

**MALE RAPE: PROBLEM, SCOPE AND SOLUTIONS**

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*“If ever there was a crime hidden by a curtain of silence, it is male rape.”*

- Stephen Donaldson

*“Sexual assault is one of the major issues that plague our society. With advancement in sexual aggression research, there has been an increased scientific and societal awareness about the psychology of the offender, the dynamics of the offense, the impact of sexual assault on the victim, and the cultural and social factors contributing to this behavioural pattern. Although the plight of male victims has been recognized, the focus remains on female victims of male assault, and male sexual assault is restricted to a subset of homosexual behaviour.<sup>2</sup> The reality, however, is quite different.*

*An impressive body of evidence has been produced which establishes men as targets of sexual aggression, and women as perpetrators. The methods commonly employed by women include verbal, indirect and relational aggression.<sup>3</sup> Since the 1980s, scholars have made varying estimates of the overall percentage of lifetime prevalence of such verbal coercion and physical assault among women. Whereas Poppen and Segal pegged this figure at fourteen percent,<sup>4</sup> Hogben asserts it to be a lifetime prevalence rate of twenty-four*

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<sup>2</sup> Sandesh Sivakumaran, *Male/male rape and the ‘Taint’ of Homosexuality*, 27(4) Hum. Rts. Q. 1274, 1290 (2005).

<sup>3</sup> Barbara Krahe et al, *Women’s Sexual Aggression Against Men: Prevalence and Predictors*, 49 Sex Roles 219, 220 (2003) (hereinafter Krahe).

<sup>4</sup> P.J. Poppen & N.J. Segal, *The Influence of Sex and Sex Role Orientation on Sexual Coercion*, 19 Sex Roles 689, 692 (1988) (hereinafter Poppen & Segal).

percent for such offences.<sup>5</sup> Anderson went a step further, and said that forty-three percent of women resorted to verbal aggression, twenty-seven percent threatened the use of force and twenty percent actually used force, to engage a man in sexual activity against his will.<sup>6</sup> Although there is no consensus about the extent of such aggression, it is unanimously agreed that the problem exists and is widespread.<sup>7</sup>

Despite the evidence, modern societies are still plagued by the stereotypical notion which classifies men as perpetrators, and women as victims. They are reluctant to accept the idea that a 'real man' could be reduced to such a sexually passive role.<sup>8</sup> Virtually all the non penological literature on rape assumes that the victim is female and the police do not even collect statistics on male rape.<sup>9</sup> As such, when a man attempts to report his assault, he is often ridiculed.<sup>10</sup> This lack of attention to male rape is despite the fact that in cases of male-rape, gang-rape is more common, multiple types of sexual acts are more likely to be demanded, weapons are more likely to be not only displayed but also used, and physical injury is much more likely to occur.<sup>11</sup>

The presumption that a man cannot be raped stems, in part, from the assumption that "real men" secretly enjoy being sexually violated by women.<sup>12</sup> This idea further stems in part from the 'valorization of the always-hard, always-ready

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<sup>5</sup> M. Hogben et al, *Coercive Heterosexual Sexuality in Dating Relationships in College Students: Implications of Differential Male-Female Experiences*, 8(1-2) J. Psychol. & Hum. Sexuality 69, 70 (1996).

<sup>6</sup> P.B. Anderson & C. Struckman-Johnson, *Sexually Aggressive Women* 73-93 (1998).

<sup>7</sup> Krahé, *supra* note 2, at 219-223.

<sup>8</sup> Gillian C. Mezey & Michael B. King, *Male Victims of Sexual Assault* 142 (2d. 2000).

<sup>9</sup> Stephen Donaldson, *Rape of Males*, 2 Encyclopedia of Homosexuality 1094 (W.R. Dynes ed., 1990) (hereinafter *Donaldson*).

<sup>10</sup> Elizabeth J. Kramer, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. Rev. 293, 318 (1998) (hereinafter *Kramer*).

<sup>11</sup> Donaldson, *supra* note 8, at 1095.

<sup>12</sup> Ronald E. Smith et al, *Social Cognitions about Adult Male Victims of Female Sexual Assault*, 24 J. SEX RES. 101, 110 (1988).

dick'.<sup>13</sup> After all, the sexually promiscuous female is thought to be every heterosexual man's dream come true.<sup>14</sup> This presumption creates an additional barrier that male victims of sexual assault need to be considered as legitimate victims.<sup>15</sup>

Societal misconception coupled with the lackadaisical attitude of the State compels victims to under-report these crimes: a silence that is construed by many as evidence of the problem being altogether absent. This paper is dedicated to the plight of men suffering from this genre of sexual offences. Relying extensively on historical and psychological analysis, the authors have analysed the problem of under-reporting, and have attempted to answer questions like 'does erection equal consent?' This discussion has been concluded with an examination of the Criminal Law (Amendment) Bill, 2012, which seeks to address these offences.

### **1. THE PROBLEM OF UNDER-REPORTING**

Covered with a blanket of silence, rape of males is a much more common event than is usually thought. In the United States, it is the most underreported crime. In fact, if prisoners were to be included, on any given day in the United States, there may actually be more males raped than females.<sup>16</sup> The National Crime Victimization Survey, which attempts to account for unreported crime in the United States, estimates that in 2010 alone, 15,020 men were either raped or sexually assaulted.<sup>17</sup> In England also, the London Rape Centre has reported that almost 90% of men do not report their rapes.<sup>18</sup>

Rape of males, while is a widespread and extremely serious problem, has escaped the attention of society because of deep taboos springing from popular conceptions suggesting, that to be raped is to forfeit one's masculinity.<sup>19</sup> Male victims generally feel powerless and lacking in confidence after being assaulted, particularly because our society perceives men as being strong and women as physically weak

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<sup>13</sup>Kerwin Kay et al, *Male Lust, Pleasure, Power, And Transformation* i-xv (2000).

<sup>14</sup>Aimee L. Widor, 'Fact or Fiction?: Role-Reversal Sexual Harassment in the Modern Workplace' 58 U. Pitt. L. Rev. 225, 226 (1996) (hereinafter *Widor*).

<sup>15</sup>*Supra* note 11.

<sup>16</sup>*Donaldson, supra* note 8.

<sup>17</sup>U.S. Department of Justice, National Crime Victimization Survey- Criminal Victimization 2010, 9 (September 2011) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf> (last visited Feb. 12, 2013).

<sup>18</sup>Siegmund Fred Fuchs, *Male Sexual Assault: Issues of Arousal and Consent*, 51 Clev. St. L. Rev. 93, 98 (2004) (hereinafter *Fuchs*).

<sup>19</sup>*Donaldson, supra* note 8, at 1097.

and vulnerable.<sup>20</sup> Additionally, victims are extremely hesitant to report such crimes due to the risk of mockery, disbelief, and disdain both from the society and law enforcement alike, who may perceive them as being “un-masculine.” Even in ancient times, the widespread belief was that an adult male, who was sexually penetrated, even by force, “lost his manhood,” and could no longer be a warrior or ruler.<sup>21</sup> In one study, researchers Sarrel and Masters found that only 0.091 percent victims of male sexual molestation sought legal aid.<sup>22</sup> Further, in another incident, on reporting his rape by another male, the complainant was informed by the police officer not to be “so bothered” by his rape since he was a man.<sup>23</sup> Given the response from law enforcement agencies, as in the case indicated above, it is not surprising why most men refrain from reporting their rapes.

Although male rape is believed to be tremendously rare and not “an important social problem,”<sup>24</sup> the truth is that men are victims of sexual assault, rape, and molestation on a daily basis, and their perpetrators include both men and women.<sup>25</sup> Even historically, male rape has been used as a means to humiliate opponents by conquering soldiers,<sup>26</sup> as a feature of sexual torture or aggression,<sup>27</sup> and as a sexual outlet in institutions where heterosexual activity is impossible.<sup>28</sup> The rape of a defeated male enemy was considered the prerogative of the victor in a battle, and served to indicate the totality of the former’s defeat.<sup>29</sup> Contemporarily, there is little documentation in litigated cases, but this absence of reported cases carries more weight in proving the cloak of stigma associated with it, rather than establishing that the offence never happens.

The indifference towards this heinous crime is such that most jurisdictions do not even recognize the crime of rape against a male victim. Instead, they use

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<sup>20</sup>William H. Masters, *Sexual Dysfunction as an Aftermath of Sexual Assault of Men by Women*, 12 J. SexMarital Ther.35, 35-36 (1986).

<sup>21</sup>Donaldson, *supra* note 8.

<sup>22</sup>Sarrel & Masters, *supra* note 18, at 130.

<sup>23</sup>Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6(1) Seattle J.Soc. Just.481-526 (2007).

<sup>24</sup>Mark Cowling, *Date Rape and Consent* 56 (1998).

<sup>25</sup>Philip Rumney & Martin Morgan-Taylor, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One*, 26 Anglo. Am. L. Rev. 198, 218 (1997).

<sup>26</sup>Michael B. King, *Male Rape*, 301 Brit. Med. J. 1345, 1345-46 (1990) (hereinafter *King*).

<sup>27</sup>I. Lunde & J. Ortmann, *Prevalence and Sequelae of Sexual Torture*, 336 Lancet 289, 289-90 (1990).

<sup>28</sup>A.M. Scacco, *Male rape: A Casebook of Sexual Aggression* 231 (1982).

<sup>29</sup>Donaldson, *supra* note 8.

terms such as “forcible sodomy” or “child abuse.” In Mississippi, for instance, a male perpetrator convicted of raping a female may receive any punishment even up to life imprisonment, whereas, a female or male perpetrator convicted of sexual battery upon a male may not receive a sentence greater than thirty years.<sup>30</sup> The trauma isn’t any different for a male victim.

Taking a cue from the New York Penal Code, it must be understood that the solution lies in moving towards gender-neutral rape statutes, rather than being restricted to gender-specific rape statutes. Before being declared unconstitutional by the New York Court of Appeals in *People v. Liberta*, Section 130.35 of the New York Penal Law (Rape in the First Degree) read as follows:

*A male is guilty of rape in the first degree when he engages in sexual inter-course with a female:*

- 1. By forcible compulsion; or*
- 2. Who is incapable of consent by reason of being physically helpless; or*
- 3. Who is less than eleven years old.*

*Rape in the first degree is a class B felony.*

Post amendment, the provision reads as follows:

*A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person:*

- 1. By forcible compulsion; or*
- 2. Who is incapable of consent by reason of being physically helpless; or*
- 3. Who is less than eleven years old; or*
- 4. Who is less than thirteen years old and the actor is eighteen years old or more.*

*Rape in the first degree is a class B felony.*

Contrast this with the retrograde provisions of the English Sexual Offences Act, 2003 which defines rape in a strictly gender-specific manner, and as a concession, adds a definition of ‘Assault by Penetration’. The operative portions of the two provisions, as they appear in Sections 1 and 2 of the Act are reproduced as follows:

Section 1: Rape

*(1) A person (A) commits an offence if—*

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<sup>30</sup>*Fuchs, supra* note 17, at 112.

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- (a) *he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,*
- (b) *B does not consent to the penetration, and*
- (c) *A does not reasonably believe that B consents.*

### Section 2: Assault by Penetration

- (1) *A person (A) commits an offence if—*
  - (a) *he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,*
  - (b) *the penetration is sexual,*
  - (c) *B does not consent to the penetration, and*
  - (d) *A does not reasonably believe that B consents.*

In the backdrop of such conflicting legislative standards worldwide for male rape, the authors will now examine the argument of ‘consent’ which is often used to defeat the very existence of male rape.

### **2. DOES ERECTION EQUAL CONSENT?**

One of the primary issues plaguing male sexual assault is that it remains largely unreported, as has been already pointed out. Victims are awfully hesitant in reporting such crimes due to the fear of ridicule, scepticism and disparagement by the community and the law enforcement alike. These problems stem from the longstanding, firm belief of the legal community that a man cannot obtain an erection involuntarily.<sup>31</sup> This misconception, in addition to other unfounded beliefs, has made Courts unwilling to provide legal remedy to male victims of sexual assault, particularly when the victim experienced an erection or an ejaculation during the assault.<sup>32</sup> However, the reality is that it is psychological absurdity to assume that every single time an individual has an erection, it is under his control.<sup>33</sup>

Erection can very well be facilitated by optical or physical stimuli, and is a purely biological response that does not indicate consent, or even, sexual pleasure.<sup>34</sup> In fact, the male body is able to function and respond sexually under a variety of

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<sup>31</sup>A Coxell & M King, *Male Victims of Rape and Sexual Abuse*, 11 *Sex Marital Ther.* 297, 298 (1996).

<sup>32</sup>*Id.*

<sup>33</sup>*Widor, supra* note 13, at 234.

<sup>34</sup>“...data that indicates that most women lubricate during rape and some women actually respond to orgasmic levels.” *Sarrel & Masters, supra* note 18.

severe emotional states, “including extreme anxiety, terror, and anger.”<sup>35</sup> It has been observed for centuries that hanged men often display an erection, and even ejaculate upon death.<sup>36</sup> Thus, even under psychologically and physically traumatic conditions, men may experience such physical reactions. Hence, on being assaulted, “an erection and any subsequent ejaculation is a physical response rooted in biology, not in implied consent.”<sup>37</sup> As the response is innate, erection during the assault should not have a preclusive effect that bars a male victim from charging a woman with rape, sexual assault or sexual harassment.<sup>38</sup>

Along these lines, in *People v. Liberta*,<sup>39</sup> it was held that the argument which suggests that it is “physiologically impossible” for a woman to rape a man is “simply wrong.” Rejecting the premise that a man cannot engage in sexual intercourse unless he is sexually aroused, it was held that sexual intercourse occurs upon any penetration, howsoever slight, and this degree of contact could be achieved without the male being aroused, and hence, without his consent.<sup>40</sup> However, on appeal, the Second Circuit Court overturned this decision, and upheld a statute that explicitly ignores male victims of sexual assault.<sup>41</sup> There was some development in *Meloon’s* case, wherein, the Court sought to protect males who maintained partial erections during the assault.<sup>42</sup> Nonetheless, there is nothing concrete to help the cause of men maintaining full erections during the attack, despite ample medical evidence that erection does not necessarily signify consent. Even ejaculation does not signify consent- it is merely a spinal cord reflex with stimulatory and inhibitory influence from the brain.<sup>43</sup> It can even be obtained by electrical stimulus, as in the case of electro-ejaculation, where the stimulus is applied intrarectally to obtain

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<sup>35</sup>*Sarrel & Masters, id.* at 128.

<sup>36</sup>Harvey L. P. Resnik, *Eroticized Repetitive Hangings: A Form of Self-Destructive Behavior*, 26 AM. J. PSYCHOTHERAPY 4, 10 (1972).

<sup>37</sup>*Widor, supra* note 13, at 234.

<sup>38</sup>*Widor, id.*

<sup>39</sup>The People of the State of New York v. Mario Liberta, 64 N.Y.2d 152 (1984).

<sup>40</sup>*Id.*, at 169.

<sup>41</sup>The People of the State of New York v. Mario Liberta, 839 F.2d 77, 82-83 (1988). See New York Penal Law, Article 130- § 130.35 (Rape in the First Degree).

<sup>42</sup>Thomas E. Meloon v. Raymond A. Helgemoe, 564 F.2d 602, 606 (1977).

<sup>43</sup>See W. Truitt & L. Coolen, *Identification of a Potential Ejaculation Generator in the Spinal Cord*, 297 SCIENCE 1566, 1566-68 (2002).

sperm samples from male mammals.<sup>44</sup>In the same manner, it can result from non-consensual, receptive anal sex.

### **3. LEGAL TREATMENT OF MALE RAPE IN INDIA**

The Indian Penal Code, 1860 (*hereinafter* the “IPC”), which comprises the substantial criminal law in India defines rape under Section 375. As interpreted by the Supreme Court, “a bare reading of Section 375 makes the position clear that rape can be committed only by a man.”<sup>45</sup> Going further, it noted that “a woman cannot be said to have an intention to commit rape.”<sup>46</sup>

The main component of this highly gender-specific definition is sexual intercourse with a woman against her will or without her consent.<sup>47</sup> Forced oral sex, sodomy or penetration by foreign objects are outside the purview of this definition and are prosecuted under Section 377 of the IPC, which deals with carnal intercourse against the order of nature and Section 354, which deals with outraging the modesty of a woman.<sup>48</sup> However, neither of the two provisions criminalizes instances of sexual assault of men by women, which, in light of new research, has been held to be substantial.

Taking note of the deficiencies in the definition of rape, the Supreme Court referred the matter to the Law Commission of India for its consideration.<sup>49</sup> The Law Commission in its detailed report on the “Review of Rape Laws” suggested comprehensive amendments to the definition of ‘rape’.<sup>50</sup> Recognizing that young boys are being increasingly subjected to forced sexual assaults and considering the suggestions made by various stakeholders, it made an attempt to make the rape law gender-neutral, borrowing heavily from the Criminal Law of Western Australia.<sup>51</sup> Extensive amendments were suggested to Indian Penal Code. It was recommended that the definition of rape under Section 375 be dispensed with altogether, and replaced with a definition of ‘Sexual Assault’, which would be comprehensive enough

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<sup>44</sup> Clayton M. Bullock & Mace Beckson, *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, 39 J. Am. Acad. Psychiatry L. 197, 203-205 (2011).

<sup>45</sup> State of Rajasthan v. Hemraj, 2009 (12) Scc 403, Para. 7

<sup>46</sup> *Id.*

<sup>47</sup> THE INDIAN PENAL CODE, No. 45 of 1860, Section 375.

<sup>48</sup> Sakshi v. Union of India, 2004 (5) Scc 518, Para. 10.

<sup>49</sup> *Id.*, Para. 17.

<sup>50</sup> Law Commission of India, 172<sup>nd</sup> Report on Review of Rape Laws (March 2000)

<sup>51</sup> *Id.* para. 3.1.

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to cover instances of male rape, digital rape and the like. Taking a cue from this report, the Government of India introduced the Criminal Law (Amendment) Bill, 2012 in the Parliament on December 4, 2012.<sup>52</sup> In light of the recent observations made by various sections of the judiciary, there need for these amendments was particularly severe. Consider for instance, the observations made by Dr. Kamini Lau, an Additional Sessions Judge in the case of *State v. Prahlad*,<sup>53</sup> where she advised the Legislature to “*have a re-look at the definition of Rape so as to specifically include the instances of Digital Rape/ Male Rape/ Anal Rape and make the offence Gender Neutral or to formulate a separate exhaustive legislation covering all categories of sexual assault similar to the Legislations that exist in Scotland, Ireland, Australia, Victoria (Sexual Assault Act) and the United States*”.<sup>54</sup>

Significant advancements were made in this sphere with the Criminal Law (Amendment) Ordinance 2013 (hereinafter the Ordinance), which was promulgated by the Central Government upon the recommendation of the “Committee on Amendments on Criminal law” set up under the Chairmanship of Justice J S Verma in light of the infamous Delhi Rape Case of December 2012. The Ordinance rightfully suppressed the provisions of Indian Penal Code insofar as it made rape a gender neutral offence by providing that a “male” could be held liable for rape, modifying the Indian Penal Code which states that only men are capable of performing rape. Take the case of Pinky Pramanik for instance. He/She was arrested on suspicion of raping his/her colleague, but was eventually let go as medical evidence regarding his/her gender was inconclusive. The predicament was that if Pinky is certified to be a woman, she cannot be prosecuted under S. 375 as the law contemplates that only men can commit the offence of rape. In addition to this, there are countless unreported cases concerning use of sexual aggression on men by women. In the absence of a well-defined law, these offences go unreported, given the strong patriarchal undercurrent in our society. The need of the hour, therefore, is to enact an effective law, possibly in line with the Ordinance to ensure that all victims of rape, regardless of gender, get justice, and all perpetrators of rape, irrespective of their gender, are punished.

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<sup>52</sup>The Criminal Law (Amendment) Bill, 2012, available at <http://www.prsindia.org/billtrack/the-criminal-law-amendment-act-2012-2552/> (last visited Feb. 13, 2013).

<sup>53</sup>*State v. Prahlad*, Session Case No. 49/11, FIR No. 155/11 PS Keshav Puram55 (Jan. 17, 2012) (India).

<sup>54</sup>See Sexual Offences (Scotland) Act, 2009, Section 2; New York Penal Code, § 130.35; Crimes (Sexual Offences) Act 2006, Section 6 (Victoria); Crimes Act, 1900, Section 61H(1) (New South Wales).

**CONCLUSION**

Male rape is a reality. When this fact is not acknowledged 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.<sup>55</sup>

Owing to sheer neglect, the exact relationship between the quest for power and dominance on one hand and sexual drive on the other is little understood. When men are sexually abused, their stereotyped role as a male, irrespective of sexual orientation, stands 'damaged':<sup>56</sup> if the perpetrator is a female, it raises even bigger questions about their sexuality and self-identity. Whereas a certain number of male rape survivors become rapists themselves,<sup>57</sup> others are forced into sexual 'passivity', and 'feminized'.<sup>58</sup>

People need to be educated that strength bears little relation to the ability to resist a sexual assault: both men and women are likely to react to sudden and extreme personal threat with frozen helplessness.<sup>59</sup> All victims, regardless of their gender, undoubtedly suffer as a consequence of sexual assault and rape. In the aftermath of sexual assault, both male and female survivors deal with the same issues i.e., anxiety, flashbacks, nightmares, guilt, shame, etc. with the same intensity and severity.<sup>60</sup> Minimising the sexual abuse of men, or making it comical in literature and films further compounds the problem.<sup>61</sup>

Instead of promoting regressive norms about masculinity, it would be more helpful to challenge the harmful status quo, and understand the ways in which these regressive gender norms harm both men and women. Sex and gender must be taken into account without setting up false divisions that pit all men against all

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<sup>55</sup>Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*11 (2001) (hereinafter *No Escape*).

<sup>56</sup>Sarah Crome, Australian Centre for the Study of Sexual Assault, *Male Survivors of Sexual Assault and Rape 2*, available at [http://www.aifs.gov.au/acssa/pubs/wrap/acssa\\_wrap2.pdf](http://www.aifs.gov.au/acssa/pubs/wrap/acssa_wrap2.pdf) (last visited Aug. 20, 2012).

<sup>57</sup>*No Escape*, *supra* note 56, at108.

<sup>58</sup>*Kramer*, *supra* note 9, at 293, 308.

<sup>59</sup>*King*, *supra* note 25.

<sup>60</sup> Pandora's Project, *Male Rape and Assault: Dispelling the Myths*, <http://www.pandys.org/articles/malerape.html> (last visited Aug. 20, 2012).

<sup>61</sup>*Supra* note 52.

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women, villains against damsels in distress.<sup>62</sup> Given the severity of the complications involved, the least that can be done is to treat rape of men at par with that of women.

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<sup>62</sup>Lara Stemple, *Male Rape and Human Rights*, 60(3) *Hastings L. J.* 605, 635 (2009).