *Robertson v. Block*, No. 82 1442 WPG (Px) (C.D. Cal. July 17, 1985) [hereinafter Consent Decree] (establishing a two-step procedure for classification to the “homosexual” units, by which “[i]nmates who state that they are homosexual” on entering the Jail “are immediately transferred to segregated housing units for homosexuals[,]” at which point the classification staff of the unit will make a subsequent determination as to their “suitab[ility] for such segregated housing units”).

117. Interview with Bart Lanni, Deputy Sheriff, L.A. Sheriff’s Department, in L.A., Cal. (Feb. 11, 2010).

118. *See* Complaint, *supra* note 112, at 7–8.

119. The Complaint described the “two separate sub-classes . . . represented by [the named plaintiffs to the suit]” as “all inmates incarcerated at the Jail and housed in that module of the Jail housing inmates who have filed statements with the Jail Classifications Unit to the effect that they are homosexual” and “all inmates who are or will in the future be incarcerated in the Jail and who, although they have filed statements with the Jail Classifications Unit to the effect that they are homosexual, are denied the right to be housed in [that] module or who are transferred from said module against their will and without hearing.” *Id.* at 3.

120. The plaintiffs brought several constitutional claims. They alleged an equal protection violation on the grounds that plaintiffs “receive less access to vocational training and educational facilities” and “less access to visitors” than “inmates who have not been classified as homosexual by Jail authorities.” *Id.* at 10. They alleged that plaintiffs’ limited “access to visitors, books, ideas and information” violated their “rights of expression, communication and association” under the First, Fourth, and Fourteenth Amendments. *Id.* at 11. They brought a general Eighth Amendment claim, alleging that the regime to which they were subjected constituted cruel and unusual punishment. *Id.* at 10. They alleged that restrictions on plaintiffs’ “access to law books and the law library” violated the plaintiffs’ right of “access to court and to the effective assistance of counsel . . .” *Id.* at 12. And, in perhaps the most creative move, the plaintiffs alleged a violation of their right of access to the courts on the grounds that the failure to keep them separate and apart from GP inmates in transit to court and in the courtroom holding cells subjected them “to a mentally exhausting and dangerous routine on court days[,]” presumably compromising their ability to devote themselves fully to defending their cases. *Id.* at 12.

121. Consent Decree, *supra* note 116, at 2.

122. *Id.*

123. *Id.* at 4.

124. *Id.* at 6.

125. *Id.* at 5.

transportation buses while en route to and from court”<sup>126</sup> and in the courthouses themselves. In addition, in one short paragraph, the consent decree sketched the two-stage process by which classification decisions into the unit were to be made—a process that is in place to this day. First, as Jail staff had already been doing, “[i]nmates entering [the IRC]” were to be asked “if they are homosexual.”<sup>127</sup> At this point, those “who state that they are homosexual are immediately transferred to segregated housing units for homosexuals.”<sup>128</sup> Under the previous regime, this was the end of the matter. But the consent decree created a second step, to be carried out “by classification staff” assigned to the unit. According to the order, those officers were to make a subsequent determination whether those inmates who declared themselves homosexual at the IRC stage “[were] suitable for such segregated housing units . . . .”<sup>129</sup> In short, it was to be up to Jail officials to determine whether those men who claimed to be gay belonged in the unit reserved exclusively for “homosexual inmates.”

### *B. Institutional Structure: Managing the Segregation*

If this program is to be effective, the boundaries between K6Gs and the general population must be carefully policed. This ongoing project has two components. The first involves policies regarding movement of residents through the facility. The second involves the issue of classification: how to make sure that those who belong, and only those who belong, are assigned to K6G. In this and the following section, I describe these two components in turn. Again, as much as possible, the focus here will be descriptive; possible concerns and objections raised by the practices identified will be generally deferred to Part III.

The population of K6G typically hovers around 350 residents. To accommodate this group, three dorms have been designated for the residents’ exclusive use.<sup>130</sup> There are also several specially designated cells in the Twin Towers facility to house K6Gs judged to have serious mental illness, as well as a separate row of single cells in Men’s Central designated as the unit’s disciplinary wing.<sup>131</sup> Until 1996, the trans women were housed separately from the gay men.<sup>132</sup> But this

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126. *Id.* at 5 (stipulating that during the drive to and from court, “[w]henver possible, homosexuals are placed in protective cages”).

127. *Id.* at 4.

128. *Id.*

129. *Id.*

130. On occasion, the population will spike, as it did, for example, in the summer of 2008. To accommodate the extra people, K6G was temporarily allocated a fourth dorm in the same cluster as the other three dorms. Telephone Interview with Bart Lanni, Deputy Sheriff, L.A. Sheriff’s Department, in L.A., Cal., (Feb. 5, 2010).

131. As of this writing, two further Twin Towers pods have been set aside to house K6Gs who have been cleared for (supervised) work in the Jail.

132. The trans women originally lived separately in a unit on the top floor of the old Hall of Justice Jail. In 1993, they were moved to a unit in North County Correctional Facility (NCCF) that became known as the “witches’ castle.” During this period, the gay men were housed at Wayside, adjacent to NCCF. In 1996, the two

separation sparked vociferous complaints on the part of the trans women in particular, and eventually the decision was made to house the two groups together.<sup>133</sup> Although the numbers are constantly shifting, trans women today typically make up anywhere from 10–20% of the unit’s population.

K6Gs spend most of their time in the dorms, but they often have occasion to be elsewhere in the Jail. Policies are therefore required to manage the risks posed by such movement. When in the visiting room, for example, K6Gs are seated in the first row of booths,<sup>134</sup> directly in the sight line of the deputies.<sup>135</sup> They are brought to pill call as a group, one dorm at a time, and monitored by deputies as they wait in the hallway to see the nurse.<sup>136</sup> In the court processing line, K6Gs are kept in a specifically designated holding cell, and en route to the courthouses they sit in the front seat of the vans, protected where possible by wire cages.<sup>137</sup> And, whenever K6Gs move through the facility for any reason—to pill call, the classroom,<sup>138</sup> the

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units were moved downtown to the Twin Towers facility and merged. Telephone Interview with Bart Lanni, Deputy Sheriff, L.A. Sheriff’s Department, in L.A., Cal., (July 27, 2010).

133. *See id.* This arrangement creates some problems, although it is arguably still the more humane approach. For more on this issue, *see* Dolovich, *supra* note 45, at 16.

134. In Men’s Central, all visits are non-contact. Detainees sit on stools facing a glass wall and speak by speakerphone to their visitors who are seated on the other side of the glass. The absence of contact visits was challenged by the ACLU of Southern California, but the constitutionality of the practice was ultimately upheld by the Supreme Court. *See* Block v. Rutherford, 468 U.S. 576 (1984).

135. The L.A. County Jail is administered by the L.A. County Sheriff’s Department (the Department). Most custodial staff at the Jail are deputy sheriffs, who rotate between staffing the Jail and patrolling the County.

136. During the summer of 2007, the Jail was investigating the possibility of moving pill call directly into the dorms, which would obviate the need for detainees to leave their dorms to get their meds.

137. Several of these procedures, including segregation in the court line and en route to the courthouses, were provided for in the original court decree. That decree also provided for the segregation of “homosexual inmates” while they are at “the court facilities for which the Sheriff is responsible and are visually checked for their well being as often as court routine permits.” Consent Decree, *supra* note 116, at 7. Unfortunately, I was not able to establish whether and to what extent this segregation and regular monitoring is actually effected in the various courtrooms to which L.A. County detainees may be sent.

138. There is a classroom allocated for the exclusive use of K6G. It is through this classroom that Senior Deputy Randy Bell and Deputy Bart Lanni, K6G’s classification officers, *see infra* note 164, run what they call the SMART program (for Social Mentoring and Academic Rehabilitative Training), which is comprised of an impressive array of additional programming exclusively for the K6Gs. The roster of classes includes, among others, GED, Drug Education, Spiritual Growth, Computer Literacy (using computers bought with money donated by the L.A. LGBT community), Job Skills Training, and New Directions. *See S.M.A.R.T. Program*, Sept. 23, 2008 (program description on file with the author). That K6Gs have programming of this sort may seem at best a side note, and at worst a way to paper over the violence of incarceration with empty reforms. But when the experience of a K6G resident—living in a dorm setting with access to a full roster of available rehabilitative programming—is compared with that of someone in protective custody (the typical safe housing option for trans women or gay men without the capacity to defend themselves), the value of programs available to K6Gs is hard to deny. *See supra* note 11. In most cases, protective custody means extended lockdown in single cells with no access to programming of any kind. *See supra*, text accompanying notes 10–12. These conditions, which mimic the key features of life in disciplinary segregation, have been routinely criticized by advocates for trans women in particular, who condemn the way the system has forced trans woman to choose between the arguably soul-destroying conditions of permanent lockdown on the one hand, and, on the other hand, living in GP at constant risk of sexual assault. K6G, which offers a clear alternative to protective custody, is still jail, and those who (rightly) condemn the profligate use of incarceration as a response to social disorder may object to the



infirmary, the visiting room, or the court line—they must be escorted by a deputy.

This last measure in particular may not seem noteworthy. Men's Central is, after all, a high-security facility. Surely all prisoners are escorted by custodial staff whenever they are out of their housing units. But custodial escort for inmate movement is not the norm in Men's Central. The Jail routinely operates at well over capacity, and is so understaffed that there are simply not enough officers to accompany all prisoners in transit.<sup>139</sup> It is thus not unusual to walk through the halls and to pass lines of unescorted detainees en route from one place to another.<sup>140</sup> There are two exceptions to this general rule. The first is the K10s, the facility's highest-security inmates, who are always escorted (in shackles) when out of their cells. The other exception is the K6Gs.<sup>141</sup> To help deputies keep track of who is where, and to ensure that people are where they are supposed to be, detainees' uniforms are color-coded<sup>142</sup>: brown for medical, white and green for trustees, orange for K10s. GPs are in dark blue, and K6Gs wear light blue.<sup>143</sup>

### C. Classification: Deciding Who Is In and Who Is Out

If a program like K6G is to succeed, an effective classification process is crucial. Access must be restricted to members of the groups for which the unit is intended,

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existence of this unit as a cynical (or merely misguided) effort to make jail tolerable rather than rejecting the institution altogether. But however objectionable the prevailing regime of mass incarceration may be, the fact remains that today, over 2.3 million people are living behind bars. If there are reforms that would make that experience safer and more endurable, not to mention rehabilitative in even the smallest degree, we ought where possible to implement them.

139. The combination of overcrowding and understaffing has prompted Jail officials to limit inmate movement as much as possible. To this end, meals are brought directly into the housing units by inmate workers or "trusties." "Clothing exchange," the trading of dirty clothes and bedding for clean, is likewise done by trustees in the dorms and cells.

140. It bears noting that in all my time in the Jail, I never felt the slightest bit of unease when encountering unescorted detainees.

141. Officers I spoke with about K6G frequently complained about the policy of requiring escorts for unit residents. In fact, I found a high level of resentment among many of the deputies in general toward the K6Gs, who are regarded as receiving special treatment. This resentment seemed in part to arise from a feeling that Jail time should be hard and that the K6Gs "have it too easy." Requiring an escort at all times was one frequently mentioned example of this special treatment. Another was the easier "program" K6Gs enjoy in the dorm; unlike GP dorms, K6G dorms have large-screen televisions that normally remain on as long as someone wants to watch them. In addition, K6Gs enjoy unrestricted access to the phones and showers, as well as to the full-time SMART program. *See supra* note 138. There is also the galling fact that many K6G residents seem at times to enjoy themselves. Some evenings—especially on "store night," when commissary items are delivered—there can be an indisputably party-like atmosphere in the dorms. I lost count of the number of officers who complained that K6Gs have "too much fun" for people who are supposed to be being punished. There is much that may be said of this view. For now, I note only that the fact that most of the unit's residents have yet to be tried, convicted, or sentenced, and thus are not being detained as punishment, seems to go unnoticed. For more on this issue, *see Dolovich, supra* note 45, at 12–14, 16–21.

142. This system of color-coding may strike some readers as distasteful or even dangerous. *See infra* Part III.A for further discussion of this issue.

143. During the period of my research, the Jail also housed a small number of juveniles, who wore red. The practice of housing juveniles in the Jail has since been discontinued. *See* Personal Communication from Director of Inmate Services Karen Dalton, L.A. Sheriff's Department (Dec. 16, 2010).

and all others must be excluded. According to the terms of the initial consent decree, the segregation unit was to hold all “homosexual inmates.” Over time, this mission was expanded to include trans women. As to this latter group, classification poses few challenges, since in most cases, trans women self-identify and self-present to some extent as female, thereby advertising both their status as trans women and their vulnerability to abuse in GP. K6G is well-known throughout the Jail, and if by chance a trans woman should be assigned to any other unit, it will likely not be long before some officer notices and brings her to K6G.

The classification challenge thus lies primarily with determining which detainees are being truthful when they say that they are gay.<sup>144</sup> Jail policy restricts admission to K6G to “male homosexuals.”<sup>145</sup> In practice, this directive is interpreted to include only those men who “live a homosexual lifestyle” when not incarcerated.<sup>146</sup> The precise meaning of this standard is a somewhat shifting target, but at base, it reflects a binary, essentialist theory of male sexuality, that one either is or is not gay and there is no in-between.<sup>147</sup> As to each interview, what the classification officers seek to determine is whether interviewees are “really gay,” by which is meant that, when they are free, they seek out men and only men for sexual gratification, for romance, and for emotional intimacy.<sup>148</sup> This standard is deliberately designed to exclude bisexuals,<sup>149</sup> and in particular men who might be regarded as “situational homosexuals,” those who have sex with men while incarcerated and sex with women when not in custody.<sup>150</sup> In what follows, I

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144. See *infra* note 176.

145. L.A. CNTY. JAIL REGULATION 5.02/050.00 (Segregation and Classification of Male Homosexuals).

146. Telephone Interview with Bart Lanni, Deputy Sheriff, L.A. Sheriff’s Department, in L.A., Cal., (Feb. 5, 2010).

147. See *supra* note 115.

148. From what I have observed, however, being married to a woman does not on its own preclude classification to K6G. This suggests that this standard allows for the possibility that a person could live a “homosexual lifestyle” as K6G’s classification officers understand the term and still look to women for emotional companionship (i.e., as life partners), if not for sexual gratification. These terms are of course fluid. Perhaps the best way to describe the aim of this process is the identification of those detainees who would be perceived as gay on the mainline. I return to this issue below in Parts II.C.2 & III.B.

149. For further discussion of this exclusion, see *infra* Part III.B.

150. Situational, or “emergency” homosexuality is commonly defined as sexual activity with partners of the same sex that occurs not as part of a gay life style, but because the participants happen to find themselves in a single-sex environment for a prolonged period. . . . At [the heart of this concept] is the notion that the participants in same-sex sexual activity would not have done so were it not for their unusual situation and that they therefore are not really homosexual.

Tina Gianoulis, *Situational Homosexuality*, GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, & QUEER CULTURE (Mar. 3, 2004), available at [http://www.glbtq.com/social-sciences/situational\\_homosexuality.html](http://www.glbtq.com/social-sciences/situational_homosexuality.html); see also Christopher Hensley, Richard Tewksbury & Jeremy Wright, *Exploring the Dynamics of Masturbation and Consensual Same-Sex Activity Within a Male Maximum Security Prison*, 10 J. MEN’S STUD. 59, 61 (2001) (explaining that, on the general view of situational homosexuality, “most men engaged in situational same-sex sexual activities would return to heterosexual sexual activities once removed from the segregated environment”). In Part III.B, I explore the practical reasons for these exclusions and address likely objections to them and to this standard more generally.

explain the way this classification system operates in practice.<sup>151</sup>

### 1. *The Initial Classification*

Classification into K6G happens in two stages.<sup>152</sup> The first stage occurs in the Inmate Reception Center (IRC), which is the first place to which all new admits are brought. The IRC, as one deputy memorably put it, is where “Joe Citizen” is turned into “Joe Inmate.” It is here that, after a strip search and a shower, new admits exchange their own clothes and personal property for prison blues and a sack lunch. They then see a nurse for medical and mental-health triage, give a DNA sample to the state DNA database, have their fingerprints taken or verified, and are transferred to their housing units.<sup>153</sup>

In addition, during intake, each person must speak to a classification official. The set-up for these conversations—a row of officers sitting behind glass and a line of men waiting their turn—is reminiscent of a wait for a bank teller. Once at a window, each new admit is directed to pick up a wall phone and asked a series of questions to determine his security classification (i.e., minimum, medium, or maximum) and to identify any “special handles,” that is, those people who require protective custody or who belong in a specialized unit. This interview occurs at dazzling speed, a pace necessitated by the number of people who must be classified into the Jail. On a busy night,<sup>154</sup> the L.A. County IRC can take in as many as 1000 people. To facilitate this process, almost all new admits to the Jail are booked by law enforcement officers at the police station.<sup>155</sup> Much of the key information (name, age, current charge, prior arrests, prior incarcerations, etc.) is thus already

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151. See *infra* Part III for possible criticisms of this process.

152. Unless otherwise noted, the content of this and the following sections is based on information learned or observations made during the course of my research.

153. For some, this process can take a few hours. For others, most notably those who are over 55 (and who are therefore required to have a more in-depth medical exam) or who admit to any medical or mental health problem in their triage interview, it can take days. In the past, those awaiting completion of the admission process were forced to sleep on the floor in IRC. More recently, a unit in Twin Towers was repurposed to provide beds for those waiting to see the nurse or the psychiatrist in advance of their transfer to more permanent housing. Notwithstanding this improvement, the desire not to be caught in IRC for any length of time is the reason that some of those who have been through the process before will sometimes deny having any medical or mental health needs during the initial triage interviews, even if they in fact need medical or mental health attention. That way, they can be transferred to their housing units and be assigned a bunk—widely thought preferable to being stuck in IRC—before making their medical needs known.

154. Mondays and Tuesdays are the busiest evenings, since by then, those who were arrested over the weekend and held in local lockups have seen a judge and have been officially taken into custody within the constitutionally mandated period. See CAL. PEN. CODE § 825(a)(1–2) (requiring that arrestees be brought before a judge within 48 hours, but “excluding Sundays and holidays” and rolling over to the next day if the 48 hours expire when the court is closed); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (holding that jurisdictions generally must find probable cause to detain a person arrested without a warrant within 48 hours of the arrest).

155. The L.A. County Jail serves an enormous geographical area and receives people into custody from the Los Angeles Sheriff’s Department, the California Highway Patrol, and the Los Angeles Police Department, as well as forty-seven other local police departments. See *Municipal Police Departments in Los Angeles County*, LOS ANGELES ALMANAC, <http://www.laalmanac.com/crime/cr69.htm> (last visited Mar. 5, 2011).

in the Jail's computer system.

At the window, once the booking number is provided and the relevant information appears on the classification officer's screen, the officer then asks a series of questions. Some of these questions go directly to the issue of security level (*have you ever escaped from a secure facility? was there a weapon involved in the current offense? do you have three or more prior felony convictions?*<sup>156</sup>). Some are solely for information-gathering purposes or some other policy purpose (*are you currently employed? are you homeless? have you ever been ordered by a court to pay child support?*). And, finally, some questions are asked to identify special handles and to determine placement in the Jail. In this vein, new admits are asked: *are you suicidal? did you ever serve in the military?*<sup>157</sup> and, for purposes of identifying those who belong in K6G, *are you homosexual?* This is typically the first moment the institution is alerted that a given person needs placement in K6G. With an affirmative answer to this question, new admits are immediately directed to sit on a bench directly in view of custodial staff. As soon as possible, they are given light blue uniforms to signal their need for official monitoring and segregation from the general population, and transferred to the K6G holding tank.

It bears noting that the initial process of identifying and segregating those men who report being gay has arisen in an institutional context in which, every week, thousands of men move through a mammoth facility that is both overcrowded and understaffed. This in itself is no small achievement: so effectively and seamlessly has K6G been absorbed into the Jail's operation that the identification of K6Gs is now woven into the daily IRC routine. Indeed, K6G has become so commonplace that even without any formal institutional mechanism or official prompting, law-enforcement officers across the county have taken it upon themselves to keep gay men and trans women separated from other detainees—and thus to provide desirable protection<sup>158</sup>—even before arrival at the Jail.<sup>159</sup>

To this, one might object that jail is a dangerous enough environment for gay men. Is it really wise to call out members of this group in IRC—or worse, at police stations—and physically place them so that anyone paying attention would know of their sexual orientation? Should we not aim to *discourage* official inquiry into

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156. The answers to these questions are generally checked against information already in the computer system.

157. The Jail has a unit specially designated for veterans. For veterans in custody, their period of service to their country is often their proudest achievement. Administrators have found that, by housing veterans together and thereby acknowledging this service, detainees are much more likely to behave well and to maintain an orderly and well-run unit.

158. See GILLIGAN, *supra* note 55, at 163–87 (describing the dangers prisoners face in lockups, courthouses, and Jail transfers); see also *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (“A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail.”).

159. In cases when a law enforcement officer aware of K6G determines in advance that a person in her custody belongs in K6G, that officer will alert Jail officials of this fact on arrival, and Jail officials will take steps to separate the individual even before he meets with a classification officer for the initial classification interview.

the sexual orientation of arrestees in close proximity to others—whether officers or fellow detainees—who may be more likely to react to gay men with hostility than with tolerance, much less with affirmative concern for their well being?

These concerns are valid ones. The problem is that it is impossible to segregate those people who are at risk of assault on the basis of their sexual identity without identifying those detainees who are gay. Certainly, all possible steps should be taken to increase the security of those who self-identify as gay during the prior booking process or the IRC classification process.<sup>160</sup> Perhaps, for example, measures might be taken to effect the more immediate removal of self-identified gay men from the main spaces of IRC to reduce their exposure to possible predators.<sup>161</sup> Yet, however risky it may be to invite official identification of gay men, whether in police lockups or IRC itself, doing so seems an inescapable feature of housing members of this group separately from the general population. That the current mechanism for identifying those individuals eligible for K6G strikes an appropriate balance is strongly implied by the readiness with which many men being processed through IRC offer an affirmative answer when asked by classification officers if they are homosexual. There is no way of knowing how many gay men answer in the negative for fear that admitting their sexual orientation may expose them to harm.<sup>162</sup> But what came through strongly both in my interviews with K6G residents and in other informal conversations with people at the Jail was that those in the know—a category that appears to include many people who have done more than one stint in L.A. County—are eager to identify themselves as gay to ensure their transfer to K6G. Some readers may view this fact merely as evidence of how bad it is for gay men in the general population, so bad that they are willing to out themselves on first entering the Jail. Yet even were it the case that only a desire to avoid harm leads men returning to the Jail to disclose their homosexuality to police officers or Jail officials, this in itself should be reason enough to regard the initial classification process as on the right track. Given the routine violence that marks the American carceral experience, it would be not only ill-advised but also morally indefensible to eschew effective if partial improvements in security on grounds of their imperfection.<sup>163</sup>

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160. None of my respondents raised this issue during my interviews, although this does not mean that further investigation would not turn up cause for concern.

161. In the case of trans women, the danger that attends such exposure is both well known and unavoidable. Their very appearance often gives them away, which is why trans women face such tragically high rates of sexual assault while in prison, and why it is standard practice to put trans women in some form of protective custody immediately on detention. *See supra*, text accompanying notes 10–13. It is only because the sexual orientation of gay men is typically not immediately obvious to observers, and indeed in many cases may be kept entirely hidden, that the question even arises.

162. *See infra* Part III.B.

163. As with K6G more generally, if inquiry into sexuality reduces victimization, it would seem that the better approach is not to prohibit inquiry into sexuality, but to take all possible steps to reduce the dangers that arise from doing so.

## 2. *The Second Step: Classification as Detective Work*

Those detainees who identify themselves as gay in IRC are not automatically housed in K6G. Instead, they are transferred to the K6G holding cell to await the second step of the classification process. During my time in the Jail, this step was—and as of this writing, still is—conducted by two officers who have long been in charge of the unit: Senior Deputy Randy Bell and Deputy Bart Lanni.<sup>164</sup> Altogether, Bell and Lanni have spent a combined 40 years running the unit. In this position, they wear many hats,<sup>165</sup> but their primary responsibility is classification. Every morning, anywhere from ten to twenty-five people await them in the K6G holding cell, having been sent there from IRC the previous night. The task of these two officers is to determine which of these detainees to classify to K6G and which to send to GP. In many cases, it will be obvious that K6G is the appropriate classification. Some of those waiting in the holding cell will be trans women, who generally can be classified into the unit at a glance. Others will be well known to Bell and Lanni from previous stays in the Jail. L.A. County has an overall annual recidivism rate (defined as anyone who is readmitted to the Jail within three years of release) of somewhere around 65 percent. But Bell and Lanni report that in K6G, the number is even higher, with a lifetime recidivism rate of 90–95 percent.<sup>166</sup> As a consequence, many of those who come through the K6G

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164. I offered these officers the option of my using pseudonyms instead of their real names, but they declined. This choice made sense, since judging from Google, Bell and Lanni are already widely known for their work in K6G.

165. These two officers run the SMART program, an educational program of their own devising exclusively for K6Gs. *See supra* note 138. They manage the many providers who serve the K6G population, including the L.A. Department of Health, whose staff, permanently assigned to K6G, provide testing for sexually transmitted infections including syphilis, hepatitis C, and HIV; caseworkers from Tarzana Treatment Center, which provides reentry services and drug treatment for HIV-positive detainees on their release; an on-site psychiatric technician; teachers from the Hacienda LaPuente School District, who have in the past had the contract to provide GED classes in the Jail; and staff from the Center for Health Justice, who provide HIV counseling and preventive education to K6Gs and who distribute condoms in the dorms once a week. Bell and Lanni also maintain security in the classroom, holding cell, and hallway outside their office; monitor goings-on in the dorms (although they are somewhat hampered in doing so by the physical separation between their office and the dorms, which are on different floors); mediate disputes between dorm residents; and provide general counseling and assistance for those dorm residents who seek them out. The commitment of these officers to K6G has not gone unnoticed by the L.A. LGBT community. In 2005, Bell and Lanni received a special commendation from Christopher Street West Hollywood and rode together under the CSW banner in the 2005 L.A. County Gay Pride Parade. So well respected are they in the LGBT community that they joke that when they retire they should open a bar on Santa Monica Boulevard called K11 (K6G's original and long-standing designation), because it is sure to be a success.

166. Interview with Senior Deputy Randy Bell, and Deputy Bart Lanni, L.A. Sheriff's Department, in L.A., Cal. (July 2007). How to explain this high recidivism rate? To some extent, it is a testament to the number of residents in the unit without a stable and supportive home to which they may return on release. Many men in GP have women waiting for them on the outside, whether mothers or wives or girlfriends. These women look out for them while they are incarcerated—visiting them, writing to them, putting money in their commissary accounts, accepting their collect calls—and will also provide a home to which they can return once they are released. K6Gs generally do not have girlfriends and wives—although some do—and sadly, many K6Gs, especially the trans women, report having been rejected by their families. They thus lack the external support that might help them stay out of trouble once they are released. An even greater factor in the K6G recidivism rate may be the high

classification office have been there many times before.<sup>167</sup> Having already been classified into K6G in a prior interview, members of this group are immediately sent down to the dorms with the trans women.

The most challenging part of this second stage involves dealing with those who remain. These are people Bell and Lanni have never met before. Their task is to determine which of these men belong in K6G and which should be “declassified”<sup>168</sup> and sent to GP or some other unit. Plainly put, Bell and Lanni must determine in each case whether the person is in fact gay in the dualistic, essentializing way they deploy the term—or, as they put it, whether he “lives a homosexual lifestyle” when not behind bars.<sup>169</sup>

There will inevitably be some underinclusiveness in the K6G classification process. Some gay men may not know about K6G and may well assume that identifying themselves as gay to Jail officials would put them at greater risk. Some will no doubt prefer taking their chances on the mainline to “coming out” to state officials.<sup>170</sup> And some may deliberately try to avoid K6G altogether, going to GP to get access to “trade” (i.e., masculine men attracted to effeminate men). If the people who choose to hide their sexual orientation or gender identity in order to go mainline are able to hold their own physically, this misclassification may not pose a problem. The worry is that some who make this choice may underestimate the extent of their own vulnerability and wind up badly hurt. This in itself is cause for serious concern,<sup>171</sup> although it bears noting that under these circumstances, the Jail would probably avoid legal liability for the harm. In order for prisoners to recover for an Eighth Amendment claim, they have to show that prison officials actually

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percentage of K6Gs with drug addiction. In my interviews, I asked respondents whether they had a problem with drugs prior to their incarceration, and the responses made me think that if not for crystal meth, many of my subjects would not have been in Jail. Of the thirty-three interviewees who answered the question, twenty-nine answered in the affirmative (i.e., that they did have a drug problem prior to their incarceration). Of those twenty-nine, nineteen spontaneously identified their drug of choice. For fourteen of those nineteen, the drug of choice was crystal meth, a highly addictive narcotic. Of the remaining five, three named marijuana and two named crack cocaine. These numbers lead me to suspect that many of the ten who did not name their drug were also likely meth users.

167. See Nina T. Harawa et al., *Sex and Condom Use in a Large Unit for Men Who Have Sex with Men (MSM) and Male-to-Female Transgenders*, 21 J. HEALTH FOR THE POOR AND UNDERSERVED 1071, 1073 (2010) (noting that “[t]he average length of stay” in Men’s Central “is 42–45 days, but varies widely”). I personally can attest to the revolving door effect in K6G. Although I spent the bulk of my time in K6G in 2007, over the past several years I have visited regularly. And every time I go, there are many faces I recognize, as well as several people I know by name whom I met on previous visits. Given the relatively short stays of many K6Gs, it is likely that many of these people had come and gone from the Jail multiple times since I first saw or met them.

168. Those who identify themselves in IRC are preliminarily classified to K6G. Their subsequent removal to a different unit thus requires that they be declassified or “declassified” from K6G and reclassified into some other unit, whether GP or otherwise.

169. See *supra* notes 145–50 and accompanying text.

170. See Robinson, *supra* note 115, at 191–92 (explaining the “profound” consequences of coming out, especially for men of color).

171. For further discussion of this issue, see *infra* Part III.B.

knew of a substantial risk of serious harm and failed to act to avert it.<sup>172</sup> Where, however, the victim has failed to disclose his sexual orientation despite the institution's efforts to discover it so as to place him in safer housing, the victim will be hard-pressed to recover, for two reasons. First, having withheld from the Jail the crucial fact of his sexual orientation, the victim will be unable to show that Jail officials actually knew of his vulnerability to assault. Second, courts are unlikely to be sympathetic to one who, by his own choosing, thwarted the very system designed to protect him from the harm ultimately suffered.

Issues of liability, however, are far more salient for Jail officials in the opposite case: when a detainee, despite asserting his homosexuality, is denied access to K6G and ultimately raped in GP.<sup>173</sup> This being so, it might be asked, why not let any detainee into K6G who avers that he is gay? In Part III below,<sup>174</sup> I respond more fully to this question. For now, it is important to recognize the daily pressure Bell and Lanni face to get the classification right on its existing terms. On the one hand, given the vulnerability of K6Gs, it is paramount that sexual predators be excluded from the unit. Certainly, ensuring that admission is restricted to those who actually satisfy the admission criteria will not guarantee protection; heterosexuals and bisexuals have no monopoly on sexual predation. But making efforts to expose and exclude those who seek access to K6G on false pretenses seems a prudent move. On the other hand, erroneously declassifying a gay man from K6G could not only expose him to sexual assault in GP, but could also open up the Jail to serious legal liability for the error.<sup>175</sup>

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172. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). See also *infra* note 175.

173. The need to avoid this outcome—as well as to protect genuinely vulnerable inmates from harm—is very present to the minds of Bell and Lanni when they go about their work.

174. See *infra* Part III.B.

175. The risk of legal exposure arising from classification errors in the K6G context exposes a deeply counterproductive feature of prevailing Eighth Amendment doctrine. Under existing Eighth Amendment law, prison officials are only liable for failing to protect those in their custody from rape and other forms of violence if they actually knew of the risk of harm to the victim, see *Farmer*, 511 U.S. at 836–37, even if those risks were ones about which reasonably attentive prison officials would have known, and thus about which defendants *should* have known. See Dolovich, *supra* note 36, at 889–90, 945 (describing the implications of *Farmer*'s deliberate indifference standard). Prevailing doctrine thus creates an incentive for prison officials not to take affirmative steps to identify risks to people in their custody. If affirmatively identifying existing risks might expose them to liability, why should they try to do so? From a liability perspective, it is better for defendants not to know of existing risks and thus not to be held accountable for any resulting harm. Understanding the incentive structure current doctrine creates helps to explain a feature of corrections practice that might otherwise seem puzzling: why, given what is well known about the heightened vulnerability of gay men in prison to ongoing rape and other forms of abuse, prisons and jails across the country have not made it standard practice to identify gay men in their custody in order to segregate them. The California prison system is typical in this regard: at no point do California prison officials seek to identify which persons in their custody are gay, leaving this information to be ferreted out by predators in the general population, who will use it to guide their selection of victims. Although this passive strategy arguably puts gay men at risk, it is nonetheless incentivized under prevailing constitutional doctrine, which rewards official ignorance of risks of harm to vulnerable prisoners. See *id.* at 945–47. L.A. County, however, explicitly agreed to a policy of segregating “homosexual inmates” in 1985, nine years before *Farmer* was decided. See Consent Decree, *supra* note 116. Although Jail officials might try to deny it, the establishment



The challenge Bell and Lanni confront every day is to determine which of the people in the K6G holding cell, all of whom claim to be gay, are telling the truth.<sup>176</sup> Why would anyone lie about being gay in the Jail? Although preventing predators from getting access to the unit is an ongoing concern, many of those seeking admission under false pretenses only want a respite from the gang politics and consequent pressure and volatility that define daily life in GP.<sup>177</sup> K6G, well-known to be the safest place in the Jail, is an attractive prospect for repeat players who just want to do their stints in peace. Because Bell and Lanni take seriously their assigned responsibility to restrict access to K6G to authorized groups, much effort is put into ferreting out those who are falsely claiming to be gay.

In the years since becoming familiar with the workings of the K6G classification office, I have encountered a number of people who, knowing a little about how these determinations are made,<sup>178</sup> have formed a fundamentally mistaken impression of this process. I have been told, for example, that the officers require maternal confirmation that a detainee is gay, that they administer a “test” of gay terms and admit only those who correctly define a minimum number, and that only those who are familiar with the gay bars and clubs on the Santa Monica strip will be admitted. To be sure, there are shades of truth in these accounts. The officers

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and ongoing implementation of the K6G program represents official acknowledgment of the heightened risk of harm that gay men and trans women face in the Jail. This does not automatically mean that any gay men and trans women who are raped in the facility will succeed on a constitutional claim. To the contrary, proof that Jail officials followed established practice in attempting to house the victim in K6G, and to prevent non-K6Gs from gaining access to the unit, will provide strong evidence that prison officials, having taken affirmative steps to provide protection, were unaware of a serious risk to the plaintiff, thus satisfying *Farmer*.

Still, the existence of K6G, and the official awareness it implies of the dangers of housing gay men and trans women in GP, does create the potential for legal exposure anytime jail officials fail to take sufficient care in complying with their own policies. And given the substance of those policies—i.e., that K6G is open only to gay men and trans women—it is both reasonable and appropriate that institutional efforts would be directed to making sure that no one else gets into the unit. For critical analysis of *Farmer*'s recklessness standard and an argument that, at a minimum, prison officials should be held to a standard of gross negligence, see Dolovich, *supra* note 36, at 940–71.

176. At this point, some may object that sexuality is more dynamic and complex than the binary gay/not gay would allow, and that even men who may not “seem” gay in the conventional sense of the term may experience same-sex attraction and thus not identify as “straight.” This is no doubt the case. But my assertion in the text that some men lie to get access to K6G is not based on a failure to credit either the complexity of sexual identity or the range of ways people might understand and relate to their own sexuality. It is based on the frank admissions of many men whose classification interviews I observed that their claims of being gay, made in their initial sorting interview, had in fact been lies. Although one’s stated self-understanding can certainly be complicated by fear of the implications of connecting with those parts of oneself that are in conflict with prevailing social norms, it would be a mistake to allow theoretical sophistication to blind us to the possibility that, in many cases, the most accurate explanation is also the most obvious. Sometimes, in other words, a lie is just a lie. And my experience in K6G leaves me confident that the phenomenon I describe in the text—of men who seek access to K6G by pretending to be gay—is a frequent occurrence.

177. For more on the pressures that gang politics create in the Jail’s GP units, see *infra* Part II.D.2.

178. Over its history, the unit now known as K6G has received a fair amount of media attention as well as considerable interest from the community. In this way, many people who would not otherwise know about the Jail’s classification procedures have come to learn about Bell and Lanni’s work in K6G.

have been known to call the mothers of detainees to ask if their sons are gay. They do have a list of terms that gay men might be likely to recognize, which aspirants to K6G may be invited to define. And they often ask interviewees if they go to any gay nightspots, and, if so, which ones. But to imagine that the decision-making process is as simple as any of these accounts suggest is to fundamentally misunderstand what these officers do.<sup>179</sup>

At its core, K6G classification is detective work, and Bell and Lanni are detectives. The inquiry in each case is the same—does this person live “a homosexual lifestyle” on the outside?<sup>180</sup>—and the officers’ aim in each case is to determine the fact of the matter as best as they can. Inevitably, in some cases, the evidence will be, if not exactly in equipoise, at least insufficiently clear to allow for certainty. In such cases, the officers will make an all-things-considered judgment, and will usually err on the side of admission. Viewed from a legal perspective, it is interesting that at these moments, Lanni in particular will conjure an imagined jury before which he might be called upon in a worst-case scenario (the rape in GP of someone he declassified) to justify his decision. If in his view, he would be unable to do so convincingly based on the evidence before him, he will keep the person in question in K6G.

The two officers deploy a range of tools to get at the facts of each case, but the main instrument is conversation; they get people talking and see what emerges. To this end, Bell and Lanni will administer forms requesting basic information (name, age, emergency contact information, etc.) and personal history (marital status, number of kids, name of current lover, date of last sexual encounter with a woman, etc.). The answers supplied provide a starting point for conversation. If the person is from L.A. County, the officers may ask whether he has been to any gay bars in the city and, if so, to describe them, or they may use that infamous list of “gay” terms, all in the service of starting a conversation that may help them develop a sense of the person they are interviewing. There is never one answer that is dispositive. Instead, in the course of an interview, a picture develops of someone

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179. Just such a misunderstanding appears to inform a forthcoming article on K6G by Russell Robinson. *See* Robinson, *supra* note 115, at 101, 120 (asserting that K6G’s classification officers “determine gay identity largely by testing inmates on perceived norms of gay culture” and that “those who flunk the test” are “[sent] back to the general population”). Robinson’s mistaken impression of the K6G classification process appears to be a function of his methodology. Judging from his description of his research methods, Robinson did not observe any classification interviews firsthand. *See id.* at 113. Instead, his information about the process appears to have come from interviews he conducted with, among others, “former inmates and others who have interacted with the K6G unit.” *Id.* at 113. And from the perspective of those who have been interviewed for admission to K6G, the process *would* seem like a “test” one could “flunk,” since Bell and Lanni do often ask interviewees questions with right and wrong answers. As I explain in the text, however, this feature of the process is misleading, since the officers are far less interested in whether interview subjects give “correct” answers than with what the resulting conversation reveals about their sexual orientation.

180. Again, for classification purposes, this term generally means that a (male) person seeks out men and only men for emotional companionship and sexual gratification. *See supra* notes 145–50 and accompanying text.

who prefers men, who when free seeks out men and only men for sexual gratification, or of someone who is just pretending that he does so.

To this, it may be objected that there is no one way to be gay. Some gay men may be married to women. Others may be celibate or have children or may never have had sex with another man. But it is clear from the many interviews I have observed that Bell and Lanni are well aware of this diversity of experience among homosexual men, which explains why one will find in K6G some men (especially among the older residents) who are married, and many men who have children.<sup>181</sup> In one sense, what these officers seek is the same thing predators in GP would look for: whether this person is sexually attracted to other men, not as a proxy for women, but because of a fundamental sexual orientation towards men. In most cases, someone who fits this description will have had sexual relationships or sexual encounters with other men and is likely to have had some other life experiences that confirm that he is gay—coming out to family members,<sup>182</sup> associating with other gay men whether in bars or clubs or at some other venue, identifying with the gay community whether in concrete ways or merely in the abstract, etc. For this reason, when facing someone who seems clearly to fit the K6G standard, Bell and Lanni will often have many facts to which they can point to confirm their conclusion.

One interview I observed during my time in K6G<sup>183</sup> took precisely this form.<sup>184</sup> Several physical cues—manner of speech, gestures, etc.—suggested at once that the person in question was a gay man.<sup>185</sup> When asked, he explained that he had never in his life had sex with a woman<sup>186</sup> and that he had known his whole life that he was gay. When asked for the name of his last boyfriend and that boyfriend's

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181. I cannot say whether there are in fact people classified to K6G who were celibate or had never had sex with men prior to their admission. But my sense of Bell and Lanni's understanding of same-sex attraction is that these factors would not preclude admission to K6G.

182. It is in these cases when the officers might resort to calling a family member. It might, for example, happen that Bell or Lanni will ask an interviewee if his family knows that he is gay. An interviewee might say that although he has never told his father, his mother knows. In that case, Bell or Lanni might call the mother for confirmation. That confirmation provides powerful evidence that this person is telling the truth, and it is this evidence that these officers seek in every interview.

183. In all, I observed approximately 50 interviews, and, of those, took notes on approximately 34. For a description of this portion of the research design, see the Methodological Appendix.

184. Field Notes, July 6, 2007, at 6–7.

185. Although taken alone, these cues are never dispositive, the sixth sense colloquially referred to by some as "gaydar" inevitably comes into play in the K6G classification process. Given the mission of the unit, taking such cues into account is wholly appropriate, since what comes across to Bell and Lanni in the K6G classification office may also be expected to come across to potential predators in GP.

186. The information revealed during a K6G classification interview is necessarily of a highly personal nature. To ensure the confidentiality of the people whose classification interviews I observed and to make the interview subjects (all of whom consented in advance to my presence), *see infra* Methodological Appendix, more comfortable, I did not record any personal details that could allow for after-the-fact identification (i.e., name, date of birth, booking number, etc.) and only recorded general information that seemed relevant to understanding what transpired in the interviews. As a consequence, I do not know the exact age of the person whose interview I am describing in the text. Since Men's Central holds adult men, he was necessarily over eighteen.

birthday, he readily supplied this information—and then did the same with the boyfriend before that. Also in response to questioning, he listed off several gay clubs that he frequented, and volunteered unasked a description of what he and his friends liked to do at their favorite clubs (have a drink on the patio before going in to dance). By the close of this conversation, there was no doubt either in Lanni's mind or in my own that this person was gay and belonged in K6G.

Some might object that anyone could produce these same answers, and perhaps even mimic gay mannerisms to confirm the picture. To be sure, such subterfuge is possible. And were such a pretender extremely disciplined and a very good actor, he might well succeed in gaining entry to K6G. But in such a case, the right decision would be to classify that person to K6G, not because he in fact fit the entrance criteria, but because the job of the classification officers is not to divine an essential truth—even assuming there is an inherent truth of the matter as to one's sexual orientation. It is instead to make their best assessment, all things considered, as to the appropriate classification for each person they interview. When the data that emerge from an interview strongly indicate a gay interviewee, the right decision is to keep that person in K6G. Short of a truth serum, the system in place for determining whether a person who appears to satisfy K6G's admission standard has only been pretending to do so is as effective as can reasonably be wished.

Moreover, as is well known in legal circles, judgments of credibility rest on more than the substance of answers given. Body language, tone of voice, hesitation or lack of it: all these cues go into a determination of whether someone is telling the truth, and they assist the K6G classification officers in making their assessments. An example: at the end of the interview just described, Lanni asked the interviewee what he thought the biggest problem was for homosexuals in the United States. In answer, he said that it was the way gay people are stereotyped, in that most people “don't realize that we are professionals just like everybody else and not everybody takes drugs and not all of us party.” Later, Lanni asked me if I had noticed the way the man had talked about gays in general, that he had not said *they*, but *we*—a locution indicating his identification with the group. This is the sort of subtle clue the officers look for in trying to formulate their judgments.<sup>187</sup>

Some readers may yet be troubled by the possibility that Bell and Lanni might regularly refuse admittance to K6G to a substantial number of men on the grounds that they disbelieve their claims of being gay. Is not sexual orientation more complex than this true/false binary would allow? Who are these law enforcement officers—both of whom have wives and children, neither of whom identifies as gay—to tell a man who insists that he is gay that he is not? There is no question that sexuality is subtle and complex and that sexual identity may be more elastic,

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187. I recorded all the details of the interviews described in this section in July 2007. I drew on those field notes to reconstitute what took place at that time.

dynamic, and hard to classify than the reductionism of conventional labels like “gay,” “bi,” and “straight” would allow. But having sat in on countless K6G classification interviews, I think it safe to say that a good many of the people who tell the IRC classification officer that they are gay are quite simply lying.<sup>188</sup> Indeed, after an unsuccessful effort to lie their way into K6G, aspirants to the unit will often admit to the lie and even explain their motivations.

Sometimes the lies are close to the surface and fairly readily detected. It is well known among K6Gs that Lanni often asks those from L.A. County whether they ever go to gay clubs or bars, and if so, to name them.<sup>189</sup> Very often, even without firsthand knowledge, an interviewee will have an answer to this first question at the ready, since in the K6G holding tank, aspirants are frequently prepped or “schooled” by the regulars to expect this question. But in many cases I observed, the prep work went no further, so that the interview subject was unable to provide the correct answers to the inevitable follow-up questions, which may be about the location of the various clubs, their decor, or the number of floors.<sup>190</sup> In this event, the interview subject will be encouraged to talk even when his answers are plainly wrong, so that later, he may be confronted with the many falsities he had offered, at which point the person will often admit that he had been lying all along. Such a revelation will not always end the matter, since as the officers well know, men may be gay without being club-goers. But from what I have observed, having been exposed in a lie, whether about a club or something else, people who are only pretending to be gay will often lose heart as to the whole enterprise and admit to the larger lie.

Sometimes the officers will open the interview by asking about a disclosure made on the intake form, perhaps the fact that the subject is married or engaged to a woman or, as in one case I observed, had four children by four different women. Again, these facts do not necessarily mean the subject does not meet K6G’s admission criteria. But they provide a point of departure for further questions. For example, the officers might ask: *how long have you been gay?* Or: *I notice you’ve been in the L.A. County Jail five (or ten or fifteen) times before now. Why have you never before told the intake officer that you are homosexual?*<sup>191</sup> In each case, the goal is to get the subject talking and see if his story seems authentic, makes sense,

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188. It should give some indication of how desperately scary, dangerous, and unpleasant life is in GP that men who are not sexually attracted to men *qua* men, but who are instead sexually attracted to women—especially men about to enter an institution in which gay men are known to be at serious risk of victimization—routinely claim to be gay on admission to the Jail.

189. Both Bell and Lanni participate in the process. On the days I spent in the office, Lanni most often took the lead on interviewing, with Bell playing the role of backup and provocateur.

190. Bell and Lanni take occasional field trips to the Santa Monica strip and elsewhere in Los Angeles to stay up on the bar scene. They frequently take photographs of various hotspots, then present these photos for identification to interviewees claiming to be familiar with the places they picture.

191. For discussion of the intake process, see *supra* Part II.C.1.

hangs together.<sup>192</sup> In one case I observed, the starting point for conversation was the charge. The interviewee was being held on charges of assaulting a boy in the living room of the boy's house. The subject was asked what he was doing in the house, and he said that he was there to see the boy's mother. It eventually came out that this woman was his girlfriend, the suspicion of which had likely led Lanni to ask the question in the first place.<sup>193</sup>

After sitting in on enough interviews, I myself learned to react with skepticism to some responses. For example, a number of subjects, when asked about prior marriages or why in previous visits to the Jail they had never said they were gay, explained that they had only just become gay the year before. Others claimed that, after years with women, they had recently decided they wanted to try men. These answers contrasted sharply with those from obviously gay men who, when asked how long they have been gay or have known of their homosexuality, typically offered some variant of "all my life" or "as long as I can remember."<sup>194</sup> Certainly,

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192. Sometimes the questions may be sexually explicit: *do you pitch or catch? What does semen taste like?* As to the latter question, Lanni reports that pretenders will often wax lyrical about the delicious taste of semen, while men with sexual experience with other men will offer more prosaic observations—that it can be salty, for example, or that it depends on what the person ate that day.

193. Another case of this sort took some time to unravel. The subject had a number of tattoos featuring female names. Lanni pointed to one and asked whose name it was. The answer was that it was the name of his daughter who had died. Then Lanni looked at his intake form and saw that he had recently had sex with a woman. When asked about this, the subject said she was his "ex-best-friend." To the question of where the woman was now, the subject answered that she had died. How had she died? After hesitating, the subject said, in an unconvincing tone, "cancer." A few moments later, when asked again about his daughter—whose name was supposedly tattooed on his arm—the subject said "oh, it was only my stepdaughter." Now consider Lanni's position. He has to decide whether the subject's claim to be gay is credible. If there is nothing in this exchange to offer definitive proof of a lie, there is nonetheless much that was suspicious. For one thing, given the recentness of the sexual encounter, how plausible was it that his partner had already died of cancer? What does it mean to be an "ex-best friend"? And how common is it for men to label a woman this way, especially a woman with whom he recently had sex, who also just reportedly even more recently died of cancer? As for that tattoo, did it refer to his daughter or his stepdaughter? Or, as was more likely the case, did it refer to a woman with whom he was emotionally involved, a fact he sought to hide from Lanni by claiming the name to be that of his daughter? It is not surprising that a man would tattoo his daughter's name on his own arm, especially if she had died. But if one cared enough about that person to have her name tattooed on his arm, would that same person, when asked about her apparent untimely death, later wave away any questions about her death with a careless "oh, it's only my stepdaughter"? In short, there was much in this story that did not add up.

A more likely story was that this man had female lovers whose names he had tattooed on his body, that the recent sexual encounter with a woman, whoever she was, was a standard part of a life lived as a heterosexual, and that he was trying as best as he could to deflect questions that might reveal these facts. A further clue bears noting: his reference to his recent lover as an "ex-best friend." Even in my short time observing K6G classification interviews, I noticed a particular pattern whereby interviewees would invoke their best friends either to supply the name of a man who is supposedly their lover or to explain away the inconvenient fact of a recent female lover or another woman in their lives. In another interview, for example, Lanni asked the subject if he had a boyfriend, and if so, what his name was. The subject said yes and immediately supplied the name. Then Lanni asked where they met, and the answer was that he was his best friend and that they had grown up together. It could have been that this longtime close friend was in fact his lover, but it was more likely that his was the first male name the subject could think of under pressure—and indeed, subsequent questioning confirmed this latter explanation.

194. One such case occurred on July 9, 2007. That day, there were five people who required classification interviews. In my field notes I described the first case as "an easy one." As I explained, this person "put on his

many men may take years to admit to themselves that they are gay. But in a highly homophobic culture, it is unusual to say the least that someone who had been unproblematically attracted to women his whole life would suddenly decide to “become gay” out of curiosity.

Again, none of these data points alone will determine the ultimate classification decision. And, as I witnessed in several cases, when the evidence appears genuinely conflicting, the person in question will typically be held in K6G. What I am trying to convey with these examples is that classification to K6G is not arbitrary, nor are the classification decisions based on an official refusal to recognize, or an inability to understand, that all kinds of men—married, single, celibate, black, white, Latino, professionals, manual laborers, gang members, those with children and those without, those who have never set foot in a gay bar or attended Gay Pride—can be gay. From what I have observed, the process currently in place recognizes this diversity full well, and the officers in charge intelligently and methodically use a variety of methods in their attempts to identify, consistent with their official responsibility, which of the thousands of people they see every year are telling the truth at intake about their sexual orientation as they themselves understand it, and which are just pretending.

There are many reasons why one might object to the process I have just described. It may seem to validate and even reify one particular and arguably partial and even stereotypical notion of gay male identity. Even worse, it seems to condition access to safety on the ability to demonstrate the markers of this particular notion, as well as on one’s willingness to allow state officials access to the most private and intimate details of one’s life. And, for all this, it yields a protected class that is both overinclusive and underinclusive: overinclusive because it will invariably lead to classifying men to K6G who are physically able to live safely on the mainline, and underinclusive because it refuses admission to those who, although neither gay nor trans, nonetheless exhibit several other characteristics known to make men vulnerable to sexual assault in custody. Indeed, to the extent that the classification process seeks to identify those people who are primarily attracted to other men, it may even be underinclusive as to its own goal of protecting those prisoners at risk of victimization because of their sexuality, since the qualities that would lead a person to be identified as gay within the prison culture may on further examination prove to differ from the standard currently employed in K6G.

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form that he had never had sex with a woman, [and] that he knew his whole life that he was gay.” When asked “about his former lovers and their birthdays,” he recited “names and birthdays without any hesitation.” At some point during the interview, Lanni asked him where he met his new boyfriend and he said that “he’s a computer guy and [this] interviewee had had a broken computer and called and this guy came to fix his computer.” The entire exchange felt authentic and the decision to keep this individual in K6G was, as I noted at the time, “pretty straightforward.” Field Notes, July 9, 2007, at 1.

These concerns are serious ones, and I examine them more fully below.<sup>195</sup> For now, my aim is simply to explain the K6G classification process. And to understand this process, it is necessary to recognize that, every day, people admitted to the Jail who are aware of K6G's admission criteria and know themselves not to satisfy it nonetheless claim to do so in a bid to get into the unit.

As best I could judge, those seeking access to K6G under false pretenses do so for two main reasons, which are not mutually exclusive. First, those with a long history of institutionalization, who have become accustomed to having sex with men while incarcerated, know that in K6G, they will find many willing sexual partners. In fact, it appears that many who fall into this category fully expect to be sent back to GP.<sup>196</sup> But as those who have been through this process well know, Bell and Lanni do not start work until 5:30 a.m., and someone admitted to the Jail the previous evening can thus expect to enjoy a long night in the K6G holding cell with any number of people open to a sexual encounter.

More disturbing was the other motivation that often emerged after the lies were exposed: the desire for safe housing in the Jail. In some cases, interviewees had specific reasons to fear placement in a less well-protected unit. In one such instance, after a lengthy exchange in which the interviewee made many inconsistent and self-contradictory claims regarding his supposed gay identity, it emerged that this man was a witness in a murder trial that was in process at the time—and that he had been arrested for an unrelated offense and now found himself detained in the same facility that was also holding the two men against whom he was testifying. When asked why he had not simply requested protective custody in the K10 unit instead of pretending to be gay to get into K6G, he explained that the two defendants in the trial had long arms and that, as he put it, “even in K10, people always seem to run into those guys.”<sup>197</sup> He thus figured K6G was his safest bet.

That this man felt compelled by what awaited him elsewhere in the Jail to seek refuge in K6G gives some idea of the unimaginable dangers and deeply diminished options that people behind bars in the United States routinely face. One interview in particular provided a disturbing window on this world. In that case, the interviewee appeared from the start to have serious mental health problems. Lanni began the conversation with general questions about the man's recent history, which I eventually realized was a way to try to calm him down. In response, this man gave a long and detailed account of going from shelter to shelter, trying to get his psych meds, leaving a residential treatment program without permission, being

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195. See *infra* Part III.A–B.

196. This is not, however, true of everyone who falls into this category. At least one person I observed, after his efforts to sustain a pretense of being gay were exposed, admitted that he heard that the K6Gs “have a pretty good time,” and that he wanted to have a good time too. I took this phrasing to be a reference to the consensual sex that regularly occurs in the K6G dorm, and in which this person had hoped to participate.

197. Field Notes, July 4, 2007.



refused entry to another program because he had left the first, and so on. Then Lanni asked a series of questions about his sexuality, the answers to which strongly pointed to this person having several gay friends but not to his being gay himself. Eventually, Lanni asked him why, in all his many stints in the Jail, he had never before said he was gay. What emerged were several reasons for his trying to get into K6G that had nothing to do with his sexuality.<sup>198</sup>

Consistent with his apparent mental health profile, this man's previous turn in the Jail had been spent in Twin Towers, which houses those detainees with serious mental illnesses, and he plainly did not want to go back there. As he described it, Twin Towers was "dirty, nasty, crowded," and people there "disrespected him and threatened to kick his ass all the time." On further questioning, he explained that there are no gang politics in the psych units, that "it is pretty peaceful," but that "it's just really overcrowded," and the mats on the bunks are "too thin and not as comfortable as the ones in Men's Central." But he also did not want to go to GP, and with good reason. This man, it turned out, had done time in the Texas prison system, where he had been a member of the Texas Aryan Nation and had the tattoos to prove it. He explained that there is "gang warfare in prisons across the country," and that "California doesn't like Texas." He was afraid that if anyone (meaning any prisoner) in California saw his Texas tattoos, he would be stabbed.<sup>199</sup> And still worse, he feared that the strongly racialized gang politics of the California system<sup>200</sup> would force him to affiliate with one of the white power gangs. The problem, he explained, was that with prison gangs, it is "blood in and blood out," meaning that anyone seeking membership must seriously hurt someone on the gang's behalf before gaining admission ("blood in"), and that if he changed his mind and tried to drop out, he would become vulnerable to attack by the members of the gang he sought to leave ("blood out"). Even apart from the risk of physical harm, being forced to undertake such violence on the inside could expose him to serious criminal charges. To make matters worse, he already had two strikes, which meant that any subsequent felony conviction in California could earn him a 25-year mandatory minimum prison term.<sup>201</sup> And as he explained, he didn't "really want to get a 25-year-to-life bid on a third strike just for dealing with someone else's problem and for someone else's politics."

In sum, here was a man who did not want to go back to Twin Towers where the conditions were especially uncomfortable and possibly threatening, and who did not want to go to GP out of fear of: (1) being stabbed for being a Texas gang member; (2) getting caught up again in the race politics; and (3) as a consequence, possibly being driven to violence that could earn him a third strike. Given all this, who could blame him for pretending to be gay in order to access a unit that he

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198. Details of this interview are drawn from my field notes dated July 9, 2007.

199. Or, as he put it, he's "going to get stuck."

200. See discussion *infra*, at Part II.D.2.

201. See CAL. PENAL CODE § 1170.12 (West 2011).

believed, not inaccurately, would be free from these problems?<sup>202</sup>

In most cases, those who sought refuge in K6G by lying about their sexuality did so for a more prosaic reason: they wanted a respite from the stress and danger of the gang politics that govern life in GP. I met one “OG” (Old Gangster, i.e., a longtime gang member) “shot caller” (i.e., a gang member in a leadership role) who was tired of the gang life and no longer wanted the pressure and responsibility that came with his status. (Think corporate vice president in an extremely high-stress business who is tired of managing the forty people who report to her.) And I met several other men who, having spent considerable time in GP on prior visits to the Jail, simply wanted a break from the pressure of an environment in which gang politics govern. As one person put it, “it’s crazy down there.”<sup>203</sup>

More will be said in the next section about the Jail’s gang culture and K6G’s insulation from that culture.<sup>204</sup> For now, it is enough to consider what it suggests about conditions in the Jail more generally that so many men would willingly expose themselves to the stigma of homosexuality to protect themselves from the stress and danger awaiting them in GP. The state has an obligation to ensure the safety of those it incarcerates.<sup>205</sup> But judging from the daily parade of people who pretend to be gay in order to avoid the dangers of GP or other housing units, the state has fallen well short of honoring its obligations<sup>206</sup> to many of the 166,000 people on average who come through the Jail every year.<sup>207</sup> This should trouble anyone committed to ensuring that the state satisfies the carceral burden it assumes when it decides to put people behind bars.<sup>208</sup>

This larger point should not be lost. Here is one way that making sense of the K6G classification process turns out to provide a window on the system in general: it reveals simultaneously the myriad dangers that people in custody routinely face,

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202. Perhaps the most unusual explanation for trying to get into K6G under false pretenses that arose during my field work was offered during an interview I did not observe, but which Lanni told me about later in the day. In that case, three young men had driven down to L.A. together from Oakland for the ATB, a black gay pride party. See AT THE BEACH: LOS ANGELES BLACK PRIDE TOY DRIVE & TOY GIVEAWAY, <http://www.atbla.com> (last visited Mar. 6, 2011). They were arrested together and, on admission to the Jail, each said that he was gay and was sent to K6G. During his interview, one of the young men gave Lanni odd and inconsistent answers to basic questions such as, “do you have a lover?” and “how long have you known him?” At some point (as he often does), Lanni told the interviewee to stop messing with him and tell him what was going on. It turned out that the man being interviewed was not himself gay. However, his brother—who at that moment was sitting out in the hallway awaiting his own interview—was gay, and this young man wanted to stay with his brother.

203. See Field Notes, July 16, 2007.

204. See *infra*, Part II.D.2.

205. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“Having incarcerated ‘persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,’ . . . having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

206. By my use of “the state” here, I mean to refer to the polity in a general sense. Strictly speaking, the L.A. County Jail is administered by the municipality of L.A. County and not the state of California.

207. See *supra* note 101.

208. For more on the state’s carceral burden, see Dolovich, *supra* note 36, at 911–22.

the many dimensions on which the state fails to protect those in its charge, and the depth of the challenges facing those officials charged with fulfilling the state's obligation in this regard. Almost by accident, with K6G, L.A. County has created a space relatively free from the gang culture that fuels much of the violence in GP. It has also successfully managed to maintain a physical boundary between those classified into K6G and the rest of the Jail's population—a feat apparently not even replicated among those people classified into K10 and designated as high-security "keepaways." The evident desperation many detainees feel to get classified into K6G is both a measure of this larger failure and a way to understand its precise shape, right down to the details. Someone looking to understand the ways L.A. County is failing to ensure adequate protection for the people it detains could learn a lot from spending a few weeks listening to the wide range of reasons why people who know full well that they do not meet K6G's admissions criteria try their hardest to convince state officials otherwise.

As to the official aim of K6G's classification process—identifying those individuals who meet the admissions criteria—from what I have observed, the system that has emerged in L.A. County does the job as well as one could reasonably hope. No doubt, mistakes are made.<sup>209</sup> But my sense is that, to maintain the safety of the unit, it is not necessary that the system be 100% accurate on its own terms. Instead, what is required is a demonstrated official commitment to: (1) an accurate classification process and (2) persistent monitoring of the dorm to identify (and remove) any predators. In this way, most of those who pose a threat to K6G residents will be weeded out, and those who are misclassified into K6G, recognizing that they are subject to removal if the error is discovered, will have a strong incentive not to draw attention to themselves by bad (i.e., predatory) behavior. With these pieces in place, there is a good chance of establishing living conditions for gay men and trans women that do not include daily harassment and fear of assault. And, given what life is typically like in GP for members of these groups, this result would be—and, as will be seen, in Men's Central, already is—nothing short of astonishing.<sup>210</sup>

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209. Just how many mistakes are made is difficult to gauge. I asked my interviewees to estimate how many people in K6G at the time had been misclassified and did not belong there. Answers ranged from two percent to twenty-five percent. This variation should not be surprising: given the desirability of placement in K6G, those who are not in fact gay are unlikely to admit the fact, which means that my interview subjects could really only guess.

210. This is not to say that life in K6G is a panacea. In many ways, conditions in K6G mimic the unpleasant and even dangerous conditions of life in GP. And the absence of gang control in K6G actually means that there are more frequent one-on-one physical altercations in the K6G dorms. For further discussion of these differences, see Dolovich, *supra* note 45, at 1–3, 7–16.

### D. Is K6G Safer?

#### 1. Direct Evidence

K6G was established to keep its residents safe from rape and other forms of sexual assault. Has it succeeded? It is impossible to know how much sexual abuse K6G residents would have suffered in the absence of this unit. But in light of what is known about the vulnerability of gay men and trans women in the general population of men's prisons,<sup>211</sup> it stands to reason that being housed separately from GP will make these groups safer.<sup>212</sup> And indeed, K6G residents themselves widely attest to the heightened security that they feel in the unit. In the summer of 2007, I conducted in-depth qualitative interviews with a random sample of approximately ten percent of K6G's residents.<sup>213</sup> I asked subjects 176 questions, several of which probed the issue of relative safety. Taken together, the answers given to these questions overwhelmingly confirm the effectiveness of total segregation as a protective measure.

My respondents almost unanimously reported feeling safe in K6G, and almost all testified to feeling safer—from physical harm,<sup>214</sup> sexual harassment,<sup>215</sup> and sexual assault<sup>216</sup>—than they would in GP.<sup>217</sup> One question asked: *how safe do you feel in K6G*<sup>218</sup>: *very safe, safe, unsafe, or very unsafe?*<sup>219</sup> Of the thirty-one interviewees to answer this question, only two reported feeling anything less than safe—a remarkable finding given the well-recognized vulnerability of gay men and trans women in carceral environments generally. Moreover, both of the people in that minority of two reported feeling a mix of “safe and unsafe,” and offered explanations for their mixed responses not inconsistent with an overall sense of security as compared with GP. As to the first, he made clear that he “feel[s] safe amongst the inmates,” but that he regarded the deputies who came into the dorms

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211. See *supra* Part I.

212. Again, gay men and trans women are not the only groups in need of greater protection from prison rape. See *supra* note 8. I return to this issue below. See *infra* Part III.B.

213. See *supra* note 23. For a detailed description of the research protocol, see the Methodological Appendix. The questionnaire is reproduced below as Appendix B.

214. See Appendix B, Q121.

215. See Appendix B, Q123.

216. See Appendix B, Q91.

217. The exceptions here were two interviewees with extremely muscular physiques—one of whom a former boxer—who both said they felt able to protect themselves and therefore felt safe in any environment. However, even the former boxer, a trans woman, said elsewhere in the interview that if she were attacked by a group of men bent on rape—a circumstance she implied was not unusual in the general population—she would be able to “take out” some of them but ultimately expected she would be forced to succumb to the others.

218. Although officially, the unit is now referred to as K6G, at the time of my interviews, most of my respondents—many of them with a long history of detention in the unit—still referred to it by its previous referent, K11. My interview questions therefore used the term “K11” instead of “K6G.” To avoid confusion, in quoting from my interviews, I have changed all references to K11 to reflect the current designation of K6G.

219. See Appendix B, Q125.

as posing a real threat<sup>220</sup>—a feeling he explicitly connected to an incident that had occurred in the K6G dorm the previous evening, in which several officers reportedly used excessive force against a K6G resident.<sup>221</sup> As for the second, this person told a more particularized story, one that suggested an even more complicated set of gender dynamics in K6G than I was able to unearth in my time in the Jail.<sup>222</sup> But the source of the discomfort, however troubling, did not reflect the fear of sexual or physical violence against which the unit was intended to protect.

A further set of questions asked interviewees to consider three different locations—K6G, GP, and “out in the community”—and to rank the three in terms of their feelings of relative safety from physical assault, sexual harassment and “being yourself.”<sup>223</sup> Here too, the results confirm the heightened security gay men and trans women feel in the unit. In the majority of cases, interviewees felt safest out in the community, followed by K6G, and then finally GP. Remarkably, especially among the trans women, K6G was frequently named as the place they felt safest, followed by out in the community. But with the exception of two or three respondents whose physical size and long experience in prison made them confident they could handle themselves equally well in any environment, interviewees uniformly named GP as the context in which they felt least safe from physical assault and least able to be themselves without danger.<sup>224</sup>

Still further evidence of the extent to which the Jail has successfully created a safer space for these vulnerable groups is found in a number of comments made by interviewees during the course of the interviews. For example, one respondent, in explaining why he preferred K6G to GP, said “I didn’t have to hide who I was. I could be myself and not have to worry about . . . being in any kind of danger that was only because of my sexuality.”<sup>225</sup> Another, explaining his preference for K6G, said simply “[b]ecause they’ll kill me in GP.”<sup>226</sup> Another attested that in K6G, he can “get in [his] bed and relax without having someone come and sexually

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220. Int. 75, at B12. As this interview subject memorably put it, “[t]here’s a group of these deputies that they literally scare the [expletive] of me, and I don’t scare very easily.” *Id.* For further discussion on interactions between K6G residents and custody staff, see *infra* Part III.A.

221. This account of the incident was corroborated by several other dorm residents. Unfortunately, it does not necessarily distinguish K6G from GP in terms of detainee safety vis-à-vis deputies.

222. This subject described a personal preference for shifting back and forth between presenting as female and presenting as male—in other words, to shift between the identity of “gay boy” and that of “queen.” Int. 68, at G14, H1-2. In K6G, however, this person felt considerable pressure to suppress that desire and to make a choice. For the most part, in the dorm, this person would present as a “girl.” But because s/he was not entirely comfortable in that role, s/he felt at constant risk of being disciplined by those K6G residents who took it upon themselves to police the gender line. Hence, s/he found K6G “both safe and unsafe,” a feeling that arose from the need to “constantly monitor myself in my actions.” Int. 68, at G14.

223. See Appendix B, Q119–Q124.

224. See *supra* note 217.

225. Int. 48, at F2.

226. Int. 92, at B1. This respondent continued: “[In K6G], I won’t have to worry about, you know, when I’m taking a shower, to watch my back. In the general population . . . [y]ou have to watch your back all the time.” Int. 92, at B8.

harassing [him]. [In GP, he] couldn't relax because you have the guys that want to run in the showers and want to have sexual things done to them."<sup>227</sup> Another said that "a lot of these guys in [GP] would expect it from us because of the fact that oh well, he likes guys, so might as well fuck him . . ."<sup>228</sup> One respondent, who felt generally safe because of his "strong personality[,]" still felt safer in K6G because in K6G, unlike in GP, you "don't have people that have the need to punk anyone."<sup>229</sup> Finally, one interviewee explained that in prison, most of the prisoners in protective custody are homosexuals, and that they ask to be put in protective custody because they "know they can't handle themselves if they go to [GP]. You're getting raped constantly by six, seven people at one time. [And] that's scary . . . even for me."<sup>230</sup>

Also noteworthy is the range of answers given to the question: *if you had five words to describe life in K6G, what would they be?*<sup>231</sup> As one would expect from a description of life in jail, several of the listed words carried a negative connotation. These included "noisy" or "loud" (3),<sup>232</sup> "nasty" (2), "hateful" (2), "sour" (1) and "depressing" or "sad" (7). But of the negative words offered, only two ("anxiety producing" (1) and "stressful" (1)) suggested anything of the tension, danger, and fear of violence one would expect to hear from people describing life behind bars—especially people known to face a high risk of sexual victimization while incarcerated.<sup>233</sup> And taking the responses to this question as a whole, what is most remarkable are the number of words that suggest a *positive* experience of incarceration in K6G, including "fun" or "wow" (8), "exciting" (1), "easy," "easier," or "easy-going" (4), "relax" or "relaxing" (2), "nice" or "good" (3), "peaceful" and "calm" (3), "learning experience" (3), and "serene" (1).

That a sizable portion of K6G residents have positive associations with life in the unit may seem shocking and hard to credit. After all, K6G *is* a unit of the L.A. County Jail, its residents prisoners of the state. Denied their liberty, they are held in often crowded, unhygienic, and unpleasant surroundings for as long as the state chooses to keep them. No doubt, however much they might prefer K6G to GP, the vast majority of residents would rather be back in the free world and out from

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227. Int. 102, at D5.

228. Int. 71, at C5.

229. Int. 200, at D9.

230. Int. 53, at B13. This respondent, a trans woman, was an extremely muscular ex-boxer who said she would fight rather than submit to forced sex. Even allowing for probable exaggeration, the message that GP is dangerous for K6Gs was nonetheless clearly conveyed.

231. See Appendix B, Q35. I then followed up by asking for an explanation of each descriptor offered. These questions, which proved very effective in eliciting a picture of life in K6G, were Joe Doherty's idea.

232. The numbers in parentheses refer to the number of respondents who offered this particular term.

233. It bears noting that the respondent who offered "anxiety producing," along with several other words with negative connotations ("miserable," "hateful," and "depressing"), stipulated that he would use the same words to describe "being in jail, period." Int. 131, at F11.

under the Jail's control.<sup>234</sup> Yet the notion that many K6Gs nonetheless seem to find life in the unit tolerable and even to some extent enjoyable is strongly suggested by many of the descriptors my respondents offered. It is, moreover, entirely consistent with my interviews as a whole, as well as with many casual conversations with residents and my extended observations of life in the dorms. I have more to say about this puzzling phenomenon elsewhere.<sup>235</sup> For present purposes, it is enough to observe that the picture of jail life painted by my respondents is a far cry from what one would expect from those at high risk of sexual victimization behind bars. Moreover, it offers powerful evidence that this segregation experiment has succeeded in creating a relatively safe carceral space for otherwise vulnerable people—one in which, in contrast to GP, vulnerable individuals need not sell themselves to stronger prisoners to be protected from violent assault by (other) predatory inmates.<sup>236</sup>

It might be argued that the data just described do not demonstrate that K6G in fact keeps its residents safer than they would be in GP, but only that residents subjectively *feel* safer—a feeling that may or may not correspond with the objective fact of the matter. But further evidence suggests the direct relationship between my subjects' perceptions and their day-to-day experience. Subjects were asked: *have you ever had to do sexual things against your will with any other inmates in K6G?*<sup>237</sup> The unanimously negative answers given in response to this inquiry contrasted with the answers to a related question, which asked: *have you ever [over your whole incarceration history] had to do sexual things against your will with other inmates?*<sup>238</sup> In response to this latter question, one person reported having been raped by a cellmate,<sup>239</sup> another reported being twice forced into oral sex,<sup>240</sup> and a third offered an answer suggesting that he had faced the pressure to engage in sexual conduct that arises in a protective pairing.<sup>241</sup> Taken as given, the answers reflect close to a 10% victimization rate in custody elsewhere than K6G. But even this number may understate the actual experience of my subjects, since in

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234. Although it would seem beyond peradventure that *all* K6G residents would prefer to be free, the fact that a majority of the trans women I interviewed reported feeling safer from physical harm and more able to be themselves in K6G makes me hesitate to offer what would ordinarily seem an uncontroversial generalization (i.e., that given the choice, all K6Gs would prefer not to be in jail at all).

235. See Dolovich, *supra* note 45, at 11–14.

236. Even in GP, people otherwise at risk of sexual assault may feel safe once they hook up with a stronger person in a protective pairing, or once they secure membership in a gang. This feeling of security, however, is still contingent. By contrast, the security K6G offers is independent of any protective arrangements individuals might feel forced to create for themselves, and thus comes without the very high cost such coerced arrangements can exact. I thank Jordan Woods for helping me to recognize this point.

237. See Appendix B, Q84.

238. See Appendix B, Q94.

239. Int. 102, at E10.

240. Int. 140, at C8.

241. See Int. 101, at A23 (“Not force, they don’t force you at all. They just give you the option that you can choose for your own. So, you force yourself, actually.”). This answer recalls descriptions of the catch-22 faced by vulnerable prisoners described in Part I above. See, e.g., *supra* note 51.

a number of cases, subjects who answered this question in the negative offered responses at other points in the interview suggesting that an affirmative answer may have been more accurate.<sup>242</sup> By contrast, the uniformly negative answers to the question regarding sexual victimization in K6G were corroborated by the interviews generally, which overwhelmingly conveyed a sense of security in the K6G dorms.

It is certainly true that a person's subjective perceptions may at times be at odds with reality. But when the question involves personal safety, it seems reasonable to expect feelings of relative security to arise from actual personal experience, and thus appropriate to credit the perceptions of otherwise vulnerable individuals that they are safer in some conditions of confinement than in others. Ideally, the conclusion as to K6G's relative safety compelled by the data would be corroborated with more extensive quantitative findings. It is, however, unclear how one could ever conclusively prove that particular individuals are in fact safer in segregated housing (thereby confirming the subjective reports of my interview subjects).<sup>243</sup> Apart from the obvious lack of a control group, there are simply too many variables to be confident in such conclusions. This being so, qualitative assessments by otherwise vulnerable parties with direct personal experience in the Jail may be the best available mechanism for appraising K6G's relative success.<sup>244</sup>

## 2. *Corroborating Circumstantial Evidence: Gang Politics in the Jail—But Not in K6G*

In addition, over the course of my research, corroborating evidence of K6G's relative safety arose from an unexpected quarter: those heterosexual men being held in the L.A. County system who, although knowing themselves not to satisfy K6G's admissions criteria, pretended to be gay to get into the unit.<sup>245</sup> Certainly, these efforts may only reflect a widespread perception as to K6G's relative safety and not the reality of the matter. But if there were nothing to this belief, it is hard to see how it would continue to be as widely and deeply held as it is. Yet it is not unusual to find newly admitted detainees—sometimes four or five a day—lying about their sexuality during their initial classification interview in order to be

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242. This reticence in the face of a direct question about sexual victimization is perhaps not surprising. *See supra* note 3. For this reason, the overall impressions conveyed in response to questions regarding perceptions of personal safety may be the more trustworthy data.

243. *See infra* note 309.

244. It may of course be that, in spite of the randomness of my sample, *see infra* Methodological Appendix, the experience and perceptions of my subjects were atypical, and that others with experience in K6G would offer a different assessment of the relative success of the unit. And my sample necessarily did not include those individuals who, although eligible for K6G, chose on the basis of prior experience in K6G to go instead to GP on subsequent turns in the Jail, believing that they would be safer by doing so. Were such individuals to exist in any numbers and could they be identified, they would prove a valuable source of insight into K6G—and possibly of counterevidence as to K6G's relative success at its institutional purpose.

245. *See supra* note 176, and Part II.C.2 generally.



classified to K6G.<sup>246</sup> Given the stigma that attaches to gay men in many communities in the United States, not to mention the harassment and assault gay men typically suffer while incarcerated, it may be hard to fathom why men who are not gay—especially those facing imprisonment—would try to pass as such. Certainly, it is not uncommon for people to pretend to be a different sexual orientation, but these efforts are more typically made by gay people pretending to be straight. How then to explain these daily efforts at reverse-passing? The reason is simple: those familiar with L.A. County know K6G to be the safest place in the Jail.<sup>247</sup> That this is so, of course, stands as strong condemnation of the Jail as a whole, for its failure to provide anything close to adequate security in its GP units. But it nonetheless raises the possibility that L.A. County may have something to teach other institutions about how to protect those who are most vulnerable to harm behind bars.

Several possible reasons for this reverse-passing phenomenon have already been explored.<sup>248</sup> This section will focus on what appeared to be the most common explanation: the respite K6G provides from GP's endemic gang politics. To understand this phenomenon, it is necessary to understand a little about the Jail's gang culture. The gang culture in L.A. County bears a close resemblance to that in the California prisons.<sup>249</sup> In L.A. County's iteration of the system, the prisoner population is divided into four "gangs" or "races" (in this context, these terms are interchangeable) that structure to a considerable extent the behavior of and interactions between individual prisoners: Blacks; Whites; "Surenos" or "Southsiders," who are native-born Latinos from south of Fresno<sup>250</sup>; and "Paisas" (slang for illegals), who are foreign-born Latinos.<sup>251</sup> As these groupings suggests, the organizing principle of the system is race-based, although, as with racial categories in general, the meaning of race in this system is constituted within the cultural context. Thus, Southsiders and Paisas are referred to as different "races," although each group is comprised of Latinos. And anyone who does not identify (or is not identified by others) as white, black, or Latino—who is, say, Asian, Native American, or Middle Eastern—is known as "Other" and is automatically assigned

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246. For further discussion on the Jail's intake process, including a description of the initial classification interview, *see supra* Part II.C.1.

247. *See supra* Part II.C.2 (discussing this phenomenon in greater detail).

248. *See id.*

249. *See Dolovich, supra* note 45, at 3–7, for more on the interplay between the gang politics in L.A. County and those in the California state prison system.

250. In the California prison system, there is a deep hostility between the Surenos and the "Nortenos," who are native-born Latinos from north of Fresno. The California Department of Corrections does its best to house Surenos and Nortenos in separate facilities. L.A. County, unsurprisingly, is dominated by Surenos, and any Norteno unlucky enough to find himself in L.A. County would likely request protective custody for his own safety. For more on this division, *see Dolovich, supra* note 45, at 4–5, n.20.

251. Anyone who does not fit one of these four designated categories (i.e., who qualifies as an "Other") is expected to "run with" the blacks, although they may have to pay a tax to do so.

to the Blacks.<sup>252</sup> This is the logic of “racial” distinctions in the L.A. County Jail. To complicate matters, these racial groupings are distinguishable from the prison gangs, organized on racial lines, which dominate the California prison system and have the power to reach into the Jail. These gangs, which include (among others) the Mexican Mafia, the Black Guerilla Family, and the Aryan Brotherhood, have restricted membership, but the leadership of each makes the rules that must be followed by all prisoners “assigned” to their respective racial groupings.<sup>253</sup>

In this culture, strict rules govern individual behavior and interaction. At their most basic, these rules arise from two foundational principles: racial segregation and mutual “respect.” The corollaries of these two principles are the two cardinal sins: racial mixing and interracial disrespect. Behavior is strictly controlled and rigidly policed by the gangs to guard against transgressions, and the commission of any offense may bring swift and violent reprisal, often from the wrongdoer’s own group.<sup>254</sup>

The gang-enforced rules that define life for prisoners in GP reflect this moral universe. First, a set of detailed precepts designed to prevent racial mixing govern everyday conduct. Between individuals of different “races,” there can be no touching, no sharing of food or utensils, and no overt displays of mutual regard. People of different races can talk to one another, and depending on the dorm, may even be able to play cards or chess with one another. But even in that case, they would not be able to sit on the same bunk to do so; one person would have to play standing up next to the bunk on which the cards or game board are placed.

Bunks too are designated by race to ensure that the top and bottom of each bunk bed are occupied by two people of the same race.<sup>255</sup> Members of different races cannot use the same toilets or phones; for this reason, in each dorm, each phone and toilet is designated as “belonging” to one race or another.<sup>256</sup> Even the water

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252. See *supra* note 251.

253. Thus, for example, the leadership of the Mexican Mafia, along with leaders of the other Latino gangs (e.g., La Nuestra Familia), makes the rules for the Southsiders; the Aryan Brotherhood, along with leaders of the other white gangs (e.g., Nazi Low Riders), makes the rules for the whites, etc.

254. This description should in no way be taken as evidence of endorsement. I am well aware that the cultural system I am describing here is deeply offensive and troubling. But to understand K6G and the difference it represents, it is necessary that the larger gang culture be understood, which is why I am describing it in such detail here.

255. This particular practice may have to change in the near future, at least in the California prison system. After the Supreme Court handed down its decision in *Johnson v. California*, 543 U.S. 499 (2005), the state agreed to a policy of racial integration in all its facilities. This policy commits the state to racially integrating as much as possible both cells and dorms. The experience of such integration in Texas suggests that the racial integration of cells should have no appreciable effect on the level of violence. See *infra* note 382. As to the dorms, however, the public nature of the living quarters may mean that even those prisoners who do not object to sharing a bunk bed with someone of another race will feel compelled to perform disgust, anger, and recalcitrance at the integration. This difference may prove to complicate California’s integrationist efforts in its prison dorms.

256. There was some suggestion in my conversations that at least sometimes, the phones and possibly the toilets were divided up between blacks on the one hand and everyone else on the other, as opposed to one per group.

fountains in the recreation areas have been assigned according to race. If you are in the rec areas and there is no fountain designated for your group, you cannot get a drink. Compliance with these rules is enforced by the gang leadership in each dorm. In each dorm, each gang has a “rep,” for four in total, whose responsibility it is to make sure that his “soldiers” comply with these rules. New arrivals are taken aside and informed of their obligations, and violations are met with reprisals ranging from strong rebukes to physical violence.

A second set of rules, designed to guard against any signs of mutual disrespect, provides for an almost scrupulous equity in the distribution of benefits. What benefits could possibly be had in a jail dormitory? Apart from the much-sought-after commissary items, which are available to anyone who can afford them or who cuts a deal with someone who can,<sup>257</sup> the main benefits are two: being the first to get your meal at chow time and getting a say in the channel to which the dorm’s communal television is set. Consistent with the demands of racial consistency and the imperative not to be disrespected, the gangs in the Jail have worked out a system. As to both being first in line at mealtimes and choosing what TV show to watch (within the parameters set for available programming by the Jail itself), the prizes rotate. The gangs take turns being the first to line up for chow, and on any given day, the group whose turn it is to go first at mealtimes gets to decide what to watch on TV that day.<sup>258</sup>

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257. As one interview subject explained, in the Jail there are:

these people that do two-for-one, and you go to them and you get, like, one cookie, you’ve got to pay two back. And sometimes I get like \$60, \$75 in two-for-one, and by the time the store comes I have to shovel out all my store, because you can only spend 130 bucks. So, if I go to the store and spend 130 bucks, and \$95 of it or 100 bucks of it is me getting two-for-one, then I’ve got like 30 bucks in there for myself. And I run out of that.

Int. 136, at C18.

*What happens if people don’t pay their debts?*

Oh, you can get in trouble. Some of them are very violent to people. Some of them want to whup your butt and they threaten you. I mean, the people that are two-for-one are people who are like drug dealers, actually, and they’re not very nice people. It’s not very good to deal with them, actually. And one of them that I deal with is a very nice guy, I like to pay him, because he gives me two-for-one. And I got myself in a pattern to where it’s like a cycle for me. I have to pay him back, so then I have to go back to him again for more, because I ran out. So it’s like a cycle.

*Id.*

A number of my interview subjects recalled one serious violent incident that had occurred not long before in the K6G dorms, which arose when a debtor could not pay. I was unable to confirm this account, nor am I able to say how often violence stemming from unpaid debts occurs in K6G.

258. I witnessed these rules in action in the GP dorm that served as a (fortuitous) control during my time in the Jail. The dorms in Men’s Central are arranged in groups of four, with a single officer’s booth affording visual access to, and some interaction with, residents of all four dorms. (For more on this configuration, see *infra* Methodological Appendix.) In the summer of 2007, one such grouping included the three K6G dorms and one dorm that served for a time as a general GP medium-security dorm. I learned a lot about GP from observing that medium-security GP dorm and from informal conversation with some of its residents. I later confirmed what I learned from that vantage point in conversations with custody officials and residents of K6G.

The rigid observation of these rules means that life in GP can often appear remarkably calm. Indeed, this relative calm is arguably what leads Jail officials to tolerate and even facilitate gang control of the internal jail culture, since for much of the time it ensures order and stability. But this seeming calm masks the intense stress created for GP residents by the imperative to follow the rules or risk physical punishment. It also masks the ever-present possibility of collective violence. In this highly calibrated system, collective violence—i.e., riots—can break out at any time, prompted by anything from a perceived slight of one person by someone of another race, to long-brewing tensions among different racial groupings, to a decision made by gang leadership—usually far off in Pelican Bay or some other high-security California prison—to launch an all-out war with another gang.<sup>259</sup> Often, the people who fight will not even know why they are doing so. But their knowledge of the reasons is irrelevant. This brings us to the preeminent obligation for all prisoners caught up in this gang culture: the imperative to “jump in” (i.e., join in the fight) whenever the signal is given. Those who fail to respond to this signal know that they can expect to be violently punished by their own gang once the dust has settled.<sup>260</sup>

The system just described, with its rigid code of conduct and penalties for violations, is what is known in the Jail as “gang politics” or just “politics.” These politics make life in GP scary, stressful, and dangerous.<sup>261</sup> In K6G, however—and here is the key to understanding the appeal of the unit for many of the people Bell and Lanni meet—*there are no politics*.<sup>262</sup> Anyone can use any phone, any toilet, any shower, without fear of being violently “disciplined.” No one prevents people of different races from sitting together, sharing food or utensils, touching, kissing or otherwise being intimate with one another. As a result, this kind of interracial mutual engagement is routine. At meal times, everyone crowds together and

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259. The most senior gang leaders are typically housed in California maximum-security facilities. But they are still able to reach into the Jail dorms through various means, most notably the frequent transfer between facilities of individual gang members, who serve as messengers.

260. As one of my (black) respondents succinctly explained, “[i]f a Mexican and a black fight, and another Mexican jumps on the black and beat on the black, I may be called to where I have to jump in and fight. And if I don’t, then the blacks may all beat me up later.” Int. 119, at C4.

261. This effect came through clearly in my interviews, as subjects described their experiences of life in GP. As one (white) respondent described,

I was scared to death. Because where I was [housed], I was with nothing but Mexicans. They were all gang bangers [i.e., someone deeply involved in the gang culture], every one of them were gang bangers. I forget what clique they were from. But in [the overhead light in my cell] we had 32 shanks, knives, handmade knives. And then one day somebody disrespected one of the Mexicans, and the Mexicans they all went off on the whites. The only reason why they didn’t go off on me is because our tank had all those shanks in them. And that’s the only thing that saved me from being jumped on by six other gang bangers.

Int. 123, at E6.

262. In my interviews, the absence of such politics in K6G was raised repeatedly as a welcome feature of life in the unit.

people get their trays on a first-come, first-served basis. To be sure, there are gang members in K6G, and, on occasion, some of them “tr[y] to turn it into a political thing,” as once happened when “a couple of the inmates [in one of the K6G dorms] . . . tried to segregate it with blacks, whites, [etc.]”<sup>263</sup> Or, people might “start throwing up those gang signs or where they’re from.”<sup>264</sup> But these efforts are readily put down by other dorm residents.<sup>265</sup> The effect is a housing unit remarkably free from the constant threat of gang-related violence.

The absence of gang politics in K6G is a puzzle I take up at greater length elsewhere.<sup>266</sup> For present purposes, it is enough to note that gang culture thrives where people anxious not to be seen as weak and therefore vulnerable to victimization are willing to enforce the rules.<sup>267</sup> Those “gang bangers” who violently compel others to submit to the demands of the gang culture thereby secure their own power and status, and broadcast that they are not someone to be messed with. Gang banging, in other words, protects against aspersions of weakness, of cowardice, of being a sissy—in short, of being female. This dynamic reveals the deep connection between the culture of prison gangs and the fear of rape, as those seen to be unwilling to adhere to the code open themselves up to being victimized. As one of my interviewees might have put it, in prison, the baddest gang bangers are the least likely to be punked.<sup>268</sup> In K6G, by contrast, there is no pressure on residents to prove their masculinity, and thus no risk that those who display “feminine” qualities will be targets of sexual assault. As a consequence, there is no premium on seeming hard or tough, suppressing emotion, or instilling fear in others—all of which behaviors are demanded by GP’s gang culture. It appears, in short, that, in the absence of pressures to perform a hypermasculine identity,<sup>269</sup> the rigid, irrational, racist, stressful, and

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263. Int. 71, at A7.

264. Int. 131, at F4.

265. *See, e.g.*, Int. 119, at B11 (explaining that gang politics are “not taken seriously in [K6G],” and “if they was causing too much of a problem, Bloods or Crips [or] whichever, I’m pretty sure that we would probably whup them . . . to stop problems for everybody”); Int. 53, at C11 (“We don’t play [gang politics] up there. We don’t play that at all. . . . If they going to come up there gang banging . . . [I tell them] you’re in the wrong place. I’m one of the ones that let them know.”).

266. *See* Dolovich, *supra* note 45.

267. As Craig Haney explains in his contribution to this issue, “[g]angs only flourish in a jail or prison society when there is a strong undercurrent of fear and reminders of one’s own vulnerability.” Haney, *supra* note 49, at 136. *See also id.* at 135–136 (explaining that through the “racial gang culture . . . [p]eople who live under conditions of scarcity, threat and alienation band together to create a sense of security and safety”).

268. Haney explains this connection at greater length in his contribution to this volume. *See id.* at 137. As he puts it, “there is a kind of symbiotic relationship between the threat of prison rape and the existence of prison gangs.” *See id.*

269. To say that there is no hypermasculinity imperative in K6G is not the same as saying that no residents of K6G have an investment in appearing masculine. As Jeannie Suk points out in her contribution to this volume, heterosexual men have no monopoly on masculine performance. *See* Suk, *supra* note 67, at 116. To the contrary, as she notes, “the phenomenon of gay masculinity is well known.” *Id.*

scary rule structure that governs (gang) life elsewhere in the Jail can get no traction.

### III. K6G OR NOT K6G: THREE CRITICAL PERSPECTIVES

The aim of Part II was to describe the way K6G works and its implications for the security of its target populations. I now turn to three key objections that might be raised against the K6G program in particular and the segregationist enterprise in general. Part III.A addresses what it terms the “antisegregationist” objection, which would condemn any state-sponsored, identity-based segregation as “demoralizing and dangerous.”<sup>270</sup> It argues that although antisegregationist concerns are valid ones that bear addressing, they are insufficient to justify abandoning the K6G program itself. It also notes a key irony for those who would take this position: by separating out detainees on grounds of sexual orientation and gender identity, K6G has become one of the only places in the Jail where detainees of different races can intermingle without consequences. Part III.B addresses the objection that K6G’s classification standards are sorely underinclusive. As it shows, the underinclusivity concern in fact represents a cluster of objections to the K6G model: that K6G should be open to anyone who asks; that the Department’s stated admissions criteria are too narrow because they self-consciously exclude bisexuals; that the classification process is inadequate to identify all those who meet existing classification criteria; and that those criteria fail to take account of all who are at risk of sexual victimization in GP. Although the first three of these objections are ultimately shown to have little weight, the last concern—that K6G’s admission criteria exclude many other at-risk detainees—proves to pose a serious challenge to the K6G model. As it happens, however, an alternative approach exists that would simultaneously mitigate antisegregationist concerns and remedy K6G’s underinclusivity. This alternative, consistent with the classification standards recommended by the National Prison Rape Elimination Commission (the Commission),<sup>271</sup> does not entirely avoid the risks of K6G’s identity-based strategy, nor is it without its own dangers. It should not, moreover, be allowed wholly to crowd out the K6G model, which may prove to best serve the needs of particular carceral institutions. Still, Part III.B concludes that on balance, the Commission’s more inclusive approach is the more advisable default model, although it argues that, despite the shortcomings of the K6G approach, L.A. County’s K6G unit should remain in place. Part III.B also responds to the objection that any strategy designed to prevent prison rape by removing the most vulnerable prisoners from GP is doomed to fail, because the hypermasculinity imperative will simply push the remaining prisoners to target the weakest remaining individuals for victimization. Finally, Part III.C responds to the argument that, even for jurisdictions like L.A.

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270. COMMISSION REPORT, *supra* note 8, at 80.

271. *See supra* note 37.

County, where the K6G approach has proved an effective way to protect their gay and trans populations, the K6G model would be off-limits as unconstitutional after the Supreme Court's decision in *Johnson v. California*.<sup>272</sup> As it shows, this argument misconstrues the implications of *Johnson*, which, in cases where prison officials can demonstrate the success of K6G at keeping target groups safer, would not pose any constitutional obstacle to adopting or maintaining this model.

A. “Demoralizing and Dangerous”<sup>273</sup>: *The Antisegregationist Objection*

The history of race discrimination in the United States has left a legacy of suspicion toward any official program of identity-based segregation. Even in the prison context—not typically a site of meaningful constitutional scrutiny<sup>274</sup>—the Supreme Court has condemned even temporary segregation on the basis of race as a “highly suspect [policy] tool.”<sup>275</sup>

This suspicion is appropriate, and not only as to race; the experience in Alabama's Limestone prison of HIV+ prisoners,<sup>276</sup> who were divided from the general population and crammed into a “drafty, rat-infested warehouse once reserved for chain gangs,”<sup>277</sup> stands as evidence that segregation to protect the majority from contact with any despised and feared minority can be as cruel and damaging to the segregated population as it was to African Americans in the Jim Crow South. And, as *Brown v. Board of Education* famously taught, even where “physical facilities and other ‘tangible’ factors may be equal,” state-sponsored segregation implies an official judgment as to the “inferiority” of the targeted population that can be demoralizing and psychologically damaging to members of that group.<sup>278</sup>

Some version of this view appears to have motivated the Commission, which, in its final report, “specifically prohibit[ed] housing assignments based solely on a person's sexual orientation, gender identity, or gender status,” on the grounds that “[this] practice can lead to labeling that is both demoralizing and dangerous.”<sup>279</sup>

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272. 543 U.S. 499 (2005).

273. COMMISSION REPORT, *supra* note 8, at 80.

274. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that policies burdening prisoners' constitutional rights will nonetheless be upheld so long as they are “reasonably related to legitimate penological interests”).

275. *Johnson v. California*, 543 U.S. 499, 506 (2005) (internal quotations omitted).

276. *See generally* BENJAMIN FLEURY-STEINER, *DYING INSIDE: THE HIV/AIDS WARD AT LIMESTONE PRISON* (Univ. of Mich. Press 2008) (discussing the inhumane treatment of prisoners, such as being chained to their beds, subjected to filth, and untreated for their medical needs in Limestone Prison's segregated HIV ward).

277. Paul von Zielbauer, *A Company's Troubled Answer for Prisoners with H.I.V.*, N.Y. TIMES, Aug. 1, 2005, at A1.

278. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

279. *Id.* The relevant draft standard, “SC-2: Use of screening information,” required that “[l]esbian, gay, bisexual, transgender, or other gender-nonconforming inmates are not placed in particular facilities, units, or wings solely on the basis of their sexual orientation, genital status, or gender identity.” COMMISSION REPORT, *supra* note 8, at 77.

Viewed from this perspective, multiple aspects of the K6G program give cause for concern.<sup>280</sup> First, there is the classification process itself, which invites and even requires state officials to make explicit judgments as to the sexual identity of the people they detain, prying into the most private and intimate details of their lives to do so. And second, there is the aftermath of this process, whereby individuals determined by the state to be gay are explicitly and openly labeled as such and placed in a unit widely known to house sexual minorities.

As to the first set of harms, it bears noting that a detainee who wants to protect his privacy and perhaps his dignity from violation by the state could refuse to answer any intrusive questions. In response to the initial question posed in IRC—*are you homosexual?*—he could answer in the negative, and that would be the end of the state’s intrusion into his personal business. Or, if he answers affirmatively and winds up opposite Bell or Lanni, he could choose to reveal no further personal information. The problem, of course, is that access to the relatively safe space of K6G is conditioned on a willingness to expose the intimate details of one’s life to state officials. This is a serious concern, but it has less to do with official violations of privacy and dignity than with the limited availability of safe space in L.A. County, a troubling but distinct issue to which I return below.<sup>281</sup> Those who do reveal their private details to a classification officer may well feel a sense of personal violation in doing so. But were this intrusiveness the only way for County officials to identify likely victims in order to ensure their safety, and the only harm to arise from classification to K6G, the privacy and dignity objections would amount to a thin reed indeed on which to condemn the whole enterprise. The carceral experience inevitably involves a loss of privacy<sup>282</sup> and dignity.<sup>283</sup> Much of this deprivation is unnecessary, and to this extent should be challenged and remedied. But unfortunately, to some extent, such violations may be the cost of keeping people safe in custody. In a deeply imperfect world, sometimes the best one can hope for is to avoid the greater evil. And, in the decidedly imperfect world of the contemporary American prison, the compromising of privacy and/or dignity as a means to ensure physical safety is surely the lesser evil.

Of greater concern is the possibility of harm from openly labeling—“outing”—certain people as gay in the carceral context. To this extent, being classified to K6G carries a number of risks, the most obvious of which is the threat of stigmatization, of being exposed to popular prejudice and hatred because of one’s identity. In my

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280. I leave aside for now the concern that K6G’s admissions standards condition safety in the Jail on the ability to convince classification officers that one is “really gay.” I return to this point and examine it in more detail in Part III.B.

281. *See infra* Part III.B.

282. *See Hudson v. Palmer*, 468 U.S. 517, 526–28 (1984) (holding that prisoners cannot have a reasonable expectation of privacy in their prison cells and that they are therefore not entitled to Fourth Amendment protection against unreasonable searches while in custody).

283. *See Dolovich, supra* note 36, at 931–35 (discussing the many ways in which prisoners are often unnecessarily dehumanized and deprived of their dignity).



interviews, one subject explicitly noted the way harm of this sort can arise from the official publicizing of difference. When asked for words to describe life in K6G, this subject offered “discrimination” and “segregation.” As he explained,

[w]e’re separated as [K6Gs] and the blues, the light blues, they just stand out. Everybody here know what a light blue is. When you walk through they know, oh, that’s a homosexual or that’s a [K6G]. . . . We get segregated from people because we’re gay. [And] that’s where the disrespect come in, when we go outside of the dorm. We’re inside our own dorms, it’s perfect, it’s fine, it’s cool. But when we step out, we have to get into the same frame of mind that some people might not like us, some people might say something to us. And that’s what discrimination is.<sup>284</sup>

On this account, what is objectionable about K6G is the way it singles out gay men and publicly announces their sexual orientation, thereby exposing them to disrespect and other discriminatory treatment when they come into contact with others. Although this interviewee was the only one to link this treatment to the color-coded uniforms, many others described the verbal harassment to which K6Gs are subjected by GPs when outside the dorm.<sup>285</sup> As was explained above,<sup>286</sup>

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284. Int. 48, at F6.

285. Interview subjects were asked: *Do you ever have interaction with GP? If so, would you describe the interaction as negative, positive, both negative and positive, or neither negative or positive? How so? See Appendix B, Q30–Q32.* The responses made clear that with the exception of the trusties who come into the dorms escorted by custodial staff to distribute meals and do clothing exchange, the interactions between K6Gs and GPs occur almost exclusively when they pass each other in transit in the facility. (The one glaring exception was the respondent who reported having been raped in the K6G court-line holding cell. *See infra* note 297.) The characterizations of these hallway interactions were split almost equally between positive and negative. Of the twenty-four inmates who reported some interaction, four characterized the interaction as positive, five as negative, eleven as both negative and positive, and four as neither negative nor positive. Those who indicated only negative interactions with GPs mainly described verbal harassment while waiting in line or during brief passing interactions. *See, e.g.,* Int. 131, at F10 (“[M]ost of [the GPs] got smartass mouths. . . . [They are] homophobic and they call you faggot or things like that.”); Int. 75, at A14 (“They walk by our cells and spit on us and throw shit at us and the deputies don’t do nothing but giggle.”); Int. 45, at A8 (“[T]hey cuss me out.”). Those who reported both negative and positive interactions described a mix of unwelcome verbal harassment (and some spitting), and welcome flirtation. Here is a brief sampling of such responses:

“[O]nly interaction . . . is pretty much when I go to court. . . . Sometimes there are some guys that say hi, but there are some that wink their eye. . . . [Some] may make a comment and say ‘faggot’ . . . .” Int. 119, at A5.

“[T]hey do say names to us or they do call me a faggot or whatever, but I’m just, like, ‘Whatever.’ . . . [S]ometimes they flirt with you or sometimes they’re nice.” Int. 92, at B4.

“Some are positive . . . [but] some of the [GP], they don’t like us talking to them, for the simple fact because we’re gay.” Int. 89, at C4.

“We [K6Gs] harass [GPs] . . . [K6Gs will] whistle . . . and try to embarrass [GPs] in front of their people. And then, of course, they’ll look at us and give us very disgusting looks a lot of times.” Int. 79, at E9.

“More positive than negative. . . . Because you got guys that’s going to face time. A lot of them is going to face a lot of time and stuff, and homosexuals is what they would probably mess with if

jail policies in place to physically separate K6Gs from GPs are reasonably effective.<sup>287</sup> But the siting of K6G within Men's Central means that when K6Gs are out of the dorms, they continually cross paths with GPs. When this happens, the K6Gs will often be the targets of catcalls, whistling, or explicitly homophobic epithets.

More troubling still, the verbal abuse K6Gs draw comes not only from fellow inmates but also from staff—custodial officers in particular.<sup>288</sup> Indeed, a number of my subjects noted that at least some custody officers treat K6Gs more harshly and less respectfully than they treat GPs. Interviewees offered several possible explanations for this differential treatment. A number of respondents suggested that K6Gs themselves provoke the officers. As one person put it, “you can't blame it all on the officers, because sometimes [K6Gs] got smart mouths and they bring it on [them]selves.”<sup>289</sup> It was also implied that the officers are more intimidated by GPs. As the same respondent explained, “the things they do in [K6G], they don't do in [GP]. . . . Like just fuck with us in general. Just talking crazy to us. They don't do that in the general population because general population tend to go off on them a little bit.”<sup>290</sup> Finally, others pointed to homophobia on the part of some officers. One respondent found that “as a whole . . . they consider us less of a threat so they're a little more lenient. But then you have those [who] are homophobic, who [are] just waiting for us to [not follow orders]” to lash out. And that, the subject concluded, is “something I feel is so degrading.”<sup>291</sup>

Moreover, when the perpetrators are custodial staff, the verbal abuse to which K6Gs are subjected is not limited to chance encounters in hallways. Many of my respondents reported that some—though by no means all—staff assigned to the booth overlooking the dorms felt free to use homophobic epithets over the loudspeakers when making routine communications like announcing mealtimes or count.<sup>292</sup>

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they get the time. . . . [T]he next best thing to a whole female would be a homosexual. . . . And then you got some that actually despises us, whether it have to do with their sexuality or a family member that they have that's the same gender as us, you know. And they can't deal with that. We get spit at a lot.” Int. 53, at B6.

“[When GPs walk past the K6G court cell], some of them just laugh and some of them just go with it.” Int. 55, at 9.

286. See *supra* Part II.B–C.

287. For one notable failure, see *infra* note 297.

288. Jail staff includes not just custodial officers, but also nurses, teachers, chaplains, volunteers, etc. For the most part, my subjects reported respectful treatment from members of these other groups.

289. Int. 140, at B1.

290. *Id.*; see also Int. 103, at D3 (“GPs get more respect. . . . I believe because they feel that, because we're wearing powder blue or because we're gay, or transgender[], that we don't pose too much of a threat, so they can talk to us any way that they want.”).

291. Int. 50, at F7.

292. See, e.g., Int. 75, at A7 (reporting that one day before count, the officer in the booth made the announcement by saying “[a]ll you faggots get on your bed[s]”).

The verbal harassment of K6Gs in their dorms raises a further, still more serious issue that might be thought of as the “sitting duck” concern: that concentrating all sexual minorities in one unit would only draw attention to people who are already extremely vulnerable, making them sitting ducks for any predators—whether inmates or officers—bent on assault. This risk would of course exist as to any vulnerable populations, but it may be greater still when the population is comprised of sexual minorities known to be targets of both popular prejudice and physical violence because of their sexuality. Certainly, it seems fair to say that K6Gs are sitting ducks when it comes to verbal harassment. Although unpleasant, this may be inevitable. Were, however, the same to be true as to physical abuse, this finding would be damning indeed, since maintaining the physical safety of K6G residents is the whole point of the enterprise. Here, my research speaks directly to this point and suggests reason for cautious optimism, at least as to assaults by fellow inmates in the dorms.<sup>293</sup> Even the subject quoted above, who objected to the discriminatory treatment K6Gs often face outside the dorms, made the point that “[when w]e’re in our own dorm, it’s perfect, it’s fine, it’s cool.”<sup>294</sup> And still more to the point, the other words this same subject offered to describe life in the unit were “comfortable” and “easy.”<sup>295</sup>

What, however, of staff? Unfortunately, restrictions placed on my data collection by Jail administrators precluded me from asking specifically about any sexual contact, whether forced, coerced, or consensual, between K6Gs and custodial or other Jail staff.<sup>296</sup> Certainly, the readiness with which my respondents affirmed their feelings of safety in K6G at least tended to suggest that unwanted sexual contact with staff had not been a problem for them. Still, confirmation of this initial impression must await further investigation, unhampered by the particular restric-

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293. *See supra* Part II.D.1.

294. Int. 48, at F6.

295. *Id.* at F4.

296. In my original research protocol, I had indicated an intent to ask about sexual contact between K6G residents and staff. But my protocol also explained that I would keep confidential all information given to me by my interviewees (with the standard exception of anything suggesting that a particular interviewee was either suicidal or homicidal). When I submitted my protocol to Jail officials for approval as required by the UCLA IRB process, they protested that because any sexual contact between inmates and staff is illegal, they would need to be informed if I discovered any information alleging such contact. Although I argued that if the stipulation were insisted upon, Jail administrators could expect to learn nothing from my research on this crucial issue, these efforts were to no avail, and ultimately, my commitment to disclose any such information to the Jail became a condition of my research. As a consequence, at the start of each interview, I explained to each subject the parameters of the confidentiality they could expect from me. Specifically, I explained that any information they gave me regarding any sexual contact, whether forced, coerced, or consensual, between any staff member and any inmate, whether themselves or someone else, would be disclosed to Jail staff. I further explained that for this reason, if they did not want that information to be disclosed, they should not share it with me during the interview—that, in other words, they should regard sharing such information as equivalent to making an official report. (So as not to prejudice the interview in general, I was careful to make clear that it was only this thin slice of information that would be treated this way.) Not surprisingly, I learned nothing in my interviews as to whether and to what extent sexual contact occurs between staff and K6G residents.

tions I faced in my own research.

In any case, it is clear that, even if K6G succeeds in ensuring residents' relative safety, some residents are still victimized. At least one of my respondents reported suffering the worst effects of a program that flags gay inmates with color-coded uniforms: he was raped in the K6G court-line holding cell by a GP inmate who threatened him with a razor.<sup>297</sup> Even apart from this disturbing incident, the persistent verbal harassment by custodial staff indicates that being publicly outed as gay in the Jail carries risks. Given these dangers, what is the appropriate response? At the most immediate practical level, it is incumbent on the Department to take prompt action to address the most troubling abuses identified by my research—the persistent verbal harassment of K6Gs by custodial staff, and, considerably more serious still, the failure to protect K6Gs from physical assault by GPs when outside the dorms.

As to the first, verbal harassment by staff, appropriate steps would include: (1) a demonstration on the part of senior Jail officials of a commitment to zero tolerance of such behavior; (2) the implementation of meaningful staff training, preferably designed in consultation with K6G residents and leaders of the Los Angeles LGBT community, as to appropriate ways to interact with K6Gs; and (3) the imposition of administrative leave without pay for any staff member found to engage in the maltreatment of K6Gs.

As to the second, keeping K6Gs physically safe, it is obvious that more must be done to shore up the physical boundary between K6G and GP when K6Gs are out of their dorms. At an absolute minimum, in response to the incident reported to me of rape by another inmate, the Department should relocate the K6G court-line holding cell so that it is directly in the sight line of officers, and should modify the cell to have a key entry only. These simple modifications, moreover, are only a starting point for considering what other changes are necessary to ensure the safety of K6Gs when they are outside their dorms.<sup>298</sup>

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297. The holding cells in the court line are designed for easy access. Each weekday morning in Men's Central, hundreds of men line up to be transferred to court. Officers determine which courthouse people need to get to and send them to wait in the appropriate cell. The processing is facilitated by the cell design itself: the cells have revolving entrances with horizontal metal bars like those one might see in a subway station, which allow someone to enter simply by pushing the bars. As in a subway, the rotation is one-way. Once someone has entered the cell, there is no exit except by an officer with the key. Unfortunately, the cell designated for K6Gs is not in the direct sight-line of the officers, which creates the opportunity for GPs or other non-K6G prisoners to enter the cell freely if they choose. One day, on his return from court, my interviewee reported that he was in the K6G holding cell with fifteen or so others when a GP inmate with a razor in his mouth entered the cell and forced him to submit to anal rape. The assailant then waited for an officer to release him from his cell. Certainly, had the victim wanted to make a formal complaint about the incident, he could have readily done so. There were many witnesses, a few of whom reportedly tried to intervene before being warned off by the razor, and the identity of the assailant was obvious. But as is often the case with forcible rapes behind bars, the victim made a calculation that it was better to say nothing.

298. The department should also take immediate steps to allow research into the incidence of sexual contact between staff and inmates, which would require lifting the disclosure requirement that precluded the pursuit of this issue in my own research. *See supra* note 296.

Arguably, the risks created by explicitly flagging gay inmates may be necessary to ensure their physical safety. But in creating that risk, the Department has a heightened obligation to protect the people in K6G from the dangers to which its own official strategy gives rise. Meeting this obligation would involve protecting K6Gs not only from predatory inmates but also from predatory staff. Although constraints placed on my research by the Department<sup>299</sup> meant that I was unable to determine the extent to which predatory staff members pose a threat to the physical safety of K6Gs, evidence from other carceral contexts suggests that some such risk certainly exists. The Department must therefore take all necessary steps to keep unit residents safe from possible sexual predation by staff. Doing so would at a minimum require ongoing monitoring of the unit, the sending of strong signals that sexual contact of any kind between prisoners and staff will bring heavy consequences, and an official readiness to take seriously any and all allegations made by unit residents of physical abuse by staff.<sup>300</sup>

It might be argued that, if L.A. County is going to retain its K6G unit, it ought at a minimum to get rid of the color-coded uniforms that serve to publicize the sexual identity of the wearers. Even taken alone, this system of color-coding may seem distasteful and insidious, dehumanizing and stigmatizing the people in custody. And, as a practical matter, given that gay men and trans women are favored targets of sexual harassment and assault, one might well wonder whether distinctly colored uniforms wouldn't just make them more visible to potential predators and thus *more* vulnerable. These concerns are legitimate ones. There *is* something unpalatable about singling people out for special notice on the basis of a stigmatized identity, an effect not lost on the residents; as has been seen, at least one of my respondents noted the discomfort he felt when outside the K6G dorms because of his light blue uniform. The choice of light blue for K6G is, moreover, particularly unfortunate when juxtaposed against the GPs' dark blue and thereby appearing to suggest a feminized version of the male norm.

But for L.A. County to abandon the color-coding of uniforms on grounds of these objections would be a grave mistake. Certainly, in an ideal world, any such crude markers of difference would be avoided. The L.A. County Jail, however, is not an ideal world. In this facility, as in any overcrowded, understaffed carceral institution, violence is a constant possibility. With stakes like these, officials are right to use every tool at their disposal to protect those in custody against assaults, even tools about which people of good faith may be ambivalent—including color-coded uniforms. Indeed, the physical safety of K6Gs arguably depends on these uniforms. K6Gs use the same medical facilities, visiting rooms, court transfer wing, and hallways as the general population. This situation creates

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299. See *supra* note 296.

300. On the possibility that prisoner complaints might serve as a source of information regarding life in the unit, see Dolovich, *supra* note 45, at 14–15.

endless opportunities for physical contact between K6Gs and GPs. To maintain an impermeable boundary around the K6Gs is thus a constant challenge. To this end, the color-coded uniforms are indispensable. They allow officers, for example, to ensure that only those classified to K6G can access the unit's dorms and to see immediately if any non-K6Gs have gained admittance. The same holds for the unit's classroom, classification office, holding cell, and anywhere else exclusively reserved for K6Gs. True, the uniforms signal to the general population that they are in proximity to gay men. (Trans women are generally obvious to all regardless of the color of their uniforms.) For this reason, K6Gs are often the targets of hooting, catcalls, and homophobic epithets from GPs whose paths they cross. But remarkably, in all my discussions with residents of K6G, I learned of only one instance of any breach of the physical boundary between K6Gs and GPs. And that tragic instance—the rape referred to above<sup>301</sup>—strongly suggests that the better response is not assimilation, but more effective segregation.<sup>302</sup>

All this, of course, begs the question: why should there even *be* a K6G unit in L.A. County? Perhaps, given the risks involved in the state's singling out of people as members of sexual minorities, it would be better not to have any K6G at all. However, assuming the choice were K6G or nothing, any move to disband K6G on the grounds just enumerated would be a grave mistake. As the Supreme Court's Equal Protection doctrine explicitly recognizes, even the most suspect group classifications may sometimes be necessary to realize urgent and legitimate state interests.<sup>303</sup> Under some circumstances, in other words, identity-based segregation may be the lesser evil. When this is so, to prohibit such segregation may be to

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301. See *supra* note 297. This incident occurred in the court line, to an individual waiting in the holding cell reserved for K6Gs. As a policy matter, the answer to such an incident is not to put the K6Gs in dark blues, which would only make it difficult to ensure their physical separation from other detainees, thereby exposing them to physical assaults by anyone who discovers their sexual orientation. The better response is more effective separation, which in this instance would involve relocating the K6G holding cell so it is directly in the sight-line of officers, and requiring a key entry as well as a key exit to ensure the effective segregation of those inside it.

302. Without a doubt, there are risks involved in explicitly flagging certain prisoners as sexual minorities. But notwithstanding the serious administrative challenges involved in running a facility as crowded, chaotic, and complex as Men's Central, the Jail does a reasonably good job of maintaining the boundary around the K6Gs. There is certainly room for improvement. However, this achievement is still notable. And it is hard to see how the same feat could have been accomplished without the color-coded uniforms. Again, however, the institution might perhaps have done better to choose a more neutral color than light blue for K6G. Moreover, the fact that the California prison system does not segregate gay men from GP raises the disturbing possibility that, by busing K6Gs from L.A. County to state prison in light blue uniforms, the state is effectively announcing the sexual orientation of these men to any GPs who are paying attention to the new arrivals. For this reason, it is imperative that, if they do not do so already, Jail administrators must make a point of providing K6G transferees with the dark blue uniforms of GP before they are removed from the K6G dorms in advance of being transferred.

303. See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–98 (2006) (demonstrating that, contrary to the widely-held view that strict scrutiny is “strict in theory and fatal in fact,” thirty percent of Equal Protection challenges analyzed under strict scrutiny by federal courts between 1990 and 2003 resulted in the challenged law being upheld) (quoting Gerald Gunther, *The Supreme Court, 1971-Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

countenance and even facilitate potentially serious harm against the very population that the prohibition is intended to protect. This would be precisely the case were the anti-segregationist concerns canvassed above found sufficient to justify eliminating K6G. If the Department were to send the K6Gs back to GP, it would certainly take the state out of the process of formally seeking to unearth and publicly announce the sexual orientation of some of its detainees. But the effect would only be to leave predatory inmates to do the scrutinizing, with very different motives and a very different result.

There is, however, a second option: a more inclusive approach that would seek to identify not which inmates are “homosexual,”<sup>304</sup> but which inmates are, for whatever reason, at a high risk of victimization in GP. This approach might well eliminate the most troubling features of state-sponsored identity-based segregation while correcting for the underinclusivity of K6G’s admissions standards. In what follows, I explore the case for such an approach, and argue that it may be a wiser choice for jurisdictions seeking to develop classification schemes aimed at protecting inmates at heightened risk of sexual victimization. At the same time, on a more local level, I argue that, notwithstanding the problems that attend a K6G approach, L.A. County ought not to disband its existing K6G program, but should instead supplement it with a second segregation unit for other vulnerable prisoners who do not otherwise qualify for K6G.

This latter two-track approach may still not wholly satisfy those who object to K6G on antisegregationist grounds. There is, however, an irony for those who would on principle oppose any form of identity-based segregation: K6G, a unit that explicitly segregates detainees on the basis of sexual orientation and gender identity, is one of the few spaces in the Jail *not* defined by rigid segregation on the basis of race. As noted, in K6G, there is no felt imperative to be hard and tough or otherwise perform a hypermasculine identity.<sup>305</sup> And, in the absence of pressure to prove one’s manhood, the demands of the gangs—that members maintain strict discipline, show no emotion or signs of weakness, and be ready to “jump in” and fight at a signal from the “shot callers”—seem absurd. With the majority of K6G residents not willing to play the game, and indeed affirmatively rejecting the game, efforts to organize along gang lines, and thereby to impose the particular regime of racial segregation the gangs demand, get nowhere.<sup>306</sup> The complete racial integration of K6G is thus a byproduct—a happy accident—of the absence in the unit of any hypermasculine imperative, which is itself the accidental byproduct of the decision to segregate gay men and trans women from the rest of the Jail’s population.

The point is not that the form of official segregation K6G represents should no

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304. See Consent Decree, *supra* note 116.

305. See *supra* Part II.D.2.

306. See *supra* note 265.

longer trouble those committed to ending identity-based discrimination. But the racial integration of K6G indicates how complex these issues are in the carceral context. It also makes a clear case as to why, in this context, ideological purity is generally both ill-advised and difficult to sustain.

### B. *Drawing the Line: The Underinclusivity Objection*

The antisegregationist objection just explored rests on the harm it is feared will be done to those admitted to K6G. By contrast, the underinclusivity objection stems from the fear of harm to those *not* classified to K6G.<sup>307</sup> Under this broad heading, it is possible to identify a cluster of objections, each concerned with a different subset of detainees excluded from K6G. First, it might be argued on grounds of distributive justice that, given the considerable advantages of K6G, access to the unit should be open to anyone who asks. Second, it might be argued that the Department's stated admissions criteria are too narrow to capture all those who are attracted to men, and that, on grounds of fairness and consistency, the criteria should be expanded to be more inclusive. Third, it might be argued that the classification process fails to identify many detainees who actually *meet* the Department's stated criteria for entrance into K6G, and that, again on grounds of consistency and fairness, the process should be modified to ensure their identification and classification to the unit.<sup>308</sup> Fourth and finally, it might be argued that the admission criteria themselves are the problem, because they only identify a subset

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307. In this section, I focus on K6G in particular. But the objections explored here would arise in any facility implementing a similar program.

308. In a forthcoming article, Russell Robinson at times appears to be making a version of this argument. Robinson seems to object to the K6G classification process at least in part on the ground that it is likely to exclude men of color and working-class men who, although they have sex with men ('MSM') are disproportionately likely not to identify as homosexual or gay. *See* Robinson, *supra* note 115, at 122. Although Robinson challenges the K6G classification process for privileging white middle-class men, he ultimately takes the position that the segregation decisions should not turn on sexual identity at all but instead should be designed to identify all those detainees who would be vulnerable to sexual victimization for whatever reason. *Id.* at 235–37. However, on this approach (which I too endorse, along with the National Prison Rape Elimination Commission, *see infra* Part III.B), many of those MSM on whose behalf Robinson condemns the current approach as underinclusive—in particular, those MSM who because of reigning stereotypes of gay identity do not “seem” gay—would likely still be excluded from a revamped K6G and sent to GP. This would not be, as is currently the case, because they chose not to “come out” to the Jail’s classification officers, but because, not “seeming” gay, they are at lower risk of being victimized on the mainline. At a minimum, this suggests that, to the extent that the process Robinson condemns for relying on stereotypical notions of male homosexuality like effeminacy does so rely (which, it bears noting, it does to a lesser degree than he imagines), this reliance may be appropriate. To be successful at its own stated goal of protecting vulnerable prisoners, the K6G classification process need not succeed in identifying all those individuals who are really, truly, fundamentally sexually attracted to men. Rather, it need only identify those whose characteristics are likely to lead them to be identified as such in GP. To the extent that predators in GP are likely to rely on the same features that Lanni and Bell take into consideration when making their decisions, the process currently in place would seem to get it exactly right, notwithstanding any possible race or class bias of relying on characteristics conventionally associated with gay identity.



of those detainees likely to be at risk of sexual victimization in GP.<sup>309</sup>

Before turning to these concerns, it is necessary to underscore the limited scope of the present inquiry and the inevitably partialist and unsatisfying nature of any classification system given the current realities of mass incarceration. At base, motivating each of the objections just articulated is the sense that the relative safety enjoyed by K6G residents should be generalized to all people detained in the Jail. Why should one have to be gay or trans to be protected from physical and sexual violence while in state custody? And once the justness of this position is granted—and who could oppose it?—the obvious conclusion is that the fault lies not with the particulars of any given policy or practice, but with the carceral system itself. And once the problem is viewed in this light, it begins to appear that those seeking to protect people from being sexually abused behind bars should focus not on crafting better classification standards for K6G, but on changing the culture, structure, and operation of all carceral facilities to ensure the physical safety of everyone society incarcerates.

It is hard to argue with the logic of this position. The problem is that there is no reason to expect that these broad changes will be achieved anytime soon. The challenges facing the L.A. County Jail—overcrowding, understaffing, aging and decrepit facilities, entrenched gang control, etc.—are not exclusive to L.A. County. They are shared by facilities all over the country and are the precise conditions in which violence thrives.<sup>310</sup> However fervently one might wish things

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309. In conversations about this project, this last objection has often taken the form of a concern that, assuming my account of the prison culture of hypermasculinity, *see supra* Part I, accurately explains why gay men and trans women are at such a high risk of rape in prison, to remove these vulnerable populations to K6G would only shift the attention of predators to other weak prisoners, thus exacerbating the vulnerability of those who are neither gay nor trans, but are young, small, mentally or physically disabled, first-time or nonviolent offenders, etc. In the absence of gays or trans individuals for predators to victimize, these other vulnerable people will become the primary targets for being “turned out.” *See, e.g., Suk, supra* note 67; *see also infra*, Part III.B, text accompanying notes 357–70 (addressing this concern at some length). This is not an unreasonable concern, at least absent concerted efforts to provide healthier and more socially productive ways for all men in custody to assure others (and themselves) of their own manhood. What it tells us, however, is not that gay and trans prisoners should not be removed from GP, but that, until the broader causes of the culture of hypermasculinity can be addressed, all prisoners known to be vulnerable to sexual victimization should be removed from GP. The answer, in other words, is *more* targeted segregation, not less. As I discuss in the text, under present conditions, the key policy question K6G raises for prison and jail administrators is whether all vulnerable people should be housed together, or whether there might be reasons why gay and trans prisoners should be housed separately even from other vulnerable populations. Of course, it would be far better if GP itself were not a site of such pressure and fear that men feel compelled to be violent toward others to guard against being victimized themselves. The possibility that K6G might only leave a different population vulnerable to the worst forms of abuse provides some indication of the urgency of the need to reengineer the carceral experience not just for the especially vulnerable, but for everyone.

310. As Terry Kupers explains,

[i]n crowded, noisy, unhygienic environments, human being[s] tend to treat each other terribly. Imagine sleeping in a converted gymnasium with 150 to 200 prisoners. There are constant lines to use the toilets and phones, and altercations erupt when one irritable prisoner thinks another has been on the phone too long. There are rows of bunks blocking the view, so beatings and rapes can

were different, and however hard one might work to bring about the desired change, there will remain the issue of what to do the meantime to keep safe the people most vulnerable to abuse under current conditions. The question, in short, is not whether, all things being equal, K6G is a perfect program, but instead whether, given current realities, K6G represents the best possible approach. This brings us back to the various iterations of the underinclusivity objection sketched above, which I now address in turn.

First, it might be thought that, in light of the desirability of K6G, fairness requires the unit to be open to anyone who asks. Given, however, that K6G is widely known to be the unit that houses gay men and trans women, this strategy would only represent an invitation for predators to gain direct access to those whom they might well have sought to victimize in GP.<sup>311</sup> This is not to say that gay men or trans women may not also be predators. Indeed, given that access is currently granted to anyone who can demonstrate their qualification to the satisfaction of the classification officers, it is inevitable that some predators will find their way into K6G. At present, when this happens, the response is to remove such people to the K6G disciplinary wing as soon as they are found to pose a threat. One might argue that the same approach could be taken with a more inclusive policy, so that those who turn out to be predators could just be removed as soon as their predatory nature comes to light, thereby not penalizing those who would not otherwise qualify but who simply want to do their time in peace. There is, however, a difference between accepting the inevitable risk that, within a broad group of people in danger of victimization, some will inevitably turn out to be predators, and creating the conditions whereby any detainees with predatory tendencies may gain admission to the unit just by asking. In that case, to wait for the predators to identify themselves by their predation would be to expose to serious (and avoidable) risk the very people K6G is intended to protect.

Second, even granting the inadvisability of an open admissions policy, one might still object that the current admission criteria are too narrow because they self-consciously exclude bisexuals. This exclusion is of particular concern because

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go on in one part of the dorm while officers sit at their desks in another area. The noise level is so loud that muffled screams cannot be heard. Meanwhile the constant noise and unhygienic conditions cause irritability on everyone's part. Individuals who are vulnerable to attack and sexual assault—for example, smaller men, men suffering from serious mental illness, and gay or transgender persons—have no cell to retreat to when they feel endangered.

Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 130 (Almerindo Ojeda ed., 2008). Under these conditions, Kupers asks, “[i]s it any wonder that research clearly links prison crowding with increased rates of violence, psychiatric breakdowns, rapes, and suicides?” *Id.*

311. *See supra* Part II.A (explaining the dangers created for unit residents of L.A. County’s “homosexual” module pre-K6G, when anyone claiming to be gay was admitted to the unit); *infra* note 392 (explaining how a similar unit on Rikers Island wound up putting residents in jeopardy by housing them with “violence-prone” inmates who falsely claimed to be gay).

members of this group are also known to face an elevated risk of sexual abuse in prison.<sup>312</sup> Before the validity of this objection can be properly assessed, it is necessary to say a little more about this aspect of the K6G admissions policy.

Recall that the unit's classification officers define their mission as classifying to the unit only those men who "live a homosexual lifestyle" on the outside, by which they mean those who prefer men and thus seek out men—and only men—for sexual gratification and intimacy.<sup>313</sup> The seemingly flexible notion of a "homosexual lifestyle" notwithstanding, what motivates the K6G classification process is a theory of (male) homosexuality that is both binary and essentialist: one is either gay or not gay, and there is an essential truth of the matter. This approach is at odds with contemporary understandings of sexuality, which regard sexual identity as more complex and fluid than this reductionist account allows.<sup>314</sup> But its lack of theoretical sophistication aside, the dualistic theory of sexual identity that drives the classification process has important practical significance: it allows for the exclusion of what might be termed "situational homosexuals,"<sup>315</sup> those men who given the choice would prefer to have sex with women, but who, when in circumstances not allowing access to women, will have sex with men. The original federal court order that established K6G<sup>316</sup> restricts access to K6G to "homosexual inmates"—a term that as a technical matter excludes bisexuals. But my reading of the determination on the part of Bell and Lanni to exclude bisexuals from K6G—and they are determined to do so—is that it stems less from an unwillingness to deviate from the terms of the original court order,<sup>317</sup> or from a view that men who are sexually attracted to both men and women are not at risk in GP, than from the sense that the vast majority of the men who seek admission to K6G on grounds of bisexuality are really situational homosexuals.

Why should situational homosexuals not gain admission to K6G? The L.A.

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312. According to the Bureau of Justice Statistics, "[jail i]nmates with a sexual orientation other than heterosexual reported significantly higher rates of sexual victimization. An estimated 2.7% of heterosexual inmates alleged an incident, compared to 18.5% of homosexual inmates, and 9.8% of bisexual inmates or inmates indicating 'other' as an orientation." *Bureau of Justice Statistics Special Report: Sexual Victimization in Local Jails Reported by Inmates, 2007*, U.S. DEPARTMENT OF JUSTICE 6 (June 2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf>.

313. There is, however, some flexibility in this definition, since Bell and Lanni often admit married men into the unit, which suggests that a person can still be regarded as gay by K6G standards, even if he looks to women for emotional intimacy and companionship.

314. See Jeffrey Weeks, *Necessary Fictions: Sexual Identity and the Politics of Diversity*, in *SEXUALITIES AND SOCIETY: A READER* 122 (Jeffrey Weeks et al. eds., 2003). Ironically, it may turn out that the unsophisticated binary approach does a better job of identifying those individuals most in need of a protection K6G provides. I return to this point below.

315. See *supra* note 150.

316. See Consent Decree, *supra* note 116.

317. Indeed, that order said nothing about trans women, but K6G has housed the trans women together with the gay men since the mid-1990s. See *supra* note 132.

County Jail houses close to 19,000 people at any given time, most of them men.<sup>318</sup> Of these men, a very large proportion have previously spent time behind bars, whether in juvenile hall, jail, or prison. It is thus likely that many in this population, being human and thus having normal sexual desires and needs, will have had sex with men while incarcerated—even if, given the choice, they would prefer to have sex with women. Were K6G to admit everyone in the Jail who fell into this category, not only would the size of K6G grow enormously, but situational homosexuals would quickly become the overwhelming majority. Perhaps this shift would not put at greater risk those detainees who meet the current admissions criteria. But there is reason to think that it would. As was explained in Part I, the prison sexual culture puts pressure on men who have sex with other men behind bars to simultaneously feminize and dominate their partners, both to prove their masculinity to others and to ward off accusations that they themselves are gay. This is a culture in which the situational homosexuals Bell and Lanni would confront have experienced sex with men. The worry is that, were members of this group admitted to K6G, they would reintroduce into K6G the notion that anyone associated with femininity is someone to be dominated and forced into submission. Indeed, given the way that the passive sexual partner in the sexual culture of GP is defined not as male but as female, many of those detainees who could fairly claim to have had sex with men in prison may not even regard themselves as having had male sexual partners at all. Were they admitted to a new, expanded K6G, they might well feel an even greater imperative to prove their manhood and thus even greater pressure to perform a hypermasculine identity. This heightened pressure could in turn place an even greater premium among residents on not seeming to be gay, thereby reproducing the same cultural dynamics that put gay men and trans women at risk in GP and which K6G has until now successfully guarded against.

Notice, moreover, that were the hypermasculinity imperative to reassert itself in this way, *all* residents, whatever their sexual orientation, would feel pressure to perform this identity,<sup>319</sup> and could thus, as a preemptive move, become predatory. This dynamic certainly exists in GP units, and there is no reason to think it would not also exist in an expanded K6G. The point is thus not that men who self-identify as gay are not capable of the abuses that can accompany the performance of hypermasculinity in men's prisons. It is instead that a widespread impulse to inflict these abuses may be the likely effect of admitting to K6G all those who self-identify as bisexuals solely because of sexual experiences they have had with men while incarcerated.<sup>320</sup> And with this effect could come the renewed victimiza-

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318. In March 2010, there were 1,912 women in custody in L.A. County. See Personal Communication from Deputy Bart Lanni, L.A. Sheriff's Department, to author (Mar. 12, 2010) (on file with author).

319. Put differently, whether detainees are likely to feel pressure to perform the traits of hypermasculinity will depend not on the sexual identity of the individuals involved but on the context.

320. This is not to challenge the sincerity of such self-identifiers. It is certainly possible and even likely that men who before their detention would not have willingly turned to men for sex may, after having had sex with

tion of trans women and men judged as gay, by whichever unit residents strong enough to inflict it.

Still, even granting that the open admission of situational homosexuals to K6G could have this dangerous effect, K6G's exclusion of bisexuals is plainly overinclusive, since at a minimum it also denies access to people whose sexual attraction to men predated their time in custody and is thus not a product of the prison sexual culture just described. Given that this population is also known to be at heightened risk of victimization in GP,<sup>321</sup> this is without a doubt a troubling effect. Arguably, if K6G's admissions standards could be modified to capture only what might be called, for lack of a better term, "pre-custody bisexuals," this would represent an improvement on the current model. However, failing this possibility, the need to ensure the ongoing protection of K6G's residents from likely predators may mean that as a practical matter, pre-custody bisexuals may need to be housed with other detainees who are at risk of sexual victimization but who are not otherwise eligible for K6G. Some readers may find this way of dealing with the problem to be non-ideal. But, as has already been observed, the complexities of prison administration in the present era of mass incarceration do not often admit of ideal solutions. So long as vulnerable people—in this case, "pre-custody bisexuals"—are kept safe, the issue of whether they are housed with gay men and trans women or with other vulnerable detainees may not especially signify.

This brings us to the third objection to K6G's terms of admission—that even granting the legitimacy of the current standards, the Jail still routinely fails to identify many people whose sexual practices or inclinations place them within the category of people K6G is intended to house. The concern here is that some men who would fit K6G's admission criteria nonetheless answer in the negative when asked in IRC if they "are homosexual." Why would they do so? Such men may be reluctant to "come out" to state officials in an environment in which being gay can typically expose one to harassment and abuse.<sup>322</sup> Or, although their primary sexual

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men while in custody, come to find themselves having feelings of sexual attraction toward other men. Nonetheless, it may be a wise strategic choice for Jail officials to refuse bisexuals access to K6G when this is the sole asserted ground for their admission.

One possible troubling effect of excluding bisexuals from K6G is that it may disproportionately disadvantage men of color. Russell Robinson reports that "black men and Latino men are more likely than white men to report having had sex with both men and women." Robinson, *supra* note 115, at 216. And, because bisexuals may also face an elevated risk of sexual violation in prison, *see supra* note 312, it may be argued that a unit designed to protect likely victims ought not to exclude bisexuals. For discussion on this issue, see text accompanying note 322.

321. *See supra* note 312.

322. Note that this concern may arise in the case of someone who knows nothing about K6G, but it need not, since some men who know about K6G may still hesitate to identify as gay in any custodial setting. Because my primary research focused on those who answered "yes" to the "homosexual" question in the IRC classification process, I am unable to provide any sense of the motivating reasons of those who, although being otherwise K6G-eligible, nonetheless answered this question in the negative. However, the fact that Latinos but not blacks appear to be substantially underrepresented in K6G, *see infra* note 323, offers at least a starting point for speculating as to possible motives. Here, it may be relevant that Southsiders, who make up the largest grouping of

orientation is toward other men, they may not self-identify as “gay” or “homosexual,” whether for cultural or other reasons.<sup>323</sup>

At base, the concern here is that K6G is underinclusive even as to its own admissions standards. To adequately assess the weight of this objection, it is worthwhile to distinguish between two groups: those individuals who because of their own appearance and self-presentation would be able to pass as heterosexual in GP, and those who would not.<sup>324</sup> As to those who *would* be able successfully to pass in GP, the fact of their exclusion from K6G is not of sufficient concern to justify a change in policy. To imagine otherwise would require a view of K6G admission as an entitlement owed to all those male detainees whose sexuality is primarily oriented towards other men. Were this the case, not only would the exclusion of successful GP-passers be grounds for condemnation of the program, but it would also become L.A. County’s affirmative obligation to take all possible

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Latinos in the Jail, are known to be especially intolerant of homosexuals. In the summer of 2007, for example, this gang even put out a “green light” on all gay Southsiders, meaning that anyone in the gang could attack gay members with impunity and even earn “stripes” for doing so. Under these conditions, a disproportionate reticence among Latino detainees to admit to being gay in IRC should not be surprising.

323. Robinson notes that many men—especially black and Latino men—will not trust law enforcement with this sensitive information. Robinson, *supra* note 115, at 209. Moreover, he reports that black and Latino men who have sex with men (MSM) “are less likely to identify as gay than white MSM and more likely to reject conventional sexual identity categories.” *Id.* at 215. Robinson’s discussion raises the possibility that whites will be overrepresented in K6G at the expense of blacks and Latinos. Because the Jail population changes daily, any statistics on this issue will at best be a snapshot of the facility. But data provided on two random days in June 2010 and March 2011 suggest a relatively stable racial distribution. And as it happens, K6G *is* disproportionately white. In June 2010, for example, whites made up 29.3% of the K6G population as compared with 13.9% of the L.A. County Jail as a whole. But, as it turns out, blacks too appear to be overrepresented in K6G, although not nearly to the same degree as whites, making up 36.5% of K6G as compared with 33% of the Jail’s population. It is Latinos who proved to be markedly underrepresented in K6G, making up 31.3% of K6G’s population and 49.7% of the Jail population as a whole.

	June 14, 2010		March 4, 2011	
	Total Jail Population	K6G	Total Jail Population	K6G
Black	33.0%	36.5%	33.0%	35.0%
Latino	49.7	31.3	49.6	29.7
White	13.9	29.3	13.7	30.1
Other	3.4	2.9	3.7	5.2

Personal Communication, Deputy Bart Lanni, L.A. Sheriff’s Department, June 14, 2010 & March 4, 2011 (on file with the author). This discrepancy suggests that cultural factors relating to how Latino men in the Jail and perhaps Latino culture as a whole conceive of sexual identity may well be influencing the way Latino detainees answer the initial IRC inquiry. For a possible explanation of Latino underrepresentation in K6G arising from the particular dynamics of the prison culture itself, see *supra* note 322.

324. As to the former—those able to pass—they may lack the characteristics that fit the stereotypical picture of the gay man (effeminacy, flamboyance, etc.) or that would otherwise lead men in GP to perceive someone as gay. Or, as was true of more than one individual I met in K6G, despite a preference for performing something of the stereotypical gay identity, they may be wholly capable of suppressing any such behavior patterns and successfully passing as heterosexual—and even as the toughest hard-core gangster.

steps to identify all such individuals and house them in K6G. But this would be absurd. For one thing, this approach would force people who have made the decision to keep their sexuality private to reveal intimate details about their personal lives—an enterprise even more unseemly than that of having state officials pry into the private lives of those men who already readily volunteered personal information about their own sexuality. And more to the point, it would do so for no good reason. Although the idea behind K6G is to segregate sexual minorities from GP, this is not its motivating purpose. There is no independent value to identifying all detainees who meet K6G's admission criteria and housing them together. The point of the program is to create a space in which those individuals most at risk of sexual assault behind bars can do their time free from this danger. Men who, although satisfying the (inevitably overinclusive) admissions standards, "are masculine and physically strong,"<sup>325</sup> or who are otherwise able to self-present in ways consistent with the operative understanding of heterosexuality in GP, quite simply do not face the same risk of victimization as men who are less able to pass as straight. From a policy perspective, therefore, the fact that the members of this first group may remain in GP is not of serious concern.

There may be an irony here for those who would condemn the K6G program as overly driven by stereotypes. As has been seen,<sup>326</sup> K6G's classification officers do what they can to go beyond the obvious stereotypes of the gay man in order to identify those men who, although not conforming to the stereotypes, are still fundamentally sexually attracted to other men. But perhaps inevitably, in seeking to identify those men who satisfy their working definition of homosexuality, Bell and Lanni will have to rely to some extent on socially constructed and culturally legible markers of sexual orientation. Some might regard this fact as proof of the biased, insufficiently sophisticated, and even dangerous nature of the K6G classification process when it comes to understanding sexual identity. However, given the mission of K6G, it is far less important that Bell and Lanni effectively identify those individuals who are "really gay"—even assuming this category has any real meaning—than that they are able to identify those people who would come to be identified as gay within the prison culture.<sup>327</sup> To some extent, there will be an overlap between those who demonstrate some of the cultural markers of gay identity and those who would be judged as gay within the Jail's GP. But this will

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325. Robinson, *supra* note 115, at 239.

326. See *supra* Part II.C.2.

327. I am grateful to Noah Zatz for encouraging me to draw this distinction. It does, however, bear emphasizing that this is not how Bell and Lanni understand what they are doing. Nor would they be fulfilling K6G's official mandate if instead of seeking to identify which inmates are "really" gay, they sought instead to identify who would be regarded as such in GP. As acknowledged throughout this Article, a system designed to do the latter may well be more normatively appealing than the present K6G admissions process. But that approach is necessarily distinct from what L.A. County is legally obliged to do under the consent decree establishing the unit now known as K6G. See Consent Decree, *supra* note 116.

not be a perfect overlap. Indeed, it would be a grave mistake for the K6G classification process to rely only on the most overt cultural markers of gay identity, since those predatory inmates determined to unearth the sexual orientation of fellow detainees will have more time and more opportunity to observe an individual's behavior at his most intimate moments, when his guard is down.<sup>328</sup> An effective classification process would thus have to go beyond stereotypes. As a practical matter, however, the possibility that, at some level, the two-step K6G classification process is tilted toward those who are on average more likely to be perceived as gay by others and thus less able to pass as straight in GP, and against those who *are* able to pass—and who may not even self-identify as gay—is simply not a plausible ground for objection. To the contrary, it seems exactly right.

The more worrisome possibility concerns those who bypass the K6G classification process by answering “no” in IRC to the question *are you homosexual?* and yet who are not able to pass as heterosexual on the mainline. It is impossible to know how many people are in this position. But it seems reasonable to expect that many are.<sup>329</sup> This means that, notwithstanding the protection K6G offers some detainees whose personal characteristics put them at risk of victimization in GP, there continue to be people who are predictably vulnerable to such abuse who are routinely housed in GP.

This fact is of serious concern. But—and here we come to the fourth and most weighty objection to K6G's classification process—even if every person who fits K6G's admissions criteria were somehow identified and sent to K6G, there would *still* be people routinely placed in GP who are known to be vulnerable to sexual abuse. Gay men and trans women are perhaps the most obvious and ready victims of the prison culture of hypermasculinity, but they are by no means its only victims. To the contrary, it is well recognized that a host of factors besides being gay or trans increase the vulnerability of male prisoners. Most notably, these factors also include “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child . . . [and] prior sexual victimization . . . .”<sup>330</sup> K6G is thus underinclusive, not only as to those gay men who, although at risk in GP, fail to

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328. See, e.g., PARSELL, *supra* note 60, at 78–79, 86–89 (recounting an experience shortly after his arrival in prison when, having been manipulated by predatory inmates into feeling comfortable and letting down his guard, he let slip a comment revealing his own status as gay—a comment particularly noted by his companions at the time, who included his future rapist).

329. L.A. County has a total population of over 9.8 million, see [http://www.google.com/search?sourceid=navclient&ie=UTF8&rlz=1T4ADBF\\_enUS331US332&q=total+population+los+angeles](http://www.google.com/search?sourceid=navclient&ie=UTF8&rlz=1T4ADBF_enUS331US332&q=total+population+los+angeles), and an estimated LGB population of over 440,000, or approximately 4.5% of the total. See GATES, *supra* note 107. Yet K6G's population of approximately 350 is only about 2% of the total male detainee population in the Jail. These numbers suggest—albeit roughly—that K6G is not capturing the whole eligible detainee population in LA County.

330. COMMISSION REPORT, *supra* note 8, at 75.



self-identify in IRC, but also as to all detainees with these other risk factors.<sup>331</sup>

True, L.A. County does have a policy designed to protect otherwise vulnerable inmates who do not qualify for K6G. This policy involves identifying and separating from GP those prisoners, unfortunately known in official Jail parlance as “softs,” who because of physical attributes or other factors are also likely to be victimized in GP. But this policy falls well short of meaningful implementation. In the summer of 2007, the “softs” unit consisted of just five individuals<sup>332</sup> out of a total male prisoner population of approximately 17,000,<sup>333</sup> a number which plainly indicates that little institutional attention was being devoted to identifying those at-risk prisoners who, although not appropriate for K6G, nonetheless needed to be housed separately from GP for their own protection.

Part of the problem may be the design of the policy itself. At some point, it was explained to me that “softs” were identified during the initial classification process, by intake officers who “eyeball” new admits and assess their likely ability to handle themselves on the mainline.<sup>334</sup> But to anyone observing the intake process, the flaw in this strategy becomes immediately obvious: classification officers sit in raised booths and speak to incoming inmates through a glass wall with the aid of a speakerphone. This set-up makes it difficult for officers to get a good look at the people to whom they are speaking, even if they were bent on doing so. In any case, during the intake process (which can take as little as one minute), the officer is focused on the computer screen into which data is being entered. There is thus little opportunity for the officer even to form an impression of the physical appearance of each incoming individual, much less to make a judgment about likely victimization. If the Jail’s claim to protect at-risk inmates not otherwise eligible for K6G is to be credible, at a minimum, a new mechanism for identifying otherwise at-risk detainees needs to be developed, one that does not place the burden on intake officers who are not in a position to fulfill it.

One strategy for addressing K6G’s underinclusivity would thus be to shore up the “softs” program to assure protection for those at-risk individuals who do not

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331. Some members of this latter group do find their way into K6G, although admittedly on the pretense of actually being gay. It is unclear whether this occurs with the tacit assent of the classification officers or in spite of their best efforts to discover the truth. I myself witnessed several instances in which, faced with such a case, the K6G classification officers denied admittance to K6G but then did their best to find another relatively safe place in the Jail for the person to land, whether in protective custody, or in the “soft tank,” or, if the person had any serious mental illness (as do many of the detainees in L.A. County), in Twin Towers. But, although laudable, these measures will seem beside the point to those who think a segregation unit for potential victims of prison rape should accommodate all likely victims, and not merely those who happen to be gay or trans or able to pass as such, or who are fortunate enough to encounter a sympathetic officer.

332. These men were housed in a pod in Twin Towers with a handful of detainees who were developmentally disabled.

333. L.A. County houses approximately 1900 women out of a total inmate population of 19,000. *See supra* note 318.

334. *See also* IRC Classification JICS Security Level Assignment (undated form on file with the author) (directing intake officers to “observe inmate” to decide whether he is “soft”).

qualify for K6G. This approach would amount to a two-track strategy for protecting vulnerable detainees: one track (K6G) for trans women and those men who satisfy the Jail's conception of homosexuality, and another track ("softs") for those who exhibit other risk factors for sexual victimization.

This brings us to the heart of the matter from a policy perspective. There is no question that all people known to be at risk of sexual abuse in custody must be protected.<sup>335</sup> And K6G teaches that systematically separating vulnerable people from GP is a relatively effective way<sup>336</sup> to ensure their safety.<sup>337</sup> The question is whether carceral institutions would do better to create a single segregation unit to house all those individuals known to be highly vulnerable to sexual victimization—call this the *unified* approach—or to maintain two separate units (two "tracks"), one on the model of K6G and another for all other vulnerable people.

In its final proposed standards, submitted to the U.S. Attorney General in June 2009, the National Prison Rape Elimination Commission<sup>338</sup> adopted in no uncertain terms the first, unified approach. The Commission's standards provided that all inmates be screened on arrival (and at "all subsequent classification reviews") to assess their risk of being victimized or a victimizer,<sup>339</sup> and included the full range of those features known to increase the vulnerability of male prisoners<sup>340</sup> among the criteria to be considered when "screen[ing] male inmates for risk of victimization."<sup>341</sup> Although it recognized the particular vulnerability of gay men and trans women,<sup>342</sup> the Commission nonetheless "discourage[d] the creation of specialized units for vulnerable groups," and "*specifically prohibit[ed]*

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335. This is both a moral obligation on the part of the state and, after the adoption by the United States Attorney General of National Standards to Prevent, Detect and Respond to Prison Rape, will also be a legal one. See National Standards, *supra* note 7.

336. Given the realities of incarceration in the United States today—including, most notably, chronic overcrowding and understaffing as well as an inmate culture in which predation and the readiness to use violence brings the greatest status and respect—relative safety may at present be the best that can be hoped for.

337. There remains, of course, the question of the implications of such segregation for the people who remain in GP. I take up this question at the end of this section.

338. See *supra* note 37.

339. COMMISSION REPORT, *supra* note 8, at 217.

340. See *supra* note 8 (listing the Commission's screening criteria for male inmates).

341. SC-1 listed separate screening criteria for female inmates. In contrast to the long list provided in the case of male inmates, see *supra* note 8, the Commission included just two criteria to consider in "screen[ing] female inmates for risk of sexual victimization: prior sexual victimization and the inmate's own perception of vulnerability." *Id.* The proposed standards issued in January 2011 by the U.S. Department of Justice do not distinguish between men and women as to screening criteria for risk of victimization and abusiveness. See National Standards, *supra* note 7, at 6280 (§ 115.41).

342. In its final report issued in June 2009, the Commission acknowledged the particular vulnerability to prison rape of both gay men and individuals "whose sex at birth and current gender identity do not correspond ([i.e.,] transgender or intersex)." COMMISSION REPORT, *supra* note 8, at 73 ("Research on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations (gay, lesbian, or bisexual)."). The Commission also condemned the practice of holding "vulnerable prisoners" in conditions of protective custody, which as it noted, "may be as restrictive as those imposed to punish prisoners." *Id.* at 79. The Commission's draft standards therefore allowed the use of protective custody of "victims or potential victims . . . only as a last resort," and then "only on a short-term basis." *Id.* at 80.

housing assignments based solely on a person's sexual orientation, gender identity, or genital status . . . ."<sup>343</sup>

Although the Commission said little to explain this latter prohibition—which, read broadly, could have put K6G itself in jeopardy<sup>344</sup>—it did condemn as “demoralizing and dangerous” the practice of officially labeling some detainees as members of sexual minorities. As has been seen, this concern is not unwarranted, and thus a unified approach may well be the better one for jurisdictions seeking ways to protect their most vulnerable prisoners. A unified approach would arguably reduce—although not eliminate<sup>345</sup>—the need for state officials to delve into the private sexual lives of people newly admitted to custody, for whom the fact of their incarceration alone would no doubt be traumatic enough. It would guard against the unpalatable and risky practice of officially labeling some people as members of sexual minorities. And it may even yield an administrative benefit by avoiding unnecessary duplication of services, as well as simplifying the challenge for prison administrators, who with a larger population needing segregation from GP might enjoy greater flexibility in terms of housing and staffing. For these reasons alone, a unified strategy would seem in most cases to be the better approach.

Still, a unified strategy would not be wholly free of the dangers posed by K6G. First, although there would be less need for officials to pry into the details of detainees' private lives in order to determine an individual's sexual orientation, there will still be occasion when such intrusion is necessary. A segregationist

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343. *Id.* (emphasis added). *See also id.* at 217 (stipulating at SC-2 that “[l]esbian, gay, bisexual, transgender, or other gender-nonconforming inmates are not placed in particular facilities, units, or wings solely on the basis of their sexual orientation, genital status, or gender identity”). *But see infra* note 344.

344. On January 24, 2011, the United States Department of Justice (DOJ) issued a Notice of Proposed Rulemaking (NPRM), in which it presented for comment proposed National Standards to Prevent, Detect, and Respond to Prison Rape. *See* National Standards, *supra* note 7. Prior to its review of the Commission's final standards, DOJ had issued an Advance Notice of Proposed Rulemaking (ANPRM) “to solicit public input on the Commission's proposed national standards.” *See id.* at 6248. Partly in response to comments on SC-2, *see supra* note 343, submitted pursuant to that ANPRM (including my own, *see* National Standards, *supra* note 7, at 6257 (noting that “[o]ne commenter discussed the success of the Los Angeles County Jail in housing gay male and transgender prisoners in a separate housing unit”)), DOJ eliminated any prohibition at all “on assigning inmates to particular units solely on the basis of sexual orientation or gender identity.” *See id.* at 6257. In responding to the January 24, 2011 NPRM, many commenters, myself included, argued that this response went too far, and that a better approach would be a qualified prohibition allowing that programs like K6G would still be possible so long as established in connection with a consent decree, legal settlement or legal judgment for the purpose of protecting lesbian, gay, bisexual, transgender or other intersex inmates. *See* Protecting Lesbian, Gay, Bisexual, Transgender, Intersex and Gender Nonconforming People from Sexual Abuse and Harassment in Correctional Settings, Comments Submitted in Response to Docket No. OAG-131; AG Order No. 3244-2011, National Standards to Prevent, Detect, and Respond to Prison Rape, April 4, 2011 (comments submitted collectively by the National Center for Transgender Equality, the National Center for Lesbian Rights, the ACLU, the National Juvenile Defender Center, the Sylvia Rivera Law Project, The Equity Project, Lambda Legal Education and Defense Fund, and the Transgender Law Center); Sharon Dolovich, Comments on National Standards to Prevent, Detect, and Respond to Prison Rape, submitted pursuant to Notice of Proposed Rulemaking, January 24, 2011 (on file with the author).

345. *See infra*, text accompanying notes 347–48.

strategy will only work to protect vulnerable prisoners if access to the protected unit is restricted to those judged to be at risk. Otherwise, as with L.A. County's pre-1985 efforts to segregate gay men for their own protection, anyone wanting access to likely victims need only assert his own feelings of vulnerability.<sup>346</sup> And, although many likely victims may be classified on appearance or mannerisms alone,<sup>347</sup> there will still be instances where further inquiry is required to assess claims of vulnerability—including claims made on the basis of sexual orientation.<sup>348</sup> As with K6G, individuals wishing to bypass this process may simply opt to keep silent. And to the extent that they are able to pass as straight in GP, their decision to do so may pose no issues for the project of protecting at-risk prisoners. But there will inevitably be some people who fear themselves unable 24/7 to keep hidden their sexual orientation toward other men, and who would thus be at risk notwithstanding their lack of any immediately obvious characteristics suggesting this orientation. The need to protect this population while at the same time maintaining some gate-keeping process means that there may continue to be some measure of official intrusion into the private lives of men in custody with the aim of assessing claims of sexual-minority status.

Second, although with a unified approach, the state will avoid overtly labeling some detainees as sexual minorities, it will still be flagging some subset of prisoners as likely victims, thus potentially reproducing the sitting duck objection raised against K6G. Possible predators—whether inmates or staff—may yet be inclined to seek out and victimize individuals in this population, whether because some among them are known to be gay or trans or simply because, by seeking protection, they are by definition exposing themselves as weak. Equally, as with K6G, the fact of their segregation may make residents of a protected unit vulnerable to the kind of systematic verbal harassment from both staff and fellow inmates that K6Gs report today.

Other dangers also attend a unified approach. For example, by explicitly combining gay men and trans women with other vulnerable populations, there is a risk of reintroducing into a combined unit some of the anxiety about possibly being thought to be gay that already exists in today's GP. Call this the identity insecurity effect. This risk may well be mitigated by a collective recognition among residents in the unit of the way the pressures to perform a hypermasculine identity create stressful and even dangerous conditions for everyone, and the desire of all residents of a unified dorm to avoid these effects. But whether this collective recognition would emerge, and result in dorms free from such pressure, would

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346. See also *infra*, note 392 (explaining the problems with the unit for gay male detainees at Rikers Island, which arose from the minimal screening procedures for admission and led to the mixing of vulnerable and predatory inmates).

347. See, e.g., Man and Cronan, *supra* note 8, at 164–75 (identifying a range of factors known to correlate with vulnerability in men's prisons, including age, projecting feminine characteristics, and physical size).

348. I thank Carole Goldberg for this observation.

depend on the institution and on the makeup of the unit,<sup>349</sup> as well as the extent to which it remains free of gang control. This means that officials would still need to be mindful of the danger of a possible reprise of the very cultural dynamics that made the segregation of vulnerable people necessary in the first place.

Equally, officials adopting a unified strategy would still need to develop mechanisms for dealing with one group that K6G overtly excludes: men who have sex with women on the outside and sex with men while in custody. Some of these men may themselves have been victimized and thus urgently require protection.<sup>350</sup> But others will have adopted the dominant role in a protective pairing. Men in this latter group will thus not only not need protection, but the argument for their admittance—that they have sex with men—assumes a view of their sexual experiences that contradicts the construction put on them in the prison culture in which they occur.<sup>351</sup> These men, in other words, may not even have regarded themselves as having had sex with men, and, indeed, may be inclined to spend considerable energy ensuring that no one doubts their status as “real men.” To put members of this group in a protected unit for possible victims is particularly likely to generate the identity insecurity effect noted above and thus to put at serious risk the very people this segregationist strategy is intended to protect.<sup>352</sup>

Officials adopting a unified strategy would also need to be mindful of the danger of diluting the protective enterprise. The worry here is that creating a catchall classification for at-risk prisoners could ultimately distract official attention from the need to protect against prison rape, leading instead to the creation of a large multipurpose unit that houses anyone who, for whatever reason, is unable to “make it” on the mainline. This concern is not wholly abstract. Some years ago, the California prison system created what are known as “sensitive needs yards.” These units, which in size and functioning are no different than GP units, house a host of likely victims of prison violence: gang dropouts, sex offenders, prison informants

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349. For example, the population of a unified unit might include a large number of elderly men, first offenders, and nonviolent offenders, as well as individuals who are physically or mentally disabled in some way. Members of these groups may be less likely than others to be drawn into the culture of hypermasculinity. I thank Jody Marksamer for this point.

350. See *Schwenk v. Hartford*, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) (“Once raped, an inmate is marked as a victim and is subsequently vulnerable to repeated violation.”).

351. In that context, those who take the dominant sexual position (whom Wooden and Parker memorably label “inserte[r]s”), are defined as heterosexual men whose passive sexual partners (Wooden and Parker’s “insertee[s]”) are viewed as women. See WOODEN & PARKER, *supra* note 91, at 15.

352. It bears noting that many of the men I have described here as possible predators—indeed, possibly all of them—are themselves afraid of being victimized. See Haney, *supra* note 49, at 128 (explaining the dynamics that lead some men in custody to become predators out of fear for their own safety). Moreover, as Suk rightly notes, removing the most vulnerable prisoners from GP may simply result in the victimization of the most vulnerable individuals who remain, see Suk, *supra* note 67, at 114—at least absent meaningful steps to counter the hypermasculinity imperative. These two aspects of the reality of prison life powerfully indicate the necessary limits of the segregationist strategy, and underscore the broader imperative that, if the state is to continue to incarcerate, ways must be found to ensure safe and humane custodial conditions for all the people consigned to live in prison.

(i.e., “snitches”), and anyone else who requests protective custody, but for whom a single cell is found by officials not to be appropriate or necessary (or available). It is unclear whether these yards are safer than GP. But experience with this policy has taught that sensitive needs yards are easily accessed by anyone with a story to tell. If a “shot caller” in GP wants a snitch dispatched, he can order one of his “soldiers” to pretend to be a gang dropout to get access to the yard with the target. The soldier can bide his time, and when the opportunity arises, assault the target. The worry, in other words, is that housing multiple populations with different risk factors together in one unit can expose some vulnerable prisoners to assault. Officials committed to creating a truly safe space for likely victims of sexual violence would need to take steps to ensure that access really is limited to those for whom it is intended. In particular, officials facing multiple, somewhat compatible policy goals (i.e., separating out certain at-risk populations for different reasons) would need to guard against the temptation to roll them all together the way the California prison system has done. Having smaller units with more narrowly defined missions may provide some defense against the pressure to consolidate, and thus against the dangers such consolidation may generate.

Still, even if a unified segregationist approach is not wholly free of the dangers to which K6G gives rise, it nonetheless promises to reduce those dangers considerably. In most cases, therefore, officials looking to develop a protectionist strategy may be well-advised to adopt such an approach. It is worth noting, however, that a unified approach would not come without a cost. In particular, the resulting unit would be unlikely to feature a carceral climate in which, as in K6G, detainees feel free to express their emotions and to openly forge mutually supportive friendships and even loving relationships.<sup>353</sup> The fact that such a climate already exists in K6G—and, most significantly for policy purposes, may well be an antidote to the hypermasculinity imperative and the fear and violence it creates—is something of which those committed to increasing the humanity of the carceral environment should not lose sight.

What of L.A. County itself? Notwithstanding the dangers associated with the K6G approach, it would be a serious mistake to dismantle a program widely acknowledged as a success. K6G has broad community support and has ensured relatively safe and humane conditions for populations that are otherwise extremely vulnerable. As a purely theoretical matter, this position may seem indefensible; if state-sponsored, identity-based segregation is wrong, surely L.A. County must adjust, especially when a unified approach could mitigate the harms of such segregation while continuing to ensure the safety of K6G’s current residents. The argument against such a change, however, is not theoretical but pragmatic, of the “if it ain’t (that) broke, don’t fix it” variety. Prisons are complex institutions that can be very difficult to manage. Programs succeed or fail for all kinds of reasons

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353. I describe this aspect of life in K6G in more detail elsewhere. See Dolovich, *supra* note 45, at 12–14.

particular to a given institution, reasons that may be entirely independent of the theoretical wisdom of the program design.<sup>354</sup> To dismantle a relatively successful program in the hope of improving on what already exists could wind up leaving everyone worse off. And if for policymakers, the consequence would be professional disappointment or perhaps wounded pride, the effect on the prisoners could be unspeakable harm. In my view, this is not a risk worth taking.<sup>355</sup>

The challenge for L.A. County going forward is to create an equally safe and successful program for those detainees who do not qualify for K6G but who are still at risk of sexual victimization. In facing this challenge, L.A. County may not be alone. Although for the reasons just canvassed, officials seeking strategies for protecting vulnerable prisoners will in most cases be well advised to adopt what I have called a unified approach, there may yet be other facilities in which, for institutional reasons, a two-track strategy would be the better approach. One such context may be male juvenile detention centers, in which the imperative among detainees to prove themselves “real men” (i.e., not gay) is likely to be extreme, raising the possibility that gay and trans youth might be at risk of victimization even in a unit filled with otherwise vulnerable individuals.<sup>356</sup>

K6G’s success in L.A. County is arguably reason enough for this approach to remain an available tool in the toolkit of prison administrators. That other institutions may find this approach the best way to ensure protection of their most vulnerable prisoners only further strengthens the argument against its foreclosure. As has been seen, segregating gay and trans prisoners even for their own protection is not without its hazards. But in the existing penal context, few policies are risk-free. So long as American society continues on its current carceral path, the best that can be hoped for is some appreciable reduction in violence. And given what such a reduction would mean for those who would escape victimization as a result, pursuing half-measures may be the most immediate moral imperative.

Plainly, the foregoing assumes that a segregationist strategy—whether unified or two-track—will lead to an overall reduction in sexual victimization. There is, however, a troubling alternative possibility, one raised by Jeannie Suk in her thoughtful commentary on this Article.<sup>357</sup> Suk’s comments suggest that, assuming the accuracy of the account of the prison sexual culture offered in Part I,

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354. For a compelling argument as to the significance of institutional context to the success of rehabilitative programming in custodial settings, see generally ANN CHIH LIN, REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON (2000).

355. If K6G should remain in place, it is still true that L.A. County must do better at protecting other vulnerable prisoners. And it is also true that the pragmatic path-dependency concern just offered against dismantling K6G does not apply to jurisdictions facing the challenge of newly establishing programs to protect their most vulnerable prisoners. In the larger context, for the reasons canvassed above, the more inclusive approach is arguably the preferable default option.

356. *But see* National Standards, *supra* note 7, at 6298 (§ 115.342 (d)) (proposing a prohibition in juvenile facilities of placing “[l]esbian, gay, bisexual, transgender or intersex residents . . . in particular housing, bed, or other assignments solely on the basis of such identification or status.”).

357. See Suk, *supra* note 67.

segregating likely victims will make no difference to the total amount of forced or coerced sex in a given facility.

How can this be? As Part I argued, the all-male environment of the prison creates anxiety among residents that they are insufficiently “masculine.” This anxiety is only exacerbated by prisoners’ lack of access to healthy, socially productive means to express (and perform) their gender identity. In the absence of alternatives, the predatory domination of weaker inmates becomes the main mechanism prisoners use to gain status and power. This predation, moreover, becomes a means of self-protection, since by dominating weaker inmates, predatory prisoners demonstrate that they are “real men” and thus not someone to be messed with. This dynamic, referred to as the hypermasculinity imperative, has a gendered aspect, with the weakest inmates being redefined as female and thereby rendered eligible for victimization.

If this account is accurate, it suggests that the removal of vulnerable inmates, rather than reducing the amount of victimization overall, will only “redistribute” it to others.<sup>358</sup> As Suk puts it, “[i]f gay men and trans women are not present to be forced to become ‘women,’ other men will be forcibly classified as female.”<sup>359</sup> Something of this understandable concern implicitly motivates the recognition, emphasized throughout this Article, that it is not enough to segregate gay men and trans women; instead, *all* vulnerable prisoners—the young, the mentally or physically disabled, the small in stature, the elderly, etc—should be housed separately from GP. But as Suk observes, even this move could be inadequate, since on the logic of the hypermasculinity imperative, those prisoners who remain behind in GP will continue to need to dominate others in order to prove their own strength and ensure their own protection from victimization. If, as I have argued, gender in this culture is ascribed, then once the most obvious targets for “feminization” are removed, other candidates for the female role will have to be identified. The strongest of the bunch will simply turn on (and “turn out”) the weakest prisoners who are left.

This insight offers a chilling reminder that the problem of sexual victimization behind bars will not be fully resolved unless the carceral experience can be reengineered in a more humane direction, not just for the especially vulnerable, but for everyone. To understand the source of the danger, moreover, is to recognize the most obvious avenue for reform: the provision of more personally healthy and socially constructive ways for all men in custody to assure themselves—and others—of their own manhood.<sup>360</sup>

Meanwhile, and perhaps on a less utopian note, Suk’s concern points to the need for an even more finely grained classification process than that proposed by the

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358. *See id.* at 114.

359. *Id.* at 113.

360. I leave for another day investigation of what these alternatives might be.



Commission.<sup>361</sup> That is, it may not be enough to divide the population into two groups (i.e., those with characteristics known to make them vulnerable and those without), but instead to house people in smaller groupings with others of like size and strength, and to be prepared to reshuffle housing assignments should any residents emerge as victims or victimizers. This approach is something like what is already being done in San Francisco County.<sup>362</sup> To facilitate this method, classification officers in San Francisco can spend up to 45 minutes interviewing each new admit, to determine not only whether he might be vulnerable or predatory, but also his relative strength and where he might fall in the pecking order of the unit to which he is assigned (i.e., might he emerge as a victim in a standard GP unit? a predator in a unit of vulnerable inmates?).<sup>363</sup> The dedication of this time and attention to each incoming detainee in San Francisco is in contrast with L.A. County, in which the initial classification interview can be as short as one minute. San Francisco's more highly calibrated approach is enabled both by its relatively small population—in recent years its annual admissions rate has been between 30,000 and 37,000 annually,<sup>364</sup> as compared with L.A. County's 166,000<sup>365</sup>—and by the modern podular design of its new facility,<sup>366</sup> which allows for smaller and more readily monitored housing units.<sup>367</sup> Unfortunately, however desirable as a policy matter, this more fine-grained approach is highly labor-intensive. And in an era of prison overcrowding and understaffing, the conditions simply do not exist for its immediate implementation more widely—although jurisdictions able to follow San Francisco's lead ought certainly to do so.<sup>368</sup>

Given the present practical limits on the classification process, there remains the question of how to respond to Suk's redistribution point in the shorter term. If removing from GP people known to be vulnerable will simply shift the burden to those who remain and leave the overall victimization rate the same, we could be left, as Suk suggests, making unpalatable normative arguments as to which

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361. *See supra* note 40.

362. Personal Communication, Undersheriff Jan Dempsey, San Francisco Sheriff's Department, May 29, 2008 (on file with the author).

363. *See id.*

364. Personal Communication, Sgt. Joan Scannell, San Francisco Sheriff's Department, May 9, 2011 (on file with the author).

365. *See supra* note 101.

366. *See supra* note 362.

367. L.A. County's Twin Towers facility is of this same design, but understaffing has meant that much of Twin Towers has stood empty almost since it opened.

368. In order to adopt San Francisco's approach, moreover, it is of considerable benefit to have a physical plant of the podular structure of San Francisco's new jail. Unfortunately, although such modern buildings are far better both in terms of safety and living standards for detainees, they are simply not the norm around the country. The reason is simple: they are expensive, and both continued prison overcrowding and budget woes nationwide mean that even those jurisdictions sorely in need of new facilities are being forced to rely on outdated housing stock with old-style cellblocks that most corrections professionals have long since condemned for, among other things, excessive noise, obstructed sightlines, and demoralizing effects on the people who live in them—not to mention their incompatibility with a strategy of smaller, more tightly controlled housing units.

prisoners most deserve protection.<sup>369</sup> Absent such arguments, moreover, there would be no justification for any segregationist strategy at all. But to justify abandoning a segregationist approach, it would have to be the case that segregation would make no difference at all to the overall victimization rate. If instead, the segregation of likely victims would put at least some downward pressure on the incidence of abuse, even if not squelching the danger entirely, segregation would still be justified on the ground that, all things considered, it is better to have fewer victims. And although any such assessments in this regard may be only speculative, my strong sense—and, presumably, that of the Commission, which studied the issue and recommended that inmate classification systems take account of relative vulnerability—is that removing the most obvious and ready victims *will* result in an overall reduction in sexual victimization, even if not its wholesale elimination. Victimizing another person is costly; it requires a readiness to fight and the capacity to overcome the strong resistance of the target (not to mention a willingness to treat another person cruelly). Removing the easiest prey and leaving the remaining prisoners more evenly matched physically increases the cost of predation, making it harder to accomplish. It stands to reason that as the cost of predation goes up, fewer prisoners will be able and willing to make the attempt, thereby keeping the threat of assault more in check. Furthermore, assuming that those units housing otherwise vulnerable prisoners can be kept free of a resurgence of the hypermasculinity imperative, there will simply be fewer people left to engage in the cycle of predation.

None of this is to minimize the danger faced by men in any housing units who become the default victims once the more obviously weaker inmates are removed. To the contrary, the possibility of their victimization demands that all available protective measures be implemented. But as I have emphasized throughout this Article, in the universe of American incarceration, we are very far from the optimal. Although ideally, no one would be raped in prison, in reality it happens every day. Failing a magic bullet, the best that can be hoped for in the short term is an improvement over what currently exists. And unless one concludes that the strategic segregation of all identifiable victims will make no appreciable difference—a position that on its face seems difficult to defend—support for the segregationist approach proposed in this Article seems the only tenable position.

### *C. Unconstitutional: The Equal Protection Objection*

I have argued that, notwithstanding the dangers associated with the K6G approach, it would be a serious mistake to dismantle a program widely acknowledged to be a success. In addition, I have argued that the K6G model should be available in cases where prison administrators determine this approach to be the

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369. See Suk, *supra* note 67, at 115.

best way to meet the particular challenges their institutions present.<sup>370</sup> To adequately defend this position, it remains to address one final objection—that identity-based segregation of the sort K6G represents violates Equal Protection, and thus that no institution may constitutionally follow the K6G model, however convinced officials might be of its desirability.

At first, the Supreme Court case of *Johnson v. California*<sup>371</sup> may seem to support this assertion. In *Johnson*, the Supreme Court heard a challenge to the official policy of racial segregation then in place in the California prison system’s reception centers. As is common practice, California designates certain prisons as reception centers to which new admits are sent to be classified.<sup>372</sup> In these facilities, prisoners may spend up to sixty days having evaluations that will “determine their ultimate placement” in the system.<sup>373</sup> In 1995, Garrison Johnson, a longtime prisoner in the California system, filed an equal protection claim alleging that the California Department of Corrections (CDC) was segregating prisoners in its reception centers on the basis of race.<sup>374</sup> This allegation was confirmed by a CDC officer, who admitted under oath “that the chances of an inmate being assigned a cellmate of another race [in the reception centers] are ‘pretty close’ to zero percent.”<sup>375</sup>

Johnson ultimately prevailed in the Supreme Court. But the Court’s holding in no way requires the conclusion that K6G is unconstitutional. The question before the Court in *Johnson* involved the appropriate standard of review. Johnson argued that, because the classification at issue was race-based, the Court should apply strict scrutiny. The CDC argued that the appropriate standard of review was the lower standard for reviewing prisoners’ constitutional claims established in *Turner v. Safley*.<sup>376</sup>

*Turner* is a highly deferential standard that gives prison officials considerable leeway in designing institutional policy.<sup>377</sup> In this respect, it fits squarely within a

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370. Ideally, this decision would be made in conjunction with community advocates, to ensure the community involvement and support that has proved so crucial to K6G’s success. *See infra*, Part IV.

371. 543 U.S. 499 (2005).

372. All prisoners being transferred between facilities also go through the reception centers. *Id.* at 502.

373. *Id.*

374. *Id.* at 504.

375. *Id.* at 502.

376. 482 U.S. 78 (1987). In *Turner*, the Court held that even when a regulation or practice “impinges on inmates’ constitutional rights,” the practice is nonetheless valid “if it is reasonably related to legitimate penological interests.” *Id.* at 89.

377. This deference is by design. As the *Turner* Court explained,

[i]n our view, such a standard is necessary if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the

long constitutional tradition of according deference to prison officials.<sup>378</sup> But in *Johnson*, the Court sided against the state, holding that strict scrutiny was the correct standard for reviewing Johnson's claim of race-based classification. In that case, the Court in effect decided that race trumps prison—that the constitutional protection against undue racial classification is sufficiently weighty to overcome the strong presumption of constitutionality generally accorded official actions that “impinge on prisoners’ constitutional rights.”<sup>379</sup> However, the *Johnson* Court did *not* find the procedure of racial segregation in California's reception centers unconstitutional. It simply held that if the state wished to continue engaging in the challenged practice, it had to show this practice to be consistent with strict scrutiny, i.e., that the racial segregation was a “narrowly tailored” means to “further compelling governmental interests.”<sup>380</sup> All along, California had defended the policy challenged in *Johnson* as “necessary to prevent violence caused by racial gangs.”<sup>381</sup> Had the state been able to prove this assertion and also show that the measure was narrowly tailored to the harm, it could have ultimately prevailed.<sup>382</sup>

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primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.

*Id.* (internal citations omitted).

378. Indeed, judicial deference to prison officials is perhaps the strongest theme to emerge from a historical survey of prisoners' rights litigation in the federal courts. For elaboration on this point, see Dolovich, *supra* note 36, at 962 n.306.

379. *Turner*, 482 U.S. at 89. In fairness to the *Johnson* Court, there was prior case law that “applied a heightened standard of review in evaluating racial segregation in prisons,” to which it could (and did) point to support its claim that it was only following precedent. *Johnson v. California*, 543 U.S. 499, 506–07 (2005) (citing *Lee v. Washington*, 390 U.S. 333 (1968)). In *Lee v. Washington*, the Court had rejected an appeal challenging a district court order striking down on Fourteenth Amendment grounds an Alabama statute that allowed for racial segregation in the state's prisons and jails. See *Lee*, 390 U.S. at 333–34. But the Court's decision in *Lee* was issued in a one paragraph *per curiam* opinion, and although this paragraph is open to the reading offered by the *Johnson* majority (that it granted the state limited leeway to racially segregate “for the necessities of prison security and discipline”), that decision by no means demands such a reading. *Johnson*, 543 U.S. at 539 (quoting *Lee*, 390 U.S. at 334). In *Lee*, the Court simply rejected the State's “contention . . . that the specific order directing desegregation of prisons and jails makes no allowance for the necessities of prison security and discipline,” noting that it did “not so read the [order] of the District Court.” 390 U.S. at 333–34.

380. *Johnson*, 543 U.S. at 505.

381. *Id.* at 502.

382. As it happened, California chose to settle the case rather than seeking to defend the policy under strict scrutiny at trial. This was a wise move, since at trial, Johnson could have produced evidence that California was the only state in the union that racially segregated its reception centers, a finding calling into question the claim that the move was necessary to avoid serious violence. As Justice Stevens noted in his *Johnson* dissent,

California's policy is an outlier when compared to nationwide practice. The Federal Bureau of Prisons administers 104 institutions; no similar policy is applied in any of them. Countless state penal institutions are operated without such a policy. An *amici* brief filed by six former state corrections officials with an aggregate of over 120 years of experience managing prison systems in Wisconsin, Georgia, Oklahoma, Kansas, Alaska, and Washington makes clear that a blanket policy of even temporary segregation runs counter to the great weight of professional opinion on sound prison management.

There are strong reasons to think that in *Johnson*, California could not have met this burden.<sup>383</sup> But it is far less clear that the same may be said of L.A. County as regards K6G. As has been seen, in the culture of hypermasculinity that prevails in the Jail's GP, gay men and trans women are at constant risk of harassment and assault. Reducing this risk and keeping members of these at-risk groups safe are plainly compelling state interests under the first prong of the strict scrutiny test. As for the second prong, narrow tailoring, it is certainly arguable that a different strategy—the single unified approach explored in Part III.B above—would ensure the protection K6G offers while minimizing the kind of overt identity-based housing decisions that troubled the *Johnson* Court.<sup>384</sup> But there are also reasons to fear that opening up K6G to other populations could lead to the resurgence of a hypermasculinity imperative among residents—whatever their sexual orientation—afraid of being labeled as gay, thereby negating the protective benefits of K6G.<sup>385</sup>

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*Id.* at 519 (Stevens, J., dissenting).

Yes, California might have tried to respond, as Justice Thomas argued in dissent, that California's racially aligned prison gangs are unlike those in any other prison system, making the need for racial segregation unique to that state. But the credibility of this claim would have been sorely tested by the evidence from Texas, where despite a prison culture as racialized as California's, prison officials have long since abandoned officially enforced racial segregation. Even more damning for California's position, in 1977, in *Lamar v. Coffield*, the Texas Department of Corrections entered into a consent decree under which "administrators agreed to [racially] integrate inmates in double cells to the maximum feasible extent . . ." See Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prison*, 36 LAW & SOC'Y REV. 743, 753 (2002) (citing *Lamar v. Coffield*, 951 F. Supp. 629 (S.D. Tex. 1996)) (emphasis added). Compliance took fourteen years, but in 1991, after a decade of "footdragging," Texas prison officials finally implemented the order. See *id.* at 754, 755–56. And, despite predictions that "any efforts to racially mix the cells would lead to catastrophic results—a violent race war," see TRULSON & MARQUART, *supra* note 33, at 13, after the integration of all prisoners found able to be safely housed in a cell with someone of another race, the race of the parties was found to make virtually no difference to levels of violence between cellmates. *Id.* at 183. In fact, analyzing data of violent incidents in the Texas prisons between 1991 and 1999, Trulson and Marquart found that "the rate of cell incidents after 1992 was always less among desegregated cellmates." See *id.* at 182. Trulson and Marquart locate a possible explanation in what they call the "equal status contact" hypothesis. On this theory, when individuals who are members of antagonistic groups interact together on terms of equal status, they are more likely to see one another as independent human beings and less through a lens of group membership—and are thus more likely to respect and judge each other as individuals. See Trulson & Marquart, *The Caged Melting Pot*, *supra* at 745, 770. How might this thesis apply in the prison context? To radically oversimplify, when two men are confined in a small cell, they can get to know one another as people and learn to see each other not primarily as members of a race to which they are potentially hostile, but instead as individuals to be judged as such. *Id.* These results bode well for California, which, in the course of settlement talks with Garrison Johnson after the Court's decision in *Johnson v. California*, committed to a program of racial integration modeled on that of Texas.

383. See *supra* note 382.

384. Indeed, this is precisely the argument offered in Part III.B above.

385. Admittedly, this particular worry is speculative. As a practical matter, therefore, the extent to which a given court might credit it as sufficient in itself to demonstrate the narrow tailoring prong would depend on the standard of proof the court demands of defendants. As Justice Stevens noted in his opinion in *Turner v. Safley*—and repeated in his dissent in *Johnson*—"[h]ow a court describes its standard of review . . . often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation." *Turner v. Safley*, 482 U.S. 76, 100 (Stevens, J., concurring in part and dissenting in part); *Johnson*, 542 U.S. at 523 n.3 (Stevens, J., dissenting).

This concern is particularly salient in L.A. County itself, given the long history of K6G and the widespread understanding among those with experience in the Jail as to the sexual identity of K6G's residents.

In any case, the fact that in many carceral contexts, a unified approach might achieve the same level of protection for gay men and trans women while reducing the harm that arises from official identity-based classification should not be enough to justify putting an end to K6G. Given the complexity of the L.A. County Jail and the many contingent factors that determine whether a given housing program is successful, it seems wiser to favor the certain present success of K6G against the speculative protection that might come from dismantling K6G and establishing a new unified unit. A court should seriously hesitate before concluding that K6G fails strict scrutiny only because a theoretical alternative approach exists.

In sum, even were K6G or other like units designed on this model to be assessed under strict scrutiny, the state would have a strong argument in defense of the program—and especially in defense of K6G itself. Moreover, although there is reason to lament this fact, neither sexual orientation nor gender identity is presently considered a protected class under prevailing Equal Protection doctrine. This means that claims of discrimination on these grounds receive no heightened scrutiny. At best, an argument could be made for the searching rational basis review—what some scholars have termed “rational basis with bite”<sup>386</sup>—that, it might be argued, is available in claims of official discrimination based on sexual orientation after *Romer v. Evans*.<sup>387</sup> And in the case of K6G, this is a standard that could readily be met.<sup>388</sup> This being so, it seems hard to credit the assertion that being housed in K6G violates Equal Protection. In any case, for such a challenge to succeed, a claim must be brought by someone with standing. Because those people currently being housed in K6G strongly prefer it to GP, residents are unlikely to bring a case challenging the constitutionality of the unit. A court would thus have to find standing on the part of someone who sought admission to K6G but was refused. And even assuming someone in that situation would have the resources to litigate the case, there are few incentives to bring suit, since even a victory would

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386. See e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–61 (2011) (referring to the Supreme Court's review of Equal Protection claims based on sexual orientation as “rational basis with bite”) (quoting Gayle Lynn Pettinga, *Note: Rational Basis with Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 780 (1987)); Jeremy B. Smith, *Note: The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (same).

387. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down an antigay Colorado constitutional amendment on rational basis review in part because it was “inexplicable by anything but animus toward the class it affects”). *But see* Yoshino, *supra* note 386 at 761 (cautioning that “rational basis with bite” has not proved in practice to operate like “formal heightened scrutiny”).

388. The *Romer* Court emphasized the animus motivating the state constitutional provision struck down in that case. See *Romer*, 517 U.S. at 632. Yet in the case of K6G, it is the desire to protect the affected class and not to injure it that motivates the enterprise.

not bring the desired relief.<sup>389</sup> Were such a plaintiff to prevail, the likely remedy would be an injunction ordering the unit disbanded—a result antithetical to the interests of someone who wished to gain access to it.

#### IV. CONCLUSION: THE PROSPECTS FOR REPLICATION

Part III addressed several objections to the K6G model, on which gay men and trans women in custody are segregated from the rest of the detainee population for their own protection. It concluded that in most cases, the better approach may well be the unified strategy endorsed by the National Prison Rape Elimination Commission in its 2009 draft standards. At the same time, it argued that the K6G model should remain available to those prison officials who find it the best way to keep safe the sexual minorities in their custody.<sup>390</sup>

To show how such a policy might be effectively implemented, this Article has drawn on the example of the L.A. County Jail, which for over twenty-five years has been housing gay men and trans women separately from the Jail's general population. Although by no means impervious to criticism, the K6G program has created a surprisingly safe environment for people who in other carceral contexts would be at great risk of abuse. For this reason alone, it merits the attention of anyone committed to reducing the incidence of rape and other forms of sexual victimization behind bars.

But a final question remains: is L.A. County's K6G program even replicable? Or is the success of K6G a product of features unique to L.A. County? My study of the K6G unit reveals a number of factors that would increase the chances of this model succeeding elsewhere. First, it helps to have a sizable population of gay men and trans women in the jurisdiction. L.A. County is home to a high number of gay men and trans women.<sup>391</sup> At any given time, there is thus likely to be a sizable number of detainees in the Jail who belong in K6G. This circumstance has a number of benefits for the program as a whole. With a large enough population, devoting an entire housing unit would not yield a net loss of bed space, which is a serious concern in a perennially overcrowded facility. A large enough population allows vulnerable prisoners access to both security and community, ensuring that no one

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389. Conceivably, a party could seek to bring suit against K6G on principle, but in doing so may face standing and other jurisdictional hurdles. And for the reasons I have suggested here, any such case should lose on the merits.

390. Arguably, the best way to ensure that this model is employed only when strong grounds exist to think it the most effective way of protecting LGBT prisoners is to restrict its availability to cases where LGBT advocates agree with this assessment. In the case of L.A. County, for example, more effective segregation was the legal remedy sought by the ACLU of Southern California on behalf of its clients, gay men detained in the Jail. This experience informed the proposal advanced by a number of LGBT advocacy organizations, and in my own separately submitted comments, *see Dolovich, supra* note 344, in response to the January 2011 Notice of Proposed Rulemaking issued by DOJ regarding its proposed PREA standards. For the substance of this proposal, *see supra* note 344.

391. *See supra* note 107.

has to choose between safety from sexual assault and satisfying his or her basic human need for the company of others. Finally, such a large population allows for multiple housing units, which in turn means that jail officials have options besides protective custody for housing people who have developed mutual enmities.

It is difficult to say how small is too small. But even recognizing the need for some critical mass of gay men and/or trans women to make a segregated unit the more desirable alternative to protective custody, it is safe to say that in many prison systems across the country, there are likely to be sufficient numbers to form the basis for a viable independent unit. This is especially so in any system encompassing a sizable urban area. Certainly, the L.A. County Jail is enormous, but there are many state prison systems with a much larger overall prisoner population, which depending on the demographic make-up may make it possible to successfully implement the L.A. County approach.<sup>392</sup>

Second, for the K6G model to work, it is crucial that the facility's command staff has a genuine commitment to the protection of vulnerable groups—and that this commitment be clearly communicated to the line officers and other staff who run the facility day-to-day. Such a commitment has been crucial to the success of K6G. The evidence can be hard to notice, but only because its most potent aspects lie in the seamlessness with which K6G has been absorbed into the daily functioning of the Jail. In an operation the size of L.A. County, it is no small thing to introduce specialized classifications into the central intake mechanisms. To make this happen, senior administrators have to make clear that it *must* happen, that successful implementation of the program is non-negotiable. K6G works because the processes that emerged in response to that directive became routine, and because when issues arise, institutional resources are devoted to their resolution—although perhaps not always as expeditiously as friends of the unit would like.

This brings us to the third point: it helps to have the support and participation of the LGBT community on the outside. In the case of K6G, the Los Angeles LGBT community has been deeply involved in the project from its inception, and has worked with jail officials in an ongoing way to develop and adapt the classification process and to help make sure that residents' needs are met. Because of this community involvement, K6Gs enjoy a range of services tailored to the particular needs of the population,<sup>393</sup> and Jail officials know that they will hear from outside

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392. However, a sizeable gay and transgender population is not sufficient to ensure the success of a K6G-style unit. The New York City Corrections Department for many years operated a segregation unit at Rikers Island for gay men and trans women, to which detainees could gain admittance merely by declaring themselves eligible. See Paul von Zielbauer, *City Prepares to Close Rikers Housing for Gays*, N.Y. TIMES, Dec. 30, 2005. As a consequence, the unit mixed genuinely vulnerable individuals with “violence-prone inmates” who claimed to be gay in order to prey on other residents of the unit. *Id.* The experience of Rikers recalls that of L.A. County's “homosexual” housing prior to the establishment of K6G, and suggests that the present tight control over admissions, see *supra* Part II.C.1-2, is a key component of K6G's success.

393. The condom distribution program, for example, was initially conceived by CorrectHELP (now the Center for Health Justice), an independent advocacy organization that has administered the program since its inception.



advocates if conditions in the unit fall below minimally acceptable standards.<sup>394</sup>

Finally, the example of K6G teaches that the attitudes of the officers in charge of the unit, both toward the residents in particular and the enterprise in general, matter enormously. L.A. County has been fortunate in the two men who have run the unit for the past several decades. Senior Deputy Randy Bell and Deputy Bart Lanni are committed to maintaining the boundaries K6G places between its residents and the other inmates in the Jail. But they are equally committed to doing what they can to meet the needs and improve the prospects of the people in their custody.<sup>395</sup> And perhaps most importantly, they regard themselves as advocates for K6G in the Jail itself, readily taking concerns and complaints to the institution's command staff and just as readily addressing problems with peer deputies.<sup>396</sup>

That Bell and Lanni are often called upon to address issues arising from the behavior of fellow deputies points to one component of the K6G program that needs ongoing attention, and to one aspect of any similar program to which attention would assuredly need to be paid: the conduct of the custodial officers who interact with unit residents. In L.A. County, Bell and Lanni have responsibility for who gets classified into the unit. But once housing assignments have been made, the dorms are administered just like any others. Non-specialized line

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K6G also has full-time program officers from Tarzana Treatment Center, a reentry project aimed at those former prisoners who are HIV-positive, and on-site sexually transmitted infections (STI) testing administered by the L.A. County Department of Health.

394. The ACLU of Southern California has a full-time staff member assigned to the Jail, who monitors conditions and works with Jail officials to resolve issues. *See, e.g.*, Jails Project, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, <http://www.aclu-sc.org/jails/> (last visited Jan. 18, 2010). But the Jail is enormous, and one person can only do so much. That K6G is on the radar screen of so many outside organizations ready to advocate on behalf of its residents helps to explain the relative appeal of K6G compared with other units in the Jail.

395. The primary responsibility of these two officers is classification, i.e., determining which of the Jail admits seeking access to K6G actually belong there. However, over the years, they have taken it upon themselves to expand their own job descriptions to include a range of initiatives directed toward improving the lives and prospects of the people classified to K6G. The two officers have developed a full schedule of educational programs open to anyone in the unit. *See supra* note 138. They have worked with outside providers to make a range of services—counseling, drug treatment, STI testing, etc.—available to residents of the dorm. *See supra* note 165. And they work with outside advocates to identify and fulfill the particular needs of the K6G population, efforts that often require them to navigate multiple channels of the extraordinarily cumbersome jail bureaucracy. For example, in the last half of 2009, Lanni worked with Commander Robert Olmstead and Captain Buddy Goldman to get permission for trans women in K6G to have cosmetics in the dorms on the same terms as detainees in the women's facility. Lanni also worked with Dr. Keith Markley, Supervising Psychiatrist at Men's Central Mental Health Service, to ensure access to hormone therapy for a number of the trans women in the unit. Bell and Lanni, when they judge it appropriate, also serve as counselors to those K6Gs who seek them out, doing what they can to help improve an individual's prospects and reduce the likelihood of a return visit to the Jail.

Bell and Lanni are no pushovers. They know when they are being played. But from what I have observed, they approach their work with a strong sense of respect for the people in the unit. In fact, they have shown me by example that this is perhaps the key requirement on the part of custodial officers if carceral conditions are to be humane.

396. This readiness to challenge the behavior of their peers vis-à-vis K6G has not endeared Bell and Lanni to their colleagues. That they do it anyway is a testament to their commitment to the well-being of the people in the unit.

officers staff the booths overlooking the K6G dorms and go in and out of the dorms to supervise the delivery of meals and clothing exchange, to conduct count, and to deal with any security issues. Officers assigned to the floor on which K6G is located understand the distinct status of the unit and follow policies designed to maintain the necessary boundaries between K6Gs and GPs.<sup>397</sup> But they may have no particular sympathy for the residents of K6G, and in many cases may be uncomfortable working with the populations K6G serves. As a consequence, officers may verbally harass or otherwise maltreat the K6Gs. In engaging in such misbehavior, line officers may be prompted by the same anxieties some detainees feel that others might suspect their sexuality. They thus may be tempted to prove their own masculinity by abusing those not considered “real men.” But whatever the cause, mistreatment of K6Gs by line officers in the Jail indicates that Jail leadership must do much more to ensure that K6Gs are treated with respect.

Such mistreatment highlights the risks involved in efforts to replicate this program elsewhere. One danger of segregating sexual minorities is that they will become lightning rods for abusive manifestations of the sexual anxieties of the other men who come into contact with them, whether fellow prisoners or officers. As regards fellow inmates, the best an institution may be able to do is to keep them as far apart as possible. As to custodial officers, however, it is the institution’s responsibility to make clear that abusive or otherwise disrespectful behavior will not be tolerated and to back up this imperative with disciplinary action for those found to be in violation. It may be impossible to wholly eliminate such abuses, but that is no reason not to reduce their incidence as much as possible.

I have tried in this brief conclusion to identify some considerations that may be relevant to any officials contemplating following the lead of L.A. County. Again, my aim throughout has not been to promote the K6G approach as against all other strategies for reducing prison rape. To the contrary, I agree with the Commission that prisons and jails must carefully screen every individual on arrival to determine the likelihood of that individual being victimized by or sexually abusive to others, and that housing assignments should be made accordingly, with ongoing monitoring to reassign any emergent victims or predators to more appropriate housing. My argument has simply been that K6G has been a relatively successful program in L.A. County, and that, in some cases, the best practice for ensuring the safety of vulnerable inmates may instead be a two-track program, modeled on K6G, in which gay men, trans women and other sexual minorities are segregated out and housed apart even from other vulnerable prisoners.

For some readers, the suggestion that this sort of state-sponsored identity-based segregation would ever be appropriate may seem anathema. And there is no doubt that this strategy is extremely far from what would exist in an ideal world. But

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397. These policies include escorting K6Gs moving through the facility and making sure that no GPs mix with the K6Gs when the K6Gs are out of their dorms. *See supra* Part II.B.

especially in an era of mass incarceration, prisons are an ugly business. The problem of prison rape admits of no ideal solutions. If we await a policy fix with no risks, with no downsides, we will wait forever. And while we wait, people in prison will continue to be raped. It may seem odd to champion an official policy of identity-based segregation in the cause of civil rights, but as Equal Protection doctrine plainly recognizes, under some circumstances, such policies may be the only way to overcome the greater evil.<sup>398</sup> If the vulnerability to rape of gay men and trans women behind bars represents such a circumstance—and I believe it does—a segregationist approach may at times be justified. And, in that case, it is worth understanding how such an approach might effectively be put into practice. It is to this end that I have described L.A. County’s K6G program in such detail. Although not without its problems, K6G offers proof that, done right, a unit of this sort can do far more good than harm. For this reason, it deserves our attention, consideration, and esteem, regardless of whether any other jurisdictions follow its lead.

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398. *See supra* note 303.

## METHODOLOGICAL APPENDIX

The research on which this Article is based was conducted in the Los Angeles County Jail over approximately seven weeks in the summer of 2007.<sup>399</sup> Data was collected through five channels:

- (1) observations of jail operations;
- (2) informal conversations with prisoners, staff, volunteers, and other service providers in the facility;
- (3) observation of K6G classification interviews;
- (4) formal interviews with a random sample of K6G residents; and
- (5) in-depth interviews with Senior Deputy Randy Bell and Deputy Bart Lanni of the L.A. County Sheriff's Department.

*1. Observation of Jail Operations*

The L.A. County Jail is composed of eight different facilities. This research focused on the two main facilities located in downtown Los Angeles: Men's Central Jail, and Twin Towers Correctional Facility. Over the course of the data collection, I observed the operation of various areas of these two facilities in order to understand how things worked at each location and the way the institution functioned as a whole.<sup>400</sup> To this end, I visited and observed many different parts of the Jail, including the Inmate Reception Center (IRC), visiting room, court line, hospital wing, library, law library, investigative line-up room, and a range of general population and specialized housing units. The Jail has a number of specialized units besides K6G. Over the course of my time in the Jail, I observed several such units, including those housing prisoners who were seriously mentally ill,<sup>401</sup> deaf, developmentally disabled, former law enforcement officers or relatives of law enforcement officers, and sexually violent predators.<sup>402</sup>

During these observations, I took notes when it seemed like doing so would not draw undue attention to myself or otherwise influence the course of what I observed. When taking notes in the moment did not seem advisable, I noted down my observations at the first available opportunity. Each evening, I dictated my notes into an audio recorder. These recordings were then transcribed and became part of my field notes. My note-taking was atheoretical. The aim was just to record what I was seeing for later analysis.

In most cases, these observations took place between 7:45 a.m. and 4:30 p.m., Monday to Friday. One exception was my visit to IRC. The busiest time of day for

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399. UCLA IRB #G07-01-106-03.

400. At the start of my research, Chief Alex Yim granted me open access to these facilities, which made it possible for me to move unescorted through the Jail.

401. There are many pods in Twin Towers that house this population. I observed one or two of these.

402. Those in this last group had been civilly committed to extended custody following the completion of their criminal sentences, and at the time of my observations were housed in a single pod in Twin Towers.

IRC is approximately 6 p.m.–11 p.m. This is because the majority of new admits to the Jail are referred from court. Each courthouse that feeds the Jail has a holding tank for the people taken into custody, and these groups are typically not transferred to the Jail until court is over for the day. There are no weekend transfers, so Mondays and Tuesdays—when weekend arrestees are finally brought to the Jail—are the busiest days in the IRC. On those days, as many as 1000 people may arrive for processing, and it can take up to five hours for everyone to be processed. For this reason, I visited the IRC on a Monday evening, arriving at 6 p.m. and staying until things slowed down, which that evening was approximately 10:30 p.m. During this period, I toured the various stages of the intake process, including the unit in Twin Towers where the Jail houses the new admits needing medical care on arrival. I then sat for several hours behind a custody assistant, observing her as she conducted classification interviews,<sup>403</sup> an experience that provided an important contrast to the detailed second stage of the K6G classification process.

Observations of the Jail's general operations occurred unsystematically during the period of data collection. By contrast, I daily observed the workings of K6G, as a way to understand how the unit operates, the experience of residents, the nature of the interaction between staff and residents, and the particular role played by the officers charged with running the unit. K6G occupies two areas of Men's Central. Upstairs is the administrative center of K6G, made up of the classification office, the classroom, and a third room used by the various service providers who work with K6G residents.<sup>404</sup> The office and classroom are directly opposite one another, divided by a narrow hallway. This hallway contains benches on which new admits sit awaiting their classification interviews or blood tests.<sup>405</sup> The third room is somewhat apart from the office and classroom, about 50 feet down the hall. One floor down are the three dorms where K6G residents are housed.

Each day, I divided my time between K6G's administrative center and its housing units, starting upstairs in the morning and moving downstairs later in the day. This allocation was dictated by the schedule of Officers Bell and Lanni, who

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403. I thank Los Angeles Sheriff's Department Custody Assistant Regina Fowlkes for her gracious willingness to have me observe her work and for her patient explanations as to what she was doing and why.

404. These providers include the Tarzana Treatment Center, which provides reentry services and drug treatment for HIV-positive detainees, and the Center for Health Justice, which, in addition to distributing condoms in the dorms once a week, provides HIV counseling and prevention education to unit residents.

405. Prior to being sent to the dorms, all incoming K6Gs ordinarily have a syphilis test administered by staff from the LA Department of Health, who are permanently assigned to K6G. These technicians also provide optional testing for other sexually transmitted infections (or "STIs"), including HIV, gonorrhea, and Chlamydia. This program was initiated in March 2000, after the Centers for Disease Control in Atlanta traced a syphilis outbreak to the Jail's K6G unit. The syphilis test is not mandatory, but Jail practice is to deny access to the K6G dorms to those who decline to have the test and to house them instead in K6G-designated single cells in the administrative segregation wing. This practice is justified by Jail administrators as a precaution against the transmission of syphilis. Interview with Deputy Bart Lanni, L.A. Sheriff's Department, in L.A., Cal., February 12, 2011.

run the K6G classification office. These officers start their shift at 5:30 a.m. and leave between 1:30 p.m. and 2:00 p.m. each day. Each morning I would arrive around 7:45 p.m., and stay upstairs until Bell and Lanni left for the day. I would then move downstairs to the housing units, where I would remain until 4:30 p.m. or so.

While upstairs, I moved back and forth between the classification office, the classroom, and the third room where I conducted my formal interviews. During this time, when I was not conducting my own interviews, I sat in on classification interviews (on which more below), observed classes in the classroom, and was a fly on the wall in the office as Officers Bell and Lanni addressed the issues that arose daily in the unit.

In the afternoons, I moved downstairs to the officer's booth overlooking the three K6G dorms. In the area of Men's Central where K6G is located, dorms are configured in groups of four, with one officers' booth per four dorms. The officers' booths are H-shaped, with one dorm extending straight up from each of the four tips of the H (ie, two at the top and two at the bottom). The booths have large glass windows at each end that allow officers to watch the goings-on in the dorms,<sup>406</sup> and narrow openings in the glass, measuring 18 inches by 3.5 inches, at the bottom of each window through which officers and residents can communicate. I spent hours each day in the booth overlooking the K6G dorms, observing the distribution of meals, clothing exchange (during which residents exchange dirty clothes and linen for clean), count, and the general goings-on. Because dorms are in groups of four and there are only three K6G dorms, I also wound up observing life in a general population dorm, which by happenstance became my control.

As noted, most days I left the Jail at approximately 4:30 p.m. On two separate occasions, however, I stayed through the evening, observing events in the dorms until close to midnight in one case, and past midnight in the other.

## *2. Informal Conversations with Staff, Residents, and Others*

Over the course of my observations, I encountered many different parties, including Sheriff's deputies, custody assistants, nurses, chaplains, teachers, volunteers, and Jail detainees. As often as possible, I engaged in informal conversations with the people I met, with the aim of learning about the workings of the Jail and the experience of all those who occupy it, staff and detainees alike. When visiting various areas of the Jail, I made a particular point of talking to the officers in charge of those areas, as a way to understand how things worked in the particular

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406. The configuration of the dorms off the officers' booth has a serious flaw: the dorms are rectangular in shape, and the officers are situated at one end, making it hard to see what is happening at the other end. Officers go daily into the dorms when meals are delivered (when residents are lined up preparatory to receiving their meals) and to perform count (when residents are face-down on their bunks, with their wrists crossed above their heads and dangling over the top of the bunk so their inmate numbers, worn on plastic wristbands, may be confirmed). But from what I observed, officers almost never do random walk-throughs at other times. This leaves plenty of opportunity for residents to engage in unobserved behavior, especially in the back corners of the dorms.

location and the challenges faced in each. While upstairs in K6G's administrative center, I had innumerable informal conversations with Bell and Lanni, with any K6G residents who happened to be around, and with the volunteers, service providers, and other staff who worked in or came through the unit. During the periods of observation in the officers' booth overlooking the K6G dorms,<sup>407</sup> I had frequent informal conversations with the duty officers assigned to the dorms, with many of the deputies assigned to the floor, and with many K6G residents, who after they became accustomed to my presence would initiate conversations with me through the opening in the booth's window.

These conversations took place during the same time frame as my observations, as described above. In each case, I obtained verbal consent. The content of these conversations was recorded in the same way as my observations: I took detailed notes at the time or as soon as possible after the conversation took place, and each evening I dictated my written notes. This dictation was later transcribed and became part of my field notes.

### *3. Observation of Classification Interviews*

Each morning at 5:30 a.m., Officers Bell and Lanni arrive to find as many as 20 people in the K6G holding tank awaiting classification. Of these, as many as 10 may require an in-depth interview to determine whether they satisfy the K6G admissions standard.<sup>408</sup> For approximately two to three weeks, I met with every individual to be classified and sat in on approximately 80% of the interviews. Once I started conducting formal interviews myself (see below), my observation of these interviews became more random. Observation of the classification interviews conducted by Officers Bell and Lanni was a crucial component of this research. Although new arrivals are asked during the brief IRC classification interview whether they are "homosexual," with those answering in the affirmative initially classified to K6G, the final determination as to who will be admitted to the K6G unit is made entirely based on this second-stage interview. To fully understand how the program works and who winds up in K6G, it is necessary to have a clear and accurate picture of this second-stage interview process.

Prior to each interview, I met in a separate room with each person awaiting their classification interview, to explain my project and obtain verbal consent to my sitting in on that exchange. The room used for this purpose was the third room of what I have called K6G's administrative center, that used by the various service providers who work with K6G's population. At that time of the day, this room was typically empty. To ensure valid consent, it was important to assure prospective

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407. During any given shift, there were two custody assistants in the booth, each responsible for two of the four dorms in the configuration. In addition, there were five to seven deputies on the floor assigned as "prowlers", whose job it is to supervise distribution of meals and clothing exchange, and conduct count in each of the floor's ten dorms, to monitor comings and goings, and generally to keep order on the floor.

408. For extended discussion of this interview process, *see supra* Part II.C.2.

subjects that Officers Bell and Lanni would not know if they declined to have me sit in on their interviews. But unless steps were taken, it would be obvious to these officers which individuals declined to consent to my presence, since during their interviews I would be conspicuously absent from the classification office. To get around this problem, I told the two officers that I would only be sitting in on approximately eighty percent of the interviews of those subjects who consented. That way, in any given case where I did not observe the interview, Officers Bell and Lanni would not know if I remained outside because the subject did not consent or because the subject was one of the twenty percent whose interviews I would not be observing notwithstanding their grant of consent.<sup>409</sup>

To make interview subjects feel comfortable, I did not audio-record the classification interviews that I observed. Instead, I took detailed notes over the course of each interview, which I dictated each evening. The transcripts of these recordings became part of my field notes. In all, I observed approximately 50 interviews, and, of those, I recorded notes on approximately 34.

#### *4. Formal Interviews with a Random Sample of K6G Residents*

Over the course of approximately four weeks, I conducted formal interviews with 32 K6G residents,<sup>410</sup> based on a 176-question questionnaire.<sup>411</sup> These interviews took place in the early part of the day shift, from approximately 8:00 a.m. to 1:30 p.m. Interviews took anywhere from one to two hours. The content of these interviews provided a detailed understanding of the experience of residents of K6G that could not be acquired any other way.

The sample was selected as follows. On the first day I commenced my interviews, Deputy Lanni gave me copies of three lists with the names of K6G's residents that day,<sup>412</sup> one for each dorm. I went down the lists, highlighting every third name. Those highlighted lists became the pool from which I drew my sample. Each day, I worked off a different list, rotating among the dorms. On arrival, I would pick three or four highlighted names, and, starting with the first name, would ask Senior Deputy Bell to send a pass for that individual to be sent up from the dorms. In almost every case, the pass was sent for the person I requested.<sup>413</sup> When the proposed subject arrived from downstairs, I initiated a brief conversation, explaining who I was and that I sought to enlist their help with my research.

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409. As it happened, in the end, only one subject declined to give consent.

410. I consented and commenced the interview process with thirty-three subjects, but one subject proved to be developmentally disabled, an incapacity that had not been evident during the consent process. In that case, I terminated the interview without completing the questionnaire.

411. This questionnaire is reproduced below as Appendix B.

412. Every day, hundreds of people are admitted to the Jail and hundreds more are released. For this reason, the list of individuals housed in any given unit will change from day to day.

413. In a very few instances, on learning the identity of the person I was asking to see, Senior Deputy Bell declined to send the pass, either because he felt the person was not someone I could safely be alone with in the interview room or because the person had psychological problems that made them incapable of participating.



In perhaps ten percent of the time, this brief conversation was enough to make clear that the proposed subject was not appropriate to be interviewed, and the individual was therefore excluded from the sample. In most such cases, the individual only spoke Spanish. Because I do not speak Spanish and because the substance of the interviews was sensitive enough that introducing a translator would have risked complicating and even compromising the interview process, I excluded non-English speakers from participation. In other cases, it was immediately clear that the proposed subject was unable to engage in the interview process, whether for reasons of mental illness, developmental disability, or other psychological incapacities.

In the remaining cases—the vast majority—I escorted the proposed subjects to the interview room,<sup>414</sup> where I explained that they had been chosen at random from among K6G residents, described the nature of their proposed participation, and sought written consent from those who chose to participate.<sup>415</sup> Among other assurances, I made clear that the decision whether to participate would have no bearing on their cases, circumstances in the Jail, or prospects for release. A difficulty existed, however, because those who chose not to participate would be out of the interview room in just a few minutes, whereas those who did choose to participate could remain for as long as two hours. In this way, the subject's decision whether or not to participate could become known to any officers or fellow detainees on the floor at the time, a possibility that could create pressure to participate on the part of subjects worried that the institution would frown on those who declined. To address this problem, I employed the following procedure, which I explained to Officers Bell and Lanni as well as to each person from whom I sought consent. I asked each person who consented to participate to roll a single die. If they rolled a 1, 2, 3, or 4, we proceeded to the interview. If they rolled a 5 or 6, their participation was at an end. This way, when a proposed subject left the interview room after only a few minutes, Bell and Lanni would not know whether it was because the individual had declined to participate, or because the die came up 5 or 6. As it happened, not one person I invited to participate declined to do so, and with only one exception,<sup>416</sup> those who rolled a 5 or 6 expressed disappoint-

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414. This room was reserved for my exclusive use during this period. During the interviews, the subject and I were alone. But the room is equipped with a closed-circuit camera, by means of which Officers Bell and Lanni could observe (but not hear) the interview, thus enabling them to ensure my safety should any problems arise without compromising the privacy of the exchange.

415. Copies of the consent forms were not given to interviewees. Jail residents have no possibility of keeping their papers private. Any record of participation would have therefore risked compromising the assurance of confidentiality. Though Jail staff and/or fellow K6G residents might know which residents were considered for participation in the study, they would only know which residents agreed to be subjects if they saw a signed consent form.

416. The lone exception was a man who seemed to have no affect, and who was the only prisoner I met during my time in the Jail of whom I was affirmatively afraid. I was relieved when he rolled a 5, although it was pointed out to me afterwards that even had his roll qualified him to participate, I ought myself to have terminated the

ment with having to leave.<sup>417</sup>

Interviews were audio-recorded and transcribed, in part by staff of the UCLA School of Law, and in part by commercial transcription services.<sup>418</sup> Research assistants then went through the transcripts systematically, summarizing the main findings for each grouping of questions. Personal data from Qs 1–6 & Qs 140–50 were collated into a spread sheet and where possible analyzed for trends (e.g., breakdown of subject group according to age, race, etc.). For each question that yielded data amenable to categorization or quantification (e.g., Qs 119–24, Q125, Qs 151–56), answers were coded and the range calculated. The answers to Q35, which asked subjects for “5 words to describe life in K6G,” were catalogued and analyzed for the range of positive and negative words, and explanations for each answer were collected and assessed. Because the aim of the interviews was to learn generally about life in K6G, much of the data collected were qualitative. Analysis therefore involved carefully reading through the transcripts to identify themes and trends and to develop a picture of the K6G experience. In many cases, the wide variation in the answers pointed to a lack of veracity on the part of some subjects. Reading through the transcripts with an eye to such instances contributed to an overall impression of which answers were more reliable—and also revealed potential weaknesses in the questionnaire itself, which informed data analysis.<sup>419</sup>

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interview and had him returned to the dorms. I resolved to do this in future should I feel that way again, but thankfully the issue never came up.

417. The reason for this disappointment became apparent over the course of my time in the Jail. The unit is small enough that by the end of my first week of interviews, many K6G residents knew about my research. In Jail, there are very few distractions, and even fewer opportunities for residents to make any kind of positive contribution or be the focus of positive attention. Interview subjects seemed to enjoy the interview process, and reported their experience to their friends and colleagues back in the dorm. As a consequence, when I appeared in the officers’ booth overlooking the dorms, I frequently had people coming to ask me if I would interview them. These requests had no bearing on whether a given individual ended up in my sample, and because I ultimately interviewed only around ten percent of K6G’s residents, in most cases the individuals offering themselves as research subjects did not wind up being interviewed. But this did occasionally happen, and one day in particular I was surprised to find that I had sent a pass for one of my most dedicated petitioners, whose moniker in the Jail, as is often the case, turned out not to be his legal name. This individual was very pleased to have been invited to participate, and no doubt believed his persistence had paid off.

418. Each UCLA staff member who transcribed these interviews, along with each research assistant who subsequently worked on the project and each law review editor who consulted the transcripts during the editorial process completed an on-line course on the protection of research subjects administered through the UCLA IRB. Each commercial transcription services employee who worked on this project gave written assurance that they would keep the contents of the interviews confidential.

419. For example, Q61 asked *what percentage of K6Gs have no consensual sex at all while in K6G?* The answers ranged widely, with the majority suggesting that the number of people who remained celibate while in K6G was extremely small. Yet to Q79, which asked *have you ever had consensual sex while incarcerated?*, a sizeable number responded in the negative. After a while, I realized that unless many of those in my sample were just coincidentally among the very few celibate residents of K6G, I was getting unreliable answers to either Q61 or Q78. Given that a constant theme throughout the interviews was that K6G was the site of a considerable amount of consensual sex, the high numbers of negative answers I received to Q78 may simply have reflected a reticence on the part of those I interviewed to admit to me in a face-to-face interview that they themselves had sex in the unit. It is, however, instead (or also) possible that the estimates of sexually active K6Gs made in response to

### *5. In-Depth Interviews with Officers Bell and Lanni*

Lastly, I conducted in-depth interviews with Senior Deputy Randy Bell and Deputy Bart Lanni. These two officers are responsible for deciding which of the detainees who report being gay during their initial IRC interview meet K6G's admissions criteria. They also run K6G's educational programming, manage the various outside providers who work with K6G's population, and are generally responsible for the unit's operation. Together, they have a combined forty years working with the K6G population. Their long history with the unit made them the best existing sources of accurate information about the evolution and functioning of the unit. I therefore spent a total of several hours in focused conversation with each. My interview with Deputy Lanni was conducted in one sitting. My interview with Senior Deputy Bell took place over several days. As to each officer, I asked questions relating to:

- their background prior to joining the Los Angeles Sheriff's Department;
- how they came to be assigned to K6G;
- the early history of K6G (i.e., prior to their assignment to the unit);
- their understanding of the reason for K6G within the LA County Jail system;
- their sense of the differences between life in K6G and life in the Jail's general population;
- their precise responsibilities in the unit;
- their understanding of their own professional mission vis-à-vis K6G; and
- anything else they'd like to tell me about K6G or their impression of the people housed in the unit.

The interview with Deputy Lanni, being the more formal of the two, was audio-recorded and transcribed. Because my interview with Senior Deputy Bell was more ad hoc, I took written notes that were then transcribed with my field notes. These interviews provided valuable background on K6G rather than data to be reported. Thus, the resulting transcripts were not analyzed, but have simply served as a source of information and thematic insight.

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Q61 were overinflated, and that my subjects overestimated the number of K6Gs who engaged in consensual sex in the dorms.

## APPENDIX B

DOLOVICH K6G PROJECT QUESTIONNAIRE<sup>420</sup>

## FINAL VERSION

Respondent ID# \_\_\_\_\_  
 Interviewer Initials: \_\_\_\_\_  
 Date: \_\_\_\_\_  
 Interviewer Start Time: \_\_\_\_\_

*First, I'm going to ask you some questions about your history in K6G, your impressions about how K6Gs are treated in the Jail, and about life in K6G. Please remember that your answers to these questions are not going to be shared with any staff (including Bell and Lanni) or other inmates. Please also remember that if you tell me anything related to any sexual activity, consensual or otherwise, between any inmate (whether yourself or anyone else) and any employee of the L.A. County Jail or any other staff member or service provider, I will be obliged to report it to Jail officials. In other words, if you tell me of any such activity, it will be as if you are making an official report of the incident.*<sup>421</sup>

1. Is this your first time in the LA County Jail? [if yes, go to question 7]	Yes No
2. [If no] How many times have you been in the Jail?	
3. Is this your first time in K6G?	Yes No
4. [If no] How many times have you been in K6G?	
5. Have you ever been in the Jail and not been in K6G?	Yes No
6. If so, where were you housed?	
7. When did you first learn about K6G?	
8. [If other than once admitted to LA County]: How did you learn about it?	
9. [If heard about it on the outside] What were you told about K6G? How was the unit described to you?	
10. Do you prefer being in K6G to being in the general population?	Yes No
11. Why?/Why not?	

420. This questionnaire was developed in close collaboration with Joe Doherty, Director of the UCLA School of Law's Empirical Research Group. Although the unit is now referred to as K6G, at the time of my interviews, most of my respondents—many of them with a long history of detention in the L.A. County Jail—still referred to it by its prior name of K11. My interview questions therefore used the term “K11” instead of “K6G.” To avoid confusion, all references to K11 have been changed to K6G.

421. See *supra* note 296.

12. What are the best things about being in K6G rather than GP?	
13. Anything else?	
14. Anything else?	
15. Anything else? [ <b>Ask until answer is no or until 5 things</b> ]	
16. What are the worst things about being in K6G instead of GP?	
17. Anything else?	
18. Anything else?	
19. Anything else? [ <b>Ask until answer is no, or until 5 things</b> ]	
20. Is life in K6G more restrictive than life in GP?	Yes No
21. In what way?	
22. Any other ways?	
23. Any other ways? [ <b>Keep following up until 5 answers, or they run out of answers</b> ]	
24. Do the guards treat K6Gs any differently than GP?	Yes No
25. In what way?	
26. Any other ways? [ <b>Keep following up until 5 answers, or they run out of answers</b> ]	
27. Does the staff treat K6Gs any differently than GP?	Yes No
28. In what way?	
29. Any other ways? [ <b>Keep following up until 5 answers, or they run out of answers</b> ]	
30. Do you ever have interaction with GP?	Yes No
31. If so, would you describe the interaction as negative, positive, both negative and positive, or neither negative or positive?	Negative Positive Both negative and positive <u>Neither</u> negative or positive
32. How so? [ <b>Probe for location and circumstances</b> ]	
33. Any other ways?	
34. Any other ways? [ <b>Keep following up until 5 answers, or they run out of answers</b> ]	

35. If you had to give me 5 words to describe life in K6G, what would they be? Why?	
36. In general, do you think K6Gs enjoy being in K6G?	Yes No
<b>[Four modules follow: Community, Sex, Gangs, and Safety. Order of modules to rotate from interview to interview]</b>	
37. <b>COMMUNITY MODULE</b> Do you think anyone commits a crime just so they can go to K6G?	Yes No
38. Is K6G better than the outside world for some people?	Yes No
39. In what ways?	
40. Anything else?	
41. Anything else? <b>[Keep following up until 5 answers, or they run out of answers. ]</b>	
42. Do you think that people who have been in K6G would be less likely to commit a crime if they knew they had to go into GP and not back to K6G?	Yes No
43. Why/Why not?	
44. Any other reason? <b>[Keep following up until 5 answers, or they run out of answers. ]</b>	
45. Some people who have been in K6G more than once say that coming back to K6G is like coming back to a summer camp or a clubhouse, and others say it is just like any other jail. What do you think?	Summer camp Clubhouse Like any other jail Other _____
46. Can you tell me more about how it is like a <b>[clubhouse or whatever they say it is]</b> ?	
47. Anything else?	
48. Anything else?	
49. Think back to your first time in K6G. When you got there, was anyone there you already knew?	
50. <b>[If yes]</b> how many people did you already know?	
51. Where did you know them from?	
52. <b>[If no to #3 and they've been in K6G before]</b> Do you hang out with your fellow K6Gs on the outside? <b>OR [if yes to #3 and this is their first time in K6G]</b> do you think when you get out that you will hang out with anyone you got to know in K6G?	
53. <b>[If yes]</b> Approximately how many?	
54. <b>[If yes]</b> Without giving me any names, what do you do when you hang out with them?	

55. Often, in a large group of people, people tend to divide up into smaller groups so they can hang out with people like themselves. Does that happen in K6G?	
56. If so, what are the different groups?	
57. How do you feel about the people in the other groups?	
58. Do the groups divide up in K6G on racial lines?	
59. Are the people you hang out with in any particular group?	Yes No
60. [If yes] Which ones?	
<b>[SEX MODULE]</b> <i>Now I'm going to ask you about consensual sexual practices in K6G. Remember that if you tell me anything related to any sexual activity, consensual or otherwise, between any inmate (whether yourself or anyone else) and any employee of the L.A. County Jail or any other staff member or service provider, I will be obliged to report it to Jail officials. In other words, if you tell me of any such activity, it will be as if you are making an official report of the incident.</i> <sup>422</sup>	
61. What percentage of K6Gs have no consensual sex at all while in K6G?	
62. What percentage of K6Gs would you say has consensual sex with other K6Gs every day?	
63. What percentage of K6Gs would you say has consensual sex with other K6Gs a few times a week?	
64. What percentage of K6Gs would you say has consensual sex with other K6Gs once or twice a week, but not more?	
65. How often does any K6G inmate have consensual sex with non-K6G prisoners?	<b>[don't read options]</b> every day 3-5 times per week 1-2 times per week 1-2 times per month Never
66. What percentage of K6G inmates would you say is in a monogamous sexual relationship?	
67. What percentage of K6G inmates would you say has consensual sex with more than one other person during their time in K6G?	<b>[don't read options]</b> Everyone; almost everyone; most people; about half; less than half; just a few; no one

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422. See *supra* note 296.

68. How many different sexual partners would you say the average person in K6G has during their time in K6G?	
69. What time of day does most of the consensual sex in K6G take place?	<b>[don't read options]</b> morning, afternoon, evening, nighttime (ie after lights out)
70. Where does most of the consensual sex in K6G take place?	<b>[don't read options]</b> bunks; back of the dorms; showers other _____
71. How often do K6Gs trade sex for money?	
72. How often do K6Gs trade sex for other things?	
73. What other things besides money do people exchange for sex?	
74. When K6Gs trade sex for money or other things, how often do they keep the money or other things for themselves?	
75. When K6Gs trade sex for money or other things, how often do they give the money or other things to someone else?	
76. <b>[If sometimes]</b> , who usually gets the money or other things?	
77. Is it always the same person or people, or does it vary?	Same; Varies
78. Have you ever had consensual sex while incarcerated?	Yes No
79. <b>[If yes to #79]</b> Without telling me any names, was the consensual sex with. . . ? <b>[read list and check all that apply]</b>	<input type="checkbox"/> A cellmate? <input type="checkbox"/> Another prisoner? <input type="checkbox"/> Someone else?
80. <b>[If yes to #79]</b> Where in the correctional facility have you had consensual sex?	<b>[circle all that apply]:</b> Cell, Shower, Dorm; Living Area (other than cell such as dorm or gym), Day Room/TV Room, Yard, Kitchen/ Dining Hall, Chapel, Hospital/ clinic/infirmery; Other _____
81. Have you ever had consensual sex while incarcerated in K6G?	Yes No
82. <b>[If yes to #82]</b> Without telling me any names, was the consensual sex with . . . ?	<b>[check all that apply]</b> <input type="checkbox"/> Another prisoner? <input type="checkbox"/> Someone else?



83. <b>[If yes to #82]</b> Where in the Jail have you had consensual sex?	<b>[circle all that apply]:</b> Shower, Dorm, Day Room/ TV Room, Yard, Kitchen/ Dining Hall, Chapel, Hospital/clinic/infirmery; Other_____
84. Have you ever had to do sexual things against your will with any other inmates in K6G?	Yes No
85. Please explain.	
86. Anything else?	
87. Anything else? <b>[Keep following up until 5 answers, or they run out of answers]</b>	
88. <b>[If yes]</b> Did you ever file an incident report regarding these incidents?	Yes No
89. Have you ever been raped by another inmate in K6G?	Yes No
90. <b>[If yes]</b> Did you ever file an incident report regarding these incidents?	Yes No
91. Do you think you are safer from being forced to do sexual things against your will with other inmates in K6G than you would be in GP?	Yes No
92. Why/why not?	
93. The next few questions deal with your experiences during prior terms of incarceration. Remind me again just so I get it right: have you been previously incarcerated in other prisons, jails, juvenile hall or any other youth correctional facility?	
94. Let me direct your attention to your whole incarceration history, including experiences in prison, jail, juvenile hall, or any other youth correctional facility. Have you ever during that time had to do sexual things against your will with other inmates while incarcerated?	Yes No
95. <b>[If yes]</b> how many times?	
96. Just to be sure, have any of the following things ever happened to you with other inmates while incarcerated: groping or fondling, kissing, genital contact, oral sex, or penetration against your will?	
97. <b>[If yes]</b> How many times?	
98. Can you tell me a little about what happened?	
99. When these incidents happened, did you file an incident report?	Yes No

100. Have you ever done sexual things while incarcerated that you were not forced to do, but which you would rather not have done?	Yes No
101. <b>[If yes]</b> About how many times?	
102. <b>[If yes]</b> Was it always with the same person?	
103. Can you tell me about one or two of these incidents?	
104. When these incidents happened, did you file an incident report?	Yes No
105. <b>[GANG MODULE]</b> Are there any gang members in K6G?	Yes No
106. Are there any gang politics in K6G?	Yes No
107. <b>[If yes]</b> Tell me more. What sort of gang politics?	
108. Would you say the gang politics are different in K6G than in GP?	Yes No
109. If so, how?	
110. Any other ways? <b>[Keep following up until 5 answers, or they run out of answers]</b>	
111. Is K6G easier time for gang members than GP?	Yes No
112. If so, how?	
113. Any other ways? <b>[Keep following up until 5 answers, or they run out of answers]</b>	
114. <b>[If say nothing re putting up a front in answer to previous question:]</b> Would you say that gang members have to put up a front in K6G, or are they able to let down their guard?	Yes No
115. Why/Why not?	
116. Anything else?	
117. <b>[SAFETY MODULE]</b> <i>Now I'm going to ask you some questions about safety. Some people feel that in certain environments they have to pretend to be something they are not in order to feel comfortable or safe. Do you ever feel like that?</i>	Yes No
118. <b>[If yes]</b> Where?	
119. <b>[Hand them 3 3x5" cards reading K6G, General Population, Out in the Community]:</b> As between these three places—K6G, GP, and out in the community—where do you feel most comfortable and safe being yourself?	

120. Of the remaining two places, where do you feel more comfortable and safe being yourself?	K6G GP Out in the community
121. Of these three places—K6G, GP, out in the community—in which one do you feel the safest from physical harm?	K6G GP Out in the community
122. Which one is the next safest?	K6G GP Out in the community
123. Of these three places—K6G, GP, out in the community—in which one do you feel the safest from sexual harassment?	K6G GP Out in the community
124. Which one is the next safest?	K6G GP Out in the community
125. How safe do <u>you</u> feel in K6G?	Very safe Safe Unsafe Very unsafe
126. Can you explain? Why do you feel [ <b>very safe, safe, unsafe, very unsafe</b> ]?	
127. Any other reason? [ <b>Keep following up until 5 answers or until they run out of things to say</b> ]	
128. Have you ever been hit, kicked, punched, or otherwise assaulted without a weapon in K6G?	Yes No
129. Have you ever been assaulted <u>with</u> a weapon in K6G?	Yes No
130. Do you think you are safer from physical violence in K6G than you would be in GP?	Yes No
131. Why/why not?	
132. Anything else? [ <b>Keep following up until 5 answers, or they run out of answers</b> ]	
<b>[FINAL MODULE: not to be rotated]</b>	
<i>Now I'm going to ask you a few questions about the K6G classification process.</i>	
133. Do you think the K6G classification team is successful at distinguishing the gay prisoners from those who are not?	Yes No
134. Is there anything you would do differently if you had the job of figuring out which prisoners were gay and which were not?	

<i>Now I'm going to ask you about the condoms given out by The Center for Health Justice (aka CorrectHelp).</i>	
135. How often do K6Gs use the condoms given out once a week by the Center for Health Justice?	
136. If K6G inmates could get more than one condom per week, would they use them?	Yes No
137. Do K6Gs who have consensual sex without condoms worry about getting HIV or other sexually transmitted diseases?	Yes No
138. If there are no more condoms available, how do K6Gs who are having consensual sex protect themselves from getting HIV or other sexually transmitted diseases?	
<i>Okay, we're almost done. Just a few more questions.</i>	
139. Where were you born?	
140. What year were you born?	
141. Race?	
142. What is the highest grade you completed in school?	
143. Are you currently married, separated, single or divorced?	Married Separated Single Divorced Living with someone
144. What gender is your [spouse; partner]?	
145. Do you have any children?	Yes No
146. <b>[If yes]</b> How many?	
147. <b>[If yes]</b> What are their ages?	
148. Before being incarcerated how often did you have contact with them?	All of the time Most of the Time Occasionally Rarely Never
149. Has anyone in your family ever been incarcerated?	
150. <b>[If yes]</b> who?	Mother, father Brothers, sisters Children Aunts, uncles
151. Before being incarcerated, did you have any mental health problems?	Yes No
152. Since being incarcerated, have you had any mental health problems?	Yes No

153. Before being incarcerated, did you have any problems with alcohol?	Yes No
154. Since being incarcerated, have you had any problems with alcohol?	Yes No
155. Before being incarcerated, did you have any problems with drugs?	Yes No
156. Since being incarcerated, have you had any problems with drugs?	Yes No
157. Are you currently a member of a gang?	Yes No
158. <b>[If yes to #157]</b> What gang?	
159. <b>[If no to #157]</b> Were you ever a member of a gang?	Yes No
160. <b>[If yes to #157]</b> What gang?	
161. When did you leave?	
162. How long have you been/were you a member of this gang?	
163. How old were you the first time you were arrested?	
164. Where was that?	
165. <b>[If outside CA]</b> when was the first time you were arrested in CA?	
166. How old were you the first time you were put in jail?	
167. Where was that?	
168. <b>[If outside CA]</b> when was the first time you were put in jail in CA?	
169. How many times have you been incarcerated in a juvenile hall? <b>[if 0, skip next question]:</b>	
170. Altogether how much time have you spent in a juvenile hall?	
171. How many times have you been incarcerated in a CYA (California Youth Authority) facility <b>[if 0, skip next question]</b>	
172. Altogether, about how much time have you spent in CYA facilities?	
173. How many times (including this time) have you been incarcerated in jail? <b>[if 0, skip next question]</b>	
174. Altogether, about how much time have you spent in jail?	

175. How many times have you been in prison? <b>[if 0, skip next question]</b>	
176. Altogether how much time have you spent in prison?	

*This is the end of the interview. Thank you very much for your time and willingness to participate. I won't tell anyone here what you've said and you don't have to tell anyone either. At this point, you have the right to ask that the information you just gave me during this interview not be used for purposes of my research. If you would prefer that your information not be used, this form will be destroyed and the audiofile of the interview will be erased. Are you still willing to have your information used for purposes of my research?*