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MALE RAPE IN U.S. PRISONS: ARE CONJUGAL VISITS THE ANSWER?

Rachel Wyatt [†]

I. INTRODUCTION

"I had no choice but to submit to being [an inmate's] prison wife. Out of fear for my life, I submitted to sucking his dick, being fucked in my ass, and performing other duties as a woman, such as making his bed."

"I'm a tall white male, who unfortunately has a small amount of feminine characteristics. . . . These characteristics have got me raped [in prison] so many times I have no more feelings physically. I have been raped by up to 5 black men and two white men at a time."

"I go through nightmares of being raped and sexually assaulted. I can't stop thinking about it. I feel everyone is looking at me in a sexual way."¹

Male prison rape is "the most tolerated act of terrorism in the United States."² Prison inmates describe rape as a common event in prison life and an accepted part of court imposed punishments.³ News reports, documentaries, films, and books extensively document the prevalence of male prison rape.⁴ The United States Supreme Court has declared that prison rape constitutes "cruel and unusual punishment" under the Eighth

[†] B.A., Ohio University (2002); J.D. Case Western Reserve University School of Law (2006). I would like to thank Associate Dean Hiram Chodosh, Amy Miller, and Andrew Malone for all their help and guidance during the development of this Note. Additional thanks are owed to Professor Michael Benza for his insightful comments and suggestions. Finally, I would also like to give the greatest thanks to my husband, Chad Cutright, and to my parents, Joan and Gregory Linscott and Robert Wyatt, for all their patience and support.

¹ Human Rights Watch, Excerpts from Prisoners' Letters to Human Rights Watch, <http://www.hrw.org/press/2001/04/rapetest.htm>.

² James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 436 (2003).

³ See *id.* (citing a quote from a book written by a "lifer," VICTOR HASSINE, *LIFE WITHOUT PAROLE* 134 (2d ed. 1999)).

⁴ See 25TH HOUR (Touchstone Pictures 2002); Ed Galucki, *Three Men Charged in September Jail Rape*, CABOT STAR HERALD, Feb. 6, 2004, available at <http://www.spr.org/en/news/2004/0206-2.html>; Stuart Dye, *Prison Rape Taunt Contributed to Man's Suicide*, N.Z. HERLAND, June 12, 2004, available at <http://www.spr.org/en/news/2004/0612.html>; *All Things Considered: Rights Groups Hail Prison Rape Law* (National Public Radio broadcast Oct. 29, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1483718>; MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* (1997).

Amendment of the U.S Constitution.⁵ Despite widespread recognition of the problem, prison officials and law enforcement agencies take little action to combat the occurrence of male rape within the U.S. prison system.⁶ Inmates report that prison officials often do not investigate claims of male prison rape and prosecutors rarely bring charges against the perpetrators.⁷

Why has so little been done to address the problem of prison rape in the United States? The literature suggests a variety of reasons.⁸ Studies indicate that prison officials have trouble determining if prison rape is occurring since many prisoners use coercive, non-violent tactics to sexually assault other inmates.⁹ In addition, inmates often underreport instances of rape for fear of being labeled "snitches."¹⁰ Therefore, prison officials often underestimate the extent of the problem. Also, societal attitudes towards prison rape may explain why prison officials, law enforcement agencies, and state legislatures are often unresponsive when inmates do come forward with claims of sexual assault.¹¹ Scholars have stated that efforts to help male rape victims have been hindered by societal views that prison rape is an acceptable part of a prisoner's punishment.¹²

In September of 2003, President George W. Bush signed the Prison Rape Elimination Act ("the Act"), creating a "major milestone" in the government's treatment of the issue of male prison rape.¹³ The Act is the first U.S. law to specifically address the issue of male prison rape by requiring prison officials to detect, prevent, and reduce prison rape.¹⁴ To help prison officials accomplish this, the Act requires the Department of Justice to conduct annual studies focusing on the prevalence of male prison rape and to

⁵ See *Farmer v. Brennan*, 511 U.S. 825 (1994). See also Daniel Brook, *The Problem of Prison Rape*, LEGAL AFF., Mar.-Apr. 2004, at 24, available at http://legalaffairs.org/issue/s/March-April-2004/feature_brook_marapr04.msp.

⁶ Robertson, *supra* note 2.

⁷ *Id.*

⁸ Helen M. Eigenberg, *Prison Staff and Male Rape*, in PRISON SEX: PRACTICE AND POLICY 65 (Christopher Hensley ed., 2002).

⁹ *Id.* at 55. ("New inmates are offered protection, loans, gifts or commissary. . . . Aggressive inmates then require the recipient of these gifts to participate in sexual acts unless the recipient repays the loans, reimburses inmates for the commissary, or gives up the protection.").

¹⁰ VICTOR HASSINE, LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY 138 (Thomas J. Bernard et al. eds., 2d ed. 1999).

¹¹ Eigenberg, *supra* note 8, at 65.

¹² See, e.g., *id.*

¹³ Press Release, Stop Prisoner Rape, Prison Rape Elimination Act Becomes Federal Law (Sept. 4, 2003), available at <http://www.spr.org/en/pressreleases/2003/0904.html>; Statement on Signing the Prison Rape Elimination Act of 2003, 39 WEEKLY COMP. PRES. DOC. 1148 (Sept. 4, 2003).

¹⁴ Prison Rape Elimination Act of 2003, 42 U.S.C.A. § 15601-02 (2006).

convene a review panel to examine the characteristics of prisons systems that appear to contribute to incidents of prison rape.¹⁵ The Department of Justice will use the research to help prison officials develop guidelines to address the occurrence of male prison rape.¹⁶ A national organization dedicated to the prevention of male prison rape has expressed hope that the Act represents the “beginning of real reform” and that it will finally bring “prisoner rape out of the shadows.”¹⁷

On March 22, 2004, the Justice Department convened a focus group of mental health experts, correctional administrators, and other substantive experts in the area of prison rape to discuss and create a preliminary set of recommendations for the prevention of prison rape.¹⁸ The focus group recommended that prison officials use technology to “enhance monitoring” to “reduce the opportunity for victimizations,” “expand the use of specialized housing . . . for vulnerable inmates,” and implement training programs for correctional officers.¹⁹ The focus group also recommended that prisons create or enhance existing programs that are successful in reducing and preventing the occurrence of male prison rape.²⁰

The focus group did not specify what programs it was referring to, but many scholars who study prison rape are presumably hopeful that they are referring to conjugal visit programs.²¹ For years scholars have proposed that giving prisoners’ physical and emotional access to their families through conjugal visit programs reduces the occurrence of male prison rape.²² They propose that more prisons in the United States begin allowing some form of conjugal visits in prison to reduce the incidents of prison

¹⁵ *Id.* § 15603.

¹⁶ Press Release, Stop Prisoner Rape, *supra* note 13. The first research results from a national survey of Federal and State inmates, local jail inmates, inmates in juvenile facilities, and former inmates will be available in 2006. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 (2004) [hereinafter DATA COLLECTIONS].

¹⁷ Press Release, Stop Prisoner Rape, *supra* note 13.

¹⁸ CENTER FOR EFFECTIVE PUBLIC POLICY, THE PRISON RAPE ELIMINATION ACT OF 2003: SUMMARY OF FOCUS GROUP DISCUSSION POINTS 3 (2004). The focus group was convened by the Department of Justice to devise some preliminary recommendations to prison officials on how to reduce and prevent prison rape until more research into the issue can be conducted pursuant to the terms of the Prison Rape Elimination Act.

¹⁹ *Id.* at 2-3.

²⁰ *See id.* at 3.

²¹ *See* Christopher Hensley et al., *Conjugal Visitation Programs: The Logical Conclusion*, in PRISON SEX: PRACTICE AND POLICY 143-46 (Christopher Hensley ed., 2002). California, Mississippi, New Mexico, New York, and Washington all currently have existing conjugal visit programs.

²² Hensley et al., *supra* note 21, at 149. *See also* Ronald G. Turner, *Sex in Prison*, 36 TENN. BAR J. 12, 26 (2000).

rape.²³ They point to the use of conjugal visits in prisons in other countries as support for their claim that conjugal visits help prevent prison rape.²⁴ For instance, several countries in Europe, Asia, and Latin America currently allow prisoners to have access to conjugal visits.²⁵ Prison officials from these countries assert that conjugal visits are a critical component in preventing prison rape.²⁶ Empirical support for these claims, however, remains scant. Despite the lack of evidence on the effect of conjugal visits, many scholars still propose that such programs can successfully prevent male prison rape.²⁷

Beyond the United States several other countries have recently begun considering implementing conjugal visits programs to combat male prison rape within their own penal systems.²⁸ Therefore, the research and recommendations of the Department of Justice's Prison Rape Elimination Act Review Panel could be influential in shaping the practices of penal institutions beyond the United States. This Note examines whether the use of conjugal visits in prisons is likely to reduce the occurrence of male prison rape, and whether penal systems should begin or continue to implement them. Section II discusses the prevalence of male prison rape in the United States and assesses its devastating impact on prison inmates, the penal system, and society in general. Section III examines the attributes of prison systems that contribute to the occurrence of male prison rape and describes the failure of previous government legislation to address the problem. Section IV considers the existing movement by prison officials both in the United States and in various other countries to have conjugal visits implemented in prisons in order to reduce the occurrence of male rape. Section IV also analyzes the current information on the prevalence of prison rape in

²³ See *id.*

²⁴ See *id.* at 25.

²⁵ Hensley et al., *supra* note 21, at 143. Canada also currently allows prisoners to have access to conjugal visits. See CORRECTIONAL SERVICE OF CANADA, PRIVATE FAMILY VISITS: STANDARD OPERATING PRACTICES (2002), available at http://www.csc-scc.gc.ca/text/ply/sop/700-12e_e.shtml; Turner, *supra* note 22, at 25.

²⁶ Foreign Prisoner Support Service, Americans in Mexican Prisons Across the Rio Grande, a Very Different "Village Within Walls," <http://www.foreignprisoners.com> (last visited Apr. 15, 2006).

²⁷ See Hensley et al., *supra* note 21, at 143-56. See generally Esther Hecht, *Council of Criminology Report: Conjugal Visits Are a Prisoner's Right*, JERUSALEM POST, Feb. 25, 1996 (discussing the benefits of conjugal visits).

²⁸ Craig Watson, *Call for Conjugal Visits in Prison*, HERALD (Glasgow), June 3, 2000, at 9. See also Lewis Machipisa, *Conjugal Visits Not the Right Answer for AIDS in Prison*, INTERPRESS NEWS SERVICE, July 21, 1998, <http://www.aegis.com/news/ips/1998/ip980704.html>; *Malaysian Prisoners Told to Fast and Pray to Curb Sex Drive*, KYODO NEWS INTERNATIONAL, Apr. 14, 2000, http://www.findarticles.com/p/articles/mi_m0WDP/is_2000_April_17/ai_61968139/print; Jo Butler, *Review to Study Conjugal Visits for Prisoners*, PRESS ASS'N, Mar. 3, 1999.

countries that allow conjugal visits. Section V discusses the validity of arguments against the use of conjugal visits, and examines the importance of future research on the impact of conjugal visits in reducing male rape. This Section looks at how the Prison Rape Elimination Act will draw on such research in its nationwide prison rape studies and discusses how other countries should use this research to verify whether the existence of conjugal visits within the prisons systems actually reduces male rape.

II. A VIVID PORTRAIT OF MALE PRISON RAPE

Male prison rape is a common, accepted part of prison life in the U.S. prison system,²⁹ as most inmates expect to be become victims of prison rape at some point during their incarceration.³⁰ For years, the U.S. legal system and various human rights organizations have been documenting the prevalence of male prison rape.³¹ Scholars who study prison rape have become familiar with its disturbing impact on inmates, their families, and society.³²

A. The Pervasiveness of Male Prison Rape in the U.S. Prison System

In April 2002, the American Civil Liberties Union filed a civil suit in Federal District Court against the Texas Department of Criminal Justice and various prison officials at a Texas state prison.³³ The suit was filed on behalf of former prison inmate Roderick Johnson, who had previously been incarcerated in a Texas prison for eighteen months following a parole violation.³⁴ The suit alleges that Mr. Johnson was repeatedly raped by prison inmates during his incarceration, and that prison officials refused to discipline the offenders or take measures to prevent the assaults.³⁵

Court documents reveal that Mr. Johnson told prison officials about the rapes, and they “would take pleasure in his plight” and “suggested he

²⁹ See HASSINE, *supra* note 10, at 133-34.

³⁰ *Id.*

³¹ See *Farmer v. Brennan*, 511 U.S. 825 (1994). See also Excerpts from Prisoners' Letters to Human Rights Watch, *supra* note 1.

³² See Hensley et al., *supra* note 21, at 43. See also Gordon James Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 HOWARD J. CRIM. JUST. 267, 269 (1999). See also Stop Prisoner Rape, The Basics on Rape Behind Bars, http://www.spr.org/en/doc_01_factsheet.html.

³³ Adam Liptak, *Ex-Inmate's Suit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.

³⁴ *Id.*

³⁵ Press Release, Am. Civil Liberties Union, Texas Officials Complicit in Gang Rape and Sexual Slavery of Gay Black Man, ACLU Charges (Apr. 17, 2002), available at <http://www.aclu.org/Prisons/Prisons.cfm?ID=10176&c=121>.

was enjoying the rapes."³⁶ According to the ACLU's complaint, on the occasion of Mr. Johnson's January, 2002, appearance before the prison's Unit Classification Committee, one prison official stated that he personally believed Mr. Johnson "liked dick."³⁷ Members of the Committee laughed, and the official continued, "You like this shit. . . . 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."³⁸

The complaint states that in February 2002, Mr. Johnson contacted the ACLU and told them he was being forced to act as a sex slave for prison inmates.³⁹ He described how prison gangs were forcing him to perform sex acts with other prisoners in exchange for cigarettes or money.⁴⁰ In one instance, Mr. Johnson stated that a prison gang forced a mentally impaired inmate to rape him with his finger in the prison showers and threatened to beat him severely if he refused to participate.⁴¹ Mr. Johnson told the ACLU that he continually wrote letters and filed complaints with prison officials who continued to dismiss his claims.⁴² Mr. Johnson stated that he was becoming depressed and suicidal and begged the ACLU to bring a claim against the prison on his behalf.⁴³

Similar stories have recently surfaced in the U. S. legal system, indicating that prison rape is a widespread problem in the U.S.⁴⁴ Recent court opinions document the prevalence of male rape in our federal and state prison systems.⁴⁵ In March, 1999, U.S. District Court Judge William Justice stated that evidence in a class action prison rape case overwhelmingly indi-

³⁶ Liptak, *supra* note 33.

³⁷ Complaint at 15, *Johnson v. Johnson* (N.D. Tex. 2002), *available at* <http://www.aclu.org/FilesPDFs/johnson.pdf> [hereinafter *Johnson Complaint*]; Brook, *supra* note 5.

³⁸ *Johnson Complaint*, *supra* note 37, at 16.

³⁹ *Id.* at 17.

⁴⁰ Liptak, *supra* note 33. *Johnson Complaint*, *supra* note 37, at 17-19.

⁴¹ *Johnson Complaint*, *supra* note 37, at 19.

⁴² Liptak, *supra* note 33.

⁴³ *Johnson Complaint*, *supra* note 37, at 12, 17. In October of 2005, a jury found that six of the prison officials involved in Mr. Johnson's case were not liable for violating his constitutional rights by ignoring his "pleas for protection from inmate rapes." Angela K. Brown, *Jurors Reject Texas Prison Rape Lawsuit*, ASSOCIATED PRESS, Oct. 19, 2005, *available at* <http://www.gay.com/news/article.html?2005/10/19/1>.

⁴⁴ *See, e.g.*, *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76 (6th Cir. 1995); *Roland v. Johnson*, 856 F.2d 764 (6th Cir. 1988).

⁴⁵ Elizabeth Alexander, Dir. of Nat'l Prison Project, Am. Civil Liberties Union, Statement: U.S. Must End Torture of Prisoners in America as Well as Iraq, ACLU Says (May 11, 2004), *available at* <http://www.aclu.org/safefree/general/17402prs20040511.html>.

cates the existence of a “prison underworld in which rapes, beatings, and servitude are the currency of power.”⁴⁶ The Supreme Court also recognized the prevalence of male prison rape in *Farmer v. Brennan*. The Court held that prison officials violate the Eighth Amendment if they deliberately disregard the occurrence of male rape.⁴⁷ In his concurrence, Justice Harry Blackmun stated that evidence presented to the Court revealed that the “horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable.”⁴⁸ Justice Blackmun referred to petitioner Dee Farmer, a young black man who had been brutally raped while serving a twenty year prison sentence.

Courts in other countries have also acknowledged the existence of prison rape in the United States.⁴⁹ In April 2001, the Supreme Court of Canada unanimously ruled to block the extradition of four men to the United States, because a Pennsylvania prosecutor involved in the case threatened that the men would become “the boyfriend[s] of a very bad man” if they decided to “wait out the extradition.”⁵⁰ The Court believed the prosecutor was referring to the occurrence of male rape in the U. S. prison system.⁵¹

The Prison Rape Elimination Act of 2003 more precisely documents the estimated prevalence of male rape in U.S. prisons.⁵² According to the Act, “nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape” and “the total number of inmates who have been sexually assaulted in the past twenty years likely exceeds 1,000,000.”⁵³ The statute estimates that incidences of prison rape are even higher for juvenile offenders housed in adult facilities and inmates who are mentally ill.⁵⁴ This information is especially troubling since U.S. prisons house “more mentally ill individuals than all of the nation’s psychiatric hospitals combined.”⁵⁵

National organizations began documenting the existence of prison rape in the U.S. during the early 1980’s. The Executive Director of the non profit human rights organization Stop Prisoner Rape estimates that one in every five male inmates is the victim of a “forced sex incident” while incar-

⁴⁶ *Id.* (quoting *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999)).

⁴⁷ *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁴⁸ *Id.* at 853 (Blackmun, J., concurring).

⁴⁹ Julie Kunselman et al., *Nonconsensual Sexual Behavior*, in *PRISON SEX: PRACTICE AND POLICY 27* (Christopher Hensley ed., 2002).

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See Prison Rape Elimination Act*, 42 U.S.C.A. § 15601 (2006).

⁵³ *Id.* § 15601(2).

⁵⁴ *Id.* § 15601(3).

⁵⁵ *Id.*

cerated.⁵⁶ One in every ten inmates admits to being raped.⁵⁷ First time offenders report even higher instances of prison rape, especially during the first few hours of incarceration.⁵⁸

International organizations also maintain that prison rape is a prevalent problem the United States.⁵⁹ Human Rights Watch recently conducted a three-year study examining male rape in U.S. prisons.⁶⁰ The organization collected information from 200 prisoners in thirty-seven states, and reported that a majority of these prisoners stated that they had been raped or otherwise sexually abused at some point during their incarceration.⁶¹ Studies conducted by individual researchers largely support the findings of Human Rights Watch, and also indicate that the occurrence of male rape in the U.S. prison system is not a recent phenomenon but one that has been documented by researchers since the late sixties.⁶²

Sociologist A.J. Davis studied sexual assault in the Philadelphia prison system from 1966 to 1968.⁶³ He interviewed a total of 3,304 prisoners, and 156 of these prisoners reported being sexually assaulted by fellow inmates.⁶⁴ They corroborated the prisoners' testimony with polygraph tests and institutional documents kept by prison officials.⁶⁵ The results of the study were generalized to rate the entire population of prisoners who had been in the prison system during the two year period, and Davis concluded that the "true number of sexual assaults in the 26-month period was in the neighborhood of 2,000."⁶⁶

Not all studies indicate that rape is a prevalent problem in prison systems within the U.S. In 1983, sociologists conducted a study of federal prisons and found low rates of reported sexual assault.⁶⁷ Only two prisoners

⁵⁶ *The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary, 107th Cong. (2002)* (statement of Lara Stemple, Executive Director, Stop Prisoner Rape) [hereinafter Lara Stemple Statement], available at <http://www.spr.org/en/reductionactstatement.html>. These estimates are based off a study that was conducted in prisons across four Midwestern states.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See e.g., HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), available at <http://www.hrw.org/reports/2001/prison/report.html>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Knowles, *supra* note 32, at 268.

⁶³ *Id.*

⁶⁴ *Id.* See also Kunselman et al., *supra* note 49, at 30-31.

⁶⁵ Knowles, *supra* note 32, at 268.

⁶⁶ *Id.* at 269 (citing L.H. BOWKER, PRISON VICTIMIZATION 2 (1980)).

⁶⁷ Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 PRISON J. 413, 416-17 (1995).

out of the 330 interviewed admitted to being victims, and only one of these admitted to being raped.⁶⁸ However, researchers perceived that the prisoners were afraid to admit they were raped for fear of repercussion from other inmates.⁶⁹ Prisoners also may have refused to admit to having had sex with other men for fear of being labeled “weak” or “gay.”⁷⁰ Many inmates feel that admitting to being a rape victim “goes against the inmate code whereby status and power are based on domination and gratification.”⁷¹ More recent research involving sexual assault in prisons found that about 20% of prison inmates report being “coerced into having sex” at least once during incarceration.⁷² In 2000 a study of 1,788 inmates in seven different prison facilities had similar results, reporting that 16% of inmates admit to being raped while in prison.⁷³ The study also found that the “rate of sexual coercion” varied drastically among the different institutions surveyed.⁷⁴

Prison authorities tend to report lower incidences of prison rape.⁷⁵ According to the U.S. Justice Department, only 10% of inmates report physical or sexual assaults.⁷⁶ Prison officials admit, however, that they may underreport incidents of rape because it is hard for them to tell whether sex acts in prison are non-consensual.⁷⁷ Inmates are often coerced into performing sex acts through non-physical means and appear to be willing participants.⁷⁸ Some inmates agree to engage in sex acts with other inmates because they are afraid that if they refuse to do so they will be severely beaten.⁷⁹ Therefore, it may seem to prison officials that they have consented to participate in sexual relationships with other inmates. Similarly, many inmates feel it is better to “give in” to sexual pressure rather than fight back

⁶⁸ *Id.*

⁶⁹ *Id.* at 418 (citing W. WOODEN & J. PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON* (1982)).

⁷⁰ *Id.*

⁷¹ *Id.* (citing W. WOODEN & J. PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON* (1982)).

⁷² Kunselman et al., *supra* note 49, at 34.

⁷³ *Id.* (referring to C.J. Struckman-Johnson & D.L. Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 *PRISON J.* 379 (2000); C.J. Struckman-Johnson & D.L. Struckman-Johnson, Paper Presented at the Annual Meeting of the Academy of Criminal Justice Sciences, New Orleans, La.: *Sexual Coercion Rates in Ten Prison Facilities in the Midwest* (Mar. 22, 2000)).

⁷⁴ *Id.*

⁷⁵ Wendy McElroy, *Confronting Prison Rape*, IFEMINISTS, <http://www.ifeminists.net/introduction/editorials/2003/0916.html>; HUMAN RIGHTS WATCH, *supra* note 59, §§ 1, 7.

⁷⁶ Press Release, U.S. Dep’t of Justice, *Prior Abuse Reported by Inmates and Probationers* (Apr. 11, 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/press/parip.pr>.

⁷⁷ HUMAN RIGHTS WATCH, *supra* note 59, § 5.

⁷⁸ *Id.*

⁷⁹ See Liptak, *supra* note 33.

and risk serious injury at the hands of their attackers.⁸⁰ Prisoners also feel that prison officials are unresponsive or unwilling to intervene, so prisoners do not approach authorities about the problem.⁸¹ Unless prison officials actually view a brutal rape by one inmate upon another, they have trouble verifying how often prison rape actually occurs.

Some prison officials also admit that they do not report instances of prison rape even when they believe it is occurring, because they have not been properly trained on how to handle the situation.⁸² One former prison guard remembers "being acutely aware" that certain inmates were being raped or were in danger of being raped, but felt that there was nothing she could do about it and so just pretended not to notice the problem.⁸³ At times she actually witnessed sexual acts between two prisoners, but avoided interfering to find out if the behavior was actually consensual because she was embarrassed.⁸⁴ Other guards refused to intervene because they felt the prisoners deserved it, and they would ridicule inmates who came forward for help by derogatorily referring to them as "punks, bitches, and queens."⁸⁵

To date, there is no conclusive data on the actual number of inmates who are raped by other inmates.⁸⁶ However, the majority of prison studies indicate that about 10-22% of inmates are raped or sexually coerced at least once during incarceration.⁸⁷ Recent litigation and the Prison Rape Elimination Act also support the finding that male rape is a common occurrence in many prisons. Prison authorities agree with the human rights organizations and members of Congress that more research needs to be done, and measures need to be taken to reduce the occurrence of prison rape.⁸⁸

B. The Devastating Effects of Prison Rape

The occurrence of male prison rape in the U.S. prison system can have "a wide range of negative emotional and physical consequences" on inmates, their families and society in general.⁸⁹ Victims of male prison rape

⁸⁰ *See id.*

⁸¹ HUMAN RIGHTS WATCH, *supra* note 59, § 8.

⁸² Eigenberg, *supra* note 8, at 49.

⁸³ *Id.* at 49-50.

⁸⁴ *Id.* at 50.

⁸⁵ *Id.* *See also* Philip Smith, *Report Finds "Deliberate Indifference" to Prison Rape Epidemic*, DRCNET, May 1, 2001, <http://www.alternet.org/story/10813> (discussing how the Human Rights Watch study found that prison guards often "react hostilely to inmates' complaints of rape").

⁸⁶ Pat Nolan, *Prison Rape—It's No Joke*, WASH. TIMES, Sept. 6, 2002, at A23, available at <http://www.washingtontimes.com/archive>.

⁸⁷ *Id.*; HUMAN RIGHTS WATCH, *supra* note 59, § 7; Kunselman et al., *supra* note 49, at 34.

⁸⁸ *See, e.g.*, Prison Rape Elimination Act of 2003, 42 U.S.C.A. § 15601 (2006).

⁸⁹ Kunselman et al., *supra* note 49, at 43.

often experience severe psychological trauma, which can have devastating effects on their abilities to cope with prison life.⁹⁰ In addition to the emotional stress, prison rape also causes serious health problems which ultimately “reach far beyond prison walls” and affect the general public.⁹¹ This section discusses in further detail the emotional, physical, and financial costs associated with incidents of male prison rape.

1. The Psychosocial Effects of Prison Rape

In 1995, a sixteen-year-old boy named Rodney Hulin, Jr. was sentenced to eight years in prison following his conviction for arson.⁹² Although he was a juvenile at the time, he was sentenced to serve his time in an adult prison facility.⁹³ Within a week of his incarceration, Hulin was raped by fellow prison inmates.⁹⁴ Medical examinations conducted at the prison confirmed the rape.⁹⁵ After the rape, Hulin asked prison officials to place him in protective custody.⁹⁶ Hulin was approximately 5’2” and weighed around 125 pounds and felt he could not defend himself against his attackers.⁹⁷ Despite this, prison officials refused to place him in protective custody.⁹⁸

Hulin continued to be sexually assaulted.⁹⁹ He wrote letters to his father detailing the incidents. On January 26, Hulin wrote a note to a fellow inmate stating that he was “tired of living.”¹⁰⁰ The inmate passed the note on to a prison guard, who took the note and then left for fifteen minutes.¹⁰¹ Hulin hung himself in his cell while the guard was gone. His family subsequently filed a civil suit against the Texas penitentiary where Hulin was incarcerated alleging that prison officials failed to protect their son from sexual assault.¹⁰² Their suit claimed that the prison officials’ actions ultimately led to Hulin’s suicide.¹⁰³ The case was recently settled, and Hulin’s

⁹⁰ See generally HASSINE, *supra* note 10, at 83-84.

⁹¹ Kunselman et al., *supra* note 49, at 44.

⁹² HUMAN RIGHTS WATCH, *supra* note 59 (describing the case history of Rodney Hulin).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (indicating that the prison doctor found two tears in Hulin’s rectum).

⁹⁶ Rodney Hulin, Sr., *Beatings, Rape and Suicide at 17—The Experience of a Child in a Texas Prison*, PROJECT NO SPANK, June 3, 1996, <http://nospank.net/hulin.htm>.

⁹⁷ HUMAN RIGHTS WATCH, *supra* note 59 (describing the case history of Rodney Hulin).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

parents reportedly received a little over \$200,000 from the Texas Department of Criminal Justice.¹⁰⁴

Hulin's story demonstrates the severe psychological impact that prison rape can cause. In addition to feeling suicidal, studies indicate that victims of prison rape often experience feelings of inadequacy and have problems sleeping and eating regularly.¹⁰⁵ Victims have trouble expressing their feelings to family and friends, and often experience an "interruption in male-female relationships" upon their release from prison.¹⁰⁶ Tom Cahill, the current president of Stop Prisoner Rape, testified before Congress that he "lost . . . his wife" as a result of his inability to cope with his experiences as the victim of prison rape.¹⁰⁷ Cahill had been the victim of a gang rape after he was arrested for civil disobedience in 1968. Cahill stated that "[r]ape is crazy making. It may be the ultimate humiliation, with very serious and long-lasting psychic damage to the victim as well as to close loved ones"¹⁰⁸

2. Health Effects

In addition to the severe psychosocial impacts, prison rape also increases the rates of Human Immunodeficiency Virus ("HIV") among inmates.¹⁰⁹ Studies indicate that the HIV rate among prisoners is "several fold higher" than that of the general public.¹¹⁰ The fact that many prisoners are intravenous drug users partly explains this statistic, but many prisoners do not contract the disease until after they enter the prison system.¹¹¹ This indicates that prison rape also plays a large part in increasing the spread of HIV in the prison system. In South Africa, AIDS rates among prisoners increased dramatically after inmates began using gang rapes to spread HIV among

¹⁰⁴ Scott Canon, *Progress Lags Despite New Legislation to Stop Prison Rape*, KAN. CITY STAR, Mar. 22, 2004, at A1.

¹⁰⁵ Knowles, *supra* note 32, at 269.

¹⁰⁶ *Id.*

¹⁰⁷ *The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Tom Cahill, President, Stop Prisoner Rape) [hereinafter Tom Cahill Statement], available at <http://www.spr.org/en/reductionactstatement.html>.

¹⁰⁸ *Id.*

¹⁰⁹ Lara Stemple Statement, *supra* note 56.

¹¹⁰ David Rosen et al., *HIV Testing in State Prisons: Balancing Human Rights and Public Health*, in BROWN MEDICAL SCHOOL, INFECTIOUS DISEASES IN CORRECTIONS REPORT (2006), available at <http://www.idronline.org/>. See also Stop Prisoner Rape, The Basics on Prison Rape, http://www.spr.org/en/doc_01_factsheet.html (noting that rates of HIV are five to ten times higher inside prison than they are the general public).

¹¹¹ *Id.* § 6.

their prison enemies.¹¹² Government officials estimate that the increase of these gang rapes has caused AIDS to become the leading cause of death among prisoners within the penal system.¹¹³ In the United States, at least 24,147 inmates were classified as HIV/AIDS positive.¹¹⁴ Some of these inmates contracted the disease after being raped.¹¹⁵ In addition to AIDS, prison inmates in the United States have higher rates of sexually transmitted diseases than those of the entire U.S. population.¹¹⁶ According to the Prison Rape Elimination Act: "Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims."¹¹⁷

3. Financial Costs of Prison Rape

Lara Stemple, the former Executive Director of Stop Prisoner Rape, testified before Congress that prison rape "costs taxpayers dearly in the form of higher rates of recidivism and re-incarceration, increased violence, higher rates of substance abuse, [and] lawsuits brought by victims"¹¹⁸ Victims of prison rape have more trouble reintegrating into society upon release and are more likely to become homeless or require government assisted living.¹¹⁹ In addition to creating reintegration problems, studies indicate that prison rape increases violence towards prison officials and prison staff.¹²⁰ The safety of society is also directly affected by prison rape, since "brutalized inmates [are] more likely to commit crimes when they are released."¹²¹ This finding is especially troubling when one considers that approximately 600,000 inmates are released from U.S. state and federal prisons systems each year.¹²²

It is apparent that the implications of male prison rape affect not only the inmates themselves; they also concern other members of society. Male prison rape causes violent and dysfunctional behavior among inmates,

¹¹² *S. African Prison Gangs Use AIDS Rape as Punishment*, REUTERS NEWMEDIA, Nov. 21, 2002, <http://ww4.aegis.org/news/re/2002/RE021128.html>.

¹¹³ *Id.*

¹¹⁴ Laura M. Maruschak, *HIV in Prisons, 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN, Jan. 2004, <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp01.pdf> (representing the U.S. Dep't of Justice).

¹¹⁵ HUMAN RIGHTS WATCH, *supra* note 59, § 6.

¹¹⁶ 42 U.S.C.A. § 15601(7) (2006).

¹¹⁷ *Id.*

¹¹⁸ Lara Stemple Statement, *supra* note 56.

¹¹⁹ See Tom Cahill Statement, *supra* note 107.

¹²⁰ See generally Lara Stemple Statement, *supra* note 56.

¹²¹ 42 U.S.C.A. § 15601(8) (2006).

¹²² *Id.*

and increases the spread of HIV and other infectious diseases. Therefore, it is imperative for prisons to understand why prison rape occurs and to take steps to prevent it.

III. FACTORS THAT CONTRIBUTE TO THE OCCURRENCE OF PRISON RAPE

Experts agree that various attributes of prison culture contribute to the prevalence of male rape.¹²³ In particular, at least one scholar asserts that overcrowding in the U.S. prison system is the real culprit behind the occurrence of male prison rape.¹²⁴ Other experts contend that the “unisex environment” in the U.S. prison system plays a greater role in explaining why prison rape happens.¹²⁵ It is apparent, however, that previous government legislation addressing the issue of rape has done little to reduce its occurrence in prison.¹²⁶

A. Overcrowding in the U.S. Prison System

Since the 1980's, overcrowding in U.S. prisons has been a significant problem.¹²⁷ As a result, prisons are inadequately staffed and rapes occur more frequently, because prison officials are simply not around.¹²⁸ According to Human Rights Watch, U.S. prisoners are often left alone, especially at night, and guards cannot hear them if they yell for help.¹²⁹ This reduces the likelihood that a prisoner will actually be caught raping an inmate, thus many prisoners are not deterred from engaging in these horrific acts.¹³⁰ Overcrowding also significantly reduces the ability of prison officials to segregate and closely monitor more dangerous, violent offenders.¹³¹ In addition, there is less room for prisoners to be placed in protective cus-

¹²³ James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 12 (1999).

¹²⁴ HASSINE, *supra* note 10, at 134.

¹²⁵ Robertson, *supra* note 123, at 13. *See also* Knowles, *supra* note 32, at 272.

¹²⁶ *See* Stop Prisoner Rape, *The Basics on Prison Rape*, http://www.spr.org/en/doc_01_factsheet.html (discussing how all fifty states and the District of Columbia have laws that criminalize rape, yet few prosecutors “concern themselves with crimes against inmates” thus this legislation is rarely enforced and does little to protect the inmates).

¹²⁷ *See generally* HUMAN RIGHTS WATCH, *supra* note 59, § 2 (explaining that the number of inmates in the U.S. prison system began accelerating in the 1980's and that “the expansion in prison capacity, via new prison construction, has not kept pace with this growth in the inmate population”). *See also* Knowles, *supra* note 32, at 272 (discussing how in the 1980's and 90's overcrowding in the U.S. prison system rose “to new heights”).

¹²⁸ *See generally* HUMAN RIGHTS WATCH, *supra* note 59, § 2.

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *Id.*

tody away from the general prison population.¹³² Therefore, in many circumstances violent offenders have access to their victims on a daily basis.¹³³

The recent increase in the use of “double celling” also contributes to the occurrence of prison rape.¹³⁴ On average, it costs \$20,000 a year to house a prisoner in his own individual cell.¹³⁵ Therefore, prisons have recently begun placing two inmates in cells designed for single occupancy in an effort to reduce housing costs.¹³⁶ Many of these prisons also allow the inmates to choose their own cellmates.¹³⁷ Unfortunately, according to one former inmate, the practice of allowing inmates to choose their cellmates becomes a “boon to prison rapists” since it allows sexual predators “to pick their victims and [then] rape them in the privacy of their own cells!”¹³⁸

Some researchers agree that overcrowding contributes to the occurrence of prison rape.¹³⁹ It is not clear from the research, however, that overcrowding in prisons causes prison rape.¹⁴⁰ For instance, overcrowding in U.S. prisons has only recently become a major problem and researchers have been documenting the occurrence of male prison rape since the 1960’s.¹⁴¹ Therefore, sociologists and psychologists who study prison rape often assert that simply reducing overcrowding in prisons will not completely prevent its occurrence.¹⁴²

B. The Unisex Nature of U.S. Prison Systems

In addition to overcrowding, scholars contend that the “one sex, closed society” in prison substantially contributes to the occurrence of

¹³² See, e.g., HUMAN RIGHTS WATCH, *supra* note 59 (describing the case history of Rodney Hulin).

¹³³ *Id.*

¹³⁴ HASSINE, *supra* note 10, at 135.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Stop Prisoner Rape, The Basics on Prison Rape, http://www.spr.org/en/doc_01_factsheet.html (explaining that “overcrowding and insufficient staffing are key contributors to prisoner rape”). See generally HUMAN RIGHTS WATCH, *supra* note 59, § 1 (discussing how the “enormous growth of the country’s prison population” has obvious “consequences with regard to rape” because the prisons are understaffed and thus the guards cannot adequately control and monitor the inmates’ behavior).

¹⁴⁰ Knowles, *supra* note 32, at 272.

¹⁴¹ See *id.*

¹⁴² See *id.*

prison rape.¹⁴³ Since inmates in most prison systems are confined in male-only institutions, heterosexual social and sexual activity is usually completely nonexistent.¹⁴⁴ Therefore, prisoners who are not homosexual have no outlet for their sexual impulses. It has been documented that many prisoners report having their first consensual homosexual contact for the first time in prison.¹⁴⁵ This suggests that long term lack of a female sex partner may force some prisoners to eventually begin participating in homosexual activity. If a prisoner cannot find a willing homosexual partner, he may eventually turn to rape as relief for his sexual frustration.¹⁴⁶

In addition to sexual frustration, the lack of ability to engage in heterosexual relationships imposes a "symbolic castration" on male inmates, which can be a "profound threat to a prisoner's self image."¹⁴⁷ Since prisoners have very little communication with women, they feel as if they have lost certain attributes of their masculine identity.¹⁴⁸ In particular, inmates who are married fathers have feelings of frustration and helplessness because they can no longer perform their role in the family effectively.¹⁴⁹ To reaffirm their masculine identity, these prisoners turn to acts of aggression such as male rape, which is seen as "the premier act of domination" in many prison systems.¹⁵⁰ The acts of aggression become statements of the inmates' masculinity.¹⁵¹

The symbolic castration theory has been reaffirmed by practices of male prison inmates in the Louisiana penal system, where the inmates refer to male rape as "turning out."¹⁵² The purpose of this "turning out" is to "redefine [the inmate] as a 'female' . . . and he must assume that role as the

¹⁴³ Knowles, *supra* note 32, at 272 (citing A.I. Ibrahim, *Deviant Sexual Behavior in Men's Prisons*, 20 J. CRIME & DELINQUENCY 38 (1974)).

¹⁴⁴ See Prison Reform Advocacy Center, Critical Facts About the Nation's Prisons, http://www.prisonreform.com/usprison_main.shtml.

¹⁴⁵ Knowles, *supra* note 32, at 273.

¹⁴⁶ Hensley et al., *supra* note 21, at 152 (citing S. Telega, FORTUNE NEWS, Apr. 1974, at 4; J. Gordon & E. McConnell, *Are Conjugal and Familial Visitations Effective Rehabilitative Concepts?*, 79 PRISON J. 119 (1999)). See also Robertson, *supra* note 123, at 13 (citing ANTHONY M. SCACCO, JR., RAPE IN PRISON 3 (1975); WAYNE WOODEN & JAY PARKER, MEN BEHIND BARS 22 (1982); Lee Bowker, *Victimizers and Victims in American Correctional Institutions*, in THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch eds., 1988)).

¹⁴⁷ Robertson, *supra* note 123, at 12 (citations omitted).

¹⁴⁸ See *id.* at 12-13.

¹⁴⁹ Bonnie E. Carlson & Neil Cervera, *Inmates and Their Families: Conjugal Visits, Family Contact, and Family Functioning*, 18 CRIM. JUST. & BEHAV. 318, 319 (1991).

¹⁵⁰ Robertson, *supra* note 123, at 14.

¹⁵¹ *Id.*

¹⁵² Knowles, *supra* note 32, at 273.

'property' of . . . whoever claimed him."¹⁵³ The turned out inmate becomes the "female" in a society where there are no actual women. He satisfies his attacker's sexual needs, washes his clothes, cooks for him, and cleans his cell.¹⁵⁴ Profiles of the typical victims of prison rape also support this theory, as they tend to describe younger males with "feminine characteristics."¹⁵⁵ Juvenile inmates, who tend to be smaller and more feminine looking, are five times more likely to be the victim of male prison rape.¹⁵⁶

Studies indicate that the lack of a female sexual outlet is not as fundamental to the occurrence of male rape as the threat to the inmate's masculine identity that occurs as a result of their isolation from women.¹⁵⁷ Most experts have found that prison rape is generally not just a sexual act, but rather "one of violence . . . and acting out power roles."¹⁵⁸ Prisoners do not rape other prisoners out of sexual frustration, they do so to dominate and humiliate each other.¹⁵⁹ Regardless of the exact reasoning, these theories contend that lack of exposure to women is a significant causal factor to the prevalence of male rape in prison.

C. The Inadequacies of Previous Legal Solutions in Combating Prison Rape

Although experts have identified several aspects of prison culture that contribute to the occurrence of prison rape, few steps have been taken by government officials to address the problem. Legislation explicitly addressing prison rape has been slow to develop, and other laws that prohibit rape have produced unsatisfying results.¹⁶⁰ Therefore, the experts who study prison rape suggest that legislation alone cannot combat the problem.¹⁶¹ In the United States, all fifty states have laws prohibiting rape, including rape

¹⁵³ *Id.*

¹⁵⁴ HUMAN RIGHTS WATCH, *supra* note 59.

¹⁵⁵ *See id.*

¹⁵⁶ Lara Stemple Statement, *supra* note 56.

¹⁵⁷ *See generally* Knowles, *supra* note 32, at 273.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ There were no U.S. laws that explicitly addressed prison rape until the Prison Rape Elimination Act was passed in 2003. Prison Rape Elimination Act of 2003, 42 U.S.C.A. § 15601-02 (2006). *See also* Stop Prisoner Rape, The Basics on Prison Rape, http://www.spr.org/en/doc_101_factsheet.html.

¹⁶¹ *See* Knowles, *supra* note 32, at 274. *See also* ALA. CODE § 13A-6-61 (2005); FLA. STAT. § 794.011 (2004), OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2005); 18 PA. STAT. ANN. § 3121 (West 2005). For a complete list of all fifty statutes that criminalize rape, see Stop Prisoner Rape, Rape and Sexual Assault Laws: A State-by-State Legislative Review, <http://www.spr.org/en/rapelaws.html>.

by prisoners.¹⁶² The 1996 Prison Litigation Reform Act and other similar legislation, however, prevents prison rape survivors from commencing litigation until appropriate remedies within the prison have been exhausted.¹⁶³ In addition, studies indicate that the disinterest of public prosecutors', the inadequate procedures for reporting rape, and the lack of criminal prosecutions of perpetrators of prison rape all support a central conclusion that implementation of laws that simply ban prison rape have little impact on the prevalence of rape in the U.S. prison system.¹⁶⁴

Experts have found that statistical research from other countries indicates that legislation protecting prisoners' rights also does little to reduce the occurrence of prison rape. For instance, the Human Rights Act of 1998 ("HRA"), which incorporates the European Convention on Human Rights into the United Kingdom's legal system, guarantees prisoners certain fundamental rights and ensures that inmates are imprisoned in humane conditions free from unnecessary violence at the hands of other inmates.¹⁶⁵ Despite the implementation of the HRA into the European legal system, prison conditions in the United Kingdom have remained largely unchanged.¹⁶⁶ A recent report by the Chief Inspector for Prisons for Scotland declares that

¹⁶² See, e.g., Stop Prisoner Rape, Rape and Sexual Assault Laws: A State by State Legislative Review, available at <http://www.spr.org/en/rapelaws.html>.

¹⁶³ 1996 Prison Reform Litigation Act, 18 U.S.C. § 3626 (2000).

¹⁶⁴ See generally HUMAN RIGHTS WATCH, *supra* note 59, § 8 (discussing how their study of the U.S. prison system reveals that prison officials often fail to collect evidence or otherwise document the occurrence of rape, and that prosecutors' rarely enforce the laws that ban rape, thus, this helps explain why sexual assaults are so prevalent). See also Stop Prisoner Rape, The Basics on Prison Rape, http://www.spr.org/en/doc_01_factsheet.html.

¹⁶⁵ See Chris McLaughlin, *Inmates May Get Sex Behind Bars*, SUNDAY MIRROR, Aug. 13, 2000, available at http://www.findarticles.com/p/articles/mi_qn4161/is_20000813/ai_n14511669. See also PollyBeth Procter, *Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case*, 31 GA. J. INT'L. & COMP. L. 459, 462, 465 (2003) (noting that the Act guarantees European citizens [including prison inmates] "a number of fundamental rights and freedoms" and since its incorporation English courts have addressed several "landmark prisoner rights cases" and "exhibited a heightened awareness of their new human rights obligations"). The Convention protects a series of fundamental rights, including the right to be free from torture and other degrading treatment. See text of European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁶⁶ See SCOTTISH HOME DEP'T, HM CHIEF INSPECTOR OF PRISONS FOR SCOTLAND, THEMATIC STUDY: THE IMPORTANCE OF VISITS IN SCOTTISH PRISONS (2003), available at <http://www.scotland.gov.uk/library/documents1/hmp-vis00.htm> [hereinafter SCOTTISH REPORT] (noting that prison violence is still a problem in the Scottish prison system). See also Brian Brady, *Europe Torture Watchdog Slams Scottish Prison*, SCOTLAND ON SUNDAY, Mar. 13, 2005, available at <http://scotlandonsunday.scotsman.com/index.cfm?id=274202005>.

Scotland's prisons currently have the high level of prisoner assaults.¹⁶⁷ The report did not explicitly mention the amount of prison rape reported, but a 2001 study of British prisoners found that 43% report being "sexually coerced" at some point during incarceration.¹⁶⁸

As history shows, it is apparent that researchers who study prison rape are correct in asserting that legislation alone cannot prevent the occurrence of male prison rape. These laws are rarely enforced,¹⁶⁹ in part because of the attitudes of prosecutors and law enforcement agents who believe that prison rape is an acceptable part of court imposed punishments.¹⁷⁰ In addition, legislation also often fails to focus on the cultural and sociological aspects of prisons that contribute to the occurrence of prison rape.¹⁷¹ Therefore, as the researchers on the Department of Justice's Prison Rape Elimination Act focus group recommended, prisons must take additional steps to prevent male prison rape by implementing programs that are successful in reducing its occurrence.¹⁷²

IV. THE PROMISE OF CONJUGAL VISITS

Experts who study prison rape claim that conjugal visit programs reduce and prevent male prison rape.¹⁷³ By allowing inmates to spend significant amounts of time with their families, conjugal visits diminish the negative effects of the unisex prison environment which can be "injurious to an inmate's masculine self-image."¹⁷⁴ Maintaining healthy bonds with their children and spouses helps inmates reaffirm their masculinity, and reduces their need to establish a manly self-image by victimizing other inmates.¹⁷⁵ In addition, conjugal visits may provide an incentive for inmates to refrain

¹⁶⁷ See SCOTTISH REPORT, *supra* note 166.

¹⁶⁸ Samantha Banbury, *Coercive Sexual Behaviour in British Prisons as Reported by Adult Ex-Prisoners*, 43 HOW. J. CRIM. JUST. 113, 118 (2004).

¹⁶⁹ See e.g., *Jailed Rapist Gets Eight Extra Years for Prison Rape of Fellow Sex Offender*, IRISH TIMES, June 16, 1998, at 5 (explaining that there has only been one prosecution for male prison rape in the Irish court system despite the fact the male prison rape is illegal in Ireland). See also HUMAN RIGHTS WATCH, *supra* note 59, § 8 (discussing how in "well over 100 rapes reported to Human Rights Watch, not a single one led to the criminal prosecution of the perpetrators").

¹⁷⁰ See, e.g., Mary Beth Lane, *Teen Confronts Killer of Her Best Friend*, COLUMBUS DISPATCH, July 1, 2000, at 1A (quoting an Ohio prosecutor "[y]ou will be beaten repeatedly, and you will be raped, and you will live in terror . . .").

¹⁷¹ See CAL. PENAL CODE § 289.6 (West 2005). See also COLO. REV. STAT. ANN. § 18-7-701 (2004).

¹⁷² CENTER FOR EFFECTIVE PUBLIC POLICY, *supra* note 18.

¹⁷³ Hensley et al., *supra* note 21, at 149.

¹⁷⁴ Robertson, *supra* note 123, at 12.

¹⁷⁵ *Id.* at 50.

from engaging in acts of violence.¹⁷⁶ Recent studies indicate that conjugal visits prevent the occurrence of prison rape, and some prison officials who work in U.S. prisons with conjugal visit programs agree that they often “serve as a behavior-controlling mechanism.”¹⁷⁷ There is also evidence that prison systems in other countries successfully use conjugal visits to lower rates of inmate sexual assault.¹⁷⁸

A. Implementing Conjugal Visits in Prison to Reduce the Occurrence of Male Prison Rape

For years prison officials, criminal psychologists, lawyers and sociologists have argued that conjugal visits reduce the occurrence of male prison rape.¹⁷⁹ They claim that allowing prisoners to have physical access to their families decreases their urge to engage in violent acts, particularly male rape.¹⁸⁰ In addition, it lowers recidivism rates by helping prisoners maintain emotional support systems they can utilize once they are released back into society.¹⁸¹ According to one psychiatrist, “complete isolation of men . . . from all sexual activities of a heterosexual nature is completely unrealistic . . . and results in hostile, aggressive and sometimes dangerous behavior towards other inmates”¹⁸² Married inmates who do not have access to conjugal visits are particularly prone to a “variety of dysfunctional behaviors” such as fighting.¹⁸³ Therefore, denying inmates meaningful contact with their families creates an aggressive atmosphere in prison where rapes are more likely to occur.

Critics of the conjugal visit theory argue that providing prisoners with sexual outlets will not reduce prison rape because prison rape is about power, not sex.¹⁸⁴ Prisoners do not rape other prisoners out of sexual frus-

¹⁷⁶ See Hensley et al., *supra* note 21, at 151 (discussing how there has been very little research on this issue, but one 1964 study found that the conjugal visit programs “could act as a stimulus for the inmates to comply with the policies of the prison”).

¹⁷⁷ *Id.*

¹⁷⁸ Abigail Haworth, *The Prison Where Families are Safe*, MARIE CLAIRE, Oct. 2004, at 118; Nazly Shamel, *Authorities are Debating the Necessity of Conjugal Visits, But Are They Not Seeing the Forest for the Trees?* EGYPT TODAY, Oct. 2004, <http://www.egypttoday.com/article.aspx?ArticleID=2517>.

¹⁷⁹ See Knowles, *supra* note 32, at 279; Turner, *supra* note 22, at 27.

¹⁸⁰ Turner, *supra* note 22, at 27.

¹⁸¹ See Kevin Wright, *Conjugal Visitation: A U.S. Perspective (1977)* (research paper presented to Professor Tyler Fletcher, University of Southern Mississippi), <http://www.fcnetwork.org/reading/conjugal.html>.

¹⁸² Turner, *supra* note 22, at 26.

¹⁸³ Carlson & Cervera, *supra* note 149, at 319.

¹⁸⁴ Knowles, *supra* note 32, at 279.

tration; they do so to dominate and humiliate each other.¹⁸⁵ Some experts contend that prison rapes are the result of power gratification, not sexual gratification and that deprivation of sex or emotional attachment is not the problem.¹⁸⁶ As a practical matter, they argue that even if conjugal visits do help reduce prison rape, implementing them will not help the majority of offenders, "because very few are legally married or have common-law wives."¹⁸⁷

In actuality, statistics show that as many as 46% of inmates report being married at some point and half of these report they are currently married.¹⁸⁸ Sociologist and psychologists also warn critics not to be so quick to dismiss the "devastating effects" that "sexual isolation" can create.¹⁸⁹ One former inmate states that "of all possible forms of starvation, surely none is more demoralizing than sexual starvation. . . . it makes very little or no difference to the average prisoner that the only available means of sexual satisfaction are abnormal."¹⁹⁰

During one of the first comprehensive studies of prison rape in the United States, researchers found that the reasons why the rapes occur were as much cultural and sociological as they were psychological.¹⁹¹ Sexual assaults by prisoners were the inevitable results of the frustration many prisoners feel, which "derive[s] from the same inability while outside prison to achieve a sense of masculine identification and pride through . . . families, and social activities."¹⁹² The researchers suggested that prisoners be allowed conjugal visits to help relieve these tensions.¹⁹³

Proponents of conjugal visits agree with their critics that prison rape is not all about sex, but also point out that conjugal visits are not so narrowly focused.¹⁹⁴ The term "conjugal" refers to the rights that are the recognized inherent rights of married couples in society and "[s]ex is but one component of these rights."¹⁹⁵ Conjugal rights encompass the rights of a couple to associate together, build a home together and enjoy all the privileges of an interpersonal relationship together.¹⁹⁶ Therefore, conjugal visits

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Carlson & Cervera, *supra* note 149, at 318.

¹⁸⁹ See e.g., JULES BURSTEIN, CONJUGAL VISITS IN PRISON 15 (1977).

¹⁹⁰ *Id.* at 17 (quoting VICTOR NELSON, PRISON DAYS AND NIGHTS 143 (1932)).

¹⁹¹ Robertson, *supra* note 123, at 12.

¹⁹² BURSTEIN, *supra* note 189, at 20.

¹⁹³ *Id.* at 29.

¹⁹⁴ See generally Wright, *supra* note 181.

¹⁹⁵ *Id.*

¹⁹⁶ See Carlson & Cervera, *supra* note 149, at 319.

enable inmates to enjoy these attributes while they are incarcerated.¹⁹⁷ Conjugal visits encourage and promote normal family behavior, a critical component of the rehabilitation process.¹⁹⁸

An examination of existing conjugal visits programs in the U.S. supports the assertion that conjugal visits focus more on allowing prisoners to spend quality time with their family, rather than on just giving prisoners access to sex with their spouses. Five states in the U.S. currently allow some form of conjugal visits within their prisons.¹⁹⁹ Mississippi has permitted conjugal visits since 1918.²⁰⁰ The visits take place every two weeks, and can last for up to three days.²⁰¹ Prisoners and their families are taken to eight by ten cottages located on the prison grounds, which are equipped with beds and tables.²⁰² The families are allowed to have picnics, watch TV, play board games and take naps together. Only prisoners in the medium or minimum security housing units are given the right to have conjugal visits regardless of the nature of their original offense.²⁰³ In New York, prisoners who participate in the New York State Department of Correctional Services family program also have overnight visits with their families in homelike settings located on the prison grounds.²⁰⁴

California instituted its first conjugal visit program at the Tehachapi Institution in 1968, and since then has expanded the program to thirty-two other institutions throughout the state.²⁰⁵ Inmates are allowed to have visits with their children, spouses, siblings and parents in modular homes located on the prison grounds.²⁰⁶ The visits can last for up to forty-three hours at a time.²⁰⁷ The program directors state that the program's purpose is to promote "family stability rather than sexual release."²⁰⁸ Conjugal visit pro-

¹⁹⁷ *Id.*

¹⁹⁸ See Hensley et al., *supra* note 21, at 150.

¹⁹⁹ CAL. DEP'T. OF CORR., INMATE VISITING GUIDELINES (2003), <http://www.cya.ca.gov/Visitors/docs/InmateVisitingGuidelines.pdf>; N.Y. DEP'T. OF CORR., HOW TO VISIT AN INMATE (2005), <http://www.nyc.gov/html/doc/html/visit.html>; N.M. DEP'T. OF CORR., INMATE VISITATIONS (2006), <http://corrections.state.nm.us/policies/CD-100200.pdf>; WASH. DEP'T. OF CORR., DOC GUIDE FOR FRIENDS AND FAMILY OF INCARCERATED OFFENDERS (2005), <http://www.doc.wa.gov/general/P184.pdf>; MISS. DEP'T OF CORR., VISITATION (2006), <http://www.mdoc.state.ms.us/>.

²⁰⁰ Wright, *supra* note 181, at 3; Hensley et al., *supra* note 21, at 146.

²⁰¹ Hensley et al., *supra* note 21, at 146.

²⁰² BURSTEIN, *supra* note 189, at 30-31.

²⁰³ Hensley et al., *supra* note 21, at 146.

²⁰⁴ Carlson & Cervera, *supra* note 149, at 320.

²⁰⁵ Hensley et al., *supra* note 21, at 147.

²⁰⁶ *Id.*

²⁰⁷ CAL. DEP'T. OF CORR., *supra* note 199.

²⁰⁸ *Id.*

grams in New Mexico and Washington also focus on promoting family stability and positive behavior among inmates.²⁰⁹

Prison officials who work in prisons that allow conjugal visits also support scholars' contentions that conjugal visits help reduce prison rape.²¹⁰ In New York, prison guards who participate in the Family Reunion Program assert that the conjugal visits reduce rape among inmates because they are used as incentives to induce inmates to "develop good behavior patterns."²¹¹ Research shows that the visits also allow prisoners to keep their sense of masculine identity through normal healthy relationships with women, and not through distorted, power based sexual relations with unwilling victims.²¹² A 1983 study²¹³ also demonstrates that the program's participants are less likely to return to prison than inmates who do not participate.²¹⁴

A recent study of the Mississippi State Penitentiary also reaffirms the prison officials' beliefs that conjugal visits are successful in preventing the occurrence of male prison rape.²¹⁵ One hundred and twenty-six male inmates who participate in the prison's conjugal visit program were asked if they had ever threatened to rape or had actually raped someone while they were incarcerated.²¹⁶ Their responses were compared to the responses of members of the prison population who do not receive conjugal visits.²¹⁷ The results of the study indicated that "conjugal visits have the possibility of reducing violent behavior by inmates [including rape]," because the visits are used as a "control mechanism that can be used to repress this inappropriate behavior in prisons, at least for married inmates."²¹⁸

²⁰⁹ *Id.* at 148-49; N.M. DEP'T. OF CORR., *supra* note 199, at 28 (outlining rules for "Extended Family Visits"); WASH. DEP'T. OF CORR., *supra* note 199, at 29-36 (outlining eligibility and stating that "visitation serves an important role in preserving the healthy relationships between offenders and their family").

²¹⁰ *See, e.g.,* Jim Mustin, *The Family: A Critical Factor for Corrections*, FAMILY CORRECTIONS NETWORK, available at: <http://www.fcnet.org/reading/mutin.html> (citing 1980 New York Department of Correctional Services study indicating positive effects on inmate behavior).

²¹¹ Carlson & Cervera, *supra* note 149, at 320.

²¹² *Id.*

²¹³ *Id.* (citing Howser et al., *Impact of Family Reunion Program on Institutional Discipline*, 8 J. OFFENDER COUNSELING, SERVICES, REHABILITATION 27-36 (1983)).

²¹⁴ *Id.* *See also* Lawrence H. Bennett, *Current Views of Inmate Visiting*, 1988 FAMILY & CORRECTIONS NETWORK 1 (1988), available at <http://www.fcnet.org/1stconf/fmcoron3.html>.

²¹⁵ *See* Phyllis Gray-Ray, *The Effects of Conjugal Visits on Mississippi Inmates*, CORRECTIONS COMPENDIUM, Apr. 1, 2000, at 1, available at <http://www.highbeam.com.library/doc3.asp?docid=1G1:65014247&ctrlInfo=Round9c%3>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

Other than the studies mentioned above, there has been very little research on the impact of conjugal visits on prison rape in the U.S. largely because conjugal visits are not allowed in most U.S. prison systems.²¹⁹ However, the studies that have been done indicate that conjugal visits have a positive effect on prisoners in general, which in turn reduces feelings of inadequacy and frustration that cause prisoners to lash out in the form of sexual assault.

B. The Prevalence of Male Rape in Other Countries that Currently Allow Conjugal Visits

In Europe, many countries have prison programs where conjugal visits are allowed and are granted to prisoners as a "matter of right."²²⁰ Swedish, Danish, and Spanish prisons all currently allow some form of conjugal visits in the prisons on a regular basis.²²¹ European prison officials assert that in their prisons "the sexual drives of [prisoners] are realistically respected. . . . An occasional interlude with a wife . . . [is a] relief of infectious sexual tension . . . it makes more sense than the cat-and-mouse homosexuality so common in Western prisons."²²² The Spanish prison system gives prisoners access to conjugal visits on a monthly basis, and prisoners can invite members of their families as well as close friends.²²³ The visits are open to all prisoners except those who are denied the right out of security concerns.²²⁴ Swedish prisons allow inmates to have visits with family members that can last for up to nine hours.²²⁵

In addition to the European countries, Brazil and Mexico both have some version of conjugal visits available in their penal institutions.²²⁶ Mexican prisons allow inmates' wives to live with them on the prison facilities.²²⁷ In Brazil, national prison law mandates that prisoners are entitled to

²¹⁹ Wright, *supra* note 181.

²²⁰ BURSTEIN, *supra* note 189, at 24.

²²¹ Jorgen Jepson, *Denmark*, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS RIGHTS 99, 126-27 (Dirk van Zyl Smit & Frieder Dunkel eds., 1991); Esther Gimenez-Salinas i Colomer, *Spain*, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS RIGHTS 567, 588-89 (Dirk van Zyl Smit & Frieder Dunkel eds., 1991); Norman Bishop, *Sweden*, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS RIGHTS 599, 613 (Dirk van Zyl Smit & Frieder Dunkel eds., 1991).

²²² BURSTEIN, *supra* note 189, at 25 (citing J. P. CONRAD, CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES 165 (1970)).

²²³ Colomer, *supra* note 221, at 588.

²²⁴ *Id.* at 589.

²²⁵ See Bishop, *supra* note 221, at 614.

²²⁶ BURSTEIN, *supra* note 189, at 25.

²²⁷ *Id.*

visits in prison from girlfriends, wives, and other members of their families.²²⁸ Most prisons in Brazil allow weekly conjugal visits, but these may be withdrawn if the prisoner exhibits disciplinary problems.²²⁹ Recently, Brazilian prison officials have also begun allowing female prisoners to have conjugal visits with male prisoners, as long as they reside in adjacent prison facilities.²³⁰

Prisons systems in Africa and Asia have also successfully implemented the use of conjugal visits.²³¹ The Home Affairs Minister of Kenya, Moody Awori, recently established conjugal visits in Kenyan prisons to reduce instances of homosexuality and the spread of HIV.²³² He declared that “[p]risoners are human beings who need to be rehabilitated. They are not social rejects bereft of any claim to the human right for love and acceptance”²³³ He ordered prisons to immediately begin providing suitable buildings on prison grounds that will allow prisoners to have privacy while they visit their families.²³⁴

In the Philippines, certain prisons allow prisoners’ wives and their children to live within the prisons with their husbands.²³⁵ The prisons consist of small apartments and cottages where inmates can live with their wives and children in private facilities.²³⁶ The wives and the children can come and go as they please, and are allowed to bring some contraband items such televisions and books into the prisons to entertain themselves.²³⁷ Although this sometimes results in overcrowding within the prisons, the prison officials tolerate it because they feel it reduces violent behaviors among inmates.²³⁸ Some Philippine prison guards assert that the presence of children influences the prisoners’ behavior and encourages them to resist engaging in violent activities.²³⁹

There is little research on the actual prevalence of male rape in countries that allow conjugal visits, but many prison officials in these countries assert that their instances of prison rape are significantly lower than in

²²⁸ HUMAN RIGHTS WATCH, BEHIND BARS IN BRAZIL, PART XI PRISONERS CONTACTS WITH THE OUTSIDE WORLD (1997), <http://www.hrw.org/reports98/brazil/Brazil-10.htm>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Kenyan Prisoners “To Have Sex”*, BBC NEWS, Feb. 26, 2003, <http://news.bbc.co.uk/1/hi/world/africa/2800369.stm>.

²³² *Id.*

²³³ *Id.* (quoting Moody Awori, Home Affairs Minister of Kenya).

²³⁴ *Id.*

²³⁵ Haworth, *supra* note 178.

²³⁶ *Id.*

²³⁷ *Id.* at 120, 126.

²³⁸ *Id.*

²³⁹ *Id.*

countries without conjugal visit programs.²⁴⁰ In Egypt, prison officials and criminal psychologists assert that the use of conjugal visits in the Egyptian prison system is a critical factor in reducing the occurrences of prison "rape and other acts of violence."²⁴¹ They claim that when prisoners are denied conjugal visits, their "pent up sexual energy" leads them to engage in these destructive behaviors.²⁴² Similarly, in Mexico prison officials claim that "conjugal visits are the main reason male-on-male [prison] rape is rare inside their [prisons]."²⁴³

In Spain, conjugal visits were re-implemented in the prison system after prison officials found that a majority of prisoners stated their first priority in prison was finding a way to address their sexual needs.²⁴⁴ The prison officials also found that isolating prisoners from their families caused the prisoners to have doubts about an "essential ingredient of their self-image, their masculinity."²⁴⁵ The only alternative prisoners have is to engage in homosexual relationships, including non-consensual relationships, as a way of reasserting their masculinity.²⁴⁶ Since the re-implementation of conjugal visits, however, prison officials have found that the inmates' quality of life and the conditions of the prisons have greatly improved.²⁴⁷

Prison officials in almost all the other countries that currently have conjugal visit programs also note that conjugal visits help reduce acts of prisoner violence because the prisoners do not want to lose access to the conjugal visits.²⁴⁸ In most of these countries, even if conjugal visits are seen as a fundamental right, the right may be taken away if prisoners engage in behaviors that violate prison rules and regulations.²⁴⁹

V. ARE CONJUGAL VISITS THE ANSWER?

Although there is research supporting the assertion that conjugal visits prevent prison rape, many U.S. prison officials still refuse to implement them in their prison systems.²⁵⁰ The officials argue that the "[c]ost of [c]onjugal [v]isitation [o]utweighs the [b]enefits", because conjugal visit

²⁴⁰ *Id.*

²⁴¹ Shamel, *supra* note 178.

²⁴² *Id.*

²⁴³ Foreign Prisoner Support Services, *supra* note 26.

²⁴⁴ Colomer, *supra* note 221, at 589.

²⁴⁵ *Id.* at 589 n.10.

²⁴⁶ *See id.* at 588.

²⁴⁷ *Id.*

²⁴⁸ Bennett, *supra* note 214.

²⁴⁹ Turner, *supra* note 22, at 25.

²⁵⁰ *See* Hensley et al., *supra* note 21, at 143 (noting that several states have dropped their conjugal visitation programs due to the attitudes of society and politicians).

programs create safety problems for inmates and their families.²⁵¹ In addition, preliminary studies indicating that conjugal visits reduce prison rape may be unreliable for a variety of reasons. Research tends to indicate, however, that many of the safety problems associated with conjugal visits can easily be reduced at minimal costs.²⁵² In order to implement the Prison Rape Elimination Act of 2003, the Justice Department is also conducting new studies on inmate sexual assault that addresses the inadequacies of the previous research.²⁵³ Therefore, prison officials should not dismiss the potential value of conjugal visit programs until future research is completed because "refusal or reluctance to devote research attention to the issue is detrimental to the study of corrections . . . and to society as a whole."²⁵⁴

A. Arguments Against the Use of Conjugal Visits

Some prison officials seem to agree that prisoners should not have to accept prison rape as part of their punishment.²⁵⁵ They probably agree that the costly impact of prison rape on prisoners and society demands that something must be done to address the problem and ensure that prison systems do all they can to combat its existence. Preliminary research indicates that many countries, including the United States, successfully use conjugal visits within their prison systems to reduce male prison rape.²⁵⁶ There are still some prison officials, however, who contend that conjugal visits should not be implemented in prisons systems.²⁵⁷ They assert four primary reasons why conjugal visits are not a suitable solution to the problem of male prison rape.

First, prison officials assert that conjugal visits should not be utilized because they create negative feelings in inmates who cannot participate in the programs because they do not have a wife or girlfriend.²⁵⁸ The presence of inmates' wives increases violence within the prison because other

²⁵¹ Reginald A. Wilkinson, *The Cost of Conjugal Visitation Outweighs the Benefits*, CORRECTIONS TODAY, Jun. 2003, available at <http://www.drc.state.oh.us/web/Articles/article76.htm>.

²⁵² Hensley et al., *supra* note 21, at 156.

²⁵³ CENTER FOR EFFECTIVE PUBLIC POLICY, *supra* note 18, at 2-3.

²⁵⁴ Hensley et al., *supra* note 21, at 156 (citing Richard Tewksbury & Angela West, *Research on Sex in Prison During the Late 1980s and Early 1990s*, 80 PRISON J. 368 (2000)).

²⁵⁵ Wilkinson, *supra* note 251.

²⁵⁶ See Gray-Ray, *supra* note 215 (discussing Mississippi's conjugal visit program). See also Carlson & Cervera, *supra* note 149, at 320 (discussing New York's implementation of a conjugal visit program).

²⁵⁷ Wilkinson, *supra* note 251.

²⁵⁸ Haworth, *supra* note 178, at 122. See also Wilkinson, *supra* note 251 (asserting that most conjugal visitation programs only allow visits between couples whose marriage is legally recognized).

inmates who do not have wives get jealous and lash out at those who do.²⁵⁹ Research into the use of conjugal visits, however, tends to rebut the prison officials' assertions. For instance, a research study conducted in 2000 revealed that less than 15% of inmates have a problem with other inmates' use of conjugal visits.²⁶⁰ Similarly, inmates who participate in the programs claim that other inmates do not express animosity towards them just because they have wives and girlfriends who visit them.²⁶¹

Secondly, prison officials argue that conjugal visits create other problems within prison systems by allowing drugs and contraband to be introduced into the prison.²⁶² Conjugal visit programs allow inmates to spend unsupervised time with their families, and this makes it difficult for prison guards to ensure that the inmates' families are not smuggling drugs or other forbidden items into the prison during their visit.²⁶³ Officials at the prisons that provide conjugal visits admit that there can be problems with inmates taking advantage of the relaxed security measures.²⁶⁴ However, they also assert that the possible flow of drugs or weapons into the prison can be controlled with tighter security measures at little extra cost to taxpayers.²⁶⁵ Every conjugal visit program in the United States conducts searches of the facilities where the visits take place before the families arrive and once again after they leave.²⁶⁶ In addition, prisons limit the types of items that families can bring into the prison.²⁶⁷ They also require visiting family members to allow guards to search their clothing and any items they have brought with them before the visit begins.²⁶⁸

In addition to their assertions that conjugal visits make prisons more violent and unsafe, prison officials opposed to its use also argue that "the unsupervised nature of conjugal visits may actually lead to an increased risk to the physical safety of [the inmate's] family members."²⁶⁹ They claim that male inmates who are predisposed to commit family violence are likely to

²⁵⁹ Haworth, *supra* note 178, at 122.

²⁶⁰ Hensley et al., *supra* note 21, at 153.

²⁶¹ Haworth, *supra* note 178, at 122.

²⁶² Wilkinson, *supra* note 251. *See also* Reginald A. Wilkinson & Tessa Unwin, *Visiting in Prison, PRISON AND JAIL ADMINISTRATION'S PRACTICES AND THEORY* (1999).

²⁶³ Wilkinson, *supra* note 251; Wilkinson & Unwin, *supra* note 262.

²⁶⁴ Hensley et al., *supra* note 21.

²⁶⁵ *See* Bennett, *supra* note 214 (asserting that problems with conjugal visits such as drugs and contraband have been dealt with appropriately through "administrative and procedural adjustments").

²⁶⁶ *See, e.g.*, CAL. DEP'T. OF CORR., *supra* note 199, at 1.

²⁶⁷ *Id.* at 4.

²⁶⁸ N.M. DEP'T. OF CORR., *supra* note 199, at Attachment CD-100201.A 1.

²⁶⁹ Wilkinson, *supra* note 251. *See also* McLaughlin, *supra* note 165.

continue to abuse their families during the conjugal visits.²⁷⁰ Therefore, the visits do not promote “healthy family bonding,” they only allow prisoners to continue to participate in unhealthy, dysfunctional family relationships.²⁷¹ Conjugal visitation also endangers inmates and their families by increasing the potential transmission of HIV or other sexually transmitted diseases.²⁷² Inmates or their spouses can unknowingly infect each other, and it is difficult for prison administrators to ensure that the inmates and their wives practice safe sex.²⁷³

All five states with conjugal visits programs, however, have policies to prevent the occurrence of family violence or the spread of HIV.²⁷⁴ In California, maximum security inmates, sex offenders, and other inmates with violent histories are not allowed to participate in the conjugal visit programs.²⁷⁵ Other prison systems deny conjugal visit privileges to inmates with severe disciplinary problems.²⁷⁶ Prison officials also require inmates who participate in conjugal visits programs to receive HIV testing, and to submit to other tests for sexually transmitted diseases before joining the program.²⁷⁷

It seems apparent that “[i]f correctional administrators use standard precautionary measures . . . many concerns associated with conjugal visitation programs can be alleviated.”²⁷⁸ The use of regular HIV and Sexually Transmitted Disease (“STD”) testing can reduce the spread of these diseases, and the implementation of certain eligibility requirements can prevent the occurrence of abuse towards family members. Strict security measures and disciplinary policies also reduce the problems associated with allowing families to have extended, unsupervised visits with inmates.²⁷⁹

So why are some prison officials still adamantly opposed to the use of conjugal visits to reduce the prevalence of male prison rape? The fourth reason that many prison officials refuse to consider implementing conjugal visits is that they may not have confidence in the research that demonstrates

²⁷⁰ Wilkinson, *supra* note 251.

²⁷¹ *Id.*

²⁷² See Machipisa, *supra* note 28.

²⁷³ Wright, *supra* note 181.

²⁷⁴ Hensley et al., *supra* note 21, at 154.

²⁷⁵ *Id.* at 147.

²⁷⁶ *Id.* See also N.M. DEP'T OF CORR., FAMILY VISITS (2006), <http://corrections.state.nm.us/policies/CD-100200.pdf>.

²⁷⁷ Hensley et al., *supra* note 21, at 154.

²⁷⁸ *Id.*

²⁷⁹ CAL. DEP'T OF CORR., *supra* note 199.

that conjugal visits prevent the occurrence of male prison rape.²⁸⁰ According to the Ohio Director of Rehabilitation and Correction, most research on prison rape is based on “disingenuous data” since it is largely relies on self-reporting methods, where inmates fill out forms or simply tell the researcher if they have ever been sexually assaulted.²⁸¹ If the research does not accurately convey the amount of sexual assaults that occur, it also cannot accurately convey the effect of conjugal visits on the prevalence of male rape. Therefore, prison officials should not rely on such research as the basis for implementing costly conjugal visit programs.

Recent research studies indicating that conjugal visits reduce prison rape may also be unreliable because the inmate response rate is typically low.²⁸² In addition, these studies tend to be very small and they only cover a few institutions, thus, any “generalizations to the national correctional population” may not be appropriate.²⁸³ For these reasons, prison officials might believe that the studies do not accurately reflect what is going on within the U.S. prison system on a large scale basis. Researchers who study conjugal visitation programs agree that only a small number of inmates usually participate in the conjugal visitation studies.²⁸⁴ Researchers claim this is because many of the studies require inmates to fill out questionnaires or mail in questionnaire forms.²⁸⁵ Recent research has since shown that few inmates are likely to respond to such questionnaires.²⁸⁶

Scholars have found that inmates do not like to fill out the forms for a variety of reasons.²⁸⁷ First, many inmates have below average reading abilities and cannot understand the questions on the forms.²⁸⁸ Secondly, researchers often do not control the settings in which the inmates fill out the forms, so they cannot guarantee that the inmates are able to complete them in an environment where they feel comfortable doing so.²⁸⁹ For instance,

²⁸⁰ See DATA COLLECTIONS, *supra* note 16 (providing that corrections administrators have concerns about the reliability of data collection in prior studies measuring the prevalence of prison rape).

²⁸¹ Reginald Wilkinson, Letter to the Editor, *Federal Prison Rape Law Is Not Needed*, CINCINNATI ENQUIRER, Dec. 26, 2002, available at <http://www.drc.state.oh.us/web/Articles/article73.htm>.

²⁸² See Gray-Ray, *supra* note 215 (discussing small number of inmates response rates).

²⁸³ DATA COLLECTIONS, *supra* note 16, at 1 (discussing how prison rape studies suffer from these same problems, thus the results may not accurately reflect what is going on within the prison population on a national level). Gray-Ray, *supra* note 215.

²⁸⁴ See Gray-Ray, *supra* note 215 (noting that 30 percent of male inmates and 33 percent of female inmates responded to a particular study in Mississippi).

²⁸⁵ See Kunselman et al., *supra* note 49, at 36; DATA COLLECTIONS, *supra* note 16, at 2.

²⁸⁶ See DATA COLLECTIONS, *supra* note 16, at 2; Gray-Ray, *supra* note 215.

²⁸⁷ DATA COLLECTIONS, *supra* note 16, at 2.

²⁸⁸ See Gray-Ray, *supra* note 215; see also Kunselman et al., *supra* note 49, at 36.

²⁸⁹ See Kunselman et al., *supra* note 49, at 37; DATA COLLECTIONS, *supra* note 16, at 2.

many inmates will not fill out the forms unless they can be assured that their answers will remain confidential.²⁹⁰ Inmates may be embarrassed to admit that they have been raped, or they fear they may be labeled a “snitch” by other inmates who may further abuse them as a result. Therefore, if researchers cannot provide a safe, secluded location where the inmates can fill out the forms in privacy, many will not provide truthful answers to the questions or complete the forms at all.

In other studies examining sexual assaults and conjugal visits, researchers have tried to avoid inmate reading comprehension problems by personally interviewing the inmates.²⁹¹ These studies tended to have even lower response rates because many inmates were too embarrassed to talk to about being raped, or to admit to being a perpetrator of male rape.²⁹² Many inmates do not want to be perceived as weak, or as a homosexual.²⁹³ Perpetrators of male rape may also fear being subjected to disciplinary measures or criminally prosecuted if they tell a researcher they have committed male rape.

In addition to low response rates, experts agree that the small-scale nature of most conjugal visit studies affects their credibility.²⁹⁴ For example, one recent study on conjugal visits and inmate sexual assault only took place in a single institution.²⁹⁵ This study was not replicated in other institutions with conjugal visit programs to see if it garnered similar results.²⁹⁶ This can make it difficult for researchers to tell what aspects of the different conjugal visit programs make them successful in combating prison rape. Similarly, without comparing programs within the different institutions, it is hard to discern if different characteristics within the prisons account for lower or higher instances of prison rape.²⁹⁷

Therefore, proponents of conjugal visit programs agree that more research needs to be done to assess the validity of studies that indicate that such programs reduce the occurrence of male prison rape.²⁹⁸ New studies should address the inadequacies of previous research so experts can use that research to help prison officials determine whether conjugal visits should be used to prevent male prison rape.

²⁹⁰ HUMAN RIGHTS WATCH, *supra* note 59; Kunselman et al., *supra* note 49, at 38.

²⁹¹ See Gray-Ray, *supra* note 215; See generally Kunselman et al., *supra* note 49, at 29.

²⁹² Kunselman et al., *supra* note 49, at 36.

²⁹³ See *id.* at 38.

²⁹⁴ Gray-Ray, *supra* note 215.

²⁹⁵ See *id.* (explaining the results of 2000 study on the effects of conjugal visits on prison rape which took place in the Mississippi State Penitentiary, a male prison in located in Parchman, Mississippi).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Hensley et al., *supra* note 21, at 154.

B. The Importance of Future Research on the Use of Conjugal Visits

Proponents of conjugal visit programs have come to the conclusion that “future research is desperately needed” to determine if conjugal visits reduce and prevent the occurrence of male prison rape.²⁹⁹ New research needs to focus on increasing inmate response rates and broadening the scale of studies to include more prison systems.³⁰⁰ This will allow experts to more accurately assess the prevalence of male prison rape and to make more definitive judgments on the effects of conjugal visit programs. Researchers can then use these studies to verify the claims of prison officials who assert that conjugal visits drastically reduce rates of inmate sexual assault. They can also potentially use the results to finally convince other prison officials that such programs should be implemented for this purpose.

Obtaining such research may be difficult, however, since large scale studies may be too costly for independent researchers to undertake.³⁰¹ In addition, correctional administrators have become reluctant to allow researchers to examine their prisons because they now “view [the work of the researchers] with skepticism and distaste”³⁰² Therefore, many experts became doubtful that such a research project would ever take place.

Then, on June 30, 2004, the Department of Justice (“DOJ”) released a document entitled *Data Collections for the Prison Rape Elimination Act of 2003* (“Data Collection Report”), which details the DOJ’s recent plans to begin implementing the Prison Rape Elimination Act of 2003.³⁰³ Since the Act requires the DOJ to conduct annual studies on the prevalence of male rape in the U.S. prison system, the data collection report outlines the new program the DOJ has developed to accomplish this task.³⁰⁴ The new program is designed to be a “reliable method [for] measur[ing] the problem [of prison rape] so that it can be addressed and eliminated.”³⁰⁵ Experts are doubtful, however, that it will be more reliable than previous studies unless it has been designed to also address existing deficiencies in the current research.³⁰⁶

The Data Collection Report seems to indicate that the DOJ’s research program will attempt to remedy the methodological deficiencies of

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 154.

³⁰² *Id.* at 156.

³⁰³ DATA COLLECTIONS, *supra* note 16.

³⁰⁴ See Prison Rape Elimination Act of 2003, 42 U.S.C.A. § 15601-02 (2006).

³⁰⁵ DATA COLLECTIONS, *supra* note 16, at 1.

³⁰⁶ See generally Kunselman et al., *supra* note 49, at 46 (explaining that future research needs to take into account the methodological difficulties of previous research).

prior sexual assault studies.³⁰⁷ In particular, its first major study seems to have been designed to address some of the primary concerns of prison officials who are skeptical of the current research on male prison rape.³⁰⁸ The status report states that the DOJ recognizes that previous research is unreliable because it is generally “small in scale” and is typically based on surveys that garner low inmate response rates.³⁰⁹ The new DOJ study addresses these defects by enlarging the scope of the prisons included in the research and developing new methods designed to increase the inmates’ response rates.³¹⁰

The DOJ plans to conduct surveys on the incidence of male rape in all fifty State prison systems, the Federal Bureau of Prisons, and several small local and privately owned jails.³¹¹ Surveys will also be distributed to inmates who have recently been released from prison.³¹² The “main objectives” of the surveys is to determine how many inmates report incidences of sexual assault, and to collect information on the characteristics of prisons where prison rape is especially prevalent.³¹³

The DOJ will conduct the surveys using a new method which has been designed to increase the response rates of inmates.³¹⁴ As the DOJ status report recognizes, low response rates to other studies on sexual assault drastically affect the credibility of such studies.³¹⁵ Therefore, the DOJ has designed a research tool called the Audio Computer-Assisted Self-Interviews (“audio-CASI”), which allows inmates to respond to questionnaires on a computer touch screen.³¹⁶ The inmates are also given headphones so they can listen to survey instructions being read aloud.³¹⁷ The DOJ anticipates that the audio-CASI system will help increase the inmates’ “willingness to report sensitive information” by “removing the presence of a personal interviewer.”³¹⁸ The surveys will require the inmates to describe the circumstances surrounding alleged incidents of prison rape so researchers can test the reliability of these “self-reports.”³¹⁹

³⁰⁷ DATA COLLECTIONS, *supra* note 16, at 2.

³⁰⁸ *See id.* at 1.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 2.

³¹¹ *Id.* at 3.

³¹² *Id.* at 2.

³¹³ *Id.* at 3.

³¹⁴ *Id.* at 2.

³¹⁵ *Id.* *See also* Kunselman et al., *supra* note 49, at 36.

³¹⁶ DATA COLLECTIONS, *supra* note 16, at 2.

³¹⁷ *Id.* at 2.

³¹⁸ *Id.* at 2.

³¹⁹ *Id.* at 3.

The use of the audio-CASI system on such a large scale basis within the U.S. prison system should correct many of the deficiencies in previous research studies, and allow experts to gain a better perspective on the occurrence of male prison rape. In addition to increasing response rates by removing the presence of personal interviewers, it also allows inmates with literacy problems to feel more comfortable responding to the surveys.³²⁰ The use of audio instructions should also reduce problems for inmates who generally have trouble reading written instructions.

It is apparent that the DOJ's new data collection methods will reduce many flaws in the methodologies of previous studies.³²¹ To further improve its programs reliability, however, the DOJ should also draw on other findings in recent research that explain why the inmate participation rate in most studies is low. For example, the DOJ should try to assure the inmates that their answers will remain confidential. Research has shown that many inmates refuse to participate in studies because they fear their answers will be shared with other inmates or prison officials.³²² Therefore, the DOJ surveys should assure inmates that their answers will not be shared with anyone other than DOJ researchers.

Finally, the DOJ should try to use other methods to verify the prisoners' stories in addition to having them describe the circumstances of the assault. Many prison officials have doubted past studies on the prevalence of male rape because the researchers could not confirm the inmates stories of sexual assault.³²³ The DOJ could consider examining medical or disciplinary reports of the prisoners to see if there is any physical evidence of the alleged sexual assault. These improvements could help bolster the reliability of the inmates' reports.

With the addition of a few minor enhancements, the research gathered by the DOJ will be an invaluable tool for both proponents of conjugal visit programs and their detractors since it will shed more light on a potential solution to male prison rape. By examining the characteristics of prisoners and prison systems where prison rape occurs, the research may establish whether conjugal visits are a factor in reducing male prison rape. Experts who study prison rape and conjugal visits can finally determine if prisons with conjugal visit programs really do have lower rates of sexual assault. They can potentially use the research to boost support for their claim that conjugal visit programs reduce prison rape and to finally convince reluctant prison officials of the importance of implementing such programs. This

³²⁰ See *id.* at 2.

³²¹ *Id.*

³²² See Kunselman et al., *supra* note 49, at 37-38.

³²³ DATA COLLECTIONS, *supra* note 16, at 1.

future research is extremely important since it could ultimately lead to significant changes within the U.S. prison system.

The results of the DOJ's research could also have effects outside of the U.S. prison system. The United Kingdom, South Africa, and various other countries have been considering implementing conjugal visits in their prisons to help reduce the occurrence of male rape.³²⁴ Administrators from the United Kingdom's Prison Service have stated that they will closely examine research on the U.S. prison system before they determine whether to implement conjugal visits in their prisons to reduce the prevalence of male rape.³²⁵ According to the Chief Executive of the Scottish Forum on Prisons and Families, Scottish prison officials are particularly interested in whether such programs could be successfully transplanted to the Scotland.³²⁶

It is evident that research on conjugal visits and prison rape is important to many countries, including the U.S. Prisons systems all over the world have begun to realize the devastating impact of male prison rape on inmates and society in general. Recent studies indicate that implementing conjugal visits programs helps reduce rates of male prison rape; however, many prison officials are still skeptical that these programs actually accomplish this. There is evidence that deficiencies exist in the present research available on conjugal visits and male prison rape. Therefore, current studies being conducted by the DOJ which address these deficiencies are critically important since they can finally establish if conjugal visits will eradicate a problem that has been plaguing prison systems for decades.

VI. CONCLUSION

In late June of 2000, an Ohio prosecutor stood up to address the courtroom during a sentencing hearing.³²⁷ The prosecutor wanted to share a few words with the defendant, Matthew Vaca, who had just been sentenced to life in prison.³²⁸ After approaching the podium in the center of the courtroom, she calmly turned to Mr. Vaca and said,

"I want you to understand what you have to look forward to [in prison]. You will be beaten repeatedly. And you will be brutally raped. And you will lose every ounce of dignity that you have left in your body.

And you will live in terror . . . for every minute for the rest of your life."³²⁹

³²⁴ Watson, *supra* note 28. *See also* Butler, *supra* note 28.

³²⁵ Watson, *supra* note 28.

³²⁶ *Id.*

³²⁷ Bob Greene, *The Executioners Who Walk Among Us*, CHI. TRIB., July 16, 2000, at C2.

³²⁸ *Id.*

³²⁹ *Id.*

The prosecutor's comments are shocking and disturbing, especially since they accurately describe a scenario that many prisoners face on a daily basis.

For many years, prison rape has been a problem that has been largely ignored by correction officers and law enforcement agencies. With the passing of recent legislation like the Prison Rape Elimination Act of 2003, however, the U. S. government has finally begun to acknowledge the prevalence of male prison rape within the U.S. prison system. The U.S. government may also begin considering if conjugal visits can help prison officials reduce and prevent the occurrence of male prison rape. There is evidence that many countries, including the U.S., have successfully used conjugal visits programs to lower rates of inmate sexual assault.³³⁰ Preliminary studies indicate that conjugal visitation programs lessen the tension and aggravation many inmates experience in prison, which causes them to lash out against other prisoners with sexually violent behavior. Many U.S. prison officials are still opposed to the use of conjugal visits programs;³³¹ however, probably because they doubt the validity of these studies since few inmates participate in them.

Therefore, the DOJ's nationwide prison rape studies are particularly important since they may finally establish if conjugal visits can solve the devastating problem of male prison rape in the U.S. prison system. The research being conducted by the DOJ is especially tailored to discovering what causes prison rape, and it could shed more light on potential solution to a crisis that has been occurring for so long inside the walls of our prisons.

³³⁰ BURSTEIN, *supra* note 189, at 25.

³³¹ Wilkinson, *supra* note 251.