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Toward a Socio-Legal Theory of Male Rape

Orna Alyagon-Darr
Sapir Academic College

Ruthy Lowenstein Lazar
Haim Striks Faculty of Law at the College of Management (COLMAN)

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TOWARD A SOCIO-LEGAL THEORY OF MALE RAPE

ORNA ALYAGON-DARR & RUTHY LOWENSTEIN LAZAR*

In this Article, we attempt to formulate a new theoretical framework for the analysis of male rape, a phenomenon that has been neglected by legal and jurisprudential scholarship for a long time. We dispute common perceptions of male rape, most notably the centrality of consent in rape discourse, and show how male and female rape myths, while distinct, are upheld by similar paradigms of gender. Although it focuses on male rape, the Article proposes a broad theory of rape and gender.

The Article offers a comparative review of the scholarship on male rape in two settings: the community and prison. It collates the various studies on male rape in these settings, classifies the main elements of male rape, and points to the interrelations between the various scholarly works.

Based on the comparison, the Article develops a sixfold framework containing three recurring and three missing themes. The recurring themes are otherness—the construction of male rape as something that occurs to others, at the margins of society; masculinity—pivotal for the understanding of male rape; and the embeddedness of male rape in social power relations. The three missing themes are consent—possibly the most discussed aspect in current theories of female rape but hardly elaborated with respect to male victims; racial aspects of male rape in the community; and female

* Orna Alyagon-Darr is an Associate Professor of Law and President's Gender Equity and Diversity Advisor in Sapir Academic College. Ruthy Lowenstein Lazar is an Associate Professor of Law and Dean of the Haim Striks Faculty of Law at the College of Management (COLMAN). Both authors contributed equally. We thank Deborah Tuerkheimer, Tasseli McKay, and Michal Buchhandler-Raphael for their insightful comments. We are also grateful to Chen Avidar, Orit Gan, Daphna Hacker, Frances Raday, and Zvi Triger for their valuable comments on previous drafts, and to participants at the Sapir College and COLMAN colloquia, the 2021 Annual Conference of the Israeli Criminal Law Association in Tel Aviv, the 2022 Annual Conference of the Israeli Victimology Association in Yezreel Valley, and the 2022 LSA annual meeting in Lisbon. We are thankful for the constructive and insightful comments of the anonymous reviewers. Finally, we thank Lior Alona Goldman for able research assistance, and the Emile Zola Chair for Human Rights for financial support.

perpetrators of male rape. The burgeoning literature on male rape dwells mostly on the first three themes.

The Article argues that a meaningful theory of male rape requires further study of the missing themes. The sixfold analytical framework suggested in this Article can assist in identifying blind spots in the academic discourse, accurately conceptualizing this phenomenon, and offering a better general understanding of it. It is also a first step toward the creation of a more inclusive and general theory of rape that accounts for sexual abuse of all victims, regardless of gender, race, sexual orientation, or other social traits.

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INTRODUCTION

This Article seeks to carve out a new theoretical space for the analysis of male rape,¹ a phenomenon that has long been neglected by legal and

¹ In this Article, the term “male rape” refers to the rape of adult men. In the psychology and social work scholarship, this phenomenon is referred to as Adult Sexual Assault (ASA). The focus on adults and not children is discussed later in the Article. With respect to the offense, we use the terms “rape” and “sexual assault” interchangeably. The want of accurate terminology is also discussed later in the Article.

jurisprudential scholarship.² Although in recent decades research has paid increasing attention to male rape, significant gaps in the literature remain regarding sexual violence against men.³

Our theorization of male rape unsettles customary perceptions of rape, most notably the centrality of consent in rape discourse. The Article shows that although male and female rape myths are distinct, they are upheld by similar paradigms of gender. The Article focuses on male rape, but it advances a broad theory of rape and gender.

Part I reviews the main attempts in the literature to theorize male rape. Parts II and III introduce a literature review of male rape in the community and prison settings, examining its prevalence and characteristics; the relationship between the abuser and the victim; the characteristics of victims and perpetrators; and the rape (e.g. as use of violence). We chose these two settings because of their contradictory nature. The community encompasses varied daily situations in the spheres of leisure, cultural activity, and social gatherings, which are not exclusively male and do not involve a formal hierarchy or power relations. Prison is a “total institution” characterized by power and control relations.⁴ It includes only male inmates and is masculine in culture.⁵ The Article collates the various studies on male rape in these two settings, classifies the main elements of male rape in these settings, and points to the interrelations between the various scholarly works on the topic.

Based on a meta-analysis of the literature on the two settings, we developed a sixfold framework containing three recurring themes (otherness, masculinity, and power) and three missing themes (consent, race in the community setting, and female-on-male rape). Part IV delineates the sixfold analytical framework designed to advance the integration of the growing field of male rape study. The framework supports common language and theorization around the phenomenon of male rape.

² Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1264 (2011) (criticizing the invisibility of male rape in legal and social discourse and arguing for a redefinition of rape as a gender-neutral crime).

³ Samantha Lundrigan & Katrin Mueller-Johnson, *Male Stranger Rape: A Behavioral Model of Victim-Offender Interaction*, 40 CRIM. JUST. & BEHAVIOR 763, 767 (2013) (discussing male stranger rape and examining its behavioral structure).

⁴ Goffman defines a total institution as “a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.” ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 11 (1968).

⁵ Here we refer to the classification by the prison authorities. Transgender individuals also make up the prison population.

One of the three themes that is missing in the research on male rape but is omnipresent in the sexual violence literature is consent to sexual relations. Consent, probably the most discussed aspect in current theories of female rape,⁶ is hardly addressed with respect to male victims. This novel finding indicates that despite the growing scholarship on male rape, considerable aspects of this phenomenon remain invisible in legal research on sexual violence. The second missing theme is the racial aspects of male rape in the community setting. The third theme concerns female perpetrators of male rape.

The Article demonstrates that male and female rape myths, although distinct, are upheld by broadly similar and interconnected ideologies of gender and sexuality. The current focus on consent in the rape scholarship and law, and the relative absence of such discourse on the subject of male rape, illustrates the limitations of theories of both male and female rape. We hope that this Article will shed light on the marginality of male rape, suggest a theoretical framework for male rape, and contribute to a general and broad conceptualization of sexual victimization.

I. A THEORY OF MALE RAPE

Until recently, male rape was often described as a marginalized and neglected area of study.⁷ Some settings of male-on-male rape, such as prison, received scholarly attention as early as the first half of the twentieth century,⁸ but research on other settings, such as rape of males in the military, in the workplace, or in the community, was scarce until the

⁶ See sources cited *infra* note 226 and accompanying text.

⁷ Michelle Lowe & Paul Rogers, *The Scope of Male Rape: A Selective Review of Research, Policy and Practice*, 35 *AGGRESSION & VIOLENT BEHAV.* 38, 38 (2017) (discussing critical issues and problems with the United Kingdom's policy regarding male survivors of sexual violence); Karen G. Weiss, *Male Sexual Victimization: Examining Men's Experiences of Rape and Sexual Assault*, 12 *MEN & MASCULINITIES* 275, 275–76 (2010) (analyzing men's sexual victimization experiences in the United States using a nationally representative sample of victim narratives from the National Crime Victimization Survey); CLAIRE COHEN, *MALE RAPE IS A FEMINIST ISSUE: FEMINISM, GOVERNMENTALITY AND MALE RAPE* 14 (2014); Ruth Graham, *Male Rape and the Careful Construction of the Male Victim*, 15 *SOC. & LEGAL STUD.* 187, 189 (2006).

⁸ For a review of 1930s and 1940s studies of male rape, see MARK S. FLEISHER & JESSIE L. KRIENERT, *THE MYTH OF PRISON RAPE: SEXUAL CULTURE IN AMERICAN PRISONS* 7–12 (2009). See generally U.S. DEP'T JUST., NAT'L INST. CORR., ANNOTATED BIBLIOGRAPHY ON PRISON RAPE / INMATE SEXUAL ASSAULT (2007) (providing a forty-three-page long annotated bibliography on prison rape).

beginning of the twenty-first century.⁹ Furthermore, most of the scholarship about male rape was conducted in disciplines such as criminology, sociology, and psychology, whereas legal or jurisprudential writing is scarce and hardly comparable to the vast literature on the rape of females.¹⁰

The general dearth of academic literature on male rape echoes the wider cultural, social, and legal invisibility of this phenomenon. The common view of rape identifies perpetrators as men and victims as women.¹¹ This “female-

⁹ KRISTEN ZALESKI, UNDERSTANDING AND TREATING MILITARY SEXUAL TRAUMA 60 (2018); Heather R. Hlavka, *Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization*, 20 MEN & MASCULINITIES 482, 483 (2017) (analyzing cultural perception that construct male sexual victimization as invisible and incomprehensible).

¹⁰ For such statements, see Graham, *supra* note 7, at 189. There are a few noteworthy exceptions, many of them from the 1990s. For some works from the last two decades, see Philip N.S. Rumney, *Male Rape in the Courtroom: Issues and Concerns*, CRIM. L. REV. 205 (2001) [hereinafter *Male Rape in the Courtroom*]; Siegmund Fred Fuchs, *Male Sexual Assault: Issues of Arousal and Consent*, 51 CLEV. ST. L. REV. 93 (2004) (suggesting that an erection under circumstances of sleep does not indicate consent to engage in sexual activity); Philip N.S. Rumney, *Policing Male Rape and Sexual Assault*, 72 J. CRIM. L. 67 (2008) [hereinafter *Policing Male Rape*] (addressing the treatment of adult male rape and sexual assault complainants by the police); Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. PUB. HEALTH 19 (2014) (analyzing five sets of federal agency data and highlighting the prevalence of male victimization); Capers, *supra* note 2 (discussing male-on-male rape in and out of prison). Rumney and Jamel suggest that the explanation for the relative richness of medical and psychological scholarship on male rape is access of the researchers in these disciplines to the phenomenon. Philip N.S. Rumney & Joanna Jamel, *The Not So Carefully Constructed Male Victim: A Response to Ruth Graham* 5 (Working Paper, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339585. Because the strictly legal and jurisprudential literature on male rape is relatively scarce, and because it is impossible to disentangle the legal from the social when it comes to male rape, our review included sociological and criminological studies, but not medical ones.

¹¹ Stemple & Meyer, *supra* note 10, at 19; COHEN, *supra* note 7, at 14; Graham, *supra* note 7, at 187. This view is based on studies showing that most victims of sexual violence are women, and most offenders are men. This paradigm is sometimes embedded in a gendered legal definition of the offense. See Scott M. Walfield, “Men Cannot Be Raped”: Correlates of Male Rape Myth Acceptance, 36 J. INTERPERSONAL VIOLENCE 6391, 6392 (2021) (investigating how demographics, personal experiences with rape, and belief systems relate to rape myth adherence for male victims). According to available statistics, females still constitute the majority of sexual assault victims, but the rate of male victims is also significant. The American National Intimate Partner and Sexual Violence Survey (NISVS) reports that in United States, 43.6% of women (nearly 52.2 million) experienced some form of contact sexual violence in their lifetime, comparable to 24.8% of men (27.6 million). SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, NAT’L INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY, 2015 DATA BRIEF – UPDATED RELEASE 2–3 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015-data-brief508.pdf> [<https://perma.cc/P5TH-RQ7G>].

centric” view does not acknowledge or recognize the phenomenon of male rape, which has remained hidden from the public eye and was socially and legally marginalized.¹² In 2011, Bennett Capers highlighted the social silence surrounding male rape and argued that it permeates legal scholarship about rape.¹³ His work demonstrates the significance of including sexual victimization of men in the broader theory of rape. The invisibility of male rape was reinforced by rape myths¹⁴ that deny or belittle the possibility of sexual assault of males.¹⁵ Such myths include: “men cannot be overcome by force,” “men can always defend themselves,” “men cannot be raped by women,” and “male-on-male rape is about homosexuality.”¹⁶ The

¹² Lowe & Rogers, *supra* note 7, at 38.

¹³ Capers, *supra* note 2, at 1264, 1288–96.

¹⁴ Rape myths are beliefs and assumptions regarding women, rape, rapists, and rape victims. These beliefs are based on patriarchal conceptions of the way women should behave in sexual interactions, the “proper” responses of rape victims to coerced sex, and more. Some examples are the assumption that when a woman says yes to sex once, she is more prone to consent to other sexual interaction; that rape victims promptly complain about the rape; that rape is perpetrated by strangers; that women who are drinking and partying are more prone to consent, and more. See Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds & Christine A. Gidycz, *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011) (providing an overview of the historical origins of rape myths and documenting the current manifestations of these myths in American society); Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127 (2001) (arguing that the Violence Against Women Act (VAWA) and the Federal Rules of Evidence amendments reflect the myth about “crazy rapists”); Rebecca M. Hayes, Rebecca L. Abbott & Savannah Cook, *It’s Her Fault: Student Acceptance of Rape Myths on Two College Campuses*, 22 VIOLENCE AGAINST WOMEN 1540 (2016) (exploring factors associated with individual’s adherence to rape myths); Jesse Fox, Rachel A. Ralston, Cody K. Cooper & Kaitlyn A. Jones, *Sexualized Avatars Lead to Women’s Self-Objectification and Acceptance of Rape Myths*, 39 PSYCH. WOMEN Q. 349, 351 (2015); Michelle E. Deming, Eleanor Krassen Covan, Suzanne C. Swan & Deborah L. Billings, *Exploring Rape Myths, Gendered Norms, Group Processing, and the Social Context of Rape Among College Women: A Qualitative Analysis*, 19 VIOLENCE AGAINST WOMEN 465, 466 (2013) (showing how many women utilize rape myths in analyzing rape scenarios).

¹⁵ Jessica A. Turchik & Katie M. Edwards, *Myths About Male Rape: A Literature Review*, 13 PSYCH. MEN & MASCULINITY 211 (2012); Rumney, *Policing Male Rape*, *supra* note 10, at 67; Hlavka, *supra* note 9, at 488.

¹⁶ ZALESKI, *supra* note 9, at 60; Betsy S. O’Brien & Leo Sher, *Military Sexual Trauma as a Determinant in the Development of Mental and Physical Illness in Male and Female Veterans*, 25 INT’L J. ADOLESCENT MED. & HEALTH 269 (2013) (reviewing the literature on Military Sexual Trauma (MST)); Gertie Pretorius, *The Male Rape Survivor: Possible Meanings in the Context of Feminism and Patriarchy*, 19 J. PSYCH. AFRICA 575, 577 (2009) (presenting a philosophical analysis of the meanings of rape for male survivors); Hlavka, *supra* note 9, at 483, 489–99.

acknowledgment of male rape challenges dominant perceptions of men's sexuality and societal understanding of masculinity and femininity.¹⁷ The perception of men as vulnerable victims who do not dominate the sexual interaction contradicts the female-centric model of sexual victimization that currently serves as the central model for the analysis of rape.¹⁸ Capers claims that male rape continues to be invisible to feminist, queer, and criminal law scholars, as well as to legal scholars who write about the plight of Black men in the justice system.¹⁹

The literature has pointed out several settings of male rape, but others remain hardly explored. Literature on prison rape and media coverage of male rape looms large while little has been written about male date rape or male rape in the sports or entertainment industries. A great deal has been written about the rape of boys, and less about the rape of adult males in community settings.²⁰

The growing literature is also inconsistent in the description and theorization of male rape. Despite growing empirical research, including national surveys, neither the definition of male rape nor its prevalence is clear.²¹ Ruth Graham noted that even a basic estimation of the prevalence of male rape remains challenging because research "is so varied in its estimates and methodologies that it would be foolhardy to attempt to put a figure on the extent of the problem."²²

The fuzzy image of the phenomenon of male rape generates theoretical and practical difficulties. There is no coherent or inclusive theorization. Different settings and scenarios of male rape are analyzed separately by the diverse scholarship, based on conflicting facts and evoking contradictory themes. Academic writing about prison rape, for example, highlights

¹⁷ Graham, *supra* note 7, at 188.

¹⁸ While Mackinnon states that "[r]ape is a crime of gender inequality," she acknowledges data on male rape and assumes it is underreported. See Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 431, 433 n.8 (2016) [hereinafter MacKinnon, *Rape Redefined*]; see also Pretorius, *supra* note 16, at 576–77; COHEN, *supra* note 7, at 14.

¹⁹ Capers, *supra* note 2, at 1293–96. Notably, male rape was recognized in some seminal feminist works. See, for example, Estrich's remark on the invisibility of male rape (although this is mentioned in a footnote and refers to gay victims and not heterosexual ones). Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1985) (exposing myths about "real" rape and proposing rape law reform).

²⁰ Graham, *supra* note 7, at 189.

²¹ Lundrigan & Mueller-Johnson, *supra* note 2, at 767–68; Graham, *supra* note 7, at 191; Zoë D. Peterson, Emily K. Voller, Melissa A. Polusmy & Maureen Murdoch, *Prevalence and Consequences of Adult Sexual Assault of Men: Review of Empirical Findings and State of the Literature*, 31 CLINICAL PSYCH. REV. 1, 2 (2011).

²² Graham, *supra* note 7, at 189.

elements of physical violence and relations of power that echo the “real rape” paradigm,²³ whereas in the research focusing on the gay male community, the paradigm of acquaintance rape is the prevalent one.²⁴ Neither paradigm necessarily represents the reality of male rape accurately.

Conversely, the scholarship on female rape has produced solid theories that shape the analysis and social discourse of female rape and also affect policy. The most prominent currents that contribute to the analysis of sexual violence are the radical, liberal, and post-feminist theories.²⁵ By contrast, the topic of male rape still lacks a coherent theory,²⁶ although several attempts to offer integrative analysis should be acknowledged.

One attempt to create an integrative framework worth mentioning was made by Noreen Abdullah-Khan, who reviewed various theories on sexual assault.²⁷ While her goal is to offer explanations for the occurrence of male rape, and the empirical part of the book is dedicated to male rape, her theoretical survey is not male rape-specific. Graham and Claire Cohen also attempted to offer a broad theory of male rape. Although differing in their intellectual perspective, both focused on male victims. Cohen uses a Foucauldian lens to explore the construction of male rape in discursive

²³ Ian O’Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241, 241 (2004). The classical “real rape” paradigm features young women, not men, as the plausible victims of rape. Nevertheless, other typical elements of the “real rape” scenario are relevant to academic focus on male rape, including the use of violence and the credibility of victims who adhere to mainstream sexual norms (chaste young girls in case of women, heterosexuals in case of male victims). Hlavka, *supra* note 9, at 498–99.

²⁴ The research that highlights violence in the setting community concerns predominantly “gay-bashing.” For a review, see NOREEN ABDULLAH-KHAN, MALE RAPE: THE EMERGENCE OF A SOCIAL AND LEGAL ISSUE 82–83 (2008). For male rape-specific surveys of the academic literature, see generally Peterson et al., *supra* note 21; Joke Depraetere, Christophe Vandeviver, Tom Vander Beken & Ines Keygnaert, *Big Boys Don’t Cry: A Critical Interpretive Synthesis of Male Sexual Victimization*, 21 TRAUMA, VIOLENCE & ABUSE 991 (2020). These scholarly attempts to generalize and classify the literature on male rape have made significant contributions to a conceptual organization of the topic but have not yet produced a general theory.

²⁵ For a review of the various feminist theories of rape, see ABDULLAH-KHAN, *supra* note 24, at 55–65; see also Ruthy Lowenstein Lazar, *Epistemic Twilight Zone of Consent*, 30 S. CALIF. INTERDISC. L.J. 461, 476–80 (2021).

²⁶ In the words of Claire Cohen, whose work is an exceptional attempt to theorize the research on male rape, present research prefers “to focus on ascertaining the size and nature or incidence and impact of the problem and seek[s] to examine the weight of empirical research, rather than reflexively engaging with the messages and assumptions such research espouses.” COHEN, *supra* note 7, at 15.

²⁷ ABDULLAH-KHAN, *supra* note 24, at 39–92.

practices in the media and the audiences' internalization.²⁸ She concludes that male victimhood is constructed by the deployment of traditional rape myths.²⁹ Cohen argues that a feminist approach that considers rape as something that men do to women is self-defeating because it reinforces rape myths based on the image of the "ideal victim."³⁰ This type of construction of male rape resuscitates myths that have been discredited in feminist scholarship and shores up hegemonic constructs of masculinity and the patriarchal power grid, to the disadvantage of all victims of sexual offenses.³¹

Graham implies that, since the victimization of men challenges hegemonic perceptions of male sexuality, the phenomenon of male rape is a good case study for the development of a general theory of sexual assault.³² She explores how academic literature constructs an ideal type of credible male victim by reference to social norms of sexual difference, sexuality, and hierarchies of sexual harm. Graham further argues that sexual victimization of men is perceived as worse than that of women and that gay victims are constructed as less legitimate than heterosexual ones.³³ She calls for an understanding of sexual assault that will not privilege some victims over others.³⁴

Socio-cultural perceptions of harm attribute greater harm to some harmful acts than to others.³⁵ The perceived level of harmfulness relies on normative and cultural institutions. Delineating the hierarchies of harm advances the theoretical understanding of the phenomenon of male rape. The comparative differentiation between various harmful situations problematizes the cultural meaning of the harm and integrates different nuances of sexual harm into a coherent framework. Clearly articulating the

²⁸ COHEN, *supra* note 7, at 37–48.

²⁹ *Id.* at 48.

³⁰ Cohen discussed rape in general. This analysis may not be suitable for particular types of rape. For example, rape in war is a form of genocide, which necessarily defines mass rape as something men do to women and which in no way reinforces the misconception of an ideal victim. Nevertheless, sexual violence against men in the course of war should not be overlooked. See Valorie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 924–27 (2013).

³¹ COHEN, *supra* note 7, at 6.

³² Graham, *supra* note 7, at 188.

³³ *Id.* at 199–200.

³⁴ Rumney and Jamel bitterly criticize Graham for selective review of literature and misunderstanding of evidence and legal definitions. We believe that her theoretical contribution should not be altogether brushed aside and that her call to construct a general theory of rape should be followed. Rumney & Jamel, *supra* note 10, at 2–5.

³⁵ Graham, *supra* note 7, at 200, 202.

socio-cultural hierarchies of harm necessarily involves a powerful critique of dominant cultural narratives and myths about male rape.

Heather Hlavka follows in Graham's footsteps and constructs a hierarchy of harm.³⁶ Her analysis of male adolescent victims' discourse places very young victims or heterosexual youths at the top tier who were intoxicated or physically assaulted, who best match the "ideal victim" typecast and are able to explain the injury to their masculinity and reestablish it.³⁷ At the bottom tier of the cultural hierarchy, she finds the gay victims, who are always suspected of consenting.³⁸ In between, she locates boys who were sexually assaulted by women. Their heterosexuality remains intact, but their victimhood is denied.³⁹ As Hlavka acknowledges, elements of race and class may add to the complexity.⁴⁰ Establishing hierarchies of harm requires a clear reference to prevalent cultural narratives and myths about rape, both in general and specifically about male rape. By doing so, it contributes to a broader theoretical understanding of rape and its embeddedness within a wide social context.

Jessica Turchik and Katie Edwards argue that, like female rape, male rape relies on a patriarchal structure, and it is related to oppression mechanisms such as sexism and heterosexism.⁴¹ They demonstrate the operation of rape myths in the social institutions of medicine, media, law, the military, and prisons. The five domains they describe, however, are not on the same analytical plane. Medicine and law are analyzed as sites of production of academic and professional-disciplinary knowledge. When referring to media, Turchik and Edwards focus on how the media represent and perpetuate rape myths, not on the practice or prevalence of the offenses in society.⁴²

Finally, the military and prisons are two settings where male rape has been studied. Integrative research by Christina DeJong and others compared the settings of prison, the military, conflict situations, and the college

³⁶ Hlavka, *supra* note 9, at 498.

³⁷ *Id.* at 499.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 498.

⁴¹ Turchik & Edwards, *supra* note 15, at 213.

⁴² The media may also be described as a social-professional institution, like law and medicine. But when Turchik and Edwards discussed media, they described how this setting reflects cultural knowledge that is created outside its bounds, whereas their discussion of law and medicine analyzed knowledge produced within the professional sphere of these disciplines. *Id.* at 214–18.

campus, and connected them to various rape myths, bringing to the forefront the issue of rape myths regarding male sexual victimization.⁴³

As described in this Part, a growing body of literature acknowledges and investigates the subject of male rape, including a few attempts to offer a more general theory of the phenomenon. Yet, this scholarship developed in diverse routes that only occasionally intersect. Thus, the phenomenon of male rape still remains invisible and subliminal in the sense that it lacks a coherent conceptual grounding that can fill the lacuna in the scholarship and inspire policy making.

II. COMPARATIVE REVIEW OF THE COMMUNITY AND PRISON

A. COMMUNITY

The first setting for male rape that we explored is what we term “the community.” The community setting refers to people’s day-to-day interactions, as well as relationships between strangers, acquaintances, friends, partners, neighbors, and the like, who interact outside formal frameworks and in non-institutional settings in the spheres of leisure, cultural activity, social gathering, and outings, and where males and females often mix and participate by their own choice.⁴⁴ We include sexual assault within intimate gay male relationships but do not include sexual violence against children and minors in the private sphere by adults because this violence has unique characteristics that are different from those of adult male rape.⁴⁵

Research suggests that male rape in the community is not as rare as popular belief assumes.⁴⁶ Existing differences in the assessment of the scope of male rape may stem from diverse methodologies, different legal definitions of the act, and different social conceptions of it. Most states in the U.S. define rape in gender-neutral terms,⁴⁷ thereby including men in the

⁴³ See Christina DeJong, Skyler J. Morgan & Alison Cox, *Male Rape in Context: Measures of Intolerance and Support for Male Rape Myths* (Mrms), 33 CRIM. JUST. STUD. 195 (2020) (discussing the manifestation of the intersection of gender, race, and masculinity in the experience of reporting crime to the police by Black and multi-racial Black people).

⁴⁴ Naturally, no choice in life is entirely free.

⁴⁵ About the special traits of sexual abuse of minors, see Laura K. Murray, Amanda Nguyen & Judith A. Cohen, *Child Sexual Abuse*, 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS 321, 321 (2014).

⁴⁶ See discussion *infra* pp. 354–55.

⁴⁷ See Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. SOC. JUST. 481 (2007) [hereinafter *In Defence*] (discussing the debate surrounding the question of whether to define rape in gender-neutral terms).

definition,⁴⁸ but the legal definitions of rape vary across states.⁴⁹ Outdated and stereotypical societal and cultural conceptualizations of male rape, which depict it as a physically violent act most often perpetrated against gay men, also contribute to the difficulties in acknowledging the phenomenon.⁵⁰

In 2012, the definition of rape by the Uniform Crime Report of the Federal Bureau of Investigation changed to a gender-neutral definition as follows: “The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”⁵¹ Although this new legal definition did not change the Criminal Codes of the states, it acknowledged sexual violence against men, sent a clear message of legal and societal condemnation of the phenomenon, and introduced a basis for more accurate reporting as to the prevalence of this phenomenon.

Men in the community experience a wide range of pressures and coercion that vitiate consent to sex. Male sexual victimization ranges from forced penetration to unwanted sexual acts perpetrated by both strangers and acquaintances.⁵² The American National Intimate Partner and Sexual Violence Survey (NISVS), conducted in 2015, found that around 24.8% of males experience some form of sexual violence over the course of their lifetime.⁵³ This includes rape, being made to penetrate another individual, sexual coercion, and/or unwanted sex.⁵⁴ It also shows that about 2.6% of U.S. men (an estimated 2.8 million men) experienced completed or attempted rape in their lifetime, around 7% of men were victimized by being made to

⁴⁸ This is contrary to the past, when rape laws were defined in gendered terms and focused exclusively on female victims.

⁴⁹ On various definitions of consent in different states, see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 6–7 (Tentative Draft No. 6, April 2022); see also NAT’L CRIME VICTIM L. INST., NAT’L WOMEN’S L. CTR. & NAT’L DIST. ATT’YS ASS’N, SEXUAL ASSAULT STATES IN THE U.S. CHART (2016) (listing the various definitions prepared by the National Crime Victim Law Institute (NCVLI) and the National Women’s Law Center, and updated by the National District Attorneys Association & the NCVLI).

⁵⁰ See sources cited *infra* notes 62, 65 and accompanying text. About the belief that male rape is perpetrated by gay men or only happens to gay men, see Graham, *supra* note 7, at 198.

⁵¹ *An Updated Definition of Rape*, U.S. DEP’T OF JUST. (Jan. 6, 2012), <https://www.justice.gov/archives/opa/blog/updated-definition-rape> [<https://perma.cc/BP9Q-3XKZ>].

⁵² Rumney, *In Defence*, *supra* note 47, at 498.

⁵³ The data did not separate sexual violence in childhood from sexual violence in adulthood. SMITH ET AL., *supra* note 11, at 3, 16. The report acknowledges several methodological limitations. *Id.* at 12. For a critique of the validity of the measures of the national scale surveys and conflation of unwanted and nonconsensual sex, see NICOLA GAVEY, JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE 52, 244, 248 (2018).

⁵⁴ Walfield, *supra* note 11, at 6393.

penetrate, and around 24% experienced some form of sexual coercion.⁵⁵ According to the U.S. Department of Justice, one in thirty-three men is sexually victimized in his lifetime.⁵⁶ A study of college males found that 21.7% of men reported unwanted sexual contact, 17.1% experienced rape, and 12.4% experienced sexual coercion.⁵⁷ In various studies conducted in England, Ireland, Australia, and New Zealand, prevalence rates ranged from 0.7% to 12.4% of men reporting nonconsensual sex.⁵⁸ When the definition includes nonphysical sexual violence, such as sexual staring and sexual comments, prevalence may be as high as 66.3%.⁵⁹

As in the case of the rape of women, the numbers above do not represent the real scope of male rape because the phenomenon is vastly underreported.⁶⁰ Some have argued that male rape in the U.S. is the most underreported crime in the country.⁶¹ Rape myths, misconceptions about male rape, and societal perceptions of sexuality and hegemonic masculinity affect the underreporting of the crime and its resulting invisibility.⁶²

A key social misconception about male rape is that it is a “gay problem,” that most male victims and perpetrators are gay, and that heterosexual men are rarely the target of rape.⁶³ Several scholarly works suggest that the prevalence of sexual victimhood is higher among gay men compared to heterosexual men.⁶⁴ But other studies show that gay and heterosexual men

⁵⁵ Men who are coerced to penetrate others are forced to engage in sex without their consent and are victims no less.

⁵⁶ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUST., OFFICE JUST. PROGRAMS, PREVALENCE, INCIDENCE, & CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NAT’L VIOLENCE AGAINST WOMEN SURVEY 3 (1998).

⁵⁷ Walfield, *supra* note 11, at 6393.

⁵⁸ Adrian W. Coxell & Michael B. King, *Adult Male Rape and Sexual Assault: Prevalence, Re-Victimisation and the Tonic Immobility Response*, 25 *SEXUAL & RELATIONSHIP THERAPY* 372, 373 (2010) (discussing the phenomenon of tonic immobility and the connection between child sexual abuse and reports about non-volitional sex in multiple countries).

⁵⁹ Depraetere et al., *supra* note 24, at 995, 1003.

⁶⁰ Lundrigan & Mueller-Johnson, *supra* note 3, at 763.

⁶¹ Fuchs, *supra* note 10, at 98.

⁶² Lundrigan & Mueller-Johnson, *supra* note 3, at 780; ALIRAZA JAVAID, *MALE RAPE, MASCULINITIES, AND SEXUALITIES: UNDERSTANDING, POLICING, AND OVERCOMING MALE SEXUAL VICTIMISATION* 172–77 (2018).

⁶³ Graham, *supra* note 7, at 198.

⁶⁴ See Lara Stemple, *Male Rape and Human Rights*, 60 *HASTINGS L.J.* 605, 631 (2008) (analyzing male rape as a problem of human rights); see also Clayton M. Bullock & Mace Beckson, *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, 39 *J. AMER. ACAD. PSYCHIATRY & L.* 197, 200 (2011) (reviewing the empirical literature on male rape and elaborating on the physiological aspects of involuntary sexual response of victims).

are both at risk of rape, that most men who sexually assault other men identify as heterosexual, and that rape of men is not related to gay identity.⁶⁵

The social focus on homosexuality reflects the unfounded cultural linkage between male rape and sexual orientation.⁶⁶ Similar to the outdated stereotype of female rape being an act motivated by sexual desire,⁶⁷ male rape is perceived as a sexual act that happens to men who engage in gay male relations.⁶⁸ This framing of the phenomenon of male rape generates homophobic views and is associated with patriarchal norms of masculinity.⁶⁹ The societal perception is that the physical nature of the act—anal penetration—constructs it as a gay issue.⁷⁰ In the social stratification of masculinity, homosexuality is perceived as less masculine than heterosexuality.⁷¹ Accordingly, male rape victims are socially perceived as less masculine.⁷²

A key contribution of the scholarship that examines the role of sexual orientation and homophobic views in the discourse of male sexual victimization is the way it highlights how some rape myths, namely the sexual identity of the victims, are unique to male victims and shape the social and legal approach to this phenomenon. These studies show that homophobia, particularly by men, is a central motif in the social and legal approach to acts that involve gay sex or gay victims,⁷³ and that gay male rape victims are considered more blameworthy for their sexual victimization than heterosexual male victims are.⁷⁴ Furthermore, male rape may be a way to

⁶⁵ Coxell & King, *supra* note 58, at 373; Bullock & Beckson, *supra* note 64, at 201.

⁶⁶ The association of anal intercourse with homosexuality can also be linked to attitudes that blame gay male rape victims for their victimization. See Philip N.S. Rumney, *Gay Male Rape Victims: Law Enforcement, Social Attitudes and Barriers to Recognition*, 13 INT'L J. HUM. RTS. 233, 244 (2009) [hereinafter *Gay Male Rape Victims*] (exploring the experiences of gay male rape victims).

⁶⁷ For a rare current description of rape as motivated by sexual desire, see Randy Thornhill & Craig T. Palmer, *Why Men Rape*, 40 SCIENCES 30, 30 (2000).

⁶⁸ Graham, *supra* note 7, at 198.

⁶⁹ See Rumney, *Gay Male Rape Victims*, *supra* note 66, at 244.

⁷⁰ See Karen Corteen, *Beyond (Hetero) Sexual Consent*, in MAKING SENSE OF SEXUAL CONSENT 180 (Mark Cowling & Paul Reynolds eds., 2004).

⁷¹ *Id.* at 173.

⁷² Rumney, *Gay Male Rape Victims*, *supra* note 66, at 244.

⁷³ Michelle Davies, Paul Pollard & John Archer, *The Influence of Victim Gender and Sexual Orientation on Judgments of the Victim in a Depicted Stranger Rape*, 16 VIOLENCE & VICTIMS 607 (2001) (examining the influence of a victim's gender and victim sexual orientation on perceptions of stranger male rape).

⁷⁴ See Irina Anderson, *Explaining Negative Rape Victim Perception: Homophobia and the Male Rape Victim*, 10 CURRENT RSCH. SOC. PSYCH. 43 (2004) (discussing the role of

express hate and disgust by the offenders toward gay men or men who are presumed to be gay.⁷⁵ The rape symbolizes the domination of the offender over the victim and his negative attitudes toward gay homosexual sex and toward gay men who deviate from the heteronormative paradigm and therefore should be punished.⁷⁶

In accordance with these homophobic views, one of the themes discussed in the research on male rape in the community is the emasculation and feminization of victims that are “almost turned into women metaphorically and symbolically.”⁷⁷ Such derogatory notions also reflect the inextricability of homophobia and misogyny.⁷⁸ Furthermore, research shows that male rape offenders often use prejudiced terms and derogatory language in relation to gay men and against victims during the rape, to emphasize their superiority on one hand, and the subordinate status of victims on the other.⁷⁹

A study that compared female and male rape myths found that the “typical” male rape victim is perceived as gay, physically smaller than the rapist, and attractive.⁸⁰ This rape myth is reminiscent of the “ideal” female rape victim, who is portrayed as delicate, weak, and passive.⁸¹ Feminist legal

homophobic attitudes towards male rape victims); *see also* Natalia K. Hanley & Philip Rumney, *Perceptions of Consent in Adult Male Rape: Evidence-Based and Inclusive Policy Making*, in *LEGAL PERSPECTIVES ON STATE POWER: CONSENT AND CONTROL* 211–12 (Chris Ashford, Alan Reed & Nicola Wake eds., 2016) (exploring how myths and assumptions shape understandings of adult male rape).

⁷⁵ Danny G. Willis, *Hate Crimes Against Gay Males: An Overview*, 25 *ISSUES IN MENTAL HEALTH NURSING* 2, 115 (2004); Aliraza Javaid, *The Penis Is a Weapon of Power: A Feminist and Hate Crime Interpretation of Male Sexual Victimization*, 13 *NORMA: INT’L J. MASCULINITY STUD.* 23, 36–37 (2018) [hereinafter *Weapon of Power*].

⁷⁶ *Id.* at 12–13.

⁷⁷ *Id.* at 11.

⁷⁸ In Boyarin’s words, “[H]omophobia and misogyny are intimately imbricated with each other” DANIEL BOYARIN, *UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN* 17 (1997). He regards both Feminist and Queer theory as criticism of heterosexuality’s privilege. *Id.*

⁷⁹ Such as “queer,” “poof,” and “faggot.” *See* Javaid, *Weapon of Power*, *supra* note 75, at 9.

⁸⁰ Irina Anderson, *What Is a Typical Rape? Effects of Victim and Participant Gender in Female and Male Rape Perception*, 46 *BRIT. J. SOC. PSYCH.* 225 (2007) (analyzing stranger rape, a “typical” female rape myth, and the othering of male rape in inaccurate, sexualizing, and homophobic terms).

⁸¹ The “ideal victim” is a term that was coined in the 1980s by criminologist Neal Christi, who described the stereotypical model of a rape victim as sexually pure, resisting the rape to the utmost, and complaining immediately. Later, the ideal victim’s model was also shaped by a neo-liberal model that requires independence, individuality, and sole responsibility for actions and their results. *See* Deborah Tuerkheimer, *Judging Sex*, 97 *CORNELL L. REV.* 1461, 1462 (2011) (describing the manner in which certain women were excluded from the discourse

and social reforms have critiqued the model of the ideal victim,⁸² which has long been out-of-date in mainstream rape scholarship and much of the case law,⁸³ but the female-centric paradigm of rape has remained a central one, excluding male victims from rape discourse.

These heteronormative stereotypical views also affect the legal response to male rape. Gay male victims experience less sensitive treatment from police officials than do heterosexual men who have been victimized.⁸⁴ They are faced with disbelieving attitudes and stereotypes based on homophobia. Because of their sexuality,⁸⁵ and similarly to female victims, gay males are perceived as consenting to sex, and therefore their credibility is often questioned.⁸⁶

As in the case of female rape, in the majority of male rape cases, the victims know their assailants.⁸⁷ Nevertheless, the scholarship suggests that heterosexual men are victims of the more acceptable scripts of stranger rape whereas homosexual victims are often sexually victimized in situations that could be categorized as date rape.⁸⁸ Research also suggests that often, as in the case of female rape in intimate relationships, male rape in gay male relationships is perpetrated through all forms of violence: emotional, physical, and psychological coercion, as a way of gaining power and control over the victim.⁸⁹

of rape); Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 849–71 (2012) (examining how rape shield laws paradoxically reinforce the rape myths they meant to uproot).

⁸² Katharine K. Baker & Michelle Oberman, *Consent, Rape and the Criminal Law*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna Williams eds., 2021) (criticizing the dichotomous account of rape law reform as either failure or success and claiming that the legal focus on consent facilitated a shift in cultural and institutional norms).

⁸³ Tuerkheimer, *Judging Sex*, *supra* note 81, at 1470.

⁸⁴ JAVAID, *supra* note 62, at 154–58; Rumney, *Policing Male Rape*, *supra* note 10, at 68, 77–78.

⁸⁵ See generally Lana Stermac, Peter M Sheridan, Alison Davidson & Sheila Dunn, *Sexual Assault of Adult Males*, 11 J. INTERPERSONAL VIOLENCE (1996) (discussing sexual assault of males by acquaintances).

⁸⁶ JAVAID, *supra* note 62, at 208.

⁸⁷ *Id.* at 54.

⁸⁸ Graham, *supra* note 7, at 199.

⁸⁹ Stephanie Allen, *Male Victims of Rape: Responses to a Perceived Threat to Masculinity*, in NEW VISION OF CRIME VICTIMS 35–44 (Carolyn Hoyle & Richard Young eds., 2002) (conducting 50 in-depth interviews with male rape victims to develop the understanding of male rape); RICHIE J. MCMULLEN, MALE RAPE: BREAKING THE SILENCE ON THE LAST TABOO 114 (1990).

Because it does not accord with heteronormative scripts of masculinity and sexuality, rape of gay male victims is often conceptualized as less of a “real rape.” By contrast, the rape of a heterosexual male is often associated with the script of stranger rape and is characterized in many studies as more physically violent than female rape, causing greater physical injury.⁹⁰ But this characterization was contradicted in various other studies that have shown low levels of physical violence in cases of male rape.⁹¹ Some studies even show greater use of physical violence in cases of female rape.⁹² Findings from the National Crime Victimization Survey (NCVS), conducted in 2003, show that, similar to female rape, only a small fraction of male rape (around 10%) is accompanied by physical violence and results in physical injury.⁹³

Research further demonstrates that like female victims, male victims, contrary to the societal expectation that men always fight back, often react by freezing, submission, and fear.⁹⁴ Nearly two-thirds of victims feared for their lives.⁹⁵

The contradictory findings regarding the use of physical violence in male rape⁹⁶ may be attributed to the various rape myths that shape the discourse on male rape. The focus on physical violence in the literature and social discourse may assist in describing the rape as “real rape,” which is forced upon the victim.⁹⁷ It emphasizes the heterosexuality of the victim, who

⁹⁰ Lundrigan & Mueller-Johnson, *supra* note 3, at 767; Graham, *supra* note 7, at 190. Male rape is also portrayed as more likely to involve the use of weapons. See Stermac et al., *supra* note 85, at 60.

⁹¹ Lundrigan & Mueller-Johnson, *supra* note 3, at 777.

⁹² *Id.*

⁹³ Weiss, *supra* note 7, at 280.

⁹⁴ Coxell & King, *supra* note 58, at 376; Hlavka, *supra* note 9, at 494.

⁹⁵ Walfield, *supra* note 11, at 6409; JAVAID, *supra* note 62, at 207.

⁹⁶ Jamel states, “There is a lack of agreement about the level of violence directed at male and female rape victims.” Joanna Jamel, *An Exploration of Rapists’ Motivations as Illustrated by Their Crime Scene Actions: Is the Gender of the Victim an Influential Factor?*, 11 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 276, 278 (2014) (examining rapists’ motivations of anger and power as inferred from rape crime scene behaviors of male and female rape victims and analyzing resistance strategies employed by rape victims to determine whether gender affects victim-offender behavioral interaction).

⁹⁷ This is similar to the myth of “utmost resistance” that shaped the social and legal discourse of female rape for many years. See, e.g., Melanie Randall, *Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming*, 22 CAN. J. WOMEN & L. 397, 415 (2010) (discussing the way the “ideal victim” model works to discredit complainants of rape in Canadian courts). See generally Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1998) (analyzing the resistance requirement in rape laws and arguing both that resistance may benefit rape victims and that verbal and physical resistance should be sufficient to prove both non-consent and force).

is coerced to have sexual acts with men, against his will. The focus on physical violence also stresses the physical power relations between the victim and the perpetrator and reflects the fact that power relations exist between men, and not only between men and women.

The script of the stranger rape also relates to the use of weapons. Regarding this element, studies show greater use of weapons in cases of male than female rape.⁹⁸ In contrast to the above findings that many male victims react with fear and may freeze up, some studies suggest that the greater use of weapons is due to a greater likelihood of physical resistance from male victims than from female victims.⁹⁹

Next, we turn to the prison setting for male rape. We will describe the differences and similarities between the research on both settings later in this Article, but first we will review the literature on prison male rape. Unlike male rape in the community, prison rape has figured in academic writing for about a century. However, as will be demonstrated below, the writing on prison rape is also characterized by inconsistencies. Our comparison of scholarship on both settings will also uncover some significant themes that are missing despite the rich literature on prison rape.

B. PRISON

Prison is a total institution, and a hierarchical organization, with a clearly marked power grid.¹⁰⁰ The inmates are not there by choice, and every aspect of their life is regulated. Male and female prisoners are held separately.

Scholarly estimates of the prevalence of male rape in prisons range from 0.3% to 28%.¹⁰¹ Some consider prison rape to be frequent and omnipresent.¹⁰² They claim that there is no safe place in prison, and that

⁹⁸ Lundrigan & Mueller-Johnson, *supra* note 3, at 768.

⁹⁹ *Id.*

¹⁰⁰ GOFFMAN, *supra* note 4, at 11.

¹⁰¹ See A. Coxell & M.B. King, *Behind Locked Doors: Sexual Assault of Men in Custodial Environments*, in MALE VICTIMS OF SEXUAL ASSAULT 79, 82–83 tbl.4.1 (2000) (examining the depiction of male rape in movies about prison).

¹⁰² See CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 61 (1974); Kevin Medina & Brian Nguyen, *Acknowledged but Ignored: A Critical Race Theory Approach to the Prison Rape Elimination Act*, 2 QUEER CATS J. LGBTQ STUD. 59, 60, 68 (2018) (discussing the overrepresentation of incarcerated men of color, specifically African American men, highlighting how racism and homophobia reproduce rape culture in prisons, and demonstrating the limitations of the PREA); Gordon James Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 HOW. J. CRIM. JUST. 267, 269 (1999).

sexual assaults can occur in cells, showers, exercise areas, kitchens, laundry areas, libraries, and hospitals.¹⁰³ Others argue that popular notions of prison rape being endemic are not corroborated by academic research.¹⁰⁴ Mark Fleisher and Jessie Krienert, for example, have argued that “an inmate pressed for sex in prison is probably safer than a coed pressed for sex at a drunken fraternity party,” because the prisoner is in a better position to call for help.¹⁰⁵

Considering the enormous number of people incarcerated in the United States, even lower estimates indicate many victims.¹⁰⁶ The Prison Rape Elimination Act of 2003 (PREA) was designed to ensure institutionalized reporting of the phenomenon and eliminate prison rape and sexual assaults,¹⁰⁷ but its implementation has met with difficulties.¹⁰⁸ In a 2007 study, the American Bureau of Justice Statistics found that 4.5% of the inmates surveyed reported being sexually abused in the previous twelve months,¹⁰⁹ and a survey from 2011–2012 estimated that 4% of inmates experience sexual abuse, a difference that is not statistically significant.¹¹⁰ These surveys

¹⁰³ See Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOLENCE 1591, 1610 (2006) (discussing the prevention of rape in prison).

¹⁰⁴ See Coxell & King, *supra* note 101, at 82; Helen Eigenberg & Agnes Baro, *If You Drop the Soap in the Shower You Are on Your Own: Images of Male Rape in Selected Prison Movies*, 7 SEXUALITY & CULTURE 56, 56–57 (2003) (examining the portrayal of images of male rape in prison movies).

¹⁰⁵ FLEISHER & KRIENERT, *supra* note 8, at 3.

¹⁰⁶ At the end of 2020, the number of persons held in state or federal prisons in the United States was 1,215,800, a decline of 15%, from 1,430,200, at the end of 2019. See E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF J. STATS., PRISONERS IN 2020—STATISTICAL TABLES 1 (2021).

¹⁰⁷ For a review of the enactment of the PREA, codified at 34 U.S.C. §§ 30301–09, see Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 187–92 (2006) (analyzing the concepts of sexuality and sexual expression in prison). For a report on inmate-on-inmate sexual abuse that predates PREA, see *No Escape: Male Rape in U.S. Prisons*, HUMAN RTS. WATCH (Apr. 1, 2001), <https://www.hrw.org/report/2001/04/01/no-escape-male-rape-us-prisons> [<https://perma.cc/98LS-8VTH>].

¹⁰⁸ See Danielle S. Rudes, Shannon Magnuson, Shannon Portillo & Angela Hattery, *Sex Logics: Negotiating the Prison Rape Elimination Act (PREA) Against Its Administrative, Safety, and Cultural Burdens*, 23 PUNISHMENT & SOC'Y 241, 243 (2020) (suggesting that rather than seeing themselves as central players in the elimination of prison sexual misconduct, prison staff is hostile to the PREA reform and regards it as a burden and obstacle to doing their “real” job).

¹⁰⁹ Capers, *supra* note 2, at 1267–68.

¹¹⁰ ALAN J. BECK, MARCUS BERZOFKY, RACHEL CASPAR & CHRISTOPHER KREBS, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, 10 (2013).

advance the empirical picture of sexual victimization of males in prisons, showing that more than 60,000 inmates are sexually abused each year in American prisons.¹¹¹ Moreover, these numbers do not reflect the real scope of the problem. Generally, formal complaints of sex offenses are only the tip of the iceberg. On top of the low level of reporting, there exists a high level of attrition.¹¹² This is even more so the case with respect to prison rape.¹¹³

The various assessments of the prevalence of prison rape may stem from diverse surveying techniques and different definitions of sexual assault.¹¹⁴ For example, Lockwood reported that 28% of the prisoners he interviewed were victims of sexual aggression, but only one (1.3%) described a complete rape.¹¹⁵ The confusion has much to do with the absence of a solid definition of the phenomenon of male rape. This may be because early scholarly accounts considered all sexual relations between men as perversity.¹¹⁶ Prison rape was even dubbed “homosexual rape” as if homosexual gay sex and rape were necessarily synonymous.¹¹⁷

Since the 1980s, scholars have differentiated rape in prison from consensual sex. Quite a few studies were dedicated to consensual sex in prison.¹¹⁸ But the differentiation between consensual and non-consensual sex may be difficult at times. For example, how should one treat sex consented to in return for protection and economic favors?¹¹⁹ Do concepts of freedom,

¹¹¹ *Id.* at 8–9.

¹¹² See Emma Sleath & Ray Bull, *Male Rape Victim and Perpetrator Blaming*, 25 J. INTERPERSONAL VIOLENCE 970, 970 (2009) (examining victim blaming attitudes towards male rape); Jeanne Gregory & Sue Lees, *Attrition in Rape and Sexual Assault Cases*, 36 BRIT. J. CRIMINOLOGY 1, 12–14 (1996).

¹¹³ Capers, *supra* note 2, at 1261, 1266, 1269–72; Sleath & Bull, *supra* note 112, at 970. Struckman-Johnson and Struckman-Johnson found that female victims of prison rape report the incidents more frequently than male victims do. Struckman-Johnson & Struckman-Johnson, *supra* note 103, at 1606.

¹¹⁴ Struckman-Johnson & Struckman-Johnson, *supra* note 103, at 1593. For a review of the conflicting scholarship on prison rape prevalence, see O'Donnell, *supra* note 23, at 246.

¹¹⁵ Struckman-Johnson & Struckman-Johnson, *supra* note 103, at 1592.

¹¹⁶ For a review of the history of this scholarship, see FLEISHER & KRIENERT, *supra* note 8, at 7–25.

¹¹⁷ See Knowles, *supra* note 102, at 267.

¹¹⁸ For a list of references, see M. Kristen Hefner, *Queering Prison Masculinity: Exploring the Organization of Gender and Sexuality Within Men's Prison*, 21 MEN & MASCULINITIES 230, 231 (2018) (drawing on Queer Theory to challenge the heterosexual/homosexual dichotomy related to prison sex).

¹¹⁹ See Leanne Fiftal Alarid, *Sexual Orientation Perspectives of Incarcerated Bisexual and Gay Men: The County Jail Protective Custody Experience*, 80 PRISON J. 80, 90, 92 (2000) (examining sexual identity and perceptions of treatment by other prisoners and staff of incarcerated bisexual and gay men in special housing). Buchanan claimed that most prison sex

autonomy, power, and rights have the same meaning in prison as in the outside world?¹²⁰

Early research explained prison rape as the outcome of female deprivation, yet recent studies point out that prison sexual assaults are not merely about sex, but also an expression of a relationship of power and control.¹²¹ This is a significant aspect in conceptualizing prison rape, which places male rape within the broader theory of rape and sexual violence. Power differences exist both between staff and inmates and between inmates. The latter are placed at the bottom of the formal hierarchy, under the control and surveillance of guards. Forced sex of inmates by staff expresses domination and discipline.¹²² The scholarship on prison rape focuses on inmate-on-inmate offenses, although there are indications that sexual abuse of prisoners by correctional staff is far more common than abuse by fellow prisoners.¹²³ Although the PREA extended the meaning of prison sexual aggression,¹²⁴ it is rare to find scholarly analyses of unlawful or improper anal search by wardens and police officers described as a sexual assault.¹²⁵

A hierarchy between the inmates exists both at the formal level, as inmates are officially classified by the prison authorities, and informally, according to their social status.¹²⁶ The key factor in determining the inmate's

is not forcefully coerced, yet it is not always consensual. See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 16 (2010) (discussing how racial and gender presuppositions influence the official acknowledgment of male rape).

¹²⁰ See Rudes et al., *supra* note 108, at 255.

¹²¹ See Medina & Nguyen, *supra* note 102, at 62; Knowles, *supra* note 102, at 273.

¹²² Most academic writing on prison rape pertains to inmate-on-inmate offenses, although according to official statistics, incidences of sexual misconduct by staff surpass those of sexual abuse by fellow inmates. See BECK ET AL., *supra* note 110, at 2013; see also Kelly Riddell, *Guards, Staff Committed Half of Sexual Assaults in Prisons*, WASH. TIMES (Mar. 10, 2021), <http://www.washingtontimes.com/news/2014/jan/23/staff-members-committed-half-sexual-assaults-priso/?page=all> [<https://perma.cc/57T7-X2C4>].

¹²³ Buchanan, *supra* note 119, at 13.

¹²⁴ The PREA National Standards encompass a wide array of physical contacts, exhibitionism, voyeurism (sexual abuse), and verbal abuse (sexual harassment). See 28 CFR § 115.6

¹²⁵ An outstanding exception is a note by Eichert, who defines forcible anal searches and anal insertion of objects by prison staff to prisoners as “disciplinary sodomy.” See generally David Eichert, *Disciplinary Sodomy: Prison Rape, Police Brutality, and the Gendered Politics of Societal Control in the American Carceral System*, 105 CORNELL L. REV. 1775 (2019) (demonstrating how disciplinary sodomy remains an intrinsic part of the American carceral system); see also Capers, *supra* note 2, at 1263.

¹²⁶ See generally Joseph H. Michalski, *Hierarchies and Hegemonic Masculinity: A General Theory of Prison Violence*, 57 BRIT. J. CRIMINOLOGY 40 (2017) (arguing that in

informal status is the embodiment of the valued forms of hyper-masculinity.¹²⁷ Having only limited economic and political resources, the inmates can promote their social status by means of a reputation of a “real man.”¹²⁸ Many aspects of prison life deprive male inmates of key constituents of their gender identity: heterosexual relations, autonomy, self-sufficiency, and fatherhood; therefore, violence becomes an important means of constructing masculinity.¹²⁹ To survive in this male environment, inmates must display excessive masculinity.¹³⁰ At times, this includes the emasculation of other prisoners.¹³¹ Social status is relational, and manhood can be measured vis-à-vis inmates who fail to conform with normative expectations. Several scholars have explained the rape of fellow inmates as an act that strips the victims of their manliness and places them at the bottom of the prison hierarchy, or even demotes them to the status of “wives.”¹³² Rape of inmates by others can be a marker of gang affiliation and communicate a humiliating message to a rival gang.¹³³ Such messages are

prison, where inmates possess only limited economic and political resources, social status, based on adherence to norms of hegemonic masculinity, assumes greater significance)

¹²⁷ See Rosemary Ricciardelli & Dale Spencer, *Exposing ‘Sex’ Offenders: Precarity, Abjection and Violence in the Canadian Federal Prison System*, 54 BRIT. J. CRIMINOLOGY 428, 436, 438 (2014) (exploring the experiences of prisoners who are known to other inmates as convicted sex offenders); Nicola Gooch, *The Feminisation of the Male Rape Victim*, 12 UCL JURIS. REV. 196, 209 (2005).

¹²⁸ Michalski, *supra* note 126, at 41 (discussing the extent to which status, the social construction of masculinity, and violence are connected). Hefner agreed that heterosexuality is perceived as superior in prison but developed a more nuanced framework that challenges the traditional male/female, heterosexual/homosexual dichotomies. Hefner, *supra* note 118, at 244.

¹²⁹ Michalski, *supra* note 126, at 40–41, 46.

¹³⁰ Yvonne Jewkes, *Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment*, 8 MEN & MASCULINITIES 44, 46 (2005) (examining “manliness” as a prison coping strategy and arguing that the predominantly male environment in prison is patriarchal).

¹³¹ Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 578 (2005) (discussing prison rape from a philosophical perspective and employing virtue ethics approach to the analysis of prison rape).

¹³² See Michalski, *supra* note 126, at 52; Sasha Gear, *Behind the Bars of Masculinity: Male Rape and Homophobia in and About South African Men’s Prisons*, 10 SEXUALITIES 209, 217 (2007) (discussing sexual violence and coercion in men’s prisons in South Africa); Knowles, *supra* note 102, at 273.

¹³³ Siyabulela Eric Mgozozeli & Sinegugu Evidence Duma, “As I Was Walking Down the Street, Four Strange Guys Came and Took Me Under the Bridge, Where They All Raped Me”: An Interpretative Phenomenological Analysis of the Types of Rape Experienced by Men in South Africa, 13 AM. J. MEN’S HEALTH 1, 8 (2019).

“louder” when the rape is perpetrated by several participants.¹³⁴ Gang rapes reinforce the solidarity, brotherhood, and masculinity of members of the gang by degrading and subordinating their victim.¹³⁵ The assertion of masculinity at the expense of the other’s emasculation is manifest also in the physical performance of the act, where the perpetrator is the penetrator, and the victim of the rape is being penetrated.¹³⁶

The phenomenon of prison rape is therefore embedded in its socio-cultural context. Scholarly opinion also diverges regarding whether prison rape follows racial or ethnic patterns. Some researchers describe such patterns,¹³⁷ but others find no corroboration of the claim that the victims are selected on a racial basis,¹³⁸ or suspect that the location of the prison may account for demographic findings.¹³⁹ Note also that U.S. patterns of incarceration are racialized, with higher incarceration rates of minorities, especially Black Americans.¹⁴⁰ Higher incarceration rates of Black Americans and other minorities means higher exposure to prison rape.¹⁴¹ A series of studies on the racial identity of aggressors and victims in U.S. prisons claim that the aggressors are predominantly Black and the victims predominantly white.¹⁴² Moreover, white victims were over-represented with respect to their share in the inmate population.¹⁴³ Ian O’Donnell hypothesized that the explanation may have to do with the fact that white inmates are relatively isolated and less likely to belong to a network in prison, which may

¹³⁴ See Javaid, *Weapon of Power*, *supra* note 75, at 34; see also Knowles, *supra* note 102, at 274.

¹³⁵ See sources cited *supra* note 134.

¹³⁶ Gear, *supra* note 132, at 217; Gooch, *supra* note 127, at 200. In the words of Franks: “This belief is strongly tied to the heterosexist idea that being sexually penetrated is inherently feminine, so that it is only men who are penetrated by other men who are feminized, not those doing the penetrating.” Mary Anne Franks, *How to Feel Like a Woman, or Why Punishment Is a Drag*, 61 UCLA L. REV. 566, 577 (2013).

¹³⁷ Coxell & King, *supra* note 101, at 91; Eichert, *supra* note 125, at 1801.

¹³⁸ FLEISHER & KRIENERT, *supra* note 8, at 24.

¹³⁹ Struckman-Johnson & Struckman-Johnson, *supra* note 103, at 1609. O’Donnell points out the differences in patterns of prison rape between the United States and the United Kingdom. O’Donnell, *supra* note 23, at 246–47.

¹⁴⁰ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 98–99, 101 (2012).

¹⁴¹ Medina & Nguyen, *supra* note 102, at 65. With respect to abuse by prison staff, it has been suggested that prison rape is a disciplinary tool harnessed in the service of white supremacy. See *id.* at 60, 65.

¹⁴² *Id.* at 61; Knowles, *supra* note 102, at 268. For a review of the various empirical works on the subject, see O’Donnell, *supra* note 23, at 247.

¹⁴³ O’Donnell, *supra* note 23, at 247.

make them seem vulnerable.¹⁴⁴ Several scholars explained the racial patterns of U.S. prison rapes as an act of revenge at the discriminatory white hegemony, yet these theories fail to explain why interracial male rape is not the norm outside prison.¹⁴⁵

Kim Shayo Buchanan disputed the conventional view of racial patterns and claimed that methodologically sound surveys conducted since 2006 demonstrate that white prisoners do not face a disproportional risk of rape and that the victims are mostly multiracial.¹⁴⁶ The focus on interracial prison rape narratives resembles, according to Buchanan, male-on-female “real rape” narratives.¹⁴⁷ It is no wonder, therefore, that complaints that do not match the stereotypical racialized narratives are often treated with skepticism by staff, who regard them as unsubstantiated or unfounded, while complaints of Black-on-white prison rape have a higher chance of being substantiated.¹⁴⁸ This may also be explained by entrenched ideas about deserving victims whose suffering matters.¹⁴⁹

Kevin Medina and Brian Nguyen analyzed prison authorities’ failure to effectively eliminate rape as a deliberate policy that drives inmates who seek safety to serve as informants, prevents the establishment of long-lasting inmate leadership, and hampers inmates’ internal organization and cooperation.¹⁵⁰ David Eichert claimed that “straight white male law enforcement agents” used sodomy systematically for disciplinary purposes.¹⁵¹ Prison rape is a phenomenon where different modes of oppression, “[r]acism, Islamophobia, xenophobia, homophobia, and transphobia all operate simultaneously.”¹⁵²

There is evidence to suggest greater victimization rates of those who self-identify as gay.¹⁵³ LGBTQ+ inmates and those who are perceived as young, naïve, small, or effeminate face a higher risk of being targeted for rape.¹⁵⁴ Of the “non-heterosexual” prison population, transgender inmates

¹⁴⁴ *Id.* at 248.

¹⁴⁵ *Id.* at 250; PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 238 (2004).

¹⁴⁶ Buchanan, *supra* note 119, at 17, 60–61.

¹⁴⁷ *Id.* at 61–62.

¹⁴⁸ *Id.* at 67.

¹⁴⁹ The authors thank Deborah Tuerkheimer for making this observation.

¹⁵⁰ Medina & Nguyen, *supra* note 102, at 62.

¹⁵¹ Eichert, *supra* note 125, at 1779.

¹⁵² Medina & Nguyen, *supra* note 102, at 67.

¹⁵³ Struckman-Johnson & Struckman-Johnson, *supra* note 103, at 1609.

¹⁵⁴ See Buchanan, *supra* note 119, at 11, 15. For a review of this literature, see Jason A. Brown & Valerie Jenness, *LGBT People in Prison: Management Strategies, Human Rights*

seem to be at the highest risk.¹⁵⁵ A Bureau of Justice Statistics Report from 2014 indicates that, in any given year, 40% of transgender inmates are sexually abused.¹⁵⁶

Prisoners hold different degrees of power and agency. These power differences form the social context of prison rape, which is “only partly related to sexual gratification and is never about mutual fulfillment. It is a stark demonstration of power.”¹⁵⁷

The classification of the various studies and the analysis of the two settings generate a complicated picture of male rape. It raises several key questions: How should we theorize male rape? Is it part of the patriarchal structure, and if so, in what way? In what ways is it related to power relations, gender performances, and misogyny? What are the key themes in the discourse of male rape and what are the concepts that are missing in the discussion of it? In the following Parts, the Article introduces a meta-analysis of the literature to examine the differences and commonalities between male rape in both settings. It then develops a framework of six themes that create the theoretical foundation for the analysis of male rape.

III. A NEW FRAMEWORK FOR THE ANALYSIS OF MALE RAPE

A. COMMUNITY AND PRISON RAPE: DISCURSIVE DIFFERENCES

The previous Parts reviewed the literature on two different settings, prisons, and the community, to identify common themes that can be used to develop a novel analysis of male rape. Before discussing these themes, we point out differences between the two settings described in the literature.

One difference pertains to visibility. Prison male rape is a relatively known phenomenon. It is the subject of considerable academic research, recognized in popular culture,¹⁵⁸ and acknowledged within the legal

Violations, and Political Mobilization, OXFORD RSCH. ENCYCLOPEDIAS; CRIMINOLOGY & CRIM. JUST. (June 20, 2020), <https://doi.org/10.1093/acrefore/9780190264079.013.647> [<https://perma.cc/93P2-E738>].

¹⁵⁵ Brown & Jenness, *supra* note 154, at 3–4.

¹⁵⁶ ALAN J. BECK, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES 2–3 (2014).

¹⁵⁷ O’Donnell, *supra* note 23, at 243.

¹⁵⁸ See, e.g., Eigenberg & Baro, *supra* note 104, at 58; Kristine Levan, Katherin Polzer & Steven Downing, *Media and Prison Sexual Assault: How We Got to the “Don’t Drop the Soap” Culture*, 4 INT’L J. CRIMINOLOGY & SOCIO. THEORY 674, 677 (2011) (examining the description and construction of prison rape in popular movies); see also Joe Wlodarz,

framework.¹⁵⁹ Unlike male rape in prison, the literature describes male rape in the community as a hidden and invisible phenomenon.¹⁶⁰ It is hardly mentioned in social discourse, and it is not rare to find victims who are unaware that they were sexually victimized. Although rape of a man is a criminal act, the lack of well-established social and cultural meaning of the act hides it from view, even to some of its victims themselves.¹⁶¹ When male rape is discussed, it is often framed as a “gay issue” and consequently marginalized as a risk pertaining to a certain category of men because of their sexual orientation.

Another difference between the two settings pertains to the scholarly conceptualization of male rape as either sex or violence. In the community, the scholarship points to the way male rape is often socially constructed in sexual terms, as an act that is committed within gay male relationships and is strongly associated with sexual orientation and with sex.¹⁶² In comparison, current scholars tend to agree that prison rape is about violence, not sex, irrespective of whether the act is committed with brutal physical violence or as gang rape, or whether the victim is coerced by fear, implicit threats, or the practical need to obtain security in a dangerous and violent environment. The literature analyzes prison rape as an act that is perpetrated against weak, vulnerable (and often new) inmates, to establish masculine superiority.¹⁶³

A third difference pertains to race. The scholarship on male rape in prison discusses the role of race and ethnicity in the depiction and analysis of male rape, whereas the literature on community settings hardly explores the intersection between race, ethnicity, and male rape. This is intriguing because race and ethnicity are key issues debated in American society. Moreover, the idea of intersectionality, particularly in relation to race, is a fundamental theoretical element in academic feminist writing on sexual violence against women.¹⁶⁴ We will return to this “missing” element later in the discussion.

Maximum Insecurity: Genre Trouble and Closet Erotics in and out of HBO's Oz, 20 CAMERA OBSCURA: FEMINISM, CULTURE, & MEDIA STUD. 59, 61 (2005).

¹⁵⁹ For example, in the enactment of the Prison Rape Elimination Act, a unique statute that regulates the reporting and treatment of prison rape. See 34 U.S.C. §§ 30301–3309.

¹⁶⁰ Although the #MeToo movement has also exposed sexual violence against men, this phenomenon remained silenced. See, e.g., Associated Press, *Some Male Sexual Assault Victims Feel Left Behind by #Metoo*, NBC NEWS, <https://www.nbcnews.com/news/us-news/some-male-sexual-assault-victims-feel-left-behind-metoo-n867386> [https://perma.cc/X4RF-NAC8] (last updated April 19, 2018).

¹⁶¹ Depraetere et al., *supra* note 24, at 1002; Peterson et al., *supra* note 21, at 16.

¹⁶² See *supra* Part II.A.

¹⁶³ See *supra* Part II.B.

¹⁶⁴ See sources cited *infra* note 253 and accompanying text.

B. COMMON THEMES

Despite the differences between the social setting of a prison—a total institution that positions prisoners at the bottom of a clearly marked power grid—and the more free and less formally structured environment of the community, the analysis of scholarship on both settings echoes several common themes: otherness, masculinity and sexuality, and power. In this Section, the Article explores these commonalities as a first step toward a more coherent and inclusive theory of the phenomenon of male rape.

1. Otherness

The concept of otherness distinguishes between the hegemonic group that possesses the dominant knowledge and those who do not belong to this group or do not possess this knowledge.¹⁶⁵ Otherness is manifested in various dimensions, including the victim's identity. A sense of "othering" underlies the notions of victim-blaming that is integral to the portrait of the "ideal victim" in the rape myth.¹⁶⁶ Othering is used to justify the victim's misfortune by differentiating between "those to whom bad things happen because they deserve it (them) and those to whom nothing bad can happen because they don't deserve it (us)."¹⁶⁷ The link between otherness and victimization is shaped by the psychological assumption that people who adhere to social norms are not victimized.¹⁶⁸

¹⁶⁵ "The conceptions of the other have created a dichotomous understanding of the people who inhabit our world, that is, in the dominant discourse there are those 'like us,' who are virtuous, just, intelligent, and kind, and there are the distant 'others,' who possess less in the way of intelligence, virtue, or any other positive attribute." Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 620 (2009) (discussing the concept of otherness in relation to victims of trafficking and focusing on the dichotomy between the other and the self); see also Ruthy Lowenstein Lazar, *Epistemic Twilight Zone of Consent*, 30 S. CAL. INTERDISC. L.J. 461, 12–17 (2020) (discussing consent in sexual violence cases as a form of epistemic injustice).

¹⁶⁶ See Tuerkheimer, *Judging Sex*, *supra* note 81, at 1463.

¹⁶⁷ COHEN, *supra* note 7, at 38.

¹⁶⁸ This is based on the theory of the "just world" developed by Lerner. The just world theory describes the way people attempt to make sense of a world where bad things happen to good people. They do it by believing that in a just world, where people obey social norms, bad things do not happen to good people. See Melvin J. Lerner, *What Does the Belief in a Just World Protect Us From: The Dread of Death or the Fear of Understanding Suffering?*, 8 PSYCH. INQUIRY 29, 30 (1997). For a discussion that connects victimization with marginalization, see Hadar Dancig-Rosenberg & Noa Yosef, *Crime Victimhood and Intersectionality*, 47 FORDHAM URB. L.J. 85, 88 (2019) (offering the theory of intersectionality as a framework in analyzing identity characteristics of victimhood).

Analyzing the scholarship on male rape in these two distinctly different settings, we argue that the phenomenon of male rape in both settings is part of the phenomenon of othering. Rape in prison is socially characterized as an act that occurs to others. It occurs inside the prison walls and away from public view, existing at the margins of society. Prison rape is understood as an inevitable and inherent part of the pains of imprisonment.¹⁶⁹ It is something that “bad” people are doing to other “bad” people, and it is invisible to “normative” people.¹⁷⁰ As Capers states, “[w]e treat prisons as invisible zones, as lawless zones, as zones that need not concern us.”¹⁷¹

The literature on male rape in the community also reflects the concept of otherness. Because widespread cultural perceptions blur the distinction between gay sex and male rape, the latter is often conceptualized as an act of gay male non-consensual sex.¹⁷² Therefore, it is perceived as an act that occurs to a distinct group of men, not to those who adhere to the norms of hegemonic sexuality and heteronormativity. Male rape in both settings is situated outside of the borders of the mainstream social and legal discourse of sexual violence, in faraway zones, and its victims are depicted as others, different from the normative group.

This characterization of male rape is contrary to the academic and popular construct of rape of females.¹⁷³ First, radical feminist literature depicts rape as a threat that is shared by all women, not limited to others. Susan Brownmiller defined rape as “a process of intimidation by which all men keep all women in a state of fear.”¹⁷⁴ Rape is analyzed as a phenomenon that affects not only its direct victims, but all other women who must be wary of places and situations that expose them to the risk of sexual assault.¹⁷⁵

¹⁶⁹ O’Donnell, *supra* note 23, at 241.

¹⁷⁰ Capers showed how male rape in prison is perceived as a price that prisoners pay for their wrongdoing. See Capers, *supra* note 2, at 1262; see also Buchanan, *supra* note 119, at 3.

¹⁷¹ Capers, *supra* note 2, at 1263.

¹⁷² Although it is perceived as non-consensual sex, a discussion of consent is absent from the discourse of male rape.

¹⁷³ Although victims, particularly of sexual violence, are also depicted as others because of their victimization.

¹⁷⁴ SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 15 (1975). Later, third-wave feminists argued that women of color and poor women are exposed to greater victimization of sexual violence. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, *STAN. L. REV.* 581, 598–602 (1990) (discussing essentialism in feminist theories).

¹⁷⁵ See SHANI D’CRUZE, *CRIMES OF OUTRAGE: SEX, VIOLENCE AND VICTORIAN WORKING WOMEN* (1998) (exploring the subordination of Victorian working women in the home, neighborhood, and workplace). This fear was also termed as “the shadow of sexual assault.” See Mine Özascilar, *Predicting Fear of Crime: A Test of the Shadow of Sexual Assault*

Second, whereas male rape is something that happens to “bad,” non-normative, or different people, female rape is something that happens to “good girls.” This is reflected in the model of the ideal victim and the paradigm of “real rape,” according to which the rape is perpetrated against a chaste and young woman.¹⁷⁶

2. Masculinity and Sexuality

The second common theme relates to notions of masculinity, sexuality, and homophobia, and how they shape the social and legal discourse of male rape in both settings. The scholarship on male rape highlights how the masculinity of both the victim and perpetrator is performed and shaped in the context of sexual assault.

There is rich literature that discusses how male rape victims’ masculinity is denigrated either because he is gay or because he supposedly failed to adhere to gendered cultural expectations. The literature describes a pattern of blaming the victim for being gay, and therefore bringing the rape upon himself.¹⁷⁷ Similarly, social norms undermine the injury of rape when it is perpetrated against women deemed too sexual.¹⁷⁸ According to dominant culture scripts, gay men are also deemed highly sexual, therefore they are perceived as less victimized and are more susceptible to being blamed.¹⁷⁹ The fact that much of the literature on male rape in community settings focuses on gay male victims may unwittingly perpetuate the framing of male rape as a “gay issue.” The relatively extensive attention paid to the rape of gay men in the community, in contrast to the much lesser focus on heterosexual victims, explicitly or implicitly presupposes that gay men are more vulnerable to sexual victimization because of their sexual orientation.

Men are expected to demonstrate physical strength, control the situation, and therefore be able to defend themselves, physically resist, or escape the assault. When men are raped, it is seen as if they failed to resist.¹⁸⁰

Hypothesis, 19 INT’L R. VICTIMOLOGY 269, 269–71 (2013); Pamela Wilcox, Carol Jordan & Adam Pritchard, *Fear of Acquaintance Versus Stranger Rape as a “Master Status:” Towards Refinement of the “Shadow of Sexual Assault”*, 21 VIOLENCE & VICTIMS 355, 360–68 (2006).

¹⁷⁶ See sources cited *supra* note 23.

¹⁷⁷ Anderson, *supra* note 80, at 242; Sleath & Bull, *supra* note 112, at 973.

¹⁷⁸ See Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1473, 1502 (2013) (discussing the concept of consent and the social discourse of female sexuality in relation to rape laws and arguing that legal reform in the law of rape should account for the idea of women’s sexual agency); see also Tuerkheimer, *Judging Sex*, *supra* note 81, at 1490, 1493.

¹⁷⁹ JAVAID, *supra* note 62, at 205–06.

¹⁸⁰ *Id.* at 207.

Consequently, male victims are described as stripped of their masculinity, being diminished as “real men.”¹⁸¹ The literature on prison rape vividly describes how such victims are considered emasculated and even feminized.¹⁸² Studies have shown that some male victims are hesitant to report the offense because they fear that their heterosexuality would be challenged.¹⁸³

Heterosexual victims of prison rape are also deemed “not real men.”¹⁸⁴ We hypothesize that the extensive scholarship on prison rape, compared to other settings of male rape, may be partly explained by the fact that its victims are often heterosexual.¹⁸⁵ This may reflect heteronormative anxieties because it threatens hegemonic masculinity and heteronormativity.¹⁸⁶

Despite the differences between the two bodies of literature, scholarship on both prison and community rape repeats the interpretation that rape injures the victim’s masculinity. According to prevailing cultural and societal norms, masculinities stand higher than femininities on the ladder of gender hierarchy, and hegemonic masculinity rates higher than gay or minority masculinities.¹⁸⁷ Thus, men who are raped “are placed at the bottom of gender hierarchy,” not being “real men” or even emasculated.¹⁸⁸ They go through a “female experience” of being victims of sexual violence, being powerless and weak compared to other men.¹⁸⁹

¹⁸¹ See Aliraza Javaid, *Theorising Vulnerability and Male Sexual Victimization*, 51 AUSTL. & N.Z. J. CRIMINOLOGY 454, 463 (2018) (discussing perceptions and constructions of male rape among police officers and agency practitioners in the UK); see also Gooch, *supra* note 127, at 211.

¹⁸² Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1352 (2011) (describing how rape of heterosexual men creates the perception of the victims as women. In prison slang, these victims are described as men who were “made boys” or “turned out.”). See Hefner, *supra* note 118, at 242; see also *supra* Part II; Gooch, *supra* note 127, at 209.

¹⁸³ Gooch, *supra* note 127, at 212.

¹⁸⁴ See Michalski, *supra* note 126, at 244.

¹⁸⁵ Eigenberg & Baro, *supra* note 104, at 74, 86; Buchanan, *supra* note 119, at 35. Cf. Alarid, *supra* note 115, at 89.

¹⁸⁶ These anxieties are expressed in popular “drop the soap” jokes, which often have a homophobic and racialized angle: the fear of being “made gay” by a large, Black prisoner. See Buchanan, *supra* note 119, at 2–3.

¹⁸⁷ JAVAID, *supra* note 62, at 200.

¹⁸⁸ *Id.*

¹⁸⁹ Catharine A. MacKinnon, *Oncale v. Sundowner Offshore Services, Inc.*, 96-568, *Amici Curiae Brief in Support of Petitioner*, 8 UCLA WOMEN’S L.J. 9, 18–19 (1997) [hereinafter MacKinnon, *Amici Brief*]. Professor MacKinnon wrote this amicus brief in support of a male employee who had to quit his job after he was sexually abused by male supervisors and co-workers. The question was whether same-sex sexual harassment was actionable under Title

Social and gendered power relations are inscribed into a hierarchy of sexual practices where the penetrated, whether female or gay male, is inferior to the penetrator, who is identified with the masculine.¹⁹⁰ A common thread between homophobic and misogynistic views is the valorization of “topness” over receptivity, and the view of femininity as a deficiency and negative passivity.¹⁹¹

Not only the masculinity of the victim is constructed in the context of male rape, but also that of the aggressor. At times, this is accomplished by connecting the motive to homophobia.¹⁹² In such cases, the aggressor is possibly motivated by unresolved conflictual dimensions of his life and masculinity.¹⁹³ Another point of view focuses on the perpetrator’s power relations with other men rather than his sexual orientation. This is most prevalent in the literature on the prison setting, where male rape is constructed and depicted as a violent act that marks power relations between men.¹⁹⁴

This conceptualization is also shaped by the heteronormative scripts according to which the “real men” dominate the less masculine ones and are themselves invincible and unrapable. Sex roles, both active and passive, also play a role in the construction of the aggressor’s masculinity. The masculinity of the aggressors—those who penetrate—remains intact, although they have sex with other men.¹⁹⁵ Straying from the heteronormative model of sexuality seems to be relatively tolerable in prison, where the inmates do not typically have alternatives to engage in sex with females, as long as they are penetrating rather than being penetrated.¹⁹⁶

The trouble with theoretical explanations that focus on masculinity and heterosexuality, Cohen, who offers to construct a broad theory of male rape, argued, is that they perpetuate rape myths about the ideal victim, maintain the stereotype about real men being unrapable, and thus, keep much of the

VII, and the U.S. Supreme Court found in his favor. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 82 (1998).

¹⁹⁰ Orna Alyagon Darr, *Narratives of ‘Sodomy’ and ‘Unnatural Offenses’ in the Courts of Mandate Palestine (1918-1948)*, 35 *LAW & HIST. REV.* 235, 239 (2017).

¹⁹¹ See BOYARIN, *supra* note 78 (recovering the Jewish ideal of the gentle, receptive male).

¹⁹² For a notable example of research that grounds male rape in homophobic motives, see generally Allen, *supra* note 89.

¹⁹³ A. Nicholas Groth & Ann W. Burgess, *Male Rape: Offenders and Victims*, 137 *AMERICAN J. PSYCHIATRY* 806 (1980).

¹⁹⁴ Peterson et al., *supra* note 21, at 20.

¹⁹⁵ Buchanan, *supra* note 119, at 37–46.

¹⁹⁶ See discussion at Part II.B, particularly at sources cited *supra* notes 126, 128.

phenomenon invisible and marginalized.¹⁹⁷ According to Cohen, this academic focus presupposes the view that sexual victimization of men must involve clear physical coercion to uphold the victim's masculinity and heterosexuality.¹⁹⁸

In the second edition of *Just Sex?*, Nicola Gavey conceptualizes the link between masculinity and male rape.¹⁹⁹ Her explanation strives to account for the suffering of some men and the sexual aggressiveness of others. The crux of her argument is the burden of the myth of invulnerable masculinity, which requires men to be dominant and superior and repudiates the idea that they can be vulnerable or dependent.²⁰⁰ These cultural expectations underlie a sense of sexual entitlement but are often incompatible with vulnerable reality. Men can act to restore their masculinity against real or imagined threats.²⁰¹ According to Gavey, these cultural expectations can explain not only the misogyny, sexism, and aggressiveness of men toward women but also sexual aggressiveness toward other men.²⁰² It helps explain sexual aggression toward queer and transgender men and against cisgender straight men (noticeably in institutional authoritarian settings such as prisons or the military).²⁰³ Although only a relatively small number of male perpetrators use violence, sexual aggression in the form of offensive remarks is widespread.²⁰⁴ Gavey further claims that it is difficult to explain female perpetration of sexual violence in terms of gender order and the myth of masculinity and that there are additional factors that affect sexual perpetration.²⁰⁵ The cultural scripts of aggressive and dominant men and submissive women may be present in everyday life, but not all individuals follow the stereotypical cultural scripts. If we focus on the victim rather than on the perpetrator, such cases can also be interpreted based on the myth of masculine invulnerability, an angle that elucidates their social invisibility and repudiation.

The inclination to focus the research on gay males in community settings results in the marginalization of heterosexual victims in the academic discourse. Yet, some scholars have moved beyond the rigid concepts of

¹⁹⁷ COHEN, *supra* note 7, at 11–13.

¹⁹⁸ *Id.* at 9.

¹⁹⁹ GAVEY, *supra* note 53, at 218.

²⁰⁰ *Id.* at 249–50.

²⁰¹ *Id.* at 250.

²⁰² *Id.* at 257.

²⁰³ *Id.*

²⁰⁴ *Id.* at 256.

²⁰⁵ *Id.* at 247–48.

sexuality to include heterosexual male victims in the study of male rape. According to Graham, who outlines the emergence of male rape as a social problem in the social research discourse, scholarly attempts to extend the research to heterosexual male victims of rape created a more “legitimate” victim: the heterosexual man.²⁰⁶ The conceptualization of the rape of heterosexual men as a “stranger rape” and the image of rape of gay males as a “date rape” create hierarchies of harm, with the rape of heterosexual men by other men being perceived as more traumatic than that of gay men (or of women).²⁰⁷ This reinforces a narrow concept of male rape.²⁰⁸

Although some of the scholarly critique claims that a focus on gay male victims marginalizes male rape as a gay issue, another line of critique argues that the research on heterosexual victims results in undermining male gay victims. However, whether one studies gay or heterosexual victims, masculinity and sexuality are central to the understanding of male rape. The hierarchies of gender and sexualities represent fundamental structures of social power, and so the difference between social hegemony and the inferior others. The scholarship on male rape explores yet additional vectors of power, to which we now turn.

3. Power

The previous two themes, otherness and masculinity, are nested in a third: both express mechanisms of power, which place the victim in an inferior position, being “less of a man,” less masculine, or someone regarded as other. Themes of power and control play a key role in the characterization and understanding of male rape. The analysis shows that the patterns of male rape in both community and carceral settings are embedded in the broader societal power grid.

Female rape has long been analyzed against the backdrop of social power relations. Radical feminist theories focus on gendered power relations as the analytical framework of sexual violence.²⁰⁹ Feminist analysis has

²⁰⁶ Graham, *supra* note 7, at 199.

²⁰⁷ Graham, *supra* note 7, at 199–200; Hlavka, *supra* note 9, at 499; Kathy Doherty & Irina Anderson, *Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape Victims*, 14 J. CMT’Y & APPLIED SOC. PSYCH. 85, 98 (2004).

²⁰⁸ *Id.* at 98.

²⁰⁹ See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (developing a theory of gender centered on sexual subordination and applying it to the state); BROWNMILLER, *supra* note 174 (pioneering a gendered theory of rape); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 636–37 (1980). Intersectional feminist theories that were later developed, partly in contrast to the essentialist

exposed and challenged the “rape culture,”²¹⁰ a belief system based on patriarchal dominant-submissive models of women, gender roles, sexuality, sex, and femininity. Rape culture encourages sexualization of violence and erotization of aggression.²¹¹ Feminist legal scholarship demonstrates the effect that rape culture has had on the societal and legal discourse of rape.²¹² Studies show that the ideologies that support male rape myths are similar to those that support female rape myths.²¹³ Both phenomena reflect patriarchal power relations and hegemonic masculinities.²¹⁴

As noted above, many scholarly analyses of male rape point to a homophobic motive for the act. Such explanations imply a connection between the phenomena of male and female rape. The notion that a man who is penetrated or unable to fend off attackers is inferior because he resembles a woman necessarily implies female inferiority.²¹⁵ This conception supports the understanding that homophobia and misogyny perpetuate each other. Like female rape, male rape is not independent of the patriarchal dominant-submissive model.

aspects of radical feminist theories, focus on additional elements that constitute social power relations and shape women’s experience of rape, such as race, socio-economic status, religion, etc. *See also* sources cited *infra* note 253.

²¹⁰ Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 465, 470–74 (2018); Dianne Herman, *The Rape Culture*, in *WOMEN: A FEMINIST PERSPECTIVE* (Jo Freeman ed. 1989) (analyzing sexual violence as a product of a culture that normalizes aggressive masculinity in sexual relations).

²¹¹ *See* Catherine A MacKinnon, *Sexuality, Pornography, and Method: Pleasure under Patriarchy*, 99 ETHICS 314 (1989) (analyzing sexual violence against women as erotization of male aggressiveness).

²¹² *See* Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000) (analyzing the case of *United States v. Morrison*); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2055–56 (2015); *see also* Emilie Buchwald, Pamela Fletche & Martha Roth, *Are We Really Living in a Rape Culture*, in *TRANSFORMING A RAPE CULTURE* 7–10 (1993). Buchwald defined rape culture as “a complex of beliefs that encourages male sexual aggression and supports violence against women.” GAVEY, *supra* note 53, at 228–29.

²¹³ *See generally* Kristine M. Chapleau, Debra L. Oswald & Brenda L. Russell, *Male Rape Myths: The Role of Gender, Violence, and Sexism*, 23 J. INTERPERSONAL VIOLENCE 600 (2008) (examining gender differences in rape myth acceptance and exploring the underlying views that shape male rape myth acceptance).

²¹⁴ *See* Pretorius, *supra* note 16, at 578; Lundrigan & Mueller-Johnson, *supra* note 3, at 768; *see generally* Aliraza Javaid, *Feminism, Masculinity and Male Rape: Bringing Male Rape ‘Out of the Closet’*, 25 J. GENDER STUDIES 283 (2016) (examining the social constructions and phenomenological realities associated with male rape).

²¹⁵ Franks, *supra* note 136, at 577.

Power differences between the perpetrator and victim, as the feminist literature on rape demonstrates, can be expressed in a variety of ways: physical, social, institutional, racial, economic, and emotional.²¹⁶ Feminist scholarship on intersectionality contributed to the understanding that various dimensions of power act simultaneously and that the gendered lens alone cannot fully capture the relations of power.²¹⁷

A complex societal and intersectional paradigm is largely missing from the scholarship on male rape. Interestingly, although Stephanie Allen claims that the meaning that victims ascribe to rape is premised more on the method of rape rather than on the nature of the relationship with the rapist, her typology nevertheless charts various axes of power relations.²¹⁸ Based on the descriptions of male victims, she identifies four types of male rape.²¹⁹ Although different in their characterization, all types represent power relations. The most common experience described by the victims was “overpower,” where the attacker used physical violence to overcome the victim. The rape is described as physically horrible, at times carried out by several attackers. This is comparable to the “real rape” model. The second type was described as “override,” in which perpetrators were friends, acquaintances, or partners of the victim.²²⁰ The victims of this form of rape were almost all gay men.²²¹ They agreed to some degree of sexual intimacy, but their lack of consent to penetration was ignored. The third type was characterized by the victims as “intimidation,” where the perpetrators took advantage of their social power over the victim (such as by threat of loss of employment).²²² There was no use of physical violence but rather exploitation of the dependence and power relations between the two parties. This is the only axis of Allen’s system that relies on broader sociological meanings of power, that are not limited to physical coercion. The fourth way

²¹⁶ See MACKINNON, *supra* note 209; see also CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 238, 245 (2006).

²¹⁷ See MacKinnon, *Rape Redefined*, *supra* note 18, at 470–71. MacKinnon links male rape to several dimensions of power such as age, ethnicity, disability or sexual orientation, perceived or actual. Although she acknowledges multiple axes of power, her perspective is still predominantly gendered because through their actions, the aggressors maintain their roles as men. MacKinnon, *Amici Brief*, *supra* note 189, at 19–20.

²¹⁸ Allen, *supra* note 89, at 35.

²¹⁹ *Id.* at 43–44. Allen interviewed 50 male rape victims, 17 of whom were heterosexual men. *Id.* at 30.

²²⁰ *Id.* at 37.

²²¹ This finding correlates with various studies that describe male rape of homosexual men as acquaintance rape.

²²² Allen, *supra* note 89, at 37.

in which male rape victims described their experience of rape was “entrapment,” where the perpetrator raped the victims when they were drugged and incapable of consenting, or when they were mentally vulnerable.²²³ By describing their sexual victimization using these four scenarios to explain why they could not resist the rape, all the male victims sought to reclaim their masculinity, which was severely harmed by the rape.²²⁴ Allen’s categories are far from exhausting all the variables of power differences that underlie cases of male rape. Human interactions are embedded in a wide social context, where the position of the different players on the power grid is associated with race, ethnicity, socio-economic status, citizenship, gender, sexuality, and more.

In sum, a comparative analysis of the scholarship on male rape in prison and community settings reveals that in both, male rape is associated with the manifestation of power and control. Until this point, we discussed common themes arising from the literature focused on both settings. From this basis, we argue that a better understanding of male rape requires an exploration of its social embeddedness. This investigation follows a path that extends beyond blunt violence or the formal hierarchy of the total system to more nuanced and implicit mechanisms of power, including the ones that are camouflaged or silenced. The next Section moves from the recurring themes to those that are missing from the academic discussion on male rape and explores the meaning ascribed to their invisibility.

C. MISSING THEMES

Social construction of a phenomenon is created not only by the way it is explicitly discussed and treated, but also, and no less significantly, by how culture silences certain aspects and renders them invisible. In this Section, we discuss three themes that are largely missing from the scholarship: consent, race in the context of the community, and female-on-male rape. The first two are central concepts in the scholarship on sexual violence against women. The third theme is hardly discussed in the feminist literature. Discussion of these invisible themes can form a foundation for a theoretical exploration of male rape in diverse contexts.

²²³ *Id.* at 43–44.

²²⁴ *Id.* at 46–47.

1. Consent

The theme of consent is scarcely examined in the academic discussion on male rape.²²⁵ This stands in sharp contrast to the extensive feminist legal scholarship that explores various models of consent, different aspects of consent, and the complexities associated with this concept.²²⁶ These nuanced analyses of consent in the feminist scholarship on rape and sexual assault are not evident in the discussion of male rape. The academic discourse on male rape tends to neglect this issue and focuses largely on physical coercion.²²⁷

²²⁵ For a few noteworthy scholarly exceptions, see generally Hanley & Rumney, *supra* note 74; Rumney, *Male Rape in the Courtroom*, *supra* note 10; Rumney, *Policing Male Rape*, *supra* note 10. Allen's work is an outstanding example. Although her work touches upon rape scenarios that do not involve physical violence, she does not engage in an in-depth analysis of various meanings of consent. Allen, *supra* note 89, at 35–44.

²²⁶ The scholarship on consent is vast, and its examination is beyond the scope of this Article. For selected literature, see generally STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998) (advocating for the protection of sexual autonomy through a standard of the affirmative, freely given permission of both parties to the sexual act); Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 671 (2015); Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE, 166–83 (Robin West & Cynthia G. Bowman eds., 2019); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO STATE J. CRIM. L. 441 (2015) (arguing that affirmative consent rules do not tend to enhance miscommunication, although the possibility of interpretative variation between the parties about what constitutes a “yes” to sexual activity should be considered. In such cases, an inquiry into reasonableness of consent becomes paramount); Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 149–51, 153–54 (2011); Lucinda Vandervort, *Sexual Consent as Voluntary Agreement: Tales of “Seduction” or Questions of Law?*, 16 NEW CRIM. L. REV.: INT’L & INTERDISC. J. 143, 143, 146–47 (2013); Jesse Elvin, *The Concept of Consent Under the Sexual Offences Act 2003*, 72 J. CRIM. L. 519, 519–23 (2008) (discussing consent in legislation in England); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957–59 (2008); Joseph J. Fischel & Hilary R. O’Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 428, 430–32 (2015); Robin West, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (2010); Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235–63 (2015) (arguing that the criminal justice system is not fit to treat sexual violence for three reasons: the difficulties in proving non-consent, the pathologic view of the rapist that is contrary to reality, and the resistance of victims being viewed as victims of rape); Peter Westen, *Some Common Confusion About Consent in Rape Cases*, 2 OHIO STATE J. CRIM. L. 333, 333 (2004); Jamie L. Small, *Conceptualizing Consent: How Prosecutors Identify Sexual Victimization in Statutory Rape Cases*, 45 LAW & SOC. INQUIRY 111 (2020) (examining prosecution discretion in statutory rape cases and arguing that norms of “proper” adolescent sexuality affect their decisions whether to proceed with complaints).

²²⁷ Occasionally the research highlights rape by intimidation, threats, or blackmail, but less violent or extreme modes of coercion, such as stealth breeding, remain mostly

Some studies on male rape have shown that physical violence does not necessarily characterize male rape, particularly in the community setting and within intimate relationships.²²⁸ Thus, the lingering focus on physical violence and the lack of recognition of the requirement of consent in the academic discourse is problematic. The focus on physical violence is integral to the social construction of masculinity. Men are expected to be strong and fend off their attackers. Like the historic demand of “utmost resistance” from female rape victims to prove their non-consent to sex,²²⁹ men are socially expected to put up physical resistance to overcome sexual violence.²³⁰ Similar to the stereotypical scenario of female “real rape,” concentrating on physical violence constructs the rape of men as unavoidable, as an act that is forced and coerced upon the victim, with very few options to resist.

Evidence of physical force is equated implicitly with non-consent by the victim. Physical violence is a visible element that negates consent; therefore, the focus on this concept maintains the social understanding of maleness and the heteronormative paradigm. This narrow construction of male rape omits a variety of coerced sex acts in which physical violence is not present, thereby denying their occurrence. It constructs a one-dimensional paradigm of male rape, which does not reflect this varied phenomenon.²³¹

The scholarly discussion on the “ideal victim” of male rape is extensive.²³² The concept of the “ideal victim” paints a picture of someone who probably did not agree to sexual contact with the perpetrator. The reliability of those who do not fall squarely within this category is questioned

understudied. The rare investigation of non-consensual sex does not necessarily entail an analysis of the legal aspects of the act. See, for example, Brennan’s study of non-consensual condom removal, which concentrates on the cultural rather than legal meaning of “stealth breeding.” Joseph Brennan, *Stealth Breeding: Bareback Without Consent*, 8 PSYCH. & SEXUALITY 318 (2017).

²²⁸ Allen, *supra* note 89, at 38–44.

²²⁹ See COHEN, *supra* note 7, at 20; Graham, *supra* note 7, at 173.

²³⁰ Buchanan, *supra* note 119, at 45; Hlavka, *supra* note 9, at 485–86.

²³¹ The preoccupation with physical force is also manifested in relation to female rape, although feminist scholarship has succeeded in partly changing this discourse and promoting rape analysis that focuses on consent. In many states in the United States, the force requirement is still part of the offense of rape or sexual assault. See Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 342–43 (2017).

²³² See e.g., John Burrow, Deena A. Isom Scott & Tonia Mikell, *No Man’s Land: The Denial of Victimisation in Male Statutory Rape Cases*, 26 J. SEXUAL AGGRESSION 316, 327 (2020) (discussing the factors that influence judges’ perceptions of male statutory rape victims of female perpetrators and comparing conflicting perspectives of traditional scholarship and more contemporary and critical theories); COHEN, *supra* note 7, at 10–36; Depraetere et al., *supra* note 24; Graham, *supra* note 7.

because they are suspected to have consented. We argue that the extensive critique of the concept of the “ideal victim” fails to make its underlying assumptions explicit and to problematize and inspect the meaning of consent. The literature expanded on the issue of the ideal male victim without following through with the implications of this concept.

The relative absence of literature on consent may be related to the social and cultural discourse of sexuality and gender roles. In sexual relations, women are perceived as passive, submissive, and compliant.²³³ Men are expected to be active, initiate sex, and constantly desire sex, whereas women’s role is either to consent or not consent.²³⁴ Accordingly, consent may be perceived as relevant strictly to female victims, and the scholarship often ignores the nuances of consent with respect to male victims.²³⁵

This model of consent is not based on mutuality and communication.²³⁶ Prior to the adoption of gender-neutral rape laws, consent frameworks typically involved a dominant masculine initiator and a passive feminine party who either consents to the sexual act or refuses to do so. This tradition of rape law entails an asymmetric gendered structure that reflects active masculinity that overcomes passive femininity.²³⁷ In this way, the legal

²³³ Natasha McKeever, *Can a Woman Rape a Man and Why Does It Matter?*, 13 CRIM. LAW & PHIL. 599, 614 (2019) (uncovering the stereotypical beliefs underlying the definition of rape in U.K. law).

²³⁴ For a critique of women’s “consentee role,” see CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 71–84 (1989).

²³⁵ The legal concept of consent also denies various nuanced forms of coercion. See generally Deborah Tuerkheimer, *Sexual Violation Without Law*, 76 N.Y.U. ANN. SURV. AM. L. 609 (2020) (discussing the complexities in recognizing consent in various coercive situations, stressing the failure of criminal law to address these complexities, and arguing that the #MeToo movement may assist in broadening our understanding of various coercive sexual situations).

²³⁶ The model of affirmative consent seeks to shape the legal construct of consent so that it is based on mutuality and communication. For selected literature that supports affirmative consent, see J. Little Nicholas, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1363 (2005); Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1147 (1993); Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & L. 395, 419 (2012); Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865 (2008) (reading the Canadian judicial elaboration of affirmative consent standards as a gendered technology of neoliberal governmentality); Tuerkheimer, *Affirmative Consent*, *supra* note 226; Kristen N. Jozkowski, *Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality*, 47 U. PAC. L. REV. 741 (2016) (arguing that before an affirmative consent policy can be effective, an affirmative approach to sexuality is necessary).

²³⁷ See Gooch, *supra* note 127, at 202.

paradigm reinforces the heteronormative nature of rape, thereby silencing the discussion on consent in relation to male rape.

The invisibility of consent may also be partly related to a physical reaction. Rape of males (adults and children alike) may stimulate an erection or ejaculation, even in the absence of consent to the act.²³⁸ These physiological responses create confusion among victims who question their own non-consent.²³⁹ Even when the victims acknowledge the rape, the authorities may have difficulty believing the victims and proving the offense in courts.²⁴⁰

The absence of consent in the discourse of male rape is particularly striking when discussing the rape of gay male victims in dating or intimate relationships. Gay male victims, particularly victims of acquaintance rape, are placed in a similar position as women because both are “suspected” to have consented and may find it hard to prove their non-consent.²⁴¹ Societal expectations about “proper” masculinity reinforce a narrative that may conceal the experience of male victims and particularly of gay male victims. Graham argued that because the “desire for anal penetration” by gay men is deemed abnormal, they are perceived to be less deserving of protection or attention.²⁴² Like certain “types” of women who are deemed “unrapable,”²⁴³ gay men are also perceived as prone to consent because of their sexual orientation and perceived sexuality.²⁴⁴ Considering the above, the invisibility of consent in the discourse of male rape is difficult to explain and deserves further discussion.

The theoretical emphasis on physical violence disregards consent and marginalizes forms of coercion when males were overcome without the use of physical violence. Possibly, it is the inability to imagine male rape unless committed by extreme force that explains why the scholarship on male rape is more developed with respect to masculine settings characterized by

²³⁸ See Ramona Alaggia & Graeme Millington, *Male Child Sexual Abuse: A Phenomenology of Betrayal*, 36 CLINICAL SOC. WORK J. 265, 269, 273 (2008); Patrick J. O’Leary & Nick Gould, *Exploring Coping Factors Amongst Men Who Were Sexually Abused in Childhood*, 40 BRIT. J. SOC. WORK 2669, 2679 (2010); Depraetere et al., *supra* note 24, at 1004; Bullock & Beckson, *supra* note 64, at 202–04.

²³⁹ See sources cited *supra* note 238.

²⁴⁰ Bullock & Beckson, *supra* note 64, at 202–04.

²⁴¹ Graham, *supra* note 7, at 199.

²⁴² *Id.*

²⁴³ Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, *supra* note 178, at 1503.

²⁴⁴ Hlavka, *supra* note 9, at 499.

physical coercion and violence, such as prison or the military.²⁴⁵ Other types of rape, and the concept of consent in particular, become invisible in the scholarship on male rape. In contrast, the feminist scholarship on consent is vast and nuanced.²⁴⁶ It offers a variety of theoretical approaches and conceptualizations of the complexities of consent in criminal cases of rape. Can these theories and conceptualizations be applied to consent in cases of male rape? Do these theories take into consideration the effect of social constructions of masculinity and heterosexuality? Are they suitable to investigate the dynamic of male rape or the differences between male and female rape? All these questions are left without an academic response because the element of consent is hardly discussed in the literature on male rape.

The literature on rape often locates consent within binary norms of masculinity and femininity, heteronormative sexuality, axes of gender, and dichotomous hierarchies of power. It is therefore difficult to explain male rape within this paradigm, unless it is perpetrated under extreme conditions (such as in prison or in war, where consent is not assumed) or when it is perpetrated against victims who are located outside the binary gender framework, whose manhood is frequently attacked, and whose consent to sexual relations with men is assumed (such as gay victims).

Radical feminist theory challenges liberal concepts of consent according to which males and females are equally autonomous parties. Catharine MacKinnon argued that the focus on consent and autonomy rather than on equality overlooks the harmful core of sexual assaults.²⁴⁷ She proposed structuring the offense of rape as an act of coercion, a theoretical construct that better captures rape as part of a pattern of social gendered inequality.²⁴⁸ Yet, her view of coercion is not limited to physical violence. On the contrary, her emphasis is on social hierarchies of power. Is this concept suitable to acknowledge male rape and unmask male sexual victimization? The answer appears to be positive. Although she focuses on

²⁴⁵ The hypermasculine environment in these settings, according to some accounts, is an element that renders male rape more comprehensible. Narratives of such deterministic biological nature construe the absence of women as the motivation for sexual assault, undermining the significance of consent. For research on male rape as part of a military conflict and within the military, see Carol O'Brien, Jessica Keith & Lisa Shoemaker, *Don't Tell: Military Culture and Male Rape*, 12 PSYCH. SERVS. 357 (2015) (discussing military culture and military norms and their effect on male rape veterans victims); ZALESKI, *supra* note 9, at 59–72.

²⁴⁶ See *supra* note 226.

²⁴⁷ MacKinnon, *Rape Redefined*, *supra* note 18, at 436.

²⁴⁸ *Id.* at 469, 474.

power relations between men and women and her scholarship is focused on women's experiences, MacKinnon's coercion paradigm may encompass more forms of hierarchies and coercive conditions that negate the will of the victim.²⁴⁹

Drawing on Judith Butler's theory of "human recognition," Alletta Brenner suggested an intersectional model of rape "as a break in the mutual process of relating to one another as human beings, or, put more simply, as a rupture in the fabric of human recognition."²⁵⁰ Her model moves away from the heteronormative framework of a male perpetrator and a female victim and avoids conceptualizing rape on gendered bases alone. Notwithstanding this criticism, incorporating Brenner's model into conceptualizing rape allows for a better exploration of the phenomenon of male rape in a broader social and political context.

Despite various legal reforms, the application of the concept of non-consent is still socially and legally challenging, noticeably when less formal axes of power and fewer visible coercive conditions are concerned.²⁵¹ Critiques of the concept of consent discuss the impossibility of consent in a situation of inequality, the possibility that consent may be the result of coercion, and the notion that consensual sex is not necessarily wanted, welcome, or equal.²⁵² These difficulties, much discussed with respect to female rape, recognizing the effect of pervasive hierarchies of power on consent and the provision of suitable legal tools to handle it, are exacerbated in relation to male rape. The heteronormative structure of sexuality, perceptions of hegemonic masculinity, homophobic views, and performances of gender make the recognition of non-consensual sex more complex when men are the victims.

2. Race

Race is a theme that is lacking from the academic literature on male rape in the community, although not from scholarship on prison rape. Race

²⁴⁹ *Id.* at 436.

²⁵⁰ Alletta Brenner, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J. L. & GENDER 504, 557 (2013). Critique of this model includes the difficulties in applying it to the *mens rea* standard of criminal law or the denial of gendered power hierarchies and the manner in which they shape the phenomenon of sexual violence.

²⁵¹ See Tuerkheimer, *Sexual Violation Without Law*, *supra* note 235, at 630.

²⁵² See JOSEPH J. FISCHER, SCREW CONSENT: A BETTER POLITICS OF SEXUAL JUSTICE 807 (2019); Fischer & O'Connell, *supra* note 226, at 524; Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. LEGAL EDUC. 804, 817 (2017).

received considerable attention in scholarship about female rape, either when pointing out racial stereotypes integral to the perception of “real rape” or as part of a discussion of intersectionality.²⁵³ Race figures prominently in the literature on female rape dedicated to myths of real rape and the ideal victim.²⁵⁴ Often this literature can perpetuate the racist trope within the “real rape” myth that the perpetrator is Black and the victim is white.²⁵⁵ The stereotype of Black men as threatening, large, hypermasculine, hypersexual others casts them as “ideal offenders.”²⁵⁶ Such stereotyping of Black men as perpetrators encourages fear of Black men. Scholars of female rape have studied the race of both the perpetrator and the victim, pointed out the greater vulnerability of Black women,²⁵⁷ and explored the racial patterns of rape.²⁵⁸

By contrast, the element of race is missing from the research on male rape in the community. Notions of heteronormativity and hegemonic masculinity rather than race dominate the model of the ideal male victim in

²⁵³ See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter *Demarginalizing the Intersection*] (criticizing single-axis frameworks that treat race and gender as mutually exclusive categories and offering an intersectional analysis of anti-discrimination law instead); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (pointing to various intersections of race and gender in shaping structural, political, and representational dimensions of violence against women of color); Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 EUR. J. WOMEN'S STUD. 193, 198 (2006); HILL COLLINS, *supra* note 145 (conceptualizing the interrelationships of gender, class, race, and ethnicity with other social categories).

²⁵⁴ For recent examples, see FLOOD DAWN RAE, *RAPE IN CHICAGO: RACE, MYTH, AND THE COURTS* 11 (2012); Emily C. R. Tilton, *Rape Myths, Catastrophe, and Credibility*, EPISTEME 1, 1–2, 16 (2022); Alisa Kessel, *Rethinking Rape Culture: Revelations of Intersectional Analysis*, 116 AM. POL. SCI. REV. 131, 133–37 (2022).

²⁵⁵ Angela Y. Davis, *Rape, Racism and the Myth of the Black Rapist*, in WOMEN, RACE & CLASS 172–201 (1981); SUSAN ESTRICH, *REAL RAPE* 1, 8, 37, 107 (1987); Crenshaw, *Mapping the Margins*, *supra* note 253, at 1269–72.

²⁵⁶ See Lisa J. Long, *The Ideal Victim: A Critical Race Theory (CRT) Approach*, 27 INT'L REV. VICTIMOLOGY 344 (2021) (discussing the manifestation of the intersection of gender, race, and masculinity in the experience of black and black mixed-race people reporting crime to the police).

²⁵⁷ See Tuerkheimer, *Slutwalking in the Shadow of the Law*, *supra* note 178, at 1482–85; see also Harris, *supra* note 174, at 598–601.

²⁵⁸ Lisa Lindquist Dorr, “Another Negro-Did-It Crime”: *Black-on-White Rape and Protest in Virginia 1945–1960*, in SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA 247–61 (Merril D. Smith ed. 2001); Crenshaw, *Demarginalizing the Intersection*, *supra* note 253, at 158–59; GAVEY, *supra* note 53, at 27; Gary D. LaFree, *Male Power and Female Victimization: Toward a Theory of Interracial Rape*, 88 AM. J. SOCIO. 311, 323 (1982); MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 44 (1971).

this literature. This omission is not as prevalent in the scholarship on prison rape. As discussed above, scholars of prison rape inquired about the racial identity of perpetrators and victims.²⁵⁹ Although the data and methodologies are disputed, there is no doubt that the racial aspects of prison rape were explicitly explored.²⁶⁰ What can explain the striking difference between the academic discourse on rape in the community, in which the issue of race is noticeably absent, and the literature on both female rape and prison rape?

A possible explanation is that the silence about the racial aspect of male rape in community settings originates from the same source as the tendency to steer away from consent. It is the impossibility of imagining male rape unless it is committed by physical force or under circumstances of clearly marked power difference, like in the institutional environment of the asylum.²⁶¹ This renders non-physically violent manifestations of social inequality, like race, invisible.

Not as blunt as physical violence, race can act nevertheless as a social mechanism of power. The social dimension of power is prevalent in the literature on female rape, which dedicates considerable attention to rape as a phenomenon that is embedded in patterns of social inequality.²⁶² The absence of a similar discussion about the embeddedness of male rape in the social power grid (in which race is one factor) may indicate the lingering influence of the myth that men can be overcome only by extreme and clear violence. The nuances of exerting power seem to be irrelevant. Perhaps the social difficulty of imagining men as vulnerable and passive victims, and not as active initiators of sex, together with homophobic views, generates an emphasis on masculinity and sexual orientation and silences the element of race, making it invisible in the discourse of male rape in the community.

Why is it then that while the discussion of race is absent from the literature on male rape in the community, scholarship on prison rape is abundant with such inquiries? The reason may have to do with the particular anxieties elicited by incarceration. In prison, inmates of different ethnicities and races meet on a theoretically equalized basis. Moreover, minorities may be better positioned in prison society because of the social power of gang affiliations.²⁶³ The hierarchies of the outside world are turned on their head.

²⁵⁹ See Part II.B.

²⁶⁰ See, e.g., sources cited *supra* notes 137, 138, 139, 142.

²⁶¹ See Goffman, *supra* note 4.

²⁶² See, e.g., BROWNMILLER, *supra* note 174 (linking rape and social inferiority of women); MACKINNON, *supra* note 209.

²⁶³ For a critical account of this narrative, see Buchanan, *supra* note 119, at 31, 80.

The intensive academic discussion of race in prison may express deep fears of this “reversed world.”

3. *Female-on-Male Rape*

A third missing theme in the discourse of male rape is the rape of men by women. Some studies refer to this aspect of male rape, but they are relatively rare.²⁶⁴ Is this theme missing because such a phenomenon hardly exists, or is it an indication of a myth that men are always available for sex with women and interested in it, therefore cannot be raped by women?

One possible explanation for the invisibility of this theme in the research on male rape is that the rape of adult males by women is believed to be rare. Yet social science research going back to the mid-late 1980s and large-scale surveys suggest that sexual victimization of males by females is far more common than customarily believed.²⁶⁵ Another possible explanation is the female-centric rape paradigm that positions men as sexual aggressors and women as victims undermines the visibility of female-on-male rape.²⁶⁶

Another explanation is that men are hesitant and ashamed to reveal that they were forced to have sexual relations with women. Research shows that when rape is perpetrated by women, reporting rates are significantly lower.²⁶⁷ Male sexuality is associated with notions of assertiveness and initiation. Men are expected to be sexually active and to “say yes” to sexual acts at all times.²⁶⁸ Therefore, men may be ashamed to admit that they did not want to engage in sexual acts, particularly if these were initiated by women. As noted above, men are socially expected to show physical resistance and are often

²⁶⁴ Stemple and Meyer called for additional research and analysis on female perpetration. Stemple & Meyer, *supra* note 10, at 21. The few studies that do address this phenomenon often focus on prison settings. See, e.g., Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630 (2012) (discussing female-on-male rape in men’s and women’s correctional facilities). For a critical review of the literature on sexual coercion of males by females, see GAVEY, *supra* note 53, at 181–201, 243–48. Some of the studies appear to blur the distinction between unwanted and coercive sexual experiences. For a review of studies on men subjected to unwanted sex, see Jennifer Lara Fagen & Peter B. Anderson, *Constructing Masculinity in Response to Women’s Sexual Advances*, 41 ARCHIVES SEXUAL BEHAV. 261, 261 (2012). These authors also describe men who are uncomfortable with sexual advances by women. *Id.*

²⁶⁵ The meaning of survey figures, however, is disputed. See GAVEY, *supra* note 53, at 244.

²⁶⁶ Nancy E. Dowd & Ted Shaw, *Men and Sexual Abuse*, in THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 125, 126, 135 (2010).

²⁶⁷ Weiss, *supra* note 7, at 286.

²⁶⁸ *Id.* at 277.

ashamed to reveal that they were forced to perform sexual acts.²⁶⁹ This shame is exacerbated when the coercer is a woman who is perceived as (and often is) physically weaker than the man. By concealing the rape, male victims do not confess their weakness, powerlessness, and emotions.²⁷⁰

Research has shown that when women are the perpetrators and men are the victims, the acts often involve “less severe” coercion tactics, such as exploiting a victim’s incapacitated state and using verbal pressure.²⁷¹ This may be related to other studies showing that men who are sexually victimized by women tend to report fewer negative reactions than do either men or women who are raped by men.²⁷² These findings reflect the one-dimensional construction of men’s sexuality and the effect of heteronormative views on the approach to male rape and to female-on-male rape in particular. This may also explain why men are reluctant to report that they were victimized by women, and why the scholarship marginalizes this issue.

A different reason for the invisibility of this theme may be related to the legal definition of rape, requiring penetration, which is identified with males²⁷³ and excludes forced intercourse by women from the scope of the prohibition.²⁷⁴ Notably, there is limited academic scholarship on this issue. Accordingly, the discussion of this theme in this paper is rather narrow. Whatever the reason for the invisibility of female-on-male rape may be, it must be rooted in socio-cultural perceptions and beliefs regarding gender and sexuality.

CONCLUSION

The invisibility of the missing themes reflects the connection between male rape and the heteronormative order, constructions of sexuality and masculinity, and power relations. It reflects a subliminal social rejection of the phenomenon, constructs it at the margins of the social discourse, and generates otherness.

²⁶⁹ Buchanan, *supra* note 119, at 45; Hlavka, *supra* note 9, at 485–86; *see also* JAVAID, *supra* note 62, at 202.

²⁷⁰ JAVAID, *supra* note 62, at 202.

²⁷¹ Depraetere et al., *supra* note 24, at 991, 1003. For some men, coerced kissing is experienced as more injurious than coerced intercourse. *See* Peterson et al., *supra* note 21, at 6.

²⁷² Rumney, *In Defence*, *supra* note 47, at 507.

²⁷³ Gooch, *supra* note 127, at 199–200.

²⁷⁴ Some scholarly works have examined the situation of “forced to penetrate.” *See, e.g.*, Siobhan Weare, ‘Oh You’re a Guy, How Could You Be Raped by a Woman, That Makes No Sense’: Towards a Case for Legally Recognising and Labelling ‘Forced-to-Penetrate’ Cases as Rape, 14 INT’L J. L. CONTEXT 110 (2018).

The marginality of the concept of consent in academic scholarship on male rape is underscored by heteronormative stereotypes of masculinity. First, men are culturally constructed as having an unquenchable thirst for sex and as active initiators of it. Nuances of consent that can be found in the discourse on female rape are not perceived to be relevant to men. Second, the focus on violent physical rape rather than consent creates a hierarchy of harm, which implicitly portrays the ideal male victim as a heterosexual man who was physically coerced to have sex.

The missing theme of male rape by women is also antithetical to gender conventions. It is difficult, even inconceivable, to think of a woman raping a man because of the female-centric paradigm of rape. This paradigm is related to various gendered norms, including the perception of men as sexual aggressors and women as victims; the physiological power differences between women and men; and the belief that penetration cannot be forced on men because of the phallogentric nature of the law of rape.²⁷⁵

Unlike the themes of consent and female-on-male rape, the hiddenness of race in the scholarship on male rape in the community is more difficult to explain in gendered terms. We introduced some insights that may serve as a basis for analyzing the silence surrounding race in the discourse on male rape in the community. The phenomenon of male rape outside prison is a relatively new area of research, and, similar to early works on female rape, it focuses on gender as the key element of analysis.²⁷⁶ One possibility is that the body of knowledge about male rape in the community is not sufficiently developed to consider more dimensions of identity as a form of power. Nuanced conceptualizations of power in male rape are yet to be developed.

Another possibility is that male rape generates masculinity-centered anxieties, particularly in men. As a result, the academic and social discourse “notices” only characteristics of sexual orientation and gender and ignores other relevant characteristics, such as race.

Missing themes are silenced ones. The silence is manifested in various dimensions: themes that are central in the feminist literature on rape (such as the concept of consent); certain victims (heterosexual victims, male victims of females, victims of prison guards); and certain forms of rape (such as rape

²⁷⁵ E.g., Gooch, *supra* note 127, at 201 (“The law of rape, by producing and defining rape as penetration without consent, reproduces the ideal of possessive love, that there is one masculine party in any sexual act whose role is to possess, and another feminine party whose role is to be possessed. This has been considered by some to be a reflection of the phallogentric nature of the English legal system.”).

²⁷⁶ Early feminist works were heavily criticized for the lack of an intersectional perspective. See sources cited *supra* note 253.

that is not accompanied by physical violence or forcing men to penetrate). These dimensions of silence marginalize some patterns of male rape and devalue the credibility of the victims whose narratives sound implausible.²⁷⁷ The silence can also explain the empirical and theoretical gaps and inconsistencies in the scholarship about male rape. The goal of the framework developed in this Article is to shed light on some hidden corners and less researched themes.

This Article argues for the necessity of establishing a theoretical foundation for the study of male rape and offers trajectories along which such theory may be formulated. A meaningful theory of male rape would assist in identifying blind spots in the academic discourse, accurately conceptualizing this phenomenon, and offering a better general understanding of it. More broadly, it would illuminate certain aspects in the theory of rape, thereby contributing to a more inclusive theory of sexual victimization. When discussing sexual assaults of men, ignoring the theme of consent or refusing to accept that males can be victims of female aggression or overcome by non-physical coercion perpetuates stereotypes of inviolable masculinity and rape myths, not just those relating to men. Based on the analysis of the literature on male rape in prison and in the community, the Article develops a framework of six themes—three recurring ones (otherness, masculinity, and power), and three missing ones (consent, race in the community setting, and female-on-male rape).

The dearth of discussion of consent demonstrates that although male rape is a known phenomenon, it is still largely ignored in theories of sexual victimization. This finding unsettles conventional perceptions of rape. Is it possible that the focus on consent in the case of female rape and the scarcity of such discussion in the case of male rape is based on implicit gender stereotypes according to which only passive females can “consent” and this notion is irrelevant to active men? It is also related to constructions of sexuality, according to which straight strong men cannot be raped. This suggests that the theories of both male and female rape require revision. Researchers of male rape may attempt to understand why this subject is relatively marginal in their theories. Researchers of female rape may consider whether their focus unwittingly perpetuates stereotypical perceptions of

²⁷⁷ See, e.g., Alena Allen, *Rape Messaging*, 87 *FORDHAM L. REV.* 1033, 1061 (2018) (arguing that public health can be used to effectively reduce the prevalence of rape); *id.* (“Even when rapes are perpetrated by strangers and accompanied by violence, male-victim rape is often classified as ‘unfounded’ and ‘unsubstantiated.’ Thus, male rape victims, like female acquaintance-rape victims, are reluctant to come forward and report rape for fear of not being believed or taken seriously.”).

female rape. This double unsettling can advance the creation of a broad theory of rape.

This Article also highlights how male and female rape myths, although distinct, are upheld by similar ideologies of gender. Male rape is noticed mostly when it accords with hegemonic societal views of gender and sexuality. This relegates many male victims and forms of rape to the shadow of the theory (and activism) on sexual violence. This Article also concludes that there is a need to explore the intersection of male rape with social patterns and norms pertaining to race, gender, and sexual orientation. We argue that a theory of male rape should include the positioning of the phenomenon on the social power grid.