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**Prisoners' Dilemma****\*24 THE PROBLEM OF PRISON RAPE**  
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**ILLUSTRATIONS BY MAX GRAFE**

**\*26 On a recent afternoon**, I visited the home of Edward Tuddenham in Austin, Tex. He showed me to a seat in his study, where the walls were adorned with American Indian weavings and his framed Harvard Law degree. Tuddenham is one of a handful of lawyers representing Roderick Johnson, a 35-year-old African-American who is suing the Texas Department of Criminal Justice, which runs the state's prison system. Johnson alleges that corrections officials were complicit in his 18-month ordeal of rape and sexual servitude, turning a blind eye to his plight and, according to his legal complaint, taking "sadistic pleasure" in his torment.

Johnson, who had been released from prison to a halfway house two weeks before, sat unobtrusively at Tuddenham's desk, his clean-cut appearance and courtly manner slightly at odds with his tall, solid frame. Johnson grew up in Marshall, near the Louisiana border, and he speaks with an East Texas drawl and a "Yes sir, no sir" formality, a product of both his Southern upbringing and his time in the Navy. Johnson enlisted right out of high school, less out of a feeling of duty to his country than in a vain attempt to overcome his homosexuality.

In 1991, after he left the service, Johnson was involved in a burglary, a lapse of judgment he blames on the influence of his then boyfriend. It was a nonviolent offense, but it earned him 10 years probation. In 1997, he failed to report for probation while working in the Dallas area as a consultant specializing in demographic research. That lapse in judgment earned him his first stay in jail. Two years later, he violated parole again, this time by bouncing a check for \$300. "It was a misdemeanor charge, but this is Texas," he said.

Johnson was placed in a low-security prison in Tennessee Colony, Tex. He soon ran afoul of the staff, having been caught hoarding extra prison whites. "It's all the same clothes, but with my background, you know, being gay, you like clothes," Johnson said, gesturing toward his pristine attire: a starched white button-down, a cream-colored sweater, and pressed khakis.

His rule breaking, while seemingly innocuous, was nevertheless repeated, and after two warnings didn't take, he was transferred to the maximum-security Allred Unit in Iowa Park, Tex., where word that he was gay spread quickly. "I'm not flamboyant, but it's a known," he said. "Sooner or later people would figure it out. And at Allred it wasn't later, it was kind of sooner."

As in many maximum-security units in Texas, Allred's cellblocks are controlled as much by gangs as guards. Within days of Johnson's arrival, another inmate, Andrew Hernandez, befriended him and offered to protect him from the gangs. But Hernandez was himself a gang member, a leader of the predominately black Gangster Disciples, whose roots are on the streets of Chicago. Hernandez soon made it clear that the price of protection was a sexual relationship. "He explained that he had chosen me. He made me feel like I had protection, that I was safe, as long as I was with him," Johnson said. "I felt like it

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was something that I had to do." But Johnson had no interest in Hernandez sexually--he told me gangsters weren't his type--and he eventually tried to break off the relationship, which is when the outright exploitation, and outright rape, began. "Hernandez went into my cell and took everything that I owned, took it to his cell," Johnson said. "He started forcing me to have sex that I didn't want. I wasn't interested in him, but it was like I had no choice whether I was interested or not."

The other Gangster Disciples soon demanded that Hernandez share his "punk" with the rest of the gang, and Hernandez soon yielded. "They're like, 'You got to remember that we protect you, so "she" belongs to us,'" Johnson said. "About that time, he started prostituting me out to his friends. He would force me to have sex with other gang members."

Prison officials eventually agreed to move Johnson to a new cellblock, known in the prison world as a pod. It was the only time, Johnson says, that the prison system came to his aid. At this time Johnson made his first written request to be put in protective custody, which prisoners call "safekeeping." The request was denied. On the eve of his cellblock transfer, he received a letter from a leader of the Bloods, another gang, informing him that he had been purchased from the Gangster Disciples. The Bloods, the letter said, would be waiting for him in his new pod.

In his 18 months at Allred, Johnson did time as the property of the Bloods, the Crips, the Mandingo Warriors, and the Mexican Mafia, all of whom forced him to have sex with their members. They also sold his services to other inmates, usually for between \$5 and \$10. (A cigarette in Allred goes for \$1.50.) On several occasions, Johnson received letters from gang leaders--now part of the evidence supporting his complaint--informing him that if he did not comply with their demands, the punishment would be even more severe than the rapes. One of the letters promised to "smash your bitch ass ASAP" if Johnson resisted. Being the sexual property of a gang is called "riding" in prison; Johnson says he was told by gang members "either you gonna ride or you gonna die."

SPIKE LEE'S RECENT FILM 25TH HOUR FOLLOWS A BUSTED New York City drug dealer named Monty Brogan on his last day of freedom before he's to be sent upstate. Brogan, played by Edward Norton, rues having to leave behind his friends, his girlfriend, and his father, but his uneasiness about losing them is matched by his dread of what awaits him in prison--rape. Near the end of the film, just hours before he's to depart, he goads his best friend Frank into beating him. "I need you to make me ugly," he says. "If they get one look at me looking like this I'll be finished." Frank obliges and beats him bloody.

Many other films and books have also invoked the specter of prison rape; to say that it is an unacknowledged problem in American culture is clearly inaccurate. Yet while our culture may not be bashful about discussing prison rape, it has, for the most part, portrayed it as a problem with no solution. Evocations like the one in 25th Hour aren't meant to inspire outrage in the moviegoer; they're meant to stir up fear. In films like Lee's, or Curtis Hanson's L.A. Confidential, rape is a fixture of prison life as unavoidable as lights \*27 out. In Hanson's film, it's a convenient shorthand for all the potential horrors of prison that can be used by detectives to extract confessions--from innocent suspects, no less.

The prevalence of rape in prison is fearsome. Line officers recently surveyed in one southern state estimated that one in five male prisoners were being coerced into sex; among higher-ranking officials, the estimate was one in eight. Prisoners themselves estimated one in three. (Female prisoners are the victims of rape as well, though they are usually assaulted by male guards, not other inmates; the phenomenon of male-on-male prison rape is generally studied separately.)

Compiling statistics on prison rape involves the same pitfalls as compiling conventional rape statistics. Male rape victims may be even more likely than female victims to underreport out of intimidation or shame. Tom Cahill, whom I talked to at his home in Northern California, heads the board of directors of the advocacy group Stop Prisoner Rape; he was gang-raped in 1968 in a San Antonio jail where he was being held on a civil disobedience charge. "For males, it's the ultimate humiliation,"

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he said. "And that silences most of us." Even without taking this reticence into account, the numbers are staggering. The most authoritative studies of the problem, conducted by the University of South Dakota professor Cindy Struckman-Johnson, found that over 20 percent of prisoners are the victims of some form of coerced sexual contact, and at least 7 percent are raped. Extrapolating from Struckman-Johnson's findings suggests that some 140,000 current inmates have been raped. The corrections industry itself estimates that there are 12,000 rapes per year, which exceeds the annual number of reported rapes in Los Angeles, Chicago, and New York combined.

Despite its prevalence, prison rape has generally been treated by courts and corrections officials as it has by novelists and filmmakers--as a problem without a solution. Prison rape is rarely prosecuted; like most crimes committed in prison, rapes aren't taken on by local district attorneys but left to corrections officials to handle. When inmates seek civil damages against the prison system, as Johnson has done, they must prove not merely that prison officials should have done more to prevent abuse but that they showed "deliberate indifference"--that is, that they had actual knowledge that an inmate was at risk and disregarded it. Showing that a prison guard should have known is not enough, no matter how obvious the signs of abuse.

This standard was established by the Supreme Court in the 1994 case *Farmer v. Brennan*, in which a transsexual inmate imprisoned for credit card fraud sued federal prison officials for ignoring his rape behind bars. While the court affirmed that prison rape is a violation of an inmate's constitutional rights and stated plainly that sexual assault is "not part of the penalty that criminal offenders pay for their offenses," it set up formidable barriers to establishing the culpability of corrections staff. At the cellblock level, the "deliberate indifference" standard discourages prison guards from shining a light into dark corners. What they don't know can't hurt them.

RODERICK JOHNSON CONTENDS THAT THE AUTHORITIES AT the Allred Unit knew that he was being raped and both passively and actively facilitated the assaults. In his time at Allred, Johnson went before the Unit Classification Committee, which determines where each inmate is housed, seven times. Each time, he requested safekeeping, arguing that his life was endangered, and each time he was denied.

Johnson claims that high-ranking officials on the classification committee mocked him during his hearings. "If you want to be a 'ho,' you'll be treated like a 'ho,'" he says one official told him. He also alleges that officials crudely suggested that because he was gay, all the sex was consensual. In his legal complaint, Johnson quotes one official as saying, "I personally believe you like dick. You like this shit .... I don't think you need no safekeeping. You need to be placed on high security where you don't have anything but one cellie and then you can get fucked all the time."

Johnson also alleges that high-level prison staff told him to use violence to resist his attackers, to "fight or fuck." But when Johnson did resist, he was punished, once earning 15 days of solitary confinement--a punishment he says he found even more psychologically traumatic than his daily ordeals on the cellblock.

Johnson accuses cellblock-level officers of being complicit in his suffering. He claims the guards called him "Coco," the female name assigned to him by the other inmates. According to his legal complaint, in one instance a guard let another inmate into Johnson's cell to be serviced. "They're their own gang," Johnson said of the corrections staff at Allred. "Their idea is they stick together .... If the major or the warden doesn't do anything about it, then everybody else kind of goes along with whatever's happening."

Johnson's allegations are as difficult to substantiate as they are shocking. Carl Reynolds, TDCJ's general counsel, wrote in an e-mail that he did not have time to go through Johnson's allegations one by one, but he questioned Johnson's credibility. During the investigation of Johnson's complaints, Reynolds wrote, his "stories kept changing." Reynolds's e-mail also noted that other inmates described Johnson as "highly manipulative" and suggested that he requested safekeeping not out of fear for his

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safety but "to be closer to a particular inmate."

Reynolds said prison officials "in some instances took remedial action short of placing him in safekeeping, but had great difficulty responding to Johnson's allegations." Johnson "often failed to identify the other participants, and when he did identify other inmates, the information typically did not check out."

But Johnson says his experience as a business consultant taught him the importance of keeping a paper trail, and he methodically copied every letter he sent to TDCJ officials, as well as requests for medical attention and grievances against corrections staff.

\*28 At the end of March 2002, the ACLU's National Prison Project took Johnson's case. Less than two weeks later, he was transferred to the Michael Unit, where he was placed in safekeeping, almost a year and a half after he had first requested it. A few weeks after his transfer, Johnson noticed new informational posters going up around the facility. Geared toward prisoners and staff, the posters explained what each group could do to prevent sexual assaults. The posters were based on the state's "Safe Prisons Program," meant to guide corrections officials in determining which inmates were potential victims of sexual assault and should be housed separately. One of the characteristics to look for, the materials state, is "homosexual tendencies." Of the Allred officials, Johnson said, "Every one of them knew that I was a homosexual." Johnson says that one of them explained to him, "We don't protect punks on this farm."

MANY PEOPLE ON THE OUTSIDE, including some within the criminal justice system, believe that prison rape is committed by "predatory homosexuals," a term used repeatedly in federal circuit court decisions. While inmate-on-inmate rape is in the most basic sense homosexual--both participants are male-- researchers who have studied it have found that gay men are actually far more likely to be its victims than its perpetrators.

The feminist mantra that "rape isn't about sex, it's about power" may be even more applicable in the prison context, where it is common for men who would have never engaged in sexual contact with other men on the outside to become rapists when incarcerated. What's more, the relationship between rapist and victim in prison is often more than just a sexual one--it can devolve into out-and-out servitude. Victims are given women's names and made to perform household tasks such as cooking food, washing clothes, and cleaning the living space. Roderick Johnson cooked and cleaned for Andrew Hernandez. "It's slavery," he said. "It's being in a position where you have no choice but to do whatever it is you're being told to do. It's like you have no control over your position. You're totally powerless."

The traditional rationale for prison rape is the lack of women, but most psychologists consider this facile. They see prison rape mainly as a means by which people who have been stripped of control over the most basic aspects of their lives--when to eat a meal, take a shower, or watch TV--can reclaim some sense of power. As one Louisiana prisoner, Wilbert Rideau, wrote, "the psychological pain involved in such an existence creates an urgent and terrible need for reinforcement of [a prisoner's] sense of manhood and personal worth." Others believe that prisoners become rapists out of fear of becoming victims themselves; it's a choice between becoming predator or prey. The psychologist Daniel Lockwood, in his study *Prison Sexual Violence*, calls this strategy "pre-emptive self-defense."

COUNTY JAIL NO. 3 SITS ON A LANDSCAPED HILL IN SAN Bruno, Calif., and when the sun shines on its Art Deco facade, you can see what a proud accomplishment it must have been for California law enforcement back in the Dragnet era. On the inside, however, the prison is crumbling. I traveled to the prison's fourth floor in its manually operated elevator, a harrowing experience I shared with Eileen Hirst, the chief of staff for the San Francisco County sheriff, and with a sheriff's deputy who trailed along to ensure our safety.

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When we arrived at the night guard's post, Hirst issued a polite order. "Stand here," she said, putting me in the spot where the guard would keep watch. "Can you see anything that's going on in any cell?" Looking down the narrow whitewashed corridor, I couldn't even say for sure that there were cells in this cellblock, and I certainly couldn't see any of the prisoners sitting inside then. Anything could have been happening behind the bars.

Hirst was willing to show off this obvious rape trap because a 1994 federal court decision had ordered that the out-of-date facility be closed. County Jail No. 3 will be decommissioned by the end of the year, replaced by a new, state-of-the-art facility. The changes were brought about by *Besk v. City and County of San Francisco*, a case that originated with an allegation of prison rape and eventually turned into a broader class-action suit about overcrowding. In its decision, a federal court mandated that the county build new state-of-the-art prisons, essentially ordering the San Francisco Board of Supervisors to come up with the necessary funds.

Even before *Besk*, however, San Francisco County had been a leader in trying to reduce sexual assaults in prison. In part thanks to its large and vocal gay community, San Francisco was one of the first jurisdictions to start asking about the sexual orientation of newly arrived inmates. In 1979, Michael Hennessey, a young lawyer, was elected sheriff of San Francisco, a position he still holds. A campaign poster from Hunter S. Thompson's run for sheriff of Aspen, Colo., hangs in Hennessey's office, an acknowledgement, perhaps, that only in San Francisco could a prisoners' rights advocate be put in charge of the county jail system.

\*29 Hennessey's 1979 campaign manager, who was gay, made him aware of the problem of prison rape. Hennessey promised to create a classification system that would house gay men separately in the county's jails. After he was elected, Hennessey says, "gay men were housed together in a gay tank, or what they called a 'queens' tank.'"

The current classification system is more sophisticated. After new inmates are booked, they're interviewed, sometimes for as long as 45 minutes. Inmates are sorted into three classification levels--minimum, medium, and maximum-- based on their likelihood of harming fellow inmates. The levels do not correspond to the crimes these people committed but to the amount of jail time they have under their belt.

San Francisco's first attempt at a classification system separated gays from straights and violent offenders from nonviolent offenders, but Hennessey has found that sorting prisoners by their vulnerability is more effective. "You might be charged with murder because you murdered your spouse or your parent or your child, but you've never been in jail before in your life. You're a vulnerable person, you're not a really tough guy," he said. On the other hand, another inmate "might be in for drunk driving, but might have just gotten out of San Quentin last week. So you can't just go by their charge. You have to go by their background and by their criminal sophistication."

San Francisco's classification system has not eliminated rapes in the county's jails, but the city has found ways to drastically reduce the rate of sexual assault in a corrections facility. The efforts have also demonstrated, however, that such reforms do not come cheap. Despite Hennessey's desire to address the rape problem, it took the *Besk* case to get the funding to build new jails. Hennessey, a named defendant in the case, said he was more than happy to comply with the court's order to build new facilities. "Jails and prisons do not have many friends," he said. "Spending money on them is not a big vote-getter." Only half-joking, he said, "it's wonderful to be sued."

County Jail No. 8, which sits on a city block in San Francisco's South of Market neighborhood once home to dot-com startups, is one of the new jails built with money from *Besk*. Eileen Hirst and I stood at the elevated guard station in one of the pods. The station, decked out with controls, monitors, and a swivel chair, felt a bit like the bridge of the *Starship Enterprise*. With the cells arrayed in a semicircle, from the guard's chair I could see into each cell, just as an actor on an amphitheater

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stage can make eye contact with every audience member. Instead of bars, the cell doors had large glass windows. Overcrowding remains a problem, and some inmates in County Jail No. 8 are double-celled. But according to Lt. Sonny Bruno, who is in charge of classification at the new jail, overcrowding has not yet led to rape. "I don't have knowledge of anyone who's reported a sex assault in these pods," she said.

IN 1826, IN WHAT WAS LIKELY THE FIRST PUBLISHED MENTION of prison rape in the history of the republic, the Rev. Louis Dwight wrote that "Boys are Prostituted to the Lust of old Convicts" throughout the institutions he surveyed from Massachusetts to Georgia. Dwight, the founder of the Prison Discipline Society of Boston, a prison reform group, wrote that "Nature and humanity cry aloud for redemption from this dreadful degradation." It was not until the 21st century, however, that the nation saw its first anti-prison-rape legislation.

Last year, Congress passed the Prison Rape Reduction Act, which allocates \$60 million to support rape-prevention programs run by federal, state, and local corrections staff and to aid investigations and punishment of perpetrators. The bill, which enjoyed bipartisan support in the House and the Senate, also requires states to collect statistics on prison rape. Backers of the legislation hope federal oversight will make sexual assault prevention a priority for jail and prison systems across the nation. But \$60 million can only go so far. The facility that will replace County Jail No. 3 in San Francisco, slated to open by year's end, cost nearly twice that amount.

Congress's money will certainly make some difference, and more might be allocated in the future. A higher hurdle, however, is the task of changing the way Americans think about prison rape. While San Francisco was honing its rape-prevention protocols, the state's attorney general, Bill Lockyer, was joking that he "would love to personally escort" Enron CEO Ken Lay "to an 8-by-10 cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'"

While humor about conventional rape has always been taboo, jokes about prison rape remain common. A recent 7-Up ad, eventually pulled from the air, depicted a spokesman handing out 7-Up in prison. When he accidentally drops a can, he says, "I'm not picking that up." Later, the spot shows the spokesman sitting in a cell, being hugged by an inmate. "When you bring the 7-Up, everyone is your friend," he says nervously. "Okay, that's enough being friends," he adds as the cell door slams. The insinuation of what's going to happen next is clear--and it's played for a laugh.

Commercials like this one might merely be examples of corporate tastelessness, but there is ample evidence that they are symptoms of a more disturbing phenomenon: an indifference to the rights of prisoners or perhaps even an acceptance of rape as a de facto part of the punishment. It may be unseemly to admit finding solace in the thought that a convicted child molester or rapist will get a taste of his own medicine behind bars, but who hasn't had such a thought or heard such an idea expressed by another?

Roderick Johnson's attorneys are confident that they can find a sympathetic jury, but prison rape cases are notoriously hard to prove, and even jurors convinced by inmates' allegations can remain unmoved. In *Butler v. Dowd*, a Missouri jury found that three inmates had been raped due to deliberate indifference from the staff, violating the inmates' Eighth Amendment right to be free of "cruel and unusual" punishment. In another case in Connecticut, *James v. Tilghman*, a jury found that corrections officials' decision to place an inmate in a cell with a suspected sexual predator similarly violated the prisoner's constitutional rights. In those cases, the juries awarded the inmates \$1 and nothing, respectively. Both "awards" were upheld on appeal.

[FN1]. Daniel Brook last wrote for Legal Affairs about gender profiling.

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