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\*5 MALE RAPE IN U.S. PRISONS: CRUEL AND UNUSUAL PUNISHMENT  
Shara Abraham [\[FNal\]](#)

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Male rape in U.S. prisons is a systemic problem that violates basic human rights and constitutional provisions, including the Eighth Amendment prohibition against cruel and unusual punishment and the Thirteenth Amendment prohibition of slavery. Despite its prevalence in U.S. prisons, male prisoner-on-prisoner sexual abuse fails to attract serious attention. Stephen Donaldson, the late president of Stop Prisoner Rape, explained the lack of attention in the following terms: "[t]he rape of males is a taboo subject for public discussion ... [i]f ever there was a crime hidden by a curtain of silence, it is male rape." This "curtain of silence" compounds the trauma and humiliation that rape victims suffer. Additionally, male rape victims in U.S. prisons essentially are without legal recourse. Inmates seeking legal redress face a plethora of obstacles, including federal judges who generally are unsympathetic to prisoners' claims, attorneys who largely are unwilling to undertake prisoner litigation, and daunting legal standards.

### **Background**

It is difficult to discern the magnitude of this systemic problem. The exact number of male inmate rape victims is elusive. To date, nearly half the states do not compile statistics on male prisoner rape, and there are no national figures. Responding to requests for statistics from Human Rights Watch, prison officials in New Mexico stated they had "no recorded incidents over the past few years." Only three states--Florida, Ohio, and Texas--reported more than fifty incidents in a given year.

Independent research belies such state statistics. A December 2000 Prison Journal study, which surveyed male inmates in seven male prison facilities in four states, concluded that 21 percent of inmates experienced at least one episode of forced sexual contact, and that seven percent of those surveyed reported they had been raped in prison. Human Rights Watch also has documented prison rape. An April 2001 Human Rights Watch report on prison rape highlights not only the pervasiveness of male prisoner-on-prisoner rape, but also the way in which corrections officials tolerate prison rape. Drawing from the findings of the Prison Journal study and other state-level surveys, Human Rights Watch concluded in its report that at least 140,000 male inmates have been raped during incarceration. In any event, the absence of definitive statistics on the incidence of male inmate rape should not be used to deny the grave human rights crisis that is ongoing in U.S. prisons.

### **The Elusiveness of Accountability**

#### The Inadequacies of Prevention, Investigation, and Prosecution

Constitutional and statutory protections make clear that rape should not comprise part of a detained person's punishment. In reality, however, sexual abuse is an ineluctable fact of imprisonment. Furthermore, those seeking legal redress are faced with daunting obstacles. For instance, prison authorities rarely investigate allegations of rape. Rather, prison authorities generally turn to internal disciplinary mechanisms as an alternative to criminal prosecution. Human Rights Watch attributes this unwillingness to seek prosecution to a system-wide failure to acknowledge that a problem exists. As a result, sexually abused

inmates suffer not only the physical and emotional trauma that accompany rape, but are re-victimized by their inability to assert their legal rights.

The nationwide dearth of prevention practices is indicative of this widespread refusal to acknowledge the problem of prisoner rape. In an article published in *Prison Journal*, Robert W. Dumond noted that "[a]lthough the problem of inmate sexual assault has been known and examined for the past 30 years, the body of evidence has failed to translate into effective intervention strategies for treating inmate victims and ensuring improved correctional practices and management."

Further, prosecutors rarely bring charges against prison rapists, and prison administrators effectively tolerate rampant sexual abuse when they fail to hold correctional authorities responsible for criminal violence that occurs behind prison walls. Correctional authorities often do not react effectively to, or investigate complaints of, sexual abuse. Failure to take the appropriate steps, such as collecting physical evidence, hinders the proper fact-finding that would accompany criminal prosecution. In compiling evidence for its report, Human Rights Watch received reports of more than 100 rapes, none of which resulted in prosecution of the alleged perpetrators.

A variety of factors contribute to the lack of criminal prosecution, not least of which is the lack of political will. It is practically inconceivable for local prosecutors to consider prisoners as part of their constituency. Moreover, prisoners have little political power to exert and, as Human Rights Watch noted, "impunity for abuses against prisoners does not directly threaten the public outside of prison." Further, \*6 the severe underreporting of cases results from the fact that inmates generally are reluctant to report sexual assault in response to their fears of reprisal and their feelings of humiliation and shame.

Equally important, federal judges generally are not sympathetic to prisoners' claims. As Joanne Mariner comments in her article, "Not Part of the Penalty: Judicial Abdication of Responsibility for Protecting Prisoners from Rape," federal judges are more likely to focus their concerns on the constraints under which correctional officers operate. As Mariner states, judges at times appear to be "resigned to tolerating prison violence and exploitation as somehow inevitable." Justice Clarence Thomas, concurring in the 1994 *Farmer v. Brennan* decision, has exhibited such cynicism: "[p]risons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, 'some level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do ... unless all prisoners are locked in their cells 24 hours a day and sedated'" (citations omitted). Moreover, the belief that policy and budgetary decisions regarding prison conditions fall beyond the scope of the courtroom partly influences the judicial decision-making process. Such judicial reasoning effectively fosters an environment of impunity for prison rapists and the correctional officers who fail to protect inmates.

*Chandler v. Jones* is one example of how the judicial system fosters an environment of impunity. This case involved an inmate who brought suit alleging he was sexually pressured and harassed after being transferred to a dangerous housing unit. In 1988, the Eastern District of Missouri dismissed the case and with atypical candor explained that "sexual harassment of inmates would appear to be a fact of life." In absolving the prison officials of responsibility, the court asserted that the officials "made the best of a bad situation."

In addition to these seemingly insurmountable hurdles, attorneys are reluctant to litigate on behalf of prisoners. Several factors contribute to this reluctance, including the fact that prisoners are neither lucrative clients nor sympathetic plaintiffs in the eyes of a jury. Consequently, the majority of cases filed challenging prisoner abuses are pro se. Because prisoners often lack knowledge of legal procedure, many courts dismiss their cases in the early states of litigation.

#### A Hostile Legal Environment

These factors operate in a legal framework that is increasingly hostile to allegedly frivolous prisoners' claims. In particular, two laws enacted in 1996 pose formidable legal constraints for prisoner rape victims. The first law, which bars the Federal Legal Services Corporation from financing legal aid organizations that represent prisoners, has reduced the number of lawyers available to litigate on behalf of prisoners. The second law--the Prison Litigation Reform Act (PLRA)--has made it even more difficult for inmates to challenge the conditions of their confinement. The PLRA invalidates all settlements that do not include explicit findings that the challenged conditions violate either federal law or the Constitution, imposes filing fees on certain indigent prisoners, and bars the recovery of damages for pain and suffering that does not accompany physical injury.

These laws are part of a conservative effort to reverse the "activist" approach to judicial monitoring of prisons of the 1960s and 1970s, when U.S. courts undertook an active role in reforming the nation's prisons. The landmark 1977 decision in *Bounds v. Smith* marked a judicial commitment to protecting prisoners' right of access to the courts. This recognition of prisoners' rights was instigated in part by events--such as the tragic 1971 rioting and subsequent killings at Attica prison in New York.

The past two decades, however, have been characterized by a severe reduction in judicial oversight of prison conditions. While federal courts cut back on prisoners' rights, a dangerous stereotype developed. As Human Rights Watch reports, the increasing judicial effort to restrict prisoners' rights found a receptive audience with a general public outraged at the notion of "pampered" prisoners filing frivolous lawsuits. Consequently, a prisoner's right of access to the courts came under attack, culminating in the enactment of draconian laws such as the PLRA.

### **U.S. Constitutional Protections for Prisoners**

The failure to protect detained persons from sexual assault violates basic human rights guaranteed by the Eighth and Thirteenth Amendments to the U.S. Constitution, which prohibit cruel and unusual punishment and slavery, respectively. Despite these constitutional protections, prisoners face burdensome legal standards, most notably the "deliberate indifference" standard. The term "deliberate indifference," which requires a showing that a prison official was subjectively aware of a risk and disregarded that risk, first emerged in the Court's 1976 decision in *Estelle v. Gamble*. "Deliberate indifference" is a higher standard than negligence.

#### **The Eighth Amendment's Prohibition against Cruel and Unusual Punishment**

Prisoners seeking legal recourse for violation of their constitutional rights may file a civil action in federal court. Such lawsuits often rely upon the Eighth Amendment's prohibition against cruel and unusual punishment. As cases \*7 such as *Estelle* and its progeny demonstrate, the Supreme Court agrees the Eighth Amendment is the appropriate framework for evaluating prison conditions. The Court's decision in *Farmer* is instructive. In this landmark 1994 decision, a transsexual inmate sued prison authorities for failing to provide protection from rape. The Court stated, "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment" (citations omitted). The Supreme Court held a prison official violates the Eighth Amendment when the victim proves that the prison official's act or omission was "sufficiently serious," and that the prison official acted with "deliberate indifference."

The Court went on to establish the Eighth Amendment imposes certain duties on correctional authorities, such as undertaking reasonable measures to guarantee the safety of inmates. Citing various lower court decisions, the Court concluded that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Notably, the Court issued an unequivocal denunciation of prison rape: "[h]aving incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Prison conditions may

be 'restrictive and even harsh,' but gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective'" (citations omitted). The Court made clear that sexual assault is not "part of the penalty" (citations omitted).

Despite these denunciations of prison rape, the "deliberate indifference" standard poses a nearly insurmountable burden for Eighth Amendment claims. Under this legal standard, the court must rule in favor of the defendant unless the prisoner demonstrates the defendant had actual knowledge of a substantial risk to the plaintiff and the defendant disregarded that risk. Proving subjective intent is a formidable requirement. The rationale for imposing such a burdensome standard stems from the principle that only unnecessary and wanton infliction of pain implicates the Eighth Amendment. Consequently, demonstrating an Eighth Amendment violation carries with it a higher burden than proving simple negligence.

At first blush, Farmer represents a bold step forward, because it recognizes a duty to protect prisoners from harm at the hands of other prisoners. Yet the strengths of this decision with respect to eradicating prison rape are outweighed by the stringent "deliberate indifference" standard. This standard enables a court to dismiss even the most egregious cases in which the risk of rape would have been obvious to a reasonable person. Moreover, the "deliberate indifference" standard fosters an incentive on the part of correctional authorities to ignore the problem of prisoner-on-prisoner rape. Ignorance of the problem enables correctional authorities to shield themselves from liability by claiming lack of knowledge as a defense. This is because, in the Court's own words, "... an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." In other words, the Farmer test does not permit liability to be premised on obviousness or constructive notice. Thus, because a trier of fact may not infer knowledge from even a seemingly obvious risk, a prison official seeking to escape liability could argue he was unaware of a substantial risk of harm to the prisoner.

#### The Thirteenth Amendment's Prohibition against Slavery

The degradation and humiliation of prison rape all too often extends beyond a single, isolated experience. Once an inmate is raped, it is practically inevitable that he will be subject to continuing sexual abuse. As Human Rights Watch reports, a rape victim is stigmatized as a "punk" or "turn out" and is vulnerable to becoming a continual target for sexual attack. An Indiana inmate revealed the following tragic consequence to Human Rights Watch: "[o]nce someone is violated sexually and there are [sic] no consequences on the perpetrators, that person who was violated then becomes a mark or marked. That means he's fair game."

An inmate who is unable to escape continued sexual exploitation from the initial rapist or other perpetrators all too frequently becomes the sexual "property" of another inmate. In exchange for protection from abuse by other perpetrators, the inmate literally is the sexual slave of his "protector." Egregious aspects of becoming the "property" of another include being "rented out" for sex and auctioned off to other inmates. Human Rights Watch documented the inhumanity of such "protection," stating that "[l]ike all forms of slavery, these situations are among the most degrading and dehumanizing experiences a person can undergo." Moreover, the transmission of HIV/AIDS is a particularly frightening consequence of such rampant sexual abuse.

#### International Human Rights Protections for the Treatment of Prisoners

In addition to the constitutional protections available to prisoners, numerous international human rights instruments protect the human rights of prisoners. At the forefront of such instruments are the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Both instruments \*8 unequivocally prohibit torture and cruel, inhuman, or degrading treatment or punishment. While

there are no international law provisions that specifically pertain to prison rape, rape is covered by the prohibitions against torture and cruel, inhuman, or degrading treatment as defined in these instruments. Additionally, several international interpretive guidelines delineate the human rights of persons deprived of liberty. To ensure compliance with international treaty obligations, governments may turn to such documents for guidance. One such document--the United Nations Standard Minimum Rules for the Treatment of Prisoners--constitutes an authoritative guide to binding treaties, including the ICCPR and the CAT.

Various provisions of the ICCPR protect the human rights of detained persons. Article 7 provides that no one shall be subject to torture or cruel, unusual, inhuman, or degrading treatment or punishment. Article 9 guarantees the right to liberty and personal security. Article 10 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

The CAT is particularly instructive with respect to whether prison authorities are responsible for preventing prisoner-on-prisoner abuses, including rape. The definition of torture and cruel, inhuman, or degrading treatment or punishment in the CAT includes acts committed by public officials as well as acts committed with their acquiescence (Articles 1(1) and 16(1)).

While the ICCPR and the Torture Convention enumerate wide-ranging protections for detained persons, significant barriers frustrate the implementation of these international protections in the United States. The United States, notoriously resistant to subjecting itself to international scrutiny, attached numerous limiting provisions to the ICCPR and the CAT when it ratified each convention. Consequently, the protections enumerated in the ICCPR and the CAT generally are not available to detained persons in the United States.

The limiting provisions the U.S. attached to the treaties operate substantively and procedurally, restricting both the scope of the treaties and limiting their usefulness in U.S. court proceedings. Procedurally, both treaties as ratified by the United States are non-self-executing. Consequently, the provisions contained in each treaty cannot stand alone as the basis for a cause of action in a domestic court. In other words, should an inmate choose to rely upon international human rights treaty provisions, this must be done in conjunction with domestic constitutional and statutory defenses and claims. To date, Congress has not enacted the requisite enabling legislation.

Substantively, in ratifying both treaties the United States reserved the right to consider itself bound by certain provisions only to the extent that such provisions comport with U.S. law. For instance, the United States entered a reservation to Article 7 of the ICCPR, whereby it declared that the provision applies only to the extent that it covers acts already barred under the U.S. Constitution. To be precise, the U.S. reservation nullifies any provision that grants broader rights than those already guaranteed under U.S. law. Notably, the UN Human Rights Commission determined the U.S. reservation to Article 7 is incompatible with the object and purpose of the ICCPR. Human Rights Watch noted that the U.S. reservation to Article 7 is particularly damaging where prison rape is concerned. The ICCPR's broad prohibition bars abusive punishment and treatment and lacks the stringent intent requirement of the Eighth Amendment, which bars only punishment. Prison authorities, who frequently are exonerated because they lack the requisite intent, would not be granted such impunity under the ICCPR.

The incorporation of international law into domestic claims nonetheless remains a viable tool. The Supreme Court's interpretation of the Eighth Amendment prohibition against cruel and unusual punishment poses a significant burden on inmates by requiring a showing of deliberate indifference on the part of prison officials. In light of this heavy burden, prisoners seeking legal redress conceivably would benefit by incorporating international law into their claims. International human rights instruments such as the ICCPR and the CAT may inform a court's interpretation of domestic law. In rendering its decision in *Thompson v. Oklahoma*, the Supreme Court looked to international human rights norms to determine whether the

execution of an individual who is sixteen years of age or younger at the time of the offense violates the Eighth Amendment. As Thompson demonstrates, arguments relying upon international human rights norms, customary international law, and human rights treaty provisions eventually may find a receptive audience in domestic courts.

### **Conclusion**

A primary obstacle to addressing the systemic problem of male prison rape is that male rape has long been a taboo subject. This fact accounts for a victim's reluctance to report rape and the unwillingness on the part of the public and the media to address this problem. A public willingness to confront male prison rape may stimulate state and federal efforts to combat this systemic problem. Immediate efforts could include effective prosecution of perpetrators and reform of burdensome laws and legal standards.

Perhaps the most immediate steps ought to be taken behind prison walls. Prison administrators should establish rape crisis centers, train corrections officials to prevent rape and respond sympathetically to victims, implement classification policies separating dangerous prisoners from those who possess the traits of a likely victim, and provide inmates with skills and knowledge to avoid victimization.

Lifting the "curtain of silence" is the first step toward remedying this systemic problem. In due course perhaps domestic courts will become sensitized to the problem and begin to incorporate the norms of international human rights law. A combination of these factors will rectify the lack of redress that victims face.

[\[FN1\]](#). Shara Abraham is a J.D. candidate at the Washington College of Law and co-editor-in-chief of the Human Rights Brief.

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