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Male/Male Rape and the “Taint” of Homosexuality

Sandesh Sivakumaran*

ABSTRACT

This article considers the problem of male/male rape. It explores reasons for the silence of the international community on the issue, principal among which is that it involves sexual activity between two men. Society considers any such contact to be indicative of homosexuality, regardless of any element of coercion. Given the prevalence of homophobia in society, this amounts to a “taint” on the part of the victim of the rape. This article explores the notion and extent of such a “taint” by analyzing the role of language and the stigma as felt by survivors, as intended by perpetrators, and as perpetuated by the state.

I. INTRODUCTION

Many articles have been written on the subject of rape. However, references to the rape by a man of a man (male/male rape) are few and far between. In the articles that do reference this important problem, all that is had is a mention, a point to be noted in passing before moving on to the next issue.¹ The same is true of reports of nongovernmental organizations (NGOs) and

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1. See infra Part III.A.
intergovernmental organizations (IGOs). Often the issue is deemed to merit discussion in reports dealing with sexual violence perpetrated against women. Even then, the sole discussion relates to the difficulties faced in trying to gather details of male/male rapes.

Four combinations of actors are possible in a single perpetrator rape—the rape by a man of a woman (male/female rape), the rape by a woman of a woman (female/female rape), the rape by a woman of a man (female/male rape), and the rape by a man of a man (male/male rape). Given the shocking number of male/female rapes that are committed each year, the risk of pregnancy associated with such rapes, and the successful and consistent efforts of the women’s movement, that male/female rape first garnered the attention of the international community is not surprising (Part II). What is surprising is the silence surrounding the three other types of rape. This article proposes to explore the reasons for the non-consideration of one of those, male/male rape (Part III).³

This article argues that the problem of male/male rape has not been addressed for two reasons. First, the subject of male/male rape is a cause without a voice. There are very few people who are both willing and able to speak on its behalf. Those at the forefront of decision-making have been unwilling to raise the issue, while those who have an interest in the subject being taken up have, for various reasons, chosen not to speak out (Part III.A). The second, and principal, reason for the neglect accorded to the issue of male/male rape is the fact that it involves sexual activity between two men. Society considers any such contact to be indicative of homosexuality, regardless of any element of coercion (Part III.B). Given the prevalence of homophobia in society, this amounts to a “taint” on the part of the victim of the rape.⁴ In exploring the notion of such a “taint” and the extent of its reach, the role of language is analyzed. The “taint” as felt by survivors, as intended by perpetrators and as perpetuated by the state, is dealt with in turn. The article concludes by offering a number of focused recommendations with respect to the removal of the “taint” of homosexuality (Part IV).

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3. This does not suggest that male/male rape is in some way more deserving of consideration than the other three types of rape.
4. The term “victim” will be used interchangeably with the term “survivor.” The term “taint” is in no way used in the pejorative sense, but simply to reflect the views of the survivor, the perpetrator, and the state.
II. THE GENESIS OF THE RAPE DISCOURSE

Traditionally, the international community has been reluctant to address the issue of rape. For example, hidden behind the veil separating the public from the private, only rape committed by public officials acting in their official capacity was deemed within the purview of the international community under the heading of torture. Yet the vast majority of rapes are carried out “by familiars not strangers, by members of one’s own ethnic group not others, at home not on the street.” The line determining international competence thus excluded the vast majority of rapes from its concerns.

Even rape that fell very much within the competence of the international community was neglected, for example the tens of thousands of women who have been raped in each and every armed conflict. This was so even though rape has been prohibited in times of armed conflict. It was only the widespread and extreme sexual violence that took place in the conflicts in Rwanda and the former Yugoslavia in the 1990s that triggered the international community into action. It was at this same time that rape committed in peacetime also started to be addressed.

Perhaps the first stage in the evolution of the discussion on rape is inevitably to be a consideration of male/female rape. Outside the penal context, male/female rape is committed far more frequently than other types of rape. Pregnancy is only possible in cases of male/female rape and female/male rape and could even be part of the intention in the former. The women’s movement may also have proved to be critical in its being addressed.

Figures from the United States Department of Justice indicate that in the United States in 2002, 86,290 women reported being raped. A further 58,950 reported an attempted rape, and an additional 70,840 women

7. “[G]ender specific abuses—even those directly attributable to states—have until recently been ‘privatized’ internationally and either go unchallenged or are left out of human rights practice altogether.” Dorothy Thomas & Michelle Beasley, Domestic Violence as a Human Rights Issue, 58 ALB. L. REV. 1119, 1123.
reported being sexually assaulted. It is important to remember that these figures necessarily represent the number of reported incidents and not the actual number of incidents that took place in 2002.

One of the gender-specific consequences of male/female rape is that of forced impregnation. As is all too evident from the conflicts in the former Yugoslavia and Rwanda, however, forced impregnation can be more than merely a “consequence” of a rape but can be the very intention of the rapist. As the 1996 Report of the Special Rapporteur on Rwanda notes, a sharp increase in the number of births immediately after a conflict provides an indication of the number of women who were raped during the conflict. While both rape and forced pregnancy violate the right to bodily security, dignity, and privacy, forced pregnancy brings into play an added scheme of violations. It is thus far more than simply an aggravating factor in the rape

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9. See U.S. Department of Justice, Criminal Victimization in the United States—Statistical Tables Index, available at www.ojp.usdoj.gov/bjs/abstract/cvus/index.htm. This should be compared with the figures for male victims. Men reported 4,100 cases of rape, 18,520 cases of attempted rape and 9,030 cases of sexual assault. See id. These incidents too only represent those that were reported. While these 31,640 reported crimes are only a fraction of the 216,090 females who reported similar crimes, male victims are clearly sizeable in number. This is especially so considering that these figures do not include instances of prison rape. What is unclear from these statistics is the sex of the offender. Thus, the figures include both male/male rape and female/male rape.

A 1999 report published in the British Medical Journal found that, on a sample of nearly 2,500 men, 3 percent had experience of non-consensual sex with another man. Adrian Coxell, Michael King, Gill Mezey, & Dawn Gordon, Lifetime Prevalence, Characteristics, and Associated Problems of Non-consensual Sex in Men: Cross Sectional Survey, 318 BRITISH MED. J. 846 (27 Mar. 1999). Extrapolating this to the US male population, 138,053,563 at the last census, provides a figure of 4,141,606 men who have experienced non-consensual sex with another man. While it may not be accurate to extrapolate nor appropriate to translate to a different country, this does provide at least an indication as to the widespread nature of the problem.

10. A large number of rapes that take place are not reported. For the reasons for under-reporting and the percentages of the different rapes that are not reported, see infra Part III.B.2.


First, women may be psychologically traumatized by the pregnancy and unable to have normal sexual or childbearing experiences with members of their own group. Second, women who are raped and bear the children of the aggressors may no longer be marriageable in their society. Third, the women, simply because they are pregnant with the children of the aggressors, cannot bear their own children during this time—their wombs are “occupied.”

of a woman. Rather, it is a crime compounded by another crime. This is so regardless of whether the offense was committed in time of peace or in time of conflict.

That in recent times the problem of rape has started to be addressed is largely due to the work carried out by the women’s movement. The women’s movement has contributed *inter alia* to the reform of definitions of rape, the prosecution of sexual crimes, and the inclusion of sexual crimes in the Rome Statute of the International Criminal Court. Recognition of the vital role of the women’s movement comes from no less a source than the preamble of the UN General Assembly Declaration on the Elimination of Violence against Women.

For these reasons, that male/female rape was the first of the types of rape to attract attention was to be expected. However, care has to be taken that rape does not end up effectively being defined solely as male/female rape. At all times it must be remembered that this is but one type of rape that can be carried out.

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13. *Cf.* Kristen Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Hum. RTS. L. Rev. 625, 630 (2001): “Rape and forced pregnancy are two of the most important crimes relating to sexual violence, addressing the basic act of wartime rape and the aggravating harm of forcible pregnancy that is suffered only by women.”

14. MacKinnon notes, “When conception results from rape or incest, it is a girl or a woman who was violated, shamed, and defiled in a way distinctively regarded as female.” MacKinnon, *Sex Equality*, supra note 6.

15. “In the Akayesu case before the ICTR, evidence of rape and sexual assault did not emerge until the sole woman member of the Tribunal, Judge Pillay, persisted in questioning witnesses about it.” Charlesworth & Chinkin, * supra note 5, at 312.

16. It was evidence of gender-related crimes before the ICTY and ICTR, indefatigable efforts by individuals and organizations working alongside or under the auspices of the Women’s Caucus for Gender Justice in the ICC, and the participation of gender-sensitive delegates that secured the inclusion of rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, sex trafficking, and other crimes of sexual violence within the war crimes and crimes against humanity provisions of the ICC Statute.


18. This is a real challenge because rape is defined precisely as male/female rape in the majority of countries.

19. Rape is different because it overwhelmingly involves male perpetrators and female victims. A focus on this male-female pattern should not, however, discount the severity of sexual assaults by males against males, which appear to be unjustifiably downplayed, or examined exclusively in the context of prison settings. Nor should an emphasis on this pattern minimize the even rarer occurrence of sexual assaults of males by females or of females by females.

III. DECONSTRUCTION

In a different context, Kapur has underlined the importance of placing in the “foreground the peripheral subject if any significant normative shifts or disruptions are to be brought about.”²⁰ She states that “it is important to recognize and center the peripheral subject . . . instead of falling back on universalized assumptions” about the dominant subject.²¹ Kapur’s analysis applies equally to the rape discourse. Now that the issue of rape has finally been recognized as an important problem in need of resolution, its intricacies should be explored. It should be recognized as an umbrella term, one that encompasses four possible combinations of actors. Those types of rape at the periphery of the existing discussion, namely female/male rape, male/male rape, and female/female rape, should be placed in the foreground. This does not mean that these issues take the place of that which is currently in the foreground and that which is currently in the foreground gets relegated to the peripheries. Foregrounding simply seeks the recognition of the multiple dimensions of a problem and invites a more nuanced consideration of the issues. This foregrounding will, as Kapur notes, create “the potential for a more inclusive politics, opening up a space for subjects who have remained unaddressed.”²²

It could reasonably have been thought that attention would have been focused on the forms of rape at the peripheries, at least as regards the initial fact-finding stages, in order to gauge the depth of the problem. Thus, data would have been collected, studies would have been commissioned, and myths would have been countered so as to encourage reporting. Instead, even at this first stage, little has been done. Such steps, in the case of male/female rape, were recognized as being crucial to any alleviation of the problem. This article seeks to explore some reasons as to why one of the peripheral forms of rape, male/male rape, has been so neglected.²³ The central thesis of this article is that there are two reasons for the silence surrounding male/male rape. One relates to persons advocating on its behalf, the other to the subject matter itself. First, the cause of male/male rape lacks a voice, in that there are very few people who are both willing and able to speak on the issue. Second, homophobia present in society coupled with a supposed link between male/male rape and homosexuality has ensured that the topic is one non grata.

²¹ Id.
²² Id. at 31.
²³ The sole consideration of the topic of male/male rape in this article in no way implies that it has in some way more reason to be foregrounded than female/male rape or female/female rape.
A. A Cause Without a Voice

One reason why male/male rape has not attracted any significant attention, especially at the international level, is that there are very few organizations that advocate or lobby on the issue at that level.24 This is in part a vicious circle. Once an issue is recognized as one of importance, organizations are set up to further the issue. This may be for such practical reasons as funding and staffing. An issue that is already in the public conscience will motivate the general public to give support, both financial and otherwise, to the organization. Similarly, funding from charitable organizations and foundations may prove easier to attract if the issue is considered to be “headline-worthy.” Yet, frequently, it is only when organizations already exist and lobby intensively that an issue is able to attract attention. Indeed, Koh has argued that in order for international law to become law that is actually obeyed, there has to be a movement “from knowledge, to networks, to norms, to horizontal process, and to vertical process.”25 Thus, networks and transnational norm entrepreneurs are a necessary part of the chain.26

It is easy to criticize those who have focused on improving the conditions of one group for not concerning themselves with another group. This is especially so when success starts to be achieved on behalf of that first group. Perhaps this is linked to the tendency to castigate those who have done the most for not doing enough. That is certainly not the intention of this section. Indeed, it is largely due to the foundation set by the women’s movement that male/male rape is an issue at all. However, it is important to ensure that an issue for which few are fighting is not dismissed as a non-issue, and the importance of one cause is not negated in order to elevate the importance of another.

Two established movements that would gain if international attention

24. Organizations that are involved in bringing attention to male/male rape do exist; the organization Stop Prisoner Rape is an example. However, these groups often work at the domestic level. Further, they tend to work in specialized areas within the field; and, as such, provide only a part, albeit an important one, of the picture.
26. See Harold K. Koh, Bringing International Law Home, 35 HOUS. L. REV. 623 (1998). Two good examples of this are the campaigns surrounding the banning of landmines and the regulation of the small arms trade. With regard to the small arms trade, the issue was first taken up by academics, then by research and activist NGOs. This was followed by the formation of a link between the international gun control lobby and the various domestic gun control lobbies. Soon after this entered the transnational norm entrepreneurs. Finally a network was set up consisting of over 300 NGOs. Koh, A World Drowning in Guns, supra note 25, 2333, 2344–45. Similarly, with regard to the landmines action campaign, it has been estimated that 225 NGOs actively lobbied the US government. Jim Wurst, Closing in on a Landmine Ban: The Ottawa Process and U.S. Interests, ARMS CONTROL TODAY, June/July 1997, at 14, 17, cited in John King Gamble & Charlotte Ku, International Law—New Actors and New Technologies: Center Stage for Ngos?, 31 LAW & POL’Y INT’L BUS. 221, 250 (2000).
were devoted to the subject of male/male rape have been largely silent. These are the women's movement and the homosexual movement. This section seeks to explain the silence on both of their parts. As regards the women's movement, this section suggests reasons as to why the movement should have taken up the issue. With respect to the homosexual movement, this section counters reasons as to why the movement has not taken up the problem. The differing approaches result from the different starting points of the two movements. In the case of the women's movement, there was no reason to take up the issue. With regard to the queer movement, there were reasons that prevented the subject from being taken up.

At first sight, it may be considered that the issue of male/male rape falls outside the ambit of the agenda of the women's movement. Thus the subject is oftentimes confined to a footnote.27 This practice has become so widespread that one commentator is able to categorize authors' responses to the subject into disclaimers, generalizations, arguments that a discussion of male/male rape is unnecessary in a work about rape, and acknowledgments of the author's conscious decision not to address the issue.28 Even a perfunctory consideration of the issue, however, reveals that the topic of male/male rape is well within the scope of the feminist movement. Notions of power, dominance, and gender, all of which play key roles in feminist analyses of male/female rape, also feature heavily in an analysis of male/male rape. Similarly, ideas of emasculation and feminization present in male/male rape obviously have an impact upon the feminist discourse.

The power dynamic theory behind rape considers that there is a hierarchy of power in society, with men placed at the top and women at the bottom. The threat of the existing power dynamic being usurped and those at the top losing their positions of power explains why those at the top of the hierarchy rape those lower down.29 Such threats do not stem from active challenges but simply from being the “other.” The power dynamic reason has been explicitly recognized in the case of male/female rape. Thus, MacKinnon has stated, “Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.”30

27. Obviously there are exceptions. See, e.g., Susan Brownmiller, Against Our Will: Men, Women and Rape ch. 8 (1975).
29. “[V]iolations of the human rights of sexual minorities and women” take place due to the “power dynamic that makes any group want to oppress any group that challenges its position.” James D. Wilets, Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective, 60 Alb. L. Rev. 989, 1006.
With a few modifications, the power dynamic model will explain not just male/female rape but the three other types of rape as well. The traditional view of the power dynamic, of two strata with men at the top and women at the bottom, is too polarized in its conceptions of masculinity and femininity. It should be adjusted to reflect more accurately the fact that the concepts of masculinity and femininity are neither uniform nor truly bipolar opposites.31 Were the concepts of masculinity and femininity acknowledged to be non-uniform in nature, the gradations within them would explain the power hierarchy within masculinity and within femininity, and not just between them.32 This would be a possible explanation for female/female rape and male/male rape, namely the acting out of power roles, albeit within the sexes.33 Indeed, as one New York court has found, “[a] number of authorities state that male sexual assault, as in the case of female rape, is an expression of anger, power dominance and control over another.”34 Accepting that masculinity and femininity are not truly bipolar opposites would also account for instances of female/male rape.

Also relevant for the feminist discourse is the notion of feminizing or emasculating victims of male/male rape. MacKinnon thus notes that “[m]en who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men’s social inferiors.”35 The term “emasculaton” is also frequently used to describe the male victim of a rape, the notion being that a male victim of rape has been stripped of his masculinity and has been

31. “Masculinity is assumed to be uniform, gender making all men sufficiently equal to one another that no man can be in a significant position of powerlessness relative to another man,” Catherine MacKinnon, Oncale v. Sundowner Offshore Services, Inc., 96–568, Amici Curiae Brief in Support of Petitioner, 8 UCLA WOMEN’S L.J. 9, 18–19 (1997).
32. Such an internal hierarchy may be based on age, physical stature, race, disability, or sexual orientation, actual or perceived. See id. at 19.
33. Such an approach is still problematic in that it bases itself on the gendered power dichotomy.
made weak and effeminate. Again to quote MacKinnon, “[t]his lowers the victim’s status, making him inferior as a man by social standards. For a man to be sexually attacked, by placing him in a woman’s role, demeans his masculinity; he loses it, so to speak.”36 While this is gender-specific in that it only applies to male victims of rape,37 it is clear that the equation of femininity and weakness, and the notion that to place a man in the role of a woman demeans him, falls well within the scope of the objectives of the women’s movement. It is perhaps surprising, therefore, that the women’s movement has not addressed the issue of male/male rape more fully.

The same is true of the queer movement. It could reasonably have been thought that the queer movement has a lot to gain from the international community’s attention being drawn to the subject of male/male rape. It would help directly the portion of those rapes that are an extension of “queer-bashing,” i.e. the rape of a male for reason of his actual or perceived sexual orientation. A number of authors have noted the link between male rape and sex discrimination,38 while others have explicated the connection between sex discrimination and homophobia.39 In light of these linkages, drawing attention to male/male rape would indirectly challenge homophobic attitudes in all cases of male/male rape regardless of the sexuality, actual or perceived, of the victim or of the aggressor.

Yet neither of these potential gains has proved sufficient for the queer movement to actively address the subject of male/male rape. Three reasons may explain this. First, the queer movement may be wary that drawing attention to the issue of male/male rape perpetuates the notion that it is only homosexuals who are parties to such rapes. This would have the opposite effect to that which is intended, namely reinforcement of such myths already prevalent in society. This is not to suggest that male/male rape does not take place within the homosexual community, simply that the queer movement may not wish to draw attention to those instances in the fear that this will reinforce inaccurate public perceptions of homosexuals. Second, the queer movement is rarely given a voice at the international level.40 Even at the domestic level, such voice is limited. Given the limited opportunity to

36. Id. at 20.
37. Id. “This cannot be done to a woman. What he loses, he loses through gender, as a man.”
38. See, e.g., MacKinnon, Sex Equality, supra note 6, n.121 (“rape of men by men, and its unfavourable treatment by law, could also be seen as sex discrimination”)
be heard, let alone listened to, a tactical decision may have been made to concentrate on one area, that of equality and nondiscrimination. These issues are of obvious importance and would also clearly lead to a reduction in homophobia. Third, the queer movement may argue that it does indeed address male/male rape, or rather that part of it, which can be considered “queer-bashing,” in the form of hate crimes and the right to bodily integrity. While these reasons are hard to disagree with in themselves, they do not adequately explain why the queer movement has not addressed the issue of male/male rape. The first reason, that of the fear of reinforcing negative stereotypes, is not a new phenomenon. In indigenous and minority communities, victims are discouraged from reporting domestic violence to the police because the matter is considered best resolved within the community itself. The fear in these communities is that if instances of domestic violence were to become public knowledge, negative stereotypes already present in society at large would be reinforced. Such a practice has been recognized as harmful, and campaigns have been undertaken in order to discourage it. Yet the same does not seem to be true of the homosexual community. The second purported reason as to why the queer movement is not in a position to advocate on the subject of male/male rape, namely the decision to concentrate on issues of equality and nondiscrimination, neglects the fact that male/male rape is about these very issues. As a result of the third reason, male/male rape that is considered to be “heterosexual” is not addressed. Thus, the gay movement does not tend to lobby on behalf of victims of male/male rape committed in prison or victims of male/male rape that take place during armed conflict, for these are not considered “homosexual” rape and, therefore, are not a matter for the queer movement. This does not appreciate the link between homophobia and all male/male rape, regardless of the sexuality of the victim.

This leaves those currently at the forefront of decision-making to address the issue of male/male rape sua sponte. Decision makers, in all good faith, tend to legislate against those risks that they themselves feel or fear. If there is no awareness of an issue by decision makers, then there is little, if any, chance that the issue will be considered. For this reason, one of the goals of the women’s movement has been to achieve greater inclusion of voices, especially ones that have previously been unheard. To contribute to perspectives other than that of the existing (predominantly heterosexual male) international community is necessary for such issues as this one to be

42. The hitherto largely male decision-makers at the international level essentially led to the public/private divide.
addressed in the future. This is not to say that those currently at the level of international decision-making are incapable of considering such an issue, but it does explain why the issue has not been addressed in the past and why it is unlikely to be considered in the near future. It further highlights the importance of a voice.

At the beginning of this section, it was stated that it is time to consider the problem of male/male rape, particularly at the international level. However, it is not just the international community that could learn this lesson. The women’s movement and the queer movement should realize that advocating on this issue would benefit both their causes. As Wilets notes, “Sexual minority rights groups and feminists have not always acknowledged the connection between the struggle for gay and lesbian rights and the effort to eliminate discriminatory and arbitrary gender roles and stereotypes. Lesbians have frequently been marginalized and isolated within the feminist movement in numerous countries, and gay men have frequently failed to see the connection between their struggle and the struggle to abolish gender role norms and stereotypes with respect to all people.” Perhaps this could be the issue that proves to be the turning point in the relationship between the two movements.

B. Male/Male Rape and the “Taint” of Homosexuality

The second reason that explains why the issue of male/male rape has not been addressed is the notion that there is a link between male/male rape and homosexuality. This, in conjunction with homophobia present in society, explains why the issue is essentially treated as a nonissue. The perceived link will be examined in this part from a number of perspectives—the perspective of the survivor, of the perpetrator, and of the state. The section begins with a consideration of the contribution language plays to the perceived link.

1. The Problem of Language

The difference between the term “male/male rape” and the term “homosexual rape” is not merely a semantic one. The term “male/male rape” describes the rape of one man by another man. There are no additional

43. “[S]ituated agents are . . . capable of acting within a given context to transform it.” Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441, 1485 (1990), cited in Fajer, supra note 39, at 527.
44. Wilets, supra note 29, at 1011.
meanings of the term, and no connotations attach to it. The same is not true of the term “homosexual rape.” While the word homosexual “means nothing more than ‘same-sex’ (as ‘heterosexual’ means ‘other-sex’),” it has been “irrevocably tainted by years of use in a pejorative sense.”\(^{45}\) Today therefore, the term homosexual rape has two meanings, the etymological and the everyday.\(^{46}\) The etymological simply describes the rape of a member of one sex by a member of the same sex and can therefore be equated with male/male rape, while the everyday describes a rape in which one or both of the parties are homosexual. It hardly needs to be said that the general public favors the everyday over the etymological.

Accepting then the use of the term male/male rape as the default term, when should the term “homosexual rape” be used? It is suggested that homosexual rape should only be used to refer to rapes in which both parties are homosexual. Were it to be used to describe rapes in which one party was homosexual and the other party heterosexual, the assumption would no doubt be that the rapist is the homosexual party. This results from society’s focus on the sexual aspect of the rape and not the power/dominance aspects.\(^{47}\) Such usage would thus implicitly perpetuate the notion that it is only homosexual men who rape. Such a perception is not grounded in fact. Indeed, studies are generally of the view that the majority of perpetrators are heterosexual.\(^{48}\) While there certainly exists a view that male/male rapists are in fact repressed homosexuals, this discounts completely the power/dominance explanation of rape and merely seeks to portray the homosexual, repressed or otherwise, as the aggressor. The sexuality of the majority of victims is disputed. Michael King, Adrian Coxell, and Gillian Mezey argue that the greater number of sexual partners of gay and bisexual men as well as an element of homophobic aggression account for why gay men have reported a higher rate of non-consensual sex.\(^{49}\) However, others


\(^{46}\) Both meanings are covered by the definition of “homosexual” in the Oxford English Dictionary, for it defines the adjective “homosexual” as “[i]nvolving, related to, or characterized by a sexual propensity for one’s own sex; or involving sexual activity with a member of one’s own sex, or between individuals of the same sex.”

\(^{47}\) See infra Part III.B.4.

\(^{48}\) See infra note 49. See also MALE VICTIMS OF SEXUAL ASSAULT, supra note 34, cited in Matt Seaton, The Unspeckable Crime, GUARDIAN (UK), 18 Nov. 2002, noting that “most perpetrators, as described by their victims, were not gay.”

\(^{49}\) Michael King, Adrian Coxell, & Gillian Mezey, The Prevalence and Characteristics of Male Sexual Assault, in MALE VICTIMS OF SEXUAL ASSAULT 12 (Gillian C. Mezey & Michael B. King eds., 2000). See also WILLIAM F. PINAR, THE GENDER OF RACIAL POLITICS AND VIOLENCE IN AMERICA: LYNCHING, PRISON RAPE AND THE CRISIS OF MASCULINITY 842 (2001). “Most victims are gay but the great majority of the rapists themselves are heterosexual.” See also MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 16, 18, 64–65 (1997).
argue that, in fact, the majority of victims are heterosexual. This is certainly true of the prison context. Thus, rapes involving all combinations of actors are committed and are not merely confined to persons of homosexual orientation. The terminology used should reflect this fact.

Correct naming and labeling is of considerable importance. In order for the law to become normalized into people’s lives, the law should take cognizance of societal definitions and, at the very least, should not clash with them. Were the legal definition of a term to be X while the public definition of the same term X1 (where X1 is a subset of X), whenever the law mentions the term in order to refer to meaning X2, X3, etc., the public would automatically assume the law is referring to X1. This is exactly the present situation where the term is “homosexual rape,” X is the rape of a male by a male and X1 the rape of a homosexual by a homosexual. Because the general public uses the term “homosexual rape” to describe a rape in which both parties are homosexual, it would be useful were commentators to do the same. Otherwise, such phrases as “homosexual attack” suggest to the general public not an attack by a male by a male but an attack by a homosexual. Reports by the UN can be similarly misleading. For example, the Final Report of the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (“UN Experts Report”) states,

[V]iolent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law. However, this is understandable as the topic of homosexuality, even today, is not discussed freely. That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation.

50. See, e.g., Seaton, supra note 48. It is estimated that “at least half of male rapes are of heterosexual men (and usually by heterosexual men).”

51. Stephen Donaldson notes that in the prison context the “victims generally are heterosexual” and the perpetrators are “almost always . . . heterosexual in identity, preference, and practice outside confinement.” Stephen Donaldson, Can we put an end to inmate rape?, USA TODAY, May 1995, at 40.

52. Naming is significant. One of the most important and empowering aspects of telling your own stories is the ability to choose the terms you use about yourself. The perceived power of names is repeatedly demonstrated by the insistence with which people demand the right to self-denomination: many women do not wish to be “girls”; many African-Americans do not wish to be “Negroes” or “blacks.”

53. The term is used in Sarah E. Frink, AIDS behind Bars: Judicial Barriers to Prisoners’ Constitutional Claims, 45 Drake L. Rev. 527, 542 (1997).

Mention of homosexuality in the second sentence clearly implies that “violent crimes of a homosexual nature” in the first sentence references not male/male rape and the like but rather homosexual rape and the like. This in turn suggests that all the sexual crimes involving two men were committed by and against homosexual men, rather than merely by and against men. This inaccurate perception has already embedded itself in the views of survivors of male/male rape, the intentions of perpetrators to a male/male rape, and society in general.

2. The View of the Survivor—Only Homosexual Men are Raped

Numerous studies have confirmed that male victims of rape suffer from rape trauma syndrome similar to that suffered by female victims of rape. This is so for both short- and long-term suffering. Part of the rape trauma syndrome is the non-reporting of, or a delay in the reporting of, the crime. This may be due to feelings of shame, confusion, guilt, stigma, fear, or a mixture thereof. Shame due to the loss of honor accorded to victims of rape by certain societies; confusion regarding why that particular individual was singled out; guilt as to whether anything more could have been done to resist the rape; stigma as a result of society’s treatment of survivors of rape; and fear of retaliation if the story is ever made public.

Additional reasons for non-reporting exist that are specific to the different sexes. For example, female survivors of rape are confronted with the notion of chastity. In certain societies, the honor of the family is reflected in the chastity of the female members therein. As a result, if a woman reports being raped, her husband or other male family member may consider himself dishonored. This may lead to the woman being abandoned by her husband, disowned by her family, and ostracized by her community. Further, if she cannot prove that she was raped, she may be punished for fornication or adultery. All this presupposes that the female victim of the rape was not killed as a result of the practice of so-called “honor killings.”

Male survivors also have to overcome particular hurdles before report-

55. See, e.g., G.W. Josephson, The Male Rape Victim: Evaluation and Treatment, 8 J. AM. COLL. EMERGENCY PHYSICIANS 14 (1979); Cotton & Groth, supra note 34, at 127, 131–32; Arthur Kaufman, Rape of Men in the Community, in VICTIMS OF SEXUAL AGGRESSION, supra note 34, cited in People v. Yates, supra note 34. See also MALE VICTIMS OF SEXUAL ASSAULT, supra note 49, at 8, 10.
57. MALE VICTIMS OF SEXUAL ASSAULT, supra note 49, at 5.
Societies' constructs of masculinity play an important role in this non-reporting. Society often equates manhood with “the ability to exert power over others, especially through the use of force.” Thus, victimization and masculinity may be considered incompatible in the belief that men cannot be victims. It is for this reason that sexual violence is often dismissed as a women’s issue and explains why only women are educated to be aware of sexual assault. An example often given is that of two people, one male and one female, walking along a deserted road at night, both of whom hear footsteps behind them. The woman fears that she will be raped, while the man fears that he will be robbed. This explains why men, when they are assaulted, feel ashamed that they were unable to defend themselves, and why male rape is often considered to be “a slur on [the] virility or manhood” of the victim. These constructs are further compounded by the fact that, in many societies, “men are discouraged from talking about their emotions and may find it very difficult to acknowledge and describe what has happened to them.” In addition, there exists a severe lack of support systems available for male survivors of rape.

The chastity of a female is considered similar, by society, to the virility of a male. Both are considered to be the sexual virtue of each sex. Further, in a number of states within the United States, to cast aspersions on the sexual orientation of a man is per se defamation, while to question the chastity of a female is considered per se defamation. If, for the purposes of non-reporting, the chastity of the female survivor can be loosely equated with the virility of the male survivor, reasons for the non-reporting of female rape and male rape are roughly comparable. Yet the actual reporting by male and female survivors is not comparable. Studies indicate that between 10 percent and 26 percent of male/female rapes are reported compared

60. See, e.g., Fred Pelka, Raped: A Male Survivor Breaks his Silence, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 253 (Patricia Searles & Ronald J. Berger eds., 1995). “While women tell me that the possibility of rape is never far from their minds, most men never give it a first, let alone a second, thought.” See also SCARCE, supra note 49, at 27.
61. Kaufman, Rape of Men in the Community, supra note 55, at 156, 163. “There is a societal belief that a man should be able to defend against sexual assault.”
63. Id.
64. See, e.g., Seaton, supra note 48. “[T]here are remarkably few services for victims. Rape crisis centres are not accessible to men.” See also Tanya Thompson, Male Rape Victims Turned Away From Women-Only Crisis Centres, SCOTSMAN (UK), 8 July 2000, at 6.
65. See, e.g., Pauline Anderson, Women Figure Prominently in Male Rape, CANADIAN BUS. & CURRENT AFF., 10 June 1997, citing a report by Dr. Michael King, Royal Free Hospital School of Medicine, University of London.
with between 3 percent\(^67\) and 10 percent\(^68\) of female/male rapes. The general view that men are less likely to report sexual assault is further confirmed by numerous other studies.\(^69\) Considering that “[m]en regard non-consensual sex with women less negatively than non-consensual sex with men,”\(^70\) it can reasonably be assumed that the reporting of male/male rape is lower than the 3 percent to 10 percent figure of reported female/male rapes. Such a view is shared by the Chief of Victimization Statistics.\(^71\) It is also affirmed by the numerous cases in which victims of male/male rape have indicated that they have been raped but have identified the perpetrator as female when, in reality, the offender was male.\(^72\)

Why is male/male rape considered “more negative” than female/male rape? After all, societal constructs of masculinity are present in both. Indeed, on a power/dominance analysis, it may be thought that a man being raped by a woman would be the ultimate emasculation. A further additional factor, an extra stigma, or an additional taboo that outweighs this must therefore be present. This factor, it is submitted, is the view that there is a “taint” of homosexuality about the victim of a male/male rape. Indeed, according to those who work with survivors of male/male rape, a commonly asked question is whether the victim is gay as a result of the rape.\(^73\) Similarly, “several” of the nine heterosexual men surveyed in one study “had wondered briefly if they had a homosexual trait that could have ‘attracted’ the assailant.”\(^74\) Two further studies cited by Mezey, Coxell, and King affirm the proposition that men who are sexually abused by other men question their sexuality.\(^75\)

The victim may consider himself tainted with homosexuality as a result of his own behavior, the behavior of the perpetrator, or the behavior of society. The victim may question his sexuality, not only because the form the rape takes mirrors the consensual homosexual act,\(^76\) but also as a result

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\(^{67}\) Anderson, supra note 65; SCARCE, supra note 49, at 16.


\(^{69}\) See, e.g., Isley, supra note 34, 164–65; Kaufman et al., supra note 34, at 223; Kaufman, Rape of Men in the Community, supra note 55, at 158. See also People v. Yates, supra note 34, at 628, n8.


\(^{71}\) Asika, supra note 66.

\(^{72}\) Id.

\(^{73}\) Seaton, supra note 48.

\(^{74}\) King, Coxell, & Mezey, supra note 49, at 3.

\(^{75}\) Id. at 4.

\(^{76}\) This results from a focus on the sexual aspect of the rape to the exclusion of the power/dominance aspect of the rape.
of his physiological response to it. It is not uncommon for survivors to have become sexually aroused during the rape and this may even have been the intention of the perpetrator. A. Nicholas Groth and Ann W. Burgess thus note that “a major strategy” used by some male/male rapists is to try and get the victim to ejaculate. This leads the victim to question his sexuality and leaves him “discouraged from reporting the assault for fear his sexuality may be suspect.”

The victim may further question his sexuality as a result of the behavior of the perpetrator. For example, the perpetrator may make derogatory comments about gay men during the course of the rape. Indeed, King, Coxell, and Mezey note that “there is some evidence that sexual assaults against gay men may be a disguised form of ‘queer bashing.’” While this presupposes that the victim is gay, the perpetrator may have merely assumed this to be the case. The victim may then question his sexuality, wondering why it was he who was targeted and whether he gave out any subconscious signals to the perpetrator that he was gay. Perpetrators often capitalize on this, in the knowledge that the rape will not be reported because “straight victims don’t want to appear gay, and gay victims might fear coming out of the closet.”

If the victim does report the rape, society may lead him to believe that he is tainted by homosexuality. Police asked one rape victim, “Did you come?”, while another was asked whether he had any gay friends. Yet another was told, “[w]ell, probably, you really wanted this to happen. You wanted to have sex with a man, then you got scared. And now you want to say it was something else.” These insinuations that the victim is gay may further confuse already vulnerable victims and lead those victims who had not previously questioned their sexuality to do so.

The fact that survivors of male/male rape question their sexuality and that society considers them homosexual would not be a reason for non-reporting were it not for society’s treatment of homosexuals. Human Rights

77. Groth & Burgess, supra note 34, quoted in Scarce, supra note 49, at 60.
80. Pelka, supra note 60, at 254. See also Kaufman, Rape of Men in the Community, supra note 55, at 163.
81. Kaufman, Rape of Men in the Community, supra note 55, at 163. See also Rochman, supra note 34, at 42, cited in People v. Yates, supra note 34, at 629.
82. Pelka, supra note 60, at 251.
83. Scarce, supra note 49, at 218.
84. Id. at 217.
85. This reaction mirrors that of prior reactions to reports of male/female rape.
Watch notes that in “virtually every country in the world people suffer[] from de jure and de facto discrimination based on their actual or perceived sexual orientation.”86 This discrimination manifests itself physically as well as psychologically. In many societies, homosexuals and those perceived to be homosexual have been vilified and their lives put in danger. President Robert Mugabe of Zimbabwe has stated that homosexuals are “worse than pigs” and “less than human,”87 while the Namibian Home Affairs Minister Jerry Ekandjo has urged new police officers to “eliminate” lesbians and gays “from the face of Namibia.”88 All over the world, homosexuals and those perceived to be homosexual are subjected to torture, ill-treatment, and arbitrary detention.89 Even in countries in which there is no explicit state support for physical harm against sexual minorities,90 there is state support for discrimination against sexual minorities. Thus, numerous countries criminalize sodomy or solely sodomy between males,91 while others have a higher age of consent for homosexuals than for heterosexuals. The vast majority of countries neither permit civil unions nor same-sex marriage. In many more still, there are no provisions regarding discrimination against homosexuals. This discrimination, pervasive in every sphere imaginable, contributes to a psychology whereby sexual minorities are second-class citizens.

The explicit psychological discrimination has only recently been lifted. It was only in 1973 that the American Psychiatric Association removed homosexuality from its list of diseases.92 It took a further nineteen years for the World Health Organization to accept that homosexuality was not a disorder.93 As a result of these relatively late changes, myths still exist, for example that homosexuals are more likely to engage in child molestation than heterosexuals.94 Indeed, in some societies, “the terms homosexual and pederast (lover of boys) have been used interchangeably.”95 All this

90. State support is implicit in so far as the state does not investigate, prosecute, and punish those individuals who do violate the rights of sexual minorities.
91. Law notes that the central effect of this criminal law is not so much to deter sexual behavior as to encourage other forms of state disapprobation of homosexuals. Law, supra note 39, at 190.
92. Id. at 213–14.
93. D.J. West, Homophobia: Covert and Overt, in MALE VICTIMS OF SEXUAL ASSAULT, supra note 49, at 21.
94. “This stereotype exists despite evidence that the vast majority of child abuse incidents involve men abusing girls, and that many men who abuse boys self-identify as heterosexual or have no interest in adult males.” Fajer, supra note 39, at 541.
95. West, supra note 93, at 22–23.
contributes to the dehumanization of individuals and explains why people would not wish to be perceived as homosexual, even if this means not reporting being raped.

3. The Intention of the Perpetrator—
   Casting Aspersions of Homosexuality

Part of the intention of the perpetrator in committing the rape may be to cast aspersions of homosexuality on the victim. This is done by forcing the victim to commit acts typically associated with homosexuality. Unlike the “love the person, hate the act” approach advocated by certain religions, the perpetrator seeks to conflate personhood with action. The intention of casting aspersions of homosexuality is evidenced, for example, by the perpetrator trying to get the victim to ejaculate or the rape being carried out as a form of “queer bashing.” In this part, the intention of the perpetrator will be demonstrated by considering some of the acts of sexual violence committed against men in times of armed conflict.

During armed conflicts, sexual abuse is widespread. Mass rape of women has been all too common and is at last starting to be addressed. Sexual violence against men is also commonplace. However, it is less well documented. The near invisibility of male/male rape in armed conflict should constitute an added reason for concern rather than serving as an excuse that it rarely takes place. Sexual violence against men has been noted on occasion. For example, there have been reports of male/male rape committed by Iraqi soldiers during the invasion of Kuwait and sexual violence being committed against men in Liberia. Similarly, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that “[o]n a smaller scale, [to that suffered by women] many men were also victims of rape and sexual assault by the Serbian forces.” Reports documenting sexual violence in armed conflict also note that the cases of male/male rape that are reported are merely a sample of those that are actually committed. Thus, the United Nations High Commission for Refugees Guidelines on Sexual Violence Against Refugees notes that

96. Rape in times of armed conflict has been finally prosecuted successfully as a war crime, as a crime against humanity, and as genocide.
98. A UN human rights officer has stated that the UN is “finding that men were also victims of sexual violence.” BBC News, UN to Probe Liberian Sex Crimes (3 March 2004), available at news.bbc.co.uk/1/hi/world/africa/3530495.stm.
“it is suspected that the reported cases of sexual violence against males are a fraction of the true number of cases.” 100 Similarly, a Human Rights Watch report on sexual violence in the conflict in Eastern Congo documents only one case of male rape, noting that “[b]ecause rape is considered even more shameful for a male victim, crimes of this kind are less likely to be reported than those involving female victims.” 101 A further report on sexual violence in the conflict in Sierra Leone notes, “FAWE [Forum for African Women Educationalists] Sierra Leone did not want Human Rights Watch to interview the boys they had treated as they feared that interviewing them would re-traumatize them.” 102 These last two quotes clearly indicate that there is perceived to be an added stigma attached to victims of male/male rape that does not attach to victims of male/female rape. It is surprising, therefore, that more is not being done to try and dispel this stigma and in turn encourage male victims to report being raped. In seeking to protect victims of male/male rape from this stigma by encouraging non-reporting, or at the very least by not actively encouraging reporting, the notion that there is a stigma is perpetuated. This additional stigma, the “taint” of homosexuality, also explains in part why the perpetrator commits acts of male/male rape.

In the conflict in the former Yugoslavia, sexual violence was rampant. Women were subjected to particularly horrendous sexual atrocities, and rape was used as a weapon of war. 103 The UN Experts Report recognized that “[m]en are also subject to sexual assault. They are forced to rape and sexually assault women, they are forced to perform fellatio on guards and on each other, they are forced to perform other sex acts on each other, and they suffer castrations, circumcisions, and other sexual mutilations.” 104 Given the widespread nature of the sexual atrocities committed in this conflict, coupled with the availability of evidence surrounding such atrocities, the conflict in the former Yugoslavia forms the background to this section. Atrocities of a sexual nature are, however, committed in each and every armed conflict.

100. UNHCR Guidelines, supra note 62 (emphasis added).
The sexual violence against men in the conflict was largely of two types—genital torture and male/male rape. The frequency of genital torture was so great that the UN Experts Report considered “[c]astrations . . . performed through crude means such as forcing other internees to bite off a prisoner’s testicles” to be one of the “common threads” that run through the reported cases. Such atrocities are documented in cases before the ICTY and the International Court of Justice. As found by the Judgment of the Trial Chamber of the ICTY in the Tadic case, “[w]itness H was ordered to lick [Fikret Karambasic’s] naked bottom and G to suck his penis and then to bite his testicles. . . . [Witness] G was then made to lie between the naked Fikret Karambasic’s legs and, while the latter struggled, hit and bite his testicles. G then bit off one of Fikret Karambasic’s testicles and spat it out and was told he was free to leave.” Similarly, the Application in the Genocide Case brought by Bosnia and Herzegovina before the International Court of Justice documents accounts of prisoners being forced to “bite each other’s testicles off,” beatings aimed particularly at the testicles, and provides an exposition of an incident involving a “Muslim man [who] . . . was severely beaten all over his body and [whose] teeth were knocked out. The guards then tied one end of a wire tightly around his testicles and tied the other end to the victim’s motorcycle. A guard then got on the motorcycle and sped off.”

One of the many atrocities that Muslim women were subjected to was their being forcibly impregnated. This was done in order that they would

105. See generally id. See also Wilets, supra note 29, at 1005: “[M]ilitias have implemented a specific form of terror against Bosnian males, including male rape and genital torture.”


[Two Serbian] brothers were let into the [Bosnian refugee] camp after 5:00 p.m. These brothers entered the sleeping quarters carrying pistols and automatic rifles. They called for Emir, Jasmin, and Alic to come forward. The three were beaten with rifle butts and police batons. . . . The brothers forced Alic to drink the urine of the other two prisoners. Alic was next beaten until he was unconscious and then revived with cold water. After further beatings, Alic was forced to take his pants off. The brothers then forced Emir and Jasmin to bite off Alic’s testicles. Alic died of his wounds that night.


109. Id. ¶ 44D(c).

110. Id. ¶ 62.
carry Serb babies; in order that Muslim men would consider them unmarriable;\textsuperscript{111} in order that they would be shunned by their communities;\textsuperscript{112} and in order that they would not give birth in the future.\textsuperscript{113}

Ultimately, these acts—the systematic rape of the women and the widespread castration of the men—were carried out to prevent procreation between Muslim men and women.\textsuperscript{114} It would thus explain why the soldiers themselves carried out female rapes whereas fellow prisoners were forced to carry out castrations. Indeed, the correlation between the rape of women and the castration of men has been recognized by Brownmiller who noted that “[c]astration, the traditional coup de grace of a lynching, has its counterpart in the gratuitous acts of defilement that often accompany a rape, the stick rammed up the vagina, the attempt to annihilate the sexual core.”\textsuperscript{115} And such gratuitous acts of defilement took place; for example, victims were “sexually abused with foreign objects like broken glass bottles, guns and truncheons.”\textsuperscript{116}

What the “prevention of procreation” reason does not explain, however, is the second of the two categories of atrocities, namely male/male rape. It does not provide an answer as to why men were forced to perform oral sex on guards, why they were anally raped by guards, or why they were forced to rape each other. It is submitted that the objective in these cases was to achieve the total and utter humiliation of the individuals concerned, stripping them of any semblance of dignity. A comparison with the other acts that male prisoners were forced to commit may prove instructive. They were forced to castrate fellow prisoners and commit incest.\textsuperscript{117} Male prisoners were also forced to sodomize one another. For example, one

\textsuperscript{112} Fisher, supra note 12.
\textsuperscript{113} Ray, supra note 58. Cf. Allen, supra note 58.
\textsuperscript{114} Genocide Application, supra note 108, ¶ 44D(c):

They were hitting me, as well as others, in the testicles, using metal hampers, metal bars, kicking with the boots. My testicles were swollen, the size of large oranges. The number of tortures varies, from one [or] two to twenty or more. . . . Serb torturers would beat us, step or jump on us until they tired out. They were deliberately aiming their beatings at our testicles saying “you’ll never make Muslim children again.”

(Emphasis added); UN Report on Resolution 780, supra note 106, at 59–60, ¶ 250(b): “Perpetrators tell female victims [of rape] that they will bear children of the perpetrator’s ethnicity, that they must become pregnant.”

\textsuperscript{115} Brownmiller, supra note 27, at 255.
\textsuperscript{116} UN Report on Resolution 780, supra note 106, at 251, ¶ 250(d); Genocide Application, supra note 108, ¶ 44D(b).
\textsuperscript{117} UN Report on Resolution 780, supra note 106, at 59, ¶ 249 notes that a witness observed “a father and a son who shared his cell [and were] forced by guards to perform sex acts with each other”; Genocide Application, supra note 108, ¶ 44D(h): “Daily Serb torturers forced Muslim prisoners to f . . . each other, to perform oral sex on each other, forcing these bestialities especially among family members, between a father and son.”
witness testified that “several men had been forced by the guards to have intercourse with each other,” while another witness reported that “he and 100 other men were beaten for 8 days and forced to perform sexual acts on each other.” The UN Experts Report has also reported this practice on numerous occasions. Thus, in the opinion of the perpetrators, sodomy is equated with incest and castration in terms of moral disgust. But why is moral disgust associated with sodomy? Why is this considered the most depraved of acts?

It may be argued that too much is being read into the act of sodomy itself and that the focus should not be on the particular form the offense takes. Instead, the focus should be solely on the non-consensual aspect of the sex act or solely on the male victim of the assault. This is not so. If the perpetrators were focusing solely on the non-consensual aspect of the rape, given the systematic occurrence of male guard/female prisoner rape, it is likely that the perpetrators would have forced a male prisoner to rape a female prisoner. While the man would not have been forced to commit vaginal rape in light of the wish to stop the procreation of the other ethnic group, there is no reason why the man would not have been forced, for example, to rape the woman anally. This is not to say that male prisoners were not forced to rape female prisoners; they were. Although men and women were separated into different camps, such incidents were not on the scale that would have been expected given the huge numbers of women that were raped during the conflict. Thus, the lack of consent per se could not have been the motivating factor in forcing the commission of the sexual assault.

Neither is it likely that the focus of the perpetrator was solely on the male victim of the sexual assault. If he were the focus, there is no reason why forms of sexual violence other than forced sodomy were far less frequently committed against him. This is particularly evident from the reports of the rapes committed. Reports indicate that the practice that was far more prevalent was not so much the rape of a male prisoner by a male guard but the rape, on threat of death, of one male prisoner by another male prisoner. This is not to suggest that male guards did not rape male prisoners; they did. However, often in such cases, there was a reason for this difference.

120. See, e.g., UN REPORT ON RESOLUTION 780, supra note 104, at 40, ¶ 179. See also Drljaca, quoted in Louise Branson, New Balkan Horror: Rape of Men, S.F. EXAMINER, 1 Aug. 1993 (on file with author).
121. See, e.g., UN REPORT ON RESOLUTION 780, supra note 104, at 40, ¶ 179.
in treatment, for example the deliberate spread of AIDS. The OSCE thus reports a witness describing that he saw “two male detainees being raped by two policemen who declared that they had AIDS.”

It is submitted that the particular focus of the perpetrators was in fact on the combination of the act of sodomy, the lack of consent thereto, and the particular actors involved therein. The answer to the question of why this was considered the most depraved of acts is the “taint” of homosexuality associated with sexual conduct between two males, regardless of whether such conduct is consensual.

The frequency of the forced male rape between two male prisoners when compared to the rape of male prisoners by male guards is consistent with the “power dynamic” explanation of rape. Power is equated with masculinity, and by masculinity one is of course referring to heterosexuality. When a guard forces a prisoner to commit acts typically associated with homosexuality, the guard tries to “taint” the prisoner with homosexuality, and by doing so, to strip him of his power. It is this focus on power that explains why, when guards anally rape prisoners, it is the prisoners who are tainted with homosexuality while the guards retain their heterosexual status. Aspersions of homosexuality are cast more effectively when two men are forced to sodomize each other. In this situation, the traditional power dynamic no longer applies because the power is vested with the guards rather than with the person committing the sodomy. As a result, forced sodomy “taints” both parties with homosexuality and strips them both of their masculinity and, with it, any power they may have. It is this “taint” of homosexuality that causes forced sodomy to be placed on the same level of moral gravitude as forced castration and incest, and it also explains the prevalence of forced rape between two male prisoners as compared with other forms of male sexual abuse. This tainting of homosexuality also suggests that men are raped as men.

In addition to stripping them of their power, there are two further, almost conflicting, reasons that explain why the perpetrators wished to “taint” their victims with homosexuality. On the one hand, casting the taint of homosexuality may have been intended by the perpetrators as punish-


123. To rape another man validates the perpetrator’s masculinity more so than the rape of a woman as it is perceived as “conquering a more powerful opponent and as stripping that victim of his very manhood.” Christopher D. Man & John P. Cronan, Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,” 92 J. CRIM. L. & CRIMINOLOGY 127, 149 (2001). See also Pelka, supra note 60, at 251–52.

124. “It is also arguable that men who are raped (usually by men) are raped as men.” MacKinnon, Sex Equality, supra note 6, at 1309 n.121 (emphasis in original).
ment for the Balkan Muslims acceptance of homosexuality.\(^{125}\) Because the physical act is the same, the perpetrators equate consensual sex between males with male/male rape and use the tolerance of the Balkan Muslims against them. In this regard, Schwartz has noted, “Serbian racism has always evoked hatred of the Balkan Muslims for their acceptance of gayness. In 1926, the Serbian writer Cedomil Mitrinovic published a classic exposition of Serbian anti-Muslim ideology attacking the Bosnians’ acceptance of homosexuality among them and recommending, in fact, one solution: genocide.”\(^{126}\) On the other hand, the “taint” of homosexuality may have been intended in the knowledge that the consequences of such a “taint” are particularly strong in the case of Muslim victims who were not tolerant of homosexuality. Either way, Salignon was correct to observe that “male sexual abuse is carried out by ‘intelligent’ torturers who ‘want to degrade their victims as much as possible.’”\(^{127}\)

4. The Attitude of the State—Complicity and Perpetuation

This section considers the extent to which the state is complicit in and perpetuates the notion that male/male rape involves a “taint” of homosexuality. This attitude manifests itself in such issues as not allowing homosexuals to serve in the armed forces. One commentator has noted that the underlying message of the media coverage of the “gays in the military” debate was “gay men will inevitably become sexual predators and assault their heterosexual comrades.”\(^{128}\) Here, however, it will be shown to exist in relation to the problem of male/male rape committed in prisons.

Rape is an entrenched part of prison life. One commentator even describes it as the most tolerated act of terrorism in the United States.\(^{129}\) The incidence of male/male rape in prisons is disputed. Some studies have found that around 1 percent of the male prison inmate population has been raped,\(^{130}\) while others consider the figure to be around 22 percent.\(^{131}\) Many

\(^{125}\) Jason Thomas, New Serbian Terror: Male Rape in Bosnia, BAY AREA REP., 17 June 1993 (on file with author).

\(^{126}\) Stephen Schwartz, Rape as a Weapon of War in the former Yugoslavia, 5 HASTINGS WOMEN’S L.J. 69, 70–71 (1994).

\(^{127}\) Salignon, quoted in Branson, supra note 120.

\(^{128}\) See, e.g., SCARCE, supra note 49, at 46. See also PINAR, supra note 49, at 1146.


\(^{131}\) David L. Struckman-Jones & Cynthia Struckman-Jones, Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men, 80 PRISON J. 379, 383 (2000). Of this 22 percent, one half were raped anally.
more cite figures in between.\textsuperscript{132} In 1995, the organization Stop Prisoner Rape “conservatively estimate[d] that nationally over 300,000 males are sexually assaulted behind bars every year.”\textsuperscript{133} This number represents the number of individual victims and not the number of actual rapes that are carried out. Because many of these 300,000 individuals are repeatedly raped and frequently gang-raped, the total number of actual rapes is far greater. Stop Prisoner Rape thus estimated that “over 60,000 prisoners are subjected to involuntary sex every day.”\textsuperscript{134} Justice Blackmun has stated that “[a] youthful inmate can expect to be subjected to homosexual gang rape in his first night in jail, or, it has been said, even in the can on the way to jail.”\textsuperscript{135} Understandably, therefore, the perception of male/male rape among prisoners is very high and has been cited as the first thing an inmate fears.\textsuperscript{136}

Prison rape, like all forms of rape, is used as a means of controlling and dominating others. It is the public display of masculinity, a weapon of the powerful. As Donald Cotton and A. Nicholas Groth note, “It is more the sexual expression of aggression than the aggressive expression of sexuality.”\textsuperscript{137} Given the focus on power and not the sexual nature of the act, the vast majority of men who commit these acts self-identify as heterosexual. Victims are feminized and the male/female power dynamic allows sexual aggression to reaffirm heterosexuality.\textsuperscript{138} Not only do the aggressors not consider themselves homosexual, they do not consider themselves to have taken part in homosexual acts.\textsuperscript{139} Susan Brownmiller explains that this is based on the “startlingly primitive view of sexual relationships, one that defines as male whichever partner is aggressive and as homosexual whichever partner is passive.”\textsuperscript{140} However, the view is not all that old-fashioned. It was as late as 1948 that Alfred Kinsey, in his seminal work, argued that to consider the active male in a male same-sex relationship as

\textsuperscript{132} For various figures and studies, see PINAR, supra note 49, at 1015; Robertson, supra note 129, at 442 n.47; Brian Saccenti, Preventing Summary Judgment Against Inmates who have been Sexually Assaulted by Showing that the Risk was Obvious, 59 MD. L. REV. 642, 644 n.7 (2000); Adrian Coxell & Michael King, Behind Locked Doors: Sexual Assault of Men in Custodial Environments, in MALE VICTIMS OF SEXUAL ASSAULT, supra note 49, at 82–83.

\textsuperscript{133} Donaldson, supra note 51.

\textsuperscript{134} Id.


\textsuperscript{136} WEISS & FRIAR, supra note 129, at 4.


\textsuperscript{138} “Feminization of inmates allows predatory heterosexual inmates to rationalize the sexual victimization of other men.” Robertson, supra note 137, at 9.

\textsuperscript{139} BROWNMILLER, supra note 27, at 266. See also Man & Cronan, supra note 123, at 151.

\textsuperscript{140} Id. at 266.
heterosexual is a misapplication of the term heterosexual.\textsuperscript{141} Given the late acceptance of this proposition, the view that the active male is heterosexual still prevails in certain sectors of society. Donaldson notes:

For the majority of prisoners, penetrative sex with a punk or queen remains a psychologically heterosexual and, in the circumstances of confinement, normal act; the relationships involved are also psychologically heterosexual to them.\ldots These prisoners, who are perhaps more focused on the physical and less on the psychological dimensions of sexual activity than members of the middle class, insist that the difference between the experience of entering a female mouth and of entering a male mouth is not significant, that the experiential difference between entering a vagina or female anus and a male anus is not significant.\textsuperscript{142}

Unlike inmates who focus on the power dynamic and the physical aspect of male/male rape, officials within the prison system only consider the sexual nature of the act. As the violent act mimics the consensual homosexual act, the two are equated as one and the same, and male inmates who rape other male inmates are considered homosexual. Indeed, it used to be thought that the high rate of sexual behavior in prisons meant that there were a “greater percentage of homosexuals within the prison than on the outside.”\textsuperscript{143}

The equation of male/male rape with homosexuality exists at all levels of the prison system. This explains, it is submitted, why the issue of male/male rape in prisons is not being tackled.\textsuperscript{144} Prison officers consider that male/male rape must necessarily be committed by and against homosexuals. For how can a heterosexual male possibly rape another heterosexual male? In one study, Helen Eigenberg found that one-sixth of prison officers assumed that male rape victims were homosexual.\textsuperscript{145} Indeed, prison officers have been known to respond to complaints of rape with statements such as “you must have wanted it because you allowed it to happen,”\textsuperscript{146} or “laughing saying yea right.”\textsuperscript{147} Further, if the rape involves self-identified

\begin{itemize}
\item \textsuperscript{141} ALFRED C. KINSEY, WARDELL B. POMEROY, \& CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 617 (1948).
\item \textsuperscript{143} PINAR, supra note 49, at 1017, quoting JOSEPH F. FISHMAN, SEX IN PRISON: REVEALING SEX CONDITIONS IN AMERICAN PRISONS 22 (1934).
\item \textsuperscript{144} It has been argued, however, that rape is used as a means of control in the prison as it “divides the prisoners . . . and gives them real cause to suspect, fear, fight and hate each other.” WEISS & FRIAR, supra note 129, at 27.
\item \textsuperscript{145} Id. at 1061.
\item \textsuperscript{146} SCARCE, supra note 49, at 41.
\item \textsuperscript{147} Stephen Donaldson, Excerpts from Typical Prisoners’ Letters on Rape, available at www.igc.apc.org/sp/ docs/prison-letters.html
\end{itemize}
homosexuals, the matter is not considered to be rape. The victim is deemed to have consented purely by reason of his sexual orientation. Thus, Human Rights Watch details an incident in which an inmate’s report of a rape was dismissed after the perpetrator claimed that it was consensual sexual activity. After the official told them that he was not interested in “lovers’ quarrels,” the victim was raped once again and nearly beaten to death. These reports are supported by the findings of one empirical study, which found that where homosexual or bisexual inmates were involved, officers were inclined to assume the sex was consensual. These two prejudices, that male/male rape necessarily involves homosexuals and that it must be consensual because it involves homosexuals, work side by side. When inmates are raped and complain to prison officials, they are frequently told that they are homosexual “and that what happened was not rape, but consensual sex.” Further, in one study, 44.6 percent of prison officers expressed the view that some inmates “deserved to be raped if they had previously engaged in consensual acts.”

Male/male rape is equated with consensual homosexual activity not merely at the level of prison officers. An associate commissioner at the Department of Corrections has opined, “I don’t believe [prison rape] is as big a problem as the general public perceives it to be. It doesn’t come to our attention, put it that way. You don’t see people walking around in prisons holding hands.” The associate commissioner is obviously confusing consensual sex with rape, for even if people were walking around the prison holding hands, this would in no way indicate that rape was occurring. Further, just because people are not walking around holding hands, it does not mean that there are no instances of rape. The associate commissioner must be of the view that it is only homosexuals, who are presumably the people who are being referred to by “people . . . holding hands,” who commit male/male rape. Because there are no people holding hands, there can be no rapes going on.

This view not only explains why male/male rape is not addressed but

148. Man & Cronan, supra note 123, at 145, note that when homosexual or bisexual inmates report rapes, officials presume that “any sex that these inmates engage in is consensual.”
150. Peter L. Nacci & Thomas R. Kane, Sex and Sexual Aggression in Federal Prisons (1982), cited in Robertson, supra note 137, at 43.
151. C.M. Sennott, Prison’s Hidden Horror; Rape Behind Bars, BOSTON GLOBE, 1 May 1994, Metro ed., at 1. See also Hansen, supra note 149, at 16.
153. Sennott, supra note 151.
indicates why it is allowed to be used as an explicit threat in crime prevention strategies. For example, on a trip to Eastham Prison, teenagers with emotional and substance abuse problems were subjected to fondling by inmates in “an attempted lesson to show the juveniles what could happen to them in prison.”154 Similarly, simulations of prison rape were carried out at one boot camp for juvenile offenders in order to scare them into reforming. Drill instructors thus told one offender, “You don’t change, they’ll be sticking things up your butt. Right up your butt!”155 Indeed, no less a person than the Attorney General of California has stated that he “would love to personally escort” the disgraced head of Enron to an “8-by-10 cell that he could share with a tattooed dude who says, ‘Hi my name is Spike, honey,’”156 the stereotype used being that of a prison rapist. At best, the Californian Attorney General must be of the view that male/male rape is a legitimate part of a prison sentence, despite an explicit statement to the contrary by the United States Supreme Court.157 At worst, the Attorney General wishes to “personally escort” the prisoner into the hands of the rapist where he may subsequently be gang raped, prostituted out, and, in all likelihood, exposed to AIDS.158

The confusion between male/male rape and homosexuality also leads to the relative disinterest of society. Instead of outrage at the problem, it is frequently joked about “so much so that when the topic of prison arises, a joking reference to rape seems almost obligatory.”159 Incredibly, male/male rape in prison is used to advertise products on television. Thus Robertson notes:

An advertisement for the soft drink 7-Up vividly illustrates how the public accepts prison rape as part and parcel of a prison sentence. As prisoners receive

154. SCARCE, supra note 49, at 43, referring to a spokesperson for the Texas Department of Criminal Justice.
155. Id. at 43.
158. Those involved in the prison administration have acknowledged this latter possibility: “When asked to comment on the possibility that [one inmate who had been raped numerous times] had contracted AIDS, this was the reply from the state Department of Correction spokesman, Anthony Carnevale: ‘Well, that’s prison. . . . I don’t know what to tell you.’” Sennott, supra note 151.
cans of the soft drinks, an inmate drops one and remarks that he will not retrieve it, implying that bending down will expose him to rape. Later, the soft drink spokesperson finds himself locked in a cell with an inmate who has his arm around him, implying that a sexual assault will soon commence.160

Male/male rape committed in prisons is a problem that is in urgent need of resolution. Yet instead of devoting much needed attention to it, the criminal justice system uses it as a threat, and society treats it as a joke. While the reason for the lack of attention may be due in part to the fact that the conduct takes place behind bars, this cannot be the complete answer, for conduct that is carried out behind bars often reaches across to the general public.161 Sexual violence in general remains under-addressed, yet the problem of male/male rape escapes practically all comment. In no area is this more evident than male/male rape committed in prison. The primary reason for this, it is submitted, is the “taint” of homosexuality.

IV. CONCLUSION AND SOME RECOMMENDATIONS

Through a failure to distinguish sex from rape, through a reluctance to distinguish homosexuality from sexual conduct between males, and through an inability to distinguish “homosexual rape” from “male/male rape,” society considers both parties to a male/male rape to be homosexual. Given the considerable homophobia present in society, these aspersions of homosexuality amount to a “taint.” The survivor may consider himself tainted by these aspersions and thus be reluctant to report the rape. To cast such a “taint” may be part of the intention of the perpetrator, hence the male/male rapes committed in armed conflict. The view that these persons are homosexual, coupled with the homophobia prevalent in society, also explains why the state has been able to neglect the mass rape committed in prison each and every day.

Removal of the stigma attached to homosexuality is clearly the most effective way of remedying the “taint” attached to male/male rape. Needless to say, this can only be achieved by removing all forms of discrimination against sexual minorities. Assuming that this is not likely to happen in the near future, the article concludes by offering some very specific steps in the


161. Stephen Donaldson, The Rape Crisis Behind Bars, N.Y. Times, 29 Dec. 1993, at A11. “The fight against rape in our communities is doomed to failure and will remain an exercise in futility as long as it ignores the network of training grounds for rapists: our prisons, jails and reform schools.” Id.
areas of reporting, combating stigma, and criminal justice statistics, all of
which can be undertaken at very little cost and which will help reduce the
notion of a “taint.”

In the context of reporting, it is essential that commentators do not
perpetuate the notion that it is only homosexuals who are parties to male/
males rapes. While the term “homosexual rape” accurately describes male/
males rape, it also reinforces society’s prejudices. For this reason, it is
essential that commentators use the term “male/male rape” as the default
one and refer to “homosexual rape” only when describing the rape of one
homosexual by another homosexual.

In terms of stigma, it is important for NGOs and intergovernmental
organizations to report on sexual atrocities committed against men in times
of armed conflict. It is not acceptable to state that figures cannot be
compiled due to the unwillingness of victims to report instances of male/
males rape. This should provide even more reason for dispelling the stigma
surrounding the offense.

The queer movement and the feminist movement should remember that
they are battling similar prejudices. The realization that male/male rape, like
all types of rape, is committed for reasons of power and domination will
help their causes. Fighting male/male rape is thus in the interests of both
movements.

With regard to criminal justice statistics, prison rape should be included.
This will ensure that the statistics provide an accurate representation of the
offense that are committed in the country. It will also highlight the gravity of
the problem of male/male rape and raise its profile to a level it deserves.

A further significant step in trying to eliminate the stigma associated
with homosexuality would be to establish a Special Rapporteur on sexual
minorities. This would have symbolic effect as well as being effective in
practice. Symbolic given that the UN has not traditionally been a place
favorable for sexual minorities, and effective given the strides previously
neglected subjects have made since the appointment of a Special Rappor-
teur in their field. During the fifty-ninth (2003) session of the UN Human
Rights Commission, Brazil proposed a resolution that expressed “deep
concern at the occurrence of violations of human rights in the world against
persons on the grounds of their sexual orientation.” The resolution called
upon states to “promote and protect the human rights of all persons
regardless of their sexual orientation” and mandated the UN High Commis-

d163. Id. ¶¶ 3, 5 (respectively).
the first time that such a resolution was considered in a UN forum. While consideration of the resolution was postponed to the sixtieth session (2004), the lack of outright dismissal was in itself a step forward. The adoption of the resolution at the sixtieth session will hopefully pave the way towards the appointment of a Special Rapporteur. At the very least, steps should not be taken backwards. As these last few words are being written, the author notes that discussion of a proposed amendment to the United States Constitution defining marriage as between a man and a woman. Embodying discrimination in the Constitution is not in anyone’s interest, not those of us who are gay, nor those of us who are not. All it would do would be to provide a further contribution to the single factor most responsible for the stigma attached to male/male rape, homophobia.164

164. SCARCE, supra note 49, at 57.