



JUST DETENTION

INTERNATIONAL

RAPE IS NOT PART OF THE PENALTY

**Submission to Ms. Rashida Manjoo,
U.N. Special Rapporteur on Violence Against Women**

*Violence Against Women in Custody in the United States
-- A Nationwide Human Rights Crisis*

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Just Detention International (JDI) welcomes the opportunity to make this submission, addressing the serious problem of violence against women and girls in U.S. custody. JDI is an international human rights organization dedicated to ending sexual abuse in all forms of detention. Specifically, JDI works to ensure government accountability for prisoner rape; to transform ill-informed public attitudes about sexual violence in detention; and to promote access to resources for those who have survived this form of abuse. All of JDI's work rests on the conviction that the international human rights framework is an essential, but often neglected, tool for promoting social justice in the U.S. generally and inside prisons in particular.

Prisons, jails, and other detention facilities across the U.S. maintain dangerous policies and practices that have resulted in widespread sexual violence. While recent studies have established trends that need to be further examined – in particular inmate-on-inmate abuse in facilities for women and girls and the targeting of non-heterosexual and gender non-conforming women -- basic measures proven to prevent abuse are well-known. Unfortunately, such measures have neither been implemented by officials nor ratified as binding regulation by the Attorney General as required by statute. To make matters worse, few jurisdictions empower an oversight entity to monitor their corrections facilities, and federal law drastically limits the ability of the courts to intervene even in the most egregious cases of abuse of prisoners.

I. Background on Sexual Abuse of Women and Girls Detained in the U.S.

In 2008-2009, the U.S. Department of Justice's Bureau of Justice Statistics (BJS) conducted anonymous surveys about sexual victimization with inmates¹ in prisons, jails, and juvenile facilities nationwide, which confirmed that sexual abuse in detention is a serious problem, particularly for women and girls. Based on these surveys, the BJS estimated that 88,500 adult inmates and 3,220 youth were assaulted at their current facility in the previous year.² As these surveys only account for people detained on a particular day – and the annual number of admissions to county jails is many times higher than the average daily jail population – these data represent just the tip of the iceberg.

The BJS surveys identified troubling trends in facilities holding women and girls. Among girls who participated in the youth survey, more than nine percent reported forced sexual activity with other youth, a rate that was more than four times that reported by surveyed boys, and almost five percent reported sexual activity with staff.³ In adult facilities, women were more than twice as likely as men to report inmate-on-inmate abuse and, of the facilities selected for the survey, women's prisons had the nation's highest rates of both inmate-on-inmate and staff-on-inmate abuse.⁴

Women and girls targeted for abuse in detention are the same individuals who are most vulnerable to abuse in the community. In particular, inmates with a history of abuse were more than twice as likely to be victimized again while incarcerated as their peers.⁵ This risk factor is particularly relevant for incarcerated women and detained girls, for whom studies have shown rates of prior abuse as high as 90 percent.⁶

Women and girls who identify as lesbian, gay, bisexual, transgender or questioning (LGBTQ) are also exceptionally vulnerable.⁷ At Fluvanna Correctional Institution in Virginia – which the BJS adult inmate survey identified as having the highest rate of inmate-on-inmate abuse for all facilities and the second highest rate of staff sexual misconduct among women’s prisons – the previous warden had purportedly established a “butch ward,” where women who identified as or were perceived to be lesbian or gender non-conforming were subject to ongoing harassment and punitive conditions.⁸

Transgender women and girls are often tormented by constant sexual harassment and abuse, as they tend to be placed in men’s and boys’ facilities in accordance with their birth gender.⁹ According to Dr. Robert Bidwell, a pediatrician at the Hawaii Youth Correctional Facility, an institutional anti-LGBTQ sentiment was among the most critical factors in creating a dangerous environment at that facility.¹⁰

The sexual assault of prisoners, whether perpetrated by corrections officials or by inmates with the acquiescence of corrections staff, is a crime and an internationally recognized form of torture. Victims of prisoner rape are left beaten and bloodied, contract HIV and other sexually transmitted diseases, become pregnant, and suffer severe psychological harm. The failure of corrections officials to take appropriate steps to prevent and address this abuse amounts to state acquiescence.

Despite the widespread nature of sexual violence behind bars, relatively few cases of this type of abuse are reported. The fear of retaliation and the often well-founded perception that reporting sexual abuse is futile cause many survivors to suffer in silence, often enduring sexual abuse over long periods of time. Those who do file a complaint frequently find that they are denied assistance and accused of fabricating reports in order to manipulate the system to their benefit. In fact, BJS data on formal complaints lodged with officials show that even in substantiated cases of staff sexual misconduct, abusive officials are rarely arrested or referred for prosecution and many are allowed to keep their jobs.¹¹

The widespread failure of corrections officials to take seriously reports of sexual abuse, and to put into place simple preventive measures, contribute to a corrections environment in which perpetrators of sexual abuse are able to act with impunity. This in turn, increases the prevalence of all forms of violence against women and girls in custody. Once released – and 95 percent of inmates do eventually return home – survivors bring their emotional trauma and medical conditions back to their communities.

II. International and Federal Law Addressing the Sexual Abuse in Detention

In their 2006 reviews of U.S. compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), the Committee Against Torture (CAT Committee) and the Human Rights Committee identified sexual violence as a serious problem in the U.S.¹²

Each Committee's report explicitly noted the need to improve protections for those vulnerable to sexual abuse. The CAT Committee pointed to the failure to prevent sexual abuse of gay and transgender inmates, to separate detained children from adult inmates, and to investigate instances of prisoner rape in a prompt and transparent manner.¹³ The Human Rights Committee expressed concern that male officers continue to have full access to women's detention quarters and noted its concern about widespread hate crimes committed against LGBTQ individuals, including by law enforcement.¹⁴

The Committees recognized the enactment of the Prison Rape Elimination Act of 2003 (PREA) as a positive development.¹⁵ Among other things, PREA required the development of binding national standards addressing sexual violence in detention. Recommended national standards, developed in accordance with PREA by the National Prison Rape Elimination Commission, were released in June 2009 and are currently before the U.S. Attorney General.¹⁶ The U.S. Attorney General had one year from the Commission's release (or until June 23, 2010) to publish a final rule adopting binding national standards, but he has yet to do so.

III. The National Standards

As mandated by PREA, the Commission's standards focus on the prevention, detection, response to, and monitoring of sexual abuse behind bars. They address core safety and management issues, such as: screening and classification; staff training and inmate education; investigations; and the provision of medical and mental health care in the aftermath of a sexual assault. The standards are the product of several years of research and extensive consultation with corrections professionals, researchers, advocates, and survivors of sexual abuse in detention.

If fully implemented, the Commission's standards would significantly reduce violence against women and girls in detention and address many of the concerns highlighted by the CAT Committee and the Human Rights Committee. For example, the standards limit cross-gender viewing and searches, so that male officials cannot view or touch women's breasts, buttocks or genital areas absent an emergency.¹⁷ While many state systems are slowly moving toward this practice, the federal Bureau of Prisons insists that cross-gender pat searches are necessary.

The Commission's standards represent a compromise between the fiscal and security concerns of officials and the basic right of inmates to be free from abuse. To achieve this balance, the Commission already reduced some protections to below international norms. Thus, for example, the Commission's standard on cross-gender viewing and searches still allows male officers to work in the housing and bathing areas of women's facilities. In addition to ratifying the standard without further delay, the Attorney General should be cautioned against further weakening these provisions.

IV. Oversight

Once the Attorney General ratifies binding national standards in accordance with PREA, compliance must be monitored for their full import to be realized. Such external oversight is arguably the greatest challenge to full implementation of PREA. Few U.S. jurisdictions empower

an external entity, such as an Inspector General or ombudsperson, to respond to inmate complaints and/or to audit corrections and detention facilities. Private accreditation organizations, such as the American Correctional Association, have their own standards but only review prisons at request of the corrections administrators and generally charge a fee for this service.

The striking lack of transparency of U.S. detention systems has been a major contributing factor to prisoner rape and other violence -- the kinds of abuses that international monitoring systems are put in place to eliminate.¹⁸ Without external monitoring, officials who participate or acquiesce in sexual violence behind bars wield tremendous unchecked power over detainees. An incident that took place in May 2010 at the T. Don Hutto Residential Center, an immigration detention facility in Texas, highlights the vital need for sensible corrections practices paired with external oversight. A Department of Homeland Security (DHS) investigation revealed that a male officer at the Hutto facility transported female detainees by himself -- a breach of Department protocol -- and sexually abused several detainees.¹⁹ While these detainees were assaulted over a period of time, the breaches in protocol only came to light when one woman reported it to the police after she was released from DHS custody.

Traditionally, civil rights litigation has been a strong component of external oversight of U.S. detention facilities -- allowing those whose rights have been violated to seek redress and demand reforms in court.²⁰ However, prisoner rape survivors and other incarcerated women and girls whose rights have been violated are virtually barred from the courthouse, due to the complex procedural requirements and substantive demands of the Prison Litigation Reform Act (PLRA). According to the PLRA, prisoner rape survivors who fail, for whatever reason, to file a grievance within deadlines imposed by their facilities are unable to have a judge review the merits of their claims.²¹ The PLRA also requires a "physical injury"²² in order for damages to be awarded -- and, shockingly, some courts have found that some forms of sexual assault do not constitute a physical injury.²³ While the vast majority of prisoner lawsuits are brought by adult men, the PLRA's requirements are equally applicable to girls and other youth.

Women and girls who have been raped by officials have unquestionably been harmed by the PLRA's provisions. Two recent cases illustrate these concerns. In Amador v. Andrews,²⁴ women in New York State prisons who complained to the Inspector General about widespread sexual abuse by male officers were deemed not to have properly "exhausted administrative remedies" because they did not use the inmate grievance procedure at their facility. The district court refused to consider the women's claims, even though they had been told to complain to the Inspector General and all internal grievances about staff sexual abuse are referred to the Inspector General as a matter of course. In B. v. Duff,²⁵ a teenage girl who was raped by a male employee at a juvenile detention facility in Illinois had her case dismissed on the same grounds. The girl provided a written statement to investigators, and explained that she did not file a formal grievance because she was afraid of retaliation; nonetheless, she was afforded no judicial protection. Reform of the PLRA is urgently needed to ensure government accountability for the sexual abuse of inmates.

PREA compliance and PLRA reform would be enhanced by U.S. participation in international oversight mechanisms established by the CAT. In particular, the U.S. has not signed the Optional

Protocol to the Convention Against Torture (OPCAT),²⁶ and refuses to recognize Article 22 of the CAT. Through the OPCAT, the U.S. would create a system of oversight for all facilities, by establishing a national preventive mechanism. Permitting Article 22 communications -- which would require the U.S. to report in writing the steps it has taken in response to individual communications to the CAT Committee -- would likewise help address abuse that often remains unresolved by the U.S. legal system.

V. Additional Research

As identified in the aforementioned PREA standards, many of the solutions to end sexual violence in detention are known but need to be implemented. However, as with most aspects of incarceration, these solutions have largely derived from examining the dynamics of sexual abuse in men's facilities. Further examination of violence against women and girls in detention is urgently needed.

Contrary to common perceptions, recent studies show that women and girls in detention frequently are abused by other inmates.²⁷ Women prisoners are often described as seeking to foster a family dynamic behind bars; no attention has been paid to whether abusive familial relationships are being mirrored -- and, if so, what can and should be done to address it. Detained girls have the highest rates of victimization but remarkably little is known about how their experiences may be different from women in adult prisons and boys in youth facilities.

The unique dangers facing lesbian and bisexual women, transgender men held in women's facilities, and gender-nonconforming women also warrant attention. The PREA standards provide protections for LGBTQ inmates, seeking to ensure that they are protected from abuse while not subject to punitive conditions based on their sexual orientation or gender identity.²⁸ However, in its provisions on screening, the Commission that drafted the PREA standards only recommends that these factors be considered in men's facilities. While preliminary data suggest that lesbian, bisexual, and transgender inmates in women's facilities are as vulnerable as gay and transgender inmates in men's facilities,²⁹ this Commission did not believe that there were sufficient quantifiable data to support such protections for LGBTQ women and girls.

VI. Conclusion

The widespread sexual abuse of women and girls in detention is not inevitable; it is the result of poor corrections management, bad policies, and dangerous practices. In 2003, Congress took the pivotal step of unanimously passing the Prison Rape Elimination Act. To ensure that the full intent of that key law is realized, JDI urges the Special Rapporteur to include the following recommendations in her report:

- The Attorney General should adopt swiftly and fully the national standards for addressing sexual abuse in detention, as recommended by the National Prison Rape Elimination Commission;
- Congress should reform the Prison Litigation Reform Act so that inmates who are sexually abused in prisons, jails, and juvenile facilities can seek relief through the courts;

- The U.S. should embrace international oversight mechanisms, such as the Optional Protocol to the Convention Against Torture and Article 22 communications with the Committee Against Torture; and,
- Further research about the dynamics of sexual violence in women and girls' facilities, particularly with respect to non-heterosexual and gender non-conforming women, should be conducted.

¹ Generally in the U.S., youth in juvenile facilities are referred to as residents while adults in prisons and jails are referred to as inmates. For simplicity, this submission will use the term "inmates" for both adult and juvenile detainees.

² ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTER BY INMATES 2008-2009 5 (2010) (hereinafter "ADULT SURVEY"); ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTER BY YOUTH 2008-2009 1 (2010) (hereinafter "YOUTH SURVEY").

³ YOUTH SURVEY, *supra* note 2, at 1. Among boys who participated in the survey, two percent reported sexual activity with another youth; 10.8 percent reported sexual activity with staff. *Id.*

⁴ ADULT SURVEY, *supra* note 2, at 8-9. Taycheeda Correctional Institution in Wisconsin and Fluvanna Correctional Center in Virginia had rates of inmate-on-inmate abuse of 11.9 and 11.4 percent, respectively. The jail with the highest rate of inmate-on-inmate abuse (7.5 percent) was also a women's facility, Orleans Parish – South White Street Jail in Louisiana. The highest rate of inmate-on-inmate abuse in a men's prison (Hughes Unit in Texas) was 8.6 percent. Regarding staff-on-inmate sexual abuse, Bayview Correctional Facility in New York had prevalence rate of 11.5 percent; the worst-performing men's prison and jail had rates of 8.2 percent (Crossroads Correctional Facility in Missouri) and 10 percent (Caroline County Jail in Maryland), respectively.

⁵ ADULT SURVEY, *supra* note 2, at 14-15; YOUTH SURVEY, *supra* note 2, at 11.

⁶ Physicians for Human Rights, Unique Needs of Girls in the Juvenile Justice System, *available on-line at* <http://physiciansforhumanrights.org/juvenile-justice/factsheets/girls.pdf> (last visited March 9, 2010); A. Browne, B. Miller & E. Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22(3-4) INT'L J.L. & PSYCHIATRY 301 (1999).

⁷ ADULT SURVEY, *supra* note 2, at 14; YOUTH SURVEY, *supra* note 2, at 11; Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. OF INTERPERSONAL VIOLENCE 1531, 1599 (2006). For more information about the severe danger of sexual abuse facing LGBTQ detainees, see JDI Fact Sheet, LGBTQ Detainees Chief Targets for Sexual Abuse in Detention (October 2007).

⁸ *Va. women's prison segregated lesbians, others*, ASSOCIATED PRESS, June 11, 2009, *available on-line at* <http://www.washingtontimes.com/news/2009/jun/11/womens-prison-said-to-have-segregated-lesbians-oth/> (last visited Jan. 24, 2011).

⁹ Valerie Jenness et al., Center for Evidence-Based Corrections, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007) (finding that 59 percent of transgender women incarcerated in men's prisons in California reported being sexually abused, a rate 13 times higher than that reported by the general population).

¹⁰ *Elimination of Prison Rape: Focus on Juveniles*, Hearing Before the National Prison Rape Elimination Commission (June 1, 2006) (testimony of Robert Bidwell, M.D., Physician, Hawaii Office of Youth Services), *available on-line at* http://www.cybercemetery.unt.edu/archive/nprec/20090820160337/http://nprec.us/docs/boston_natureofproblem_bidwell.pdf (last visited Jan. 24, 2011).

¹¹ ALLEN J. BECK & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007-2008 (2011); ALLEN J. BECK, DEVON B. ADAMS & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES, 2005-2006 (2008).

¹² Committee against Torture, 36th Session, Consideration of Reports Submitted by States parties under article 19 of the Convention, CAT/C/USA/CO/2; Human Rights Committee, 87th Session, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, CCPR/C/USA/CO/3/Rev.1.

¹³ Committee Against Torture, *supra* note 10, at ¶¶ 32, 34.

¹⁴ Human Rights Committee, *supra* note 10, at ¶¶ 25, 33.

¹⁵ Committee Against Torture, 36th Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, CAT/C/USA/CO/2, at ¶ 9; Human Rights Committee, 87th Session, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, CCPR/C/USA/CO/3/Rev.1, at ¶ 33.

¹⁶ The NPREC report and the recommended national standards are available at:

<http://www.cybercemetery.unt.edu/archive/nprec/20090820154816/http://nprec.us/publication> (last visited Dec. 10, 2009).

¹⁷ National Prison Rape Elimination Commission, Standards for the Prevention, Detection, Response and Monitoring of Sexual Abuse in Adult Prisons and Jails, Standard PP-4 (2009).

¹⁸ For example, in 2007, a scandal at the Texas Youth Commission uncovered more than 1,000 cases of sexual abuse of teen detainees. Subsequent external investigations revealed that hundreds of these complaints were ignored or egregiously covered up, sometimes by high-ranking officials. *See*, David Kaiser & Lovisa Stannow, NEW YORK REVIEW OF BOOKS, *The Rape of American Prisoners*, March 11, 2010 (available at <http://www.nybooks.com/articles/archives/2010/mar/11/the-rape-of-american-prisoners/> (last visited June 14, 2010.))

¹⁹ *See* William Fisher, INTERPRESS NEWS SERVICE, *Female Migrants Charge Sexual Abuse In Detention*, June 7, 2010, available at <http://www.globalissues.org/news/2010/06/07/5906> (last viewed June 14, 2010).

²⁰ For example, in July 2009, a class of 500 female prisoners who had been sexually abused by male guards while incarcerated in Michigan state prisons during the 1990s was awarded \$100 million in a settlement of their claims. One of the lead plaintiffs was raped by prison guards eight times during her incarceration; thirty percent of the male staff at the prison she was housed at was estimated to have taken part in sexual assaults of female inmates. While this group of prisoners was able to pursue their claims in court, litigation of prisoner rape claims is not a viable option in most instances. The resolution of the Michigan case came more than a decade after the lawsuit was filed, and a settlement of this magnitude in a case involving prisoner rape is virtually unprecedented. *See* Jeff Siedel & Dawson Bell, *\$100 Million Ends Prison Sex-Abuse Suit*, DETROIT FREE PRESS, July 16, 2009, available on-line at <http://www.freep.com/article/20090716/NEWS06/101250006/-100-million-ends-prisoner-sex-abuse-suit> (last visited June 14, 2010).

²¹ 42 U.S.C. §1997e(a); for more information, *see* Just Detention International, Fact Sheet, The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Detention (2009).

²² 42 U.S.C. §1997e(e).

²³ *See Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D. Miss. January 4, 2006) (holding that prisoners' allegations that a staff member "sexually abused them by sodomy" did not qualify as a physical injury); *Moya v. City of Albuquerque*, No. 96-1257 DJS/RLP, Mem. Op. and Order (D.N.M. Nov. 17, 1997) (holding that male officers' strip-searches of women prisoners did not result in physical injuries, even where one woman allegedly attempted suicide due to the trauma of the search).

²⁴ No 03 Civ. 0650, 2007 U.S. Dist. LEXIS 89648 89648 (S.D.N.Y. Dec. 5, 2007), *pending on appeal sub nom. Amador v. Superintendents of the Department of Correctional Services*, 08-2079 (2d Cir.).

²⁵ *B. v. Duff*, No. 06-C-4912, 2009 WL 2147936 (N.D.Ill. 2009).

²⁶ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT"), G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002). *See also* Just Detention International, Fact Sheet, U.N. Optional Protocol to the Convention Against Torture (OPCAT) (2009).

²⁷ *See infra* notes 3-4.

²⁸ National Prison Rape Elimination Commission, *supra* note 17, at Standard SC-2.

²⁹ *See infra* note 7.