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Kupers, Terry A.

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# THE ROLE OF MISOGYNY AND HOMOPHOBIA IN PRISON SEXUAL ABUSE

Terry A. Kupers, M.D., M.S.P.\*

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The National Prison Rape Elimination Commission (NPREC) recently published standards for the prevention and response to prison rape and other forms of sexual abuse. Mandated by the 2003 federal Prison Rape Elimination Act (“PREA”),<sup>1</sup> the standards are the culmination of six years of hearings and deliberations by the NPREC. The first chapter of the standards for adult jails and prisons, “Prevention and Response Planning,” begins:

The agency has a written policy mandating zero tolerance toward all forms of sexual abuse and enforces that policy by ensuring all of its facilities comply with the PREA standards . . . . Eliminating sexual abuse in confinement requires first and foremost a commitment to safety as a core mandate of con-

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\* Institute Professor, The Wright Institute. Mailing address: 8 Wildwood Avenue, Oakland, California 94610. Email: kupers@igc.org. The author is grateful to Deborah LaBelle for her understanding of the importance of prison culture as backdrop to sexual abuse.

1. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 17 Stat. 972 (2003).

finement operations. Agency and facility heads will be responsible not only for ensuring that staff and inmates are informed of the agency's zero-tolerance policy toward sexual abuse but for setting a tone that signals true commitment to an institutional culture of safety and security for all inmates and staff . . . . To ensure successful compliance with the PREA standards, the PREA coordinator may need to develop strategies to address the culture of the agency or facility(ies) to determine the levels of staff and inmate resistance or openness to PREA standards implementation. Examples of strategies may include conducting or coordinating assessments by surveying staff members and inmates to understand their attitudes, beliefs, and values that support or conflict with a "reporting" culture that creates safety and security.<sup>2</sup>

Thus, prison culture is deemed an important factor in prison sexual abuse, and reporting on those who violate the standards is a central requirement in the standards' implementation as well as a central part of any zero tolerance policy.

In this article, I will discuss the "institutional culture of safety and security for all inmates" and the way misogyny and homophobia within that culture make the attainment of safety problematic. Additionally, just as male prisoners who subscribe to the prison code will not snitch on other prisoners, custody staff often subscribe to an equivalent unspoken code, the "Blue Code," including the code of silence, and refuse to inform on their colleagues.<sup>3</sup> The prohibition against "snitching" in the unwritten prisoner code and the equivalent prohibition against reporting in the officers' code of silence impede the enactment of a zero tolerance policy.

### I. MISOGYNY IN PRISON CULTURE

The culture within prisons and jails can foster or weigh against sexual abuse, and the degree to which misogyny and homophobia permeate that culture determines which way the influence will go. I will begin by describing the role prison culture plays in the occurrence of custodial sexual misconduct in women's prisons, where the most prevalent form of abuse is pepe-

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2. PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 9 (2009), available at [http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC\\_FinalReport.PDF](http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF).

3. Gary Rothwell & Norman Baldwin, *Whistle-Blowing and the Code of Silence in Police Agencies: Policy and Structural Predictors*, 53 *Crime & Delinquency* 605 (2007), available at <http://cad.sagepub.com/cgi/content/abstract/53/4/605>.

trated by male staff upon female prisoners. Then I will identify parallel cultural influences in men's facilities, where the most frequent form of sexual abuse is perpetrated by prisoners on other prisoners. Despite this distinction, I will argue that the same kind of misogyny exists within the culture of male prisoners and staff in men's prisons.

#### A. *Misogyny in Women's Facilities*

A 2002 case, *Everson v. McGinnis*, addressed custodial sexual misconduct in the Michigan Department of Corrections - specifically, the appropriateness of having male custody staff patrolling women's housing units where the women sleep, shower, and use the bathroom,<sup>4</sup> I testified as a psychiatric expert:

In an institutional setting where men are in positions of authority and women are under their control, it causes very real damage for the men in authority to address and refer to the women under their control in patronizing, infantilizing and disrespectful ways. For instance, during my tours of the women's facilities in Michigan, I heard male staff refer to women prisoners as "the girls." Women reported being referred to as "bitches" or "ho's," or even worse demeaning and sexualized terms. The atmosphere created by small acts of disrespect make more overt acts of sexual harassment and abuse more likely and sexual abuse more easily contemplated and accomplished without detection. It also creates a pervasive sense of unsafety in women prisoners, especially in light of their known history of prior abuse and lack of recourse. Women need a safe place inside the prisons where they do not have to be afraid of sexual assaults and invasions of their privacy by males. Women prisoners need to be able to go to their housing units and feel that they do not have to deal with male officers acting inappropriately toward them.<sup>5</sup>

To the extent that sexism and misogyny permeate the culture of a jail, prison or correctional system as a whole, there is support for, or at least there is all too little opposition to, the staff perpetrator of (actual) sex crimes against women. This matters a great deal for purposes of establishing deliberate indifference on the part of prison authorities in litigation involving

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4. *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002) (No. 00-73133).

5. Transcript of Record at Vol. 4 170-171, *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002) (No. 00-73133).

custodial sexual misconduct.<sup>6</sup> When a warden or commissioner permits misogyny to permeate the prison culture, and certain staff-members subsequently or concurrently sexually abuse female prisoners - and we know from research and correctional experience that a culture of misogyny is predictably the backdrop to sexual assault - then the warden or commissioner is deliberately indifferent to women's rights to privacy and safety. The NPREC appreciated this reality, as is reflected in their standards' requirement of zero tolerance and a "culture of safety."

In *Everson v. Michigan DOC* I testified further about women's prisons in Michigan:

From the documents I reviewed, the tours I made and the interviews I conducted, I concluded in 1999 that there was a sexualized, unsafe atmosphere in the women's institutions within the MDOC. Many women complained of a lack of basic privacy. There were and continue to be male correctional officers in all the living areas whose duties include supervision of the women even while they are showering and using the bathrooms. During one tour I took, a male officer barged into the shower area and barked an order at a woman who was partially clad, and even though I tried to avoid viewing women in states of undress I found myself walking in on women who were wearing only underclothes or coming out of the shower naked. It was my impression that entirely insufficient effort was made to guard the women's privacy and dignity, and the atmosphere of total surveillance by male staff made the women fearful and subdued. At Scott Correctional Facility, the women are housed in cells and yet male staff can walk up to the door of a woman's cell and peer in at any time, and the shade that partially covers that window when the woman is dressing does not preclude a man of average height from walking up to the door and peering inside. The constant presence of male officers in women's housing units together with the structural design precludes real privacy. The added practice of cross-gender pat searches contributed to a sexualized atmosphere that makes more overt forms of sexual assault all the more likely to occur.<sup>7</sup>

We know from sociological research and forensic experience that men who hate and abuse women typically perform small acts of disrespect and privacy violation prior to committing blatant

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6. See generally *Farmer v. Brennan*, 511 U.S. 825 (1994), (discussion of deliberate indifference in a case involving prisoner-on-prisoner sexual assault).

7. Transcript (*Everson*), *supra* note 5, at 161- 62.

abusive acts, including rape.<sup>8</sup> In other words, there is a progression from small acts of intrusion and disrespect, which build over time, to overt acts of boundary-violation.<sup>9</sup> The entire progression constitutes misogyny. Typically, the male prison staff-member who is planning to sexually molest a woman prisoner first makes a lustful and inappropriate comment in her presence, for example saying something crude about the shape of her body parts. Then he touches her inappropriately, perhaps during a pat search.<sup>10</sup> Then he follows her around, peers at her lewdly while she is in a state of undress, or orders her to go somewhere where he and she will be alone and out of view of others.<sup>11</sup> Finally, he makes his approach and engages in sex acts with her, with or without her apparent consent (I say apparent because, of course, sex between staff and prisoners is illegal in most states, the rationale being that no real consent is possible in a situation where staff have total control over prisoners and are responsible for their wellbeing). Clearly it is the duty of staff and correctional administrators to intervene to change the culture of misogyny. Without the exercise of such duty, sexual assaults will predictably continue in a cultural context that fosters demeaning and disempowerment of women; moreover, the staff and administrators who fail to change that culture are guilty of deliberate indifference.<sup>12</sup>

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8. PETER RUTTER, *SEX IN THE FORBIDDEN ZONE: WHEN MEN IN POWER-THERAPISTS, DOCTORS, CLERGY, TEACHERS AND OTHERS-BETRAY WOMEN'S TRUST* (1989).

9. *Id.*

10. Cross-gender pat searches provide male staff a far too easy opportunity to grope a woman inappropriately, and this is why litigation has addressed the appropriateness of this practice. See *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993).

11. In correctional facilities officers have near-total control and can give prisoners orders, which they must obey, even if the prisoner feels they are not appropriate. This creates confusion for the prisoner who knows that she would be punished for refusing to obey an order, knows that the officer is breaking the law, and at the same time believes that if she complains that the officer is giving her an inappropriate and illegal order nobody will believe her.

12. See generally BARBARA OWEN ET AL., *GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES* (2008) (examining the context of gendered violence and safety in women's prisons and proposing strategies for improving safety in women's correctional facilities). See also Just Detention International, <http://www.justdetention.org>, for personal accounts of survivors of sexual assault in jail and prison. In most states, there is a law prohibiting sexual contact between staff and prisoners; and in most departments of correction there is a policy requiring staff to report other staff members who break laws; thus the failure of staff to report colleagues who engage in sexual activities with prisoners is a breach of policy and may constitute being party to a crime.

### B. *An Equivalent Culture of Misogyny in Men's Prisons*

The connection between the degree of misogyny in prison culture and the occurrence of actual sexual abuse is easiest to understand in women's facilities, where the perpetrators are most often male staff. One has to go one step further to grasp the parallel dynamic in men's prisons. The most common form of sexual abuse in men's jails and prisons is prisoner-on-prisoner sexual assault. One might wonder what misogyny has to do with that.

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

1. There is an exaggerated dominance hierarchy wherein the toughest men dominate those who are less tough.

2. There is a sharp demarcation between those at the top of the dominance hierarchy and those at the bottom. At the top are the "real men," whereas weaklings and "punks" populate the bottom of the hierarchy.

3. "The bottom is defined in terms of the feminine. Whether a man is known as a loser, a weakling, a snitch, a faggot, or a punk, he is accused of being less than a man - in other words a woman. . . . When one man beats up another and sodomizes him, the message is clear: 'I, the dominant man, have the right and the power to use you, the loser, sexually, as if you were a woman and my slave'."

4. There is a narrowing of personal possibilities, and men are forced to act in hyper-masculine and dominating ways merely to prove they are not feminine, they are not anyone's "punk." This hyper-masculinity reinforces the misogyny and toxic masculinity that are central to the male prison culture.<sup>13</sup>

[In examining these four structural elements in the context of men's prison facilities, it becomes apparent that the misogyny of men's prison culture parallels the misogyny in women's prisons.] I have described toxic masculinity as "the constellation of socially regressive male traits that serve to foster domination, the devaluation of women, homophobia and wanton violence."<sup>14</sup> In prison, toxic masculinity erupts in fights on the prison yard, as-

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13. Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111, 115 (Don Sabo, Terry A. Kupers & Willie London eds., Temple Univ. Press 2001).

14. Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. CLINICAL PSYCHOL., 713, 714 (2005).

saults on officers, and the ugly phenomenon of prison rape.<sup>15</sup> Toxic masculinity tends to proliferate wildly in the prison context. The prison code that reigns in men's prisons is an exaggeration of the unspoken "male code" on the outside. According to both, a "manly man" does not display weakness of any kind, does not display emotions other than anger, does not depend on anyone, is never vulnerable, does not "snitch," does not cooperate with the authorities, and suffers pain in silence. Misogyny is one aspect of toxic masculinity - it permeates the prison culture - and as in women's jails and prisons, it is the backdrop and a critical component of incidents of sexual assault. After all, one way to make it obvious that one is manly is to denigrate the feminine, to stigmatize feminine qualities in other men, and to dominate and abuse men who seemingly exhibit female characteristics. For the perpetrator of sexual assault, there is this further advantage in stigmatizing the victim as feminine: that way, the perpetrator can subjectively imagine himself engaging in heterosexual, not homosexual sex.

Not all prisoners are misogynistic, nor are they all abusive toward weaker male prisoners. Many are friendly and caring, and protect more vulnerable peers without demanding sexual favors in return as repayment. Quite a few prisoners tell me that they would never have survived their time in prison had it not been for the kindness and mentoring of other prisoners. But there are abusive men among the prison population. Moreover, the prison code prohibits "snitching." As a result, there is a danger that kind and caring prisoners will inevitably become collusive in the sexual assaults that occur simply because they are constrained from reporting or taking action to halt the assaults.

## II. ADDING HOMOPHOBIA TO THE MIX

I have argued that homophobia and misogyny are two sides of the same coin, positing that male inadequacy is the link between these two concurrent phenomena.<sup>16</sup> Men who feel inse-

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15. See Julie Kunselman et al., *Nonconsensual Sexual Behavior, in PRISON SEX: PRACTICE AND POLICY 27* (Christopher Hensley ed., Lynne Rienner Publishers, 2002); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 *PRISON J.* 379 (1964); Just Detention International, *Learn the Basics: The Problem of Sexual Abuse in Detention*, [http://www.justdetention.org/en/learn\\_the\\_basics.aspx](http://www.justdetention.org/en/learn_the_basics.aspx) (last visited Sept. 2, 2009).

16. See generally TERRY A. KUPERS, *REVISIONING MEN'S LIVES: GENDER, INTIMACY, AND POWER* (The Guilford Press 1993). [See also Karen Franklin, *Enacting*



cure about themselves think of their insecurity in terms of a compromised masculinity. The failed or fallen man is the one who is not "manly." Permit me to resort to psychodynamic interpretation for a moment: in men's private fantasies the most frightening consequence they envision for being proven less than manly is the prospect of being anally raped by another man. Since the fallen man thinks of himself as unmanly, and there are only two choices in this starkly dichotomized vision of gender and power, he thinks of himself as more like a woman. And who among men is penetrated like a woman? In the mind of the average straight man, being gay connotes being anally penetrated. So to the average straight man, it is the gay man who is penetrated. Of course, in reality, this is a distorted fantasy, and anal penetration is not necessarily part of male homosexual experience - but it is the straight man's unconscious fantasies we are discussing here, not the real experience of gay men. So the inadequate man's misogyny becomes homophobia - he hates the one he fears being like. By demeaning and diminishing gay men he symbolically proves to himself he is not like them - he is not such a woman-like man. Alternatively, the similarity between misogyny and homophobia could be explained another way: it is because he is terrified he might be gay that a misogynistic male hates and abuses women. Either way the dynamic is delineated, the inadequacy in men is expressed as the need to dominate women, feminine men and gay men, as if the man believes he can prove he is still manly because he can dominate the other.

Of course, I am summarizing a much larger and more complex discussion in the discipline of gender studies.<sup>17</sup> Despite this, the bottom line remains the same: misogyny and homophobia are intricately linked, and the domination or diminishing of the other, whether the other is a woman, gay, lesbian, bisexual or transgender person, or a weaker man, is a desperate attempt on the part of some men who feel inadequate to prove to themselves and their buddies that they are really still manly, or at least they are not a \_\_\_\_ (*fill in the blank*) \_\_\_\_, where the blank is filled in with a favorite derogatory word for the despised gender identity or orientation. In prison, the same abuse that would be directed

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Masculinity: Antigay Violence and Group Rape as Participatory Theater, *Sexuality Research & Social Policy Journal of NSRC*, <http://nsrc.sfsu.edu>, pp. 25-40, 2004.]

17. : See generally, RECONSTRUCTING GENDER: A MULTICULTURAL ANTHOLOGY (Estelle Disch ed., 2003) and SEX, GENDER & SEXUALITY (Abbey Ferber, Kimberly Holcomb & Tre Wentling eds., 2009) .

at women, if they were available, is re-directed at other men because women are not available. Thus, the dark drama of sexual custodial misconduct, prisoner-on-prisoner rape, and the victimization of gay men in prison share intertwined themes of misogyny and homophobia.

This dark drama is evident as soon as new arrivals enter the prison facility. At first glance, older felons look on and yell cat calls to the more fair and meek among the newcomers: "come bunk with me, you look like you need a man to protect you!" Men buff up and act tough precisely to avoid appearing effeminate or weak. Homophobic terms (i.e., faggot, gay, punk) directed at those men who seem weak or effeminate are used as insults. These slurs may also be substituted, quite easily, for terms connoting the feminine (i.e., bitch, cunt, whore). Gay men who appear at all feminine are often offered protection by staff, as the staff know that they will be victimized by their fellow inmates because of their sexual identity or orientation.<sup>18</sup>

The most pronounced display of the inherent homophobia in prison culture involves transsexual individuals.<sup>19</sup> Prison staff usually house (pre-operative)<sup>20</sup> transsexual females in male prisons, and then there is a very substantial risk of sexual assault.<sup>21</sup> In a relatively recent high profile case, a transsexual female prisoner alleged that she was raped after she had been forced to share a cell with a "tougher" male prisoner.<sup>22</sup> The plaintiff alleged that the California Department of Corrections and Rehabilitation had been deliberately indifferent because the CDCR knew or should have known that placing a female-identified pris-

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18. T. J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN'S PRISON* 49-53 (2006).

19. Transsexuals are individuals who identify as a sex different than the one with which their body was classified at birth. Transsexual males are people who were born in the body of a woman. Transsexual females are generally women who were born in the body of a man. In this case, I am referring to individuals who were born in male bodies but identify as female, i.e. transsexual females. See generally MILDRED L. BROWN & CHLOE ANN ROUNSLEY, *TRUE SELVES: UNDERSTANDING TRANSSEXUALISM - FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS* (1996).

20. After a transsexual female has undergone surgery to alter genital anatomy, there is the possibility she will be sent to a women's prison.

21. See Human Rights Watch, *NO ESCAPE: MALE RAPE IN U.S. PRISONS*, HRW, 2001 @p. 71. See also Katrina C. Rose, *When is an Attempted Rape Not an Attempted Rape? When the Victim is Transsexual: Schwenk v. Hartford, The Intersection of Prison Rape, Title VII and Societal Willingness to Dehumanize Transsexuals*, 9 AM. U. J. GENDER SOC. POL'Y & L. 505, 510 - 11 (2001).

22. *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 168 Cal.App.4th 231 (Ca. 2008).

oner in a cell with a male prisoner would result in sexual abuse and rape.<sup>23</sup> A recent California Department of Corrections and Rehabilitation research report conducted in compliance with the PREA protocol had determined that “[s]exual assault is 13 times more prevalent among transgender inmates, with 59% reporting being sexually assaulted while in a California correctional facility.”<sup>24</sup> During the trial, the plaintiff testified that while she had been double-celled with the perpetrator, she reported the ongoing sexual abuse to a mental health staff member who told her to talk to an officer about it. When she reported the abuse to an officer, he allegedly retorted: “what’s the matter? . . . You’re gay and you love dick! You should have been happy – you were getting dick!”<sup>25</sup> Although several staff members later denied ever saying anything like that, I quote her allegation (as an allegation) because it so graphically illustrates the manner in which homophobia can play out within prison culture.

### III. STAFF SHARE THE SAME PRISON CULTURE WITH PRISONERS

Prison culture is informed by codes that guide the conduct and belief-systems of staff as well as prisoners. The Prison Code is an unwritten set of norms and values that informs prisoners’ thinking and behavior.<sup>26</sup> There is an emphasis on manliness. A manly prisoner must be tough; he must not display any sign of weakness or any quality that others might interpret as a reflection of femininity or homosexuality. He must cope with his pain silently and not display emotions other than anger. He must fight back when challenged to prove himself or fight. Even if he cannot defeat his opponent he must at least make a good show-

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23. Dee Farmer, a female-identified transsexual federal prisoner confined in a male prison, was raped by a male prisoner and her case was eventually heard by the U.S. Supreme Court. In *Farmer v. Brennan* the Court held that a prison official may be held liable under the Eighth Amendment for acting with “deliberate indifference” if he knows that an inmates faces a substantial risk of serious harm and fails to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825 (1994).

24. VALERIE JENNESS ET AL., *VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 3* (Univ. Cal. Irvine Dep’t of Criminology, Law & Society 2007).

25. The author was present in court after testifying as a psychiatric expert for plaintiff. The quotes are paraphrased from the author’s memory.

26. The Prison Code is described throughout the literature about prisons for men. *See, e.g.*, JAMES AUSTIN & JOHN IRWIN, *It’s About Time: America’s Imprisonment Binge 105-108* (Wadsworth Publ’g Co. 2000) (1994); *See, e.g.*, Kupers, *supra* note 14.

ing. He must “take care of his business” (including threats by other prisoners and theft of his possessions) on his own and not complain. He will not intervene in a conflict between other prisoners, and when asked about a violent incident he must act as if he did not see or hear anything. The Prison Code was designed in an earlier period to help prisoners stand up for themselves when they were being wrongly punished or abused.<sup>27</sup> Of course, the Prison Code is merely a vastly exaggerated version of the more widespread culture among men in our society.<sup>28</sup>

The biggest prohibition is against “snitching,” and the worst vengeance is reserved for those who snitch. One of the most violent prison yards in the California Department of Corrections and Rehabilitation (CDCR) is the general population side of Pelican Bay State Prison.<sup>29</sup> The CDCR plays a part in creating the problem by crowding the entire system, assigning a certain population of prisoners to Pelican Bay State Prison, depriving them of rights and denying them sufficient meaningful activities.<sup>30</sup> In this context, the Prison Code exacerbates the problem significantly. The prison is divided between a Security Housing Unit (SHU) that contains approximately 1,500 prisoners in segregation, and a general population section that contains an approximately comparable number.<sup>31</sup> Prisoners talk about a “snitch, parole or die” scenario at “The Bay.” In order to get out of the SHU, one must “de-brief,” which means one must tell the officers about criminal acts committed by others, usually related to gang activity.<sup>32</sup> When a prisoner is transferred out of the SHU at Pelican Bay

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27. See Austin, *supra* note 26, at 105-108.

28. For an apt discussion of male culture, see generally TERRENCE REAL, *I DON'T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION* (Scribner 1997); see also TERRY KUPERS, *REVISIONING MEN'S LIVES: GENDER, INTIMACY AND POWER* (Guilford, 1993).

29. One measure of prison violence is the use of force by staff - i.e., the more violence there is in a prison, the more often and strongly staff must resort to use of force. Regarding the use of force at Pelican Bay State Prison, see Madrid v. Gomez 889 F. Supp. 1146 N.D. Cal. 1995). Regarding the use of force, see FRED COHEN, *THE MENTALLY DISORDERED INMATE AND THE LAW* 48-50 (Civic Research Institute, 1998).

30. Besides conditions that prevail throughout the California Department of Corrections and Rehabilitation such as crowding, specific conditions within supermaximum security units such as the Security Housing Unit (SHU) at Pelican Bay State Prison include severe isolation and idleness.

31. Madrid v. Gomez, *supra* note 29; Cohen, *supra* note 29.

32. See SHARON SHALEV, *SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT* 81-86 (2009); See generally, Lira v. California Department of Corrections and Rehabilitation, No. C 07-1447 SI (pr), WL 2782715 (N.D. Cal. 2008).

State Prison, he is typically moved to the general population side of the prison, at least for a while. When a newcomer appears on the general population yard the other prisoners are left to assume, with a certain degree of veracity, that he must have won his release from the SHU by snitching on somebody. So he is, to some extent, a marked man. The presence on the yard of prisoners who are marked in this way obviously serves to inflame tempers and trigger a certain amount of violence. But since the code prohibits prisoners from reporting about all of this, it is not possible for outsiders, or even corrections officers, to know exactly how big a part this dynamic plays in the high prevalence of violence on the general population yard at Pelican Bay State Prison. In any case, prisoners are quick to explain that snitching can carry a penalty of death within the prisoner culture.

There are exceptions to the Prison Code. Roderick Johnson, a gay African American ex-prisoner, filed a civil suit in which he accused correctional staff at Texas' Allred Prison of deliberate indifference in leaving him in a maximum security prison for eighteen months while he was subjected to repeated rapes and continuously "pimped" by gang members. During the trial, several gang members from the prison testified on his behalf, including one prisoner who had acted, on gang orders, as Mr. Johnson's pimp.<sup>33</sup> It was an extraordinary turn in the trial. The gang members testified that Mr. Johnson's allegations were correct, he was repeatedly raped, and he repeatedly appealed to corrections staff to get him out of that unit. Presumably the prisoner gang members put themselves in grave danger for going public about dark prison secrets involving their gangs, but as one of the courageous witnesses explained to me during a trial recess, "Sometimes abuses are just so awful you just have to do the right thing regardless of the risks."<sup>34</sup>

Among corrections officers there is an equivalent set of rules of conduct. The Blue Code is an unwritten code of honor among police and corrections officers. Officers must stand tall and stick together. They must be strong, face danger without flinching, and must take seriously their vows to uphold the law and protect vulnerable citizens. And according to the Blue Code, officers do not inform on each other. In the press, the

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33. *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004) (summary and complaint in the case available at <http://www.aclu.org/lgbt/discrim/12168res20050404.html>).

34. The author served as an expert witness and was present in the courtroom during testimony by the prisoners.

Blue Code and the Code of Silence are synonymous. The code is notorious, and it is widely known that in civil and criminal court proceedings it is extremely difficult to find active duty officers who will testify about the illegal actions of other officers. Interviews with officers reflect that most believe that the code is applicable in cases of “illegal brutality or bending of the rules in order to protect colleagues from criminal proceedings,” but not to illegal actions with an “acquisitive motive.”<sup>35</sup>

It is remarkable how similar the unspoken prison code that shapes prisoners’ culture and the Blue Code that informs the behaviors and beliefs of officers are. So it should be no surprise to discover that both codes of conduct emphasize the need to be tough, focus on being respected, demean weakness, and place a high value on loyalty and cooperation among peers. Also, both contain very strong prohibitions against snitching, with comparable punishments for violations.

Unfortunately both the prisoners’ Prison Code and the officers’ Blue Code foster, or at least implicitly condone, misogyny and homophobia. For example, the emphasis on toughness, not displaying feelings, and remaining silent about one’s pain – shared elements in the two codes – would lead adherents to diminish qualities they associate in any way with women and gay men. In turn, both codes stigmatize qualities associated (by the homophobic male) with femininity and homosexuality in oneself, the man, which tends to lead to the demeaning of these qualities in women and gay men.<sup>36</sup> This is not to say that masculinity itself fosters or condones misogyny and homophobia; rather, it is masculinity in extremis, or toxic masculinity,<sup>37</sup> that contains a significant degree of misogyny and homophobia. But I am not going to pursue an argument here that the emphasis on hyper-masculine qualities in the code fosters misogyny and homophobia. For the

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35. Louise Westmarland, *Police Ethics and Integrity: Breaking the Blue Code of Silence*, 15 *POLICING & SOC’Y* 145, 145 (2005); see also Ann Mullen, Editorial, *Breaking the Blue Code*, *METRO TIMES* (Detroit), Nov. 11, 2008, available at <http://www.metrotimes.com/editorial/story.asp?id=869> (reporting on a National Institute of Ethics study that examines the Blue Code, also known as the code of silence, and makes practical suggestions on how to abolish it).

36. I am not positing that it is appropriate to delineate “qualities” associated with homosexuality, but merely that for the average man, there are relatively stereotypic qualities that signify homosexuality, and these qualities are stigmatized. Of course, the very notion that there are a set of definitive qualities linked with homosexuality is itself the product of homophobia. But I employ the term “qualities” only to identify that very stigma and homophobia.

37. See generally Kupers, *supra* note 14, at 716 - 17.

purposes of this discussion, the aspect of the two codes that is most relevant is the prohibition against informing or snitching. The two codes are identical in this regard, and as I will argue, this is the reason why both codes effectively foster and condone misogyny, homophobia, and sexual abuse in correctional settings.

#### IV. THE EXTENT OF MISOGYNY AND HOMOPHOBIA IN PRISON CULTURE

I am certainly not arguing that all prison staff are misogynistic or homophobic, just as I am not arguing that all male prisoners are. There are many prisoners and prison staff who care about women, men and gay prisoners, and who try to be sensitive to their needs. Rather, I am arguing that there is something about the shared culture of corrections officers and prisoners - the valuation of hyper-masculinity, the proscription of exhibitions of weakness and displays of emotion other than anger, and the rule against informing - that provides a fertile environment for misogyny and homophobia. Further, there is something about the institutional dynamics and culture that nurture any existing misogynistic and homophobic tendencies in the people who dwell and work therein.<sup>38</sup>

For staff, there is a worrisome contradiction: zero tolerance of sexual abuse requires staff to report other staff they see violating the rules, despite the fact that the unspoken Blue Code prohibits officers from informing on their co-workers. This is quite a contradiction in the minds of custody staff, which might explain a high rate of burn-out.<sup>39</sup> As a group, they register relatively high rates of substance abuse, domestic violence and suicide.<sup>40</sup> Most

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38. See generally Angela Browne, Brenda Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J.L. & PSYCHIATRY, 301 (1999) (presenting findings from a comprehensive study of victimization histories among incarcerated women in maximum security facilities); LAWRENCE A. GREENFELD & TRACY L. SNELL, *Women Offenders*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (U.S. Dep't of Justice/Bureau of Justice Statistics), Dec. 1999 at 8 (presenting data on the self-reported history of physical or sexual abuse of women under correctional authority).

39. TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS, AND WHAT WE MUST DO ABOUT IT 84-86 (1999); See generally CHRISTINA MASLACH & MICHAEL P. LEITER, THE TRUTH ABOUT BURNOUT: HOW ORGANIZATIONS CAUSE PERSONAL STRESS AND WHAT TO DO ABOUT IT (1997).

40. Robert Morgan, Richard Van Haveren & Christy Pearson, *Correctional Officer Burnout: Further Analyses*, 29 Criminal Justice and Behavior, 144 (2002), available at <http://cjb.sagepub.com/cgi/content/abstract/29/2/144>; James B. Wells, Kevin I. Minor, Earl Angel, Adam K. Matz & Nick Amato, *Predictors of Job Stress Among Staff in Juvenile Correctional Facilities*, 36 Criminal Justice and Behavior, 245 (2009),

resolve the contradiction by remaining silent.<sup>41</sup> A relatively small minority among custody staff resolve the contradiction by carrying out their responsibility under PREA, and inform on other officers they have witnessed sexually abusing prisoners.<sup>42</sup> But the price they pay is ostracism, and sometimes violent revenge by their peers. Neither resolution is very satisfactory.<sup>43</sup>

Let us assume that the field of corrections is a helping profession and that a large number of corrections officers are very professional and caring toward their wards. Nonetheless, misogyny and homophobia are, to some extent, potentialities in all individuals. All of us have within us a potential misogynist and a potential homophobe. The way to block the overt expression of misogyny and homophobia is not to deny it – however subtle and restrained its existence in each of us – but rather, to remain constantly vigilant and willing to struggle to prevent or correct their subtle and not-so-subtle expression. Thus, when a heterosexual couple come to see me for couples therapy and the woman complains that the man is expressing an unrecognized form of sexism when he refuses to do his share of childcare because he views it as “woman’s work,” I am cheered by the man’s confession that maybe he is – to a certain extent – expressing previously unrecognized sexism and that he would like to have it pointed out to him so he can correct it. But when the man becomes defensive and exclaims “I’m no sexist!,” I worry about the outcome for the couple. My job is to help him see that he may not be a sexist *per se*, but rather, like all men, he is capable of holding and acting upon sexist ideas and not being aware of it. Similarly, when a gay man points out that something I have said to him reflects unexamined homophobia, my openness to the possibility that he might be right and that I might have something to learn in our interaction - rather than immediately denying that I am capable

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available at <http://cjb.sagepub.com/cgi/content/abstract/36/3/245>; see also Bruce Finley, *Prison Horrors Haunt Guards' Private Lives*, Denver Post, March 25, 2007 available at [http://www.denverpost.com/news/ci\\_5510659](http://www.denverpost.com/news/ci_5510659)

41. Kupers, *supra* note 39.

42. Mark Arax & Mark Gladstone, *Prison Guard Breaks Code of Silence*, L.A. Times, Dec. 28, 1998, available at <http://www.worldfreeinternet.net/news/nws162>; see also Mark Arax, *Whistleblower CA prison guard challenges 'green wall'*, L.A. Times, Jan. 20, 2004, available at [www.energy-net.org/nuz/hrights/cal/04125106.txt](http://www.energy-net.org/nuz/hrights/cal/04125106.txt).

43. See generally ALISON LIEBLING & DAVID PRICE, *THE PRISON OFFICER* 75-111 (2001) (discussing the shared values and shared dilemmas of prisoners and staff); Cf. CRAIG HANEY, *REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* 310-311 (2006) (discussing the impact of correctional officers on the nature of prison life).



of failing to recognize and then exhibiting homophobia - makes it possible for us to struggle together to achieve a relationship relatively devoid of homophobia. The point is that everyone has misogynistic and homophobic tendencies. The way to end them is not to deny the possibility of their presence by believing we are somehow too enlightened to harbor such politically incorrect inclinations. Rather, we must look openly at ways we might be unaware of our misogynistic and homophobic tendencies and change our behavior or our language when previously unrecognized expressions of misogyny and homophobia enter our conversations and interactions. We all need to struggle to halt the expression of misogyny and homophobia, in our own cases and in all social situations, including jail and prison culture.

Certain environments tend to diminish the expression of these dark tendencies while other environments tend to foster them. Unfortunately, the modern prison is an environment that can foster misogynistic and homophobic tendencies. Both prisoners and staff are subject to the effects of the prison environment - an environment in which one group (the officers) exercise total control over the lives of another group (the prisoners). Prisons are designed to maintain a huge power imbalance, which is built into our society's notion of punishment. Haney and Zimbardo demonstrated that when one group has total control over another, terrible cruelty is likely to be directed by the keepers toward the kept.<sup>44</sup> Trends of recent decades - including prison crowding, cuts in rehabilitation programs and downsizing of mental health treatment programs - exacerbate the problem.<sup>45</sup> For example, the crowding and dismantling of rehabilitation programs leave a large number of men idle and restless on the yards and in the dayrooms - a situation that increases the prevalence of violence and sexual assault among prisoners and, in turn, intensi-

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44. See Craig Haney & Philip G. Zimbardo, *The Socialization into Criminality: On Becoming a Prisoner and a Guard*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 198, 216-17 (June Louin Tapp & Felice J. Levine eds., Holt, Rinehart & Winston 1977); See also Craig Haney, C. Banks & Philip G. Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, in *INTERNATIONAL JOURNAL OF CRIMINOLOGY & PENOLOGY*, I, 69-97 (1973) (providing a report of the original research).

45. Terry Kupers, *Mutual Respect and Effective Prison Management*, in *TRANSFORMING CORRECTIONS: HUMANISTIC APPROACHES TO CORRECTIONS AND OFFENDER TREATMENT* 121-134 (David Polizzi & Michael Baswell, eds., Carolina Academic Press 2009).

fies custody staff's inclination to punish prisoners harshly.<sup>46</sup> Prisoners often feel they have no rights and no recourse to appeal what they consider unfair or abusive treatment by staff.<sup>47</sup> They feel disrespected. Staff, meanwhile, feel that their job has relatively low status in society, and that they risk their safety and security by working in correctional facilities, especially as crowding and violence mount.<sup>48</sup>

In a power imbalance of such severe proportions, there is a heightened risk that the group that has control will - however inadvertently - express some degree of misogyny or homophobia and the group that is without power will be ill-equipped to stand up for their rights. This is precisely the problem in a women's prison when male staff make inappropriate sexual innuendoes or overt abusive actions toward women who have been previously sexually traumatized, and the women prisoners fear retaliation for reporting the inappropriate innuendoes or abuse.<sup>49</sup> This problem persists in a men's prison when a gay man is told by an officer that his complaints about sexual victimization are not valid because he likes sexual attention from men.<sup>50</sup> The expression of inappropriate sexual innuendos toward a woman prisoner by a male staff member and the discounting of a gay prisoner's complaints about sexual abuse because he is gay are obvious examples of misogyny and homophobia in the prison context. There are many less obvious varieties of both forms of oppression that occur in jails and prisons on a daily basis. Unfortunately, the reality of staff having total control over the lives of prisoners can give license to and grow the misogynist and homophobic tendencies in a certain number of staff members. Furthermore, staff's inattention to the safety of prisoners can provide cover for prisoner-on-prisoner assaults.

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46. See Terry Kupers, *How to Create Madness in Prison*, in *HUMANE PRISONS* (David Jones ed., Radcliff Publ'g 2006).

47. See generally, *Through The Eyes Of The Judged: Autobiographical Sketches By Incarcerated Young Men* (Simeon Terry et al. eds., 2001).

48. Liebling, *supra* note 43.

49. See Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, *HUMAN RIGHTS WATCH REPORT* (Human Rights Watch, New York, N.Y.) Sept. 1998, at 6-7.

50. The author has interviewed a significant number of gay and transgender prisoners who report homophobic inattention to their rights and outright abuse accompanied by gross homophobic insensitivities that take approximately this form. Not surprisingly, officers tend to deny such allegations and swear they never said any such thing.

The pressure placed on correctional staff not to inform on fellow staff members constitutes another institutional dynamic in correctional settings that makes the expression of misogyny and homophobia more pervasive and difficult to suppress. Let us assume that most prison staff are decent people who care about the prisoners they are responsible for. Let us also assume that they would say they struggle to prevent the emergence of misogyny and homophobia in their own utterances and behaviors. Despite these possibilities, there will inevitably also be a certain number of “bad apples” among corrections officers – individuals who enjoy abusing prisoners and regularly act out their rage toward them. I have presented several examples of this kind of “bad apple:” the male officer who takes advantage of women prisoners and the officer who tells gay and transgender prisoners that they have no complaint because they must enjoy sexual attention from men. The question is, who is going to stop the “bad apples” from abusing prisoners? In too many cases, often because the code of silence is the dominant cultural prescription, other officers who are much less misogynistic and homophobic will not say anything when the “bad apples” abuse prisoners by commenting about their body parts or stigmatizing their effeminacy or homosexuality.

I am giving staff the benefit of the doubt, assuming that most are not overtly misogynistic and homophobic and not interested in abusing prisoners. The problem is that the misogynists among the officers work their way into positions of near-total authority over prisoners and then proceed to abuse them. The professional and caring officers on staff then are faced with a quandary: though not especially misogynistic themselves, when they witness the abuse other officers enact they feel torn about their duty to report the abuse. To the extent they fail to report and to do all they can to halt the abuse, they become collusive in the misogyny, no matter how sensitive and caring they are toward women.

##### V. NPREC, PRISON CULTURE AND ZERO TOLERANCE

The NPREC Standards, if implemented in good faith, provide substantial help in remedying the problem of prison sexual abuse. They do not, however, constitute a sufficient or comprehensive remedy. For example, when it comes to prisoner-on-prisoner sexual assault in men's facilities, the totality of conditions is critical. We know that due to crowding and a relative lack of meaningful rehabilitation programs a large number of men are

left idle in the dayrooms and on the yards, which increases the prevalence of fights and sexual assaults.<sup>51</sup> We also know that with crowding, classification systems tend to break down and leave vulnerable prisoners more likely to be placed in harm's way.<sup>52</sup> Therefore, alleviating crowding, re-instating meaningful rehabilitation programs and improving classification procedures, in addition to specific measures to prevent sexual assaults and respond when they occur, are crucial components in any comprehensive and effective process to remedy the problem of prison rape.<sup>53</sup> We also know that a critical component of any effective rape elimination campaign would be the enhancement of recourse for prisoners who fall victim to sexual assault. Thus, reform of the Prison Litigation Reform Act to permit survivors of prison sexual assault their day in court is critical.<sup>54</sup> The words misogyny and homophobia do not appear in the NPREC Standards, but I am arguing that they are definitely implied and addressed in the discussion of zero tolerance and prison culture. In short, if real change is to occur, the issues addressed in the NPREC Standards must be viewed as part of a larger picture, with careful attention to misogyny and homophobia.

I will not review all of the sections of the standards and the ways in which they affect the problem as a whole. Rather, I will focus on the requirement in the Standards that prisoners who fall victim to custodial sexual misconduct must be provided an opportunity to discuss their conflicts about reporting the sexual abuse before they are essentially forced to report. No matter

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51. See Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects* 35 HASTINGS L.J. 313, 326-28 (1983); see also Paul B. Paulus, Garvin McCain & Verne C. Cox, *Death Rates, Psychiatric Commitments, Blood Pressure, and Perceived Crowding as a Function of Institutional Crowding*, 3 ENVTL. PSYCHOL. & NONVERBAL BEHAV. 107 (1978) (examining the effects of crowding in a large state prison system).

52. See generally JAMES AUSTIN & KENNETH MCGINNIS, *CLASSIFICATION OF HIGH-RISK AND SPECIAL MANAGEMENT PRISONERS: A NATIONAL ASSESSMENT OF CURRENT PRACTICES* (U.S. Dep't of Justice National Institute of Corrections 2004) (presenting results from a survey designed to obtain information on the procedures used to classify high-risk inmates).

53. See Terry A. Kupers, *How to Create Madness in Prison*, in HUMAN PRISONS 47, 54-55 (David Jones ed., Radcliff Publ'g 2006); See generally TERRY A. KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 217-73 (Jossey-Bass Publishers 1999) (discussing recommendations for rehabilitation of prisoners).

54. See generally *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH (2009) (urging Congress to amend the PLRA to remove barriers that severely limit prisoners' access to courts).

how conscientiously a zero tolerance policy is enforced, there will be incidents of sexual abuse; and no matter how sincerely wardens and commissioners of corrections facilities attempt to end retaliation, there will be retaliation. An all too common scenario in a women's prison is that a woman is sexually assaulted. Let us assume, hypothetically, that the abuse actually occurred, and the sexual contact was clearly unwanted. She follows the protocol and reports the incident. The investigators interview her and her alleged perpetrator, a male officer, who denies all allegations. There are no prisoner witnesses because other women are afraid to testify, and the staff, guided by the Blue Code, refuse to corroborate her story even if they know something about the incident that would aide the investigator. It's her word against his. The investigator concludes there is insufficient evidence, and the woman finds herself in a situation in which her abuser remains at work and is once again in total control of her within the prison. He can then retaliate in many different, undetectable ways. For example, he can write a bogus disciplinary report and either have her sent to segregation or interfere with her visits with her children – a complaint I have heard repeatedly from women prisoners I have interviewed in several states

Fear of retaliation of this kind prevents many women from reporting.<sup>55</sup> Women who have been sexually assaulted might wish to talk to a mental health clinician prior to formally reporting. They might hope to work through their mixed feelings about reporting, to talk about their fears of retaliation, and to have an opportunity to explore with a psychotherapist the pros and cons of reporting.<sup>56</sup> Mandatory staff third-party reporting rules in most jurisdictions obligate staff – including mental health staff - to report a crime if they know about it.<sup>57</sup> This reporting requirement contradicts standard confidentiality requirements in mental health treatment contexts.<sup>58</sup> In the community, the ethical guideline for psychiatrists who hear in a treatment context that their

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55. Human Rights Watch, *supra* note 49.

56. The author has been told this by very many women during interviews in preparation for his testimony as a psychiatric expert in civil litigation regarding custodial sexual misconduct in women's correctional facilities.

57. The author has investigated the policies in multiple states and arrived at the conclusion that most departments of correction include a mandatory reporting rule in policies regarding staff conduct.

58. Benjamin J. Sadock, *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, in KAPLAN AND SADOCK'S SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 1366-1367 (9th ed., Benjamin Sadock & Virginia Sadock eds., Lippincott Williams & Wilkins 2003).

adult patient has been sexually abused instructs the clinician to maintain the patient's confidentiality and not report the boundary violation. Rather, the clinician must help the patient explore the pros and cons of her reporting the abuse.<sup>59</sup> In other words, the choice to report is the patient's, and the therapist's duty is to help the patient make an informed and intelligent choice. In contrast, prison policies mandate that the clinician report all instances of sexual misconduct, regardless of confidentiality considerations. These policies ignore the prisoner's reality-based fears of retaliation and the strong possibility that an investigation will be inconclusive and will leave the woman under the control of her abuser.<sup>60</sup>

The National Prison Rape Elimination Commission has heard quite a lot of testimony related to this quandary in prison including the author's invited comments. In an earlier draft of the Standards, the Commission created an exception to mandatory reporting requirements for medical and mental health staff: prison mental health staff are essentially permitted to use their discretion about reporting sexual abuse of a patient, absent any law requiring clinicians employed within the correctional facility to report.<sup>61</sup> In the final version of the Standards, NPREC changed course, requiring mental health staff to file a third party report of crimes reported during confidential therapeutic encounters, including previously unreported sexual abuse, but with two provisos.<sup>62</sup> First, the clinician must inform the prisoner/patient of the clinician's requirement to report prior to hearing about the sexual abuse. Second, the prisoner is entitled to consult with an outside agency or advocate who does not have the same legal reporting requirement. Thus, in theory, the prisoner is informed about the mandatory reporting, but permitted to discuss with an outside advocate or counselor her mixed feelings about reporting and her fears of retaliation before she is forced to report.<sup>63</sup>

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59. Videotape: Reporting Ethical Concerns about Sexual Involvement with Patients (APA Subcommittee on the Education of Psychiatrists on Ethical Issues 1990).

60. This observation is the product of the author's investigation of custodial sexual misconduct in several states.

61. See PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 9 (2009), available at [http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC\\_FinalReport.PDF](http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF).

62. *Id.*

63. *Id.*

The NPREC's approach is a creative compromise of a thorny issue. Similarly, provisions in the Standards address other thorny issues and draw lines in attempting to require a bona fide zero tolerance approach. I have never spoken to a warden or commissioner of corrections who does not proclaim a zero tolerance policy in the prison or department; however, when I tour facilities and speak with prisoners, a very different story inevitably emerges. I will limit the discussion here to one other issue: staff training.

If a correctional administration really desires to create a zero tolerance policy on sexual abuse, the hiring and retention of staff must involve careful selection to exclude individuals prone to abusing prisoners and overtly misogynist and homophobic staff who are not amenable to training. This would mean that applicants for staff positions must be screened and their history of criminal activity, domestic violence, and prior allegations or findings of custodial misconduct (even if it occurred in a different state or jurisdiction) must be carefully scrutinized. Then, staff training must be effective in changing more subtle misogynist and homophobic tendencies on the part of staff. This is a tall order. As in the case of mental health staff reporting sexual abuse, there is no absolutely fool-proof way to end misogyny and homophobia among staff. However, in the institutional context, given the fact that staff have nearly absolute control over the prisoners - and that we know that in situations of absolute control of this kind abuse is all too likely - there is a responsibility to do absolutely everything possible to prevent misogynistic and homophobic tendencies from being acted out in abusive ways against prisoners.

With regard to misogyny and homophobia, there is both effective and ineffective training. For example, when a trainer is called into a police or fire department because of complaints of staff misconduct, and administration requires staff to undergo gender sensitivity or multi-cultural awareness training, the trainer who is brought in typically encounters a "crossed arm phenomenon."<sup>64</sup> The trainer is standing in front of a room full of police or fire officers, and in the back row are a bunch of men sitting with their arms crossed, as if to say "We're not really impressed that we need to be here for sensitivity training; we're only here because the boss ordered us to undergo the training,

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64. Thanks to Dr. Barry Shapiro for an explication of this notion.

and we don't think it will do any good." The trainer's job is to get those men to uncross their arms and take an active part in the training.

The success of trainings of this kind depends on getting participants to acknowledge that they are, in fact, subject to the bias or insensitivity being discussed, and that the only way to transcend them is to recognize that something they assume or say or do reflects sexism, homophobia, or racism. This does not mean that the employees being trained "are sexists," "homophobes," or "racists." Rather, there is recognition that in a multi-cultural heterodox culture like the U.S., it is quite possible that white males or straight females or people of any color might, however inadvertently, fall into a misogynist, homophobic or racist stance about something, unbeknownst to them.<sup>65</sup> The point of this kind of training is to help participants recognize previously unrecognized biases, and to change their attitudes and behaviors.<sup>66</sup> If they can admit an oppressive utterance or behavior when it is pointed out to them, they will grow from the training and go on to be better at avoiding sexist, homophobic or racist stereotypes and actions. For the training to be successful, participants have to be open to self-exploration and struggle to change. The point is not to label anyone an across-the-board sexist, homophobe or racist. Rather it is to raise consciousness about ways in which we all fall into biases and can always grow and be more sensitive.

Switching to the correctional context, this kind of training is one important component of what is needed to counter the misogyny and homophobia that dwells within staff's attitudes and the institution's dynamics. Zero tolerance requires a struggle to abate these tendencies, and only thorough, deep training that results in a new level of understanding will sufficiently effect zero tolerance.

The NPREC has succeeded in bringing the issue to the table with the publication of its Standards. The fact that PREA requires jail administrations and Departments of Corrections to study the problem of jail and prison sexual abuse and share its findings publicly already accomplishes one of the crucial steps to

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65. See PAUL KIVEL, *UPROOTING RACISM: HOW WHITE PEOPLE CAN WORK FOR RACIAL JUSTICE* (New Society Publishers 1996); see also PAUL KIVEL, *MEN'S WORK: HOW TO STOP THE VIOLENCE THAT TEARS OUR LIVES APART* (Ballantine Books 1992).

66. See generally Jerry Diller, *Cultural Diversity: A Primer For The Human Services* (2004).



remedying the problem. As the Stanford Mock Prison Experiment demonstrated, when one group of people has total control of another group, the group that is controlled has no recourse to grieve mistreatment (in other words, abuse goes unpunished); and when the entire scenario is kept secret with no public notice, serious abuse will occur.<sup>67</sup> To the extent misogyny and homophobia permeate a prison culture, the abuse will include sexual misconduct. To the extent PREA forces corrections systems to be transparent about all of this, abuse will be lessened. The next step needs to be a very real effort to enforce a zero tolerance policy. I have provided one example of the line between token and real zero tolerance: training that requires participation, self-exposure and real change in prison staff. There are many other components to a zero tolerance policy. Recent court victories and settlements awarding damages to prisoners and ex-prisoners who have been harmed by sexual abuse behind bars also serve to hurry the day when sexual abuse in jails and prisons no longer occurs.<sup>68</sup> We have much work to do.

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67. Haney et al, *supra* note 44.

68. A Michigan civil litigation recently concluded with a settlement of \$110 million for 500 women alleging sexual abuse in the Michigan DOC. See *Neal v. Dept. of Corrections*, No. 28532, WL 187813 (Mich. App., Jan. 27, 2009). A legal summary of the case is available at <http://www.aele.org/law/2009all09/jb2009sep.html>. News coverage is available at <http://www.freep.com/article/20090721/opinion05/90721056/0/news06/prison-rape> (news of the settlement) and [http://www.freep.com/article/99999999/news06/90105010&template=theme&theme=012009\\_PRISONS](http://www.freep.com/article/99999999/news06/90105010&template=theme&theme=012009_PRISONS) (a review of the litigation in Michigan).