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Male Rape and Human Rights

LARA STEMPLER*

INTRODUCTION

For the last few decades, the prevailing approach to sexual violence in international human rights instruments has focused virtually exclusively on the abuse of women and girls. In the meantime, sexual violence against males continues to flourish in prison and other forms of detention.¹ Men have been abused and sexually humiliated during situations of armed conflict, such as the highly publicized Abu Ghraib scandal in Iraq.² Childhood sexual abuse of boys is alarmingly common; in fact, the vast majority of those abused at the hands of Roman Catholic clergy in the United States were boys.³ And sexual assault against gay men remains unchecked due to assumptions that, as was once commonly assumed about women, gay men who have been raped must have “asked for it.”⁴

In Part I of this Article, I discuss the phenomenon of male rape, summarizing research data about the problem and exploring various contexts in which it occurs. In Part II, I show that numerous instruments in the human rights canon, including U.N. treaties, resolutions, consensus documents, and general comments address sexual violence while

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1. See ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 214646, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005, at 6 (2006).

2. See ANTHONY R. JONES & GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 68-69 (2005), available at http://www.globalsecurity.org/intell/library/reports/2004/intell-abu-ghraib_ar15-6.pdf.

3. JOHN JAY COLL. OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 9 (2002), available at <http://www.usccb.org/nrb/johnjaystudy/> (follow “Executive Summary” hyperlink) (reporting that 81% of those sexually abused were boys).

4. Anna Wakelin & Karen M. Long, *Effects of Victim Gender and Sexuality on Attributions of Blame to Rape Victims*, 49 SEX ROLES 479, 485 (2003), available at http://www.findarticles.com/p/articles/mi_m2294/is_9-10_49/ai_110813269 (“It is not surprising that gay male or heterosexual female victims are seen as having more unconscious desire, given that stereotypes of rape victims portray heterosexual women as wanting rape and homosexual men as asking for rape.” (citation omitted)).

explicitly excluding male victims. I argue that the female-specific approach is best understood in the political context in which these instruments were developed: women's issues were historically ignored in international law, and violence against women emerged as the salient issue around which attention to women's human rights would revolve. I posit in Part III, however, that to continue this approach to sexual violence in light of evidence that males constitute a small but sizable percentage of victims has problematic theoretical implications: it reifies hierarchies that treat some victims as more sympathetic than others, perpetuates norms that essentialize women as victims, and imposes unhealthy expectations about masculinity on men and boys. I also outline why, paradoxically, neglecting male rape is bad for women and girls. In Part IV, I discuss the impact the female-specific approach to rape has in practice, and I point to other rights frameworks and areas of international law that hold potential for more inclusive approaches to the problem.

It is worth noting that in my treatment of this topic I distinguish the use of a *gender analysis*, which can be as important for understanding the rape of men as it is of women, from a *female-specific approach*, which explicitly excludes all male victims from efforts to remedy sexual violence, and as such, should no longer continue.

I. THE PHENOMENON OF MALE RAPE

A. DATA ON VICTIMIZATION

According to research, females are more likely to be victimized by rape than males.⁵ Despite popular perception, however, males comprise a sizable minority of rape victims.⁶ Perhaps unsurprisingly, given the lack of societal concern about male rape and the hesitancy of male victims to report,⁷ data about male rape is wanting.⁸ We do know that the most recent U.S. prevalence estimates indicate that 15.2% of those who have experienced rape in their lifetime are men.⁹ The Centers for Disease Control and Prevention and the National Institute of Justice found that

5. See Brian H. Spitzberg, *An Analysis of Empirical Estimates of Sexual Aggression Victimization and Perpetration*, 14 VIOLENCE & VICTIMS 241, 245 (1999) (finding 3% of men worldwide have been raped in their lifetime in contrast with 13% of women).

6. See Kathleen C. Basile et al., *Prevalence and Characteristics of Sexual Violence Victimization Among U.S. Adults, 2001–2003*, 22 VIOLENCE & VICTIMS 437, 441 (2007).

7. E.g., Gillain Mezey & Michael King, *The Effects of Sexual Assault on Men: A Survey of 22 Victims*, 19 PSYCHOL. MED. 205, 207 (1989) ("Failure to report was a consequence of the stigma, fear of rejection or disbelief they anticipated. Victims were even more reluctant to report to the police for these reasons as well as out of a perception of the police as anti-homosexual.").

8. See WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 154 (Etienne G. Krug et al. eds., 2002) (asserting that the rape of men "has largely been neglected in research").

9. See Basile et al., *supra* note 6 (dividing the total number of men that were raped, 2.1 million, by the total number of people raped, 13.8 million).

92,700 adult men are forcibly raped each year in the United States, and that approximately 3% of all American men—a total of 2.78 million men—have experienced an attempted or completed rape in their lifetime.¹⁰ The Bureau of Justice Statistics' *National Crime Victimization Survey* found that 11% of total sexual assault victims are male.¹¹

Data on male rape outside of the United States is even less common.¹² In the only population-based survey conducted outside of the United States on nonconsensual sex experienced by adult men, a study in England found a prevalence rate of 2.89%.¹³ Also, in England and Wales, reported male rape comprises 7.5% of all rape reported to criminal authorities.¹⁴

One analysis of 120 prevalence studies concluded that 3% of men worldwide have been raped in their lifetime (as children or adults), in contrast to 13% of women.¹⁵ The World Health Organization gives a higher estimate for males, asserting that between 5% and 10% of men throughout the world reported a history of childhood sexual abuse, while acknowledging that most studies have been conducted in developed countries.¹⁶ In prevalence studies conducted in developing countries, the findings were 20% in Peru, 3.6% in Namibia, and 13.4% in the United Republic of Tanzania.¹⁷ Other international estimates of childhood prevalence of sexual abuse indicate that between 3% and 29% of males have been affected.¹⁸

B. SEXUAL VIOLENCE AGAINST MALES IN CONTEXT

In this Part, I provide three examples of different contexts in which men and boys have experienced sexual violence to illustrate the need for

10. See PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 3-4 & exhibit 1 (1998).

11. See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 182734, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 1999, at 6 (2000) (calculating a figure of 11% from the cited rates of three female rape victims per 1000 persons and 0.4 male rape victims per 1000 persons).

12. See, e.g., Divya Singh, Men—The Discriminated Victims of Rape 1-4 (July 13-18, 2003) (unpublished paper submitted for the XIth International Symposium on Victimology, Stellenbosch, South Africa, on file with author) (discussing male rape victims in South Africa but relying almost entirely on U.S. data).

13. Adrian Coxell et al., *Lifetime Prevalence, Characteristics and Associated Problems of Non-Consensual Sex in Men: Cross-Sectional Survey*, 318 BRIT. MED. J. 846, 846 (1999).

14. See JON SIMMONS ET AL., HOME OFFICE, CRIME IN ENGLAND AND WALES 2001/2002, at app. 1, tbl.3.04 (2002) (using the 2001/2002 figures of 9008 reported rapes of females and 735 reported rapes of males to calculate that 7.5% of the total 9743 reported rapes had male victims).

15. Spitzberg, *supra* note 5, at 244-45.

16. WORLD HEALTH ORG., *supra* note 8.

17. *Id.*

18. D. Finkelhor, *The International Epidemiology of Child Sexual Abuse*, 18 CHILD ABUSE & NEGLECT 409, 411 (1994).

a gender-inclusive approach to rape: rape in prison, rape in situations of armed conflict, and childhood sexual abuse.¹⁹

I. Prisoner Rape

Prisoner rape is an alarmingly widespread human rights abuse that has received little attention within international human rights law or human rights scholarship. It is a common phenomenon in the United States in particular, and men, because they constitute more than 92% of prison inmates,²⁰ are overwhelmingly the victims.²¹

A study of state prisons found that approximately one-in-five male inmates reported a pressured or forced sex incident while incarcerated.²² Seven percent were raped.²³ A recent Bureau of Justice Statistics (BJS) survey found that 4.5% of the nation's state and federal prisoners experienced sexual victimization in only a twelve-month period.²⁴ BJS also found that 3.2% of jail inmates reported sexual victimization in a six-month period.²⁵ Given that approximately 2.3 million people are incarcerated in the United States²⁶—the highest per capita rate in the world—the scope of the abuse is profound.²⁷ The United States also holds approximately 200,000 people per year in immigration detention,²⁸ another site of sexual abuse.²⁹

19. The forms of abuse chosen for this Part entail the sexual abuse of males by other males. Nevertheless, sexual abuse of males by females does occur. See Deborah W. Denno, *Why Rape Is Different*, 63 FORDHAM L. REV. 125, 128 (1994); Philip M. Sarrel & William H. Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES SEXUAL BEHAV. 117, 118 (1982); Cindy Struckman-Johnson, *Forced Sex on Dates: It Happens to Men, Too*, 24 J. SEX RES. 234, 241 (1988).

20. WILLIAM J. SABOL & HEATHER COUTURE, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 221944, PRISON INMATES AT MIDYEAR, 2007, at 1 tbl.1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>.

21. ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 4 (2007) (finding that 88% of victims who reported "substantiated" incidents of inmate-on-inmate sexual violence in 2005 were male and in 2006 82% were male).

22. Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 67 (1996); see also Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000).

23. See Struckman-Johnson & Struckman-Johnson, *supra* note 22, at 379.

24. ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 221946, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 2 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svljri07.pdf>.

25. *Id.*

26. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 210667, PRISONERS IN 2004, at 1 (2005).

27. CHRISTOPHER HARTNEY, NAT'L COUNSEL ON CRIME & DELINQUENCY, US RATES OF INCARCERATION: A GLOBAL PERSPECTIVE I (2006).

28. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 175 (2002) (stating that the now-defunct Immigration and Naturalization Service detained "approximately 202,000 aliens during fiscal year 2002").

29. See generally STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION (2004) (exploring the phenomenon of sexual violence in immigration detention including the magnitude of harm, the legal and political problems involved, and the

Those who become prisoner rape victims are typically the most vulnerable members of the population in custody. Male victims are often nonviolent, first-time offenders who are small, weak, shy, effeminate, and inexperienced in the ways of prison life.³⁰ A study in one facility showed that gay male inmates were more than four times as likely as heterosexually identified inmates to become victims of sexual assault.³¹ A recent California study revealed that while nonheterosexual inmates (choosing to self-identify as gay, bisexual, or other) made up only 3.7% of the state prison population, they comprised 57.2% of those reporting sexual assault in custody.³²

Vulnerable inmates sometimes engage in a practice known as “protective pairing” in which the weaker inmate provides sex to a dominant inmate in exchange for protection from assault by others.³³ Treated like the perpetrator’s property, victims have been forced into servitude that includes prostitution arrangements with other prisoners.³⁴

Inmate-on-inmate rape is a serious human rights abuse; it is also a major public health problem. In addition to high rates of physical and psychological trauma resulting from prisoner rape, rates of HIV are three times as high inside of U.S. prisons as in the general population,³⁵ making forced sex—where prevention methods are virtually nonexistent—a dangerous proposition.³⁶ Though reliable statistics are unavailable, inmates have contracted HIV through prisoner rape,³⁷ and sexual assault behind bars can spread other sexually transmissible diseases, such as hepatitis A and B, syphilis, and gonorrhea.³⁸

Researchers have bemoaned the lack of data on prisoner rape in countries throughout the world.³⁹ One study of male prisoners in New South Wales, Australia revealed that 26% of inmates between the ages of eighteen and twenty-five experienced sexual assault in custody, and 8% reported that they were assaulted weekly or daily.⁴⁰ As in the United States, younger, smaller, and homosexual prisoners were among those at

departmental regulations that may contribute to the prevalence of sexual violence in immigration detention).

30. HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* 63 (2001).

31. See WAYNE S. WOODEN & JAY PARKER, *MEN BEHIND BARS* 18 (1982).

32. See VALERIE JENNESS ET AL., *VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT* 78 tbl.5 (2007).

33. HUMAN RIGHTS WATCH, *supra* note 30, at 92–93.

34. *Id.*

35. LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, *HIV IN PRISONS* 2003, at 5 (2005).

36. HUMAN RIGHTS WATCH, *supra* note 30, at 112.

37. See Just Detention International, *Prisoner Rape Spreads Disease—Inside and Outside of Prison*, <http://www.justdetention.org/en/factsheets/disease.aspx> (last visited Feb. 14, 2009).

38. *See id.*

39. *See, e.g.*, DAVID M. HEILPERN, *FEAR OR FAVOUR: SEXUAL ASSAULT OF YOUNG PRISONERS* 66 (1998).

40. *Id.* at 29.

greatest risk within the age range studied.⁴¹ Another Australian study of drug users in Sydney found that 5% had been raped in prison.⁴²

In South Africa, a country which also ranks high among nations in terms of incarceration rates,⁴³ the problem of prisoner rape has been exacerbated by chronic overcrowding.⁴⁴ No data about the frequency of rape exists. Indeed, until the recent Sexual Offences Act was passed, male rape was not included in the country's definition of rape.⁴⁵ To date, the Department of Correctional Services does not record rape incidents; those reported are collapsed under the general category of "assault."⁴⁶

A qualitative survey of prisoners revealed a subculture in which rape is used to maintain a prison hierarchy, in which victims are humiliated, dominated, and feminized.⁴⁷ Once again, victims tend to be effeminate, young, and inexperienced.⁴⁸ They are often raped in holding cells at the court, in transport vehicles on the way to prison, or upon arrival to the prison.⁴⁹

The widespread prevalence of gang culture contributes to rape.⁵⁰ In one of South Africa's so-called "numbers" gangs, the "28s" are known for their particularly rigid gender hierarchy, which dictates the rules for sex and rape in prison.⁵¹ Members belong to the masculine "blood line" or the feminine "private line."⁵² The blood line members hold the higher

41. *Id.* at 41.

42. *Id.* at 44 (citing Alex Wodak et al., *Behind Bars: HIV Risk-Taking Behaviour of Sydney Male Drug Injectors While in Prison*, in *HIV/AIDS IN PRISONS: PROCEEDINGS OF A CONFERENCE HELD 19-21 NOVEMBER 1990*, at 240, 240 (1992)).

43. See HARTNEY, *supra* note 27, at 2 (showing South Africa ranks seventh highest in a list of comparative international incarceration rates).

44. See K.C. GOYER, INST. FOR SEC. STUDIES, MONOGRAPH NO. 64, *PRISON PRIVATISATION IN SOUTH AFRICA: ISSUES, CHALLENGES AND OPPORTUNITIES* ch. 2 (2001), available at http://www.issafrica.org/index.php?link_id=3&slink_id=443&link_type=12&slink_type=12&tmpl_id=3 (follow "Chapter 2: Overcrowding" hyperlink).

45. Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007; S. AFR. DEP'T OF JUSTICE & CONST. DEV., *THE NEW SEXUAL OFFENCES ACT: PROTECTING OUR CHILDREN FROM SEXUAL PREDATORS* 1 (2007).

46. Sasha Gear, *Behind the Bars of Masculinity: Male Rape and Homophobia in and About South African Men's Prisons*, 10 *SEXUALITIES* 209, 216 (2007).

47. Sasha Gear & Kindiza Ngubeni, *Your Brother, My Wife: Sex and Gender Behind Bars*, S. AFR. CRIME Q., June 2003, at 11, 14.

48. *Id.* at 14-15; see also Isak Niehaus, *Renegotiating Masculinity in the South African Lowveld: Narratives of Male-Male Sex in Labour Compounds and in Prisons*, 61 *AFR. STUD.* 77, 92 (2002) (adding that the most desirable wives tend to be "fat" and with a "light complexion").

49. *Carte Blanche: Out of Darkness...* (M-Net television broadcast Apr. 28, 2002) (transcript available at <http://www.mnet.co.za/Mnet/Shows/carteblanche/story.asp?Id=1939>).

50. See Amanda Dissel, *South Africa's Prison Conditions: The Inmates Talk*, 2 *IMBIZO* 4, 4-10 (1996).

51. Sasha Gear, *Sex, Sexual Violence and Coercion in Men's Prisons* 2-3 (Apr. 2001) (unpublished paper presented at AIDS in Context International Conference), available at <http://www.csvr.org.za/wits/papers/papgear1.htm>.

52. *Id.* at 3.

status and they forcibly recruit men from the private line to be their "wyfies," whose duties include domestic chores and sexual services.⁵³ It is the responsibility of the dominant inmate to protect his wyfie from assault by other inmates.⁵⁴ Reports from some prisons allege that officials sell access to vulnerable inmates and accept payoffs to allow rape to occur.⁵⁵

HIV is a severe problem in South African prisons, with one estimate placing the rate of infection at 30%⁵⁶ and another at 60%.⁵⁷ AIDS is the leading cause of death in prison.⁵⁸

2. *Rape in Conflict Situations*

Male rape also occurs in situations of armed conflict. Although these circumstances often include the rape of those detained in prisons or prison-like conditions, a discussion separate from prisoner rape is merited. In armed conflict, perpetrators are more likely to be captors from opposition forces, whereas in the domestic prisoner rape context, the perpetrators are most often, though not exclusively, other inmates. The heightened political tensions during armed conflict and the frequently lengthy sentences carried out in domestic prisons are other important contextual distinctions.

Early research on violence during conflict situations was predominantly gender-blind, often ignoring women's experiences altogether.⁵⁹ Later analysis that began to attend to gender portrayed men solely as aggressors and perpetrators, and women as peacekeepers and victims.⁶⁰ So marked has this distinction been, that even men who fall as casualties during wartime are held up as emblematic of heroic masculinity.⁶¹

Some scholars have begun to question this oversimplification of sex roles during armed conflict, arguing that it strips women of their political agency during periods of turmoil,⁶² misses women who are open supporters of conflict,⁶³ and fails to account for female combatants.⁶⁴

53. *Id.*

54. Niehaus, *supra* note 48, at 91.

55. Gear, *supra* note 46.

56. GOYER, *supra* note 44.

57. K.C. GOYER, INST. FOR SEC. STUDIES, MONOGRAPH NO. 79, PROBLEMS, POLICIES AND POTENTIAL 26 (2003), available at <http://www.iss.co.za/Pubs/Monographs/No79/Chap1.pdf>.

58. GOYER, *supra* note 44.

59. Caroline O.N. Moser & Fiona C. Clark, *Introduction to VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE* 3, 3 (Caroline O.N. Moser & Fiona C. Clark eds., 2001) [hereinafter *VICTIMS, PERPETRATORS OR ACTORS?*].

60. *Id.*

61. *Id.*

62. See Simona Sharoni, *Rethinking Women's Struggles in Israel-Palestine and in the North of Ireland*, in *VICTIMS, PERPETRATORS OR ACTORS?*, *supra* note 59, at 86.

63. See Urvashi Butalia, *Women and Communal Conflict: New Challenges for the Women's*

I argue that this essentializing of sex roles also fails to acknowledge male victims of sexual violence during armed conflict. Civil society has been particularly slow to address the concerns of these victims. For instance, one review found that 4076 nongovernmental organizations (NGOs) around the world address rape during wartime and other forms of political sexual violence.⁶⁵ Of these, only 3% mention the experience of males in their informational materials, typically as a passing reference.⁶⁶

Similarly, professionals who encounter male sexual abuse victims frequently fail to treat them accordingly. Physicians and aid workers are often "not trained to recognize the physical sequelae" of rape in men or to provide psychological counseling to male victims.⁶⁷ Many are unaware of the forms of sexual abuse men may experience.⁶⁸

This lack of attention to sexual abuse of men during conflict is particularly troubling given the widespread reach of the problem. It has been documented throughout the world, including in Chile,⁶⁹ Greece,⁷⁰ Croatia,⁷¹ Sri Lanka,⁷² El Salvador,⁷³ Iran,⁷⁴ Kuwait,⁷⁵ the former Soviet Union,⁷⁶ the Democratic Republic of Congo,⁷⁷ and the former Yugoslavia.⁷⁸ For example, an astonishing 76% of male political prisoners

Movement in India, in VICTIMS, PERPETRATORS OR ACTORS?, *supra* note 59, at 99, 104–11.

64. See Ana Cristina Ibanez, *El Salvador: War and Untold Stories—Women Guerrillas*, in *VICTIMS, PERPETRATORS OR ACTORS?*, *supra* note 59, at 117, 120–25.

65. Augusta Del Zotto & Adam Jones, *Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?* 8 (Mar. 2002) (unpublished paper presented at the Annual Convention of the Int'l Stud. Ass'n (ISA)) (citation omitted), available at <http://adamjones.freesevers.com/malerape.htm>.

66. *Id.*

67. Eric Stener Carlson, *Sexual Assault on Men in War*, 349 LANCET 129, 129 (1997) (citation omitted).

68. *Id.* (noting a lack of awareness of forms of sexual abuse other than anal rape).

69. Ana Julia Cienfuegos & Cristina Monelli, *The Testimony of Political Repression as a Therapeutic Instrument*, 53 AMER. J. ORTHOPSYCHIATRY 43, 46 (1983).

70. G. Daugaard et al., *Sequelae to Genital Trauma in Torture Victims*, 10 ARCHIVES ANDROLOGY 245, 245 (1983).

71. Pauline Oosterhoff et al., *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, 12 REPROD. HEALTH MATTERS 68, 69 (2004).

72. *Id.* (citing M. Peel et al., *The Sexual Abuse of Men in Detention in Sri Lanka*, 355 LANCET 2069, 2069–70 (2000)).

73. Inger Agger, *Sexual Torture of Political Prisoners: An Overview*, 2 J. TRAUMATIC STRESS 305, 311–12 (1989).

74. *Id.* at 306 (citation omitted).

75. MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* 31 (1997) (citation omitted) [hereinafter *MALE ON MALE RAPE*].

76. *Id.* (citing Paul Hofheinz, *Soviet Union Heading for a Showdown*, TIME, Aug. 6, 1990, at 36).

77. JULIANE KIPPENBERG ET AL., HUMAN RIGHTS WATCH, *SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR* 20–21 (2005).

78. M. CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA* 17–18 (1996).

surveyed in El Salvador in the 1980s reported at least one instance of sexual torture.⁷⁹

In the wake of another conflict, 21% of Sri Lankan Tamil males receiving service at a torture treatment center in London reported that they had experienced sexual abuse while in detention.⁸⁰ The forms of abuse began with forced nudity, taunting, and verbal sexual threats, creating an experience of degradation and humiliation.⁸¹ Ultimately, the abuse included various forms of genital mutilation and forced sex acts.⁸² Most of those abused had not reported the incidents to authorities, explaining that they were too ashamed.⁸³

The conflict in the former Yugoslavia eventually resulted in a uniquely thorough accounting of sexual violence against males during conflict.⁸⁴ It was the first conflict for which an international body, the Commission of Experts created by the U.N. Security Council, was formed in order to investigate sexual violence.⁸⁵ The International Criminal Tribunal for the former Yugoslavia also instituted a Sexual Assault Investigation Team, which included investigations into the rape of men during the civil war.⁸⁶ The team reported that men were castrated and otherwise sexually mutilated, forced to rape other men, and forced to perform fellatio and other sex acts on guards and one another.⁸⁷

One study of 6000 concentration camp inmates in Sarajevo Canton found that 80% of males reported that they had been raped in detention.⁸⁸ Accounts of abuse throughout the conflict were often quite graphic,⁸⁹ including severe genital mutilation⁹⁰ and forced incest.⁹¹

79. Oosterhoff et al., *supra* note 71.

80. Peel et al., *supra* note 72, at 2069.

81. *Id.*

82. Seven percent reported electroshock to their genitals, 9% had sticks forced through their anus, typically with chilies rubbed on the sticks, and 7% were forced to perform oral sex on soldiers. *See id.*

83. *Id.*

84. BASSIOUNI & MCCORMICK, *supra* note 78, at 2.

85. *Id.*

86. Carlson, *supra* note 67.

87. *Id.*

88. THERESE MCGINN ET AL., HUMANITARIAN PRACTICE NETWORK, NO. 45, REPRODUCTIVE HEALTH FOR CONFLICT-AFFECTED PEOPLE: POLICIES, RESEARCH AND PROGRAMMES 10 (2004) (citing Zeljka Mudrovic, *Sexual and Gender-Based Violence in Post-Conflict Regions: The Bosnia and Herzegovina Case*, in UNITED NATIONS POPULATION FUND, THE IMPACT OF CONFLICT ON WOMEN AND GIRLS: A UNFPA STRATEGY FOR GENDER MAINSTREAMING IN AREAS OF CONFLICT AND RECONSTRUCTION 60, 64 (2001)).

89. *See* Del Zotto & Jones, *supra* note 65, at 12. Six men from the Omarska camp in northwestern Bosnia independently testified to the abuse and killing of two men, which included forced intercourse with one another and castration. *Id.* (citation omitted).

90. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment, ¶¶ 198, 206, 238 (May 7, 1997). A prisoner in a Bosnian Serb prison camp was forced, in front of other detainees, to bite off another prisoner's testicle. *Id.* at 206.

Reports have emerged from southern Sudan that boys held as slaves have been subjected to sexual abuse at the hands of government soldiers, including violent gang rape. One reporter interviewed fifteen boys held as slaves and found that six of the boys had been raped, most of them numerous times and by more than one perpetrator.⁹²

Sexual humiliation was at the forefront of the abuse scandal at the Abu Ghraib prison in Iraq.⁹³ Investigation into abuses committed by individuals and small groups of American forces revealed that detainees were forced into acts such as nude posing in piles, group masturbation, and simulated sex, several of which were photographed.⁹⁴ Other detainees were sodomized and some had electrical wires attached to their genitals.⁹⁵

The use of nudity as an interrogation technique was developed by the military and used in U.S. military operations in Afghanistan and Guantanamo Naval Base in Cuba.⁹⁶ Imported to Iraq, the use of forced nudity there has been credited with setting the stage for the dehumanization of detainees and an escalation of abuse.⁹⁷

The sexual abuse of men during armed conflict frequently touches on issues of shame and degradation. The public, performative nature of many of these instances of abuse, for example when a Bosnian Serb police chief forced two detainees to perform sexual acts on one another in front of other detainees,⁹⁸ indicates a concerted attempt to humiliate the victims.⁹⁹ Other wartime acts such as humiliating nude poses, the use of women's underwear, and castration seem designed as a direct affront to the victims' masculine identity. Indeed the use of a camera to record the abuse at Abu Ghraib has been described as a "shame multiplier," extending the humiliation beyond the time and place in which it occurred.¹⁰⁰

91. See SCARCE, *supra* note 75, at 30-31 (citing Jennifer Scott, *Rape Used as 'Ethnic Cleansing' Weapon in Bosnia*, REUTERS NEWSWIRE, July 2, 1996) (recounting one investigator's report that Serbian police and paramilitaries were forced to perform fellatio on one another, including between fathers and sons).

92. See Maria Sliwa, *Sudan Cries Rape*, WORLDNETDAILY, Mar. 2, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=37387.

93. See JONES & FAY, *supra* note 2.

94. See *id.*

95. *Id.* at 77.

96. *Id.* at 10.

97. *Id.*

98. See *Prosecutor v. Miljkovic*, Case No. IT-95-9, Indictment, ¶ 31 (June 29, 1995).

99. See BASSIOUNI & MCCORMICK, *supra* note 78, at 18.

100. MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 18-19 (2004).

3. *Sexual Abuse of Boys*

The overall prevalence of childhood sexual abuse has been much debated, with some painting the problem as an epidemic, and others portraying this belief as exaggerated hysteria. U.S. prevalence estimates have ranged from 2% to 62%, depending largely on methodological design.¹⁰¹ One U.S. survey of adult men and women found that 16% of men and 27% of women and were sexually abused as children.¹⁰² Nearly one fourth of U.S. victims under the age of twelve whose abuse was reported to police were male.¹⁰³

An analysis of childhood sexual abuse surveys from twenty-one countries found that prevalence rates ranged from 3% to 29% of males, in comparison to 7% to 36% of females.¹⁰⁴ Comparisons between countries are difficult because of methodological differences among studies, including different definitions of abuse, but several of the surveys identified relatively high prevalence rate of sexual abuse of boys. These include rates of 19% in Austria, 13% in Costa Rica, 29% in South Africa, and 15% in Spain.¹⁰⁵

A meta-analysis of thirty-seven studies published from 1976 to 1996 examined the impact of childhood sexual abuse and found that it substantially increases the risk of problems such as post traumatic stress disorder, depression, suicidality, sexual perpetration, and poor academic performance.¹⁰⁶ It found no statistical difference in these outcomes between sexes.¹⁰⁷

The childhood sexual abuse scandal that has rocked the Roman Catholic Church in the United States over the last several years provides an example of a specific context in which victims were actually more likely to be male than female.¹⁰⁸ One thorough survey, initiated by the U.S. Conference of Catholic Bishops and responded to by 95% of the American diocese, revealed a great deal about the incidents of sexual

101. JOHN JAY COLL. OF CRIMINAL JUSTICE, *supra* note 3, at 69 (citing Rebecca M. Bolen & Maria Scannapieco, *Prevalence of Child Sexual Abuse: A Corrective Metanalysis*, 1999 SOC. SERV. REV. 281, 281 (1999)) (citing reasons for a range in childhood victimization rates such as "the number of screening questions used to identify abuse victims, the size of the sample, and the year in which the study was conducted").

102. David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT 19, 20-21 (1990).

103. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 13 (2000) (using data from the National Incident-Based Reporting Systems (NIBRS), based on voluntary data collected from twelve states).

104. Finkelhor, *supra* note 18.

105. *Id.* at 410.

106. E.O. Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse*, 135 J. PSYCHOL. 17, 30 (2001).

107. *Id.*

108. See JOHN JAY COLL. OF CRIMINAL JUSTICE, *supra* note 3.

abuse of minors as reported to church officials throughout the country from 1950 to 2002.¹⁰⁹ Notably, 81% of the victims identified were male, and 19% were female.¹¹⁰

A total of 4392 priests, representing approximately 4.3% of the priesthood were accused of more than 10,000 accounts of sexual abuse during this time period.¹¹¹ Eighty-one percent of all victims were male, and over 40% of all victims were males between the ages of eleven and fourteen.¹¹² A wide range of types of abuse were reported, but a substantial percentage involved serious abuse: 34% of all abuse incidents included either oral sex or sexual penetration.¹¹³ In terms of response to the abuse, only 6% of all priests against whom allegations were made were criminally convicted, and about 2% had been sentenced to prison by the time of the study.¹¹⁴

Over 5000 cases of childhood sexual abuse by Catholic clergy around the globe—spanning at least twenty countries—were reported in the media from 1995 to 2002.¹¹⁵ No data disaggregated by sex on the totality of worldwide abuse exists, and the Holy See's confidential processes do not allow for a cumulative analysis of the scope of abuse by priests around the world,¹¹⁶ but many of the reports which have emerged detail the sexual abuse of boys and adolescent males.¹¹⁷ And while the United States has been the epicenter of the crisis, this may be due in part to different cultural norms in other countries that reduce the frequency of reporting abuse by clergy. A lack of public openness,¹¹⁸ the perceived need to protect the church,¹¹⁹ a continuing tendency to blame victims, and victims' fear of community shaming¹²⁰ have been cited as reasons for possible underreporting in different parts of the world.¹²¹

109. *See id.* at 5.

110. *See id.* at 9.

111. *Id.* at 6–7.

112. *Id.* at 9.

113. *Id.* at 72.

114. *Id.* at 10. For further discussion of criminal prosecutions and penalties, see generally *id.* at 59–65.

115. CATHOLICS FOR A FREE CHOICE, THE HOLY SEE AND THE CONVENTION ON THE RIGHTS OF THE CHILD: A SHADOW REPORT 23 (2002), available at <http://www.catholicsforchoice.org/topics/other/documents/2002rightsofthechildshadowreport.pdf>.

116. *Id.* at 24.

117. *See* sources cited *infra* notes 122–35.

118. The chairman of the Association of Member Episcopal Conferences in Eastern Africa stated, “this is not an American problem . . . we have not been open enough to acknowledge the situation.” *Id.* at 15 (citing *East African Bishops Confront Sexual Abuse*, PANAFRICAN PRESS AGENCY DAILY NEWSWIRE, July 29, 2002, <http://www.panapress.com/newslatf.asp?code=engo13125&dte=29/07/2002>).

119. A nun in the Philippines responded to a question from a reporter about why she didn't report a case of sexual abuse to authorities by explaining that “she thought she had to protect the image of the church.” *Id.* at 15 (citation omitted).

120. Roberto Blancarte, a scholar of the Mexican church, stated, “police, prosecutors and society still tend to regard sex crimes victims as somehow culpable . . . [and victims] fear they will be shamed

Nevertheless, reports have surfaced outside of the United States. Charges of negligent administrative response to abuse, reminiscent of the U.S. scandal, plagued the church in Ireland. For example, Fr. Sean Fortune of Ireland was ultimately charged with sixty-six counts of sexual abuse, including rape, of eight boys.¹²² He was not removed from his duties until eighteen years after the first complaint was made.¹²³ Europe has seen numerous scandals in which boys have been sexually abused by priests and bishops in France,¹²⁴ an Archbishop in Poland,¹²⁵ and the Cardinal of Vienna.¹²⁶

In Latin America, sexual abuse charges have plagued Argentina,¹²⁷ Brazil,¹²⁸ and Mexico.¹²⁹ One Columbian priest was accused of sexually abusing eighteen boys in Venezuela, and was indicted on sixty counts of abuse in the United States, yet he still easily found work as a priest in Columbia, where he was convicted of raping two boys there in 2001.¹³⁰

in their community.” *Id.* (quoting Kevin Sullivan & Mary Jordan, *Reluctant Mexican Church Begins to Question Its Own*, WASH. POST, Apr. 17, 2002, at A12).

121. Some have observed that it is easier to “confront and take action against” abusers in the United States, and that the U.S. news media has aggressively pursued the story. Barry James, *Priests and Pedophilia: A Scandal Not Only in America*, INT’L HERALD TRIB., Apr. 19, 2002, at 3, available at http://www.iht.com/articles/2002/04/19/priests_ed3_.php?page=1.

122. He was never convicted, owing to his preemptive suicide. *Correspondent: Suing the Pope* (BBC Two television broadcast Mar., 19 2002) (transcript available at <http://news.bbc.co.uk/2/hi/programmes/correspondent/1879407.stm>).

123. *Id.*

124. Father Rene Bissey was sentenced to eighteen years in prison for raping one boy and sexually abusing ten others between 1989 and 1996. *Bishop Charged with Covering Up Abuse: Confessional Seal at Issue*, CATH. WORLD REP., Apr. 2001, available at <http://www.us.catholic.net/rcc/Periodicals/Igpress/2001-04/wfrance.html>. Another Bishop accused of cover-up, Pierre Pican of Bayeux, failed to report Father Bissey to authorities after he confessed to abusing the boys. *Id.* Bishop of Evreux, Jacque Gaillot, admitted to placing a priest in a parish whom he knew might have a tendency to sexually abuse children. *Id.*

125. Archbishop Juliusz Paetz resigned in 2002 in the wake of allegations that he abused several seminarians. *Polish Archbishop ‘Molested Students,’* BBC NEWS ONLINE, Feb. 23, 2002, <http://news.bbc.co.uk/2/hi/europe/1837840.stm>.

126. Multiple allegations that the Cardinal of Vienna, Hans Hermann Groër, sexually abused boys at a seminary in the 1970s forced him to resign in 1998. CATHOLICS FOR A FREE CHOICE, *supra* note 115, at 24 (citing *Vatican Probes Austrian Prelate*, BBC NEWS ONLINE, Mar. 2, 1998, <http://news.bbc.co.uk/2/low/despatches/61368.stm>).

127. An Argentinean priest was indicted in 2000 on charges that he molested multiple residents at the school for adolescent boys in which he worked. *Id.* (citing Maria Carbajal, *Abuso con Sotana*, PAGINA12, July 22, 2002, available at <http://www.pagina12.com.ar/diario/sociedad/3-4517-2002-04-28.html>).

128. A Brazilian priest and director of a school for needy children in João Pessoa was caught sexually abusing a six-year-old boy in a hotel room. *Id.* at 19 (citation omitted).

129. In 1997, nine men publicly accused Mexican Reverend Marcial Maciel of sexually abusing them as children from the 1940s to the 1960s. *Id.* at 27 (citing Gerald Renner, *Maciel Accusers Seek Accountability*, NAT’L CATH. REP., Nov. 3, 2000, at 6). Despite the fact that the abuse was reported to the Holy See in 1978 and 1989, the priest was praised for his work with youth and received no discipline. *Id.*

130. Dean E. Murphy & Juan Forero, *For 2 Decades, in 3 Countries, Priest Left a Trail of Sex*

Priest Michael Lau of Hong Kong sexually abused a fifteen-year-old boy, and although he was defrocked after a church investigation confirmed the allegations, the abuse was not reported to law enforcement.¹³¹ Three reports from 2002 accuse other priests of abusing boys at Hong Kong secondary schools in the 1960s and 1970s.¹³²

The Catholic abuse scandal has been particularly rampant in Australia where over ninety priests and brothers were convicted of sexual abuse of children from 1996 to 2002.¹³³ One priest alone, Gerald Risdale, pled guilty in 1994 to forty-six sexual assault charges, mostly against alter boys.¹³⁴ The Catholic Church in New Zealand paid damages to fifty-six male victims of childhood sexual abuse committed by priests and staff at a Catholic school for boys with learning disabilities.¹³⁵

II. THE USE OF FEMALE-SPECIFIC LANGUAGE ON SEXUAL VIOLENCE IN INTERNATIONAL LAW

A. TEXTS OF HUMAN RIGHTS INSTRUMENTS DO NOT ADDRESS MALE SEXUAL ABUSE

Despite the grave and widespread nature of sexual violence against men and boys, the current international human rights framework is inadequate for addressing this problem. The international instruments that contain the most comprehensive and meaningful definitions of sexual violence exclude men on their face, reflecting and embedding the assumption that sexual violence is a phenomenon relevant only to women and girls.¹³⁶ There are well over one hundred uses of the term “violence against women”—defined to include sexual violence¹³⁷—in U.N. resolutions, treaties, general comments, and consensus documents. No human rights instruments explicitly address sexual violence against men.

While the understanding of “violence against women” does not include violence against men and boys by definition, another term employed in human rights instruments dozens of times, “gender-based violence,” might reasonably be thought to include both males and

Abuse, N.Y. TIMES, Apr. 20, 2002, at A1.

131. *HK Investigates New Child Abuse Claims*, BBC NEWS ONLINE, May 15, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/1988744.stm>.

132. *Id.*

133. *Catholic Church in Fresh Abuse Row*, BBC NEWS ONLINE, Aug. 20, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2204855.stm>.

134. Emma Tinkler, *Catholic Church in Australia Embroiled in Child Sex Scandal*, ASSOCIATED PRESS, May 31, 2002, available at <http://www.rickross.com/reference/clergy/clergy92.html>.

135. *Catholic Order Offers \$3.7m*, COURIER-MAIL, Mar. 17, 2003 (on file with The Hastings Law Journal).

136. See *infra* notes 142–56 and accompanying text.

137. See *infra* note 145 and accompanying text.

females. Instead, the difference between sex and gender, well known to any undergraduate in a women's studies course, is terribly muddled in the human rights canon.

In general, "sex" refers to the biological categories of male and female,¹³⁸ while "gender" refers to socially and culturally construed notions of masculinity and femininity.¹³⁹ But, in human rights instruments the term "gender-based" seems to be limited to social norms that perpetuate discrimination against females, as opposed to the socially constructed expectations ascribed to both males and females. "Gender-based violence" is used only to describe female victimization, thereby leaving no room for a much-needed gender analysis of male rape.

The Committee on the Elimination of Discrimination Against Women, the committee responsible for overseeing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁴⁰ defines gender-based violence in its General Recommendation No. 19: Violence Against Women.¹⁴¹ "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."¹⁴² The committee also notes that "[t]he definition of discrimination [found in CEDAW, article 1] includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."¹⁴³

Other instruments, using the term outside of the definitional context, also illustrate this understanding of gender-based violence. For example, one U.N. General Assembly draft resolution declares that states should "develop gender-sensitive supportive programmes and train health workers to recognize gender-based violence and provide care for girls and women of all ages who have experienced any form of violence."¹⁴⁴

In addition to defining gender-based violence as violence that affects women, the term "violence against women" is defined in human rights

138. In the *Oxford English Dictionary*, "sex" is defined as "[e]ither of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively." 15 OXFORD ENGLISH DICTIONARY 107 (2d ed. 1989).

139. The *Oxford English Dictionary* states that "gender" in modern, especially feminist use is "often intended to emphasize the social and cultural, as opposed to the biological, distinctions between the sexes." 6 OXFORD ENGLISH DICTIONARY, *supra* note 138, at 428.

140. Convention on the Elimination of All Forms of Discrimination Against Women art. 17, Dec. 18, 1979, 1249 U.N.T.S. 13.

141. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence against Women*, U.N. Doc. A/47/38 (Jan. 29, 1992) [hereinafter *General Recommendation 19*].

142. *Id.* ¶ 1.

143. *Id.* ¶ 6.

144. *Report of the Ad Hoc Comm. of Whole of the Twenty-Third Special Session of the General Assembly*, ¶ 69(i) U.N. GAOR, 23d Special Sess., Supp. No. 3, U.N. Doc. A/S-23/10/Rev. 1 (June 5-9, 2000).

instruments as a form of gender-based violence. For example, the Beijing Declaration and Platform for Action states: "The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women."¹⁴⁵ Although not conceptually problematic (violence directed at women because of their roles as women is a subset of gender-based violence), this tendency to use gender-based violence and violence against women to define one another perpetuates their mistaken use as interchangeable terms.

The confusion manifests itself in a publication by a major international NGO working in this field, International Planned Parenthood Federation (IPPF). IPPF produced a publication entitled, *The Facts About Gender-Based Violence*.¹⁴⁶ Under the subheading, "The United Nation's Definition of Gender-Based Violence," IPPF asserts: "The U.N. defines violence against women as 'any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.'"¹⁴⁷ IPPF confusingly asserts that the United Nations' definition of gender-based violence is violence against women, which is gender-based violence, as it harms women.

In addition to these definitional problems at the outset, the instruments addressing sexual violence do so with a breadth and depth that give the impression that sexual violence has been thoroughly explored and comprehensively addressed. The CEDAW committee's 1992 General Recommendation No. 19: Violence Against Women calls for sweeping remedies for violence against women, including sexual violence.¹⁴⁸ For example, states are instructed to institute "[p]reventive measures, including public information and education programmes to change attitudes,"¹⁴⁹ as well as "effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including . . . sexual assault."¹⁵⁰ It calls on states to issue reports which "include all available data on the incidence of each form of violence, and on the effects of such violence on the women who are victims,"¹⁵¹ and to "establish or support services for

145. Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and the Platform for Action*, ¶ 113, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995).

146. INT'L PLANNED PARENTHOOD FED'N, *THE FACTS ABOUT GENDER-BASED VIOLENCE* (1998).

147. *Id.* at 1 (citing Declaration on the Elimination of Violence Against Women, G.A. Res. 104, art. 1, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/48/104 (Dec. 20, 1993)).

148. *General Recommendation 19*, *supra* note 141, ¶ 24.

149. *Id.* ¶ 24(t)(ii).

150. *Id.* ¶ 24(t)(i).

151. *Id.* ¶ 24(u).

victims" including "specially trained health workers, rehabilitation and counseling."¹⁵²

The 1993 U.N. Declaration on the Elimination of Violence Against Women gives further details about the abuse, stating that it includes "violence related to exploitation"¹⁵³ and that it can occur in "educational institutions and elsewhere,"¹⁵⁴ including "physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs."¹⁵⁵

This thoroughness, however, does not extend to include the male half of the population. One example of an uncritical application of sex-specificity in an otherwise thorough instrument is U.N. Security Council Resolution 1325. It begins with member states "[e]xpressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict."¹⁵⁶

Absent further data, this confusing platitude seems difficult to prove or refute. First, it is difficult to discern whether it is a statement about the degree of impact on women and children or on all civilians, including men. To say that "women and children" make up the majority of any population is to say very little: if women are roughly half of the adult population, "women and children" (everyone but adult men) will comprise the "vast majority."

Secondly, to say that any population makes up the majority of those affected is to say nothing about disproportionate impact, a more meaningful measure. Do the facts support the proposition that females are more likely than males to be harmed by armed conflict? If so, it would be very useful to assert and substantiate these claims. Instead, the resolution inserts gender uncritically and paints a vague picture of women's vulnerability without making it clear whether they are in fact disproportionately at risk.

This sex-based framing serves to justify the exclusion of males from the proscriptive measures later in the articles which, among other issues, address sexual violence.¹⁵⁷ The resolution "[c]alls on all parties to armed conflict to take special measures to protect women and girls from gender-

152. *Id.* ¶ 24(k).

153. Declaration on the Elimination of Violence Against Women, *supra* note 147, art. 2(a).

154. *Id.* art. 2(b).

155. *Id.* art. 2(c).

156. S.C. Res. 1325, pmbl., U.N. Doc. S/RES/1325 (Oct. 31, 2000).

157. By definition, boys are included as "children" in the preamble, but only "girls" are addressed in these later articles. Compare *id.* ("Expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict . . ."), with *id.* ¶ 8(a) ("Calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction . . .").

based violence, particularly rape and other forms of sexual abuse,”¹⁵⁸ and it urges all states to end impunity for “sexual and other violence against women and girls.”¹⁵⁹

Reading the document as a whole is telling. In the perambulatory language, boys are included through the use of the term “women and children.”¹⁶⁰ But as soon as sexual violence is addressed specifically, the instrument excludes them, switching to the term “women and girls.”¹⁶¹

Elsewhere in the international human rights canon, sexual violence against boys is included, and a conflicted, inconsistent pattern emerges. For example, the Convention on the Rights of the Child uses a sex-neutral approach to sexual abuse. “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”¹⁶² The convention also sex-neutrally declares that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”¹⁶³

In other instruments, the focus is exclusively on girls. A resolution passed by the U.N. General Assembly on “The Girl Child,” for example, urges states to

enact and enforce legislation to protect girls from all forms of violence . . . including . . . rape, domestic violence, incest, sexual abuse, [and] sexual exploitation, . . . and to develop age-appropriate, safe and confidential programmes and medical, social and psychological support services to assist girls who are subjected to violence.¹⁶⁴

In general, the explicit mention of boys in U.N. instruments is rare. When they are named, and not simply included through the use of a term like “the child,” it is often in an instrumentalist capacity vis-à-vis the rights of others. In other words, when boys are explicitly included, it is often to illustrate the need to modify their behavior as it affects women and girls:

Parents and schools should ensure that attitudes that are respectful of women and girls as equals are instilled in boys from the earliest possible age, along with an understanding of their shared responsibilities in all aspects of a safe, secure and harmonious family

158. *Id.* ¶ 10.

159. *Id.* ¶ 11.

160. *Id.* pmbl.

161. *Id.* ¶¶ 10–11.

162. Convention on the Rights of the Child, art. 19, ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

163. *Id.* art. 34.

164. The Girl Child, G.A. Res. 60/141, ¶ 9, U.N. GAOR, 60th Sess., 64th plen. mtg., U.N. Doc. A/RES/60/141 (Dec. 16, 2005).

life. Relevant programmes to reach boys before they become sexually active are urgently needed.¹⁶⁵

The state obligation to provide sex education for adolescent males can also be found buried toward the end of a paragraph from the CEDAW committee's General Recommendation No. 24, which otherwise attends only to the concerns of women and girls:

The issues of HIV/AIDS and other sexually transmitted diseases are central to the rights of *women and adolescent girls* to sexual health. *Adolescent girls and women* in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, *women and adolescent girls* are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose *girls and women* to the risk of contracting HIV/AIDS and other sexually transmitted diseases. *Women* in prostitution are also particularly vulnerable to these diseases. States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all *women and girls*, including those who have been trafficked, even if they are not legally resident in the country. In particular, States parties should ensure the rights of *female and male adolescents* to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their right to privacy and confidentiality.¹⁶⁶

Boys are sometimes included, by definition, in antiviolence texts referring to "women and children,"¹⁶⁷ "women, adolescents and children,"¹⁶⁸ and "women and families."¹⁶⁹ "Women and girls," however, is employed with much greater frequency than these three boy-inclusive phrases combined. In one case, adolescent boys might have been included by accident: States should "develop counseling, healing and support programmes for girls, *adolescents* and young women who have been or are involved in abusive relationships, particularly those who live in homes or institutions where abuse occurs."¹⁷⁰

Men, like boys, are typically only included in language about violence in their instrumentalist capacity—as actors who are important to its reduction:

165. International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Programme of Action of the International Conference on Population and Development*, ¶ 4.29, U.N. Doc. A/CONF.171/13, (Oct. 18, 1994).

166. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and Health*, art. 12(1), ¶ 18, U.N. Doc. A/54/38/Rev.1, ch. 1 (Feb. 5, 1999) (emphasis added).

167. "Special emphasis should be placed on the prevention of violence against women and children." International Conference on Population and Development, *supra* note 165, ¶ 4.27.

168. "Countries should take full measures to eliminate all forms of exploitation, abuse, harassment and violence against women, adolescents and children." *Id.* ¶ 4.9.

169. States should "[d]isseminate information on the assistance available to women and families who are victims of violence." Fourth World Conference on Women, *supra* note 145, ¶ 125(h).

170. *Id.* ¶ 126(c) (emphasis added).

Special efforts should be made to emphasize men's shared responsibility and promote their active involvement in responsible parenthood Male responsibilities in family life must be included in the education of children from the earliest ages. Special emphasis should be placed on the prevention of violence against women and children.¹⁷¹

The attention to the role of men as important actors in the reduction of violence would not be problematic if the instruments also acknowledged instances of men's vulnerability. The instrumentalist approach is particularly worrisome in the context of HIV/AIDS, to which, in some parts of the world, gay men have been particularly vulnerable. The U.N. Declaration of Commitment on HIV/AIDS states:

[B]earing in mind the context and character of the epidemic and that, globally, *women and girls* are disproportionately affected by HIV/AIDS, develop and accelerate the implementation of national strategies that promote the advancement of *women and women's* full enjoyment of all human rights; promote shared responsibility of *men and women* to ensure safe sex; and empower *women* to have control over and decide freely and responsibly on matters related to their sexuality to increase their ability to protect themselves from HIV infection.¹⁷²

Men are mentioned here in regard to their shared responsibility to practice safe sex; the vulnerability of gay men (to violence, stigma, discrimination, etc.) is nowhere mentioned in the declaration.

In fact, men with characteristics that make them particularly vulnerable to violence are consistently excluded from human rights instruments. Subgroups of at-risk men, such as refugees, the internally displaced, migrant workers, disabled men, or men who are vulnerable to sexual violence because of their membership in a particular racial or ethnic group during armed conflict are excluded. Human rights instruments that do address the vulnerability of these groups to sexual violence address only the vulnerability of women.¹⁷³

171. International Conference on Population and Development, *supra* note 165, ¶ 4.27; *see also* Fourth World Conference on Women, *supra* note 145, ¶ 125(g) (urging States to "organize and fund . . . programmes in order to sensitize girls and boys and women and men to the personal and social detrimental effects of violence in the family, community and society; teach them how to communicate without violence and promote training for victims and potential victims so that they can protect themselves and others against such violence").

172. Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶ 59, U.N. GAOR, 26th Special Sess., 8th plen. mtg., U.N. Doc. A/RES/S-26/2 (Aug. 2, 2001) (emphasis added).

173. *See, e.g.*, Comm. on the Elimination of Racial Discrimination, *General Recommendation XXV: Gender Related Dimensions of Racial Discrimination*, ¶ 2, U.N. Doc. A/55/18, Annex V (Mar. 20, 2000) [hereinafter CERD, *General Recommendation XXV*] ("Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict."); Fourth World Conference on Women, *supra* note 145, ¶ 126(d) (urging States to take "special measures to eliminate violence against women, particularly those in vulnerable situations, such as young women, refugee, displaced and internally displaced women, women with

B. HISTORICAL CONTEXT EXPLAINS FEMALE-SPECIFIC LANGUAGE IN HUMAN RIGHTS LAW

Legal scholars have described the development of international law as biased against women and based upon the paradigm of men's lives.¹⁷⁴ Early developments in human rights law were no exception. Despite affirmation of the "equal rights of men and women" in the preamble of the 1948 Universal Declaration of Human Rights¹⁷⁵ and the enshrinement of nondiscrimination on the basis of sex in the U.N. Charter,¹⁷⁶ a near total neglect of women's issues plagued the human rights movement in its early decades.

CEDAW marked an important doctrinal turning point, but truly transformational political will was still lacking. The widespread failure of states to characterize the violation of women's rights as human rights abuses, the tendency of mainstream human rights organizations to neglect women's concerns, and the lack of awareness of human rights law's potential by women's groups are among the complex reasons for this failure of the early human rights movement.¹⁷⁷

The emphasis of the movement on state responsibility meant that harms perpetrated by private individuals were initially left outside of human rights law's reach. A political prisoner tortured by an agent of the state fit squarely within the framework; a woman battered by her spouse did not. Notably, nowhere in CEDAW is violence against women explicitly mentioned. This new treaty failed to bring the issue explicitly within the reach of international accountability.¹⁷⁸

Such neglect fueled the growth of the international women's rights movement, a movement that began to push urgently for sweeping changes, holding up violence against women as one of the foremost harms in need of redress. Organizations coalesced around this issue,

disabilities and women migrant workers, including enforcing any existing legislation and developing, as appropriate, new legislation for women migrant workers in both sending and receiving countries"). Despite the fact that the CERD's *General Recommendation XXV* is about "gender" and not about "women" and that its first paragraph calls for an "explicit recognition or acknowledgement of the different life experiences of women and men," such treatment of men's experiences is entirely absent. CERD, *General Recommendation XXV*, *supra*, ¶ 1.

174. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 614 (1991).

175. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

176. U.N. Charter pmbl. (reaffirming "faith in . . . the equal rights of men and women").

177. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 3, 3 (Rebecca J. Cook ed., 1994).

178. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, ¶ 13, U.N. Doc. E/CN/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. McDougall) [hereinafter *Contemporary Forms of Slavery*].

telling vivid stories of sexual violence against women and portraying a harm “too horrendous to ignore.”¹⁷⁹

During the second half of the 1980s and the early 1990s, women’s organizations, governments, and the U.N. published well-researched documentation on the causes, consequences, and frequency of violence against women,¹⁸⁰ which helped frame the issue and give it saliency. The issue was highlighted by NGOs at the Third World Women’s Conference in Nairobi,¹⁸¹ and by 1989, the Committee on the Elimination of Discrimination Against Women passed a resolution instructing states to include information on violence against women in their periodic reports.¹⁸² Eventually the Committee issued a General Recommendation describing the way in which violence against women was, if not mentioned by name, implicitly covered by various Convention provisions.¹⁸³ In 1993, the U.N. General Assembly passed a resolution entitled, Declaration on the Elimination of Violence Against Women.¹⁸⁴ There was tremendous momentum around the issue at the World Conference on Human Rights in Vienna in 1993, the International Conference on Population and Development in 1994, and again at the 1995 Fourth World Conference on Women in Beijing.¹⁸⁵ The U.N. General Assembly’s adoption of the Declaration on the Elimination of Violence Against Women and the establishment of the U.N. Special Rapporteur on Violence Against Women are other achievements of that era attributable to women’s rights NGOs.¹⁸⁶

The issue of violence against women served a critical purpose for the women’s movement. It united local women’s groups in a common, international cause, dramatically illustrating the subordinated position of women worldwide. It helped make the point—an obvious one in retrospect, but an urgent one at the time—“that women’s rights *are*

179. Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, HEALTH & HUM. RTS., Vol. 7(2), 2004, at 17, 25.

180. Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women’s Human Rights*, in WOMEN’S RIGHTS: A HUMAN RIGHTS QUARTERLY READER 3, 52–53 (Bert B. Lockwood ed., 2006) [hereinafter WOMEN’S RIGHTS].

181. *Id.* at 50–51.

182. Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, in WOMEN’S RIGHTS, *supra* note 180, at 57, 67 (citing Comm. on the Elimination of Discrimination Against Women, *General Recommendation 12: Violence Against Women*, U.N. Doc. A/44/38 (Mar. 6, 1989) [hereinafter *General Recommendation 12*]).

183. *General Recommendation 12*, *supra* note 182; see also *General Recommendation 19*, *supra* note 142, ¶ 1.

184. Declaration on the Elimination of Violence against Women, *supra* note 147.

185. Fraser, *supra* note 180, at 53–54. See generally International Conference on Population and Development, *supra* note 165 (detailing the conference’s focus on and concern towards addressing violence against women).

186. Rosalind P. Petchesky, *Rights of the Body and Perversions of War: Sexual Rights and Wrongs Ten Years past Beijing*, 57 INT’L SOC. SCI. J. 301, 304 (2005).

human rights."¹⁸⁷ With attention to violence leading the charge, the U.N.'s belated response was to frame sexual violence as a women's issue.¹⁸⁸ The female-specific approach used by the U.N. can therefore be traced to its early wholesale neglect of women's issues.

Had women's concerns been addressed by the U.N. and the broader human rights movement from the outset, sexual violence might have been approached in a more objective manner, allowing for a gender-inclusive approach. It is in this context that the female-specific approach to sexual violence in human rights law can be seen as an understandable, if not unproblematic, overcorrection.

III. PROBLEMATIC THEORETICAL IMPLICATIONS OF THE FEMALE-SPECIFIC APPROACH

The female-specific approach to sexual violence in human rights instruments developed in the particular context of United Nations policymaking. More broadly, assumptions about gender influence the response to rape in a range of social contexts. One explanation for the widespread neglect of male rape is that men are less likely to be raped than women. Indeed, some commentators and advocates explain their emphasis on male-on-female rape by noting its disproportionate frequency.¹⁸⁹ Worldwide, women's typically subordinate role and men's position of social and economic privilege allow male-on-female violence to be frequently committed with few repercussions, illuminating one of the many roles that gender plays.¹⁹⁰ A gender analysis is certainly needed.

But a gender analysis is also warranted when it comes to many forms of male rape. Significantly, when both the perpetrator and victim are men, the interaction often typifies a gendered power-play of masculinized dominance and feminized subordination, as in the case of prisoner rape described above.¹⁹¹ The female-specific approach to rape does not allow room for any consideration of male rape, much less a gender analysis which takes into account some of these complexities. Understanding rape *in toto* will require a dismantling of the rigid presumptions which keep us from seeing the complete picture.

187. Fraser, *supra* note 180, at 52 (emphasis added).

188. See, e.g., Declaration on the Elimination of Violence Against Women, *supra* note 147.

189. See Denno, *supra* note 19, at 127 (noting that "[r]ape is different because it overwhelmingly involves male perpetrators and female victims," but also noting that male-on-male rape appears "unjustifiably downplayed"); see also RICHARD A. POSNER, SEX AND REASON 383 (1992) (claiming that the rape of males is "exceedingly rare" outside the prison context).

190. Declaration on the Elimination of Violence Against Women, *supra* note 147, pmbl. ("Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which [has] led to domination over and discrimination against women . . .").

191. See discussion *supra* Part I.B.1.

Instead, the term “gender” has become virtually synonymous with women-specific issues or concerns.¹⁹² Because of this, the gender-specific needs of men are rarely discussed or addressed.¹⁹³ Proponents of the female-specific approach to rape argue that laws acknowledging male victims can “cover up” what is happening in reality.¹⁹⁴ Removing references to men as perpetrators and women as victims, it is argued, is to deny a common reality and to obfuscate men’s sexual violence toward women.¹⁹⁵ Some have gone so far as to argue that the acknowledgement of male rape victims via more inclusive laws and policies “is part of a backlash against feminism.”¹⁹⁶ However, other feminists have countered that the complexities of sexual violence must be acknowledged, noting further that the proponents of the female-specific approach to rape have failed to point to concrete evidence that inclusive laws have harmed women or jeopardized the enforcement of rape laws.¹⁹⁷ I argue that, in addition to the weaknesses in the arguments put forward by those in favor of a female-specific approach, the approach also has troubling theoretical and practical implications for men and women, as described below.

Twenty-five years ago, anthropologist Gayle Rubin laid out her influential hierarchical system of sexual value to illustrate the rationalization of sexual privilege.¹⁹⁸ Those practicing “good,” “normal,” “natural” sex (e.g., heterosexual, monogamous, vanilla) rank at the top of the social hierarchy, while those practicing “bad,” “abnormal,” “unnatural” sex (e.g., homosexual, promiscuous, kinky) are at the bottom.¹⁹⁹

More recently, Alice Miller and Carole Vance argued that the human rights movement’s preference for “innocent victim[s]” in the struggle for sexual rights stems from the desire to create appealing and effective advocacy messages.²⁰⁰ They warn, however, that anti-sexual violence campaigns centered on innocent victims leave many other victims out, serving all the while to reinforce norms of sexual privilege.²⁰¹

192. NOËLLE N.R. QUÉNIVET, *SEXUAL OFFENSES IN ARMED CONFLICT & INTERNATIONAL LAW* 117 (2005).

193. *Id.*

194. Philip N.S. Rumney & Martin Morgan-Taylor, *The Construction of Sexual Consent in Male Rape and Sexual Assault*, in *MAKING SENSE OF SEXUAL CONSENT* 141, 153 (Mark Cowling & Paul Reynolds eds., 2004) (citation omitted).

195. QUÉNIVET, *supra* note 192, at 14–16.

196. Rumney & Morgan-Taylor, *supra* note 194 (citation omitted).

197. *Id.* at 54.

198. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 275–84 (Carole S. Vance ed., 1984).

199. *Id.* at 279–83.

200. Alice M. Miller & Carole S. Vance, *Sexuality, Human Rights, and Health*, *HEALTH & HUM. RTS.*, Vol. 7(2), 2004, at 5, 11.

201. *Id.*

The struggle to gain credibility for women's human rights issues, Miller argues, has caused advocates to "assert respectability at the price of other less respectable women."²⁰² Rubin's delineation of sexual privilege²⁰³ and more recent critiques of the deployment of "innocent" victims can be used to imagine a sexual *victim* hierarchy all its own—one in which, I argue, one's sex and perceived gender identity plays a significant role. The victim ranked at the top of the hierarchy is a heterosexual female (preferably a virgin) attacked and raped by a stranger, all the while struggling frantically, but futilely, to resist. While comparatively rare, so-called stranger rape is the abuse that catapulted sexual violence into public discourse, legitimizing rape as a cause for public policy and social service intervention.

Moving down a notch in the hierarchy, we find victims who are perceived as less innocent: nonvirgins and women who know their perpetrators. Research has shown that acquaintance rape victims receive less sympathy (and more blame) than do victims of stranger rape.²⁰⁴ Further down are promiscuous women, then women so promiscuous as to have had sex recently or with more than one partner within a short period of time, trailed distantly by sex workers.²⁰⁵

Where do male victims rank in the sexual violence hierarchy? Boys, with innocence still intact, certainly stand high above men,²⁰⁶ and arguably, very close to girls. But adult men are viewed as the aggressors. Chastity is not a virtue to which men are generally taught to aspire and is not an attribute associated with proper manhood. That men are often raped in unappealing contexts such as prisons—one cannot imagine a setting in which "innocence" is less prevalent—helps propel male victims to the bottom of a hierarchy of victim sympathy.

Homosexuals,²⁰⁷ relatively low ranking on Rubin's hierarchy,²⁰⁸ fair similarly on a sexual victim hierarchy. Stereotypes about promiscuity in

202. Miller, *supra* note 179, at 37.

203. See *supra* notes 198–99 and accompanying text.

204. Judith. S. Bridges, *Perceptions of Date and Stranger Rape: A Difference in Sex Role Expectations and Rape-Supportive Beliefs*, 24 SEX ROLES 291, 291–307 (1991); Wakelin & Long, *supra* note 4, at 479 (citing Susan T. Bell et al., *Understanding Attributions of Blame in Stranger Rape and Date Rape Situations: An Examination of Gender, Race, Identification, and Students' Social Perceptions of Rape Victims*, 24 J. APPLIED SOC. PSYCHOL. 1719, 1719–34 (1994).

205. Cf. Rubin, *supra* note 198, at 282 fig.2.

206. The American Medical Association notes that while attention to sexual abuse of boys has improved, sexual assault against older adolescents and men continues to be neglected. AM. MED. ASS'N, STRATEGIES FOR THE TREATMENT AND PREVENTION OF SEXUAL ASSAULT 24 (1995).

207. I acknowledge the limitations of operating here within the artificially rigid classifications of heterosexuality and homosexuality. Nevertheless, I believe that a focus on rape victims who are perceived as or who self-identify as gay is useful for exploring the role that homophobia plays in the broader problem of male rape. For a discussion of the limits and utility of these categories, see generally Jeffrey Weeks, *Necessary Fictions: Sexual Identities and the Politics of Diversity*, in INVENTED MORALITIES: SEXUAL VALUES IN AN AGE OF UNCERTAINTY 82, 82–123 (1995).

the gay community and conceptualizations of homosexuality as deviant, serve to strip away innocence and to leave these victims at the bottom rung.²⁰⁹ Adult male rape victims generally, and gay adult male rape victims in particular, find themselves attracting the least sympathy as the lowliest members of the sexual victim hierarchy.²¹⁰

A closer look at the rape of gay men highlights the impact that negative stereotypes about gay men have on the continued callousness toward the perpetuation of male rape. The female-specific approach to rape not only leaves no room to include gay male victims; it allows harmful biases against gay men to go unchallenged.

When the few researchers who have studied male rape have made the effort to include questions about the sexual orientation of the victim, they have concluded that gay men are raped at significantly higher rates than heterosexual men.²¹¹ Moreover, the research literature generally concludes that most men who rape other men identify as heterosexual,²¹² despite the fact that they have initiated the technically same-sex act. In the U.S. prison context, gay men report sexual abuse at four times the rate of straight men.²¹³ Many men who perpetrate rape maintain their heterosexual identity by feminizing their victims and enforcing their role as the penetrative partner.²¹⁴

These patterns stand in contrast to popular notions of the homosexual rapist, an archetype constructed around conceptions of the gay male's predatory sex drive.²¹⁵ Conversely, when gay men are the victims of rape, lack of sympathy for them is sometimes justified by assumptions about gay male promiscuity.²¹⁶ The belief that gay men possess an unusually high sex drive fuels the societal perception that no sex is unwelcome, or that, because of a gay man's sexual preferences, he

208. See Rubin, *supra* note 198, at 282 fig.2.

209. See THE MASCULINITIES READER 40 (Stephen M. Whitehead & Frank J. Barrett eds., 2001) (asserting that gay men are at the "bottom of a gender hierarchy among men").

210. See Wakelin & Long, *supra* note 4, at 483.

211. Men who have experienced consensual sex with other men are six times as likely to have been raped or sexually assaulted than men who have not. Coxell et al., *supra* note 13, at 849; see also Mezey & King, *supra* note 7, at 208 (finding, in a study conducted in Great Britain, that homosexual or bisexual men predominated among the victims of male sexual assault). But cf. A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806, 807 (1980) (finding three out of six male victims considered themselves homosexual or bisexual).

212. SCARCE, *supra* note 75, at 17; see also Groth & Burgess, *supra* note 211 (finding that only two out of sixteen men who reported that they had sexually assaulted other men limited their consensual sexual encounters to men). But cf. Mezey & King, *supra* note 7, at 208 ("In contrast to American reports the majority of assailants were homosexual.").

213. Struckman-Johnson & Struckman-Johnson, *supra* note 22, at 380.

214. Gear, *supra* note 46, at 216-17.

215. See Lara Stemple, *HBO's OZ and the Fight Against Prisoner Rape: Chronicles from the Front Line*, in THIRD WAVE FEMINISM AND TELEVISION: JANE PUTS IT IN A BOX 166, 166-88 (Merri Lisa Johnson ed., 2007).

216. Wakelin & Long, *supra* note 4, at 484-85.

must have somehow “asked for it.”²¹⁷ In some parts of the world, the rape of gay men is viewed as “punishment” for their transgressive behavior.²¹⁸

British researchers found that people attribute more blame to homosexual male rape victims than to straight male victims.²¹⁹ Study participants tend to suspect that gay victims possess more of an unconscious desire for rape than their heterosexual counterparts, and that gay men undergo less stress and experience more pleasure from rape.²²⁰ Research has also shown that gay men are aware of social bias against them in the context of rape.²²¹ One study found that, when reporting rape to police, gay men often claim to be heterosexual in order to improve their chances of being believed.²²²

Of greater concern than the need to establish the voracity of one's claim, for many men at least, is the risk facing of criminal prosecution oneself. Eighty-five countries around the world have enforceable laws banning homosexual sex.²²³ For example, when a man in Romania reported that two men had raped him, prosecutors reasoned that “being gay, he must have wanted it.”²²⁴ The victim himself was sentenced to eighteen months in prison after being prosecuted for consensual homosexual activity.²²⁵ In addition to the manifest injustice of the imprisonment of a rape victim, legal prohibitions against sodomy may also have a chilling effect, keeping countless other male victims from reporting their abuse in the first place.

Some have argued that the underreporting of rape within the gay community (the rape of one gay man by another) stems from a fear that such reports will serve to confirm the gay predator fallacy, providing “fodder to opportunistic enemies who are anxious for information that demonizes homosexuality when taken out of context.”²²⁶ In addition to the stigma and shame to which male rape of all stripes are subject, a rape survivor in this situation may fear that his report will betray his own (already misunderstood) community.²²⁷

217. *Id.* at 485 (“[S]tereotypes of rape victims portray . . . homosexual men as asking for rape.”).

218. WORLD HEALTH ORG., *supra* note 8.

219. Wakelin & Long, *supra* note 4, at 484 (citing Damon Mitchell et al., *Attributions of Victim Responsibility, Pleasure, and Trauma in Male Rape*, 36 J. SEX RES. 369, 369–73 (1999)).

220. Mitchell, *supra* note 219, at 372–73.

221. See Mezey & King, *supra* note 7, at 208.

222. Wakelin & Long, *supra* note 4, at 486 (citing Samantha Hodge & David Canter, *Victims and Perpetrators of Male Sexual Assault*, 13 J. INTERPERSONAL VIOLENCE 222, 222–39 (1998)).

223. Int'l Gay & Lesbian Human Rights Comm'n, *Where Having Sex is a Crime: Criminalization and Decriminalization of Homosexual Acts* (2003) (unpublished report, on file with The Hastings Law Journal).

224. SCARCE, *supra* note 75, at 203 (quoting Scott Long & Julie Mertus, *What Stonewall Means for the Iron Curtain*, S.F. CHRON., June 27, 1994, at A19) (internal quotation marks omitted).

225. *Id.* (citing Long & Mertus, *supra* note 224).

226. SCARCE, *supra* note 75, at 66.

227. *Id.*

The traditional male-on-female rape construct also neglects the rape of people for whom traditional gender categories do not apply, such as transgender persons. For example, when two men in South Korea raped a male-to-female transgender person, the nation's highest court held that this could not constitute rape because the law only proscribes the rape of chromosomal females.²²⁸ The perpetrators were instead convicted of the lesser crime of sexual assault.²²⁹ Intersex people are similarly marginalized by the current framework's use of tidy binary sex categories and would be better served under a more comprehensive approach.

The circumstances that gay male rape victims experience illustrate the need for a range of approaches with which to understand and remedy the problem. A gender analysis that includes a critique of masculinity norms is one such approach. Some have posited, for example, that the subjugation of gay men stems from the perception that they forfeit their male privilege by behaving like women.²³⁰ Other fruitful approaches might explore the rape of gay men under the emerging human rights discourses about sexual rights²³¹ and equality rights based on sexual orientation.²³² In contrast, the female-specific approach, by excluding gay men, offers little to this population. It also misses an important context ripe for feminist critique: the rape of men is a form of gender oppression in which gendered hierarchies are reproduced.

By failing to grapple with male rape in the same relatively complex and substantive way as it grapples with the rape of women, the international human rights movement leaves in place the ignorance and bias that perpetuate callousness toward the rape of gay men, a population disproportionately vulnerable to rape²³³ and in need of rights protection. Ending the silence about male rape is an important first step toward a more thorough dismantling of the deep misunderstandings about rape and male homosexuality.

That said, an approach to male rape that assumes that all victims are homosexual would serve no one. In addition to its inaccuracy, it would further perpetuate the biased understanding that "real" men should be able to prevent their own rape. Jeffrey Weeks has described a precarious

228. *Id.* at 79–80 (citing *South Korea Says Transsexuals Cannot Be Raped*, REUTERS NEWSWIRE, June 13, 1996).

229. *Id.*

230. See SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 18–19 (1988) (examining this theory).

231. See Alice M. Miller, *Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights*, HEALTH AND HUM. RTS., Vol. 4(2), 2000, at 68, 69–70.

232. See Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN*, HEALTH & HUM. RTS., Vol. 7(2), 2004, at 48, 49.

233. Men who had experienced consensual sex with other men are six times as likely to have been raped or sexually assaulted than men who have not experienced such consensual sex. Coxell et al., *supra* note 13, at 849.

“gender fragility” in which masculinity “is achieved by the constant process of warding off threats to it.”²³⁴ The failure of a man to defend himself against sexual threats can compound the shame that is routinely reported by male rape victims.²³⁵ The tendency of perpetrators to feminize their victims and the general use of misleading terms such as “homosexual rape” causes some heterosexual victims to feel that their sexual orientation has been compromised or altered.²³⁶ Often, the sexual penetration that a victim has experienced is associated with femininity and homosexuality, thereby itself operating as a threat to his conceptualization of his own “manhood.”²³⁷ The linking of male victimization to homosexuality may also increase the tendency of gay victims to experience self-blame.²³⁸ No one benefits from a picture of rape in which perpetration is painted as masculine and victimization as feminine.

In 1975, Susan Brownmiller famously described rape as “nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear.”²³⁹ With the might and imprecision of a sledgehammer, Brownmiller’s words forced sex and gender to the center of the rape discussion. This perspective, usefully provocative in its era, reads today as an unreasonable generalization,²⁴⁰ particularly the author’s accusation that *all men consciously* use rape to intimidate. By creating a perpetrator class of men, Brownmiller dangerously sets up men as implausible victims.²⁴¹

Both common understanding and research data point to men as the disproportionate perpetrators of sexual violence.²⁴² Knowing that most perpetrators are male, however, does not beget the conclusion that most

234. JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES* 190 (1985).

235. See Gear, *supra* note 46, at 214.

236. See STOP PRISONER RAPE, HOPE FOR HEALING: INFORMATION FOR SURVIVORS OF SEXUAL ASSAULT IN DETENTION 11 (2006) (advising prisoner rape survivors that “[a]fter the initial crisis, it is normal to begin to question your sexual orientation”), available at <http://www.justdetention.org/pdf/HopeforHealingweb.pdf>.

237. Gear, *supra* note 46, at 214.

238. STOP PRISONER RAPE, *supra* note 236, at 22.

239. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975).

240. Though her claims strike me as dated and unreasonable, similar generalizations were not uncommon even two decades later; for example, “[e]very rape is an expression of male domination and misogyny, a vehicle of terrorizing and subordinating women.” Rhonda Copelon, *Surfacing Gender: Reengraving Crimes Against Women in Humanitarian Law*, in *WOMEN AND WAR IN THE TWENTIETH CENTURY: ENLISTED WITH OR WITHOUT CONSENT* 332, 347 (Nicole Ann Dombrowski ed., 1999).

241. But see BROWNMILLER, *supra* note 239, at 257–68 (discussing male prisoner rape).

242. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUBL’N NO. NCJ 163392, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 10* (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf>.

(let alone, all) males are perpetrators.²⁴³ This seemingly axiomatic bit of logic gets lost in Brownmiller's blunt sex-based division.

Similarly, the human rights canon's sex-specific approach to rape imbeds notions of naturalistic masculinity that have been the subject of intense criticism by contemporary gender theorists who assert that masculinity is culturally constructed, not universally biologically determined.²⁴⁴ Societal perceptions about gender work to enforce expected male attitudes and behaviors. Prominent among these behaviors is the perpetration of violence—both against women and against other men. Some have posited that violence, including sexual violence, is the ultimate demonstration of this kind of masculinity.²⁴⁵

Assumptions that real men are sexual aggressors and never victims promote harmful perceptions about the "one" way to be a man. They can justify violent behavior as an archetypal manifestation of maleness, promoting a sense of inevitability about its continuation. Such perceptions may influence behavior; Judith Butler famously emphasized the "performative" conduct of individuals seeking to display gendered traits as a form of social interaction.²⁴⁶

Male rape will only be curtailed when the perception of men broadens beyond one that sees men as a monolithic perpetrator class, and instead recognizes that men and boys can and should also be a group entitled to rights claiming. The failure of human rights instruments to address these claims promotes regressive norms about masculinity rather than challenging the harmful status quo. It would be more helpful to understand the ways in which regressive gender norms harm both men and women. It is possible to take sex and gender into account without setting up false divisions that pit all men against all women, villains against damsels in distress.

Furthermore, I argue that a female-specific approach to rape in the human rights instruments has also had the unintended consequence of reaffirming the portrayal of women as defenseless victims in need of protection. Some in the women's human rights movement have begun to question the prominence of violence against women within the movement's priorities. Ratna Kapur points out that the essentializing

243. See Spitzberg, *supra* note 5 (noting that in prevalence studies on sexual aggression, nearly 5% of men claim to have perpetrated rape).

244. See, e.g., Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *TOWARD A NEW PSYCHOLOGY OF GENDER* 223, 224 (Mary M. Gergen & Sara N. Davis eds., 1997) ("Manhood is neither static nor timeless; it is historical. Manhood is not the manifestation of an inner essence; it is socially constructed. Manhood does not bubble up to consciousness from our biological makeup; it is created in culture. Manhood means different things at different times to different people.").

245. KENNETH C. CLATTERBAUGH, *CONTEMPORARY PERSPECTIVES ON MASCULINITY: MEN, WOMEN, AND POLITICS IN MODERN SOCIETY* 45-46 (1997).

246. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 128-41 (1990).

portrayal of women as victims of gender violence has been critiqued in the United States “by Black, Latina/o, and lesbian feminists as being exclusive and failing to recognize that women experience various forms of oppression simultaneously.”²⁴⁷ The author also criticizes the international feminist emphasis on violence against women, arguing that it “has reinforced the representation of the Third World woman as thoroughly disempowered, brutalized, and victimized: a representation that is far from liberating for women.”²⁴⁸

In a related argument, Alice Miller further points out that an overwhelming emphasis on sexual violence against women has the potential to confirm notions of women’s purity as paramount. She explains:

The recognition that sexual harm has begun to operate in isolation from other injustices as the worst abuse that can happen to a woman should alert us to the uncomfortable similarities, and differences, between this position and a position we fight against—that the most important thing to know about a woman is her chastity.²⁴⁹

I argue that, in addition to the heavy emphasis on sexual violence in the women’s human rights movement, the locating of *all* sexual violence exclusively within human rights instruments that address women similarly serves to perpetuate the essentializing norms of female victimhood. Not only does the emphasis on sexual violence against women fail to attend to more holistic needs of all women as Kapur and Miller point out, but it also reinforces outdated assumptions about gender norms and ideals to which both men and women are detrimentally subject.

In situations of armed conflict, for example, women who have suffered sexual violence have most likely experienced nonsexual violence as well.²⁵⁰ When women who have been raped are treated exclusively as “the rape victims,” this minimizes other harms they may have endured.²⁵¹ Conversely, this is as problematic as a situation in which men have experienced abuse of a sexual nature and they are treated solely as torture survivors, and the sexual component of their suffering is virtually ignored.

247. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 8 (2002).

248. *Id.* at 18.

249. Miller, *supra* note 179, at 19.

250. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, ¶ 109, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. MacDougal).

251. *Id.*

It is worth noting that perhaps the international human rights movement would have prolonged its neglect of women's concerns had it not been for the motivating portrayal of rape suffered by women. And certainly, a gender analysis is warranted, as discussed above. Nevertheless, a treatment of sexual violence that recognizes it as a real harm that can happen to anyone—to women, to men, and to children—would, in addition to being accurate, move us a step away from the portrait of “woman as rape victim.”²⁵²

IV. LIMITATIONS OF THE FEMALE-SPECIFIC APPROACH IN PRACTICE

A. THE APPROACH LIMITS ADVOCACY AGAINST MALE RAPE

1. *Instruments Are Lacking*

In addition to the problematic theoretical implications of excluding of male rape from the international human rights canon, there are obvious practical implications as well. The very states that failed to address any form of sexual violence for decades are likely to be unaware of or unconcerned with sexual violence against men and boys. The failure of the instruments to hold governments accountable for sexual violence against male victims, simply put, encourages states to continue to ignore the problem.

Advocates against male rape are also disadvantaged by the current framework. The broad, prescriptive language on sexual violence found in the women's rights instruments offers a depth I had grown accustomed to as an advocate for women's sexual and reproductive health and rights. Upon undertaking work focused largely on sexual violence against men as the previous executive director of the human rights organization Just Detention International,²⁵³ I quickly realized that human rights advocacy tools for men are inadequate.

Advocacy work for men and boys that operates within a human rights framework must solely rely on sex-neutral documents such as the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,²⁵⁴ and the International Covenant on Civil and Political Rights,²⁵⁵ stretching these legal tools to fit a problem for which they were not explicitly crafted. These instruments are more general in

252. A picture Miller describes as reducing women to “suffering bodies in need of protection by the law and the state, rather than . . . bodies and minds in need not only of protection, but participation and equality.” Miller, *supra* note 179, at 27.

253. Just Detention International was formerly called Stop Prisoner Rape. Press Release, Just Detention Int'l, Welcome, Just Detention International (Sept. 4, 2008), available at <http://www.justdetention.org/en/pressreleases/2008/09-03-08.aspx>.

254. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

255. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

nature and leave out the sexual component of this abuse, in contrast to many of the instruments focused on women and girls.

2. *Reporting Is Inhibited*

Advocacy work aimed at ending any human rights abuse is clearly thwarted when the abuse is undetected or unreported. Male rape victims rarely report their rape to authorities.²⁵⁶ Reasons for not reporting include feelings of embarrassment and distress, the fear that no one will believe that the victim was unable to defend himself, and the belief that reporting itself compromises one's masculinity.²⁵⁷ The relative weight of such concerns surely differs by person, circumstance, and culture, but it is reasonable to assume that the failure to openly address male rape as an abuse worthy of attention only exacerbates the problem.²⁵⁸

Studies which purport to demonstrate the extent of underreporting of rape have themselves excluded men and boys. One widely cited U.S. report determined that 84% of rape victims did not report the crime and found rates of rape to be five times as high as those reported by the FBI's Uniform Crime Reports and the Bureau of Justice Statistic's National Crime Survey.²⁵⁹ Despite the sweeping title of this publication, *Rape in America: A Report to the Nation*, it was based on research that explicitly excluded all men and boys from the research sample.²⁶⁰ To date, there is little data on the extent to which sexual violence against males remains underreported.

When male rape is unacknowledged by society, left out of crime reports, or excluded by the international human rights movement, victims may believe that their experience is an aberration or that the problem is unworthy of redress, further compounding the inhibition to report—creating a cycle which stymies advocacy against the problem.

Male rape victims continue to be a largely unorganized constituency. Have the instruments failed to include men and boys because there have been few advocates to clamor for their inclusion? This seems a likely factor.²⁶¹ Or might it be the case that the instruments' inattention to males contributes to the continued shame, silence, and lack of political

256. Craig L. Anderson, *Males as Sexual Assault Victims: Multiple Levels of Trauma*, 7 J. HOMOSEXUALITY 145, 151 (1982) (stating that reporting to police is "rare"); *id.* at 156–57 (concluding most male victims do not seek medical or legal assistance).

257. Groth & Burgess, *supra* note 211, at 808–09.

258. Anderson, *supra* note 256, at 146 ("[Male sexual abuse is] a subject that has historically been unmentionable and disbelieved, and whose victims have as a consequence been underserved, ignored and further abused.").

259. NAT'L VICTIM CTR. & CRIME VICTIMS RES. & TREATMENT CTR., *RAPE IN AMERICA: A REPORT TO THE NATION* 1, 6 (1992).

260. *Id.* at 1.

261. QUÉNIVET, *supra* note 192 (positing that the "lack of information and literature on the subject is much due to men's reluctance to deal with" sexual offenses committed against men).

organizing?²⁶² Few NGOs working on sexuality and reproductive issues address men comprehensively, and those that do acknowledge that men have been a forgotten constituency.²⁶³

B. THE FEMALE-SPECIFIC APPROACH VIOLATES NONDISCRIMINATION NORMS

The international human rights system is one in which principals of nondiscrimination are paramount, and excluding one sex, *prima facie*, from protection from sexual abuse is problematic from this perspective. The right to be free from discrimination is enshrined in international treaties and, like other rights of great consequence, held to be nonderogable.²⁶⁴ While corrective temporary special measures like affirmative action are sometimes encouraged,²⁶⁵ the powerful nondiscrimination norm is worth noting.

Sexual violence against one vulnerable group, persons with mental illness, has been addressed in a sex-neutral manner: "All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment."²⁶⁶

262. See Anderson, *supra* note 256, at 158. Anderson posits that increasing the visibility of male rape "is a critical indirect intervention and can result in tangible clinical benefits to clients. Breaking the silence on the issue often uncovers more victims, many of whom can then seek helping services." *Id.*

263. See generally, e.g., INT'L PLANNED PARENTHOOD FED'N, MALE INVOLVEMENT PROJECT (2003), available at <http://www.ippf.org/NR/rdonlyres/269F5E8E-CCE3-4280-9133-CFAF671B82FD/0/kenya.pdf>. "For many years, Kenyan men have effectively been excluded either deliberately or by default from many SRH [(sexual and reproductive health)] programmes. The male involvement project—Reaching out to men: the forgotten 50%—aims to redress this." *Id.* at 1. It is worth noting that men's instrumentalist capacity (their ability to affect outcomes for women) is at least partly motivating IPPF's inclusion of men. *Id.* "In a setting where patriarchal traditions are strong, negative male attitudes can restrict women's access to services and hamper efforts to promote HIV prevention. . . . A more understanding attitude among men may liberate women to use contraception without fear or shame." *Id.*

264. "That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well as women 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." U.N. Sec'y Council, *Rape and Sexual Assault: A Legal Study*, ¶ 2 n.4, U.N. Doc. S/1994/647/Add.2 (Vol. I) (Dec. 28, 1994).

265. See Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 5: Temporary Special Measures*, ¶ 2, U.N. Doc. A/43/38 (Mar. 4, 1988) (urging states to "make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment").

266. Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. Res. 46/119, princ. 1(3), 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/RES/46/49 (Dec. 17, 1991). Elsewhere, however, violence against persons with disabilities is addressed in a female-specific way. For instance, states are instructed to "[a]dopt and promote a holistic approach to respond to all forms of violence and abuse against girls and women of all ages, including girls and women with disabilities." Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action, G.A. Res. S/23-3, ¶ 69(j), U.N. Doc. A/RES/S/23-3 (Nov. 16,

To point to this language is not to encourage an erasure of gender considerations. Some instruments have, in fact, used the word “gender” in a way that does not preclude a gender analysis of male abuse: “Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.”²⁶⁷

V. ALTERNATIVE APPROACHES TO CONSIDER

A. CONCEPTUAL FRAMEWORKS OUTSIDE OF WOMEN’S RIGHTS

Outside of women’s rights, there are other instructive approaches for framing a human rights response to sexual violence. The health and human rights discourse that emerged in the 1990s identified the interconnected, mutually reinforcing relationship between public health and human rights.²⁶⁸ The discourse argued for, among many other things, attention to the health implications of rights abuses and for the recognition of and attention to the human right to “the highest attainable standard of physical and mental health”²⁶⁹—a right broad enough to get at rape’s psychological harms, not just its physical ones. Those advocating for reproductive rights, for example, while still asserting principles of gender equality, also assert the “right to health,”²⁷⁰ which broadens and strengthens the call for change.

Despite the fundamental role of sexuality in human nature, states have been slow to recognize sexual rights, thought to encompass rights to sexual expression, pleasure, and well-being, free from discrimination, harm, or coercion. In the late 1990s and 2000s scholars have worked to disentangle sexual rights from other rights such as gender equality rights and reproductive rights.²⁷¹ This new line of research²⁷² has made

2000); see also Ad Hoc Comm. on a Comprehensive and Integral Int’l Convention on the Prot. and Promotion of the Rts. and Dignity of Persons with Disabilities, Draft Convention on the Rights of Persons with Disabilities, art. 16(5) (2006), <http://www.un.org/esa/socdev/enable/rights/ahc8adart.htm> (“States Parties shall put in place effective legislation and policies, including women and child focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”).

267. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme for Action, World Conference on Human Rights*, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993).

268. Jonathan M. Mann et al., *Health and Human Rights*, in *HEALTH AND HUMAN RIGHTS: A READER* 7, 7–8 (Jonathan M. Mann et al., eds. 1999).

269. *Id.* (asserting that state parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (citing the International Covenant on Economic, Social and Cultural Rights art. 12(3), Dec. 16, 1966, 993 U.N.T.S. 3)).

270. See, e.g., Reproductive Justice, <http://www.fwhc.org/reproductivejustice.htm> (last visited Feb. 14, 2009) (“Women’s reproductive rights under international human rights law are a composite of a number of separate human rights: the right to health . . .”).

271. See Miller, *supra* note 231, at 70.

272. See generally SUSANA T. FRIED, INT’L WOMEN’S HEALTH COAL., ANNOTATED BIBLIOGRAPHY:

important progress in extending the theoretical boundaries of sexual rights, highlighting the conceptual limitations that have unduly restricted both theory and practice in this area. Still, sexual rights remain contested at the state level. The phrase "sexual rights" does not exist in any U.N. instrument and they are generally underconceptualized in U.N. texts.²⁷³ The right of individuals to be free from nonconsensual sexual activity is, however, a relatively uncontroversial tenet of this evolving framework²⁷⁴ and as such fits squarely within nearly any conceptualization of sexual rights.

A human rights approach to sexual violence is beset by limitations when linked inextricably to one framework only: the women's rights framework. Attending to sexual violence as a health rights issue and a sexual rights issue would allow for new theoretical linkages to be made, as well as an important broadening of the response to the problem.

Rosalind Petchesky questions the Beijing framework's legacy of "exclusive privileging" of women as the bearers of sexual rights.²⁷⁵ Instead Petchesky urges, ten years after Beijing, we should consider "new, more inclusive coalitions of diverse social movements around rights of the human body."²⁷⁶ She notes with caution the potential that such broadening has to again render female sexual sufferings invisible, but asserts that male suffering cannot be denied,²⁷⁷ and concludes that "the dangers of not enlarging feminist movements and visions are greater still."²⁷⁸

B. INTERNATIONAL LEGAL FRAMEWORK OUTSIDE OF HUMAN RIGHTS LAW

The entire international legal framework for addressing sexual violence has evolved from human rights law, humanitarian law, and international criminal law, each of which has its own texts and historic

SEXUALITY AND HUMAN RIGHTS (2002), available at <http://www.iwhc.org/docUploads/SexRtsBiblio.pdf> (listing and summarizing a broad variety of research in this emerging field).

273. See, e.g., Fourth World Conference on Women, *supra* note 145, ¶ 96 (asserting only that "[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences."); see also International Conference on Population and Development, *supra* note 165, ¶ 7.2.

274. See Petchesky, *supra* note 186 ("Negative rights—proclamations against the catalogue of horrors—always win broader sympathy than the affirmative ones. This is in part because protections against abuses and violence are easily associated with stereotypical images of women and girls as fragile victims whose chastity marks their value . . .").

275. *Id.* at 302.

276. *Id.*

277. *Id.* at 314.

278. *Id.* at 302.

origins.²⁷⁹ A comprehensive treatment of humanitarian law and international criminal law is outside the scope of this Article. Nevertheless, it does bear briefly illustrating that, outside of human rights law,²⁸⁰ important progress toward gender inclusiveness has been made in international law—particularly in the Rome Statute that created the International Criminal Court (ICC)²⁸¹—and as such, provides evidence of its feasibility.

Prior to the Rome Statute, inclusiveness was not the norm. Early humanitarian law used female-specific language when proscribing sexual abuse: the Fourth Geneva Convention of 1949 stated that, “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”²⁸² This language has been widely criticized, though less for its sex-specificity than for its problematic implicit conclusion that the dishonor befalls the victim, rather than the perpetrator.²⁸³ Moreover, it was not until 2001 that the first conviction by an international criminal tribunal exclusively for a crime of sexual violence occurred, when the International Criminal Tribunal of the Former Yugoslavia (ICTY) convicted three Bosnian Serbs of raping Muslim women and girls during the conflict.²⁸⁴ The International Criminal Tribunal for Rwanda (ICTR) recognized and prosecuted crimes of sexual violence,²⁸⁵ and the Statute of the Special Court for Sierra Leone, like the ICTY and the ICTR statutes, included crimes of sexual violence as crimes against humanity.²⁸⁶

279. *Contemporary Forms of Slavery*, *supra* note 178, ¶ 34.

280. Despite the fact that this Article focuses on human rights law, the three fields should not be seen as completely separate. “Geometrically, international human rights law, international humanitarian law, and international criminal law might be visualized as three circles or rings, each of which overlaps with the other two.” JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 607 (2d ed. 2006).

281. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

282. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. An additional protocol further asserted, “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 76(1), Dec. 7, 1978, 1125 U.N.T.S. 3.

283. See *Contemporary Forms of Slavery*, *supra* note 178, ¶¶ 59–60.

284. CONGRESSIONAL HUMAN RIGHTS CAUCUS, MEMBERS’ BRIEFING: THE USE OF SEXUAL VIOLENCE AGAINST WOMEN AS WAR STRATEGY DURING VIOLENT CONFLICT 2 (2004). For a discussion of the historic efforts to secure attention to sexual violence in the former Yugoslavia, see Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN’S L.J. 171, 173 (1994).

285. CONGRESSIONAL HUMAN RIGHTS CAUCUS, *supra* note 284.

286. Statute of the Special Court for Sierra Leone art. 2(g), June 3, 2002, 2178 U.N.T.S. 138, U.N. Doc. S/2001/246, app’x II.

The treaty known as the Rome Statute created the International Criminal Court, the first permanent international criminal tribunal to prosecute genocide, war crimes, and crimes against humanity.²⁸⁷ In addition to treating crimes such as rape and sexual slavery as war crimes²⁸⁸ and crimes against humanity,²⁸⁹ the definition of rape as a crime against humanity (as provided in a later document) includes language inclusive of both sexes:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.²⁹⁰

Crimes against humanity, which include sexual slavery²⁹¹ and sexual violence,²⁹² are also applicable to male and female victims. Case law from the ICTY and ICTR, which used gender-inclusive definitions of rape, laid influential groundwork for the ICC.²⁹³ Moreover, it is worth highlighting that women's rights advocates can be credited with pushing for progress toward a gender-inclusive understanding of sexual violence at the ICC.²⁹⁴

The Rome Statute also contains the first definition of "gender" in an international treaty: "the two sexes, male and female, within the context of society."²⁹⁵ The Rome Statute definition of gender was the subject of contentious debate among state parties and women's rights NGOs. Delegates from some Roman Catholic and Muslim countries opposed the definition, fearing that it could be read to include sexual orientation.²⁹⁶ Women's NGOs pressed for language on gender that

287. Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, HUMAN RIGHTS BRIEF, Fall 1998, at 1, reprinted in BETH VAN SCHAKK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 64, 64-65 (2007).

288. Rome Statute, *supra* note 281, art. 8(2)(b)(xxii).

289. *Id.* art. 7(1)(g).

290. Elements of Crimes for the International Criminal Court art. 7(1)(g)-1, U.N. Doc. ICC-ASP/1/3 (Nov. 2, 2000) (footnote omitted).

291. *Id.* art. 7(1)(g)-2.

292. *Id.* art. 7(1)(g)-6.

293. Hilmi M. Zawati, *Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity*, 17 *TORTURE J.* 27, 30-33 (2007). The ICTY concluded that rape is a forcible act of "the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object." *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 174 (Dec. 10, 1998). The ICTR defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 598 (Sept. 2, 1998).

294. See generally Pam Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28 *SIGNS: J. WOMEN CULTURE & SOC'Y* 1243 (2003) (discussing the importance of a gender-inclusive understanding of sexual violence at the ICC).

295. Rome Statute, *supra* note 281, art. 7(3).

296. Spees, *supra* note 294, at 1244.

would assert that differences between the sexes are not inevitable products of biology.²⁹⁷ Though women's advocates initially sought a different definition of gender for the statute—"socially constructed differences between men and women and the unequal power relationships that result"²⁹⁸—it bears noting that their concern for women's disadvantage at no point yielded female-specific language that would exclude male victims. While the phrase that made its way into the statute, "within the context of society," was criticized for its failure to critique socially constructed norms,²⁹⁹ it does offer a groundbreaking nod to gender's societal context, and includes both males and females. The statute's inclusion of gender was rightly heralded by some as a victory for women³⁰⁰—as it was for all victims of sexual violence.

C. NATIONAL LEVEL APPROACHES TO MALE RAPE

The female-specific approach to sexual violence is certainly not necessary from a practical perspective. As noted above, international instruments such as the Convention on the Rights of the Child and the instruments developed in conjunction with the International Criminal Court use a sex-neutral approach to sexual abuse.³⁰¹ From a national perspective, a sex-neutral approach has proved viable in numerous states including Russia,³⁰² Australia,³⁰³ and Norway.³⁰⁴

Turning to the United States in particular, it can be said that, in many respects, our current era marks a time in which the United States hinders rather than leads in the advancement of human rights globally. But, on the specific issue of sexual violence against men and boys, the United States has taken important steps toward addressing an abuse that has been left out of the international human rights agenda.

In general, early state laws on rape were limited to female victims by defining rape as the penetration of the vagina.³⁰⁵ The 1970s saw a move toward sex neutrality in criminal statutes; many states redefined rape as

297. *Id.* at 1244 n.22.

298. *Id.*

299. See Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 57 (2005).

300. "The Rome Statute . . . [has incorporated] a gender perspective to ensure that women who are victims of the gravest crimes under international law have access to justice." THE INTERNATIONAL CRIMINAL COURT, FACT SHEET 7: ENSURING JUSTICE FOR WOMEN 1 (2005), <http://www.amnesty.org/en/library/asset/IOR40/006/2005/en/dom-IOR400062005en.pdf>. But cf. Oosterveld, *supra* note 299, at 55–58 (defending the definition, but detailing the range of critiques that have been launched against it).

301. See *supra* notes 161–63, 288–300 and accompanying text.

302. Ugolovnyi Kodeks RF [UK] [Criminal Code] art. 131 (Russ.).

303. Criminal Code Act, 1995, c. 8, § 268.14 (Austl.).

304. Almindelig borgerlig Straffelov 22. Mai 1902 nr. 10 § 192 (Nor.).

305. William B. Rubenstein, *Forward to MALE ON MALE RAPE*, *supra* note 75, at ix.

criminal sexual assault and, formally at least, included male victims.³⁰⁶ Today, the vast majority of states (and the District of Columbia) use a sex-neutral definition of rape or sexual assault. Only Georgia,³⁰⁷ Maryland,³⁰⁸ Mississippi,³⁰⁹ and North Carolina³¹⁰ do not.³¹¹

Another significant U.S. advancement toward the prevention of male rape was the 2003 passage of the Prison Rape Elimination Act, the first-ever federal legislation to address this problem.³¹² The states of California³¹³ and Texas³¹⁴ followed suit, enacting or amending state laws to address the problem. While the efficacy of these statutes will depend largely on implementation efforts, they represent significant legislative milestones. Male victims who have experienced rape behind bars have been at the forefront of advocacy efforts, such as those lead by Just Detention International.³¹⁵

Victims of clergy sexual abuse in the United States have also succeeded in clamoring for attention to their cause. Media attention has been persistent, lawsuits have been won, abusive priests have been forced to resign, and other priests have attended mandatory classes on sexual abuse.³¹⁶ Groups like the Survivors Network of Those Abused by Priests have embraced male and female survivors alike, and male survivors have assumed public leadership roles.³¹⁷

CONCLUSION

I do not believe it appropriate to address the neglect of sexual violence against men and boys in the human rights canon through the development of a new and separate resolution, convention, or the like. Leaving aside current debates about the efficacy of such instruments as tools for change,³¹⁸ the creation of a separate document on sexual violence against males would be conceptually problematic, resulting in an

306. *Id.*

307. GA. CODE ANN. § 16-6-1 (2007).

308. MD. CODE ANN., CRIM. LAW § 3-303-304 (LexisNexis 2002).

309. MISS. CODE ANN. § 97-3-69 (2007).

310. N.C. GEN. STAT. § 14-27.2-.3 (2005).

311. In addition, Idaho defines male and female rape as two different crimes. IDAHO CODE ANN. § 18-6101 (1997 & Supp. 2003) (female rape); *id.* § 18-6108 (male rape).

312. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2006).

313. A.B. 550, 2005 Leg., Reg. Sess. (Cal. 2005).

314. H.B. 1944, 2007 Leg., 80th Sess. (Tex. 2007).

315. See Press Release, Stop Prisoner Rape, Survivors of Prisoner Rape Speak at Capitol for First Time (June 24, 2003), available at http://www.justdetention.org/en/pressreleases/2003/06_24_03.aspx.

316. William Lobdell, *Priests' Victims Feel Vindicated*, L.A. TIMES, Mar. 21, 2002, at A1.

317. Charlie Hungerford, *David Clohessy: Holding out for Change*, DRURY UNIV. MAG., Summer/Fall 2002, at 12, 14-15, available at http://snapnetwork.org/stories_about_snap/clohessy_holding_out.htm.

318. See generally Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003) (discussing the shortcomings of measurements of the effect of human rights treaties on such change).

artificially sex-bifurcated treatment of rape. Those working to end sexual violence should resist the temptation of identity politics to parse sufferers into tidy categories. Indeed, inclusiveness itself would seem an important feminist principle. Advocates must recognize that shared goals can bring them out of identity ghettos:³¹⁹ “the formulation of alliances and coalitions under a human rights framework—in which queer groups work along with feminist groups, civil liberties groups, and groups working on HIV/AIDS” to make progress on health and sexuality issues has become a “critical necessity.”³²⁰

Rather, as the international human rights movement moves forward in its attention to gender issues, health and human rights, and sexual rights, both in concert and separately, we must be vigilant in our efforts to address sexual violence inclusively and accurately. Assumptions should no longer be made in human rights advocacy, instruments, and other texts that “gender” pertains only to women. Attention to gender-based violence must include violence to which men are disproportionately vulnerable on account of their sex. Definitions of rape and other forms of sexual abuse must always leave room for male victims. Any gender analysis of sexual violence must tease out the ways in which harmful masculinity norms serve to render certain groups of men (men who are perceived to be gay, weak, small, or effeminate) vulnerable to such violence.

In a world in which, one hopes, compassion is not a finite resource, new concern for one type of victim, in this case, men and boys, need not signify the lessening of concern for women and girls. It is not a zero-sum game. Indeed, the total undoing of women’s sexual subordination must include an accurate understanding of rape and a thorough critique of gender assumptions—and should not and cannot come at the expense of failing to account for other victims.

319. Petchesky, *supra* note 186, at 306 (referring to the “confining ghettos of identity politics”).

320. *Id.* at 315 (citing Avirind Narrain, *The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hinduva*, HEALTH & HUM. RTS., Vol. 7(2), 2004, at 142, 154).
