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Hate Speech and the Status of Prisoners

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Bachelor of Arts in Philosophy, Saint Louis University

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## Hate Speech and the Status of Prisoners

### **Abstract**

Drawing from feminist and critical race theorists' analyses of pornography and racist speech, I advance an argument in favor of speech regulations vis-à-vis prison rape films. I call 'prison rape films' (PRFs) those films that depict prison rape humorously, as narrative springboards, or as unnecessary tangents. I explore why such films ought to be regulated by pointing out the harms these films have on prisoners. In doing so, I examine what it is to be a 'historically oppressed group' and what makes such groups particularly vulnerable to hate speech. Prisoners are a historically oppressed group that is harmed by prison rape films and, on this basis, deserve protection from such harm by way of regulation.

### **Introduction**

In this paper I analyze the social status and treatment of prisoners in American society. I argue that prisoners constitute a historically oppressed group and are therefore uniquely susceptible to the damaging effects of hate speech, particularly as it is presented in cinematic portrayals of prison rape. I call 'prison rape films' (PRFs) those films in which prison rape is portrayed humorously, as a narrative springboard, or as an unnecessary tangent. PRFs play on the tacit acceptance that prison rape is an appropriate lot for criminals and convicts. I explore why representations of prison rape ought to be regarded as hate speech. I begin in Section I by laying the groundwork for legally defined hate speech. In Section II, I talk about prisoners in terms of historically oppressed groups and explain the advantages of classifying prisoners as such. I compare

prisoners to other marginalized groups to support this classification. In Section III, I discuss the relationship between films in which prison rape is portrayed humorously and viewers' sensibilities. I argue that prison rape representations provide cues for the ways Americans think about prisoners and their experiences. I describe cinema as an integral part of shaping Americans' feelings towards prisoners. In Section IV I describe the harms that prison rape representations have on prisoners and, more broadly, the citizenry at large. I conclude in Section V by designating prison rape representations as hate speech and, on this basis, argue that prison rape representations ought to be censored for the same reason that pornography and racist speech ought to be censored.

## I

In this section I analyze legally defined hate speech. Such analyses typically consist of speech that harms women and minorities. I take a different approach. I consider a heretofore unexamined group, prisoners, and argue that prison rape representations in film should be considered hate speech because prison rape representations cause harm to the group prisoner. This section's purpose is to respond to the needs of prisoners who are or might very well be harmed by sexual violence. I do not intend to create a new conceptual category of harm or wrong-doing and apply it to prisoners, however. This section is less abstract than that. I take a well-established category of expression—hate speech—and subsume representations of prison rape under its banner. Prisoners are unjustly harmed when they are raped or otherwise violated in state and federal prisons. The assailants, however, are not just rapists, abusive prisoners, or abusive guards. I propose that the use of words and symbols in popular movies that display prisoners as deserving or otherwise expecting to be raped are

partially responsible for the violent plight of prisoners. The words and symbols in movies harm prisoners and, on that and other bases, ought to be regarded as hate speech.

Understanding what constitutes legally protected speech goes a long way in understanding hate speech. I see the prevailing reason for protecting some, if not most, speech<sup>1</sup> in the following way. The permissibility of making certain claims—or signs, or symbols—derives not from their truth, but from their value to society.<sup>2</sup> Some claims are false but nonetheless valuable. If a claim is false but censored, people who dissent from the claim’s message lose out on a clearer impression of their own claim’s truth. In Mill’s words, when people interact with a claim with which they disagree, they acquire a “livelier impression of truth, produced by [their claim’s] collision with [an erroneous claim].”<sup>3</sup> When a claim—or a whole class of claims, e.g., hate speech—is unprotected by law, the claim is unprotected because it is injurious to society, not because it is false. In these cases, the value of speech is measured against its harm. There are, however, expressions that seem to be illicit because false, e.g., libel and slander. Yet libel and slander are not only the expressions of falsehoods; they are expressions of *injurious* falsehoods. To count as libel or slander, an expression must be false *and* injurious to one’s character or reputation. Neither truth nor falsehood is bedrock for protecting or regulating speech. Something other than truth and falsehood is operative.

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<sup>1</sup> I use ‘speech’ and ‘claims’ interchangeably. The words are not exclusive; they equally refer to signs and symbols. What I do *not* mean by ‘speech’ and ‘claims’ are expressions used in the sphere of commerce. Regulation of claims in that sphere is based on myriad factors, none of which is relevant to our purposes here.

<sup>2</sup> Mill, J.S., “Of the Liberty of Thought and Discussion,” in *On Liberty* (New York: Barnes & Noble, 1859): 25.

<sup>3</sup> *Ibid.*, 19.

J. S. Mill tells us that we have no way of knowing, in advance, what expressions are or are not valuable. The best way to ensure valuable expressions, then, is by allowing all expressions.<sup>4</sup> The threat of silencing expression is great; we must try to avoid it. Nonetheless, we inevitably run into speech with which we wish to dissent. Mill advocates the defeat, not the regulation, of such speech. The best way to counter false or valueless speech, then, is not by suppressing it, but by presenting *more* speech as counter-argument.<sup>5</sup> This is the predominant view, one expounded by scholars old and new.<sup>6</sup> Let's call it the Absolutist View. The Absolutist View is typically contrasted with arguments ushered in by critical race theorists and feminist jurisprudence. Contra the Absolutist View, let us call these latter positions the Equality View. According to the Equality View, some speech ought to be regulated when the speech harms historically oppressed groups at which the speech is aimed. Such speech is designated as hate speech.

To embrace the idea of hate speech regulations, we need to understand what values motivate speech regulations. For the Equality View, the values of respect and equality motivate regulating pornography and racist speech. Pornography creates a reality for women in which they suffer, spurring inequality.<sup>7</sup> In pornography, subjection itself is the content of women's experience and desirability.<sup>8</sup> Women are under the authority of others—a power disparity that reflects the very idea of inequality. Catharine MacKinnon ventures to say that pornography “furthers the idea of the sexual inferiority

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<sup>4</sup> Ibid.

<sup>5</sup> Waldron, Jeremy, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012), 25.

<sup>6</sup> The view is, famously, that of Mill and, less famously, that of Ronald Dworkin.

<sup>7</sup> MacKinnon, Catharine, “Not a Moral Issue,” *Yale Law and Policy Review* Vol. 2, No. 2, (Spring, 1984): 321-45.

<sup>8</sup> Ibid., 326.

of women.”<sup>9</sup> A push for equality requires us to push out pornography. Hate speech aimed at groups operates in the same way when the speech’s message is inculcated by members of a historically oppressed group. The self-identification of group members can be corrupted by ubiquitous messages of inferiority and hate. The effects of hate speech on one’s self-esteem are not to be taken lightly. Hate speech is a verbal form of inequality.<sup>10</sup>

Just as we need to understand the values motivating speech regulations, so too do we need to understand the values ushered forth against the regulation of hate speech. In contrast to the Equality View, the value of autonomy motivates unrestricted speech and the Absolutist View. The Absolutist View holds that all opinions should be aired freely, and if people disagree with those opinions, *more* opinions, also aired freely, should be used to counter them. On this view, speech should never be sacrificed for other social goals.<sup>11</sup>

When one’s speech is regulated, the worry is that one’s opinions are *prima facie* assumed to be false or valueless. This is problematic, for the opinion—that’s what it reduces to—that some speech is valueless is itself an opinion. That opinion must be validated in the marketplace of ideas. To suppress a claim—or class of claims—on the basis of the claim’s falsehood is to assume a degree of infallibility. Yet, of course, regulators of speech are fallible. When all claims are aired freely, we have the greatest

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<sup>9</sup> Ibid., 335.

<sup>10</sup> MacKinnon, Catharine, *Only Words* (Cambridge: Harvard University Press, 1996), 99.

<sup>11</sup> T.I. Emerson, “Toward a General Theory of the First Amendment,” *Yale Law School Legal Scholarship Repository* (January 1963): 16-25.

chance of getting the right answer.<sup>12</sup> The regulation of speech represents a by-passing of one's thought and a bypassing of the marketplace of ideas. Moreover, the regulation of one's expression is worse than an affront to one's right to free speech, one's right to air one's opinions; it calls into question one's status as a full moral agent. Full moral agents should, arguably, be allowed to express their thoughts on any number of topics. When their speech is regulated, however, they are deprived of rights that constitute their autonomy.

What we have, then, is a conflict between a push for regulation of speech and first amendment absolutism—a conflict between respect and equality, on the one side, and autonomy on the other. This is a conflict between competing interests that is *prima facie* quite problematic, for the Equality View and the Absolutist View seem ineluctably at odds. There is, however, a solution that bridges the conceptual divide between absolutism and regulation. This approach has it that speech that harms historically oppressed groups should be considered hate speech and should be regulated as such. Rather than begging the question, I want to motivate this position and show why priority should be given to the values of equality and respect. In other words, I argue that the equality and respect of historically oppressed groups are endangered by hate speech. Equality and respect should be protected against speech by regulating hate speech—not, as Mill and Justice Holmes argue, by presenting more speech as counter-argument. In the absence of regulation and left with only the marketplace of ideas, we would wait for yet more speech—counter-speech—to defeat harmful speech. But if we wait for counter-speech, we will have waited too long, and historically oppressed groups will pay the price

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<sup>12</sup> Matsuda, Mari, "Public Response to Racist Speech," in *Words that Wound* (Oxford: Westview Press, 1993), 32.

for our inaction. Hate speech will have taken root in the hearts and minds of historically oppressed groups and caused real harm. When the legal system offers no mechanisms for addressing this harm, the system tacitly perpetuates it.<sup>13</sup>

The psychological effects of hate speech on historically oppressed groups are robust. The negative effects of hate speech are, as Mari Matsuda says, “real and immediate for the victims.”<sup>14</sup> Matsuda provides a list of some of the physiological and psychological symptoms, which range from “fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.”<sup>15</sup> Although we might acknowledge that some messages of hate speech are false—Blacks and women are not *actually* morally, socially, or biologically inferior—historically oppressed groups’ moral inferiority is planted in our minds as an idea that *might* hold some truth. Experimental psychology tells us that ideas, presented repeatedly, interfere with our perception of and reaction to people around us,<sup>16</sup> despite knowing that such ideas are literally false. Despite our acknowledgement of an idea’s falsehood, the idea remains operative in our perceptions and interactions with people.<sup>17</sup> The Equality View argues that we cannot wait for counter-speech to defeat such invasive ideas in the market place of ideas. They must be regulated.

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<sup>13</sup> Ibid., 50.

<sup>14</sup> Ibid., 24.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid. And Greenberg & Pyszczynski, “The Effect of an Overheard Ethnic Slur on Evaluation of the Target,” *Journal of Experimental Social Psychology* (January 1985): 61, 70.

<sup>17</sup> In her research on hate speech, Matsuda read an alarming number of racist slurs and statements. She read about a “dot busters” campaign, which was targeted against immigrants from India. A few weeks later, she walked by an Indian woman on her campus. The first thought that came to her mind was “dot busters!” and not, as she wished it would have been, “what a beautiful sari.” Matsuda, “Public Response to Racist Speech, 26.

In opposition, it might be argued that speech should be illegal or regulated only when it is directed at an individual. To put it another way, speech that is directed at one person and harms that person should be illegal, but the same harm, reaching thousands of people, should be protected.<sup>18</sup> MacKinnon spells out this reasoning, telling us that “words or pictures can only be harmful if they produce harm in a form that is considered an action. Words work in the province of attitudes, actions in the realm of behavior.”<sup>19</sup> Words, that is, cannot constitute harm in themselves. Harms, on this view, are things that affect individuals at the particular, causal, Jack-hit-Joan level, not at the group level.<sup>20</sup> This approach, however, ignores the possibility that speech aimed at groups might harm every individual who associates with that group. This approach also fails to account for words that bear a striking resemblance to, and function as, acts. Indeed, as MacKinnon rhetorically asks, “which is saying ‘kill’ to a trained guard dog—a word or an act?”<sup>21</sup> When words cause targeted groups to experience psychosis, PTSD, and suicide, we should not be prevented from calling these things proper ‘harms’. For harms are not the types of things that are limited to the Jack-hit-Joan sense. Effects are recognizable *as* harms when one’s group, with which one associates, is publically singled out as inferior and unequal.

Yet there is no doubt that freedom of speech contributed, and continues to contribute, to social progress and Americans’ flourishing.<sup>22</sup> The right to speak out against unjust governmental policies and practices is paramount. Speech that at first seemed controversial and even harmful is now viewed as gospel. This is not what I wish

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<sup>18</sup> MacKinnon, Catharine, *Only Words*, 51.

<sup>19</sup> MacKinnon, Catharine, “Not a Moral Issue,” 337.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Matsuda, Mari, “Public Response to Racist Speech,” 34.

to argue against, and I do not lay out the benefits of free speech merely to knock them down later. Rather, what I want to show is that speech that endangers equality—speech that harms historically oppressed groups—is less valuable than the equality and respect it endangers. The right to air an opinion, *simpliciter*, should not necessarily trump rights to avoid harm. In attempting to show this, I consider whether free speech values and principles are necessarily incompatible with the Equality View. The method that I have in mind for answering this question involves drawing a bright line between hate speech and speech *simpliciter*, the reason for which is to illustrate that first amendment values do not necessarily conflict with the Equality View. To that end, I lay out three necessary and sufficient conditions of hate speech.

The best way to define hate speech is as a narrow category of speech. Narrowing the definition of hate speech allows us to set aside the most harmful forms of speech and preserve the broader principles of free speech.<sup>23</sup> I follow Matsuda's lead when, in reference to racist speech—and hate speech generally, for the same argument applies—she says it is best viewed as “a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.”<sup>24</sup> Hate speech is a *sui generis* category, distinguished from other forms of speech, because hate speech meets three intuitively powerful conditions. Those conditions are as follows: First, the message of hate speech is of social and moral inferiority; second, the message is directed against a historically oppressed group; and third, the message directed towards those groups is hateful or

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<sup>23</sup> *Ibid.*, 36.

<sup>24</sup> *Ibid.*, 35.

degrading.<sup>25</sup> These three conditions constitute the necessary and sufficient conditions for hate speech.

There are alternatives to the conditions listed above, yet the ones above are preferable for a number of reasons. These elements are intuitively strong as grounds for regulating speech and providing a way to narrow the definition of hate speech while leaving intact the broader principles of free speech. Moreover, the elements are not arbitrary or ad hoc. I will consider each in turn and provide reasons for accepting them.

First, if a message of hate speech is of social and moral inferiority, a targeted group member might react by disassociating from his or her own race or targeted group, or devaluing oneself as a member of that group. The morally ‘inferior’ group is afforded a less robust moral consideration, and one’s reaction is often to distance oneself from the targeted group. By distancing oneself, the targeted group member presumes that she’ll be afforded greater moral consideration as a non-target group member. As Matsuda points out, however, “the price of disassociating from one’s race is often sanity itself.”<sup>26</sup> Messages of social and moral inferiority have devastating consequences for targeted groups. Second, when a message of hate speech is directed against a historically oppressed group, it is those groups that are particularly vulnerable to the message’s venom. Either because of a unique historical relation to the message—as in Blacks’ relation to burning crosses—or because of a group’s limited number of resources in combatting the message, historically oppressed groups are uniquely assailable. Often, groups are vulnerable for both reasons. (Once I show that prisoners are best considered a

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<sup>25</sup> Ibid., 36. I owe much to Mari Matsuda’s delineation of these desiderata.

<sup>26</sup> Ibid., 25.

historically oppressed group, it will be clear that they are particularly vulnerable to hate speech because they lack resources to counter the speech's message and because they occupy a unique historical relation to the message.) Third, if the message directed against historically oppressed groups is hateful or degrading, the message not only contributes little in the way of reasonable discourse; what is worse, the message inflicts psychic wounds on those vulnerable persons who are affected by it. In extreme cases, post-traumatic stress disorder is the price one pays when hate messages take root in one's mind.<sup>27</sup> Additionally, one can imagine hateful and degrading messages affecting the self-confidence of historically oppressed group members, which, although less striking than PTSD, adds a layer of harm of its own. The cultural theorist Stuart Hall describes self-confidence deficit in terms of cultural identity production.<sup>28</sup> A group's identity is not simply *represented* by a cultural image; identity is partly *produced* by it, and the image has the power to make one see oneself as "other" and inferior relative to some reference group.<sup>29</sup>

These conditions allow us to set aside hate speech for regulation. They narrow the definition of hate speech so that even disagreeable and offensive speech is protected—so long as it avoids promoting moral and social inferiority, targeting historically oppressed groups, and espousing hate and degradation. Such an approach illustrates that first amendment values do not irresolvably conflict with principles of the Equality View. Matsuda explains how, on this method, even disagreeable and offensive speech is protected. She says

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<sup>27</sup> Allport, Gordon, *The Nature of Prejudice* (New York: Basic Books, 1979):461-78.

<sup>28</sup> Hall, Stuart, "Cultural Identity and Diaspora," *Framework* 36 (1989): 225-26.

<sup>29</sup> *Ibid.*

...arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutory language remains protected. Hateful verbal attacks upon dominant group members by victims is permissible.<sup>30</sup>

Because these claims don't trigger any of the desiderata, they fall outside of the narrowly-defined category of 'hate speech'. With regard to first amendment principles, claims that fall outside of the hate speech camp are, as Mill is correct in saying, best dealt with by presenting *more* speech as counter-argument, not by government regulation of speech. In other words, offensive and disagreeable speech that falls short of hate speech is best handled in the marketplace of ideas. We see, then, how some speech—hate speech—is picked out by the three conditions and given special treatment on that basis. Yet, some disagreeable and offensive speech is protected.

In opposition, one might attempt to restrict speech on the grounds that it endangers equality but does not meet the hate speech criteria. The worry is that if people think there is a 'speech war', as it were, waged against them, they will want to restrict such speech. People want to restrict speech that harms them. Consider those who think saying "Happy Holidays" counts as a war on Christmas.<sup>31</sup> Such worries reflect a broader concern, namely, where regulation of speech will end. Ultimately, if such an argument goes through, it would call into question the necessity of the hate speech conditions that I've advocated. The problem with this thinking, however, is that it equates two unlike groups—those who have power and those who do not. Arguments for regulation of speech center around empowering historically oppressed groups, those with

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<sup>30</sup> Ibid.

<sup>31</sup> Thanks to Jill Delston for providing this example.

comparatively less political and expressive power. For instance, in the Canadian Supreme Court case *Butler v Regina*—a case involving a Canadian distributor of pornography—the Court ruled against the distributor and found that pornography harms women and advances sexual inequality.<sup>32</sup> The Court’s ruling reflects support for “a comparatively powerless group in its social fight for equality against socially powerful and exploitive groups.”<sup>33</sup> Pursuing equality by way of regulations requires recognizing who is being hurt and who is most susceptible to harm; it requires sensitivity to groups’ histories and statuses.

The desire to protect the equality and respect of historically oppressed groups motivates setting aside hate speech for special treatment. The values of respect and equality can be read through the three desiderata. A desire to motivate the values of respect and equality for historically oppressed groups is implicit in the desiderata. Before considering the values of respect and equality further, however, I will put my explication of historically oppressed groups on the table and argue that prisoners, like women and minorities, should be considered as such.

## II

In this section I argue that prisoners are a historically oppressed group. I define historically oppressed groups as groups that are treated as moral subordinates. I talk about prisoners in terms of such groups and explain the advantages of classifying them as such. I compare prisoners to other historically oppressed groups and present the harms done to prisoners to support the claim that there are good reasons for classifying them as

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<sup>32</sup> *Butler v. Regina* (1992) 2 W.W.R. 1 (1990) (Can.).

<sup>33</sup> MacKinnon, Catharine, *Only Words*, 103.

such. What makes historically oppressed groups particularly vulnerable to hate speech is those groups' unique relation to the ideas of moral inferiority expressed by hate speech. The messages conveyed by prison rape representations affect prisoners and ex-cons uniquely because of their status as a historically oppressed group. As a platform through which the cultural perception of prisoners is promulgated, prison rape in films cements prisoners' status as a historically oppressed group.

The prevailing view<sup>34</sup> holds that if any group qualifies as a historically oppressed group, it is a group with a history of violence inflicted on it and political power withheld from it. More than just the infliction of violence and political exclusion goes into making historically oppressed groups, however. Indeed, groups are historically oppressed if, throughout their history, they have been treated as moral subordinates<sup>35</sup> and hence as morally inferior. The 'oppressed' component of 'historically oppressed groups' is, then, quite a multi-faceted idea. Oppression comes in many shapes. Violence and political exclusion constitute but two types of oppression. Talking about oppression in terms of violence and political exclusion is indeed rich territory, and talking about historically oppressed groups in this way has something to contribute to our understanding of those groups' place in our moral and legal considerations. But my purposes require a different type of investigation. My objectives call for a focus on symbolic oppression—the oppression instantiated by hate speech and negative stereotypes.

Women and minorities fall rather uncontroversially into the category of historically oppressed groups for a number of reasons. Historically, the two groups were

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<sup>34</sup> Matsuda, "Public Response to Racist Speech," 32-33.

<sup>35</sup> Altman, Andrew, "Liberalism and Campus Hate Speech: A Philosophical Examination," *Ethics* Vol., 103, No., 2 (January 1993): 312.

disenfranchised and excluded from meaningful public roles. As MacKinnon puts it, women have been traditionally “disenfranchised, excluded from public life and denied an effective voice in public rules.”<sup>36</sup> The same can be said of minorities generally. It takes no great stretch of the imagination to see Blacks—perhaps more than any other group—as a historically oppressed group. On top of the violence inflicted on them,<sup>37</sup> the treatment of Blacks as slaves and second-class citizens runs counter to the “idea of persons as free and equal.”<sup>38</sup> To treat a member of a historically oppressed group as less than free and equal on the basis of their group membership is to treat that person as a moral subordinate and hence as morally inferior. The language of moral inferiority is the language of hate speech. Put another way, hate speech promulgates ideas of moral inferiority against the very groups that are least equipped to respond to them. Hate speech presents ideas that are so historically untenable and so tied to moral subordination that they are best treated as outside the realm of protected speech.

Andrew Altman provides a clear explication of the notion of ‘moral subordinate’. He writes, “Treating persons as moral subordinates means treating them in a way that takes their interests to be intrinsically less important, and their lives inherently less valuable, than the interests and lives of those who belong to some reference group.”<sup>39</sup> A person or a group can be treated as morally inferior in an almost unimaginable number of ways. Ethnic cleansing is perhaps the clearest example. Certainly, ethnic cleansing is, symbolically, the expression that the destroyed group is in some way morally inferior—that the group members’ lives are inherently less valuable. Yet less stark examples are

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<sup>36</sup> MacKinnon, Catharine, *Women’s Lives, Men’s Laws* (Cambridge: Harvard University Press, 2005): 311.

<sup>37</sup> For a detailed recounting of such treatment, see bell hooks’ *Ain’t I a Woman?* (New York: Routledge, 1981):15-40.

<sup>38</sup> Altman, Andrew, “Liberalism and Campus Hate Speech,” 312.

<sup>39</sup> *Ibid.*, 310.

just as illustrative. Burning crosses in public spaces or signs on store windows reading “No Jews Allowed” do more than simply express ideas concerning the racial or ethnic inferiority of Blacks and Jews. They deprive Jews and Blacks of access to public spaces and retail shops; they tell Jews and Blacks that they are not the types of people who should feel comfortable in those places. Concerning the unique susceptibility of historically oppressed groups, consider how a burning cross carries a unique message about Blacks; it evokes memories of violence and discrimination, memories that non-Black groups do not share. What the burning cross means to Blacks is different from what it means to non-Blacks. Likewise, consider the unique historical message that “Jews to the gas!”<sup>40</sup> and Nazi salutes in comedy routines<sup>41</sup> mean to Jews. Though less stark than ethnic cleansing, these examples of hate speech directed at historically oppressed groups reflect symbolic oppression by way of hate speech. The examples also illustrate the fact that hate speech does more than transmit ideas. Hate speech is not just words; it is a verbal form of inequality.

Prison rape films, as I see them, comprise the ideology of inferiority that maintains prisoners’ status as morally inferior. The implements of such films include disparaging depictions of prison rape victims and representations of prison rapists as non-rational, insatiable animals. Recall that Blacks, for instance, should be considered a historically oppressed group not only because of their history of violence, but because of the effects and harms *words* have had, and continue to have, upon them—notably, the visceral feeling in the gut that those group members experience. This is what Robert

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<sup>40</sup> Weinberg, Micki, “Wave of anti-Semitic Rallies Hits Cities across Germany,” *Buzzfeed* (21 July 2014).

<sup>41</sup> Rubin, Alissa, “For Hateful Comic in France, Muzzle Becomes a Megaphone,” *New York Times* (10 March 2014).

Cover called “the violence of the word.”<sup>42</sup> From the prisoners’ perspective, prison rape films single them out and inflict wounds, wounds that remind them of their status as tolerable victims of violence. Prisoners and ex-cons experience the “violence of the word,” given their history of violence, and because of their unique relation to hate speech’s message. Prisoners are to be considered a ‘historically oppressed group’ because of the harms words inflict upon them.

Prisoners are, of course, deprived of some rights—e.g., liberty and associational rights, among others. This should neither be considered violent nor the reflection of a cultural image of prisoners as tolerable victims of violence. Some of these rights-deprivations are surely justified. Rights-deprivations are the price of being found guilty in courts of law. But prisoners face other, unjustified deprivations of rights. Just as Blacks were deprived of voting rights on the basis of their race, prisoners are deprived of adequate safety rights on the basis of their group—that is, on the basis of their being prisoners. So, too, is the violence inflicted on prisoners justified and made sense of on the basis of their group membership. Prisoners’ plight is marked as insignificant inasmuch as their lives are perceived as less valuable than some reference group. Prison rape films promulgate the cultural conception of prisoners as acceptable victims of sexual violence.

Rights-deprivations are the price people pay for prison sentences. As I intimated previously, though, we can distinguish between justified rights-deprivations and unjustified rights-deprivations. Indeed, we may introduce a method of discerning when, and how, prisoners are unjustly stripped of rights while in prison and under the state or

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<sup>42</sup> Cover, Robert, “Violence and the Word,” *Yale Law Journal* (January 1986): 95.

federal government's stewardship. No one contends that someone found guilty of rape should be left free to walk the streets and live in society at large. Such an approach, if accepted, poses a number of difficulties. Firstly, the free rapist poses a danger to people who could be raped. Secondly, there is an onus upon the government to actually punish those who commit crimes, and the punishment ought to fit the crime. Thirdly, there is an onus upon the government to try to correct the offender's behavior. For these reasons and more, the government has an obligation to imprison or otherwise remove an offender from society at large. Such an approach necessarily involves depriving the offender of his or her liberty—that's what it is, after all, to imprison someone. This is widely regarded as a just and good thing. A necessary evil though it might be, depriving people of their liberty is acceptable when the law and safety of the citizenry require it.

Some rights-deprivations are, then, justified. Our judicial system is set up such that specific punishments are handed out for specific offenses. A crime is committed, a person is found guilty, and a constitutionally-sanctioned punishment is meted out. Yet, the price prisoners pay while they are imprisoned extends beyond the specific punishment meted out in courts. Prisoners are sentenced to one thing and receive another, different kind of punishment.

According to the Department of Justice figures, it was estimated that in 2008 “216,000 inmates were sexually assaulted while serving time...That is compared to 90,479 rape cases outside of prison.”<sup>43</sup> The numbers are staggering. Outside of prison, there are measures taken to reduce and, with time, eliminate rape. Methods ranging from

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<sup>43</sup> “More Men are Raped in the US than Women, Figures on Prison Assaults Reveal,” *Daily Mail* (16 October 2013).

educational programs to increased police presence aim at eliminating rape. One might, without much in the way of imagination, conceive of such measures as motivated by a desire to keep citizens safe, which, in its own way, can be read as a desire to protect citizens' right to safety. Within prison walls, however, the phenomenon of rape is even more rampant than it is outside. Whereas measures to reduce rape, outside of prison, are motivated by citizens' right to safety, the absence of effective measures inside of prisons reflects a lack of prisoners' basic safety rights. If one were to presuppose that prisoners have a right to safety, a cursory investigation would reveal that they do not. Establishing prisoners' right to safety is the crucial, initial step in improving prison conditions and thereby reducing prison rape. The lack of an effective right to safety illustrates prisoners' status as a historically oppressed group.

One might present the Prison Rape Elimination Act (PREA) of 2003 as a reflection of an increased awareness of and reaction to prison rape. Indeed, the legislation of 2003 may very well be read as an evolving standard of decency with regard to prisoners' wellbeing. The Act was passed at a time when a new awareness was taking shape; sexual violence in prisons was at the forefront of many people's minds. Two years prior to the Act's passing, a *New York Times* article noted that "few prison rapists are ever prosecuted, and most prisons provide little counseling or medical attention for rape victims, or help in preventing such attacks."<sup>44</sup> Crimes in prison, the article seemed to say, weren't treated like *real* crimes. PREA was supposed remedy such ills. The overall mission of PREA is to eliminate rape in American prisons.<sup>45</sup> Since 2003, PREA has been relatively successful in collecting data concerning prison rape and other forms

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<sup>44</sup> Lewin, Tamar, "Little Sympathy or Remedy for Inmates Who are Raped," *NY Times* (15 April 2001).

<sup>45</sup> Public Law 108—79—Sept. 4, 2003, <http://uscode.house.gov/statviewer.htm?volume=117&page=972>.

of sexual violence. Some argue that although collecting data does not, directly, achieve PREA's lofty goals, it is a step in the right direction.<sup>46</sup>

Varying opinions of PREA's success notwithstanding, the Act has one feature that reflects broader societal concerns—or lack thereof—for prisoners. PREA is a federal act. States may opt out of it if they wish, but in doing so they stand to lose five-percent of federal funding that goes towards prisons and jails. The five-percent provision is there to incentivize states to comply with the federal law. Since its inception, six states have opted out of compliance with PREA—Arizona, Florida, Idaho, Indiana, Texas, and Utah.<sup>47</sup> These states' rejection of PREA reflects a lack of concern for prisoners. When states revoke citizens' freedom, states incur a duty to protect those citizens' safety. Prisoners' corresponding right to safety is thus endangered, if not ignored, when states reject PREA and fail to properly address prison rape.

A right is only as good as its implementation and efficacy. We might say that one has a right to privacy within one's own home. But if her calls are monitored, emails are read, and mail is collected, we might say that her right to privacy isn't doing her person very much good. We might say that she has no privacy right at all, or that her right to privacy is being violated. What we say about this person's situation has implications for what we say about prisoners' violent plight.

If prisoners have a right to safety that is being violated, we ought to spell out *why* the right is violated. If, on the other hand, prisoners have no right to safety, one might

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<sup>46</sup> Dumond, Robert W., "Confronting America's Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003," *Journal of American Academic Psychology*, Vol., 31 (2003): 358.

<sup>47</sup> "Rick Was Wrong: JDI Defends PREA from Shameful Campaign," *Just Detention International* (September 2014).

speculate as to why they have no such right. Fortunately, the second alternative—that prisoners have no right to safety—can be cast aside. Under the Eighth Amendment, prisoners have the right to be free from cruel and unusual punishment. Though not precise, cruel and unusual punishment is taken to include violations of prisoners' basic dignities<sup>48</sup>, which entails protecting prisoners from sexual violence. After casting aside the second alternative, what is left is the first line of reasoning—that prisoners have a right to safety that is being violated.

Prisoners are disenfranchised when they are convicted of crimes. When they are convicted of certain crimes, they lose the right to vote. Yet they maintain other, fundamental rights, like the right to safety. Despite being persons who lack some rights, prisoners maintain the right to, for instance, health care. Prisoners are eligible for organ transplants. They share this right with other, free persons. Prisoners, moreover, have grievance mechanisms that may allow for legal vindication. When someone outside of prison is raped, he or she can find vindication in the courts. The assailant is often sent to prison and the rape victim is therefore protected from immediate harms that the assailant could inflict further. Such an approach reflects the free person's protection from violence and, more broadly, society's protection from the rapist. In prison, a rape victim might get recourse from accusing an assailant of rape. But to protect the rape victim, he or she might be placed in solitary confinement—the only safe place for him or her. His or her protection, therefore, turns into an incidental punishment.<sup>49</sup> The prisoner is forced into an

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<sup>48</sup> "Prisoner's Rights Laws," *Legal Resources*, <http://www.hg.org/prisoner-rights-law.html>.

<sup>49</sup> Stahl, Aviva, "Transgender Women in New York State Prisons Face Solitary Confinement and Sexual Assault," *Solitary Watch* (7 August 2014).

untenable dilemma; he must choose between reporting the rape and being confined to solitary.

Moreover, the legal grievance mechanisms for prisoners, mentioned briefly above, are shockingly inadequate. In cases in which prison rape victims do come forward, the flaws of grievance mechanisms “tend to be plagued by a lack of confidentiality, which may expose the complaining prisoner to retaliation by others, a bias against prisoner testimony, and a failure to seriously investigate prisoners’ allegations.”<sup>50</sup> The flaws are confounded by a systemic bias against indigent prisoners. Grievance filing fees are required for prisoners who have brought three or more grievances that have been found dismissed as frivolous.<sup>51</sup> The purpose of these fees is to deter frivolous grievance claims. But as Human Rights Watch has concluded, claims are often found frivolous not because they lack merit, but because prisoners “lack legal skills.”<sup>52</sup>

There are countless explanations for why prisoners’ right to safety is violated. Some of the explanations are surely logistical—there are far too many prisoners and far too few guards to adequately protect the former’s safety at all times. The logistical explanation answers some of the questions. I am interested in a different, conceptual account, however. Prisoners’ status as a historically oppressed group reflects an ambivalence towards the plight of prisoners. If historically oppressed groups are treated

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<sup>50</sup> Mariner, Joanne, “No Escape: Male Rape in US Prisons,” *Human Rights Watch*, (2001); available at <http://www.hrw.org/reports/2001/prisoner/report.html> (citing a letter from M.O., a prisoner serving time in Texas in 1996).

<sup>51</sup> Ellenbogen, Philip, “Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada,” *Columbia Journal of Law and Social Problems*, Vol., 42, (2009): 344.

<sup>52</sup> Mariner, Joanne, “No Escape: Male Rape in US Prisons.”

and viewed as intrinsically less valuable than others, as Altman contends, then prisoners' status as a historically oppressed group goes a long way in explaining their violent treatment. Prisoners' status also goes far in explaining citizens' ambivalent reaction towards the plight of prisoners. In the next section, I analyze the connections between filmic representations of prison rape—what I've categorized as hate speech—and the ambivalence toward prisoners' treatment.

### III

In this section I discuss the relationship between films that exploit prisoner tropes and prison rape and viewers' sensibilities. I argue that prison rape films provide cues for the ways Americans think about prisoners and their experiences. I describe cinema, and narrative forms more broadly, as an integral part of shaping Americans' feelings towards prisoners. Representations of prison rape often render the violence inflicted on prisoners unimportant or as a de facto part of punishment. To get the argument off the ground, I borrow from Section II of this essay, showing that prisoners' right to safety is often violated for reasons that extend beyond logistical hurdles. I move from the matter of fact claim that prisoners' safety rights are violated to a speculative one, arguing that a likely reason for prisoners' safety rights being violated is prison rape films. The connection between prisoners' violent plight and prison rape films relates, as I'll argue, to prison rape films' desensitization of viewers and normalization of abhorrent prison conditions. I draw from Kimberlé Williams Crenshaw's insight that media images intimate and, what's more, construct how minorities are viewed in our society.<sup>53</sup>

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<sup>53</sup> Crenshaw, Kimberlé Williams, "Beyond Racism and Misogyny: Black Feminism and 2 Live Crew," in *Words that Wound* (Oxford: Westview Press, 1993): 117.

The effect of visual imagery on behavior is contested. Yet here I propose a speculative account of visual imagery—specifically, filmic portrayals of prison rape—that holds that representations of prison rape help us understand how and why prisoners are viewed as they are in our society. Crenshaw argues that “the images of Latina, African-American, Asian-American, and Native American women are constructed through combinations of readily available race and gender stereotypes.”<sup>54</sup> The combination of these stereotypes is readily available through representations in film, music, and other narrative forms. The ubiquity of audibly- and visually-depicted stereotypes forms the images of minority women that we associate with stereotyping. Though contested, whatever the relationship is between imagery and behavior, one can speculate that the stereotypical imagery presents its images as the nature of women, not as stereotypes of women. These women are represented *as* women, not as caricatures of women. If women are treated badly as a result of these representations, it is because, as Mackinnon says, “men treat women as who they see women as being.”<sup>55</sup> The imagery constructs who that is. Women are treated as ‘women’, and ‘women’ are who—perhaps *what*—the images say they are.

The same framework holds for prisoners and their violent plights. There is a cultural image of prisoners—prisoners are the types of people who should expect, and perhaps deserve, violent treatment and less than full safety rights. This is an image of prisoners as morally lesser. The image I have in mind is an image partly constructed through readily available, visually-depicted stereotypes—i.e., associations between

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<sup>54</sup> Ibid.

<sup>55</sup> MacKinnon, Catharine. “Not a Moral Issue,” 326.

members of the group ‘prisoner’ and various attributes,<sup>56</sup> notably, non-rational, animalistic, and suitable victims. Films in which prison rape is portrayed humorously are but one example of readily-available source material for prisoners’ stereotype. Other depictions of prison rape, as in television shows, comics, and songs<sup>57</sup> are also included in my account, yet for brevity I narrow the scope to include only films. Prison rape films are a platform through which the cultural perception of prisoners is promulgated. The cultural image of prisoners, like that of minority women, is an image that is morally unique. The image has moral implications for prisoners. When one accepts this image of prisoners, consciously or unconsciously, prisoners factor into one’s moral consideration less significantly than free persons. Prisoners are granted not only fewer legal rights but a less robust moral status as well. When we mark someone as a ‘criminal’, he or she becomes, as it were, an acceptable victim. Legislators and policy makers, prison wardens and prison guards, and ambivalent citizens treat prisoners as who they see prisoners as being. Prison rape films construct who that is.

In prison rape films, men are raped for dropping soap on the ground while showering.<sup>58</sup> Men are raped for sitting at the wrong table and disrespecting rival gangs. In films in which prison rape is merely alluded to, one wrong glance or looking too cute are grounds for rape. As in the new movie *Get Hard*, the main character needs to prepare for imprisonment by toughening up, which means performing oral sex on other men. In Spike Lee’s *25<sup>th</sup> Hour*, the protagonist cannot go to prison looking the way he does. He’s too good looking, and he fears this makes him an irresistible target for rape, so he coaxes

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<sup>56</sup> Fricker, Miranda, *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press, 2009): 30.

<sup>57</sup> It is odd and perhaps a bit unwieldy to say that songs ‘depict’ prison rape, but Sublime’s “Date Rape” does just that.

<sup>58</sup> Believe it or not, there’s a board game called “Don’t Drop the Soap.”

his friend into beating him until his face is mangled. This is how the protagonists acclimate to prison culture. Lee's *25<sup>th</sup> Hour* debuted in 2002. Previous to *25<sup>th</sup> Hour*, *Animal House*, which debuted in 1978, informed viewers in the most casual way that Greg Marmalade—the film's antagonist—became a Nixon White House aide and was thereafter “raped in prison.”<sup>59</sup> Since *Animal House*'s debut, one might, without much effort, count the number of films in which prison rape is represented implicitly or explicitly. The conservative account, consisting of ‘comedic’ representations only, stands at eighteen. (These aren't simply made-for-TV movies, either; titles include *Office Space*, *The Rock*, *There's Something about Mary*, *My Cousin Vinny*, *Horrible Bosses*, and *Reservoir Dogs*.) To be raped in prison comes with the territory, so to speak. Rape in prison is expected. This is what films tell us about prison. Prison is a place where rape is an expectation, rather than an exception.<sup>60</sup>

Before beginning research for this paper, I envisioned *American History X* as a paradigmatic case of *appropriate* prison rape representation. The film contains no jokes about prison rape and, when its protagonist is raped, he is raped brutally and mercilessly. If any depiction of prison rape could elicit from viewers a new sensitivity to the plight of prisoners, it would be *American History X*. Upon further reflection, though, I look at the film not as a shining example of how to expose prison rape as a ubiquitous and frightening phenomenon. Instead, prison rape in the film has a purely narrative function;

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<sup>59</sup> “Prison Rape,” *Tvtropes.org*, <http://tvtropes.org/pmwiki/pmwiki.php/Main/PrisonRape>.

<sup>60</sup> Other PRFs, not listed in the main text, include *Puss in Boots* (the *Shrek* spinoff, which is, oddly, clearly aimed at younger audiences, but what's even odder is that *Puss in Boots* isn't the only film or television show aimed at children that communicates messages about prison rape; others include *SpongeBob Square Pants*, *Looney Tunes*, *Rocko's Modern Life*, and *The Powder Puff Girls*); *Hit and Run*; *I Now Pronounce You Chuck and Larry*; *Naked Gun*. Television shows that use the prison rape trope include *Friends*, *The Office*, *Third Rock from the Sun*, *South Park*, and *Law and Order: SVU*.

it is the catalyst for Derek, the protagonist, to change his racist and criminal ways. Derek is imprisoned for murder, yet imprisonment itself has little effect on his behavior. Not until he is raped does his violence and racism subside. Rape changes Derek and progresses the film's plot. As Elizabeth Stoker Bruenig puts it, "Rape is part of forcing prisoners to change, it's what makes learning your lesson in prison scary, and scary prisons are what keep bad people in line."<sup>61</sup> *American History X* elevates prison rape from a joke to a curative—still at the expense of prison rape victims. Even if Derek's rape initiated his transformation, rape is not curative or rehabilitative, and it's not justified by virtue of its (albeit) positive impact.

In the public consciousness there is a disanalogy between reactions to rape vis-à-vis free persons and rape vis-à-vis prisoners. People acknowledge rape in prison differently from how they acknowledge rape outside of prison. There is, however, at least a rough similarity between saying "Jack would not have been raped in prison if he had behaved better" and "Joan would not have been raped in the park if she had dressed more conservatively." The latter has become, thankfully, less common with regard to the rape of free persons, but I imagine the cognizance of prison rape is still followed by the "he had it coming" line of thought. The thinking appears to be that prisoners are bad people who deserve whatever harms befall them. Yet, there's a disconnect here. Our legal system relegates specific punishments to specific criminal activities. Such specificity in distributing punishments suggests that there are precise sentences, or ranges of sentences, to specific activity or conduct. Here, then, is the disconnect. The precision of punishment distribution contradicts the cultural perspective observed above that

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<sup>61</sup> Bruenig, Elizabeth Stoker, "Why Americans Don't Care about Prison Rape," *The Nation*, (2 March 2015).

prisoners deserve whatever they get, including rape. Because our judicial system is set up this way, we operate as if we have a certain degree of control over the severity of the punishment, but this is mistaken. In reality, we lack the fine-grained control of punishment that our judicial model presumes. Sexual violence in prison constitutes an increase in the severity of punishment that judges don't take into account when sentencing—despite the tacit recognition that this goes on.

Outside of prison, incidence of rape is met with outrage and cries for prosecution and more effective protective measures. Recognition of prison rape is met with less fervor. Absent outrage and cries, cognizance of prison rape is met with nary a holler. But rape is rape. Rapes in prison signal the same disregard for human autonomy, the same power dynamics, and the same violence that rapes outside of prison signal. What explains this inconsistency? The image of prisoners, constructed partially from prison rape films, explains the relative absence of concern for prison rape victims. Prison rape is seen at the very least as tolerated, and at most “subtly appreciated as part of [prison’s] punitive purpose.”<sup>62</sup> If prisoners are treated badly, it is because of who they are seen as being. If prisoners’ violent plight is acknowledged as something that comes with imprisonment, it is because of how imprisonment is portrayed. In far too many films this is exactly how imprisonment is portrayed—as a place where rape happens as a fact of life. Prison rape films construct who prisoners are seen as being.

One might argue, however, that PRFs are merely a symptom, not a cause, of prisoners’ cultural status.<sup>63</sup> Indeed, one might hold that PRFs do not produce or shape

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<sup>62</sup> Ibid.

<sup>63</sup> Brison, Susan, “‘The Price We Pay?’ Pornography and Harm,” in *Contemporary Debates in Applied Ethics* (London: Blackwell Publishing, 2005): 240.

Americans' feelings towards prisoners and ex-cons; if anything PRFs simply reflect an already-existing cultural attitude towards prisoners and ex-cons. PRFs are a reflection of a cultural attitude regarding prisoner. This is a serious concern, for it calls into question the causal story that I've maintained, namely, that PRFs shape viewers' feelings towards prisoners. All the same, the 'reflection' argument is not a defeater against my broader contention that PRFs are best treated as outside the realm of protected speech. Even if PRFs are a symptom, not a cause, of prisoners' cultural status, we may still be concerned about prison rape depictions in film.<sup>64</sup> As Susan Brison puts it, "The fact that there are so few female legislators in the US at the federal level... is a symptom, not a cause, of patriarchy. But this does not mean that we should not do anything about the political status quo."<sup>65</sup> Even if PRFs do not, strictly speaking, create cultural conceptions of prisoners as tolerable victims and animalistic predators, they fall into the causal story as more than simply symptoms. PRFs perpetuate and reinforce cultural attitudes that center on the moral inferiority of prisoners.<sup>66</sup>

As I quoted Crenshaw saying earlier, if men treat women badly, it is because of who men see women as being. The imagery Crenshaw relates constructs who men see women as being. This is an articulation of the effects imagery has on behavior. In a manner of speaking, it is an articulation of a fact's transition into a norm. The repeated display, portrayed narratively, of women as moral subordinates becomes perceived as a

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Concerning 'symptom-not-cause' arguments against the harms of visual imagery, I sympathize with Frederick Schauer: "I find it a constant source of astonishment that a society that so easily and correctly accepts the possibility that a cute drawing of a camel can have such an effect on the number of people who take up smoking, has such difficulty accepting the proposition that endorsing images of rape or other forms of sexual violence can have an effect on the number of people who take up rape." (Quoted in MacKinnon, Catharine and Dworkin, Andrea, *In Harm's Way: The Pornography Civil Rights Hearings*, (Cambridge: Harvard University Press, 1997): 396.

fact about women's nature. Likewise, in the case of prisoners, the repeated portrayal of prisoners as expectant rape victims becomes normalized—it becomes perceived as reality. This reality turns out to be one in which prisoners suffer. Through a variety of mechanisms—namely, as I've said, hate speech, among which prison rape films should be counted—viewers' perceptions of historically oppressed groups are distorted. Viewers' perceptions are shaped by, among other things, hate speech whose target group is prisoners. Perceptions are so distorted that prisoners are seen as nothing but tolerable, and sometimes deserving, victims. Our perceptions, then, are saturated with cultural constructions of prison rape films—most notably, ideas of prisoners as non-rational; ideas of prisoners as tolerable victims; and even ideas of prisoners as deserving targets of rape. When we fail to correct for the ways in which our perceptions of prisoners are saturated with these cultural images, we fail to see the harms done to prisoners and, by extension, ourselves.<sup>67</sup> For if we take Dostoevsky at his word and measure our society's humanity by entering its prisons, we see that ours is a society that tolerates sexual violence inflicted on a statistically significant portion of its citizenry. In what follows, I discuss the specific harms that prison rape films, and their perceived reality, have on prisoners and, more broadly, the citizenry at large.

#### IV

In this section I continue with the track I began in the previous one. I describe the harms that prison rape representations have on prisoners and, more broadly, the citizenry at large. To get the argument off the ground, I describe the psychological harms that prisoners face in and outside of prison. In the previous section I concluded with the idea

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<sup>67</sup> Fricker, Miranda, *Epistemic Injustice: Power and the Ethics of Knowing*, 90.

that the reality, which is constructed by prison rape films, is one in which prisoners suffer. Here, I expand on that argument.

Prison rape films, on the Equality View, are not harmless depictions of the violent plight of prisoners. The films cause harm. Similar to critical race theory, the Equality View uses the experience of prison rape victims to offer a phenomenology of film and life. To comprehend the extent of the harms prison rape films cause, I draw from section III of this paper and amend it with a new argument. To begin, recall that I argued that prison rape films present prisoners as the type of people who, at the very least, we tolerate as victims and, at most, people whose punishment we accept as part of the punishment.

Most people currently in prison will be reintroduced into society. Those among them who have suffered sexual violence will carry the scars with them. Rape's psychological effects on victims are serious and enduring.<sup>68</sup> As the findings of the Prison Rape Elimination Act (PREA) suggest, prison rape can "increase the rate of post-traumatic stress disorder and depression, and can worsen existing mental illness among both current and former inmates."<sup>69</sup> Further, rape trauma syndrome (RTS), while typically associated with "non-incarcerated women,"<sup>70</sup> occurs in male inmates and former inmates. Effects of RTS include "feelings of helplessness, shame, nightmares, self-

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<sup>68</sup> Ellenbogen, Philip, "Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada," 344.

<sup>69</sup> Prison Rape Elimination Act of 2003, 42 U.S.C. §15601(15)(C) (Supp. V 2005); from Ellenbogen article above.

<sup>70</sup> Ellenbogen, Philip, "Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada," 345.

blame, suppressed rage, violent behavior, and social and sexual dysfunction.”<sup>71</sup> These effects are exacerbated in settings in which the *cause* of the effects, namely rape, is seen as deserved.

When sufferers of RTS are reintroduced into society, they have more than the effects of that syndrome to contend with. The specters of few job prospects, obtaining health care, substance abuse problems, and re-establishing family ties are obstacles with which freed inmates must grapple.<sup>72</sup> Introduce an environment in which prisoners’ trauma is portrayed, trope-like, as a joke at worst and as a transitional necessity at best, and you have an environment in which recovery is stifled. Imagine the freed inmate who finds out—if he or she doesn’t already know—that their ordeal is depicted in film and accepted by viewers as *funny* or *deserved*. Prison rape representations in film function to remind prisoners of the traumas they suffered in prison. These memories undoubtedly stymie prisoners’ rehabilitative efforts.

As I said in section II, a burning cross carries a unique message about, and for, Blacks. Blacks occupy a particular historical relationship to the burning cross, one that, in some cases, triggers memories of hate, oppression, and violence. The psychological and physiological effects sometimes manifest, moreover, in target group members’ experiencing symptoms of post-traumatic stress disorder, fear, increased heart rates, high blood pressure, and thoughts of suicide—all classic symptoms of RTS.

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<sup>71</sup> Ibid.

<sup>72</sup> Petersilia, J, “When Prisoners Return to the Community: Political, Social, and Economic Consequences,” *National Criminal Justice Reference Service* (2000); and Travis, J., Solomon, A., and Waul, M., “From Prison to Home: The Dimensions and Consequences of Prisoner Reentry,” *Urban Institute* (2001).

Now that I've presented some effects of prison rape, I show that prisoners' and ex-inmates' turmoil stems not only from prison rape itself, but from the public's response to it. First, let me draw an analogy. I've said that isolation, self-hate, desire to disassociate from one's group, and devaluation of oneself as a member of a group are reactions to hate speech aimed at historically oppressed groups. These reactions stem not only from the hate messages themselves, but from "the government response of tolerance."<sup>73</sup> 'Government response of tolerance' manifests, e.g., when "hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks."<sup>74</sup> Following these government responses of tolerance, the victim becomes a "stateless person,"<sup>75</sup> one whose worth is measured against free speech values and found wanting.

This is precisely the effect we see with regard to prison rape films. That isolation, self-hate, and disassociation stem not only from hate speech but also from tolerance vis-à-vis hate speech has an analog to prison rape films. The analogy, specifically, is to the relationship between prison rape victims, prison rape films, and the public response to those films. I want to point out that, e.g., Blacks' reaction to government responses of tolerance are similar to prison rape victims' reaction to prison rape films and those films' reception. Feelings of helplessness, self-hate, self-blame, and social and sexual dysfunction are symptoms of RTS and hence reactions to sexual violence. I contend that these reactions stem not only from prison rape itself, but also from prison rape films and their reception. Feelings of isolation—of being truly a stateless person—stem, as well,

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<sup>73</sup> Matsuda, Mari, "Public Response to Hate Speech," 25.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

from public responses of tolerance. Prison rape films re-present the original trauma prison rape victims experienced, and the films' reception reflects the cultural status of victims. Prison rape victims must either identify with a society that accepts them as tolerable victims or admit that the society does not include them.<sup>76</sup> Prison rape films and the responses they draw are not merely innocuous expressions of ideas, best dealt with in the marketplace of ideas. In an atmosphere surrounded by hate speech, it is impossible for a prisoner or ex-con to receive equality of opportunity—be it in job or housing applications, or legal mechanisms for redress of grievances.<sup>77</sup>

## V

Prisoners' experiences tell us that prison rape films constitute a real harm, a real form of oppression, for real people. Oppression can take explicit form, as in genocide, violence, and political exclusion. Subtler forms of oppression, however, constitute harms that hit their targets squarely—notably, through self-hate, self-doubt, and in extreme cases, post-traumatic stress disorder. An implement of such oppression is hate speech. Hate speech inflicts harm covertly, for it has the power to construct cultural realities and interfere with our perceptions of the people around us. The harms, then, are not easily recognizable *as* harms. In the public consciousness the victimization of prisoners is tolerable because prisoners are seen as having less worth, fewer rights, and less humanity. Nonetheless, the harms exist.

Drawing from feminist and critical race theory's insights into pornography and racist speech, I motivated a phenomenology of hate speech and prisoners' experience—

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<sup>76</sup> Ibid.

<sup>77</sup> MacKinnon, Catharine, *Only Words*, 99.

one that bridges the gap between free speech principles and what I've called the Equality View. In doing so, I argued that speech that harms historically oppressed groups is best treated as outside the realm of protected speech. To bolster the argument, I presented three intuitively powerful desiderata that allow us to set aside the most harmful forms of speech and preserve broader principles of free speech. Speech is most harmful when it is directed at or about historically oppressed groups, for such speech has the power to inflict serious psychological and physiological effects. The message of moral inferiority, particularly, is of first amendment dimensions. More than the message alone causes harm, however. Feelings of helplessness, self-blame, and social dysfunction are responses to prison rape, and re-presentations of prison rape by way of films recreate the original trauma that prisoners experienced. Feelings of isolations stem, however, not only from re-presentations of trauma, but from public responses of tolerance. For these reasons, I hope it is clear that regulating prison rape representations serves a societal purpose, one that becomes more clear as soon as one sees prison rape films for what they really are—a form of hate speech.

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