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Sexual Abuse in Detention and the Law

“As a victim, I know first-hand the horrors of sexual violence, its debilitating consequences, and what is needed to put an end to it. It is hard to imagine that there is little or no legal representation or advocacy assistance available to those of us in desperate need of support.”

— Jay, a survivor of prisoner rape in a Florida facility

PRISONER RAPE is a national human rights crisis. A recent government report estimates that roughly 200,000 people are sexually abused behind bars in a year.¹ Fortunately, inmates enjoy the same constitutional protections to which every citizen is entitled and prisoner rape, whether perpetrated by corrections officials or other inmates, is recognized as a crime nationally and in every state. Through civil and criminal laws,² survivors and their advocates can hold perpetrators and corrections departments accountable for this violence.³

Even with these protections, however, it is very difficult for current and former inmates alike to get legal help in the aftermath of a sexual assault. Few attorneys are willing to take on cases involving the sexual abuse of detainees. Similarly, police and prosecutors often treat crimes committed against prisoners less seriously, and as a result, very few perpetrators of sexual violence in detention are convicted.

Community service providers can play an instrumental role in raising a broad awareness – among rape survivors, police, and prosecutors – of the right to be free from sexual abuse in detention and the importance of holding perpetrators accountable.

Civil Law and Sexual Abuse in Detention

The Eighth Amendment to the U.S. Constitution, which prohibits cruel and un-

usual punishment, is the primary legal tool available to rape survivors who seek to hold officials and corrections departments accountable under civil law. In 1994, the U.S. Supreme Court affirmed that prisoner rape is a violation of the Eighth Amendment.⁴

Prisoner rape survivors have brought successful civil lawsuits against corrections departments. In these cases, corrections officials were determined to be directly responsible – either intentionally or through neglect – for the emotional distress or injury caused to the inmates in their care. For example, in 2009 the state of Michigan agreed to pay \$100 million to settle a class-action lawsuit brought by more than 500 women prisoners who were sexually assaulted by corrections officials.⁵

However, inmates who wish to bring a lawsuit alleging sexual violence face significant hurdles, including those imposed by the Prison Litigation Reform Act (PLRA).⁶ Under this law, before filing suit, inmates must follow the facility’s internal grievance process, which often consists of an onerous set of procedures that would be difficult for anyone to follow, let alone a traumatized survivor.⁷

Fortunately, one of the PLRA’s most problematic provisions – the so-called “physical injury requirement” – was addressed by Congress when it reauthorized the Violence Against Women Act. Whereas previously an inmate could seek monetary damages only by proving “physical harm,” the revised law allows civil action by inmates in cases of documented physical or sexual abuse.⁸

Criminal Law and Sexual Abuse in Detention

Rape, sexual assault, and sexual battery are crimes when they occur in corrections facilities, just as in the outside community. A person does not give up the right to be free from sexual violence after being arrested or placed in a detention facility. Child abuse laws give youth in custody particularly strong legal protections against sexual assault. Most states have also put into place laws that specifically address staff sexual misconduct in juvenile facilities.⁹

Every state has laws prohibiting sexual contact between staff and inmates, in addition to federal laws targeting this abuse.¹⁰ The severity of the penalty varies from state to state, as does whether or not convicted perpetrators must register as sex offenders.¹¹

Unfortunately, few of these state laws apply to probation or parole officers or to the staff of community corrections facilities, like halfway houses. Alarming, survivors of abuse can be charged themselves in such cases. Nevada's criminal code, for instance, permits inmates to be prosecuted for "voluntarily" engaging in sexual contact with corrections staff.¹² What this law fails to recognize, however, is that sex is never consensual when one person holds the key, literally, to the other's freedom.

Survivors of sexual abuse have a right to seek justice, whether they are incarcerated or not. With an increased awareness of inmates' basic right to be free from sexual abuse, community service providers can help survivors to heal and to hold perpetrators accountable.¹³

Endnotes

¹ Allen J. Beck and Candace Johnson, *Sexual Victimization Reported by Former Prisoners*, 2008 (Bureau of Justice Statistics, May 2012), 5; available at www.bjs.gov/content/pub/pdf/svrfsp08.pdf.

² Civil laws deal with disputes in which an aggrieved party seeks compensation. Criminal law is a body of rules that defines conduct prohibited by the government, typically classified as either a misdemeanor or felony.

³ The Prison Rape Elimination Act (PREA) of 2003 mandated the development of national standards to address the problem, but the law itself did not create any new criminal laws or grounds on which a survivor could use to bring a civil lawsuit.

⁴ See *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁵ Jeff Seidel and Dawson Bell, "\$100 million ends prisoner sex-abuse suit: Women started their legal fight in 1996," *Detroit Free Press*, July 16, 2009, www.freep.com/article/20090716/NEWS06/101250006/-100-million-ends-prisoner-sex-abuse-suit.

⁶ 42 U.S.C. § 1997(e).

⁷ 42 U.S.C. § 1997e(a); see also *Woodford v. Ngo*, 548 U.S. 81, 89-90 (2006).

⁸ This distinction is crucial. While it may seem obvious that sexual assault, by its very definition, causes physical harm, some courts have held otherwise.

⁹ NIC/WCL Project on Addressing Prison Rape, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody*, August 2009, www.wcl.american.edu/endsilence/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf.

¹⁰ *Ibid*; for federal criminal law, see 18 U.S.C.S. § 2246 at "Definitions," cited in Brenda Smith and Jaime Yarussi, *Legal Response to Sexual Violence in Custody: State Criminal Laws Prohibiting Staff Sexual Abuse of Individuals under Custodial Supervision* (The NIC/WCL Project on Addressing Prison Rape, 2009), p. 2.

¹¹ For more information on sex offender registration for perpetrators of staff sexual misconduct, see this Brenda Smith and Mary Pavlik's White Paper, *Legal Responses to Sexual Violence in Custody Sex Offender Registration Statutes* (The NIC/WCL Project on Addressing Prison Rape, 2012), www.wcl.american.edu/endsilence/documents/WHITEPAPER_SexOffenderRegistration.pdf?rd=1.

¹² Nev. Rev. Stat. Ann § 212.187(1) (West 2008). Some states used to allow corrections staff to use an inmate's "consent" as a defense against a criminal charge; fortunately, these states have since stricken those provisions. However, in some states today a staff member who uses this defense successfully might be charged with sexual misconduct – which is a misdemeanor, unlike rape.

¹³ Visit JDI's website, www.justdetention.org, for a variety of resources for prisoner rape survivors, including JDI's Resource Guide for Survivors of Sexual Abuse Behind Bars, which has a comprehensive list of victim and legal service organizations that can give support to survivors and to their loved ones. The resource guide can be found at www.justdetention.org/en/resourceguides.aspx.

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Legal Tips for Advocates

- Familiarize yourself with your state's criminal sexual conduct and staff sexual misconduct laws.
- Inform survivors that there are civil and criminal laws protecting them from sexual abuse in detention. Consider providing accompaniment for incarcerated survivors when they meet with law enforcement and prosecutors, as you might for survivors in the community.
- Affirm survivors' right to be free from sexual abuse regardless of their custody status.
- Refer survivors seeking legal assistance to a lawyer, preferably one who has experience with sexual assault cases.
- Provide training for local law enforcement, corrections officials, and prosecutors on the basics of the crisis of sexual abuse in detention, including why this violence must be taken seriously.

JUST DETENTION INTERNATIONAL
is a health and human rights organization that seeks to end sexual abuse in all forms of detention.

HEADQUARTERS
3325 Wilshire Blvd., Suite 340
Los Angeles, CA 90010
Tel: (213) 384-1400
Fax: (213) 384-1411

EAST COAST OFFICE
1900 L Street NW, Suite 601
Washington, DC 20036
Tel: (202) 506-3333
Fax: (202) 506-7971

SOUTH AFRICA OFFICE
66 Grant Avenue (corner Nellie)
2nd Floor, Norwood Place
Norwood, Johannesburg, GT 2192
South Africa
Tel: +27 11 728 6299

info@justdetention.org
www.justdetention.org