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Inside Out

Elizabeth F. Emens*

INTRODUCTION

Russell Robinson has done it again. With *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, he has given us another provocative Article, which illuminates a phenomenon in the world and, indirectly, in ourselves.

The Article represents much of what generally makes Robinson's work so compelling. First, he writes about tremendously complex subjects and attends to their many complexities in remarkably lucid prose. Second, despite his critical perspective, he does not hesitate to make prescriptive arguments. In this Article, he even ventures into the hallowed ground of constitutional argument, something he has not done since his first article on race-based casting.¹ Third, Robinson is not afraid to offend people by taking controversial positions, yet for the most part he does not seem to court controversy. Finally, he manages to bridge multiple modes of scholarly writing, employing diverse methodologies to analyze problems rigorously and to transform readers' perspectives along the way. For example, Robinson often brings together empirical scholarship—whether extant social science data or his own empirical investigations—with narrative legal scholarship. Although this Article omits the personal narratives that sometimes characterize his writing, it is replete with evocative material from the characters he interviewed.

Masculinity as Prison closely examines the selection procedures for the K6G unit for gay and MTF transgender inmates in the L.A. County Jail,

* Professor of Law, Columbia Law School. My thoughts for this essay benefitted particularly from the input of Sujatha Baliga, Noa Ben-Asher, Sarah Lawsky, and Russell Robinson, and from the excellent research assistance of Laura Mergenthal.

1. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1 (2007).

drawing on interviews Robinson conducted with inmates, administrators, and lawyers. In so doing, Robinson uses this margin of margins to enrich our understanding of the dominant conceptions of race, gender, and sexuality. My first aim in this brief response is to map Robinson's analysis of the jail structure, tracing the way that practices of both inclusion and exclusion operate to construct the boundaries of maleness.

My second aim will be to press Robinson's normative conclusion a step further. I read Robinson to argue for a universalizing vision of accommodating vulnerability: Rather than merely protecting gay and trans inmates, the jail should concern itself with all kinds of vulnerability to sexual violence. But, I want to ask, why should we be concerned only with *sexual* violence? Is sexual violence really special, or should the ambit of Robinson's concern extend even further?

I.

MAPPING THE BOUNDARIES

My first point arises out of a footnote. In note 220, Robinson writes:

K6G's exclusion of bisexual men and alignment of bisexuals with heterosexuals is baffling in light of broader norms that erase bisexuality by interpreting claims of bisexual male identity as a cover for gay identity. By contrast, the K6G deputies appear to view bisexual men as essentially straight men with a penchant for sexually exploiting gay men.²

What Robinson says first seems right to me. Men who identify as bi are more often read—through the mechanisms of bisexual erasure³—as *really* gay. (Whether the opposite might be more true for women, I leave for another time;⁴ Robinson limits his point here to bisexual men, and so will I.) So why does K6G screening flip the usual assumption about bisexual men?

The reason, Robinson's gloss suggests, is this: When the K6G deputies are reviewing bisexual men, they are focused more on the question of who should be *excluded* from K6G than on who should be *included*. Their question isn't so much, is the bisexual man really attracted to men, but rather, is he a threat to the super-vulnerable super-gay men who truly belong in K6G? This observation leads me to a broader observation about the structure of the screening process.

In a sense, the K6G screening process is ultimately an effort to screen

2. Russell Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1408 (2011) (citations omitted).

3. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

4. My inclination is to say the opposite is more often the case for bisexual women, whose sexualities may be interpreted through the lens of the assumption that women's desire is really there for men (so lesbianism is sexy to women because it's sexy to men) or the assumption that women's desires are just so amorphous and fluid that they can more easily sleep with women for sentimental or political reasons without really desiring women sexually.

both *out* and *in*, to exclude as well as to include, for both K6G and the General Population (what Robinson calls the “GP”). This point is, I think, implicit in Robinson’s article, and I want to try to make it more vivid by charting it. The following four-square asks who the screening aims to include and exclude, for each sector of the jail.

	Include	Exclude
K6G	I “True” gay victims	II Bisexual predators
General Population (GP)	IV “True” men	III HIV positive (gay) men (overlapping with Quadrant I)

Each quadrant identifies the character or core story that a particular intersection highlights.⁵ Quadrant I—inclusion in K6G—is the explicit focus of the court order and the entire K6G enterprise: protecting the true “righteous gay male[s]”⁶ by creating a special sector for them. Robinson eloquently describes the fascinating, troubling, and sometimes bizarre inquiries used to construct the world of K6G. Distressing as this material is, for all the reasons that Robinson cites, it is also a good read. (Law reviews rarely offer observations like, “Counterintuitively, describing semen as ‘delicious’ is the wrong answer.”⁷)

The flip side of inclusion in K6G is Quadrant III—exclusion from the GP. Robinson recognizes that inclusion and exclusion are not simply mirror images here: The men in K6G are more likely to be HIV positive.⁸ Thus, keeping the true gays out of GP, Robinson surmises, is a way of protecting the true men in GP from HIV.⁹

More broadly, a central insight of Robinson’s analysis is that the jail’s architecture—though ostensibly focused on the true gay men in Quadrant I—

5. On the notion of “core stories,” see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199 (1995).

6. Robinson, *supra* note 2, at 1346 (quoting Deputy Lanni).

7. *Id.* at 1326.

8. *Id.* at 1369 (citing Nina T. Harawa et al., *Sex and Condom Use in a Large Jail Unit for Men Who Have Sex with Men (MSM) and Male-to-Female Transgenders*, 21 J. HEALTH CARE FOR POOR & UNDERSERVED 1071, 1075-77 (2010)).

9. *Id.* at 1408.

also constructs the identity of the true men of Quadrant IV.¹⁰ By elaborately defining what gay men are, by telling ourselves that there is a “relatively unified homosexuality that ‘we’ *do* ‘know today,’”¹¹ we reaffirm normative masculinity.¹² Those who are affirmatively included in the GP are the real prisoners who need no special protections. They can presumably survive the threat of sexual violence because they are too strong to be vulnerable to it: They don’t desire men, even in the absence of women, and they can fight off the advances of any less “righteous” straight men.¹³

What then should we make of the diagonal relationship of those true men of Quadrant IV to the bisexual predators of Quadrant II? Recall that these bisexuals, who inspired our discussion through footnote 220, are the men who must be excluded from K6G because they are a threat to the unit.

On one level these bisexual men can be viewed as erased into heterosexuality, as Robinson suggests: “the deputies appear to view bisexual men as essentially straight men with a penchant for sexually exploiting gay men.”¹⁴ But on another level these men could just be the wrong kind of gay men for K6G, because they are presumptively sexual aggressors.¹⁵ They are strong enough to impose themselves on other men, to demand sex.

This kind of gay man runs counter to the vision of gay men in K6G, who are apparently deemed no threat to each other. Indeed, though the gay and trans inmates of K6G are given condoms, they are presumed not to need them all that much. Their condom supply is limited to one a week,¹⁶ perhaps suggesting a rather minimal sex drive, relative to the stereotype of the hypersexual (gay) man.¹⁷ This might be because the gay men of K6G—like their trans cohabitants—are not really cast as men at all. This construction of their sexual lives calls to mind the famous scene in *Annie Hall* contrasting men’s and women’s stereotypical sex drives, wherein women consider sex three times a week to be having sex “constantly,” and men consider the same frequency to be

10. *Id.*

11. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 44–45 (critiquing the different context of the constructivist historiography of homosexuality).

12. Robinson, *supra* note 2, at 1361.

13. *Cf. supra* note 6.

14. *See supra* note 2.

15. In light of the literature on bisexual erasure, I ascribe to the deputies a perspective inclined to group the men as either gay or straight; thus, the alternative to them being “essentially straight men with a penchant for sexually exploiting gay men,” as Robinson characterizes them, is for them to be gay men with a penchant for sexually dominating other gay men—i.e., tops. Robinson, *supra* note 2, at 1408.

16. *Id.* at 1367.

17. *Id.* at 1341–43 (discussing the stereotype of the promiscuous gay man). Of course there are various reasons that condoms could be denied altogether—such as a ban on sex—or that access to condoms could be limited—such as cost savings. But a nonprofit supplies the condoms, and supplies are limited by an express Jail policy, not by the nonprofit provider. *Id.* at 1367 n.329. So why give the men access to condoms but limit them to *only one a week*?

“hardly ever.”¹⁸ In this light, the gay inmates of K6G are cast more as women than as men of any kind. The bisexual predator must be excluded, not because he doesn’t *really* want to have sex with men, but perhaps because he wants to have too much sex with men. In this light, he need not be a sexual aggressor; he need only approximate a “true” man with his correspondingly manly sex drive.

Alternatively, the one-condom-a-week limit might reflect an assumption by the deputies that gay sex generally requires a top and a bottom, and that the men of K6G are all bottoms.¹⁹ This would be consistent with the deputies’ assumption that all the men who qualify for K6G have tasted semen,²⁰ and with their exclusion of the seemingly bisexual man. Under either view of the condom rule, the deputies’ principle for policing the boundaries is the same: To admit this bisexual, masculine man would disrupt the pure sexless feminine space of K6G.

II.

MOVING BEYOND THE SEXUAL

My second point relates to Robinson’s solution. Robinson proposes that “[t]he Jail should remove the need for verifying sexual orientation—the central problem with the current K6G policy—through a policy that reduces the importance of sexual orientation and instead considers all vulnerability traits.”²¹ I read this as a universalizing move.

This move is universalizing in its approach both to identity and to accommodation. Robinson proposes a universalizing accommodation of vulnerability, in keeping with what Jessica Clarke has called the “universal turn” in workplace protections.²² Clarke observes that the universal turn involves “changing the axis of protection from identity traits to universal conditions like vulnerability.”²³ This approach allows Robinson to move away from K6G’s troubling reification of a particular notion of gay male identity, troubling both because it stigmatizes the men who might fit the identity and because it leaves out a wide swath of men who won’t, particularly along salient axes like race and class.

18. ANNIE HALL (MGM 1977). Here is the scene:
 [Alvy and Annie are seeing their therapists at the same time on a split screen]
 Alvy Singer’s Therapist: How often do you sleep together?
 Annie Hall’s Therapist: Do you have sex often?
 Alvy Singer: [lamenting] Hardly ever. Maybe three times a week.
 Annie Hall: [annoyed] Constantly. I’d say three times a week.

Available at <http://www.imdb.com/title/tt0075686/quotes>.

19. I thank Russell Robinson and Alesdair Ittelson for comments urging this interpretation.

20. See *supra* note 7 (referencing Robinson’s discussion of the deputies’ views on proper answers to the question of what semen tastes like).

21. Robinson, *supra* note 2, at 1403.

22. Jessica Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219 (2011).

23. *Id.* at 1240.

Robinson's universalizing proposal aims to unsettle the prevailing categories of gayness in the jail by offering protection much more broadly—and this is the accommodation part. He wants the jail to accommodate a more expansive set of traits that correlate with sexual victimization.²⁴ These traits have been identified by the National Prison Rape Elimination Commission (NPREC) as follows: “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate's own perception of vulnerability.”²⁵ Situating sexual orientation within this broader list seems a change in the right direction, even though, as Robinson acknowledges, it will be more costly than the current K6G approach.²⁶

One response to Robinson's proposal might be to ask why the aim is not to restructure jail conditions in order to reduce the risk of sexual violence for all inmates. Why limit the focus to a list of enumerated traits at all? Why not target the broader problem that the jail is organized around a particular vision of powerful aggressive men—those imagined by Quadrant IV above? To restructure the jail to protect everyone from prison rape would be a fuller elaboration of a universalizing view of identity and of accommodation. No longer would anyone need to be identified as particularly vulnerable, thus risking ossification of the very vulnerability the initiative seeks to avoid, nor must we worry about underinclusive (or overinclusive) definitions and shifting power relations that might leave out some people. Rather, the design of the jail could aim to protect everyone from this form of violation.²⁷

24. Robinson, *supra* note 2, at 1402-05.

25. NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, 217, available at http://nprec.us/files/pdfs/NPREC_FinalReport.PDF; Robinson, *supra* note 2, at 1312.

26. Robinson, *supra* note 2, at 1404-05.

27. Some work attempts to target prison rape in general. For instance, the Prison Rape Elimination Act requires agencies to follow the recommendations set out by the NPREC in 2009, which focus on prevention, detection and response, and monitoring. Prison Rape Elimination Act, Pub. L. No. 108-79 (2003); NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS (2009). In that first category, they do continue to screen both likely victims and perpetrators, but with the aim of separating the most likely members of each group. *Id.* at 27, 30.

One proposal that moves a little further away from screening for discrete vulnerable traits is the idea of organizing prisons by “weight classes.” See, e.g., Bryan Caplan, *Why Not? Weight Classes for Prisons*, LIBRARIES OF ECONOMICS AND LIBERTY, May 9, 2010, http://econlog.econlib.org/archives/2010/05/why_not_weight.html; Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J. L. & SOC. PROBS. 335, 365–67 (2009) (incorporating also classification by “potential risk of violence”). This proposal still uses risk factors for vulnerability—building on the evidence that “smaller and weaker inmates are at a substantial risk of being sexually victimized, as compared to their larger, and stronger[,] counterparts,” Ellenbogen, *supra*, at 364—but it locates everyone on a spectrum of size, rather than segregating a select group of vulnerable figures.

The final point I want to raise, however, goes even further, and that point concerns Robinson's emphasis on sexual violence. Why, in fact, are we concerned only with violence that is *sexual*? Why interrogate all the inclusions and exclusions created by the line drawing around K6G but leave the exclusive focus on *sexual* violence untouched?

In other words, why is sex special here?²⁸ The most obvious reason is that the court order that frames Robinson's project focuses our attention on sexual violence. But should our attention remain there?

The exclusive focus on sexual injury—both in the court order and in our ensuing discussion—suggests that there's some special harm being done to men by sexual violence. Now this may well be true: there may well be a special harm to rape. Indeed, in a society that clearly does—as a descriptive matter—attach special significance to sex, rape is a specially significant harm. Perhaps on account of that common feeling, the law should recognize the special significance of rape.

But the question remains whether—as a prescriptive matter—we want to reinforce this special status. We make a choice when we legislate the specialness of sex. In the context of male rape in particular, giving sexual violence special status caters to a particular set of anxieties about men being penetrated, and thus feminized.²⁹ In this way, our discussion of male prison rape remains tethered to the project of shoring up the impenetrability of normative masculinity. So long as our focus remains on prison *rape*, the real men of Quadrant IV continue to haunt our efforts at reform.

Moreover, broadening the focus to include all physical violence may have salutary results from a number of perspectives. For instance, inmates with disabilities—especially mental disabilities³⁰—experience higher rates of physical assault than other groups, suggesting a possible reason to be concerned about physical violence more generally. In addition, there is reason to be concerned about violence in the particular context of the L.A. County jails. The federal government is currently investigating the L.A. County jail system because of reports of widespread physical violence, and the ACLU is calling for an even more aggressive inquiry.³¹ Moreover, while in general gay and

28. For a more developed discussion of this question across contexts, see Elizabeth Emens, *Is Sex Special?* (unpublished manuscript) (on file with the author).

29. See Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 182, 189 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). Cf. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 2-5, 9-36 (1995) (arguing that departures from normative masculinity receive special opprobrium because the opportunity for masculine privilege means men give up more through gender transgression than do women).

30. Paul-Philippe Pare & Matthew W. Logan, *Risks of Minor and Serious Violent Victimization in Prison: The Impact of Inmates' Mental Disorders, Physical Disabilities, and Physical Size*, 1 *SOC. & MENTAL HEALTH* 106, 108-109 (2011). Of those inmates with physical disabilities, those with arthritis appear to experience the highest rates of victimization. *Id.* at 114-15.

31. Jennifer Medina, *Report Details Wide Abuse in Los Angeles Jail System*, *N.Y. TIMES*, Sept.

trans inmates tend to be subjected more to sexual violence and heterosexual inmates more to physical violence,³² Sharon Dolovich suggests the possibility that the inmates at K6G may be more vulnerable to certain kinds of physical violence.³³

In many ways, the work of reducing all forms of prison violence is probably not so different from the work of reducing specifically sexual violence, so long as the method involves overall reform of prison conditions rather than segregating the vulnerable populations.³⁴ If, however, we allow this question to lead us to question the per se violence of the apparatus of imprisonment, then we have ventured far from our original terrain. Where do we go if we question not only prison violence but the prison's violence? Perhaps only with visionary ventures like the restorative justice alternatives to incarceration.³⁵ The question of whether restorative justice approaches are truly feasible alternatives or just useful supplements to the current system takes me well beyond my areas of expertise, so I will stop here, noting only that the data on restorative justice show some surprising successes.³⁶

28, 2011, at A12; Robert Faturechi & Jack Leonard, *U.S. Widens Inquiry into Abuse at L.A. County Jails*, L.A. TIMES, Oct. 15, 2011, <http://articles.latimes.com/2011/oct/15/local/la-me-fbi-jails-20111015>.

32. See VALERIE JENNESS ET AL., *VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES* 33, Apr. 27, 2007.

33. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 17 n.210 (2011) ("In many ways, conditions in K6G mimic the unpleasant and even dangerous conditions of life in GP. And the absence of gang control in K6G actually means that there are more frequent one-on-one physical altercations in the K6G dorms.")

34. Initiatives to reduce prison violence include, for example, prevention efforts targeting inmates through conflict resolution and counseling techniques, see JAMES BYRNE, COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISON: SUMMARY OF TESTIMONY 6-7 (2006), available at http://faculty.uml.edu/jbyrne/byrne_james_m.pdf; Donald Specter, *Making Prisons Safe: Strategies for Reducing Violence*, 22 J. L. & POL'Y 125, 133 (2006), and attempts to alter the institutional culture and conditions, such as staff attitudes and overcrowding, see, e.g., *id.* at 7-8; E. Thompkins, Dep't of Sociology, John Jay College of Criminal Justice, Address to the Commission on Safety & Abuse in America's Prisons: Executive Directives & Prison Violence, at 4 (Apr. 19-20, 2005).

35. Restorative justice "is a theory of justice [that] requires a shift away from punishment towards repair. And a good way to think about it is what's often called the three questions. . . . What we generally ask is: what law was broken or what rule was broken, who broke it, and how do we punish them? And in restorative justice we ask a very different set of questions. We ask: what harm was done and to whom, what needs have arisen based on that harm, and whose obligation is it to meet those needs? It's really about processes that bring all the multiple stakeholders together to engage in a reparative process, ideally through consensus-based decision-making." Interview by David Onek with Sujatha Baliga, Program Director, Community Justice Works, at Univ. of Cal. Berkeley School of Law (Apr. 28, 20110), available at <http://www.law.berkeley.edu/10974.htm>. Baliga is currently a Senior Program Specialist at the National Council on Crime and Delinquency.

36. For citations on high rates of both victim and offender satisfaction with restorative justice programs, see, for example, John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & J. 1, 22 (1999), and for reduced recidivism rates among offenders, see Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 544 (2007). Some work also identifies various concerns with restorative justice approaches, such as due process considerations. See, e.g., Braithwaite, *supra*, at 81-83, 101-02.

This journey has taken us far from where we began with the critique of K6G, to the possibility of turning the entire prison system inside out. Yet the seeds of these more radical proposals are just below the surface of Robinson's provocative and illuminating analysis of L.A. County's experiment in protecting gay male and trans inmates.

CONCLUSION

I conclude with a quotation from Robinson's conclusion:

Although this Article seeks to illustrate how masculinity norms regulate all men, I do not argue that masculinity is inherently harmful or that we need to abolish it. Gender is such a totalizing force, structuring the way we socialize children from birth and the way that most people experience sexual desire, that I doubt that "gender-free" is attainable or desirable. A more realistic goal is to think critically about gender and seek selectively to intervene and reconstruct certain aspects of it. The answer, then, is to change the meaning of masculinity and realign it with values that are constructive.³⁷

I quote these lines to register my hope that Robinson will take up his own charge to identify and help to shape the constructive values of masculinity. This is a formidable task. But given his tools—from interdisciplinary methodology and facility with personal narrative, to fearless engagement with controversial issues, to rigorous attunement to the complications of distinct and intersecting identity categories, to comfort with taking normative and prescriptive positions amidst all that complexity—I can think of no one better positioned to undertake this project than Russell Robinson. I look forward to reading the result.

37. Robinson, *supra* note 2, at 1407 (citation omitted).