

# NOTE

## DISCIPLINARY SODOMY: PRISON RAPE, POLICE BRUTALITY, AND THE GENDERED POLITICS OF SOCIETAL CONTROL IN THE AMERICAN CARCERAL SYSTEM

*David Eichert*†

*This Note engages with critical legal scholarship about gender and race to reframe discussions about sodomy in American law. Instead of concentrating on the history and constitutionality of sodomy bans, I instead demonstrate how disciplinary sodomy remains an intrinsic part of the American carceral system. I detail several scenarios in which anal rape and the threat of anal rape have been used by prison staff and law enforcement agents to control male bodies in the American carceral system. I then identify the “audiences” of this violence, demonstrating how ideas of sexuality, gender, and race are weaponized against marginalized populations to reinforce power hierarchies in American society.*

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## INTRODUCTION

In December 2018 a lawsuit was filed in Manhattan on behalf of four young pretrial detainees.<sup>1</sup> The plaintiffs, all Black and Latino men between the ages of nineteen and twenty-five, alleged that they had been taken out of the Rikers Island Prison Complex (without warning to their lawyers or families) and sent to the Albany County Correctional Facility in upstate New York.<sup>2</sup> All four men had previously been at odds with correctional officers in New York City—one had complained to the Legal Aid Society of being groped by a prison guard and another had been in a fight with a guard.<sup>3</sup>

Upon arriving in Albany, the plaintiffs were met by a team of ten correctional officers wearing riot gear and green paramilitary uniforms. The officers began to repeatedly punch, beat, and verbally berate the plaintiffs, threatening to kill them if they did not comply with instructions. The officers then accused all four men of having contraband hidden in their rectums. Despite the fact that the New York Department of Corrections forbids nonconsensual rectal cavity searches in all circumstances, the guards announced that they were going to force the alleged contraband out of the plaintiffs' bodies.<sup>4</sup>

One plaintiff was pepper sprayed at close range and forced to bend over, at which point a guard repeatedly thrust a baton into his anus. A guard then electrocuted him twice with a taser, forcing him to involuntarily defecate. Now incapacitated and covered in his own feces, the plaintiff was again penetrated (this time by a guard's fingers) and electrocuted two additional times before being led to his cell. Following this assault, the plaintiff was denied access to medical care even though his rectum bled for weeks. Finally, after months of continued neglect and abuse, the plaintiff was compelled to sign a plea deal

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<sup>1</sup> Complaint with Jury Demand at 7, *Washington v. City of New York*, No. 18-cv-12306, 2019 U.S. Dist. (S.D.N.Y. 2019) [hereinafter *Complaint with Jury Demand*].

<sup>2</sup> *Id.* at 27, 36, 48, 56.

<sup>3</sup> *Id.* at 1–2, 28, 36.

<sup>4</sup> *Id.* at 18–21. Best practices for preventing inmates from bringing contraband into a prison include isolating the inmate until the contraband leaves their body or seeking the assistance of a qualified medical professional who can remove the contraband with the inmate's consent. In no case should a prison guard without medical training attempt to remove contraband from a person's rectum without their consent. *Id.* at 20–21; see also WORLD MED. ASS'N, *WMA Statement on Body Searches of Prisoners* (Feb. 17, 2017), <https://www.wma.net/policies-post/wma-statement-on-body-searches-of-prisoners/> [<https://perma.cc/SUX8-QPUD>] (describing guidelines of how searches of prisoners by physicians should be carried out and under what circumstances).

(pleading guilty to possession of a controlled substance in the third degree) in order to be transferred into a different prison facility.<sup>5</sup>

Two of the other plaintiffs allege similar sexual abuse, stating that prison guards inserted their fingers into the plaintiffs' anal cavities without their consent. Another plaintiff was forced to defecate on the floor in front of the guards. All four plaintiffs claim that they were severely beaten during and after the intake procedure, and that they were denied medical care for bleeding rectums and other body parts. Throughout the entire experience prison guards also repeatedly dehumanized the plaintiffs using racial slurs, including "monkey" and "n— —."<sup>6</sup>

## I

### RECONTEXTUALIZING SODOMY

How does this story fit into traditional narratives about the status of sodomy in American legal history? After all, many states continue to use the terms "sodomy" or "forcible sodomy" to refer to anal rape.<sup>7</sup> At the same time, however, popular discussions of sodomy focus entirely on the history of anti-LGBTQ sodomy bans, ignoring how sodomy as violence has also been used to create sexual hierarchies in American society.

The standard narrative about sodomy in American legal history begins in a pre-enlightened era when puritanical lawmakers outlawed sodomy as one of many unnatural and perverse "crimes against nature" that threatened public decency.<sup>8</sup> In 1986, the Supreme Court held in *Bowers v. Hardwick* that state sodomy bans did not violate the Constitution, ruling that there was no federal "right to engage in homosexual

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<sup>5</sup> Complaint with Jury Demand, *supra* note 1, at 51–56.

<sup>6</sup> *Id.* at 59, 62. In October 2019, a settlement was announced in which the four plaintiffs would be awarded just under one million dollars. As part of the deal, New York City agreed to stop transferring young inmates to the Albany County Correctional Facility. Jan Ransom, *Beaten and Left in Solitary Confinement, He Thought He Would Die*, N.Y. TIMES (Oct. 20, 2019), <https://www.nytimes.com/2019/10/20/nyregion/rikers-inmates-solitary-lawsuit.html> [<https://perma.cc/J255-AXXH>].

<sup>7</sup> See, e.g., ALA. CODE § 13A-6-63 (2019).

<sup>8</sup> Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 AM. MED. ASS'N. J. ETHICS 916, 916–17 (2014) (quoting Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 9, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); see also WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 157 (1999) (discussing the history of sodomy during the pre-enlightened era).

sodomy.”<sup>9</sup> This decision was valid for seventeen years until the Supreme Court reversed the ruling in *Lawrence v. Texas*, declaring that sodomy bans were an unconstitutional invasion of privacy.<sup>10</sup> While opposition to sodomy still exists among select groups within American society, many believe that the law no longer reproduces anti-LGBTQ inequalities through the category of “sodomy.”<sup>11</sup>

This Note seeks to trouble this teleological narrative by demonstrating that the American legal system has long benefited from, and continues to benefit from, the extrajudicial use of sodomy to enforce hierarchies of state power.<sup>12</sup> While no court has ever expressly condemned a prisoner to be punished by sodomy, the practice is nevertheless a common tool by which prison guards, police officers, and other agents of state power control the bodies of those who are deemed deviant or unworthy of physical security and freedom.<sup>13</sup> As seen in the example above, sodomy remains an important form of disciplinary control today, being used by state agents like the correctional officers in Albany to produce “subjected and practised bodies” that are easier to manage and dominate.<sup>14</sup>

I begin this Note by exploring the different ways in which sodomy is used as a disciplinary technique in the United States today. This section includes discussions of prison rape,

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<sup>9</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); see also DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF Lawrence v. Texas* 257 (2012) (discussing the *Bowers v. Hardwick* decision in the context of *Lawrence v. Texas*); ESKRIDGE, *supra* note 8, at 149–52 (analyzing the impact of the *Bowers v. Hardwick* decision).

<sup>10</sup> *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); see also DAVID A. J. RICHARDS, *THE SODOMY CASES: Bowers v. Hardwick and Lawrence v. Texas* 108–14 (2009) (discussing the evolution of the Supreme Court’s makeup and the societal shifts that led to *Lawrence v. Texas* overturning *Bowers v. Hardwick*); Weinmeyer, *supra* note 8, at 919–20 (discussing the holding *Lawrence v. Texas*).

<sup>11</sup> See, e.g., James Kirchick, *The Struggle for Gay Rights Is Over*, ATLANTIC (June 28, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/battle-gay-rights-over/592645/> [<https://perma.cc/E9EN-BFKY>] (arguing, among other things, that the gay rights movement in America should abandon civil rights lawsuits in favor of intervening in non-Western countries where homosexuality is illegal); see also DAVID L. ENG, *THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY* 35–49 (2010) (discussing several critiques of *Lawrence* and post-*Lawrence* gay rights narratives).

<sup>12</sup> See I MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 3–10 (Robert Hurley trans., Pantheon Books 1978) (1976) (discussing the teleological narrative that society’s treatment of sexuality has progressed from a repressive Victorian mentality).

<sup>13</sup> See Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. TIMES (Dec. 29, 1993) at A11 (reporting on the rape crisis within prisons).

<sup>14</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 138 (Alan Sheridan trans., Pantheon Books 1977) (1975).

threats of prison rape, and the use of extrajudicial sodomy by police. Following this, I use an audience-focused framework to understand the diverse cultural meanings associated with disciplinary sodomy, drawing upon critical race and gender theories to unpack how masculinity, heterosexuality, and whiteness are hierarchically constructed through the use of sodomy.

In particular, I argue for using a three-tiered audience-focused framework to understand the various meanings of disciplinary sodomy. First, disciplinary sodomy is useful for prison staff and police officers on an *individual* level, acting as a language through which perpetrators can communicate to victims the gendered, sexual, and racial power hierarchies that exist inside prisons and police stations. Second, disciplinary sodomy is important on a *group* level, allowing prison staff and police officers to bond over the joint violation of taboos and to reinforce their heteromascularity in one another's eyes. Finally, disciplinary sodomy sends a message to victims' *communities* outside the prison or police station about the wider social and sexual order that exists in the United States, perpetuating systemic problems like overpolicing and overincarceration.

My purpose in writing this Note is not to provide an exhaustive list of every reason why sexual violence is used against male victims in the American penal system. While this Note presents several anecdotes to illustrate the phenomenon of disciplinary sodomy, writing about patterns of sexual violence (and particularly sexual violence against men) is difficult because of a general lack of reliable statistics.<sup>15</sup> Moreover, it goes without saying that while many perpetrators of sexual violence are straight white men—the general focus of my analysis here—perpetrators can come from other racial groups, genders, and sexual orientations.<sup>16</sup> Despite this, the anecdotes and data presented in this Note demonstrate a clear pattern of sodomy being used by straight white male law enforcement agents to systemically maintain order and discipline in the American carceral system, which is why they are the focus of this piece.

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<sup>15</sup> See *infra* note 31 and accompanying text.

<sup>16</sup> See, e.g., Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1638–39 (2012) (describing recent survey data suggesting that female correctional officers are actually responsible for the majority of staff-on-male inmate sexual assaults in some prisons).

## II

## DISCIPLINARY SODOMY AS AN AMERICAN PENAL TOOL

## A. Defining Sodomy

It is important to note that the exact meaning of the term “sodomy” has a long and complicated past.<sup>17</sup> In the words of Foucault, the “utterly confused category” of sodomy once had a much broader meaning that served as a catchall term for any kind of sexual deviancy.<sup>18</sup> For example, during the European Middle Ages sodomy could mean masturbation, anal sex between a man and a woman, sex with Jews or Turks, and sometimes even vaginal sex that did not conform to the missionary position.<sup>19</sup> Penetrative sex acts between men were also frequently categorized as a form of sodomy, with religious and secular thinkers enacting a variety of punitive measures over time to discourage and punish sex acts between men.<sup>20</sup>

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<sup>17</sup> This section is, of course, a very short operational summary of a much longer historical and discursive project that many others have already carried out. See generally WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003 at 100–111, 154–161 (2008) (providing background history of sodomy laws in America); RECLAIMING SODOM 1 (Jonathan Goldberg ed., 1994) (providing a historical analysis of sodomy and law).

<sup>18</sup> FOUCAULT, *supra* note 12, at 38, 101.

<sup>19</sup> ESKRIDGE, *supra* note 8, at 157; HUMAN RIGHTS WATCH, THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM 13 (2008); ROBERT MILLS, SEEING SODOMY IN THE MIDDLE AGES 3 (2015); David Clark, *Discourses of Masturbation: The (Non)solitary Pleasures of the (Medieval) Text*, 20 MEN & MASCULINITIES 453, 462–64 (2017).

<sup>20</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 19, at 13–19 (discussing sodomy laws during British Colonialism); MILLS, *supra* note 19, at 271, 286–90 (analyzing how sodomy was viewed and punished during the European Middle Ages). At the same time, however, anal rape has been used throughout human history to control and humiliate men who are deemed criminal or inferior. For example, Fatimid caliph al-Hakim bi-Amr Allah, who ruled in Cairo from 996 to 1021, reputedly commanded his slave Mas’ud to sodomize male merchants who cheated their clients. JOSEPH A. MASSAD, DESIRING ARABS 303 n.116 (2007); PAUL E. WALKER, CALIPH OF CAIRO: AL-HAKIM BI-AMR ALLAH, 996-1021 at 10, 247–50 (2009). The Catholic Inquisition similarly used a torture implement called the Judas Cradle, a sharp pyramid-shaped block onto which a naked victim would be lowered until it penetrated his anus, often causing death. SUSAN GUBAR, JUDAS: A BIOGRAPHY 137–38 (2009). During World War Two, Nazi policies against homosexuality led to the internment of thousands of allegedly homosexual men, some of whom were sodomized by concentration camp guards as a form of torture. Harry Oosterhuis, *Male Bonding and Homosexuality in German Nationalism*, 22 J. HOMOSEXUALITY 241, 248 (1991). Moreover, the anal rape of men has been a feature of numerous wars and armed conflicts in every part of the world. Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT’L L.J. 639, 643–44 (2015).

Many American sodomy bans were inherited from English laws prohibiting “unnatural” sex acts.<sup>21</sup> These laws often did not use the word “sodomy,” instead preferring vague circumlocutions like “crimes against nature” that could apply to a variety of sexual acts seen to threaten public decency and morality.<sup>22</sup> While several states reformed their criminal statutes in the 1960s and 70s to explicitly define “sodomy” as homosexual sex,<sup>23</sup> other courts simply read anti-sodomy statutes as only applying to homosexual people.<sup>24</sup> This process of judicial specification both expanded the crime of sodomy (often including non-penetrative lesbian sex acts in the definition) while simultaneously narrowing the crime so as to only affect homosexuals.<sup>25</sup> However, at the end of the day these laws were not motivated by the desire to prohibit anal sex; instead, they served as “a symbolic message of disdain directed toward the people thought to commonly engage in sodomy.”<sup>26</sup>

In this Note I use the term “disciplinary sodomy” to refer to the use of penetrative anal rape as a method of maintaining societal control in the United States. I have chosen “disciplinary sodomy” (instead of “disciplinary same-sex anal rape”) to underscore the fact that the violence discussed in this Note is motivated by the same kinds of repressive sexual regimes that inspired sodomy bans. In other words, just as sodomy bans created a second-class category of citizen with fewer rights and privileges,<sup>27</sup> disciplinary sodomy similarly creates second-class

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<sup>21</sup> CARPENTER, *supra* note 9, at 3–5; *see also* Orna Alyagon Darr, *Narratives of “Sodomy” and “Unnatural Offenses” in the Courts of Mandate Palestine (1918–48)*, 35 *LAW & HIST. REV.* 235, 242–44 (2017) (describing Palestinian sodomy laws during the British Mandate).

<sup>22</sup> ESKRIDGE, *supra* note 8, at 109; Weinmeyer, *supra* note 8, at 916–17. This hesitation to even name the crime of sodomy was also widespread in the United Kingdom before the American Revolution. *See* RICHARDS, *supra* note 10, at 3 (citing William Blackstone’s circumlocutory way of describing the “crime not fit to be named”). *But see* Stephen Robertson, *Shifting the Scene of the Crime: Sodomy and the American History of Sexual Violence*, 19 *J. HIST. SEXUALITY* 223, 233 (2010) (arguing that many sodomy prosecutions in colonial America were for rape, not consensual sexual acts).

<sup>23</sup> ESKRIDGE, *supra* note 8, at 106.

<sup>24</sup> *Id.*; CARPENTER, *supra* note 9, at 16.

<sup>25</sup> CARPENTER, *supra* note 9, at 12–16, 161; *see also* RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 47–58 (1992) (describing the diverse ways in which laws banning “unnatural” sex were interpreted to include lesbian sex acts in different US jurisdictions).

<sup>26</sup> CARPENTER, *supra* note 9, at 8.

<sup>27</sup> *Id.*

citizens inside prisons and police stations who are symbolically subjugated through the systematic use of sexual violence.<sup>28</sup>

## B. Prison Rape

The sexual assault of male prisoners may be the most common way in which sodomy operates as a disciplinary technique.<sup>29</sup> In prisons, sodomy serves two functions. First, the reality of prison rape creates and reinforces dominant hierarchies of power inside American prisons, with correctional officers physically and symbolically dominating inmates through the use of sexual violence. At the same time, the threat of being raped in prison is also leveraged by state agents as part of a wider carceral campaign against marginalized communities, with prosecutors and police officers using threats of sodomy to scare individuals into signing plea deals or obeying police orders.

An estimated 200,000 inmates experience some form of sexual violence every year in American prisons,<sup>30</sup> affecting one in every five incarcerated men.<sup>31</sup> Despite this omnipresent threat, judges continue to punish men with lengthy sentences in dramatically overcrowded prisons, effectively subjecting a significant proportion of these men to prison rape.<sup>32</sup> Moreover,

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<sup>28</sup> That is not to say that other forms of sexual violence (e.g., enforced masturbation, rape committed by women against women) cannot be used to reinforce hierarchies of state power. Rather, my goal here is limited to explaining how penetrative male sexual violence is used in the modern American carceral system to control individuals and communities viewed as deviant.

<sup>29</sup> This Note obviously focuses on the phenomenon of male-on-male sexual assault, but female and non-binary inmates also experience high rates of rape in prison that should not be ignored. See MICHAEL SINGER, PRISON RAPE: AN AMERICAN INSTITUTION? 46–47 (2013). Additionally, throughout this Note I have chosen to use the umbrella term “prison rape” to refer to rape that occurs in all kinds of American correctional facilities, including prisons, jails, and detention centers throughout the United States.

<sup>30</sup> JUST DETENTION INT’L, SEXUAL ABUSE IN DETENTION AND THE LAW (2013) <https://justdetention.org/wp-content/uploads/2015/10/FS-Sexual-Abuse-in-Detention-and-the-Law.pdf> [<https://perma.cc/BZ7P-MMMD>].

<sup>31</sup> STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 3 (2006), <https://justdetention.org/wp-content/uploads/2015/10/In-The-Shadows-Sexual-Violence-in-U.S.-Detention-Facilities.pdf> [<https://perma.cc/BZ7P-MMMD>]. Reliable statistics about nationwide rates of sexual violence, including rates of disciplinary sodomy against male inmates, are difficult to obtain because the stigma that many male inmates face causes under-reporting. See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POLY REV. 1, 68 (2010); see also T.J. Parsell, *Unsafe Behind Bars*, N.Y. TIMES (Sept. 18, 2005), <https://www.nytimes.com/2005/09/18/opinion/nyregionopinions/unsafe-behind-bars.html> [<https://perma.cc/KZ5Z-RSKC>].

<sup>32</sup> Overcrowded prisons significantly increase the risk of prison rape, as fewer correctional officers are tasked with controlling a large and physically un-

men who have never been convicted of a crime (like the four pretrial detainees in the anecdote that opened this Note) can be sexually assaulted while awaiting trial.<sup>33</sup> Even a short stay in a local jail can put a person at risk of prison rape, with potentially life-changing medical and emotional consequences.<sup>34</sup>

Prison rapists can be members of staff or other inmates and tend to target men who are perceived as weak or less masculine.<sup>35</sup> As such, LGBTQ individuals face a much higher rate of sexual assault than the general prison population.<sup>36</sup> Inmates who are disabled, minors, or unable to speak English also face higher rates of victimization due to their perceived inability to defend themselves or report their experiences.<sup>37</sup> Inmates who have already experienced rape are at a much higher risk of additional assault, since news about the rape spreads quickly and marks victims as targets.<sup>38</sup> While men of all races can be sexually assaulted in prison, survey data seem to suggest that victims of staff-on-inmate sexual violence are most frequently Black, while victims of inmate-on-inmate sexual violence are most frequently multiracial.<sup>39</sup>

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restricted prison population. Christopher Hensley, *Introduction: Life and Sex in Prison*, in *PRISON SEX: PRACTICE AND POLICY* 1, 5–6 (Christopher Hensley ed., 2002).

<sup>33</sup> This includes male victims who were sexually assaulted because they were unable to pay bail. Donaldson, *supra* note 13; see also JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS AND CRIMINAL JUSTICE* 114–16, 126 (9th ed. 2010) (noting the impact of race and socioeconomic status on the likelihood of being granted bail and ability to pay bail if granted).

<sup>34</sup> See Carolyn Marshall, *Panel on Prison Rape Hears Victims' Chilling Accounts*, N.Y. TIMES (Aug. 20, 2005), <https://www.nytimes.com/2005/08/20/politics/panel-on-prison-rape-hears-victims-chilling-accounts.html> [<https://perma.cc/W8QZ-E2U9>]. This danger has been acknowledged by many judges, including the justices of the Supreme Court. For example, in their dissenting opinion in *U.S. v. Bailey*, Justices Blackmun and Brennan stated that “[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.” *United States v. Bailey*, 444 U.S. 394, 421 (1980).

<sup>35</sup> See Buchanan, *supra* note 31, at 13.

<sup>36</sup> See *id.*; Lauren Zitsch, Note, *Where the American Dream Becomes a Nightmare: LGBT Detainees in Immigration Detention Facilities*, 22 WM. & MARY J. WOMEN & L. 105, 110 (2015).

<sup>37</sup> See STOP PRISONER RAPE, *supra* note 31, at 15; Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), [www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html](http://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html) [<https://perma.cc/ASR8-7F9C>]; Alice Sperti, *Detained, Then Violated*, INTERCEPT (Apr. 11, 2018, 12:11 PM), [www.theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/](http://www.theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/) [<https://perma.cc/G2GW-UNJ2>].

<sup>38</sup> See Helen M. Eigenberg, *Prison Staff and Male Rape*, in *PRISON SEX: PRACTICE AND POLICY*, *supra* note 32, at 49, 49–50.

<sup>39</sup> Buchanan, *supra* note 31, at 60–61.

Following an assault, victims of disciplinary sodomy frequently lack access to proper medical support for the physical and psychological harm done to them.<sup>40</sup> Anal rape can require reparative surgery or leave long-lasting wounds which can reopen and bleed.<sup>41</sup> Victims might similarly contract a sexually transmitted infection that would require medical treatment.<sup>42</sup> Rape is also frequently accompanied by severe psychological and emotional trauma related to the violence, including deep feelings of shame, suicidal thoughts, sleeplessness, loss of appetite, and more.<sup>43</sup> The gendered nature of anal rape can also result in victims feeling displaced from their gendered identity as a man, especially if a victim has an erection or ejaculates during the assault.<sup>44</sup> Other victims may lose interest in sex or experience impotence during consensual sexual encounters later in life.<sup>45</sup> All of this trauma can be life-changing—“un-making” and “obliterat[ing]” a victim’s sense of personhood, autonomy, and agency for many years.<sup>46</sup>

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<sup>40</sup> See, e.g., Complaint with Jury Demand, *supra* note 1, at 51–62; HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 43 (2001).

<sup>41</sup> See Sarah K. Chynoweth, Julie Freccero, & Heleen Touquet, *Sexual Violence Against Men and Boys in Conflict and Forced Displacement: Implications for the Health Sector*, 25 REPROD. HEALTH MATTERS 90, 92 (2017). Throughout this Note I have chosen to use literature about both American and non-American cases of sexual violence to illustrate the effect of disciplinary sodomy. This is a conscious choice, as analyses of American politics often ignore important research that has been done about identical topics outside of North America. Americans are just as capable of perpetrating horrific sexual violence as human beings from other parts of the world, and the disciplinary logic motivating sexual violence in different cases is often very similar. See JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 3–5 (2017) (discussing how Americans often view themselves as “exceptional” regarding sexuality and sexualized violence).

<sup>42</sup> See Kevin Medina & Brian Nguyen, *Acknowledged but Ignored: A Critical Race Theory Approach to the Prison Rape Elimination Act*, 2 QUEER CATS J. LGBTQ STUD. 59, 64 (2018).

<sup>43</sup> See Pauline Oosterhoff, Prisca Zwanikken, & Evert Ketting, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, 12 REPROD. HEALTH MATTERS 68, 71 (2004); Parsell, *supra* note 31.

<sup>44</sup> See Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers’ Attitudes Toward Rape in Prison*, 69 PRISON J. 39, 42 (1989); Harriet Gray, Maria Stern & Chris Dolan, *Torture and Sexual Violence in War and Conflict: The Unmaking and Remaking of Subjects of Violence*, 46 REV. INT’L STUD. 197, 203 (2020); Philipp Schulz, *Displacement from Gendered Personhood: Sexual Violence and Masculinities in Northern Uganda*, 94 INT’L AFF. 1101, 1103–07 (2018).

<sup>45</sup> See Oosterhoff, Zwanikken, & Ketting, *supra* note 43, at 71.

<sup>46</sup> See Gray, Stern & Dolan, *supra* note 44, at 6–7; see also Richard S. Jones & Thomas J. Schmid, *Inmates’ Conceptions of Prison Sexual Assault*, 69 PRISON J. 53, 57 (1989).

### 1. *Disciplinary Sodomy in Prison*

Men in prison are sometimes sodomized by prison officials, often in response to some kind of real or perceived disobedience.<sup>47</sup> Take, for example, the experience of one inmate who was assaulted during his incarceration in Illinois:

The abuse began in August 2014, when a corrections officer became verbally abusive towards me. I wrote a grievance, which led to a campaign of harassment by him and other members of the staff. Every time the officer saw me, he used racist and homophobic slurs and threats. . . .

[A few months later] I was called for a visitation, and the officer who harassed me was in charge of performing strip searches before visits. As I undressed, he began using racist and homophobic slurs to humiliate me. He told me to turn around and bend over at the waist. Then he yelled out loudly, "What's this?" before proceeding to place the end of an ink pen inside my rectum.

"You better not move. If you do I'll terminate your visit right now," he said, while pushing the ink pen deeper, over and over again. "That wasn't so bad," he said, after pulling the pen out. He had this wicked, evil grin on his face. I'll never forget that look on his face. I've had nightmares of that grin.<sup>48</sup>

While the exact number of staff-on-inmate rapes is unknown, the most recent report from the Bureau of Justice Statistics states that more than half of prisoner allegations of sexual abuse involved prison staff (54% or 36,578 over four years).<sup>49</sup> While the Eighth Amendment, state and federal laws, and internal prison regulations all prohibit the sexual abuse of inmates, "an edifice of 'near-insurmountable' constitutional, statutory and common-law obstacles to prisoner litigation immunizes correctional authorities against enforcement of these

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<sup>47</sup> See Singer, *supra* note 29, at 53–56.

<sup>48</sup> *Survivor Stories: Gregory*, JUST DETENTION INT'L, <https://justdetention.org/story/gregory/?pageno=6> [<https://perma.cc/6FQJ-DGDM>] (last visited June 7, 2020).

<sup>49</sup> See RAMONA R. RANTALA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251146, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15, at 7 (2018); see also Kim Shayo Buchanan, *E-race-ing Gender: The Racial Construction of Prison Rape*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 187, 189–91 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (noting that studies show there are higher rates of staff-on-inmate sexual abuse than inmate-on-inmate); Buchanan, *supra* note 31, at 68 (discussing problems with the data on sexual abuse in American detention facilities, including racial biases that may affect which allegations of sexual abuse are substantiated by prison staff).

legal rules.”<sup>50</sup> Moreover, some federal regulations about prison rape do not apply to many immigration facilities, parole officers, or informal correctional facilities like halfway houses.<sup>51</sup> As such, many incarcerated victims of staff-on-inmate rape lack access to justice, with formal complaints being ignored by local prosecutors or even covered up by prison officials.<sup>52</sup> In other cases, prison rape allegations are handled administratively, often failing to resolve the structural forces that led to the violence in the first place.<sup>53</sup>

While staff-on-inmate rape is a frequent occurrence, so is inmate-on-inmate rape.<sup>54</sup> While some inmates choose to rape other men of their own volition, prison guards can also be complicit in the act, blaming the victim for attracting attention or even encouraging sexual assault by certain prisoners.<sup>55</sup> In fact, the prevalence of rape among prisoners can be a management tool for officials to control the prison population and force resistant inmates to be more submissive.<sup>56</sup> Consider, for ex-

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<sup>50</sup> Buchanan, *supra* note 31, at 6–7 (footnote omitted).

<sup>51</sup> See Chantiri Duran Resendiz, *Effects of Privatization of Immigration Detention in the Lives of Detained Transgender Latina Immigrants*, 30 HARV. KENNEDY SCH. J. HISP. POLY 39, 46 (2018) (“The standards require that any ‘new contracts, contract renewals or substantive contract modifications’ comply with these standards, but unfortunately, most of Department of Homeland Security’s contracts have auto-renewals or will not be up for renewal for decades. This means that many immigrants in DHS custody are housed in facilities that will never be required to comply with the [Prison Rape Elimination Act] standards.”); JUST DETENTION INT’L, *supra* note 30, at 2.

<sup>52</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 40, at 143–58; Alysia Santo, *Preying on Prisoners*, MARSHALL PROJECT (June 17, 2015, 7:15 AM), [www.themarshallproject.org/2015/06/17/preying-on-prisoners](http://www.themarshallproject.org/2015/06/17/preying-on-prisoners) [<https://perma.cc/WJA7-7WCB>]; Speri, *supra* note 37. For guard-on-inmate rape cases that do make it to court, the crime is often downgraded to “sexual misconduct,” with prosecutors arguing that the abuse was merely illicit sex between two consenting adults. MICHAEL A. SMYTH, *PRISON RAPE: LAW, MEDIA, AND MEANING* 139, 143 (2011). However, some lawsuits have been successful against sexually abusive prison staff. See, e.g., Robert W. Dumond & Doris A. Dumond, *Training Staff on Inmate Sexual Assault*, in *PRISON SEX: PRACTICE AND POLICY* 89, *supra* note 32, at 96–99.

<sup>53</sup> See STOP PRISONER RAPE, *supra* note 31, at 19.

<sup>54</sup> See RANTALA, *supra* note 49, at 1, 7. For a much more in-depth theorization of inmate-on-inmate sexual violence in prison, see generally [Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006) (discussing how incarceration is a form of sexual punishment and proposing possible reforms to the carceral system).

<sup>55</sup> Take, for example, one victim who reported his rape and was told “[t]his is prison. . . . [s]top being gay.” Lovisa Stannow, *Standing By as Prisoners Are Raped*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/opinion/prison-rape-sexual-violence.html> [<https://perma.cc/Q2K6-X46U>].

<sup>56</sup> See Christian Parenti, *Rape as a Disciplinary Tactic*, SALON (Aug. 23, 1999, 8:00 PM), [https://www.salon.com/1999/08/23/prisons\\_3/](https://www.salon.com/1999/08/23/prisons_3/) [<https://perma.cc/FPG9-4GZX>] (describing, among other horrors, how prison guards knowingly

ample, the story of Eddie Dillard, a young inmate who lashed out at a prison guard and was then punished with sodomy:

Dillard was transferred to the cell of Wayne Robertson, better known as the “Booty Bandit.” For a time, his vocation was beating, torturing and sodomizing fellow inmates while prison guards looked the other way. This psychopathic serial rapist was the guards’ resident enforcer, one whose specialty was reigning in abrasive young toughs.

Dillard protested the transfer . . . . [but] [f]or the next several days Robertson beat, raped, tortured and humiliated Dillard, tearing open his rectum in the process. Guards and other inmates listened to the echoes of the young man screaming, crying for help and begging for mercy.

[In the end,] Robertson . . . received new tennis shoes and extra food for his services.<sup>57</sup>

Disciplinary sodomy can also take the form of bodily searches and invasive medical procedures in prison.<sup>58</sup> As seen in the example that opened this Note, the claim that contraband has been hidden inside a person’s rectum can provide the pretext for a dehumanizing bodily search. Prison medical staff can also coercively withhold medication until inmates engage in sex or allow penetrative medical examinations in the absence of proper consent.<sup>59</sup>

## 2. Prison Rape as Threat

Even if prison guards refrain from physically assaulting an inmate, the threat of sodomy nevertheless plays an important role in enabling state agents to coerce individuals into compliance. Take, for example, the case of Jolonta Little, a disabled teenager who was arrested in 2008 for allegedly stealing a car from an elderly woman.<sup>60</sup> Police woke Little at 7:00 a.m., took him to the police station in his underwear, and chained three of his limbs to the floor of the interrogation room. When Little denied stealing the car, his interrogators turned up the pres-

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transferred resistant prisoners to the cell of a serial rapist who would “re-educate” them). Prison guards can also overlook or ignore threats to prisoners, ignoring requests for protective care until it is too late. See Lilah Wolf, *Purgatorio: The Enduring Impact of Juvenile Incarceration and a Proposed Eighth Amendment Solution to Hell on Earth*, 14 STAN. J. C.R. & C.L. 89, 91–92 (2018).

<sup>57</sup> Parenti, *supra* note 56.

<sup>58</sup> See Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 69, 83–93 (2015); see also Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1201 (2013).

<sup>59</sup> Arkles, *supra* note 58, at 87–93; Santo, *supra* note 52.

<sup>60</sup> Little v. United States, 125 A.3d 1119, 1121–23 (D.C. Cir. 2015).

sure, telling him that he would be sexually assaulted in prison if he did not confess.<sup>61</sup> The interrogators talked to Little about his godbrother (who had recently been raped in prison) and suggested that if he did not cooperate, Little would end up in a facility far from his family. If he confessed, however, the detectives falsely promised him that he could go free. Lacking access to legal counsel and faced with the threat of prison rape, Little confessed to the crime and was later convicted of carjacking, robbery, and aggravated assault because of the confession.<sup>62</sup>

Because prison is widely believed to be a site of unchecked rape, police officers and detectives are able to use that fear to coerce men into “cooperating” against their own interests. Prosecutors also benefit from this fear, using the threat of sodomy to negotiate unfair plea bargain agreements.<sup>63</sup> For example, in 1997 a prosecutor in Pennsylvania threatened two Canadian men with harsh prison conditions if they did not voluntarily comply with the extradition request that his office had issued, publicly announcing that they would “be the boyfriend of a very bad man if [they] wait[ed] out [their] extradition.”<sup>64</sup>

The continued existence of prison rape is also seen as a benefit by some given its perceived deterrent value.<sup>65</sup> For example, beginning in the 1960s the Scared Straight program brought children to prisons, where former convicts would scream at them in graphic detail about the reality of “homosexual rapes” in prison (e.g., “when one is finished the others will come in and there will be 15 mother[fuckers] [fucking] you”).<sup>66</sup>

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<sup>61</sup> *Id.* at 1124–26.

<sup>62</sup> Little’s convictions were later reversed by the District of Columbia Court of Appeals. *Id.* at 1134.

<sup>63</sup> See SINGER, *supra* note 29, at 80; see also John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 15 (1978) (discussing how torturous plea bargains can compel individuals to plead guilty to avoid greater risks of longer prison sentences).

<sup>64</sup> *United States v. Cobb*, [2001] 1 S.C.R. 587, 594 (Can.). In the same interview, the prosecutor also touted the results of these violent threats, claiming “out of the 89 people we’ve indicted so far, approximately 55 of them have said, ‘We give up.’” *Id.*

<sup>65</sup> See HUMAN RIGHTS WATCH, *supra* note 40, at 262–64; Elizabeth Stoker Bruenig, *Why Americans Don’t Care About Prison Rape*, NATION (Mar. 2, 2015), <https://www.thenation.com/article/why-americans-dont-care-about-prison-rape/> [<https://perma.cc/49JU-RGAM>].

<sup>66</sup> SMYTH, *supra* note 52, at 27–28 (quoting SCARED STRAIGHT! (GOLDEN WEST TELEVISION 1978)). Sometimes inmates would do more than yell at children, such as the 14-year-old who was gang-raped by five prisoners as part of a judge-ordered deterrence program in Canada. Mack Lamoureux, *Man Awarded £100,000 After Gang Rape During ‘Scared Straight’ Programme*, VICE (Dec. 10,

Scared Straight programs received significant government funding throughout the twentieth century despite evidence that the programs actually increase a minor's likelihood to commit crime.<sup>67</sup>

Finally, narratives about prison rape have become so commonplace that they are often comedic—being played for laughs on television and in movies.<sup>68</sup> This societal acceptance of prison rape has even extended to board games, as Michael Singer points out in his analysis of the game “Don't Drop the Soap” where the goal is to avoid being raped by rival gang members in a fictional prison.<sup>69</sup> As Buchanan has argued, “Such jokes imply, none too subtly, that prison rape is part of the punishment for criminal wrongdoing. At the same time, they send a message to the listener: If you don't want to get raped, you better obey the law.”<sup>70</sup>

### C. Police Brutality

Disciplinary sodomy can also be used by police officers against unincarcerated men and boys.<sup>71</sup> Take, for example,

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2018, 3:45 AM), [www.vice.com/en\\_uk/article/zmdw73/man-awarded-pound100000-after-gang-rape-during-scared-straight-programme](http://www.vice.com/en_uk/article/zmdw73/man-awarded-pound100000-after-gang-rape-during-scared-straight-programme) [<https://perma.cc/F4FQ-9CF9>].

<sup>67</sup> See ANTHONY PETROSINO ET AL., *Scared Straight' and Other Juvenile Awareness Programs for Preventing Juvenile Delinquency*, COCHRANE DATABASE SYSTEMATIC REVIEWS, 2013, at 1, 2, 14–16.

<sup>68</sup> See Jonathan McIntosh, *Sexual Assault of Men Played for Laughs – Part 1 Male Perpetrators*, YOUTUBE (Feb. 11, 2019), [https://youtu.be/uc6QxD2\\_yQw](https://youtu.be/uc6QxD2_yQw) [<https://perma.cc/RZU5-DEPV>].

<sup>69</sup> See SINGER, *supra* note 29, at 81–82. The flawed cultural belief that prison rapists are “gang members” also plays to many white middle-class American fears about being sexually victimized by men of color. Given this fear, is it any wonder that many white Americans are content to indiscriminately lock up thousands of Black and brown men? See Buchanan, *supra* note 31, at 13.

<sup>70</sup> Buchanan, *supra* note 31, at 12; see also John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881, 894 (2014) (discussing a prosecutor in New York City who posted pictures to his personal Facebook in which he simulates prison rape with a friend); Tom G. Palmer, *'Hi, My Name Isn't Justice, Honey,' and Shame on Lockyer*, L.A. TIMES (June 6, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-jun-06-me-6915-story.html> [<https://perma.cc/EWN5-8S82>] (telling the story of former California Attorney General Bill Lockyer who threatened Enron's CEO Kenneth Lay with rape for his perceived role in the 2001 California energy crisis).

<sup>71</sup> In addition to the examples listed in this section, see, e.g., Katherine M. Franke, *Putting Sex to Work*, in LEFT LEGALISM/LEFT CRITIQUE 290, 306 (Wendy Brown & Janet Halley eds., 2002) (discussing how white NYPD officers abducted and anally raped six Black immigrant men); *Sergeant Charged with Molestation*, SAN GABRIEL VALLEY TRIB. (Aug. 31, 2006), <https://www.sgytribune.com/2006/08/31/sergeant-charged-with-molestation/> [<https://perma.cc/6ETW-8NZM>] (discussing a former school resource police officer who was arrested for sodomizing two boys); *Survivor Stories: Micah*, JUST DETENTION INT'L, <https://justdeten->

the widely publicized case of Abner Louima, a Black Haitian immigrant, who was arrested and sodomized by Italian American police officer Justin Volpe in New York City in 1999.<sup>72</sup> While being processed at the police station, an unidentified officer pulled Louima's pants and underwear down before a room full of people.<sup>73</sup> Volpe then forced Louima to accompany him to the police station bathroom while another officer sneered, "You n—s have to learn how to respect police officers."<sup>74</sup> Once in the bathroom, Volpe and another officer kicked Louima in the testicles and sodomized him with a broomstick, perforating Louima's bladder and colon.<sup>75</sup> After some time Volpe removed the bloody broomstick from Louima's rectum and forced it down Louima's throat, breaking several teeth during the process.<sup>76</sup> Having finished the torture, Volpe escorted Louima to a holding cell and then went to brag about the incident to other police officers, showing them the feces-stained broomstick and telling them to smell it as proof that Volpe had indeed sodomized Louima.<sup>77</sup> Several hours later, Louima was finally taken to the hospital, where police claimed that Louima's injuries were the result of "abnormal homosexual activities" at a gay bar.<sup>78</sup> During the trial that eventually followed, Volpe's lawyer also questioned Louima's sexual orientation, falsely claiming that there was evidence of another

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tion.org/story/micah/?pageno=11 [https://perma.cc/5XBW-Z4GY] (last visited June 7, 2020) (describing how police sodomized and tortured a political activist in California). Disciplinary sodomy is part of a wider trend of police brutality and police sexual violence, affecting thousands of Americans every year. See also Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 222-223 (2015) (discussing the rate of police killings); Sophia Tesfaye, *The Police Brutality Epidemic that Goes Unnoticed: More than 1,000 Police Officers Fired over the Last Six Years for Sexual Misconduct*, SALON (Nov. 2, 2015, 10:52 PM (UTC)), [https://www.salon.com/2015/11/02/the\\_police\\_brutality\\_epidemic\\_that\\_goes\\_unnoticed\\_more\\_than\\_1000\\_police\\_officers\\_fired\\_over\\_the\\_last\\_six\\_years\\_for\\_sexual\\_misconduct/](https://www.salon.com/2015/11/02/the_police_brutality_epidemic_that_goes_unnoticed_more_than_1000_police_officers_fired_over_the_last_six_years_for_sexual_misconduct/) [https://perma.cc/MB9T-ZYSJ] (noting the prevalence of sexual assault by law enforcement).

<sup>72</sup> MUMIA ABU-JAMAL, HAVE BLACK LIVES EVER MATTERED? 47 (2017); Franke, *supra* note 71, at 302; Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1166-67 (1999).

<sup>73</sup> Paula Ioanide, *The Story of Abner Louima: Cultural Fantasies, Gendered Racial Violence, and the Ethical Witness*, 13 J. HAITIAN STUD. 4, 6 (2007).

<sup>74</sup> *Id.* (uncensored in original).

<sup>75</sup> *Id.* at 6-7. Some accounts state that Volpe used a plunger or mop handle. See, e.g., Alfieri, *supra* note 72, at 1166.

<sup>76</sup> Ioanide, *supra* note 73, at 7.

<sup>77</sup> Joseph P. Fried, *In Surprise, Witness Says Officer Bragged About Louima Torture*, N.Y. TIMES (May 20, 1999), <http://www.nytimes.com/1999/05/20/nyregion/in-surprise-witness-says-officer-bragged-about-louima-torture.html> [https://perma.cc/5ZSA-BE4R].

<sup>78</sup> Alfieri, *supra* note 72, at 1167; Ioanide, *supra* note 73, at 7.

man's DNA mixed in with Louima's feces at the police station bathroom.<sup>79</sup>

A similar incident occurred in Chicago in 2012. Angel Perez, a documentary filmmaker, was arrested and taken to a police station where he was shackled to a wall and interrogated for hours without access to a lawyer.<sup>80</sup> In addition to physically assaulting him, police threatened Perez with prison rape, claiming that they would send him to Cook County jail to be raped by gang members.<sup>81</sup> After several continued hours of torture:

The officers told [Perez] that if he refused to cooperate with them that they were going to give him a "little taste" of what he would be getting at the Cook County jail. They put [Perez] over a chair and pulled down his pants, and [one officer] said "I hear that a big black n—— dick feels like a gun up your ass."

Then [one officer] . . . inserted a cold metal object, believed to be one of officer's service revolvers, into [Perez's] rectum causing [him] severe pain and humiliation. The two officers laughed hysterically while inserting the object into [Perez's] rectum.

[One officer] then said "I almost blew your brains out." The officers told [Perez] that they would continue to insert the gun into his rectum until he cooperated with them.

[Perez] began to cry and agreed to cooperate with the officers.<sup>82</sup>

The use of disciplinary sodomy by police can be systematized, as it was in Chicago by Jon Burge. Between 1972 and 1991 Burge and his fellow police officers tortured over 100 Black men in order to coerce confessions from them.<sup>83</sup> Burge and his officers used a range of weapons to torture victims,

<sup>79</sup> Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 778 n.7 (2000). Ioanide also convincingly argues that Louima's status as a Haitian—a group widely-maligned in the United States as vectors for the spread of HIV—was part of the othering process borne of the intersection of his Black skin and foreign status that made him a target for the sexualized torture he experienced. Ioanide, *supra* note 73, at 7–10.

<sup>80</sup> Complaint at 3, *Perez v. City of Chicago*, 2015 U.S. Dist. (N.D. Ill. 2013) (No. 13-cv-04531) [hereinafter Complaint]; Rania Khalek, *The Chicago Man Accusing the Cops of Raping Him with a Gun*, VICE (Jan. 9, 2014, 10:30 AM), [https://www.vice.com/en\\_us/article/5gkga5/the-chicago-man-accusing-the-cops-of-raping-him-with-a-gun](https://www.vice.com/en_us/article/5gkga5/the-chicago-man-accusing-the-cops-of-raping-him-with-a-gun) [https://perma.cc/RVT9-EW2Q].

<sup>81</sup> Complaint, *supra* note 80, at 4–5.

<sup>82</sup> *Id.* at 5–6 (uncensored in original).

<sup>83</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 104 (2017); Kelly Hayes, *Chicago Police Torture: Explained*, APPEAL (Dec. 6, 2019), <https://theappeal.org/chicago-police-torture-explained/> [https://perma.cc/RDY6-URZR].

including electrical sex toys that they would insert inside their victims' rectums or place against their victims' exposed genitals.<sup>84</sup> Because of this torture, many of Burge's victims confessed to crimes they did not commit, leading to long jail sentences and eleven death sentences.<sup>85</sup>

Police officers have even used sodomy to humiliate and punish marginalized men during routine police stops.<sup>86</sup> For example, one researcher reported the results of an unconstitutional police stop during which a white cop stopped a Black man on a bike and accused him of possessing drugs.<sup>87</sup> After searching the man's possessions and clothing, the officer announced his intention to further search the Black man's body: "I bet you are hiding them under your balls. If you have drugs under your balls, I am going to fuck your balls up."<sup>88</sup> After putting on gloves and feeling around for the non-existent drugs hidden near the Black man's testicles, the police officer announced his intention to go further: "I bet you are holding them in the crack of your ass. You better not have them up your ass."<sup>89</sup> The police officer ordered the man to expose his anus while standing on the side of the road, at which point the officer inserted his fingers into the man's rectum. Finding nothing, the officer let the man go.<sup>90</sup>

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<sup>84</sup> Charles Hounmenou, *Monitoring Human Rights of Persons in Police Lockups: Potential Role of Community-Based Organizations*, 20 J. COMMUNITY PRAC. 274, 277–78 (2012); Peter C. Baker, *In Chicago, Reparations Aren't Just an Idea. They're the Law*, GUARDIAN (Mar. 8, 2019, 1:00 AM), <https://www.theguardian.com/news/2019/mar/08/chicago-reparations-won-police-torture-school-curriculum> [<https://perma.cc/7HUA-AEYN>].

<sup>85</sup> Hounmenou, *supra* note 84, at 278. While many of Burge's victims have been freed from prison, some remain. Moreover, while Burge was sentenced to prison for perjury, no officer involved in the systematic torture was ever convicted for their role in the violence. *Id.*

<sup>86</sup> KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 53, 66–73 (2d ed. 2009); Cooper, *supra* note 58, at 1200. *See also* Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited Terry Stops*, 54 IDAHO L. REV. 297, 312–13 (2018) (discussing how police sometimes grope people with impunity during firearm searches and other police stops); Aaron Morrison, *Illinois Man Alleges Police Illegally Forced Him to Undergo a Strip Search, Rectal Exam*, THE APPEAL (Dec. 19, 2019), <https://theappeal.org/illinois-man-alleges-police-illegally-forced-him-to-undergo-a-strip-search-rectal-exam/> [<https://perma.cc/JLW6-3MSF>] (describing a Black man who was illegally arrested and subjected to multiple humiliating rectal exams).

<sup>87</sup> Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 350–52 (2004).

<sup>88</sup> *Id.* at 351.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* For further commentary on this incident, see generally Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMI-

### III THE MEANINGS AND “AUDIENCES” OF DISCIPLINARY SODOMY

Why choose sodomy as a disciplinary technique? In other words, why would state agents choose to use anal rape instead of other forms of physical violence to enforce order inside prisons and police stations? Sodomy can be a messy form of punishment, sometimes requiring the cleanup of feces and blood or leaving behind physical scars that could be used as proof in a lawsuit.<sup>91</sup> Moreover, the prevalence of sodomy in prisons and police stations is paradoxical given the fact that many of these men publicly identify as heterosexual and would normally be uninterested in having consensual sex with other men.<sup>92</sup>

Why, then, has the use of disciplinary sodomy persisted in the American penal system? In this final section I offer a three-fold response to this question, focusing on the various *audiences* that perpetrators attempt to target through the use of sexual violence. First, disciplinary sodomy is useful for prison staff and police officers on an *individual* level, acting as a language through which perpetrators can communicate to victims the gendered, sexual, and racial power hierarchies that exist inside prisons and police stations. Second, disciplinary sodomy is important on a *group* level, allowing officers to bond over the violation of taboos and to reinforce their hetero-masculinity in one another’s eyes. Finally, disciplinary sodomy sends messages to victims’ *communities* outside the prison or police station about the wider social and sexual order that exists in the United States, reinforcing systemic problems like over-policing and over-incarceration.

#### A. The Individual Audience

First, disciplinary sodomy acts as a language through which state agents can communicate their power and dominance to individual victims.<sup>93</sup> Anal rape, as opposed to other

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NOLOGY & PUB. POL’Y 363, 363–74 (2004) (reframing the public policy debates about police searches).

<sup>91</sup> See Chynoweth, Freccero, & Touquet, *supra* note 41, at 92 (discussing the physical trauma that victims of sodomy may experience).

<sup>92</sup> See NOREEN ABDULLAH-KHAN, MALE RAPE: THE EMERGENCE OF A SOCIAL AND LEGAL ISSUE 87 (2008) (discussing heterosexual and masculine norms among police officers). See also JANE WARD, NOT GAY: SEX BETWEEN STRAIGHT WHITE MEN 35 (2015) (discussing how self-identified heterosexual men often engage in consensual and non-consensual sex with other men).

<sup>93</sup> See ABDULLAH-KHAN, *supra* note 92, at 17 (discussing the role of sexual violence in creating power hierarchies in prison).

nonsexual forms of violence, brings with it powerful normative meanings about sexuality and gender that define how men understand themselves and their places in the world.<sup>94</sup> By exploiting these norms, state agents are able to use their victims' bodies and identities to position themselves as dominant and powerful in the hierarchy of the prison or police station.<sup>95</sup> Because the gendered power relations inside prisons and police stations are not always evident, disciplinary sodomy renders these hierarchies visible by physically enacting them upon the bodies of victims.<sup>96</sup>

The hypermasculine setting of prisons and police stations creates a situation in which this form of communication is viewed as necessary by law enforcement.<sup>97</sup> Because prisons frequently have many more inmates than staff, power hierarchies are vital to maintaining a subdued and cooperative community.<sup>98</sup> By asserting values traditionally associated with masculinity (e.g., physical strength, violence, and humiliation of others) prison guards and police officers are able to reinforce their claims to masculinity, giving them the legitimacy that they think they need to control the prison population.<sup>99</sup>

This is especially important in situations where prison staff or police officers feel that their authority has been threatened (such as in the case of the Illinois inmate who filed a grievance

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<sup>94</sup> See Schulz, *supra* note 44, at 1111–12. See also Natalie Adler, 'It's Not About Sex, It's About Power' and Other Lies, THE ESTABLISHMENT (Nov. 20, 2018), <https://theestablishment.co/its-not-about-sex-its-about-power-and-other-lies/index.html> [<https://perma.cc/Z6GW-63SH>] ("Sexual violence is very much about sex—it is a particular way of hurting someone where they will stay hurt, since their wounds are discouraged from being publicly bandaged.").

<sup>95</sup> See David Eichert, "Homosexualization" Revisited: An Audience-Focused Theorization of Wartime Male Sexual Violence, 21 INT'L FEMINIST J. POL. 409, 416 (2019).

<sup>96</sup> See ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 27 (1985) (discussing how torture inflicts physical pain while also enforcing power hierarchies).

<sup>97</sup> See Ristroph, *supra* note 54, at 161 (describing the necessity of corporeal punishment to control in prisons).

<sup>98</sup> See Eamonn Carrabine & Brian Longhurst, *Gender and Prison Organisation: Some Comments on Masculinities and Prison Management*, 37 HOW. J. 161, 164–66 (1998) (discussing how masculinities, and conflicts about masculinity, are used to maintain order in prisons).

<sup>99</sup> See Frank Rudy Cooper, "Who's the Man?": Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 674 (2009); see also Cliff Cheng, *Marginalized Masculinities and Hegemonic Masculinity: An Introduction*, 7 J. MEN'S STUD. 295, 296–300 (1999) (discussing how masculinity is relational—existing on a spectrum with marginalized masculinities being seen as weaker or less manly than hegemonic masculinities); Ristroph, *supra* note 54, at 149–55 (discussing prison subcultures and how sexual hierarchies among inmates are (re)produced through sexual violence).

against a prison guard and was later sodomized). In these situations, disciplinary sodomy allows law enforcement agents to communicate their relative power and masculinity to their victims.<sup>100</sup> In other words:

Within prisons, . . . prison rape is about perpetrators expressing their power and domination against the inmates who are positioned in feminine and powerless categories . . . . Prison rape is a resource that [perpetrators] can draw on to arrange configurations of hegemonic masculinity when other resources are difficult to attain in order to construct patterns of hegemonic masculinities; this is especially likely to be the case given the confined spaces of prison.<sup>101</sup>

At the same time, however, masculinity and hegemonic dominion are fleeting values which must be continuously reasserted.<sup>102</sup> This is because masculinity is at its core “a positional claim” based upon “opposition to and competition with subordinated masculinities and femininities.”<sup>103</sup> An individual’s claim to hegemonic masculinity thus exists relative to the masculinities of other human beings in that person’s society, meaning that continued displays of strength and aggressiveness are necessary to maintain one’s status as consistently masculine.<sup>104</sup>

This need for continued displays of masculinity is complicated by the fact that there are few positive ways to demon-

<sup>100</sup> See Harris, *supra* note 79, at 791 (discussing how group violence strengthens that group’s claim to masculinity and hegemony).

<sup>101</sup> ALIRAZA JAVAID, *MALE RAPE, MASCULINITIES, AND SEXUALITIES: UNDERSTANDING, POLICING, AND OVERCOMING MALE SEXUAL VICTIMISATION* 62 (2018). Javaid focuses his analysis in the original quote on inmates as perpetrators, although the same logic applies to other types of perpetrators as well.

<sup>102</sup> See Vivien Miller, *Tough Men, Tough Prisons, Tough Times: The Globalization of Supermaximum Secure Prisons*, in *RACE, GENDER, AND PUNISHMENT: FROM COLONIALISM TO THE WAR ON TERROR* 200, 206 (Mary Bosworth & Jeanne Flavin eds., 2007); Michael Flood, *Men, Sex and Homosexuality: How Bonds Between Men Shape Their Sexual Relations with Women*, 10 *MEN & MASCULINITIES* 339, 341 (2008).

<sup>103</sup> Sandra Via, *Gender, Militarism, and Globalization: Soldiers for Hire and Hegemonic Masculinity*, in *GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES* 42, 43 (Laura Sjoberg & Sandra Via eds., 2010). While few men ever achieve the idealized standard of masculinity in a particular culture, the hegemonic idea of masculinity is nevertheless normative, serving as an ideal toward which all men are expected to strive. Men who cannot achieve hegemonic masculinity often turn to hypermasculine behaviors to compensate, including harassing “weaker” men, bragging about sexual exploits, and homophobia. See Cooper, *supra* note 99, at 686–87, 691–92.

<sup>104</sup> See R. W. CONNELL, *MASCULINITIES* 37 (2d ed. 2005); Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *TOWARD A NEW PSYCHOLOGY OF GENDER: A READER* 223, 223–24 (Mary M. Gergen & Sara N. Davis eds., 1997).

strate masculinity in a prison or police station.<sup>105</sup> Traditional law enforcement can be tremendously tedious, focusing on repetitive tasks and regulations that conflict with the heroic masculinity that many police officers and prison guards are socialized to expect.<sup>106</sup> The situation is even worse for inmates who are often deprived of “positive” ways to demonstrate their manhood (e.g., fatherhood, leadership, and economic autonomy).<sup>107</sup> Because of this, for many men in the carceral system the only way to assert masculine status is through the use of violence.

Additionally, because sodomy and gay male sexuality are understood by many in the United States as perverse or disgusting—rather than a commonplace component of human sexuality—perpetrators use disciplinary sodomy to position victims as second-class citizens by connecting victims’ bodies to the perverted category of “the homosexual.”<sup>108</sup> Sexuality, therefore, is not necessarily about whether a person is gay or straight; rather, sexuality is a form of societal power whereby some individuals are relationally constructed as “abnormal” and afforded fewer rights and benefits.<sup>109</sup> Disciplinary sodomy thus provides officers the opportunity to communicate to victims which kinds of bodies are deemed to be worthy of bodily integrity in the heteromascuine hierarchies that dominate prisons and police stations.<sup>110</sup>

The penetrative element of disciplinary sodomy is also full of meaning. This is because sex is understood in the United States as more than just an act. Rather, sex generates sexual identities which are seen as unchanging and constitutive of a person’s being.<sup>111</sup> Because penetrating is widely understood

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<sup>105</sup> See Frank Rudy Cooper, *Towards Multidimensional Masculinities Theory: Policing Henry Louis Gates*, in *EXPLORING MASCULINITIES: FEMINIST LEGAL THEORY REFLECTIONS* 81, 83 (Martha Albertson Fineman & Michael Thomson eds., 2013) (discussing how police officers engage with expectations of masculinity).

<sup>106</sup> See Anastasia Prokos & Irene Padavic, *There Oughtta Be a Law Against Bitches: Masculinity Lessons in Police Academy Training*, 9 *GENDER, WORK & ORG.* 439, 442 (2002).

<sup>107</sup> See Nancy E. Dowd, Nancy Levit & Ann C. McGinley, *Feminist Legal Theory Meets Masculinities Theory*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH*, *supra* note 49, at 25, 29 (listing the various ways in which a person can assert masculine status).

<sup>108</sup> See C. J. PASCOE, *DUDE, YOU’RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL* 61 (2007); Kimmel, *supra* note 104, at 236–37.

<sup>109</sup> See PASCOE, *supra* note 108, at 9–10.

<sup>110</sup> See JAVOID, *supra* note 101, at 9; *see also* Stannow, *supra* note 55 (discussing the sexual violence that occurs in prisons across the United States and the lack of transparency in auditing the prisons for compliance).

<sup>111</sup> FOUCAULT, *supra* note 12, at 43 (“The sodomite had been a temporary aberration; the homosexual was now a species.”). *See generally* Holly Hender-

as masculine/heterosexual/normal (while being penetrated is understood as effeminate/homosexual/perverted), the mechanics of disciplinary sodomy reinforce and communicate potent messages about power and dominance between a perpetrator and a victim.<sup>112</sup> As such, the act of being sodomized is construed as a negative “behavior” onto which observers can read perversion and malignancy, while the act of imposing sodomy on another man is understood as aggressive and powerful, and thus can be masculine and heterosexual.<sup>113</sup>

It is also important to note how disciplinary sodomy recreates racialized power hierarchies through the use of violence.<sup>114</sup> When an officer combines anal rape with homophobic and racist slurs, he communicates which bodies are deserving of bodily autonomy (i.e., those which are white/masculine/heterosexual) and which bodies are subjugated and defenseless (i.e., those which are non-white/effeminate/homosexual).<sup>115</sup> In this way, disciplinary sodomy, as well as other forms of systemic bigoted violence, makes visible the racial hierarchies that dominate prisons and police stations by enacting them upon victims’ bodies.<sup>116</sup>

Furthermore, many straight white men have tremendous anxiety about men of other races, which influences the deci-

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son, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER L. & JUST. 225 (2007) (presenting a more comprehensive analysis of how sex and power overlap during rape).

<sup>112</sup> See Buchanan, *supra* note 31, at 44. This is not to say that “penetrating” is always understood as masculine or heterosexual. Context is important. See AARON BELKIN, BRING ME MEN: MILITARY MASCULINITY AND THE BENIGN FACADE OF AMERICAN EMPIRE, 1898–2001 at 86 (2012) (describing a sexual assault in which the victim was forced to penetrate another man’s mouth); Jade Aguilar, *Pegging and the Heterosexualization of Anal Sex: An Analysis of Savage Love Advice*, 2 QUEER STUD. MEDIA & POPULAR CULTURE 275, 286 (2017) (describing the “straight” sex act of pegging, in which men construct themselves as masculine while being penetrated by their female sex partners); Franke, *supra* note 71, at 303 (describing how Justin Volpe was vilified by some as a “faggot” due to his use of sexualized violence).

<sup>113</sup> See KATHRYN BOND STOCKTON, BEAUTIFUL BOTTOM, BEAUTIFUL SHAME: WHERE “BLACK” MEETS “QUEER” 77 (2006) (discussing how being penetrated is understood by some as a behavior that reveals information about a person’s morality).

<sup>114</sup> See SALVADOR VIDAL-ORTIZ, BRANDON ANDREW ROBINSON & CRISTINA KHAN, RACE AND SEXUALITY 42 (2018) (arguing that modern concepts of race and sexuality intersect and must be analyzed together).

<sup>115</sup> See Koen Sloommaeckers, *Nationalism as Competing Masculinities: Homophobia as a Technology of Othering for Hetero- and Homonationalism*, 48 THEORY & SOC’Y 239, 242, 255–56 (2019) (discussing how biopolitical binaries create categories of people who are understood as relatively superior or inferior); see also *id.* at 244–45 (discussing how “technologies of Othering” reduce human beings to objects).

<sup>116</sup> See SCARRY, *supra* note 96, at 27 (analyzing how physical violence translates to power hierarchies).

sion to use disciplinary sodomy.<sup>117</sup> For example, racist stereotypes about Black men being inherently hypersexual and aggressive often lead to white officers feeling threatened or emasculated.<sup>118</sup> Disciplinary sodomy is thus a way for prison guards and police officers to assert their dominance over an individual victim, placing both men in a hierarchized matrix of power that replicates racist societal hierarchies outside the prison. In so doing, the individualized violence communicates to the victim that bodies like his have fewer rights and protections inside the prison walls, putting the victim “in his place” and assuaging white fears of inferiority.<sup>119</sup>

## B. Group Dynamics

The choice to use disciplinary sodomy can also be understood by looking to the group dynamics that exist inside prisons and police stations. Anal rape is a tool by which a group of perpetrators reaffirm their heteromascularity and belonging to each other while drawing clear lines between their group and the groups which they position as inferior and less deserving of physical protection.<sup>120</sup> This “us-versus-them” dynamic created by disciplinary sodomy works through reference to many of the same individualized racist and heterosexist cultural scripts mentioned above, while also allowing individuals to sort themselves into social groups that are consolidated through the use of violence.<sup>121</sup>

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<sup>117</sup> See, e.g., WARD, *supra* note 92, at 144–49 (analyzing how straight white men speak to, and sexually engage with, Black men as compared with other white men); Mireille Miller-Young & Xavier Livermon, *Black Stud, White Desire: Black Masculinity in Cuckold Pornography and Sex Work*, in *BLACK SEXUAL ECONOMIES: RACE AND SEX IN A CULTURE OF CAPITAL* 39, 41–45 (Adrienne D. Davis & BSE Collective eds., 2019) (detailing the white male attitude toward black males in the context of the “Mandingo archetype” in pornography); Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 353 (2016) (discussing the portrayal of Black men as “brutes” in the post-Civil War era).

<sup>118</sup> McGinley, *supra* note 71, at 243–44.

<sup>119</sup> See Mike King, *The ‘Knockout Game’: Moral Panic and the Politics of White Victimhood*, 56 RACE & CLASS 85, 88–90 (2015) (discussing white perceptions of victimhood).

<sup>120</sup> See PASCOE, *supra* note 108, at 107 (analyzing how boys in groups differed from individual boys in how they spoke about groups they viewed as inferior); Prokos & Padavic, *supra* note 106, at 446–48 (discussing the othering of women in the police academy).

<sup>121</sup> See Harris, *supra* note 79, at 798–99; Sloomaeckers, *supra* note 115, at 244–45; see also Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60, 70 (2017) (discussing how people organize themselves into social groups to navigate their beliefs).

Feminist scholars have demonstrated how prison guards and police officers are socialized into hypermasculine roles which mirror the kinds of militaristic masculinities expected of soldiers in combat scenarios.<sup>122</sup> However, these militaristic masculinities are paradoxical in their gendered expectations: while men are required to create intimate bonds of comradery with each other (so that adherents can stand strong and united against threats), they are also forbidden any kind of closeness that would resemble homosexuality and compromise their claims to masculinity.<sup>123</sup> Because navigating these two conflicting expectations can be extremely difficult, disciplinary sodomy provides an “interactional and institutionalized ritual[ ]” through which men can publicly reaffirm their belonging and heteromascularity to their peers.<sup>124</sup>

This group bonding element of disciplinary sodomy works through what Jane Ward calls “the erotic spectacle of repulsion.”<sup>125</sup> In other words, when heterosexual men approach repulsive homosexual sex the “right” way (i.e., by imposing, enduring, and repudiating it), doing so bolsters their claims to heteromascularity and belonging among their peers.<sup>126</sup> Thus, disciplinary sodomy (re)creates binaries of gender (masculine/feminine), sexuality (heterosexual/homosexual), and power (dominant/subjugated) against which perpetrators can define themselves in front of their peers and in relation to their victims.<sup>127</sup> This may explain, for example, why Justin Volpe was so eager to share the details of his crime with his fellow officers, showing them the feces-covered broomstick and telling them to smell it as proof. For Volpe, socialized into the masculine New York City police force, his use of disciplinary sodomy was meant to reassert his belonging in the group, demonstrating that he was manly enough to belong in the militarized police force.

Expanding upon the Volpe/Louima story, it is important to note that Volpe was not alone in his violence. Many officers likely knew about the assault while it was happening, hearing

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<sup>122</sup> See, e.g., Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1213–16 (2015); Susan L. Miller & Terry G. Lilley, *Proving Themselves: The Status of LGBTQ Police Officers*, 8 SOC. COMPASS 373, 373–75 (2014); Prokos & Padavic, *supra* note 106, at 442.

<sup>123</sup> See Harris, *supra* note 79, at 787–88, 793.

<sup>124</sup> PASCOE, *supra* note 108, at 158.

<sup>125</sup> WARD, *supra* note 92, at 153.

<sup>126</sup> *Id.* at 5.

<sup>127</sup> See BELKIN, *supra* note 112, at 183 (analyzing the need for distinction between groups to reinforce masculinity).

Louima's screams and doing nothing to stop it. Police officers even showed their support for the act by pulling down Louima's pants in the lobby, using racial slurs, helping to restrain Louima, and lying to hospital staff about the true cause of Louima's injuries. These facts demonstrate how violence can be a communal event wherein men draw clear boundaries between themselves and their "enemies" by jointly violating taboos and regulations against same-sex sexual violence.

This communal element of disciplinary sodomy is especially apparent when looking at gang rape, or rape by multiple perpetrators. When multiple perpetrators work together to enact violence upon the bodies of their victims, such as in the violence at Albany or the sexual assault of Angel Perez, disciplinary sodomy

allows [perpetrators] to demonstrate both sexual prowess and aggression (two important hyper-masculine traits) to others in the group. Perpetrators compete with one another to show superior strength and are unified by the experience, both during the violence and afterwards when perpetrators brag to others and discuss the event among members of the group. As such, gang rape can maintain social order, create bonds of loyalty and solidarity, and assert the importance of hyper-masculine traits. . . . [P]erpetrators can create a profound sense of belonging by consenting to violate strong cultural norms against violence and homosexuality, thus creating a lasting "us-versus-them" group mentality where military unity is more important than social taboos.<sup>128</sup>

The queer meanings associated with sodomy also work to draw clear lines between perpetrators and their victims. While many prison guards and police officers publicly identify as heterosexual, the existence of homosexuality is nevertheless an invisible but ever-present "spectre" of failed masculinity.<sup>129</sup> As such, "by performing or displaying homophobia" through the use of disciplinary sodomy, "men can consolidate their own hegemonic masculinity" and prove that they are not feminine or gay.<sup>130</sup>

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<sup>128</sup> Eichert, *supra* note 95, at 418 (citations omitted).

<sup>129</sup> See also JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 3 (1993) (arguing that the sexed subject is defined relative to—and through—the repudiation of other abject subjects); WARD, *supra* note 92, at 5, 153 (discussing the need to reaffirm masculinity while engaging in homosexual related acts).

<sup>130</sup> Sloommaeckers, *supra* note 115, at 247; Dowd, Levit & McGinley, *supra* note 107, at 29.

The racial elements of disciplinary sodomy also clearly demonstrate how this us-versus-them mentality inspires sexual violence in prisons and police stations. As Ward has explained, the heteromascularity of straight white men “is authenticated not only via expressions of homophobia and misogyny, but also through white dudes’ disidentification with men of color.”<sup>131</sup> In other words, the idea of the superior “white man” exists only when there are contrasting identities relative to which white men can distinguish themselves.<sup>132</sup> Disciplinary sodomy therefore allows straight white men to reproduce racist and gendered narratives wherein Black and brown men are constructed as subjugated, inferior, and perverted.<sup>133</sup>

Disciplinary sodomy also asserts the dominance of the perpetrator’s group through the use of feces and other bodily fluids. This can be seen, for example, in the anecdote about the men being forced to defecate in front of the Albany prison officials, or in Justin Volpe’s use of the feces-covered broomstick to reassert his masculinity. Similarly, the unnamed police officer who penetrated a Black man on the side of the road began the incident by putting on gloves, physically isolating himself from any kind of fecal contamination during the search.

How do disgusting bodily fluids relate to disciplinary sodomy? To explain, I want to refer to an important anecdote recounted by C.J. Pascoe in her study of gender norms at an American high school. Pascoe observed a group of boys sitting around the school weight room telling stories (“tall tales”) about their sexual exploits.<sup>134</sup> All of these stories involved some kind of disgusting bodily fluid: one boy, for example, claimed that he ripped open a girl’s vagina during sex, resulting in blood spurt-ing all over her body; another boy claimed that his friend engaged in anal sex with a girl who “shit all over the place.”<sup>135</sup> Pascoe concludes:

None of these stories were about sexual desire or how attractive the girls were; rather, they were quite gross, about farts, feces, and blood. These stories were about what boys could make girls’ bodies do. That is, the sexual tall tales these boys told when they were together were not so much about indi-

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<sup>131</sup> WARD, *supra* note 92, at 134.

<sup>132</sup> See CONNELL, *supra* note 104, at 43–45, 80; Cooper, *supra* note 105, at 83.

<sup>133</sup> See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 2, 19 (2006); Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in *A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY* 360, 362–64, 367 (Tommy L. Lott & John P. Pittman eds., 2003).

<sup>134</sup> PASCOE, *supra* note 108, at 103–04.

<sup>135</sup> *Id.* at 103.

cating sexual desire as about proving their capacity to exercise control on the world around them, primarily through women's bodies by making them bleed, pass gas, or defecate. These stories also highlighted femininity . . . as an abject identity. Girls had out-of-control bodies, whereas boys exhibited mastery not only over their own bodies but over girls' bodies as well.<sup>136</sup>

Disciplinary sodomy works in the same way, using feces and blood to demonstrate the relative dominance of the perpetrator's group and the abject humiliation of the victim's group. In the anecdotes described above, prison guards and police officers affirm their strength and control by forcing their victims to publicly bleed and defecate. At the same time, perpetrators remain isolated from the contamination (e.g. by using gloves, or observing the defecation from a clinical distance), thus demonstrating the relative superiority and mastery of their group.

### C. The Community as Audience

Finally, the use of disciplinary sodomy also sends a message to victims' communities regarding the social and sexual hierarchies which exist in the United States.<sup>137</sup> In particular, the continued impunity with which prison guards and police officers commit sexual violence sends an intentional message about the kinds of crimes which are tolerated in American society.<sup>138</sup> In the version of the United States created by these acts of sexual violence, marginalized communities are subjected to cruel disciplinary control while those who dominate American society remain largely unaffected by the violence.<sup>139</sup>

Disciplinary sodomy has a very real effect on the American legal system, since marginalized individuals who are aware of the threat of anal rape are more likely to cooperate if they are

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<sup>136</sup> *Id.* at 104; see also WARD, *supra* note 92, at 158–61 (discussing the use of filth in homosocial military rituals).

<sup>137</sup> See Cooper, *supra* note 58, at 1185–86 (discussing the impact of overincarceration and over-policing on Black communities in the United States).

<sup>138</sup> See Allison Rogne, *U.S. Institutionalized Torture with Impunity: Examining Rape and Sexual Abuse in Custody Through the ICTY Jurisprudence*, 10 BRAZILLIAN. J. INT'L L. 126, 127 (2013). Others have argued that many forms of policing, such as stop and frisks, are inspired by a need to send messages of control. See BUTLER, *supra* note 83, at 106–15.

<sup>139</sup> Christopher Glazek, *Raise the Crime Rate*, N+1, Winter 2012, <https://nplusonemag.com/issue-13/politics/raise-the-crime-rate/> [<https://perma.cc/6GYK-6Z55>].

stopped by police or taken in for questioning.<sup>140</sup> When Jolonta Little confessed to a crime that he did not commit, he did so because he knew that rape was rampant in prison and hoped that cooperation would prevent his own victimization. When the white police officer sodomized a Black man on the side of the road while looking for drugs, the officer sent a message about the kinds of violence that are a regular part of the carceral system for marginalized men who do not willingly cooperate with police. In these ways, sexual violence has an asymmetrical disciplinary effect on victims' communities: while a relatively small percentage of American men are actually sodomized by state agents, the practice nevertheless affects the actions of many more men who must live under the constant threat of violence.<sup>141</sup>

The homophobic ideas expressed through the use of disciplinary sodomy—that anal penetration is perverse, that being penetrated is humiliating, and that gay or effeminate men are less deserving of rights—are also part of a wider political project in which hierarchies of sexuality and gender are upheld through the use of violence.<sup>142</sup> By connecting sodomy with violence, perpetrators construct queer bodies as weak and perverse, reinforcing homophobic messages about which bodies and identities qualify as legitimate in American society.<sup>143</sup>

Disciplinary sodomy also reinforces racial hierarchies in the United States by reproducing the kinds of white supremacist violence that have been used throughout American history to control communities of color. Sexual violence against men and boys has always been a feature of white supremacist violence. In the antebellum United States, for example, male slaveowners would demonstrate their dominance by raping their male slaves.<sup>144</sup> Lynchings and other forms of racist violence following the Civil War also frequently involved horrific

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<sup>140</sup> See Mary Bosworth & Jeanne Flavin, *Race, Control, and Punishment: From Colonialism to the Global War on Crime*, in *RACE, GENDER, AND PUNISHMENT: FROM COLONIALISM TO THE WAR ON TERROR*, *supra* note 105, at 1, 1–3 (discussing how the overrepresentation of racial minorities in prisons and police stops is part of a wider system of social control).

<sup>141</sup> See BUTLER, *supra* note 83, at 83 (“For African American men, stop and frisk is a form of government. It is the most visceral manifestation of the state in their lives. Most black men have never been convicted of a crime. . . . But virtually every African American man gets stopped and frisked.”).

<sup>142</sup> See CONNELL, *supra* note 104, at 40–41 (discussing the role of masculinity in creating hierarchies among men).

<sup>143</sup> See Eichert, *supra* note 95, at 420.

<sup>144</sup> Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. SEXUALITY 445, 452–54 (2011).

sexual violence, with white men raping, castrating, and dismembering their Black victims.<sup>145</sup> Similarly, for years Native American children were taken out of their communities and forced to attend boarding schools where hundreds of children were knowingly sexually and physically abused.<sup>146</sup> And today, disciplinary sexual violence is a key feature of many immigration detention facilities, meant to send a message to immigrant communities that individuals who attempt to enter the United States illegally are at risk of being sexually victimized.<sup>147</sup> While these various forms of sexual violence all target individuals, the violence is also motivated by a desire to terrorize and control communities of color by informing them about existing power hierarchies.<sup>148</sup> The use of anal rape in prisons and police stations is a clear continuation of this violence, albeit hidden behind institutional walls and couched in the language of individual wrongdoing.<sup>149</sup>

#### CONCLUSION

In this Note I have considered the various ways in which sodomy has remained an active part of the American carceral system. Instead of ending with *Lawrence v. Texas*, I have argued that sodomy has retained important social and moral meanings that make it useful for state agents in prisons and police stations who want to reinforce racial, sexual, and gendered disciplinary hierarchies through the use of violence.

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<sup>145</sup> See BUTLER, *supra* note 83, at 98; Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 735–36, 758 (2002); see also GAIL BEDERMAN, *MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917* at 46–49 (1995) (arguing that lynching was viewed as “necessary” because Black men were unable to control their criminal sexual desires).

<sup>146</sup> See Andrea Smith, *Boarding School Abuses, Human Rights, and Reparations*, 31 SOC. JUST. 89, 90–91 (2004).

<sup>147</sup> See Morgan Gstalter, *Former GOP Lawmaker on Death of 7-Year-Old Migrant Girl: Message Should Be ‘Don’t Make this Journey, It Will Kill You’*, HILL (Dec. 15, 2018, 11:32 AM), [www.thehill.com/homenews/media/421534-former-gop-lawmaker-on-death-of-7-year-old-migrant-girl-message-should-be-dont](http://www.thehill.com/homenews/media/421534-former-gop-lawmaker-on-death-of-7-year-old-migrant-girl-message-should-be-dont) [<https://perma.cc/8FSS-84NP>]; Hazar Kilani, *Thousands of Migrant Children Allegedly Sexually Abused in US Custody*, GUARDIAN (Feb. 27, 2019, 11:18 AM), [www.theguardian.com/us-news/2019/feb/27/migrant-children-sexual-abuse-complaints-filed-documents-hhs](http://www.theguardian.com/us-news/2019/feb/27/migrant-children-sexual-abuse-complaints-filed-documents-hhs) [<https://perma.cc/599M-2YY9>]; Speri, *supra* note 37.

<sup>148</sup> See BUTLER, *supra* note 83, at 105; ROBYN WIEGMAN, *AMERICAN ANATOMIES: THEORIZING RACE AND GENDER* 83 (1995).

<sup>149</sup> See FOUCAULT, *supra* note 14, at 74 (arguing that modern punishment has been de-individualized by hiding institutional violence behind prison walls); see also Alfieri, *supra* note 72, at 1186–92 (discussing the prevalence of racialized sexual violence throughout American history).

Just as anti-sodomy laws were meant to create second-class citizens by criminalizing LGBTQ individuals, disciplinary sodomy also works to create a second-class category of person inside and outside of American prisons.<sup>150</sup> This works on three levels. First, on an individual level disciplinary sodomy acts as a language through which a perpetrator can place himself and his victim in a social hierarchy of power, weaponizing the victim's own gender, sexuality, race, and bodily integrity to reinforce heteromascuine power hierarchies. Second, disciplinary sodomy allows for group bonding among prison staff and police officers who violate taboos together. Finally, disciplinary sodomy addresses victims' communities as part of a wider campaign of control meant to restrict the actions and lives of marginalized communities.

Rather than being an act committed by "a few bad apples," disciplinary sodomy is instead a key tool used by law enforcement agencies to control the bodies of marginalized men.<sup>151</sup> Just like many other aspects of the American penal system,<sup>152</sup> disciplinary sodomy is meant to be cruel—maintaining order through dehumanizing, retributive practices.<sup>153</sup> Because of this violence, prisoners are subdued, police officers are vindicated, and prison guards are better able to enforce their demands on their victims.

It is important to note that maintaining a docile prison population is tied up in powerful economic considerations. The construction and maintenance of prisons are lucrative business ventures for local communities and private prison corporations, which profit off of continued over-incarceration.<sup>154</sup> Thousands of prisoners are employed by private corporations throughout the United States, often providing cheap labor for less than a dollar an hour.<sup>155</sup> Prison violence, including disci-

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<sup>150</sup> CARPENTER, *supra* note 9, at xiv–xv.

<sup>151</sup> SMYTH, *supra* note 52, at 154; *see also* PUAR, *supra* note 41, at 112 (arguing that the use of sexuality to punish and humiliate is not an exception, but rather central, to the delineation of acceptable American identities).

<sup>152</sup> *See generally* ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* (2019) (discussing how law enforcement targets certain social groups with violence and noting the problems with mass incarceration in the United States).

<sup>153</sup> *See* GOTTSCHALK, *supra* note 133, at 21–22; Hensley, *supra* note 32, at 1–2.

<sup>154</sup> *See* GOTTSCHALK, *supra* note 133, at 29.

<sup>155</sup> *See* Genevieve LeBaron, *Captive Labour and the Free Market: Prisoners and Production in the USA*, 94 *CAP. & CLASS* 59, 59–60 (2008); Chris W. Surprenant, *Policing and Punishment for Profit*, 159 *J. BUS. ETHICS* 119, 125–26 (2019).

plinary sodomy, helps to guarantee that this prison workforce remains submissive and effective.<sup>156</sup>

While this violence is enacted by prison guards and police officers, judges and prosecutors who recommend lengthy prison sentences in overcrowded prison facilities are also partly responsible for this violence. To paraphrase a famous quote, when one individual sodomizes another without his consent, we call that rape; when the legal system places thousands of men in a position where they are forcefully sodomized, and yet permits those conditions to remain, the guardians of the legal system are just as guilty of rape as the rapist.<sup>157</sup>

Of course, none of this is unavoidable or predetermined.<sup>158</sup> In addition to legal changes which prioritize the bodily integrity and dignity of detained individuals,<sup>159</sup> structural changes such as reductions in prison populations and the mandatory use of body cameras offer temporary (albeit imperfect) solutions to the problems described in this Note.<sup>160</sup> Politicians and government

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<sup>156</sup> See FOUCAULT, *supra* note 14, at 138 (“Discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience.)”).

<sup>157</sup> FREDERICK ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND IN 1844* at 95 (Florence Kelley Wischnewetzky trans., 1892) (“When one individual inflicts bodily injury upon another, such injury that death results, we call the deed manslaughter; when the assailant knew in advance that the injury would be fatal, we call his deed murder. But when society places hundreds of proletarians in such a position that they inevitably meet a too early and an unnatural death, . . . when it deprives thousands of the necessities of life, . . . and yet permits these conditions to remain, its deed is murder just as surely as the deed of the single individual . . .”) (footnote omitted).

<sup>158</sup> See Buchanan, *supra* note 31, at 14 (describing correctional facilities where no sexual victimization has been reported).

<sup>159</sup> See, e.g., GOTTSCHALK, *supra* note 133, at 259 (discussing legislation to improve prison conditions); SINGER, *supra* note 29, at 17, 80 (noting that the view toward sexual abuse in prison has changed but the enforcement mechanisms to stop this abuse have not); Arkles, *supra* note 58, at 116–24 (detailing new measures to ensure imprisoned individuals can maintain autonomy over their bodies); Harris, *supra* note 79, at 799–806 (describing the issues with gender violence in the criminal justice system and noting reforms to deter sexual abuse); Michele C. Nielsen, Comment, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 267–79 (2017) (positing measures to deter sexual violence and promote individual dignity); James E. Robertson, *The “Turning-Out” of Boys in a Man’s Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819, 843–51 (2011) (discussing reforms that could be beneficial to PREA); Jessi Lee Jackson, *Sexual Necropolitics and Prison Rape Elimination*, 39 SIGNS 197, 197–98 (2013) (arguing for additional policies to ensure sexual autonomy within prisons).

<sup>160</sup> Buchanan, *supra* note 31, at 21–22; see also Ristroph, *supra* note 54, at 139, 141. See generally Kim Shayo Buchanan & Phillip Atiba Goff, *Bodycams and Gender Equity: Watching Men, Ignoring Justice*, 31 PUB. CULTURE 625 (2019) (discussing gender bias issues with current police bodycam policies and recommending solutions).

bureaucrats need to rethink the tendency to respond to any problem through criminalization and instead focus on developing noncriminal solutions to the country's overincarceration problem.<sup>161</sup> Reforms also need to combat the hypermasculine militarization of law enforcement officials and encourage a more expansive understanding of gender, sexuality, and race.<sup>162</sup>

Moreover, there needs to be a cultural shift regarding how prison rape is perceived in American culture and media. Instead of portraying sexual violence against men as comedic or commonplace, disciplinary sodomy needs to be seen as what it truly is: an institutionalized form of torture meant to control and punish individuals who have been constructed as criminal and therefore undeserving of rights.<sup>163</sup>

While I have focused here on the phenomenon of sexual violence against men, it is worth noting that all forms of police brutality and state violence are interconnected in their origins and effects.<sup>164</sup> Violence against men is related to violence against women, against queer people, against poor people, and against racial and ethnic minorities.<sup>165</sup> Sodomy and bodily torture are just some of the techniques which perpetuate ra-

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<sup>161</sup> See Harcourt, *supra* note 90, at 375 ("The great illusion is that all we are doing is fighting crime. That crime is out there, that we know what it is, that we simply go after it. This is the deepest fallacy. The fact is, we *make* crime. We decide what to criminalize and enforce, and in the very process, we allow other forms of deviance to flourish. Unconstitutional police searches are, tragically, but one perfect example. We set our scope on the drug war, we let loose discretionary policing, and we inevitably produce a certain amount—a predictable amount—of improper searches, of sexual batteries, of bodily injury."); see also Cooper, *supra* note 58, at 1202–04 (arguing that rather than deterring violence, state violence against marginalized communities actually destabilizes these communities).

<sup>162</sup> See, e.g., Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1013–17 (2012) (noting how the operation of K6G allows the inmates to form relationships and engage with their emotions, which deters hypermasculinity); Amanda L. Farrell et al., "There's No Crying in Police Work:" *Exploring Police Shootings with Feminist Methods*, 35 GENDER ISSUES 220, 231 (2018) (arguing that applying feminist methods to police shootings allows for more holistic review); Goodmark, *supra* note 122, at 1220–22 (analyzing domestic violence and law enforcement policies).

<sup>163</sup> See Andrew Dilts, *Justice as Failure*, 13 LAW CULTURE & HUMAN. 184, 185 (2017); Rogne, *supra* note 138, at 138–39.

<sup>164</sup> See ABU-JAMAL, *supra* note 72, at 154–55, 182–84 (discussing police brutality in the context of Black Lives Matter protests).

<sup>165</sup> See David Ponton, *Clothed in Blue Flesh: Police Brutality and the Disciplining of Race, Gender, and the "Human,"* 19 THEORY & EVENT 1, 19 (2016). See generally ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017) (detailing discriminatory practices and policies that are used by law enforcement against women of color).

cial, colonial, and sexual hierarchies of power,<sup>166</sup> and much more needs to be said about how state agents use other forms of sexual violence (oral rape, groping, etc.) to reinforce corrupt social orders.<sup>167</sup>

Finally, the experience of prison rape is certainly not limited to the United States.<sup>168</sup> While disciplinary sodomy may share similar socio-legal meanings and purposes in other countries, future studies of disciplinary sodomy will have to grapple with the fact that attitudes towards race and masculinity differ wildly along time and space, as do conceptions of homosexuality and homosexuals.<sup>169</sup> Despite these potential differences, it is vital to understand the role that sexual violence plays in today's carceral systems, for it is only by understanding it that we can work to undo it.

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<sup>166</sup> PUAR, *supra* note 41, at 79–80.

<sup>167</sup> *See, e.g.*, BUTLER, *supra* note 83, at 102–03 (discussing the sexual violence committed by law enforcement officers during frisk searches).

<sup>168</sup> *See, e.g.*, Amy Braunschweiger, *Witness: The Horrors of Brazil's Prisons – Jorge's Story* (Oct. 19, 2015, 10:00 PM), <https://www.hrw.org/news/2015/10/19/witness-horrors-brazils-prisons-jorges-story> [<https://perma.cc/RJ29-J64D>] (describing prison conditions in Brazil and detailing the narrative of an inmate named Jorge's sexual assault while in prison).

<sup>169</sup> *See* Alan Bray, *Epilogue*, in *SODOMY IN EARLY MODERN EUROPE* 164, 164 (Tom Betteridge ed., 2002); Eichert, *supra* note 95, at 413–14.