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The Value of Human Dignity An Analysis of DOJ's Prison Rape Rule

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Since President Obama issued [Executive Order 13563](#), *Improving Regulation and Regulatory Review* in early 2011, some onlookers have wondered how and to what extent regulators will consider human dignity as a regulatory analysis input. The executive order stressed the role of both quantitative and qualitative costs and benefits in shaping regulations, and, among other things, encouraged regulatory agencies to include the impacts of regulation on human dignity when promulgating new rules: “Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”

Last Wednesday, the Department of Justice issued a [final rule](#) whose regulatory impact analysis relies entirely on quantified human dignity benefits resulting from the prevention of sexual misconduct in prisons. The intent of DOJ's rulemaking is to reduce the number of incidences of sexual misconduct (including rape) by establishing monitoring requirements, increasing prison staffing, and better reporting. The prevention of prison rape and its contingent benefits “are some of the most important and consequential benefits of the final rule,” despite the fact that DOJ is [unsure](#) whether they can be accurately monetized.

The Department has a few constraints in issuing this rule: by statute, the immediately binding standards cannot “impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.” Additionally, in accordance with [Executive Order 12866](#), DOJ can only adopt a regulation “upon a reasoned determination that its benefits justify its costs.” The benefits of regulation are often difficult to quantify; the benefits posed by this rule, because of their qualitative and highly sensitive nature, are even more so.

The Department estimates that implementing these standards will cost [\\$6.9 billion](#), or \$468.5 million annually, with an “annualized cost per facility of compliance with the standards [of] approximately \$55,000 for prisons, \$50,000 for jails, \$24,000 for community confinement facilities, and \$54,000 for juvenile facilities.” The start-up cost of implementing these standards in 2012 will be \$745.8 million for all applicable facilities in the U.S.

The Department uses a breakeven analysis to calculate how many incidents of prison sexual misconduct must be prevented in order to justify the \$6.9 billion cost of implementing these rules. By valuing an incidence of prison sexual misconduct at between \$310,000 and \$675,000 per victim, DOJ suggests the rule will break even (the costs just equal the benefits) at 1,671 prevented incidences of prison sexual misconduct annually. At these values, DOJ estimates that, even if the rule avoided *less than 1 percent* of all prison sexual abuse, it would be worthwhile.

However, as the Department [notes](#), this rule is not outcome-based, but procedure-based, leading to difficulty in determining the number of incidents that DOJ actually anticipates will be avoided through implementation. In fact, the Department has no idea how much sexual misconduct will be prevented by this rule. In the final rule, [DOJ cautions](#) that the expected monetized benefit of the standards themselves has not been calculated, because it is unclear how effective the standards will be in preventing sexual assault: “The actual monetized benefit of the standards... will depend on a number of factors, including the extent to which facilities comply with the standards, *and the extent to which the standards are effective in achieving their goals.*”

Despite the fact that correctional facilities will be required to provide sexual misconduct reports to DOJ upon request, allowing for some metric to track prison rape prevalence, these incidents will not be relevant in determining whether a facility is effectively complying with DOJ’s standards. The lack of outcome-based measures will make it difficult to tell if these requirements will accomplish their intended effect, and will instead only tell DOJ and the public whether the requirements are being implemented.

Human dignity absolutely has a value, but it may very well not have a price. The difficulties of putting a dollar number on inmates’ human dignity are revealed in the Department’s analysis for this final rule.