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Sexual Epistemology and Bisexual Exclusion: A Response to Russell Robinson’s “Masculinity as Prison: Race, Sexual Identity, and Incarceration”

Michael Boucai*

INTRODUCTION

In an effort to curb sexual assault behind bars, the Los Angeles County Jail currently houses inmates deemed homosexual and transgender in a special unit called “K6G.” Professor Russell Robinson’s Article, *Masculinity as Prison: Race, Sexual Identity, and Incarceration*, challenges this policy on a number of grounds.¹ I focus in this Response on just two of Robinson’s objections. First I affirm Robinson’s proposal that carceral segregation programs, if they are to persist, will more effectively protect queer inmates from sexual assault if they do not fixate exclusively on queer identity.² Homosexuality’s complicated social epistemology, notoriously an “epistemology of the closet,” compels this conclusion.³ I then reflect on some possible reasons (not necessarily justifications) for K6G’s categorical exclusion

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1. Russell Robinson, *Masculinity as Prison: Race, Sexual Identity, and Incarceration*, 99 CALIF. L. REV. 1309 (2011).

2. I do not pursue here the possibility that segregation policies only palliate a disorder “endemic” to incarceration itself. See Alice Ristorph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 184 (2006) (“[P]rison rape, alongside all the ambiguously coercive forms of sex that occur in prison, is a prison issue. It is produced by the prison, endemic to it . . . [.]”).

3. See *id.* at 1356–57 (citing EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990) and suggesting that “Sedgwick’s work helps to illuminate the failures in the logic of the K6G screening test as well as the test’s ultimate goal”).

of people who claim a bisexual identity. This exclusion is one of several aspects of the Jail's segregation policy that Robinson criticizes for disadvantaging individuals who diverge from a race- and class-specific stereotype of "the homosexual."

I.

SEXUAL IDENTITY: EPISTEMOLOGY AND VULNERABILITY

I'll begin by clarifying what we know and do not know about the relationship between sexual identity and sexual vulnerability in the context of incarceration. We know that queer inmates—by which I mean inmates who avow in confidential surveys an identity other than heterosexual—are at significantly greater risk of sexual assault while incarcerated than self-professed heterosexuals. The Department of Justice's 2007 study of sexual victimization in local jails, based on 40,419 anonymous "audio computer-assisted self-interview[s]," found that 2.7 percent of heterosexual-identified inmates suffered sexual assault in the previous six months, compared to 18.5 percent of homosexual-identified inmates, 9.8 percent of bisexual-identified inmates, and 9.8 percent of those who described themselves as "other."⁴ Though these percentages powerfully capture queer inmates' special vulnerability to sexual violence, they also reveal that the vast majority of victims—a total of 18,975 inmates in the DoJ survey—identify as heterosexual, compared to 2,812 bisexuals, 1,832 homosexuals, and 1,009 who identify as "other."⁵

We do not know, however, how respondents understood the question, "Do you consider yourself to be heterosexual or 'straight,' bisexual, or homosexual or gay?"⁶ Especially after completing a battery of questions about recent sexual experience, some inmates who called themselves homosexual, bisexual, or

4. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES 1, 2, 6 (2007) [hereinafter 2007 DOJ REPORT], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL INMATE SURVEY: YEAR 1, QUESTIONNAIRE SPECIFICATIONS 1 [hereinafter INMATE SURVEY], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/nis_acasi_spec.pdf ("Your name will never be connected with the information you provide in this interview. We will treat everything you say as private and confidential."). *See also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09 14 (2010) (lumping "[b]i-sexual, homosexual, or other" inmates together and finding that this population experienced sexual assault from other inmates at a rate of 11.2 percent, compared to 1.3 percent for heterosexual inmates), *available at* <http://www.bjs.gov/content/pub/pdf/svpjri0809.pdf>; JUST DETENTION INTERNATIONAL, LGBTQ DETAINEES CHIEF TARGETS FOR SEXUAL ABUSE IN DETENTION 1 (2009) (noting a study finding that 67 percent of LGBTQ-identified inmates in the California prison system reported sexual assault by another inmate while incarcerated, "a rate . . . 15 times higher than for the inmate population overall" (citing VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT, CENTER FOR EVIDENCE-BASED CORRECTIONS (2007))), *available at* http://justdetention.org/en/factsheets/JD_Fact_Sheet_LGBTQ_vD.pdf.

5. *See* 2007 DOJ REPORT, *supra* note 4, at 6.

6. *See* INMATE SURVEY, *supra* note 4, at 15.

“other” might have employed these labels not to indicate an erotic preference, but to describe or account for their sexual practices while incarcerated. This particular ambiguity might have produced an over-count of queer inmates. At the same time, a more familiar problem—purposeful prevarication—could have counterbalanced it. How many heterosexual-identified respondents feel themselves to be homosexual, bisexual, or “other,” but declined to make this sensitive confession?

Perhaps most importantly, we do not know the extent to which queer inmates’ sexual identities, as stated in an anonymous survey, correspond to the identities they adopt or are ascribed in the course of their detention. Specifically, the data are silent as to the proportion of victims who, prior to their first sexual assault, (1) voluntarily communicated a queer identity in jail (i.e., were “out”); (2) were involuntarily but correctly pegged as queer (i.e., were “outed”); or (3) neither adopted nor were ascribed a queer identity, but instead were perceived as heterosexuals who had been “punked.”⁷ Ignorance of these details frustrates the development of policies that adequately address queer inmates’ enhanced vulnerability to sexual coercion, and I highlight them largely in order to press the need for more nuanced research in this area.

To see the salience of these missing epistemological facts, imagine a study showing that 75 percent of sexually victimized queer inmates were out prior to their first assault, while 15 percent were outed and 10 percent were neither out nor outed. Alternatively, suppose the survey showed that only 10 percent of sexually victimized queer inmates were out prior to their first assault, while 50 percent were outed and 40 percent were neither out nor outed. These two hypothetical data sets describe drastically different phenomena and, I think, call for markedly different preventative measures. If sexual assaults on queer inmates are usually preceded by, and to that extent credibly predicated on, victims’ voluntarily projection of a queer identity, then we might be justified in segregating only inmates who avow an intention to disclose their queerness or actually do so. On the other hand, if the vast majority of queer victims were “outed,” or were sexually violated without any prior imputation of queer identity, then segregation should also account for characteristics that give rise to ascriptions of queerness or otherwise mark an individual as vulnerable.

The need for further research notwithstanding, I suspect that queer inmates’ vulnerability to sexual assault in prison usually does not arise from voluntary disclosure of queer identity. Though some courageous men do maintain a queer persona even in the brutally masculinist context of incarceration, it is hardly surprising that, as Human Rights Watch reports, “many gay inmates—even those who are openly gay outside of prison—

7. While these possibilities are not so distinct as I have drawn them, their fuzzy boundaries only reinforce Robinson’s conclusion that sexual identity is an insufficient measure of queer inmates’ vulnerability. Some repeat offenders will be out during one stay in jail because they were outed in an earlier stay. Others may be branded “queer” based on characteristics having nothing to do with their perceived sexual orientations.

carefully hide their sexual identities while incarcerated.”⁸ The likelihood that the closet is the rule rather than the exception in jails and prisons is a good reason to pursue Robinson’s proposed alternative to the K6G model. Echoing expert consensus, Robinson suggests that facilities’ segregation efforts “take[] into account *all* vulnerability, with sexual minority or gender identity just two of several potential factors, . . . including youth, slight stature, perceived effeminacy, serving for the first time in prison, doing time for nonviolent offenses, inexperience in personal combat, and having a disability.”⁹ Robinson’s inclusion of “perceived effeminacy” on this list is particularly noteworthy for present purposes. If queer inmates’ vulnerability to sexual assault arises largely or primarily from other inmates’ and guards’ accurate perception of their queerness, then looking for traits associated with the stereotypical gay identity that Robinson elsewhere critiques may prove essential to protecting these men from sexual assault.¹⁰

II.

BISEXUAL EXCLUSION

Having spent much of the past year investigating the law’s channeling of bisexuals into heterosexual identities and relationships,¹¹ I was particularly intrigued by Robinson’s sustained attention to K6G’s rigorous exclusion of self-identified bisexuals. What explains this practice? Rather than offering definitive or mutually exclusive answers, I seek here to situate K6G’s bisexual ban within a field of diverse and sometimes complementary discourses on sexual orientation generally and bisexuality in particular.

One possible reason for bisexuals’ exclusion from K6G is that they are not, strictly speaking, homosexual. Though the L.A. County Jail has voluntarily segregated homosexual inmates since the 1970s, it now does so pursuant to a court order that, as Robinson notes, refers to “‘homosexual inmates’ twenty-three times in a mere seven pages.”¹² Yet the Jail has not interpreted the

8. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 52 (2001), available at http://www.hrw.org/legacy/reports/2001/prison/report4.html#_1_23.

9. Robinson, *supra* note 1 at 1402, n.575 (citing NAT’L PRISON RAPE ELIMINATION COMM’N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 30, 217, available at http://nprec.us/files/NPREC_FinalReport.pdf) (emphasis added). See also Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 9 (2011) (proposing that “a unified approach,” which segregates into a single unit inmates with a variety of vulnerabilities, “represents the better default option” for policies combating sexual violence in jails and prisons).

10. See Robinson, *supra* note 1, at 1330–60. See also Dolovich, *supra* note 9, at 71 (suggesting that “it is far less important that” K6G’s administrators correctly “identify those individuals who are ‘really gay’—even assuming this category has any real meaning—then [sic] that they are able to identify those people who would come to be identified as gay within the prison culture”).

11. See Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, SAN DIEGO L. REV. (forthcoming 2012) (proposing bisexuality as an ideal perspective on same-sex marriage bans’ burden on the right to choose homosexual relations and relationships).

12. Robinson, *supra* note 1 at 1319, 1320 (citing Stipulation and Request for Dismissal: Order, *Robertson v. Block*, No. 82-1442 (C.D. Cal. July 22, 1985)).

requirement to segregate homosexuals as an injunction to segregate homosexuals only. A “strict construction” rationale for bisexual exclusion fails so long as K6G houses transgender inmates regardless of sexual orientation.¹³

Another possibility is that, by the numbers, bisexuals just aren’t sufficiently vulnerable to warrant class-based protection. The 2007 National Inmate Survey referenced earlier shows that 9.8 percent of bisexual inmates (and the same proportion of inmates who described their sexual orientations as “other”) were sexually assaulted in prison, compared to 18.5 percent of homosexual inmates.¹⁴ Whether 9.8 percent is too low a figure to trigger a population’s inclusion in K6G is ultimately a matter of opinion. In any event, statistical disparities between homosexual and bisexual vulnerability have little explanatory force in the case of K6G. The L.A. County Jail’s policy of bisexual exclusion predates by many years the availability of such precise data.

Professor Sharon Dolovich reluctantly defends a different ground for bisexuals’ exclusion from K6G. Based on interviews with Deputies Randy Bell and Burt Lanni, the officials responsible for K6G intake, Professor Dolovich highlights the Deputies’ “sense that the vast majority of the men who seek admission to K6G on grounds of bisexuality are really situational homosexuals”—in other words, individuals “who have sex with men while incarcerated and sex with women when not in custody.”¹⁵ Barring bisexuals from K6G therefore prevents an influx of precisely the type of persons K6G is designed to keep out: men who take to sexual predation in order to fulfill their sexual urges in a single-sex environment and/or to assert dominance over their peers. Though Dolovich urges the Jail to differentiate the wrong kind of bisexuals (“situational homosexuals”) from the right kind (“pre-custody bisexuals”), she concludes that, “failing this possibility, . . . the need to ensure the ongoing protection of K6G’s residents” may compel the latter group’s continued exclusion.¹⁶

I am unconvinced by the Deputies’ “sense” that most self-identified bisexuals are wily heterosexuals. First, the suspicion that inmates who call themselves bisexual are lying corresponds all too well to the popular canard that bisexuals, particularly bisexual men, do not exist.¹⁷ Although such denials of bisexual existence usually tend to assume that men who call themselves bisexual are really homosexuals in denial, this is not always the case.¹⁸ Second,

13. See Robinson, *supra* note 1, at 1403 (rejecting in light of K6G’s history the possibility that the unit’s admissions criteria simply reflect the fact of a “lawsuit that happened to focus on ‘homosexual’ inmates”); see also Dolovich, *supra* note 9, at 67 (likewise doubting that bisexuals are excluded from K6G because, “as a technical matter,” they do not fall within the class of “homosexual inmates” designated by the Consent Decree).

14. See 2007 DOJ REPORT, *supra* note 4, at 6.

15. Dolovich, *supra* note 9, at 26, 67.

16. *Id.* at 69.

17. See, e.g., Dale Carpenter, *Do Bisexual Men Exist?*, BAY AREA REP., July 21, 2005, available at <http://igfculturewatch.com/2005/07/21/do-bisexual-men-exist/> (last visited Jan. 8, 2012).

18. One study, whose findings have since been disavowed by its authors, determined from

Robinson's interview with Deputy Lanni suggests that the Jail's ascription of heterosexual identity to avowed bisexuals relies heavily on unwarranted extrapolations from anecdotal and ambiguous evidence, like "an incident in which [Lanni] called an inmate's home, asking for a male partner, and discovered that he had a female fiancée living at the residence along with the alleged male partner."¹⁹ Nothing in this inmate's account disproves his claim to bisexuality.²⁰

Moreover, even if it were true that Bell and Lanni consider "the vast majority" of self-identified bisexuals to be "situational homosexuals," it remains to be said why they would consciously exclude from K6G the supposed minority who are truly bisexual. Given the Deputies' otherwise conscientious investigations into the lives of K6G hopefuls,²¹ I am dubious that the task of distinguishing between "situational homosexuals" and "pre-custody bisexuals" is too cumbersome. Two alternative explanations present themselves. The first and more generous builds on the empirical claim that most bisexuals, in Deputy Lanni's words, "play[] the straight guy" when not behind bars.²² Under this view, even true bisexuals are legitimately excluded from K6G because they can be relied upon to successfully closet their queer sexualities in prison, just as they do in other parts of their lives. Such men can mute, or simply do not possess, the telltale signifiers of queerness that homosexual men are presumed to manifest.

The second and more sinister interpretation relates to the normative idea that bisexual men should be steered away from homosexuality, and that incarceration should reinforce their heterosexual social roles and deter them from homosexual relations and relationships.²³ As I argue elsewhere, such an

bisexual-identified men's erectile responses to pornography that these subjects were either, as the *New York Times* put it, "gay, straight, or lying." Ben Carey, *Straight, Gay, or Lying?: Bisexuality Revisited*, N.Y. TIMES, July 5, 2005, at F1. See J. Michael Bailey et al., *Sexual Arousal Patterns of Bisexual Men*, 16 PSYCH. SCIENCE 579 (2005); J. Michael Bailey, *Sexual Arousal Patterns of Bisexual Men Revisited*, 88 BIOL. PSYCHOL. 122 (2011).

19. See Robinson, *supra* note 1, at 1329.

20. For an account of the call in Lanni's own words, see *id.* at 1329, n.113.

21. See Dolovich, *supra* note 9, at 30–43 (characterizing the Jail's classification efforts as "detective work").

22. See Robinson, *supra* note 1, at 1329. See also Boucai, *supra* note 11 (crediting the claim that most bisexuals live "hidden in the shadows of heterosexuality") (citing Amanda Yoshizaki, *Breaking the Rules: Constructing a Bisexual Feminist Marriage*, in CLOSER TO HOME: BISEXUALITY AND FEMINISM 155, 156 (Elizabeth Reba Weise ed., 1992)).

23. As Professor Robinson observes, however, homosexual sex occurs in the General Population as well as in K6G. The willful pretense that it does not is manifest in the Jail's nominal prohibition of sexual contact between inmates and its provision of condoms only to K6G inmates. This latter condition undercuts the otherwise problematic possibility that bisexuals are excluded from K6G in order to protect their different-sex partners on the outside from HIV. For discussions of the so-called "bisexual bridge" in HIV transmission between homosexual and heterosexual milieus, see Ann O'Leary & Kenneth T. Jones, *Bisexual Men and Heterosexual Women: How Big Is the Bridge? How Can We Know*, 33 SEXUALLY TRANSMITTED DISEASES 594 (2006); Adaora A. Adimora & Robert E. Fullilove, *Men Who Have Sex with Men and Women: Pieces of the U.S. HIV Epidemic Puzzle*, 33 SEXUALLY TRANSMITTED DISEASES 596 (2006); C.H. Mercer et al., *Behaviourally Bisexual Men as a*

objective is not only morally wrong but unconstitutional with regard to bisexuals who are not incarcerated.²⁴ Whether it is equally illegal with regard to bisexual inmates depends on the extent to which the Fourteenth Amendment's protection of individuals' liberty "in matters pertaining to sex" extends to the carceral context.²⁵ Robinson has reserved this question "for another day,"²⁶ and I eagerly await his conclusions.

Bridge Population for HIV and Sexually Transmitted Infections? Evidence from a National Probability Survey, 20 INT'L J. STD & AIDS 87 (2009). The "bisexual bridge" theory may be particularly salient in this context to the extent that it has particular prominence in discussions of HIV transmission among blacks, and especially of HIV transmission by and among men "on the down low." See O'Leary & Jones, *Bisexual Men and Heterosexual Women*, 33 SEXUALLY TRANSMITTED DISEASES, at 594; see generally Russell Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1464 (2009) (interrogating the widespread notion that men on the down low "expose their unwitting female partners to HIV").

24. See generally Boucai, *supra* note 11.

25. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

26. See Robinson, *supra* note 1, at 1316, n.30 (suggesting that "*Lawrence*, properly understood, nonetheless raises serious questions as to whether broad bans on consensual sexual expression between inmates can continue to stand").