

Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada

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Prison rape is a traumatic event experienced by inmates across the globe. It causes tremendous physical, emotional, and mental pain to those who experience it. This Note offers a specific examination of prison rape in the United States and Canada. While sexual violence is pervasive in both American and Canadian prisons, Canada is not reputed to exhibit the problem to the same magnitude. Three factors that have been suggested as important in reducing actual occurrences of prison rape explain this contrast: differing incarceration rates, the availability conjugal visits, and societal norms. After reviewing these factors, this Note argues that while each of them contribute to the differing reputations, they do not contribute or lead to a reduction in actual occurrences of prison rape. The Note argues that preventing occurrences of prison rape must start with changes to the institutional practices common to both countries, namely changes in prisoner classification methods, and protective custody arrangements. Only when the problems associated with these practices are addressed and altered can we expect to see lower occurrences of prison rape in both Canada and the United States.

I. INTRODUCTION

In one of the many letters sent daily to Human Rights Watch,¹ one Texas inmate explains a growing problem facing today's

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present prison population: “When I was sentenced I didn’t hear the part . . . that stated, ‘you are hereby sentenced to six years of hard labor to the Texas Dept. of Criminal Justice. While there, you will be beaten daily, savagely raped, and tortured mentally, to the point of contemplating suicide.’”² While the Supreme Court has made clear that “[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society,”³ in many cases it very much is.

Sexual assaults in prisons are commonplace across the globe, but the United States is known to have extremely high “prison rape” rates.⁴ Perplexingly, Canada, separated in most places only by an invisible border, is not reputed to have a problem of the same magnitude.⁵ This Note will examine the reasons for prison rape in general, and will attempt to determine why the U.S. carries this negative reputation, and whether this reputation is an accurate reflection of the prevalence of prison rape in the United States and Canada. In making this determination, the Note will consider several factors that have been suggested as important to reducing actual occurrences of prison rape. The Note will then determine whether these factors translate into fewer occurrences of prison rape in Canada as opposed to in the United States. Finally, after concluding that these factors contribute more to the differing perception of prison conditions in the United States and Canada than to actual occurrences of prison rape, the Note will analyze institutional practices common to both countries, and address ways these practices can be altered to lower occurrences of prison rape in both Canada and the United States.

In the early 2000s, at around the time Congress passed the Prison Rape Elimination Act, the issue of sexual violence in our nation’s prisons was brought to the forefront. A 2001 New York

1. Human Rights Watch is an organization dedicated to defending, protecting, and advocating for human rights around the world. *See generally* About Human Rights Watch, <http://hrw.org/about> (last visited Feb. 20, 2009).

2. JOANNE MARINER, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 177 (2001), *available at* <http://www.hrw.org/reports/2001/prison/report.html> (citing a letter from M.O., a prisoner serving time in Texas in 1996).

3. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

4. *See* MARINER, *supra* note 2, at 3 (“Few members of the public would be surprised by the assertion that men are frequently raped in prison, given rape’s established place in the mythology of prison life.”).

5. While statistical evidence of occurrences of prison rape in Canada is hard to come by, anecdotal evidence suggests that this is the case. *See infra* Part II.D.

Times article suggested that rape has become accepted as a fact of prison life. The article noted that “[f]ew prison rapists are ever prosecuted, and most prisons provide little counseling or medical attention for rape victims, or help in preventing such attacks.”⁶ Scholars have noted that research on sexual victimization in prisons is a controversial, often neglected area of criminal justice, because it is not a “‘clean,’ ‘easy,’ or ‘safe’ topic.”⁷

Recognition of the problems associated with prison rape is the first step in combating what has become a global crisis. In Part II, this Note will set forth the background of prison rape with a specific examination of the United States and Canada. Part III will analyze the current state of the law with respect to prison rape in both countries. Part IV will suggest three factors (incarceration rates, conjugal visits, and societal norms) that contribute to the proposition that prison rape is far worse in the United States than in Canada. The Note will discuss whether altering or adopting these factors can practically reduce occurrences of prison rape in the United States, or whether the factors simply contribute to what the Note refers to as the “reputation gap.” Part V will analyze factors common to both the United States and Canada, and argue that these factors can be altered through the reform of standard prison rules to reduce occurrences of prison rape in both countries.

II. BACKGROUND ON PRISON RAPE

This section will first discuss the physical, mental and emotional effects of prison rape generally. Next, it will discuss several reasons that make the prevention of prison rape so difficult. After establishing and understanding why combating prison rape is so challenging, this section will provide a background of prison rape in the United States and Canada. This background will include statistics as well as anecdotal information to show the prevalence and occurrences of prison rape in both nations.

6. Tamar Lewin, *Little Sympathy or Remedy For Inmates Who Are Raped*, N.Y. TIMES, Apr. 15, 2001, at A1.

7. Richard Tewksbury & Angela West, *Research on Sex and Prison During the Late 1980s and Early 1990s*, 80 PRISON J. 368, 368 (2000).

A. EFFECTS OF PRISON RAPE GENERALLY

The trauma of being raped in prison transcends the physical pain and embarrassment associated with this sexually violent treatment. Prison rape can increase the rate of post-traumatic stress disorder and depression, and can worsen existing mental illness among both current and former inmates.⁸ Prisoners who worry and are constantly on alert to being assaulted and victimized are at a high risk of suffering from psychophysiological conditions that include asthma, ulcers, colitis, and hypertension.⁹ These conditions can also lead to rape trauma syndrome ("RTS"), a disease that while typically associated with non-incarcerated women occurs in men as well. When untreated, sufferers of RTS can experience feelings of helplessness, shame, nightmares, self-blame, suppressed rage, violent behavior, and social and sexual dysfunction.¹⁰ These symptoms can last anywhere from a few days to decades, or even to life.¹¹ Furthermore, recovery from RTS is severely hindered, as victims remain incarcerated and "unable to withdraw from the setting of their victimization."¹² As a result of the systemic under-reporting of rapes in prison, psychological treatment is often not requested, or is simply unavailable, thereby worsening the length and extent of the effects.¹³ In

8. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(15)(C) (Supp. V 2005).

9. Robert W. Dumond & Doris A. Dumond, *The Treatment of Sexual Assault Victims*, in PRISON SEX: PRACTICE AND POLICY 67, 71 (Christopher Hensley ed., 2002); see also MARINER, *supra* note 2, at 122 (noting that psychological effects of being raped can also include nightmares, deep depression, loss of self-esteem, self hatred, a marked increase in anger and a tendency toward violence).

10. MARINER, *supra* note 2, at 115–16; Charles Crawford, *Sexual Assault Behind Bars: The Forgotten Victims*, in SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA 73, 78 (James F. Hodgson ed., 2001); see generally Dumond & Dumond, *supra* note 9, at 69 ("The sequel of sexual victimization has physical, cognitive, social, behavioral, and psychological components, yet during incarceration, sexual victimization has additional effects on victims."); *Prison Rape Prevention: Hearing Before the Committee on Senate Judiciary*, 107th Cong. (2002) (Statement of Rep. Frank R. Wolf) ("Severe psychosis is the most common outcome of prisoner rape . . . In the advanced stages of rape trauma syndrome, a survivor's mood often swings between deep depression and rage. Prisoner rape may be the quickest, most cost effective way of producing a sociopath.").

11. ENCYCLOPEDIA OF HOMOSEXUALITY 1096 (Wayne R. Dynes ed., 1990).

12. Stephen Donaldson, JUST DETENTION INT'L, RAPE TRAUMA SYNDROME IN MALE PRISONERS (1994), available at http://www.justdetention.org/en/docs/doc_01_rts.aspx.

13. See Lawrence J. Cohen & Susan Roth, *The Psychological Aftermath of Rape: Long-Term Effects and Individual Differences in Recovery*, 5 J. SOC. & CLINICAL PSYCHOL. 525, 533 (1987).

the most extreme cases, some inmates would rather take their own lives than subject themselves to the continuous pain and suffering of sexual assault. A seventeen year old boy, in prison for setting a dumpster on fire, writes:

Since I was placed in prison . . . I have found myself to be more mentally and emotionally destroyed than I have ever been. I'm very sorry to end my life this way. But if I don't do this, someone will. I'm saying I'd rather die of my own free will than be killed. I love you Mom and Dad.¹⁴

Aside from the physical, mental, and emotional effects, the spread of HIV/AIDS, tuberculosis, hepatitis B and C, and other sexually transmitted diseases threaten prisoners within correctional facilities.¹⁵ In the United States in 2005, over 20,000 prisoners (1.7% of the male prison population) were diagnosed with HIV/AIDS.¹⁶ In Canada, as of 1997, there were 158 known cases of HIV and 20 cases of AIDS, which translates to an infection rate of more than 10 times that of the general Canadian population.¹⁷ The risk of spreading these diseases has consequences that extend far beyond prison walls. Infected prisoners who are released risk transmitting viruses or deadly diseases to their partners or spouses. Christopher Hensley, in his book entitled *Prison Sex: Practice and Policy*, describes this potential outcome as a "death sentence for both the inmates and their significant others."¹⁸

14. ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS ON AMERICA'S PRISONS 61 (citing Gabriel Media, Rodney Hulin Suicide Note, available at http://www.gabrielfilms.com/prisonrapefilm/documentation/hulin_6.html).

15. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(15)(B) (Supp. V 2005); see generally Rosemary L. Gido, *Inmates with HIV/AIDS: A Growing Concern*, in PRISON SEX: PRACTICE AND POLICY *supra* note 9, at 101, 101–10.

16. LAURA M. MARUSCHAK, U.S. DEPT. OF JUST., HIV IN PRISONS 1 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp06.pdf>.

17. Allan Manson, *Canada*, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS 135 (Dirk van Zyl Smit & Frieder Dunkel eds., 2001).

18. Christopher Hensley, *Introduction: Life and Sex in Prison*, in PRISON SEX: PRACTICE AND POLICY *supra* note 9, at 1, 11.

B. THE DIFFICULTY WITH COMBATING PRISON RAPE

One of the major obstacles in combating the problem of prison rape is the fact that countless rapes go unreported each year.¹⁹ This under-reporting can have three explanations: first, inmates fail to report acts of sexual violence; second, inadequate staffing and lack of supervision; third, prison officials remain quiet and turn a blind eye to avoid having to report to higher officials. For some inmates, admitting that he was raped or sexually assaulted is like admitting that he is not a man.²⁰ Inmates also fear that by reporting the abuse, they risk being labeled a “snitch,” a connotation that can lead to further sexual abuse and violence.²¹ Because of the negative consequences of reporting incidents, prisoners often attempt to “protect” themselves and escape sexual assault by multiple inmates by essentially becoming “sex slaves.”²² A vulnerable prisoner will typically seek out a larger, older and “better established” inmate²³ and will “consent” to various sexual acts and other menial tasks, such as making one’s bed,²⁴ in exchange for protection against being raped by other inmates.²⁵ Once a victim realizes that being raped is inevitable, he will often comply with little direct pressure, with the hopes of reducing the physical pain of the act.²⁶ This is often referred to as “protective coupl-

19. See ELSNER, *supra* note 14, at 61 (explaining that “most victims feel too embarrassed and humiliated even to tell friends and loved ones and too terrified to tell prison authorities”).

20. Crawford, *supra* note 10, at 76.

21. ELSNER, *supra* note 14, at 62 (“Under the prison ‘code of silence,’ any prisoner fingered as a ‘snitch’ can measure his life expectancy in hours rather than days. Rapists often warn their victims to keep their mouths shut if they want to live.”).

22. Wilbert Rideau, *The Sexual Jungle*, in LIFE SENTENCES, RAGE AND SURVIVAL BEHIND BARS 73, 76 (Wilbert Rideau & Ron Wikberg eds., 1992). Dr. Frank L. Rundle, Director of Correctional Services of New York City explains that “[t]here certainly are weak men who become forced into the position of being a sex slave or the ‘whore’ and accept it unwillingly — but accept it. They have no alternative — they’re either going to be hurt or killed if they don’t.” *Id.*

23. See MARINER, *supra* note 2, at 68.

24. *Id.* at 163 (citing M.P., a pro se federal civil rights complainant).

25. MARINER, *supra* note 2, at 89; see also KEVIN MARRON, THE SLAMMER: THE CRISIS IN CANADA’S PRISON SYSTEM 48 (Doubleday Canada Ltd. 1996) (“According to Dorchester Penitentiary inmate Gerald Benoit, predators often misapply skills that they have learned in prison therapy programs to manipulate their victims. He said they listen to the fears of the younger prisoner and then exploit them by offering them protection.”).

26. MARINER, *supra* note 2, at 89.

ing.”²⁷ For these victims, being raped by one man is better than being raped by multiple men. This protective arrangement is often accepted by correctional officers as consensual.²⁸ This “consent” is anything but. Yet, due to the nature of the arrangement, these events are undetected, and go unreported.

Rape typically occurs when there is no prison staff around to see or hear it.²⁹ The Human Rights Watch report on male rape in prison has surmised that the “inadequate staffing and supervision of inmates . . . [is] . . . [a]nother casualty of the enormous growth of the country’s prison population.”³⁰ Often, prison officials fail to make their rounds at regular intervals, and even when they do, they often neglect to make a meaningful effort to determine precisely what is going on in the various areas of the prison.³¹ One inmate has explained that “[r]apes occur because the lack of observation make it possible. Prisons have too few guards and too many blind spots.”³²

Even where prison guards are present and aware, as long as there is no visible physical injury, prison guards will often stand by and suggest that the alleged rape was in fact consensual sex, simply because the prisoner was considered “weak” and not strong enough to repel such victimization.³³ In many cases, prison officials just turn away, and pretend that such violence is not really occurring.³⁴ One former correctional officer admits being “acutely aware” that many of the prisoners were in danger of being raped; however, with no solutions to offer them, she ignored

27. Crawford, *supra* note 10, at 78 (noting that this survival strategy often violates official prison rules because, on its face, the arrangement appears consensual — and even consensual relationships violate prison rules).

28. James E. Robertson, *Rape Among Incarcerated Men: Sex, Coercion and STDs*, 17 AIDS PATIENT CARE & STDs 423, 427 (2003) (citing Helen M. Eisenberg, *Correctional Officers’ Definition of Rape in Male Prisons*, 28 J. CRIM. JUST. 435 (2000)); Helen M. Eisenberg, *Prison Staff and Male Rape*, in PRISON SEX: PRACTICE AND POLICY *supra* note 9, at 49, 50 (recalling “numerous instances where other officers and/or I stumbled upon inmates engaged in sexual activities with each other and chose to ignore it. Embarrassed to confront the situation, many of us justified looking the other way by assuming these acts were consensual”).

29. MARINER, *supra* note 2, at 10.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 152–53.

34. Crawford, *supra* note 10, at 78.

the problem and pretended like nothing was going on.³⁵ Charles Crawford, author of *Sexual Assault Behind Bars: The Forgotten Victims*, explains that for prison administrators, admitting that such behavior exists in their institutions is a “public relations nightmare.”³⁶ Stephen Donaldson, former President of the U.S. based organization, Just Detention International (“JDI”) (formerly known as Stop Prisoner Rape),³⁷ explains that denying or ignoring the problem of prisoner sexual aggression “will not make it go away, and will instead allow it to fester and multiply.”³⁸

C. BACKGROUND OF PRISON RAPE IN THE UNITED STATES

The prevention of prison rape is made more difficult in a society that accepts prison rape as a part of every day life in our nation’s prisons. In 1980, Justice Blackmun summarized the findings of researchers and government agencies in this area:

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping the abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system.³⁹

Prison rape was recognized as a problem in the United States before the twenty-first century, but until recently, no research confirmed what Justice Blackmun and others had surmised as true. With as many as 2,319,258 Americans (one out of every 99

35. Eisenberg, PRISON SEX: PRACTICE AND POLICY, *supra* note 28, at 49.

36. Crawford, *supra* note 10, at 78.

37. Just Detention International is an organization whose mission “seeks to end sexual violence committed against men, women, and youth in all forms of detention.” Just Detention International, http://www.justdetention.org/en/mission_statement.aspx (last visited Jan. 26, 2009).

38. Stephen Donaldson, *Administrative Policy and Prisoner Rape*, http://www.justdetention.org/en/docs/doc_01_policy.aspx (last visited Jan. 26, 2009).

39. *United States v. Bailey*, 444 U.S. 394, 421–22 (1980) (Blackmun, J., dissenting).

adults) in jail or prison at the start of 2008,⁴⁰ the threat of being raped in our nation's prisons is greater than ever. While the research may still be insufficient, the latest conservative estimates indicate that at the very least, thirteen percent of the United States' inmates have been sexually assaulted while incarcerated in prison.⁴¹ This conservative number translates to almost 200,000 inmates currently in jail, and over 1,000,000 inmates in only the last twenty years.⁴² In a 2007 U.S. Department of Justice survey of 23,398 prisoners in 146 state and federal prisons, 1109 of them reported experiencing one or more incidents of sexual victimization within the past twelve months.⁴³ The Department translated those numbers into a nationwide estimate of 60,500 inmates that have experienced one or more incidents of sexual victimization while in prison in 2007.⁴⁴ Only six of these 146 facilities had no reports of sexual victimization from the sampled inmates, while ten of these facilities had prevalence rates of 9.3% or higher.⁴⁵

In the rare case where a victim does come forward, "[t]he flaws of grievance mechanisms . . . tend to be plagued by a lack of confidentiality, which may expose the complaining prisoner to retaliation by others, a bias against prisoner testimony, and a failure to seriously investigate prisoners' allegations."⁴⁶ Moreover, the Prison Litigation Reform Act of 1996 ("PLRA") places additional obstacles in the way of vindicating the rights of prisoners.⁴⁷ It mandates the use of these flawed grievance mechanisms, limits prisoners' access to courts by barring recovery of damages for pain and suffering absent a showing of physical injury⁴⁸ and

40. JENIFER WARREN, THE PEW CTR. ON THE STATES, ONE IN ONE HUNDRED: BEHIND BARS IN AMERICA 5 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

41. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (Supp. V 2005).

42. *Id.*

43. ALAN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, DEP'T. OF JUSTICE, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES 2 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svspfpr07.pdf>.

44. *Id.*

45. *Id.*

46. MARINER, *supra* note 2, at 37.

47. See Mary Sigler, *By the Light of Virtue: Prison and the Corruption of Character*, 91 IOWA L. REV. 561, 591 (2006); see generally MARINER, *supra* note 2, at 47.

48. Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) (2000 & Supp. V 2005). The PLRA does not address claims against the rapists themselves.

mandates court filing fees on some indigent prisoners.⁴⁹ The provision on filing fees provides that “if a prisoner has brought three or more lawsuits that have been dismissed as frivolous, malicious, or as having failed to state a claim, that prisoner is barred from obtaining indigent status, a prerequisite for the reduction of filing fees.”⁵⁰ Courts have explained that “Congress enacted the PLRA with the principal purpose of deterring frivolous prison litigation by instituting economic costs for prisoners wishing to file civil claims.”⁵¹

While Congress might have prevented the occasional frivolous law suit, it might have also prevented legitimate and well-founded claims. Human Rights Watch has concluded that suits are often dismissed as frivolous because prisoners lack legal skill, not because their claims lack merit.⁵² By imposing filing fees on prisoners who lack the money to pay them, the provision “has the effect of creating a class of poor prisoners for whom the courthouse door is closed.”⁵³ Furthermore, in order to file prison abuse suits in federal court, inmates must first exhaust the remedies open to them via the questionable internal grievance procedures available to them.⁵⁴ As many of these internal procedures require pointing out the perpetrator of the violence, victims — hoping to avoid being labeled a “snitch” — suffer in silence out of fear of retaliation.

D. BACKGROUND OF PRISON RAPE IN CANADA

The subject of prison rape is not well documented in Canada. This is either because prison rape does not occur as often as it does in the United States, or because, as is the case in the United States, there is a severe problem of under-reporting. The real answer may be a combination of the two. Officials from JDI visited a number of Canadian prisons to assess the extent of sexual

49. See MARINER, *supra* note 2, at 47.

50. *Id.* at 352 n.9.

51. Lyon v. Krol, 127 F.3d 763, 764 (8th Cir. 1997). *But see* MARINER, *supra* note 2, at 352 n.9 (“[I]t is clear to Human Rights Watch that numerous prison suits are dismissed as frivolous because prisoners lack legal skill and, in some cases, because judges simply lack interest in their claims, not because prisoners’ claims actually lack merit.”).

52. MARINER, *supra* note 2, at 352 n.9.

53. *Id.*

54. 42 U.S.C. § 1997e(a) (2000 & Supp. V 2005).

violence in these facilities. Most Canadian officials who spoke with the JDI staff “did not believe that prisoner rape was a significant problem in their facilities, although many were aware of ‘relationships’ between inmates where sex was provided, often in exchange for goods and/or protection.”⁵⁵ After completing this visit, JDI concluded that “Canada’s prisons are safer than their U.S. counterparts.”⁵⁶

While recognizing prison rape as an area of concern, Bill Staubi, Director General for Performance Management at the Correctional Services of Canada agreed that prison rape “is not presently noted as a major problem area in Canadian prisons.”⁵⁷ Anne Marie Dicenso, a harm reduction coordinator at Prisoner HIV/AIDS Support Action Network (“PASAN”) explains that rape in Canadian jails is much less common than in the U.S. because “Canadian prisons are smaller, sentences are shorter, and sex offenders are kept segregated.”⁵⁸ It has also been argued that while “[y]oung and vulnerable prisoners are always at risk of being exploited by sexual predators . . . [t]he popular image of new prisoners being routinely gang-raped is derived from movies and perhaps some U.S. prison experiences.”⁵⁹

Evidence of the pervasiveness of rape in U.S. prisons can also be found in the Supreme Court of Canada. A United States prosecutor, in an effort to extradite two Canadian citizens, appeared on Canadian television, threatening that if the two Canadians continue to delay their extradition, they will end up becoming “the boyfriend of a very bad man.”⁶⁰ In response to this apparent threat of sexual assault in U.S. prisons, the Canadian judge, Judge Hawkins, granted a stay of the extradition proceedings, concluding that “[t]o commit these fugitives for surrender . . . to be prosecuted by a prosecutor who has publicly threatened them with homosexual rape (boasting at the same time how effective

55. E-mail from Melissa Rothstein, Esq., Program Development Director, Just Detention Int’l. (Jan. 23, 2008, 11:00:31 EST) (on file with author).

56. *Id.*

57. E-mail from Bill Staubi, Director General, Performance Management, Correctional Services of Canada (Nov. 15, 2007, 13:45:42 EST) (on file with author).

58. DOUGLAS VICTOR JANOFF, PINK BLOOD: HOMOPHOBIC VIOLENCE IN CANADA 92 (Univ. of Toronto Press 2005) (citing Frank Pendergast, *Rape in Jails not Common*, XTRA!, May 6, 1999, available at <http://archives.xtra.ca/Story.aspx?s=1379170>).

59. MARRON, *supra* note 25, at 47.

60. U.S. v. Cobb, [2001] S.C.R. 587, 594 (Can.).

the technique has been) ‘shocks the Canadian conscience’ and is ‘simply not acceptable.’”⁶¹ In dicta, he added that he believed “that no right-thinking Canadian would endorse the use of a threat of homosexual rape as a means of persuading Canadian residents to abandon their rights to a full extradition hearing.”⁶² While Judge Hawkins’ belief is common among Canadian officials, there are those who do believe that sexual victimization in Canadian prisons is a serious concern.⁶³ Douglas Janoff, a policy director for the Canadian government and author, recalls several inmates at Kingston Penitentiary alleging that they “had been raped or used as sex slaves, by an inmate who sold drugs in prison.”⁶⁴

Currently, Correctional Services of Canada, and Statistics Canada (the Bureau responsible for keeping and maintaining national statistics) do not record occurrences of inmate sexual victimization. The Correctional Services of Canada did however report that in 2006–07, it received 556 *complaints* of assaults on staff and inmates, a five year high.⁶⁵ In a 1999 report, according to the Ontario Correctional Services, out of 411 assault reports in a three month span, 1.9% of these allegations were sexual assaults, which could include everything from inappropriate touching to rape.⁶⁶ In another study, a prison psychiatrist at Kingston Penitentiary estimated that among the 400 inmates in the prison, “there were at least five predatory homosexual prisoners, or ‘wolves.’”⁶⁷ Admittedly, these studies are outdated, and represent only a small sample of a much larger picture. They do, however, suggest that if multiplied to take into account the national scale, they may constitute a larger and more wide-spread problem than

61. *Id.* at 596.

62. *Id.*

63. See E-mail from Craig Jones, PhD, Executive Director, The John Howard Society of Canada, to author (Jan. 21, 2008, 16:08:16 EST) (on file with author) (“Sexual violence is a problem everywhere — in every prison system — because it's an expression of power. And POWER is everywhere. Period. Full stop.”); See generally, JANOFF, *supra* note 58, at 91–94.

64. JANOFF, *supra* note 58, at 91–92.

65. THE HONORABLE STOCKWELL DAY, P.C., M.P., MINISTER OF PUBLIC OF SAFETY, CORRECTIONAL SERVICES OF CANADA — REPORT ON PLANS AND PRIORITIES 27 (2008–2009), available at <http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/pen/pen-eng.pdf>. This data does not consider or contemplate the countless assaults that go unreported.

66. JANOFF, *supra* note 58, at 28.

67. MARRON, *supra* note 25, at 47.

people recognize. Nonetheless, the United States continues to carry a more negative image than its neighbor to the north.

III. CURRENT STATE OF THE LAW

This section will analyze the current state of the law with regard to prison rape, and how the legislatures and courts have tried to deal with the problem of sexual violence in prisons. The United States' analysis will focus on the Supreme Court case, *Farmer v. Brennan*, which established the standard that an inmate has to meet in order to have a successful claim against a prison or prison official.⁶⁸ This section will also examine the legislative response in creating the Prison Rape Elimination Act. The Canadian analysis will focus largely on the legislative response, as well as the interpretation of statutory and case law language and its applicability to sexual violence in prisons.

A. UNITED STATES

The United States has taken significant legal steps to try to combat the difficulties victimized inmates face in having their complaints heard. Results, however, have yet to be seen. In 1994, the United States Supreme Court declared prison rape to be "cruel and unusual punishment" under the Eighth Amendment of the United States Constitution.⁶⁹ In *Farmer v. Brennan*, the Supreme Court held that a prison official can be found liable under the Eighth Amendment for "denying an inmate humane conditions of confinement" if "the official *knows of and disregards* an excessive risk to inmate health or safety."⁷⁰ The Court went on to opine that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."⁷¹ This is known as the "deliberate indifference" standard.⁷² To successfully

68. See *infra* Part III.A.

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

70. *Id.* at 837 (emphasis added).

71. *Id.*

72. In *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976), the Supreme Court established this standard as a basis for 8th Amendment liability. The Court held that "unnecessary and wonton infliction of pain" was to be considered "deliberate indifference," however

demonstrate an 8th Amendment violation, the plaintiff inmate must show “deliberate indifference” on the part of the prison official.⁷³

While on the surface this seems to be a major decision, critics have questioned its true practicality due to the heavy burden placed on the inmate.⁷⁴ Although it recognizes that prison rape is constitutionally unacceptable and reprehensible,⁷⁵ the Court in *Farmer* gives little protection to prisoners by apparently holding officials to the standard of “actual knowledge.” Human Rights Watch has noted that “[t]he incentive this legal rule creates for correctional officials to remain unaware of problems is regrettable.”⁷⁶ Requiring a mens rea of knowledge permits prison officials to escape liability by turning a blind eye towards potential harm to an inmate.⁷⁷ Under this standard, if a prison official suspects that an inmate is the victim of sexual abuse behind bars, and it turns out that the prisoner actually was a victim of such abuse, the prison official would escape liability since he only *suspected* abuse, and therefore did not have the requisite knowledge requirement.

The difficulty in meeting this high standard was illustrated in the Seventh Circuit case, *Riccardo v. Rausch*, which overturned a \$1.5 million jury award to a prisoner who had been raped by his cellmate.⁷⁸ Anthony Riccardo made very clear to prison officials,

failed to elaborate on what other actions could satisfy such standard, except to indicate that negligence does not amount to a valid 8th Amendment claim.

73. *Farmer*, 511 U.S. at 828.

74. See Jeffrey M. Lipman, *Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Circuit Outlook*, 31 CREIGHTON L. REV. 435, 446 (1998) (stating that since “most inmates are not constitutional scholars and have very little or no education[,] . . . [i]nmates are often not intelligent or sophisticated enough to adequately articulate their perceived threat to sufficiently charge prison officials with knowledge”); see also James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 450 (2003) (explaining that the ruling in *Farmer v. Brennan* “provided the lower federal courts with the test for cruel and unusual punishment that perversely blames rape victims”).

75. See *Farmer*, 511 U.S. at 834 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (stating that being sexually abused in prison is “not part of the penalty that criminal offenders pay for their offenses”).

76. MARINER, *supra* note 2, at 146.

77. See *id.* (pointing out that “in many lawsuits involving prisoner-on-prisoner rape, the main thrust of prison officials’ defense is that they were unaware that the defendant was in danger”); see also Sigler, *supra* note 47, at 590 (arguing that this high standard will essentially preclude relief in all but the most serious and obvious cases).

78. 375 F.3d 521 (7th Cir. 2004).

specifically to Lt. Larry Rausch, that he feared for his life while being celled with another inmate, named Garcia.⁷⁹ Soon after making his fears known, Garcia forced Riccardo to perform oral sex on him.⁸⁰ At the trial court level, a jury found that Rausch had subjected Riccardo to cruel and unusual punishment, and awarded Riccardo \$1.5 million in compensatory damages.⁸¹ The Seventh Circuit overturned, stating that “no reasonable juror could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk.”⁸² The court found that the fact that Riccardo informed Rausch that he “feared for his life” was not enough to put Rausch on alert to the risk of sexual assault.⁸³

In an Eighth Circuit case, an inmate who claimed to have been “raped by more than twenty inmates in one year and contracted AIDS as a result,”⁸⁴ charged an Assistant Director of the Arkansas Department of Corrections with violating his Eighth Amendment right to be free from cruel and unusual punishment.⁸⁵ The court, citing *Farmer*, held that even if the Assistant Director should have perceived a significant risk, his failure to alleviate this risk “is not ‘deliberate indifference’ to an inmate’s health or safety and therefore not a violation of the Eighth Amendment.”⁸⁶

In 2003, realizing the urgency of this issue, Congress passed the Prison Rape Elimination Act (“PREA”), whose overall mission is to prevent prison rape from occurring in U.S. prisons and penitentiaries.⁸⁷ Recognizing the widespread occurrence of prison rape, Congress intended “to provide for the analysis of the incidence and effects of prison rape in federal, state, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape.”⁸⁸ Aside

79. *Id.* at 525.

80. *Id.*

81. *Id.* at 523.

82. *Id.* at 526.

83. *Id.*

84. Lewin, *supra* note 6, at A1.

85. *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998).

86. *Id.* at 786 (citing *Farmer v. Brennan*, 511 U.S. 825, 838 (1994)).

87. *See generally* 42 U.S.C. § 15602 (Supp. V 2005) (discussing nine general purposes of the Act).

88. H.R. 1707, 108th Cong. (2003). *See generally* James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act of 2003*, 30 N.E. J. ON

from simply increased punishment and surveillance, the PREA suggests several other remedies to combat this systemic problem. These suggestions include “careful classification of prisoners[,] . . . better guard training, prisoner education, and victim treatment and counseling.”⁸⁹ Although the Act suggests various practical changes, it does not suggest ways in which to implement these suggestions.

The PREA has its fair share of critics.⁹⁰ On the one hand, some argue that since the primary focus of the statute is to collect data, the goal will prove difficult because of the inherent unreliability of observations as well as the widespread underreporting of sexual assaults.⁹¹ On the other hand, supporters suggest that this is still a step in the right direction. With a strong emphasis on “visibility” and “accountability,” the PREA will be “highly effective, as it mandates collection and maintenance of accurate information by correctional institutions and provides for careful scrutiny of each facility’s prison rape abatement practices.”⁹²

Since the PREA’s passage in 2003, statistics have reflected a yearly increase in the estimated number of nationwide allegations of sexual victimization (5,386 in 2004; 6,241 in 2005; 6,528 in 2006; 60,500 in 2007).⁹³ While these statistics might suggest the inadequacy of the PREA, they may also reflect the adoption of new Bureau of Justice Statistics definitions, as well as improved

CRIM. & CIV. CONFINEMENT 1 (2004) (“[T]he PREA provides for . . . 1) a research program to collect and analyze data on prison rape; 2) a panel to conduct public hearings on prison rape; 3) a clearinghouse and a grants program to assist corrections staff; and 4) a commission to draft standards for preventing rape, treating its victims, and punishing its perpetrators.”).

89. Alice Ristroph, *Prison and Punishment: Sexual Punishment*, 15 COLUM. J. GENDER & L. 139, 177 (2006) (citing 42 U.S.C. § 15606(e)(2) (Supp. V 2005)).

90. See *id.* at 146 (“Although the Act brings public attention to the most violent prison rapes and may produce marginal improvements, it fails either to recognize the complicated forms of sexual coercion or to address the underlying structural problems with the prison.”); see ELSNER, *supra* note 14, at 62 (“[I]t is unlikely to come anywhere near to ending the problem.”).

91. Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 427 (2005) (citing Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, MSN Slate, Oct. 1, 2003, available at <http://slate.msn.com/id/2089095>).

92. Robert W. Dumond, *Confronting America’s Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 31 J. AM. ACAD. PSYCHIATRY & L. 354, 358 (2003).

93. ALAN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf>; BECK & HARRISON, *supra* note 43, at 2.

reporting by correctional facilities, as mandated by the PREA.⁹⁴ The first step in prevention is more effective reporting. The increase in statistics could therefore be explained less by the inadequacy of the PREA than by its required improvements in reporting mechanisms. Such mechanisms include not only the confidential victim surveys, but also increased sampling techniques,⁹⁵ as well as the solicitation of “views from representatives of the following: State departments of correction; county and municipal jails; juvenile correctional facilities; former inmates; victim advocates; researchers; and other experts in the area of sexual assault.”⁹⁶

The effects of the PREA have extended to various states as well. California, for example, responded by creating the Sexual Abuse in Detention Elimination Act which implemented policies intended to prevent sexual abuse of inmates,⁹⁷ and also provides guidelines for officials and inmates to follow when abuse has already occurred.⁹⁸ The California Act has established procedures for investigation and data reporting⁹⁹ as well as establishing the position of an ombudsman to whom inmates may confidentially report sexual abuses.¹⁰⁰ The passage of the PREA has given state legislatures the initiative to take this serious matter into their

94. For example, unlike previous surveys in 2004, 2005 and 2006 that were based on administrative records, the statistics in 2007 were based on surveys that came directly from inmates. BECK & HARRISON, *supra* note 43, at 1.

95. 42 U.S.C. § 15603(4) (Supp. V 2005) (“The review and analysis . . . shall be based on a random sample, or other scientifically appropriate sample, of not less than 10 percent of all Federal, State, and county prisons, and a representative sample of municipal prisons. The selection shall include at least one prison from each State.”).

96. *Id.* § 15603(3).

97. CAL. PENAL CODE § 2636 (2007). Practices include implementing housing assignment procedures that take into account risk factors that can lead inmates to become victims and also ensures that staff members intervene when an inmate appears to be the target of sexual abuse.

98. *Id.* § 2638. Protocols include, but are not limited to, receiving “appropriate acute-trauma care for rape victims, including, but not limited to, treatment of injuries, HIV/AIDS prophylactic measures, and, later, testing for sexually transmittable diseases.” *Id.*

99. *Id.* §§ 2639-40.

100. *Id.* § 2641 (“The Department of Corrections and Rehabilitation shall allow all inmates . . . to write confidential letters regarding sexual abuse to the ombudsperson.”). For a general discussion of California’s Sexual Abuse in Detention Elimination Act, see Heather L. McCray, *Review of Selected 2005 California Legislation: Penal: Protecting Human Rights in California’s Detention Facilities: The Sexual Abuse in Detention Elimination Act of 2005*, 37 MCGEORGE L. REV. 303 (2006).

own hands. The success of the PREA will continue to be measured over time.

B. CANADA

Although they are scarcely used,¹⁰¹ legal remedies do exist for victims of prison rape in Canada. According to Article 12 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.”¹⁰² In order to violate this standard, the treatment must be so “excessive as to outrage standards of decency.”¹⁰³ The prohibition against cruel and unusual treatment or punishment applies to prison conditions as well.¹⁰⁴ Courts have held that the existence of oppressive conditions in penitentiaries or prisons could amount to cruel and unusual punishment.¹⁰⁵ In fact, when overcrowding of prisons leads to oppressive conditions, “a judicial order . . . might require releasing some prisoners or building new facilities.”¹⁰⁶ While Section 12 claims based on sexual victimization are hard to come by in Canadian decisions, Ivan Zinger, Director of Policy and Senior Counsel at the Office of the Correctional Investigator, explains that a “plaintiff could certainly argue that allowing a sexual assault to take place in a federal penitentiary amounts to a breach of [Section 12 of] the Canadian Charter of Rights and Freedoms.”¹⁰⁷

Canadian inmates can find further protection in the Corrections and Conditional Release Act of 1992. Section 3 explains that “[t]he purpose of the federal correctional system is to contri-

101. E-mail from Ivan Zinger, Director of Policy and Senior Counsel at the Office of the Correctional Investigator (Jan. 7, 2008, 11:46:20 EST) (on file with author) (surmising that “court cases are few and not representative of the reality as many prisoners choose not to pursue any remedy because of the nature of the crime”).

102. Constitution Act, being Schedule B to the Canada Act 1982, ch. 11, s. 12 (U.K.).

103. *R. v. Smith*, [1987] S.C.R. 1045, 1072 (Can.); Cf. PETER HOGG, CONSTITUTIONAL LAW OF CANADA § 53.3 (5th ed. 2007) (arguing that while that standard is not particularly helpful, “it is clear that the phrase includes two classes of treatment or punishment: (1) those that are barbaric in themselves, and (2) those that are grossly disproportionate to the offence”).

104. HOGG, *supra* note 103, at 53.6.

105. *Id.* (citing *McCann v. The Queen* [1976] F.C. 570 (Can.) (conditions in solitary confinement held to be cruel and unusual)); *R. v. McC. (T.)* [1991] 4 O.R. (3d) 203 (Ont. Ct. Prov. Div.) (dirty and overcrowded holding cells held to be cruel and unusual).

106. See HOGG, *supra* note 103, at 53.6.

107. E-mail from Ivan Zinger, *supra* note 101.

bute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through *the safe and humane* custody and supervision of offenders.”¹⁰⁸ Furthermore, Section 70 imposes an affirmative duty to “take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates . . . are safe, healthful and free of practices that undermine a person’s sense of personal dignity.”¹⁰⁹ According to *Wild v. Canada*, “prison authorities owe a duty to take reasonable care for the health and safety of the inmate while in custody.”¹¹⁰ A breach of this duty occurs if the “acts or omissions of the defendant fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances.”¹¹¹ This negligence standard requires far less to establish breach of duty than the United States’ “deliberate indifference” standard, which, as discussed earlier, seems to require actual knowledge.

IV. REASONS BEHIND THE DIFFERING REPUTATIONS

While reputations are not one hundred percent trustworthy, they can be in a broad sense a reflection of reality, and therefore can be a source for discussion and reflection. If the differing reputations are an accurate reflection of reality (which would mean that rape in Canadian prisons is in fact less of a problem than in the United States), it is important to understand the sources of these differences. The differences impact potential implementation of these policies as a solution to the prison rape problem in the United States. On the other hand, if the differing reputations do not accurately reflect reality, it remains equally important to understand why these differences exist. The differences help show that certain practices and policies, while looking good on paper, do not actually correlate to fewer occurrences of prison rape.

Aside from the seemingly easier standard by which an inmate can bring a claim in Canada, this Note will examine several other

108. Corrections and Conditional Release Act, S.C. 1992, c.20 (Can.) (emphasis added).

109. *Id.*

110. *Wild v. Canada* (Correctional Services), [2004] F.C. 942 (Can.) (citing *Timm v. Canada* [1965] 1 Ex. C.R. 174 (Can.)).

111. *Id.* at 20 (citing *Russell v. Canada*, [2000] B.C.T.C. 276 (Can.)).

potential reasons for this “reputation gap,” and will consider whether Canadian prison policies and practices, if taken seriously and implemented in this country, could substantially limit the incidence of prison rape here. Section A will examine the difference in incarceration rates between Canada and the United States, and will discuss how those rates affect a larger problem of overcrowding in prisons. Section B will look at whether Canadian law regarding conjugal visits affects the less violent prison reputation in Canada. Finally, Section C will consider whether the societal norms and behavioral differences between the two countries can account for this disparity.

A. INCARCERATION RATES

The United States is the “world leader” when it comes to the use of imprisonment as a form of punishment.¹¹² The United States incarcerates 737 individuals per 100,000 people, while Canada incarcerates 107 individuals per 100,000 people.¹¹³ The United States’ implementation of mandatory minimum sentences, the increase in the number of “three strikes” laws, “get tough on crime” attitudes, the “war on drugs,”¹¹⁴ and the absence of many of these factors in Canada¹¹⁵ account for such wide disparities. By reducing judicial discretion in sentencing, legislatures have shifted their goals of punishment from rehabilitation to incapacitation. Those convicted of burglary in the United States, for example, served on average 16.2 months in prison, whereas burglars in Canada spent 5.3 months on average.¹¹⁶

112. THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH 1 (2005), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf.

113. *Id.*

114. Hensley, *supra* note 18, at 5; see also MARINER, *supra* note 2, at 28.

115. Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate*, 40 L. & SOC'Y REV. 325, 326–27 (2006). In 1987, the Supreme Court of Canada, in *R. v. Smith*, [1987] S.C.R. 1045 (Can.), held that mandatory minimums for importing narcotics constituted cruel and unusual punishment under the Canadian Charter of Rights and Freedoms.

116. MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS 2 (2003), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_comparative_intl.pdf.

Marc Mauer, the Assistant Director of the Sentencing Project,¹¹⁷ in a report to the U.S. Commission on Civil Rights, notes that in the past twenty years, one of the most significant changes in the U.S. prison population has been the rise in the amount of people incarcerated for drug offenses.¹¹⁸ Forty thousand inmates were being held for drug offenses in 1980, whereas today 450,000 inmates are being held on drug charges.¹¹⁹ In the spring of 2006, the delegation from JDI that traveled to Canada and spoke with officials from the Correctional Service of Canada¹²⁰ concluded that there are “lower levels of sexual violence in Canadian prisons than in their American counterparts . . . largely because the size of the prison population is manageable.”¹²¹ A manageable prison population reduces the amount of shared cells, prevents violence from going undetected, and protects non-violent prisoners.

Scholars have pointed out that these high incarceration rates in the United States reflect a punitive attitude towards criminals,¹²² whereas perhaps the focus of Canadian punishment is more based on rehabilitation. A largely punitive justification for punishment calls for non-violent offenders to be imprisoned with some of the most dangerous and most violent prisoners. While one scholar suggests that in fact “there is not more prison rape solely because there are more prisoners, serving longer sentences,”¹²³ the more people that the United States imprisons, the more prisoners have to share cells, the less supervision there will be, and the more they are put at risk of becoming victims of sex-

117. The Sentencing Project is an organization that “works for the reform of unfair and ineffective criminal justice policies and promotes alternatives to incarceration.” <http://www.sentencingproject.org/Issues.aspx> (last visited Feb. 20, 2009).

118. MAUER, *supra* note 116, at 7.

119. *Id.*

120. Lovisa Stannow, Opinion, *Memo to Canada: Don't Ape U.S. Crime Policy*, TORONTO STAR, Oct. 20, 2006, at A25.

121. *Id.* The JDI delegation used this information to try to convince Canadian officials that a shift to mandatory minimum sentencing would jeopardize a manageable prison population, and would in turn cause an increase in occurrences of sexual violence. *See also* Email from Melissa Rothstein, *supra* note 55 (explaining that Canadian prisons are able to maintain appropriate staff-to-inmate ratio as a result of a smaller prison population).

122. Doob & Webster, *supra* note 115, at 326 (“Such policies as three-strikes sentencing, mandatory minimum penalties, habitual offender laws, and truth-in-sentencing are typically cited as evidence of increasing punitiveness.”).

123. Ian O'Donnell, *Prison Rape in Context*, 44 BRIT. J. CRIMINOLOGY 241, 249 (2004) (arguing that “[s]exual violence was a problem when U.S. prison populations were much smaller and indeed, some of the most serious sexual violence occurs in local jails, where prisoners are held on remand or serving short sentences”).

ual assault. While increased incarceration might not be the *sole* reason, it certainly seems to be a contributing factor to the occurrence of sexual violence in prisons.

There is no denying that non-violent crimes are serious and ought to attach serious penalties. However, legislatures and courts have been unwilling to consider ways to reduce levels of incarceration in the face of increased sexual violence in prisons.¹²⁴ For any meaningful long-term reform to take place in this area, this concept must be taken seriously. While the Canadian justice system has not explicitly taken rape prevention into account, it is certainly a side effect of broader non-punitive humanitarian approaches to punishing crime.¹²⁵ As two Canadian professors have stated, “Canadians have not only shown consistent skepticism about the effectiveness of criminal punishment in resolving the problem of crime, but they have also . . . been identified — as more communitarian and nonviolent than their American counterparts.”¹²⁶ This attitude has the effect of keeping non-violent people from serving long prison sentences, thereby keeping them out of the violent situations that the prison environment can foster.

B. CONJUGAL VISITS

Federal prisons in the United States do not permit conjugal visits in their facilities.¹²⁷ Only six states — Washington, New York, California, New Mexico, Mississippi and Connecticut — currently permit overnight visits in their penitentiaries.¹²⁸ These states, however, do not give visitation rights to several categories of inmates: “those on death row, sex offenders, those serving sentences of life without parole, those who have been violent with

124. See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 64 (2008) (arguing that based on recent Supreme Court decisions, it has become “clear that the Supreme Court has no appetite for eliminating the core problem of prison overcrowding except when it manifests itself in other appalling conditions,” such as “proof that poor conditions were the result of wanton behavior by prison officials”).

125. See generally Doob & Webster, *supra* note 115.

126. *Id.* at 359.

127. Federal Bureau of Prisons: Conjugal Visits — General Information Page, http://www.bop.gov/inmate_locator/conjugal.jsp (last visited Feb. 20, 2009).

128. Mark Martin, *Gays and Lesbians Allowed Conjugal Visits in Prisons*, S.F. CHRONICLE, June 1, 2007 at A1.

minors or family members,” and those who have displayed poor behavior while serving their time.¹²⁹

Canada, on the other hand, is one of several countries that permit conjugal visits in both federal and provincial prisons.¹³⁰ The Private Family Visiting Program, established by the Correctional Service of Canada, permits eligible offenders and visitors extended private visits within the prison to allow them to have personal relationships in home-like surroundings.¹³¹ If an offender is assessed as a risk of becoming involved in family violence, he is ineligible.¹³²

Scholars have questioned whether the availability of conjugal visits is a contributing factor to reducing prison rape. Some experts argue that conjugal visit programs would effectively reduce male prison rape,¹³³ while others disagree.¹³⁴ Supporters of conjugal visit programs explain that conjugal visits permit a man to keep his masculinity and reduce the need to establish it through “homosexual conquests.”¹³⁵ In Egypt, for example, proponents of the conjugal visitation program explain that the denial of marital sexual gratification has led to prisoners seeking relief by way of different outlets.¹³⁶ These proponents argue that “pent up sexual energy” leads to destructive behavior such as “rape and other acts of violence.”¹³⁷

Prison rape is only due in small part to a lack of sexual gratification. Men who are not in prison may go days, months, or even years being sexually frustrated, without engaging in inter-

129. Jesse McKinley, *Gay Inmates to be Granted Conjugal Visits in California*, N.Y. TIMES, June 3, 2007 at A28.

130. See *Soper v. Canada* [2004] F.C. 1457 (Can.) (“[A]n inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.”).

131. CORRECTIONAL SERVICE OF CANADA, CANADA STANDARD OPERATING PRACTICES 700-12(1) (2002), available at <http://www.csc-scc.gc.ca/text/plcy/sop/700-12e-eng.shtml>.

132. *Id.* at (3).

133. See Rideau, *supra* note 22, at 103 (citing COLUMBUS B. HOPPER, *SEX IN PRISON* (Umi Research Press 1970)).

134. Gordon James Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 HOW. J. CRIM. JUST. 267, 279 (1999).

135. Rideau, *supra* note 22, at 103.

136. Nazly Shamel, *Prisoners' Dilemma*, EGYPT TODAY, Oct. 2004, available at <http://www.egypttoday.com/article.aspx?ArticleID=2517>.

137. *Id.*

course.¹³⁸ For many prisoners, sexual deprivation is not driving them to act so viciously.¹³⁹ Opponents of conjugal visit programs claim that prison rapes are more a result of exerting power rather than receiving sexual gratification.¹⁴⁰ This might suggest that the principal purpose of conjugal visits is less about satisfaction of sexual needs, and more about keeping marriages or relationships intact while the inmate is in prison. Section 71 of the Canadian Corrections and Conditional Release Act explains that the reason for allowing such visits and contact is “to promote relationships between inmates and the community.”¹⁴¹

Although there may be valid justifications for allowing conjugal visits, it remains questionable whether they effectively alleviate actual occurrences of prison rape, which appears to be more about power than sexual gratification. Furthermore, because many aggressors are too young to have wives, or too violent and prone to get into trouble, they lack enough “street time” to form relationships prior to entering prison.¹⁴² Another shortcoming of conjugal visits as a solution to prison rape is that they are a privilege restricted to non-violent offenders — those inmates most prone to violence and sexual violence would not qualify for such visits in any event.¹⁴³

Critics also argue that conjugal visitation programs will increase the spread of sexually transmitted diseases such as HIV/AIDS outside the prison gates,¹⁴⁴ along with a potential increase of lawsuits against correctional facilities.¹⁴⁵ To rebut this claim, proponents explain that the states, and many of the countries that allow conjugal visitations “have some type of policy in

138. See Eugene J. Kanin, *An Examination of Sexual Aggression as a Response to Sexual Frustration*, 29 J. MARRIAGE & FAM. 428, 428 (1967).

139. Knowles, *supra* note 134, at 279.

140. *Id.*

141. Corrections and Conditional Release Act, S.C. 1992, c.20 (Can.).

142. DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 148 (Elsevier N. Holland, Inc. 1980).

143. See MARINER, *supra* note 2, at 64 (“[Prison rapists are] generally more assertive, physically aggressive, and more at home in the prison environment. They are ‘street smart’ — often gang members. They have typically been convicted of more violent crimes than their victims.”).

144. See generally Thomas M. Bates, *Rethinking Conjugal Visitation in Light of the “AIDS” Crisis*, 15 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 121, 121–45 (1989).

145. Christopher Hensley, Sandra Rutland, & Phyllis Gray-Ray, *Conjugal Visitation Programs: The Logical Conclusion*, in PRISON SEX: PRACTICE AND POLICY *supra* note 9, at 154.

place regarding HIV and other sexually transmitted diseases.”¹⁴⁶ For instance, Canadian correctional administrators, recognizing the reality that inmates are contracting sexually transmitted diseases, must provide preventive measures including bleach, dental dams, and condoms.¹⁴⁷ While these preventive measures might go a long way in providing a safe conjugal visitation program, it is uncertain whether implementing conjugal visit programs in the remaining forty-four states and in the federal system will reduce the occurrences of prison rape in the United States.¹⁴⁸ Conjugal visits help maintain family stability and are sexually gratifying for the inmate. However, since prison rape may be more about power than sexual gratification,¹⁴⁹ a conjugal visitation program may not be the solution.

C. THE “SOCIETAL FACTOR”

The United States is a society where power reigns supreme. Many Americans grow up competing to be the best, the brightest, and the most powerful. As youngsters, we look at our teachers as having power in the classroom. Our parents have power in the house. As we grow up, we recognize that the President of the United States is the world’s most “powerful” person. Americans often strive to be partners at law firms, or CEO’s of large corporations. As a society, we recognize power at an early age, and many try to emulate it. One scholar has put it this way: “America is and always has been a very competitive society, nurtured by the myth of the American Dream, which suggests that anyone with a little vision and a lot of hard work can achieve material success.”¹⁵⁰ Prison can be the first time that an inmate has the abili-

146. *Id.*

147. *Id.* at 155.

148. There is no evidence that shows a lower prison rape rate in the six states that have adopted a conjugal visit program. *See generally*, BECK & HARRISON, *supra* note 43, at 19–39.

149. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (describing a prison underworld in which rapes, beatings, and servitude are the currency of power); *see also* Knowles, *supra* note 134, at 279 (“prison rapes have been shown to be the result of ‘power gratification’, rather than ‘sexual gratification’”); Rideau, *supra* note 22, at 75 (arguing that rape in prison “is rarely a sexual act, but one of violence, politics, and an acting out of power roles”).

150. MICHAEL ADAMS, FIRE AND ICE: THE UNITED STATES, CANADA AND THE MYTH OF CONVERGING VALUES 53 (Penguin Canada 2003).

ty, or the opportunity to become “powerful.”¹⁵¹ For the strong, violent prisoner, this power allows the aggressor to use sexual victimization to attend to his personal, and often times sexual needs. In his article, Charles Crawford classifies prison rape not as simply “a response to the pains of imprisonment,” but as “an act of violence perpetrated to dominate and exert some form of control in an institution that offers little individuality or autonomy.”¹⁵²

Wilbert Rideau, author of *The Sexual Jungle*, explains that “the pursuit of power via sexual violence and the enslavement of weaker prisoners . . . is an integral feature of imprisonment throughout the United States.”¹⁵³ Perhaps this pursuit of power is rooted in a deeper societal problem, one based on our nation’s values. Some scholars contend that to a certain extent, the rape culture prevalent in U.S. prisons reflects the high levels of every day violence present in American society.¹⁵⁴ Others argue that the punitive nature of our society’s judicial system is a function of underlying punitive and violent values.¹⁵⁵ Sociologist Seymour Martin Lipet explains that “the concomitant imperative to achieve material success [is] so strong in America that many people pursue the goals of wealth and status in reckless, sometimes even criminal ways.”¹⁵⁶ He goes on to conclude that “[t]he end is of such monumental importance that the means almost become irrelevant.”¹⁵⁷ It is argued that Americans are much more willing than Canadians to take risks, use violence and to do what

151. Julie Kunselman, Richard Tewksbury, Robert W. Dumond & Doris A. Dumond, *Nonconsensual Sexual Behavior, in* PRISON SEX: PRACTICE AND POLICY, *supra* note 9, at 27, 42 (“[A]n individual inmate knows that by sexually assaulting or simply degrading another inmate, he can gain status for himself.”).

152. Crawford, *supra* note 10, at 81; *see also* Donaldson, *supra* note 38 (“[Prison] puts men in particular under strong psychological and social pressure to compensate for their loss of personal power by asserting it, violently or through manipulative pressure, over other prisoners.”).

153. Rideau, *supra* note 22, at 75.

154. O’Donnell, *supra* note 123, at 249 (pointing to the fact that the average homicide rate per million population between 1997 and 1999 was 62.6, which is among the highest in the world); ADAMS, *supra* note 150, at 53 (arguing that crime rates in the United States are about three times higher than in other countries).

155. Doob and Webster, *supra* note 115, at 358.

156. ADAMS, *supra* note 150, at 53.

157. *Id.*

it takes to achieve the American dream.¹⁵⁸ This “achieve at any cost” attitude does not exist only outside prison walls.

Scholars have concluded that Canadian culture is derived from more passive and communitarian norms.¹⁵⁹ For example, with regard to restraint in sentencing, Canada’s caution in the use of imprisonment was enacted into legislation in 1996. Section 718.2 of Canada’s Criminal Code states, “[a]n offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in all circumstances . . . All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.”¹⁶⁰ Beyond structural factors is the notion that unlike Americans, “Canadians appear to lack the moral taste for harshness — on an individual level — and faith — at the political level — regarding the effectiveness of more-punitive sanctions in solving the crime problem.”¹⁶¹ One scholar characterizes Canadian values as representing its “openness to change and diversity, and its emphasis on quality of life over material concerns.”¹⁶² He characterizes United States values as being based on “material success and deference to traditional authority,”¹⁶³ calling special attention to the increased acceptance of violence.¹⁶⁴ These diverging cultural values can certainly account for the violence and power assertion that is commonly displayed in our nation’s prisons. While these values may certainly be a contributing factor that explains differing national reputations, it is a problem that is almost existential, one without a clear legal solution.

V. SHARED PROBLEMS & PROPOSED CHANGE

The three aforementioned factors all play a contributing role in the United States’ and Canada’s differing reputations regarding prison rape. While some suggest that these factors contribute

158. *Id.* at 54. In a 2000 study, thirteen percent of Canadians felt that the use of violence was an acceptable way to achieve one’s objectives, whereas almost double, or 23 percent of Americans felt the same. *Id.*

159. Doob & Webster, *supra* note 115, at 358.

160. Canada Criminal Code, R.S.C., Ch. C-46, § 718.2 (1985).

161. Doob & Webster, *supra* note 115, at 354.

162. *Id.* at 357 (citing Adams, *supra* note 150, at 36).

163. *Id.* at 28.

164. *Id.* at 52.

to lower actual rates of sexual violence in Canada, the lack of statistics and records is a problem that Canadian scholars and officials cannot explain. Perhaps the real reason for these differing reputations is that the United States has taken the first step in recognizing prison rape as a growing national problem, whereas Canada, because of these three “reputation factors,” chooses not to acknowledge the existence of such a problem.

Simple math shows that a reduction in incarceration rates would reduce the amount of prisoners and the length of sentences, thereby potentially reducing the number of aggressors and victims of sexual violence. While a lofty long-term goal, it is one that would require re-thinking the purposes and justifications of punishment, and the underlying theories behind sentencing (a subject beyond the scope of this Note). Furthermore, even if accomplished, a reduction of sexual victimization would only be a side effect, and not a factor that would eliminate occurrences of prison rape on its own. One scholar has pointed out that sexual violence was just as serious a problem when U.S. prison populations were smaller.¹⁶⁵ He noted that “some of the most serious sexual violence occurs in local jails, where prisoners are held on remand or serving short sentences.”¹⁶⁶ The “Societal Factor” certainly accounts for differing reputations between the countries, however, it is based solely on the inherent values of each individual nation, and has no practical legal solution. Lastly, while conjugal visits certainly play a role in accounting for this difference in reputation, it is not the answer to reducing occurrences of prison rape.¹⁶⁷ As discussed earlier, conjugal visits help cure sexual frustration, and can keep family units together. They cannot cure rapists from exerting their power behind bars.

While it is not clear whether this “reputation gap” is justified, it is clear that prison rape is a problem that affects both nations. Apart from the aforementioned differences, there are practices and policies shared by both the United States and Canada that contribute to the problem of sexual victimization in correctional facilities on both sides of the border. A discussion of, and proposal for, unified change in the following areas could practically re-

165. O'Donnell, *supra* note 123, at 249.

166. *Id.*

167. *See supra* Part IV.B.

duce occurrences of sexual violence in the United States and Canada. Part V.A will examine how prisoners are classified in both Canada and the United States, and propose changing classification such that the main focus is on the size and strength of the prisoner, as opposed to basing it solely on the type of crime committed. Part V.B will examine the pitfalls of protective custody in both the United States and Canada and will propose ways in which to structure a protective custody system that will, in fact, protect the inmates.

These proposals, while not direct responses to the differences in reputation, are responses that, if implemented in the form of prison rules, could achieve a reduction in actual occurrences of prison rape. These proposals do not respond directly to the reputation differences because each of the factors (i.e., incarceration rights, conjugal visits, and cultural issues) either do not translate into actual reduction of prison rape or have no clear legal solution, save a complete re-thinking of the punishment and sentencing scheme.

A. PRISONER CLASSIFICATION

Alice Ristroph, in her article, *Prison and Punishment: Sexual Punishments*, asserts that beyond further punishment, and increased surveillance, the United State's Prison Rape Elimination Act points to specific mechanisms intended to reduce occurrences of prison rape, which "include more careful classification of prisoners to ensure that likely targets are not housed with likely aggressors."¹⁶⁸ Her article, as well as the Prison Elimination Act, both fail to suggest how these "targets" will be separated from the "aggressors." The Human Rights Watch report on prisons concluded that most countries have a classification system usually based on the type of offense for which the prisoner has been convicted of, resulting in confinement in prisons with different security levels.¹⁶⁹ Most prisons in the United States evaluate inmates

168. Ristroph, *supra* note 89, at 177; Prison Rape Elimination Act of 2003, 42 U.S.C. § 15606(e)(2) (Supp. V 2005) (recommending national standards that include "the classification and assignment of prisoners, using proven standardized instruments and protocols, in a manner that limits the occurrence of prison rape").

169. JOANNA WESCHLER, HUMAN RIGHTS WATCH, GLOBAL REPORT ON PRISONS 28 (1991).

upon entering confinement, and they are classified by their security risk and potential for violence while behind bars.¹⁷⁰ “Classification is essential to the operation of an orderly and safe prison . . . It enables the institution to gauge the proper custody level of an inmate, to identify the inmate’s educational, vocational, and psychological needs, and to separate non-violent inmates from the more predatory.”¹⁷¹

The threat or use of physical force is one of the most common elements of coercion used in prison rape.¹⁷² Smaller and weaker inmates are at a substantial risk of being sexually victimized, as compared to their larger, and stronger counterparts.¹⁷³ During a 2001 sentencing hearing, a Florida judge claimed that, “[the offender is] a *small, thin*, white man with curly dark hair, and I suspect he would certainly become a target in the Florida state prison system.”¹⁷⁴ While the judge did include a racial suggestion, she later stated that “[race] is never an issue in [her] courtroom.”¹⁷⁵ One scholar argued that “the judge would have used the same reasoning and discretion in sentencing if the offender had been small, thin, and not white.”¹⁷⁶ Inmates who display these target characteristics are at an increased risk of being victims of sexual assault.¹⁷⁷ Nevertheless, within a given facility, prisoners are often divided solely by their differing security and threat levels.¹⁷⁸

In Canada, prisoners are classified when they first arrive at penitentiaries.¹⁷⁹ They first go through what is called an “initial assessment” where the offender is classified on a broad range of factors that include prior convictions, prior violence, and prior

170. Crawford, *supra* note 10, at 81.

171. Palmigiano v. Garrahy, 443 F. Supp. 956, 965 (D.R.I. 1977).

172. Christopher D. Man & John P. Cronan, *Criminal Law: Forecasting Sexual Abuse: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127, 165 (citing MARINER, *supra* note 2, at Chapter IV).

173. *Id.*; ELSNER, *supra* note 14, at 64 (explaining that the physically weak and small are especially vulnerable).

174. Kunselman et al., *supra* note 151, at 43 (citing PENSACOLA NEWS J., Jan. 7, 2001 at 2A) (emphasis added).

175. *Id.* (citing ST. PETERSBURG TIMES, Jan. 27, 2001 at 3B).

176. *Id.*

177. *Id.*

178. See MARINER, *supra* note 2, at 33.

179. Prison Classification and Reclassification, 2006, <http://www.insideprison.com/prison-classification.asp>.

prison misconduct.¹⁸⁰ “Dynamic risk factors” are also included in the classification.¹⁸¹ These factors include gang membership, history of violence, and age.¹⁸² Prison officials ought to continue classifying and grouping inmates based on potential risk of violence. This should not, however, end the analysis.¹⁸³

Recognizing, as Professor Ristroph does, that preventing sexual coercion in prison requires us to “be attentive to every contributing cause,”¹⁸⁴ this Note goes beyond that assertion by pointing to a specific contributing cause, and identifying a solution. As discussed earlier in this section, a victim of prison rape is often much smaller and weaker than the perpetrator of the violence. Therefore, while prior violence should certainly be taken into account, the classification system should incorporate the strength and size of the inmate as well. This Note encourages prison officials to continue to use degree of violence as a factor but within that violence classification, to check each inmate for height and weight, and classify each according to a sliding scale, the details of which will be discussed later in this section.

In 2001, the New York Times chronicled the story of Eddie Dillard, a prisoner at Corcoran State Prison in California.¹⁸⁵ He was a 120-pound inmate and was forced to serve his time in the same cell with 230-pound Wayne Robertson. Dillard explained that during their first night together, he had been sodomized “all night long.”¹⁸⁶ A prison classification system whereby inmates of the same size and strength are housed together would prevent a dominant male from taking advantage of a smaller and weaker one. A prison classification based on size and strength could have saved Eddie Dillard from his unjustified and unwarranted degrading treatment.

180. *Id.*

181. *Id.*

182. *Id.*

183. Just because violence was the reason a person was incarcerated in the first place, does not necessarily imply that he will be violent in prison, and therefore should be placed with other potentially larger, and stronger violent inmates. Similarly, just because violence was not the reason a person was incarcerated in the first place, this does not imply that he will not be violent in prison, if housed with a smaller, weaker nonviolent inmate.

184. Ristroph, *supra* note 89, at 183.

185. Lewin, *supra* note 6, at A1.

186. *Id.*

While this form of classification could arguably be considered discriminatory, the Supreme Court has carved out an exception in the name of safety and security. During the nineteenth and twentieth centuries, racial violence was rampant in United States prisons.¹⁸⁷ In an effort to reduce such violence, prisoners were classified strictly according to their race.¹⁸⁸ In the South, African Americans and Whites were typically placed in separate prisons, whereas in the North, racial segregation and classification was maintained within each individual correctional facility.¹⁸⁹ In 1968, however, this form of classification was banned by the Supreme Court.¹⁹⁰ Courts have interpreted this decision to mean that racial discrimination in prisons is unconstitutional, "save for the necessities of prison security and discipline."¹⁹¹ In an age where people are increasingly mindful of racial discrimination, whether in the workplace, schools, or even prisons, the necessities of security remain paramount. If an exception can be made for racial discrimination to enforce prison security, an exception can be made for discrimination on the grounds of size and strength, if the ultimate end is safety and security.¹⁹²

Another possible way to segregate prisoners is by sexual orientation. For example, University of Hawaii lecturer Gordon James Knowles suggests classifying inmates by a sexual category of "homosexual, bisexual, heterosexual, and transsexual."¹⁹³ He claims that this classification is needed in order to "protect the weaker and feminine inmates from attack."¹⁹⁴ This claim, however, is founded on the very dangerous assumption that homosexuals are all weak and feminine. This is clearly not the case. While this system would certainly remove *some* of the more vul-

187. MARINER, *supra* note 2, at 33.

188. *Id.*

189. *Id.*

190. *Lee v. Washington*, 390 U.S. 333 (1968).

191. *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (citing *Lee*, 390 U.S. at 335) (Black, J., Harlan J., & Stewart, J., concurring).

192. This reference in no way tries to oversimplify or downplay the historical significance and role of race in this country. The point of the reference is to show that given the importance and significance of racial discrimination, the fact that the court found the necessities of security to be important enough to outweigh the threat of racial discrimination in this specific instance, illustrates that perhaps the court would come to the same conclusion when faced with discrimination on the basis of size or body type, a type of discrimination far less serious than racial discrimination.

193. Knowles, *supra* note 134, at 280.

194. *Id.*

nerable prisoners from the general population, the argument has two additional flaws. First, admitting one is a homosexual in prison could be dangerous. If, for whatever reason, the inmate who made this admission is not able to be separated immediately, he now carries the negative stigma that homosexuality carries in prison, and that may subject him to even more sexual violence. Second, among these classifications, differences in size and strength still remain. Just because inmates are separated by sexual orientation, does not mean they will be free from sexual abuse. Strong and large homosexual men may be just as likely to rape young and weak homosexual men since, as discussed above, prison violence is more about asserting power, rather than gratifying desires. Likewise, strong heterosexual men not only rape homosexual men but heterosexual men as well. Without a size advantage or superior strength, the act of raping someone becomes quite difficult. Therefore, a classification based solely on sexual orientation will not prevent the problems associated with sexual violence.

Critics may question how to logically implement such a solution. In order to incorporate the potential risk of violence, inmates will be categorized in three groups according to their history of violence.¹⁹⁵ Level I for the least dangerous, Level III for the most dangerous. Once classified by level of potential violence, inmates will then be classified by height and weight. Imagine a graph whereby the x-axis is represented by weight, and the y-axis is represented by height. Each section of the graph will correspond to a different size classification. Where the inmate's height intersects with the inmate's weight is the size classification the inmate will be assigned. While the number of size classifications will be a function of the size of the prison, there should be at least three (A for the smallest, B for medium build, and C for the largest). Therefore, if an inmate is classified as level I for violence, and level B for size, his classification would be IB. Prison officials could then adopt a rule whereby inmates with different size classifications cannot share a cell, shower at the same time, or occupy any unsupervised area at the same time. In other words, this proposal would limit contact as much as possible between the different classifications. To account for the fact that body types

195. This system of classification already exists in many prisons.

change over time, the weighing and measuring could be recalculated every year.

Admittedly, this is not a foolproof solution. However, if implemented it could directly combat prison rape. It is a solution that targets the common occurrence of a larger, stronger man abusing a smaller and weaker one. If 120-pound Eddie Dillard, the prisoner chronicled in the New York Times,¹⁹⁶ were in a prison that adopted such a solution, he would not have been housed in the same cell with a 230-pound man and may not have been subjected to this sexual violence.

B. PROTECTIVE CUSTODY: AN INADEQUATE RESPONSE

For prison rape victims in the United States, a common response to a claim of sexual violence is to be placed in protective custody, often described as a “23 hour lockdown and segregation from the general population.”¹⁹⁷ Protective custody is used to isolate and protect those prisoners believed to be victims of sexual violence.¹⁹⁸ This solution, however, “merely punishes the victim again.”¹⁹⁹ The Human Rights Watch report indicates that protective custody “may mean significantly inferior living conditions when compared with life in the general prison population, because such inmates may be housed in virtual isolation and have no access to activities afforded other inmates.”²⁰⁰ In the United States, disparities in rights and conditions between the general population and protective custody are limited by law. According to the Seventh Circuit decision *Williams v. Lane*, programs in protective custody must be equivalent to programs in the general population.²⁰¹ In *Williams*, the court held that restrictions on attending religious services, the use of the library, and participation in vocational, education, and recreational programs are unreasonable.²⁰² While this decision accounts for the interests of the protective custody inmates while in protective custody, it does

196. See *supra* notes 185–86 and accompanying text.

197. Crawford, *supra* note 10, at 80.

198. MARINER, *supra* note 2, at 33.

199. Crawford, *supra* note 10, at 80.

200. WESCHLER, *supra* note 169, at 29.

201. 851 F.2d 867 (7th Cir. 1988).

202. *Id.* at 878; see generally PETER M. CARLSON & JUDITH SIMON GARRET, PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 229 (Jones and Bartlett Publishers 1999).

nothing to limit the negative effects and stigma the inmate suffers when released back into the general population.

Canada houses inmates in what is called administrative segregation.²⁰³ As with protective custody, an inmate is placed in administrative segregation if his “safety is at risk in the population.”²⁰⁴ Although conditions and rights of the inmates are to be the same in both the general population and in administrative segregation,²⁰⁵ this ideal is often not obtained. In the Calgary Remand Centre, for example, inmates in the general population “are allowed out for five hours one day, and six the next.”²⁰⁶ Those in administrative segregation “have only up to one hour per day out of their cells.”²⁰⁷ While prison segregation units have separate areas for inmates in protective custody, they often are forced to live under the same conditions as those being punished.²⁰⁸ One investigator of the Canadian prison systems points out the visible differences between the general population and the protective custody side of the prison:

On the general population side prisoners had made these places as comfortable and as aesthetically pleasing as possible. In one room that I visited, there were sofas, a stereo, a large tank of tropical fish and several striking pieces of art on the walls. On the protective custody side, I visited a lounge with bare walls and no furniture except for a small black and white television on a stand and one institutional, hard-backed chair. The chair had been knocked over and nobody had bothered to pick it up.²⁰⁹

203. See Corrections and Conditional Release Act, 1992 S.C., ch. 20, § 37 (Can.).

204. Manson, *supra* note 17, at 138.

205. Corrections and Conditional Release Act, 1992 S.C., ch. 20, § 37 (Can.). The section reads:

An inmate in administrative segregation shall be given the same rights, privileges and conditions of confinement as the general inmate population, except for those rights, privileges and conditions that (a) can only be enjoyed in association with other inmates; or (b) cannot reasonably be given owing to (i) limitations to the administrative segregation area, or (ii) security requirements.

Id.

206. R. v. Chan, [2005] A.B.Q.B. 615 (Can.).

207. *Id.*

208. MARRON, *supra* note 25, at 49.

209. *Id.* at 52.

Regardless of the statutory requirements for similar privileges and conditions, the conditions found in protective custody seem far inferior to those found in the general population.

A brief stay²¹⁰ in administrative segregation or protective custody might be necessary to ensure the immediate safety of the inmate, but there comes a time when these inmates are released back into the general prison population. Electing to enter protective custody is a “momentous” choice for any inmate, since “it means being clearly identified as a target and therefore living in fear for the remainder of the sentence.”²¹¹ Some Canadian institutions even require that any inmate who wishes to enter protective custody must name his aggressor(s) before his request is granted.²¹² Upon being released from protective custody, the inmate immediately faces the danger of being considered weak, vulnerable, or even worse, a “rat.”²¹³ The apparent loss of privileges while in protective custody, coupled with the dangers that exist upon being released, creates a less than ideal situation for inmates who are threatened with sexual violence.

To protect the safety of threatened inmates, they must be permitted to make an anonymous claim, whereby they identify the potential risk, and potential aggressors. Of course, an anonymous claim prevents immediate disciplinary action to be taken against the aggressor and subjects the remaining prison population to the risk that the aggressor will strike again. However, in prisons where the victim reports the crime without the protection of anonymity, the punishment is quite light — at most, thirty days in disciplinary segregation — and then the accused prisoner is permitted to continue his normal prison life, once again subjecting both the victim and the other prisoners to the risk of further violence.²¹⁴ While an anonymous claim has its risks, the alternative seems no better.

Once the inmate makes the anonymous claim, the inmate will be placed in protective custody for no more than a certain number

210. *But see* MARRON, *supra* note 25, at 53 (reporting that there were cases of inmates who stayed in protective custody for three or four years).

211. *Id.* at 49.

212. *Id.*

213. *Id.* (explaining that it is often assumed by other prisoners that anyone in protective custody is a rat).

214. MARINER, *supra* note 2, at 10–11.

of days (to be determined by the individual prison). While in protective custody, inmates are to be housed in solitary confinement. However, they are to be afforded the same rights as other prisoners, as prescribed by law. The conditions in these units should not be similar to the conditions in disciplinary segregation which typically restrict privileges, and require the prisoner to be behind bars for 23 hours per day.²¹⁵ During this period of confinement, the inmate shall never mix with anyone from the general population. Also during this period of confinement, an investigation must occur, whereby the named aggressors are vigorously watched, without being notified of such increased surveillance. At the conclusion of this period, prison officials shall determine whether the actions of the potential aggressor warrant involuntary transfer to another penal institution. If they do not, the inmate in protective custody shall be automatically removed and placed in another facility without it being disclosed to the new prison population why such a transfer has occurred. This will ensure the maximum safety of an inmate who has been threatened with sexual abuse or rape.

VI. CONCLUSION

One inmate offers a painful reminder of the problem facing those in prisons all over the world:

A rough, callused hand encircled his throat, the fingers digging painfully into his neck, cutting off the scream rushing to his lips . . . He was thrown on the floor . . . A sense of helplessness overwhelmed him and he began to cry . . . overwhelmed by knowledge that this was not over, that this was only the beginning of a nightmare that would only end with violence death or release from prison.²¹⁶

The physical, mental, and emotional effects of prison rape are devastating. The purpose of this Note was to undertake an explanation of why prison rape occurs and how it is that two countries so geographically close to each other could have such differ-

215. *Id.*

216. Rideau, *supra* note 22, at 73.

ent reputations with regard to such a sensitive and serious issue. While the three factors (incarceration rates, conjugal visit programs, and societal norms) certainly explain to some extent the existence of this “reputation gap,” they do not translate to a reality that prison rape occurs less in Canada than it does in the United States. Having come to this conclusion, the focus must shift to analyzing, and suggesting ways to overcome practices common to both the United States and Canada that provide breeding grounds for sexual violence in prison. Prison classification systems that fail to take into account the size and strength of the inmates ignore that in order to exert power, (the main driving force behind prison rape), physical domination and strength is a necessity. Furthermore, prison systems that utilize a system of temporary protective custody fail to recognize the risks associated with being placed in such an environment.

Decreased incarceration rates, conjugal visit programs and general societal factors *suggest* that Canada has far fewer occurrences of prison rape than in the United States. However, as this Note has suggested, these factors contribute only to a reputation gap that fails to represent reality. Until both countries recognize the institutional problems inherent to the prison environment, people like Eddie Dillard will continue to suffer in ways that were never meant to be part of their penalty.