

Legal Issues in Addressing Sexual
Violence in Juvenile Justice Settings:
The Impact of the Prison Rape
Elimination Act

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Legal Issues

- PREA
- Laws Implementing PREA
- Criminal Laws
 - Sexual abuse of persons in custody
 - Statutory rape
 - Sexual assault
 - Sex Offender Registration
- Reporting Laws
 - Notification
 - Mandatory Reporting
- Licensing
- Vulnerable Victims
- Civil Liability

The Prison Rape Elimination Act

- Explicitly covers residential settings – whether state or contract run
- Juveniles are included in data collection by BJS– In 2005 the BJS report covered juveniles but in future reports juvenile data will be published in a separate report.
- Safe Communities Section
- Reporting Issues
- Standards

State Laws Implementing PREA –California Sexual Abuse in Detention Elimination Act (Chapter 303, 2005 California Statutes)

- Provide inmates and wards with informational handbooks regarding sexual abuse in detention;
- Adopts specified policies, practices, and protocols related to the placement of inmates, physical and mental health care of inmate victims, and investigation of sexual abuse;
- Ensure accurate data collection concerning sexual abuse across all institutions which is accessible to the public; and
- Develop guidelines for the provision of resources and counseling from outside organizations to inmates and wards.
- Creates the Office of the Sexual Abuse in Detention Ombudsperson to ensure confidential reporting and impartial resolution of sexual abuse complaints in CDCR facilities.

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Texas House Bill 1944 (HB 1944)

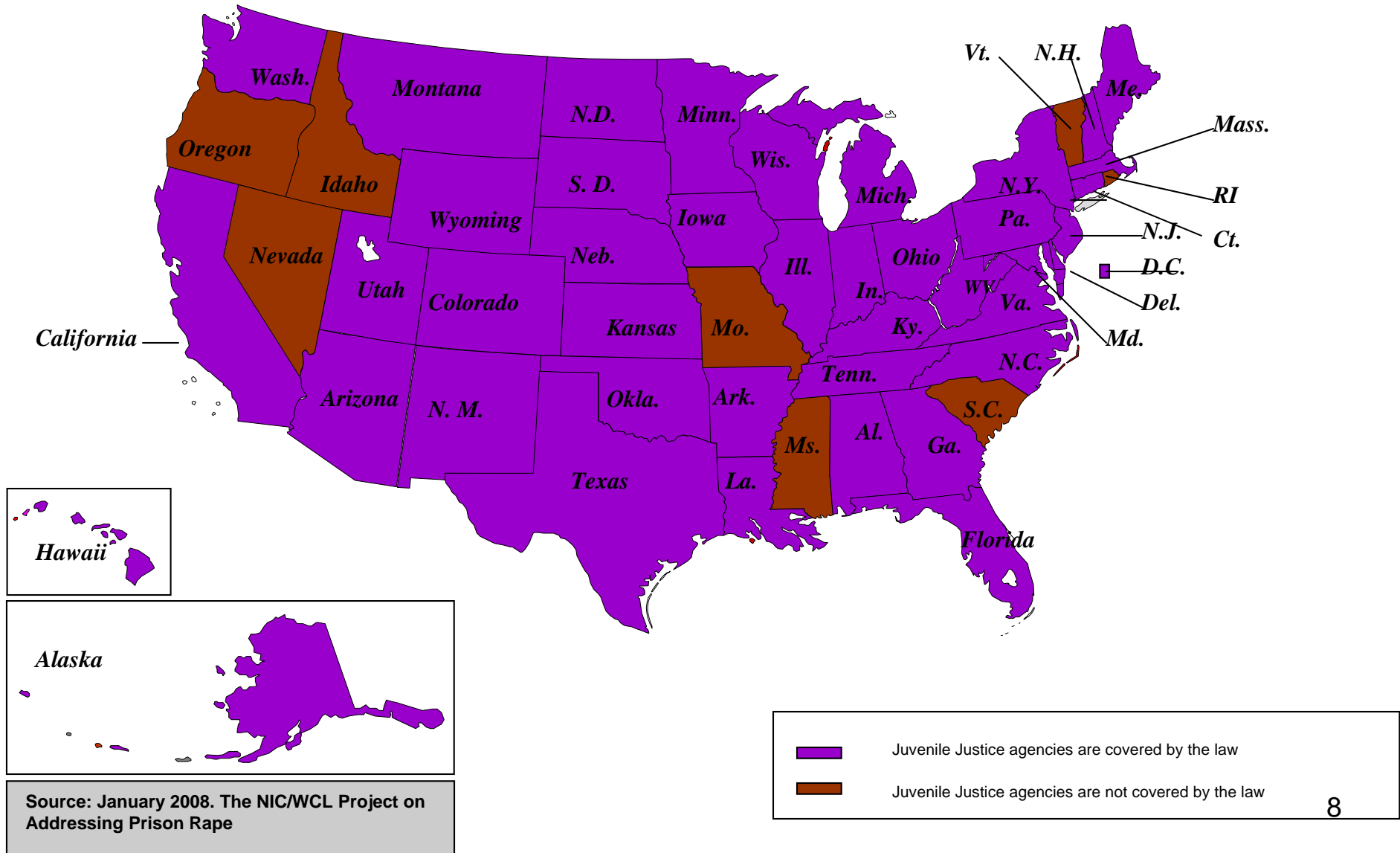
- Creates a position of ombudsperson in the Office of the Inspector General to monitor prevention and investigation policies to ensure impartial resolution of inmate complaints of sexual assault.
- Authorizes the ombudsperson to collect evidence and interview inmates or employees at correctional facilities in conducting an investigation of an inmate complaint of sexual assault under this section
- Prohibits the ombudsperson from requiring an inmate who reports a sexual assault to assist in the investigation or prosecution of the offense.

State Criminal Statutes Prohibiting the Abuse of Persons in Custody

- All 50 states, the federal government and DC have laws specifically covering the sexual abuse of persons in custody
- 41 states and Washington, DC cover juvenile justice agencies
- 8 states do not cover juveniles at all

State Criminal Laws Prohibiting Sexual Abuse of Juveniles Under Correctional Supervision

National Institute of Corrections/American University, Washington College of Law – January 2008



Texas Penal Code §39.04

- Prohibits the following from engaging in sexual activity with a youth in custody
 - Official of a correctional facility
 - A person who works for compensation at a correctional facility
 - Volunteers
 - Peace officer
 - An employee of the Texas Department of Criminal Justice;
 - Employee of local juvenile probation department

Texas Penal Code §39.04

Exceptions

- Marriage
- Lack of knowledge of youth's status

Bureau of Justice Statistics Data – Sexual Violence Reported by Correctional Authorities -- 2004

- Juvenile facilities reported the highest rates of sexual violence
- In 2004, there were an estimated 1,290 reported allegations of sexual violence in juvenile facilities (state, local, and private)
- State-operated juvenile facilities had the highest rate of alleged staff sexual misconduct
- Local and privately operated juvenile facilities reported 3.22 allegations of staff sexual misconduct per 1,000 youth; nearly the 3 times the rate in State prison systems and Federal prisons.
- In state run facilities, 15% of the allegations were substantiated; 39% were unfounded

2004 Bureau of Justice Statistics Data- Texas State Juvenile Facilities

- There were 62 reported allegations of youth on youth non-consensual sexual acts
 - Of those reports, 17 were substantiated, 45 unsubstantiated and 0 unfounded
- There were 10 reported allegations of youth-on-youth abusive sexual contacts
 - Of those reports, all 10 were unsubstantiated
- There were 138 reported allegations of staff sexual misconduct
 - Of those reports, 13 were substantiated, 125 were unsubstantiated and 0 were unfounded

2004 Bureau of Justice Statistics Data- Texas Local and Private Juvenile Facilities

- There were 5 reported allegations of youth on youth non-consensual sexual acts
 - Of those reports, 1 was substantiated and 4 were unfounded
- There were 2 reported allegations of youth-on-youth abusive sexual contacts
 - Of those reports, 1 was substantiated and 1 was unsubstantiated
- There were 6 reported allegations of staff sexual misconduct
 - Of those reports, 1 was substantiated, 1 was unsubstantiated and 3 were unfounded

Statutory Rape

- Statutory rape takes place when an individual regardless of age has sex with an individual who is not old enough to legally consent
- All states have statutory rape laws with variations
 - Age of consent
 - Label
 - punishment

Sexual Assault Laws

- All 50 states have laws
- Can use along with statutory rape
- Can use when age of youth is beyond statutory rape limit
- Consent is issue

Sex Offender Registration

- All 50 states have sex offender registration schemes
- Each state decides which offenses are eligible for registration and what registration means
- Staff on youth sexual misconduct is expressly subject to registration in many states
- The obligation for juveniles offenders to register as sex offenders is state-specific

Adam Walsh Child Protection and Safety Act of 2006

- Creates a national registration and notification system for sex offenders
- President signed in to law on July 27, 2006
- **REQUIRES** juveniles aged 14 and older who have been adjudicated delinquent for offenses comparable to aggravated sexual assault to be registered.
- Creates 3-tiered classification system based on seriousness of crime committed – duration of registration tied to sex offender's tier classification – 15-25-life
- 3 years to comply or lose 10% federal law enforcement funds

Mandatory Reporting

- All 50 States have mandatory reporting statutes concerning abuse against youth
- The individuals required implicitly and explicitly to report vary according to state (law enforcement, teachers, doctors, correctional officers)
- In every state individuals with custodial or supervisory authority of youth are mandatory reporters
- Failing to report to appropriate authorities is a consistent problem that has resulted in civil and criminal liability

Williams v. McKeithan, 121 F. Supp. 2d 943 (D.C. M.D. La. 2000)

- State ordered to do acknowledgement training with all mandatory reporters at facility
- Each had to acknowledge responsibility to report under state law
- State had to tell them office and phone # to report suspected child abuse
- State required to insure that allegation has been or is being investigated

Notification Issues

- Who is the child's guardian?
- Who must be notified of the injury to the child
 - Child's parent
 - GAL
 - Youth Services Administration
 - Department of Social Service
 - Court



Licensing

- Licensing of facility
 - State licensing requirements
- Licensing of staff
 - The American Correctional Association provides professional certification for executives, managers, supervisors and officers in youth facilities

Civil Liability

- Most common legal issues
 - Prison Litigation Reform Act
 - 42 U.S. C. 1983
 - Eighth Amendment
 - Fourth Amendment
 - Fourteenth Amendment
 - State tort claims

Prison Litigation Reform Act

- Passed in 1995
- Limitation on right to bring constitutional claims in federal court for conditions of confinement
- Limits length of consent decrees
- Limits attorneys fees
- Has exhaustion and physical injury requirement
- Like PREA – says prisons but applies to juveniles as well
 - “the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law – PLRA”

42 U.S. C. 1983

- Creates a federal cause of action for the vindication of rights found elsewhere
- Key elements
 - deprived of a right secured by the constitution or law of U.S.
 - deprivation by a person acting under color of state law
 - Don't forget volunteers and contractors

Eighth Amendment

- Prohibits cruel and unusual punishment
- Legal standard is deliberate indifference
 - established in a prison rape case Farmer v. Brennan
 - two part test
 - the injury must be objectively serious and must have caused an objectively serious injury
 - the official must have a sufficiently culpable state of mind and have acted with deliberate indifference or reckless disregard for the inmate's constitutional rights

What the court looks for

- Deliberate indifference to inmate vulnerability -- safety or health
 - official knew of and disregarded an excessive risk to inmate safety or health
 - official must be aware of facts from which an inference could be drawn that a substantial risk of harm exists and he must draw the inference

Fourth Amendment -- Bell v. Wolfish, 441 U.S. 520 (1979)

- Does the individual have a legitimate expectation of privacy
 - The scope of the intrusion
 - The manner in which it was conducted
 - The justification for the intrusion
 - The place in which it is conducted

What the Fourth Amendment Stands for

- No expectation of privacy in cell --
Hudson v. Palmer, 468 U.S. 517 (1984)
- Can have same gender searches
- Cross gender searches and supervision for both boys and girls more limited than in adult context

Three Cases

- **Philadelphia v. Penn. Human Relations Comm'n, 300 A.2d 97 (1973)** (holding that gender is a legitimate BFOQ at youth facilities, males to supervise males and females to supervise females)
- **Long v. California State Personnel Board, 41 Cal. App.3d 1000, 116 Cal. Rptr. 562 (1974)** (female excluded from chaplain's job at youth training center for males)
- **In the Matter of Juvenile Detention Officer Union County, 837 A.2d 1101 (N.J. Super. A.D. 2003)** (creation of 8 male juvenile detention officer positions upheld)

What these cases stand for

- Juvenile detainees have greater expectation of privacy than adults
- Younger age of juveniles makes them more vulnerable – both girls and boys
- Views cross gender searches and viewing of juveniles naked by staff of opposite sex as traumatic and likely to cause “permanent irreparable harm”
- May be able to legitimately exclude staff of opposite gender from wide range positions with youth
- BFOQ’s for youth upheld

Fourteenth Amendment – Substantive Due Process

- Can not be deprived of life, liberty or property without due process of law
- Depending on jurisdiction courts apply 14th amendment as opposed to 8th Amendment in analyzing legal claims
- 14th amendment is lower legal standard and easier to prove
- Some have used both 8th and 14th Amendment to analyze claims of abuse of youth in custody.

Sixth Circuit Cases

- **Doe v. Patton, 381 F.Supp.2d 595 (E.D. KY 2005)**
(county and county official granted immunity in rape of minor doing community service work at courthouse. County official not immune in official capacity)
- **S.J. v. Hamilton County Ohio, 374 F.3d 416 (6th Cir. 2004)**(county not entitled to immunity for failure to investigate and prevent sexual abuse of youth by another youth) (MSJ – 11th amendment case) (youth challenge raised under 14th amendment)

K.M. v. Alabama Department of Youth Services, 360 F. Supp. 2d 1253 (M.D. Al. 2005)

● Facts

- 4 juvenile girls sued AL DYS, DYS Exec. Dir.; Chalkville Campus Spt.--James Caldwell; Aseme and John Ziegler
- Allege they were physically and sexually assaulted and harassed by Aseme.
- Claims
 - 42 U.S.C. 1983
 - 14th Amendment
 - 8th Amendment
 - State Tort law [negligence, outrage, assault and battery]
 - Widespread public allegations of sexual abuse and harassment by e'ees at Chalkville against detainees
 - Plaintiffs raped in laundry room

Legal Posture and Issues

- Motion for Summary Judgment
- 8th Amendment vs. 14th Amendment
 - Juvenile institutions are not correctional facilities
 - Partially correctional, partially educational
 - Meant to discipline as opposed to punish
 - Rehabilitative and educational
 - Juvenile detention is not criminal adjudication
 - Bottom line juveniles entitled to > than protection from wanton and unnecessary pain
 - Even if the conduct violates the 8th amendment
- State tort claims allowed as well

Typical State tort claims

- Assault
- Battery
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Negligent hiring, training and supervision

Important Themes

- Sex with youth under correctional supervision can be a violation of the Fourteenth Amendment Due Process
- Sex with youth can be a violation of Eighth Amendment
- Special Responsibility for youth in custody – no consent
- Courts look to the practice of the agency in determining liability
- Protect employees and youth who report misconduct



Liability

- Municipal
- Official
- Individual
- Personal

Municipal Liability

- **Monell v. Department of Social Services, 436 U.S. 658 (1978)**
 - Municipality is a person who can be held liable under Section 1983
 - Officially executed policy or toleration of custom within municipality must inflict the injury
 - Inaction
 - Failure to train or supervise
 - Failure to investigate

Municipal Liability

- Can't be held responsible under respondeat superior or vicarious liability for
 - Independent actions of employees
 - Wrongful conduct of single employee
 - Must make showing that this officer was likely to inflict a particular injury

Official Liability

- Will cause liability to municipality
- Did it happen on your watch
- Were you responsible for promulgating and enforcing policy
- Did you fail to act or ignore information presented to you
- Failure to TRAIN, SUPERVISE, FIRE

Individual Liability

- Officials sued in individual capacity may be protected from damages if the alleged wrongful conduct was committed while they performed a function protected by qualified immunity

Personal Liability

- Plaintiff must provide notice that the suit is against the official in her personal capacity
- Direct participation not required
- Official participated directly in the alleged constitutional violation
- Failed to remedy the wrong after being informed through a report or an appeal

Personal Liability

- Enforced a policy or custom under which unconstitutional practices occurred or allowed the continuation of such policy or custom
- Was grossly negligent in supervising subordinates who committed the wrongful acts
- Exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring

Qualified Immunity

- No violation of federal law -- constitutional or otherwise
- Rights and law not clearly established at the time of the incident
- Official's action was objectively legally reasonable in light of clearly established legal rules at time of the action—deliberate indifference

Preventive Steps in Juvenile Context

- Criminal Background Checks
- Appropriate classification of youth
- Medical and mental health services for youth
- Training to staff and youth
- Proportional staff to youth gender ratios

Preventive Steps in Juvenile Context

- Proximity of staff to youth
- Prohibitions on relationships between staff and youth
- Strong grievance process
- Aggressive and credible investigation

Follow the ACA Standards

- Facilities should perform criminal background checks for staff with direct supervision of youth
- Continuous training of staff is necessary
- Offer youth same-sex contact person with whom they may feel comfortable reporting to
- A care worker should be within hearing distance of juveniles to ensure the full protection of a youth in emergency settings

ACA Standards on Juvenile Classification

- Age
 - Separation of juveniles from adult offenders decreases the likelihood of sexual victimization
- Gender
 - Facilities should consider the gender of youth when determining sleeping and programming arrangements
- Offense
 - The ACA encourages evaluation of a youth's escape history and assault behavior and the identification of potential sexual predators and potential victims
- Behavioral Assessment

Smith v. Wade [461 U.S. 30 (1983)]

- The court found the failure of facility authorities to separate aggressive youth from potential victims could demonstrate callous or reckless indifference, making them liable for the injury of the endangered youth

ACA -- Procedures

- Staff should report all known abuse and neglect of juveniles
- Youth should be provided with information about sexual assault and abuse- including prevention/ intervention, self-protection, reporting sexual abuse, treatment and counseling- upon their arrival to the facility
- Recommendations for abuse investigation include automatic and mandatory investigations into any allegation of actual or threatened sexual abuse and that reporting procedures allow for the juvenile to report to a designated staff member other than the point-of-contact staff person

Resources

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NIC Information Center,

www.nicic.org

NIC/ WCL Project on Addressing Prison
Rape

www.wcl.american.edu/nic