

# Legal Issues in Addressing Sexual Violence in Juvenile Justice Settings:

## The Impact of the Prison Rape Elimination Act

Juvenile Web Chat

March, 2008

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# Discussion 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 of 2003 Public Law 108-79

Makes important findings about  
the impact of prison rape on  
inmates, the economy and state  
and federal governments

# PREA Purposes

- Establish zero tolerance for the conduct
- Make prevention a top priority
- Develop national standards for detection, prevention, reduction and punishment
- Increase available data and information on incidence in order to improve management and administration
- Standardize definitions used for collecting data on the incidence of rape

# PREA Purposes

- Increase accountability of prison officials who fail to detect, prevent, reduce and punish prison rape
- Protect 8<sup>th</sup> amendment rights of federal, state and local prisoners
- Establish grant programs
- Reduce costs of prison rape on interstate commerce

# Major Provisions

- Section 4: Collection of prison rape statistics, data and research (BJS)(\$15MM for FY 2004-2010)
  - Surveys
    - Including prisons, jails, community corrections, boot camps, road camps, forestry programs, farms, youthful offender facilities, hospitals, drug treatment programs
  - Federal, state and local officials are required to participate
  - Review panel on prison rape with subpoena power
  - Public hearings for 3 highest incidence systems and 2 lowest
  - Report each year on 6/30

## 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

## Bureau of Justice Statistics Data – Sexual Violence Reported by Correctional Authorities (2004)

- 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

# BJS Update

- Expert panel meetings [this week]
- Administrative survey collections -- 2004 and 2005 data
  - <http://www.ojp.usdoj.gov/bjs/abstract/svrca04.htm>
  - <http://www.ojp.usdoj.gov/bjs/abstract/svrca05.htm>
- BJS Juvenile Report – ~ June 2008
- Data from victim self reports to be published in 2007 and 2008
  - Adults (2007)
  - Youth (2008)

# Major Provisions Continued

- Section 5: Prison Rape Prevention and Prosecution (NIC) (\$5MM for FY 2004-2010)
  - Information and Assistance through National Clearinghouse
  - Training and Education
  - Report due on 9/30 annually

# NIC Update

- Completion of Informational PREA Videos
  - PREA Introduction
  - Responding to PREA
  - Inmate Orientation Videos – male and female (English and Spanish)
  - Juvenile video and facilitator's guide\*\*
- PREA Videoconferences (June 2006 – Juvenile)\*\*
- Nationwide technical assistance and training on PREA

# NIC Update

- Development of legal tool kits for states
- Development of curricula for addressing sexual violence against youth in custody
- Current focus on investigations, prosecutions and juvenile justice agencies

# Major Provisions Continued

- Section 6: Grants to Protect Inmates and Safeguard Communities (DOJ) (\$40MM)
  - Protection of the community
    - \$ to address overcrowding
    - Risk assessment tools
    - Mapping of concentration of inmates in communities
    - Policy and program development
    - Collaboration between corrections and community on reentry
  - Protection of Inmates
    - Investigations
    - Prosecution
    - Prevention



# NIJ Update

- Meetings held to discuss the protection of human subjects in doing this work
- Four awards were made in September of 2004 on program identification and risk assessment



# BJA Update

- Convened meetings to discuss protecting inmates and community safety
- 16 states were awarded grants in 2004
- 28 awards in 2006

# Office of Juvenile Justice and Delinquency Prevention (OJDDP)

- Elissa Rumsey named PREA point of contact for OJJDP
- Testimony at Boston hearing and commitment by Director Flores
- Raising Awareness at National Conferences
  - September – New Orleans
  - October -- Salt Lake City
  - January – San Diego

# Major Provisions Continued

- Section 7: National Prison Rape Elimination Commission
  - 8 members
  - Conduct legal and factual study of the effects of prison rape in the US
  - Report in 2 years of initial meeting
  - Recommend national standards
  - Consultation with accreditation organizations
  - Can't impose something that would mandate substantial increased costs to agency
  - Hold hearings

# NPREC Update

- Held public meetings and hearings
  - \*\* all hearing transcripts can be found at [www.nprec.gov](http://www.nprec.gov)
  - Indiana
  - Washington, DC
  - Miami
  - Boston –Detroit
  - Los Angeles
  - Austin
- Reported findings and draft standards to be made public in 2008
- Seeking extension to respond to delayed research findings of BJS, NIJ, and BJA

# Major Provisions Continued

- Section 8: Adoption and Effect of National Standards
  - A year after National Prison Rape Elimination Commission issues report, AG publishes a final rule with standards
  - 90 days after publication -- transmission to state departments of correction
  - FBOP is immediately covered by rule
  - Possible reduction of 5% each year for failure to meet the standard
  - Annual report on non-compliance

# Major Provisions Continued

- Section 9: Accreditation organizations must adopt standards or lose federal funds
- Section 10: Definitions
  - Covers jails, police lockups, prisons
  - Covers both adult and juvenile facilities, government and private
  - Prison rape includes rape of inmate in actual or constructive custody

# What does this mean?

- Increased scrutiny at state, federal and local level on prison rape generally and staff sexual misconduct specifically as a subset
- Broadened concern about offender on offender and youth on youth conduct
- Data collection is important
- Enhanced focus on investigations, prosecution and administrative sanctions



# State Laws Implementing PREA

Developed under NIC Cooperative Agreement  
07S25GJQ5

# 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.

# California Sexual Abuse in Detention Elimination Act (Chapter 303, 2005 California Statutes)

- Creates the Office of the Sexual Abuse in Detention Ombudsperson to ensure confidential reporting and impartial resolution of sexual abuse complaints in CDCR facilities.
- Develop guidelines for the provision of resources and counseling from outside organizations to inmates and wards.
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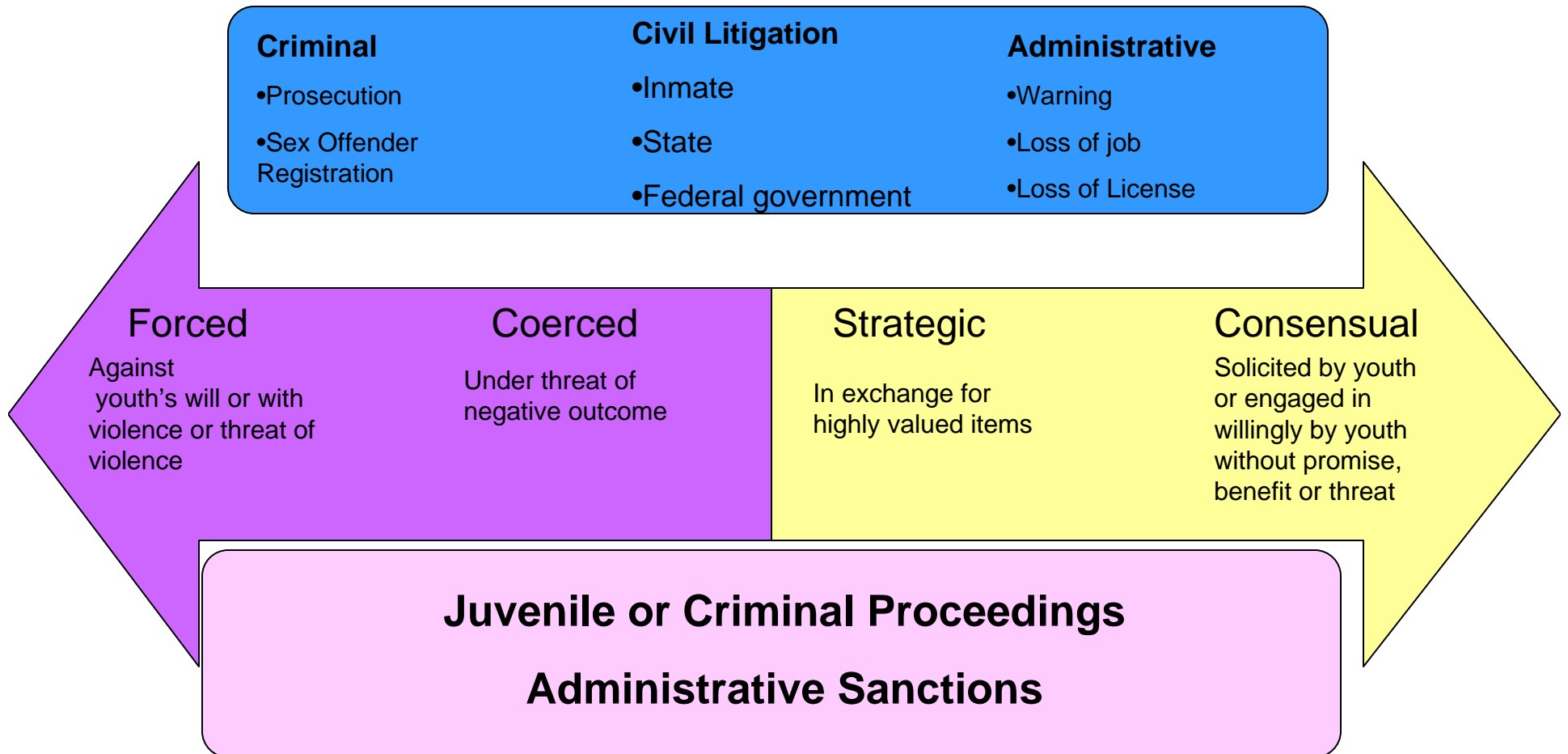
# Texas House Bill 1944 (HB 1944)

- 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.

# Continuum of Sexual Activity Involving Youth

Developed by Brenda V. Smith Under NIC Cooperative Agreement 06S20GJJ1

## Staff on Youth Sanctions



## Youth on Youth Sanctions\*

NOTE: Sanctions for youth on youth sexual activity may depend on a state's mandatory reporting statutes and age of consent

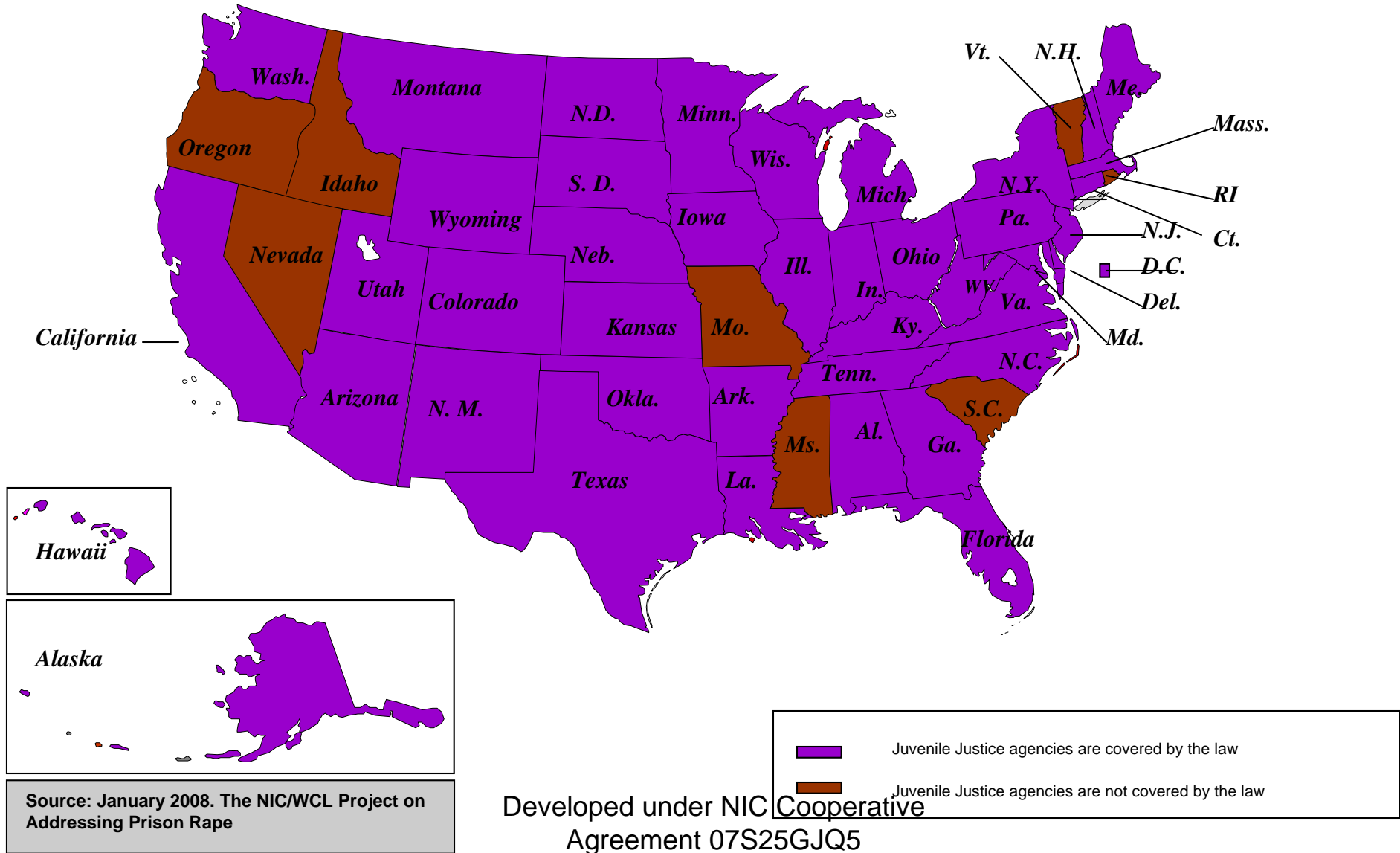
Developed under NIC Cooperative Agreement 07S25GJQ5

# 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



# 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.

# Adam Walsh Child Protection and Safety Act of 2006

- 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 (PLRA)

- 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

# Prison Litigation Reform Act (PLRA)

- 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 14<sup>th</sup> amendment as opposed to 8<sup>th</sup> Amendment in analyzing legal claims
- 14<sup>th</sup> amendment is lower legal standard and easier to prove
- Some have used both 8<sup>th</sup> and 14<sup>th</sup> 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 (6<sup>th</sup> Cir. 2004)**
  - (county not entitled to immunity for failure to investigate and prevent sexual abuse of youth by another youth) (MSJ – 11<sup>th</sup> amendment case) (youth challenge raised under 14<sup>th</sup> 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.

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

## ● Claims

- 42 U.S.C. 1983
- 14<sup>th</sup> Amendment
- 8<sup>th</sup> 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
- 8<sup>th</sup> Amendment vs. 14<sup>th</sup> 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 8<sup>th</sup> 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

# Follow 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

# 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

# Resources

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NIC Information Center,  
[www.nicic.org](http://www.nicic.org)

NIC/ WCL Project on Addressing Prison  
Rape  
[www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)