

**Specialized Training: Investigating Sexual Abuse in  
Correctional Settings  
Notification of Curriculum Utilization  
December 2013**

The enclosed *Specialized Training: Investigating Sexual Abuse in Correctional Settings* curriculum was developed by The Moss Group, Inc. (TMG) as part of contract deliverables for the National PREA Resource Center (PRC), a cooperative agreement between the National Council on Crime and Delinquency (NCCD) and the Bureau of Justice Assistance (BJA). The PREA standards served as the basis for the curriculum's content and development with the goal of the *Specialized Training: Investigating Sexual Abuse in Correctional Settings* curriculum to satisfy specific PREA standard requirements.

It is recommended that the *Specialized Training: Investigating Sexual Abuse in Correctional Settings* curriculum be reviewed in its entirety before choosing which modules to use. Any alterations to the original materials must be acknowledged during their presentation or requires removal of the PRC and TMG logos.

BJA is currently undergoing a comprehensive review of the enclosed curriculum for official approval at which point the BJA logo may be added.

*Note: Utilization of the enclosed curriculum, either in part or whole, does not guarantee that an auditor will find a facility "meets standard". Rather, an auditor will take into consideration the curriculum used as part of their overall determination of compliance.*





## Module 2: Legal Issues and Agency Liability: What Investigators Should Know

**Notice of Federal Funding Disclaimer** – This project was supported by Grant No. 2010-RP-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice nor those of the National Council on Crime and Delinquency (NCCD), which administers the National PREA Resource Center through a cooperative agreement with the Bureau of Justice Assistance.

*This module has been developed over many years and includes legal research and work provided by American University, Washington College of Law, and Jeff Shorba.*

# Module 2: Objectives

1. Identify the steps to take prevent or mitigate legal liability through the investigative process.
2. Understand the use of, and the difference between, Miranda and Garrity, as required by PREA standard 115.(3)34.
3. Apply an understanding of Miranda and Garrity to conducting successful investigations.

# Miranda and Garrity





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# Miranda v. Arizona (S.C.T. 1966)

- Stems from the Fifth Amendment against self-incrimination:
- “The prosecution may not use statements....stemming from an interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination....”

# Miranda v. Arizona (S.C.T. 1966)

If a person is in custody and being interrogated:  
→ **They must be made aware of the fact that they have the right not to answer questions.**

# Berghuis v. Thompkins (S. Ct. 2010)

- Shooting suspect mostly silent during three-hour interrogation
- Asked if “he prayed to God to forgive him for the shooting.” Answered yes
  - » S. Ct. said statement could be used
- Silence during interrogation does not invoke right to remain silent
- Interrogation need not end until there is an “unambiguous” statement that you wish to remain silent



# Miranda v. Arizona (S.C.T. 1966)

A suspect must waive his/her rights:

- Voluntarily
- Knowingly
- Intelligently
- Unambiguously

# Miranda

- Are incarcerated offenders ever not in custody?
- Can they ever choose to leave?
- Under what conditions would they really have “freedom” to leave?

# Howes v. Fields (S. Ct. 2012)

- Michigan jail inmate questioned for 5-7 hours by armed deputies using a sharp tone and profanity
- Told he was free to return to his cell but no Miranda warning
- Court defined custody as “circumstances that are thought generally to present a serious danger of coercion”
- People already in prison or jail unlikely to be coerced by a longing for prompt release and questioners lack authority to do so
- Balance – told free to leave with length, hour and tone of the questioning

# Miranda

- Agency in collaboration with your prosecuting authorities will need to decide how to develop your own process
- Most conservative approach is to provide Miranda warnings
- Generally does not discourage inmate from talking and will provide the most protection
- If not, will need to ensure documentation the inmate was free to leave and other conditions which would distinguish the situation from “custody”.

# Garrity V. New Jersey (S. CT. 1967)

- Officers were threatened with termination if they would not testify to the fixing of tickets
- The court held that this process of requiring officers to testify violated the constitution
- Coerced testimony could not be used against them in criminal proceeding

# Garrity

- The warning will clearly inform the staff that his/her answers to questions will not be used against them in a criminal prosecution
- Subject must be informed that refusing to give a statement (or failing to give a true statement) may be grounds for immediate termination of employment

# Garrity: The Investigative Process

- The burden of proof that the prosecutor did not use statements of the accused under Garrity is on the State.
- The two cases must not mingle after interrogation of the suspect staff with Garrity warning

# Garrity: The Investigative Process

## Solutions

- Try a non-coerced staff suspect statement first
- If the suspect staff refuses to answer questions and your agency wants answers you must provide some type of Garrity warning



# Garrity: The Investigative Process

It is important to let the criminal case pass into the charged state before the administrative investigator begins to interview the staff suspect

# Court Approach

- Courts are not prison administrators
- Courts always have the benefit of hindsight
- Litigation changes the landscape for decisions
- Litigation brings other issues
  - » Press coverage, etc.



# What The Court Looks For

- Prior Practice of the Department/Facility
  - ✓ Have there been prior complaints?
  - ✓ Who has raised them?
  - ✓ Is there a policy? Consistently applied?
  - ✓ Is there training? Mandatory? For whom?
  - ✓ Was there a thorough investigation?
  - ✓ Were appropriate actions taken?  
(Discipline, termination, etc.)



# Staff Sexual Misconduct Criminal Laws

- The climate has changed significantly in the last two decades
- Similar to the current emphasis on PREA – staff sexual misconduct became significant issue in the early 1990's
- Problems arose due to major cases in several states

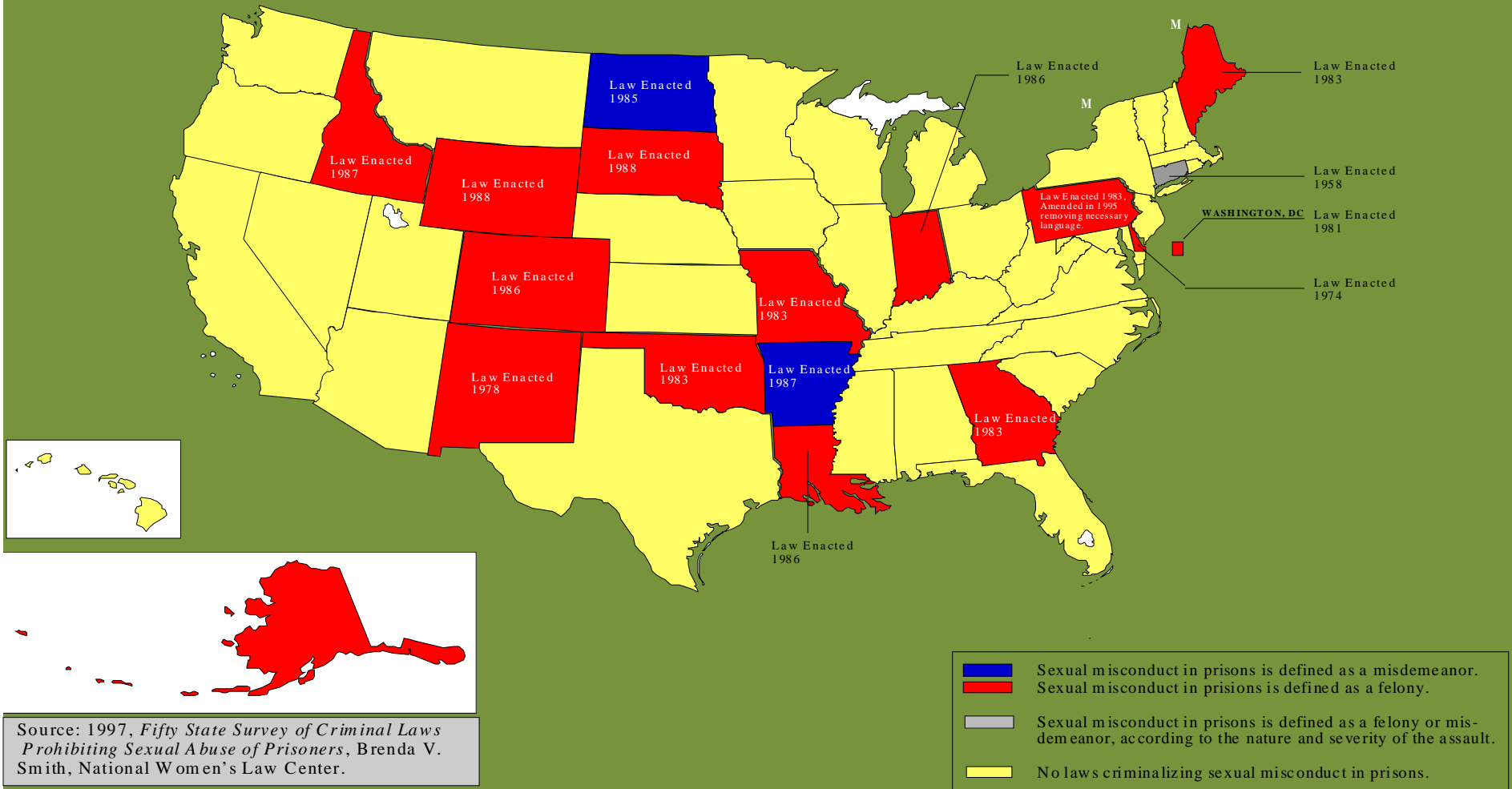


# Staff Sexual Misconduct Criminal Laws

- All 50 states, the federal government, and D.C. have laws specifically covering the sexual abuse of persons in custody
- 32 states cover community corrections agencies
- 29 cover juveniles explicitly – 17 implicitly

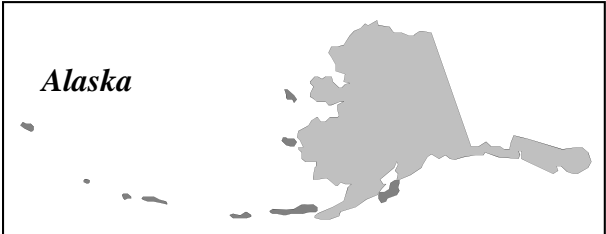
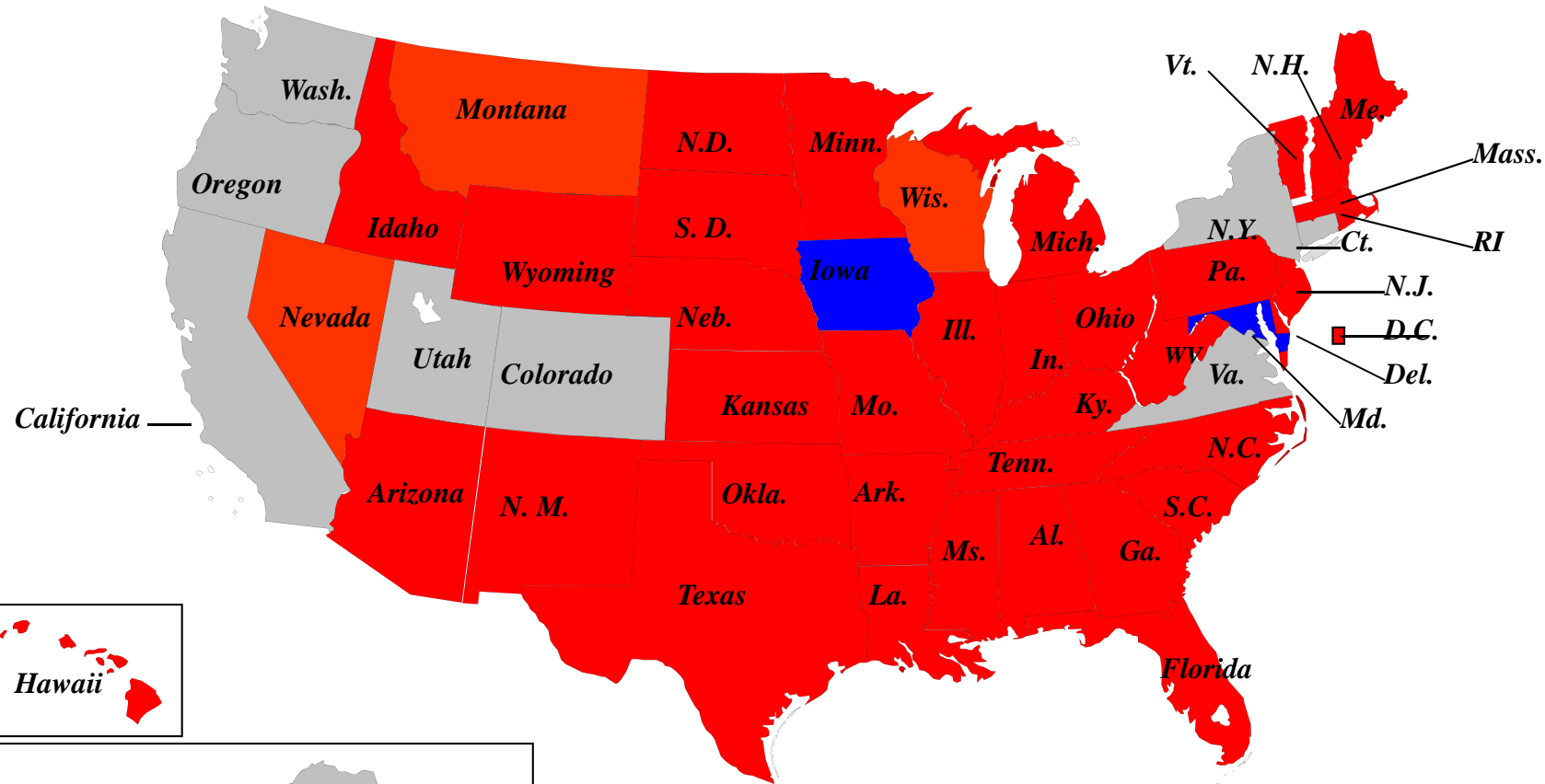
# 1990 State Laws Prohibiting Staff Sexual Abuse

## State Criminal Laws Prohibiting Sexual Misconduct with Offenders in 1990 National Institute of Corrections

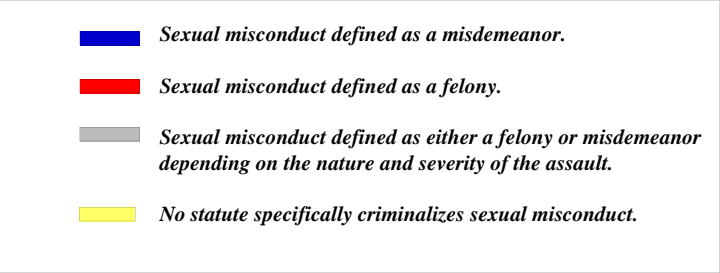


Source: 1997, *Fifty State Survey of Criminal Laws Prohibiting Sexual Abuse of Prisoners*, Brenda V. Smith, National Women's Law Center.

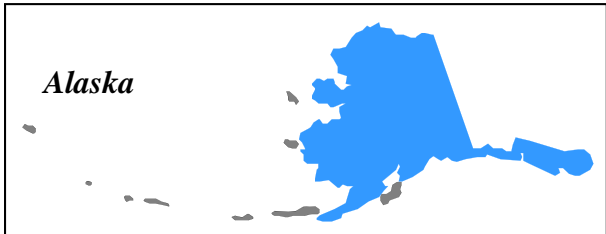
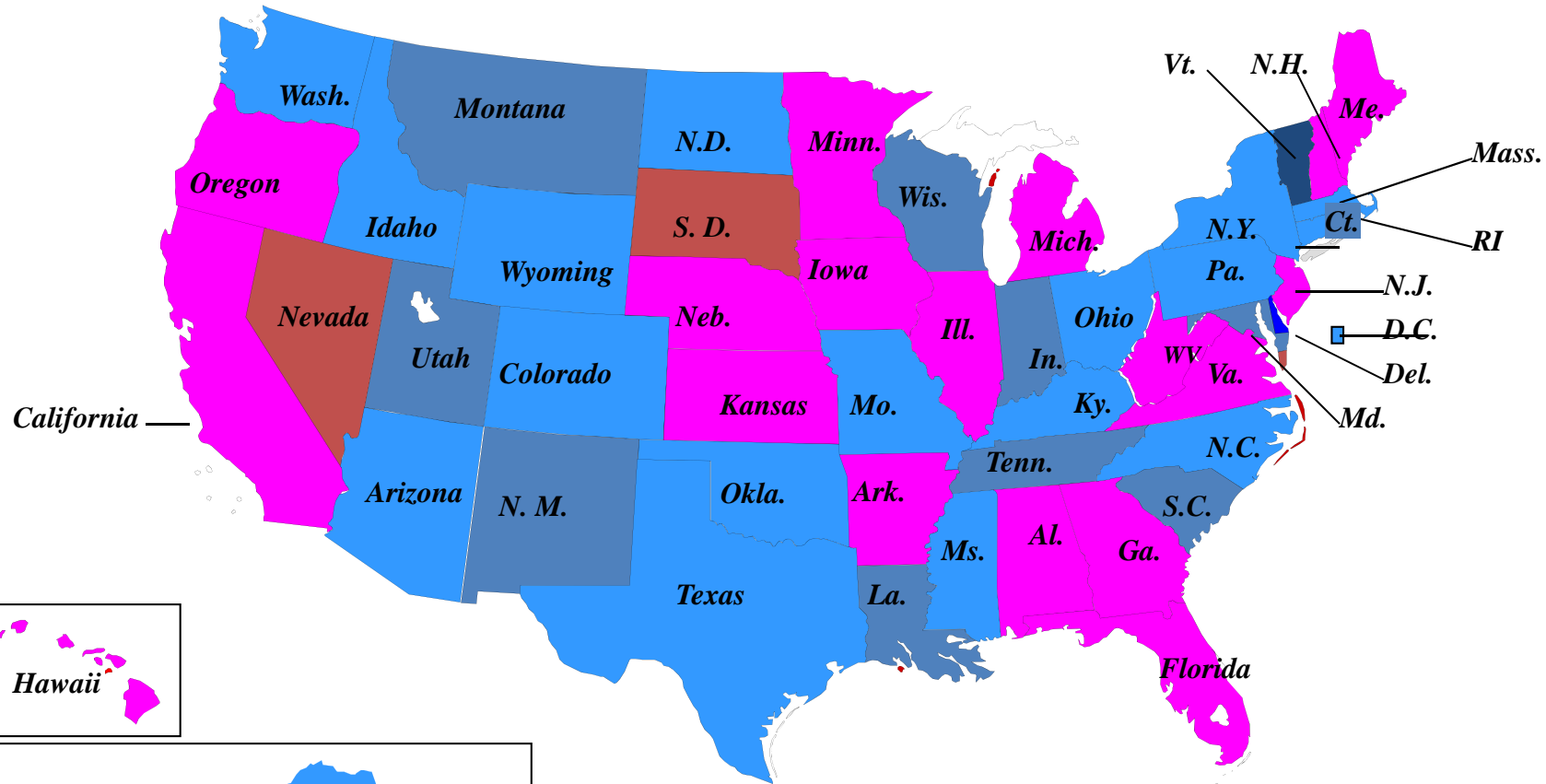
# 2010 State Laws Prohibiting Staff Sexual Misconduct



Source: September 2005. Brenda V. Smith, The American University, Washington College of Law



# States that Cover Community Corrections 2010



Source: September 2005. Brenda V. Smith, The American University, Washington College of Law

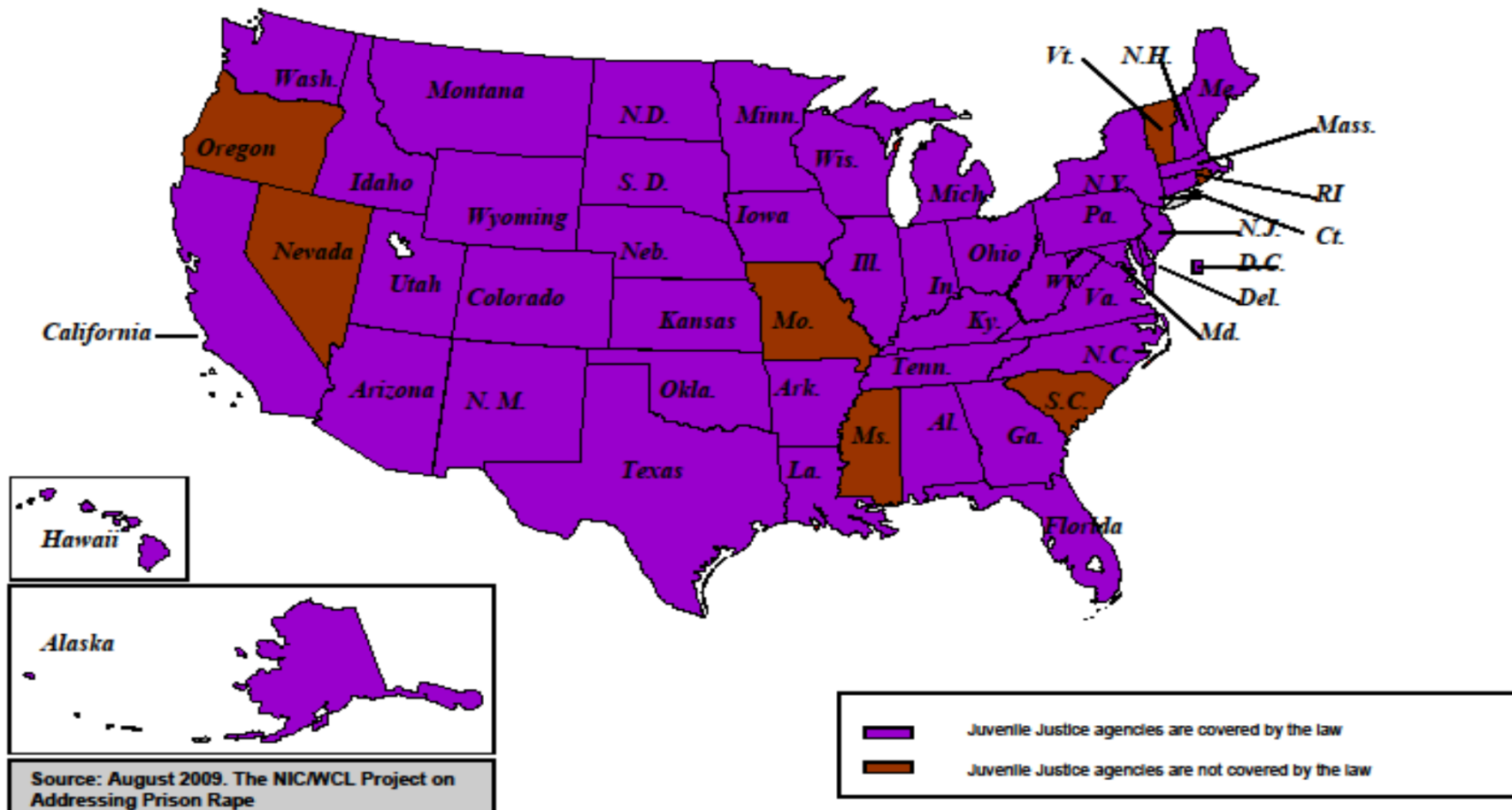
- Community Corrections covered under law
- Not community corrections specific- general language used (i.e.: supervision"
- Community Corrections specifically not covered
- Community Corrections not mentioned by law



# States that Cover Juvenile Justice Agencies

## State Criminal Laws Prohibiting Sexual Abuse of Juveniles Under Correctional Supervision

National Institute of Corrections/American University, Washington College of Law – August 2009





-INSERT SLIDE WITH THE LAWS OF THE STATE IN WHICH YOUR AGENCY/FACILITY IS LOCATED-

# Other State Criminal Laws

- Sexual Assault
- Statutory Rape
- Sodomy
- Sex Offender Registration
  - » Adult and Juvenile
- Vulnerable Adult Statutes
- Licensing
- Malfeasance in Office/Official Misconduct
- Obstruction of Justice
- Making False Statements to a Government Official
- Mandatory Reporting

# State Tort Law Claims

- Assault
- Battery
- Intentional Infliction of Emotional Distress
- Negligent Infliction of Emotional Distress
- Negligent Hiring, Firing, Supervision



# Litigation

- Policy and practice are often developed in crisis
- Being proactive now can help avoid crisis later
- Taking the right steps in policy, procedure, practices and investigations will make litigation less likely and will make for more effective policies and procedures in the long run



# PREA and Legal Issues

- **PREA does not create a separate cause of action. However, it will be used as justification in other lawsuits.**



Byrd v. Maricopa County (9<sup>th</sup> Cir -1/5/11)

- Pretrial detainee in jail subjected to cross gender strip search
- Ninth Circuit found search violated 4<sup>th</sup> amendment rights
- Opinion cited the PREA Commission report and standards

# Legal Framework



**42 USC. 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 US
  - Deprivation by a person acting under color of state law
  - Don't forget volunteers and contractors

# Official Liability: 8<sup>th</sup> Amendment

## **Farmer v. Brennan, 511 US 825 (1994)**

- Transsexual prisoner brought suit for injuries suffered when prison officials placed him in general prison population
- Established new legal standard with two part test:
  1. The injury must be objectively serious
  2. The official must have acted with deliberate indifference or reckless disregard for constitutional rights



# 8<sup>th</sup> Amendment: What the Court Looks For

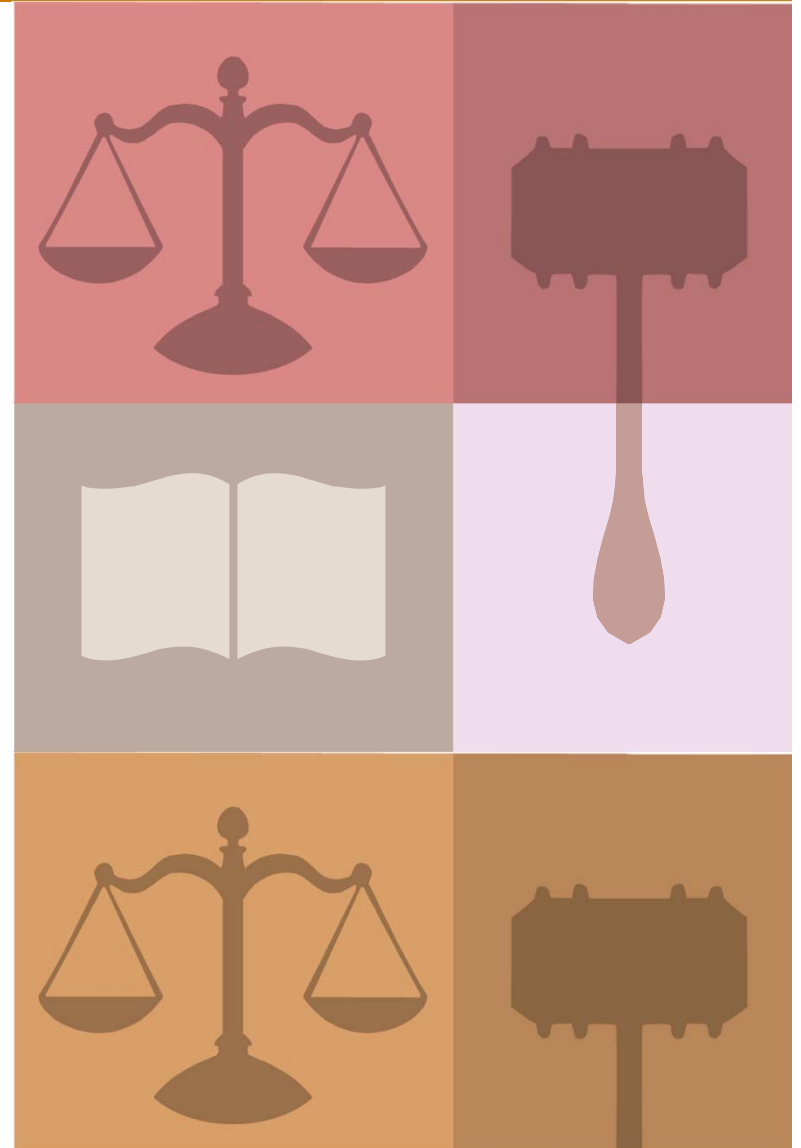
- Deliberate indifference to inmate vulnerability – safety or health
- Official knew of and disregarded an excessive risk to inmate safety or health
- Official must be aware of facts which would indicate a substantial risk of harm and the official drew that inference
- Do not need to know of actual harm just risk

# Legal Framework

## Types of Liability

Two types of liability:

- Official
- Individual



# Legal Framework

## Official Liability

- Did it happen on your watch?
- Were you responsible for promulgating and/or enforcing policy?
- Did you fail to act or ignore information presented to you?
- Did it result in harm – proximate cause (as opposed to the direct cause)?

# Legal Framework

## Official Liability

Can Result From:

- Failure to train – ensure staff are aware of laws and policies
- Negligent supervision – oversight to ensure policies followed and complaints addressed
- Negligent employment or retention – take action if needed – failure to fire
- Best protection is proactive approach – courts will look to see what steps have been taken

# Legal Framework

## **Official Liability – Policy is Not Enough**

Daskalea v. DC (DC Cir. 2000)

Court ordered sexual misconduct policy could not insulate agency even though guard's acts were against policy

- No training on policy
- Never gave policy to staff or inmates
- Policy not posted
- 15 grievances by inmate resulted in no action
- No "supervision" by staff or cameras

# Legal Framework

## Individual Liability

- Plaintiff must provide notice that the suit is against the official in her personal capacity
- Direct participation not required
  - Actual or constructive notice of unconstitutional practices
  - Demonstrated gross negligence or deliberate indifference by failing to act
  - Assumed knowledge of state law as correctional administrator
  - Egregious behavior – but it can happen

# Riley v. Olk-Long, 282 F.3<sup>rd</sup> 592 (8<sup>th</sup> Cir. 2002)

- Inmate brought Eighth Amendment action against Warden (Olk-Long) and Director of Security (Sebek)
- Alleged male staff had forced sexual relations with offender
- Jury found corrections officials deliberately indifferent
- Warden and Security Director found personally liable
  - » Warden (\$25,000);
  - » Security Director (\$20,000)

# Riley v. Olk-Long – What Happened?

- Officer made inappropriate comments to inmate regarding sex with roommate
- Officer groped the inmate. She did not report it. Did not think she would be believed and feared discipline
- Officer later entered inmate's cell and raped her
- Another inmate witnessed the incident and reported it
- Inmate placed in administrative segregation during investigation
- Officer terminated and convicted under state law



# Riley v. Olk-Long

## Why Personal Liability?

Why were Warden and Security Director held personally liable?

- Prior to this incident other female inmates had complained
- Officer had a history of predatory behavior
- Four prior investigations closed as inconclusive (sending \$, sexual assaults, bus stop pick up, comment to inmate's mother)
- Collective bargaining unit precluded permanent reassignment – put in control center for short time then put back
- Opportunity to terminate officer but did not

# Riley v. Oik-Long – Court Decision

## Court Decision

- Found the Warden and Security Director were deliberately indifferent
- Did not take the threat posed by the officer seriously
- Collective bargaining agreement is not an excuse
- Protecting the inmate is the duty of both correctional officials

# Ortiz v. Jordan (S.Ct. 1/24/11)

- Female reformatory inmate brought 4<sup>th</sup> and 8<sup>th</sup> amendment claims against a case manager and prison investigator
- Alleges officer Schultz walked up to her in living quarters and grabbed breast – said he would “see her tomorrow”
- Next day she reported it to case manager Jordan
- Jordan said Schultz was reassigned to another facility and would be leaving the next day. Just wait it out.

# Ortiz v. Jordan (S.Ct. 1/24/11)

- Jordan wrote an incident report. In it she stated Ortiz would not name her assailant. Jordan did not notify her supervisor (she submitted the report two days later).
- Later that day Ortiz was again sexually assaulted by Schultz. She reported it.
- Investigator Bright assigned who began investigation two days later.
- Bright placed Ortiz in solitary confinement. Ortiz claims this was retaliation for reporting.

# Ortiz v. Jordan (S.Ct. 1/24/11)

- Legal claims: Jordan did nothing to stop second assault and placement in solitary was retaliation
- Case proceeded to trial. Jury returned a verdict for plaintiff
- \$350,000 in compensatory and punitive damages against Jordan
- \$275,000 against Bright
- Case appealed on technical grounds - when can qualified immunity defense be raised

# Gonzales v. Martinez, 403 F.3d 1179 (10<sup>th</sup> Cir. 2005)

- Inmate alleged sexual assaults by jail administrator and officer (son-in-law of Sheriff)
- Written statements provided by women to Sheriff
- Sheriff delayed moving women from jail or moving officers
- Both later convicted of assault

# Gonzales v. Martinez – Court Findings

- Sheriff ignored complaints claiming inmates were being troublemakers
- Rarely went to the jail and admitted administrator did not like investigations
- Left women in custody of alleged assailants
- Knowledge of risk does not have to be specific to one individual or one incident

# Beers-Capitol v. Whetzel, 256 F.3d 120 (2001)

- Residents of juvenile detention facility sexually assaulted brought 8<sup>th</sup> Amendment claim against supervisors and co-workers
- No summary judgment for facility counselor on official or personal liability where:
  - » She told one of the plaintiffs she “kind of knew” employee was “messing” with residents
  - » Admitted in deposition she heard rumors employee was having sex with residents
  - » She did not investigate or report, but made file notes of the claims to “cover herself”



# Guidry v. Rapides School Board, 560 So.2d 125 (La. App. 1990)

- Action against residential training school
- Co-ed group of mentally handicapped children required constant supervision
- Staff took brief smoke break
- Girl sexually assaulted by group of boys
- Court held: School breached its duty of reasonable care by leaving students alone
- Responsible for damage caused by male students

## R.G. v. Koller (D. Hawaii 2006)

- Lesbian, Gay and Transgender Youth sought preliminary injunction against secure juvenile facility
- Court granted a preliminary injunction based on evidence of:
  - » Campaign of harassment based on sexual orientation including threats of violence, physical and sexual assault, social isolation and constant use of homophobic slurs

# R.G. v. Koller

- Supervisory staff knew of the harassment. Failed to take the following actions:
  - » Policies and training to protect LGBT youth;
  - » Adequate staffing and supervision;
  - » Functioning grievance system; and
  - » Classification system to protect vulnerable youth
- System was also in discussions with DOJ to reach agreement on civil rights violations

# Kahle v. Leonard (8<sup>th</sup> Cir. 2007)

- On the job trainee supervised by senior officer in jail
- After lockdown trainee entered inmate's cell three times
- Allegations of kissing, oral sex and genital contact – one visit lasting more than 5 minutes
- Any entrance into cell was to be logged

# Kahle v. Leonard (8<sup>th</sup> Cir. 2007)

- Supervisor could be held liable for trainee behavior
- Work station had lights indicating cell door was open
- Testimony he could see cell from supervisor station
- No logs of any entry into cell
- No qualified immunity

# Legal Framework

## Qualified Immunity

- Was the law governing the conduct clearly established?
- Reasonable person test
- Sepulveda v. Ramirez (9<sup>th</sup> Cir. 1992)
  - » Male officer observed female in stall during entire urinalysis process
  - » No qualified immunity. Observation was unconstitutional – no reasonable officer could believe it was lawful
- Similar result in staff sexual misconduct cases

# Volunteer and Contractor Liability

Smith v. Cochran, 339 F.3d 1205 (2003)

- Inmate assigned to work in state driver's license bureau as part of her sentence
- Supervised by non correctional officer
- Provided sex in exchange for favors (seeing brother at the job, gifts, trips to see family, etc.)
- Agency that is delegated the responsibility of the state can be liable under 8<sup>th</sup> amendment

# Volunteer and Contractor Liability

- Holding of the case has implications for anyone with authority over inmates
- “Penological responsibilities” delegated (supervisory authority and job training)
- Acting as agents of corrections
- Have the ability to affect inmate conditions or release via discipline
- Ensure mandatory training to avoid civil and criminal penalties



# Investigative Process

- False Arrest and Malicious Prosecution
- Undercover operations
  - » Issues of consent
  - » Need to protect
  - » How is inmate treated following the investigation?
  - » What incentive is provided for participation in the investigation?

## Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)

- Investigator Lunn assigned to review allegations of sexual misconduct
- Receives information that Inmate Ross had sex with Officer Corona
- Inmate initially denies
- Inmate later admits to sex
- Inmate has had history of mental illness

## Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)

- Investigator takes statement
- Investigator corroborated details of the encounter with records and review of facility
- Files a felony complaint against Officer
- Officer placed on administrative leave without pay
- Officer charged with sexual assault of inmate
- Acquitted after jury trial
- Reinstated with back pay
- Officer files suit for false arrest and malicious prosecution

# Investigative Process Standards

- False arrest – no probable cause to make allegations against Officer
- Malicious Prosecution – commenced or continued a criminal proceeding without probable cause
- Both probable cause issues. If probable cause is there for initial arrest something else must intervene to invalidate it for prosecution

## Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)

- No false arrest because Lunn had probable cause.
  - » Could rely on informant testimony notwithstanding her psychiatric history
  - » Corroborated her testimony through review of facts
  - » Was objectively reasonable to believe that probable cause existed
  - » Reasonable officers could have disagreed over whether probable cause existed
- Nothing happened with probable cause to suggest malicious prosecution

# Sting Operations: Sanchez-Luna v. US (Dec. 2004)

- Suspicion of female offender sexually abused by officer
- Investigator sets up sting. Agent in closet with camera
- Oral sex occurs with offender while agents record
- No effort made to stop the act

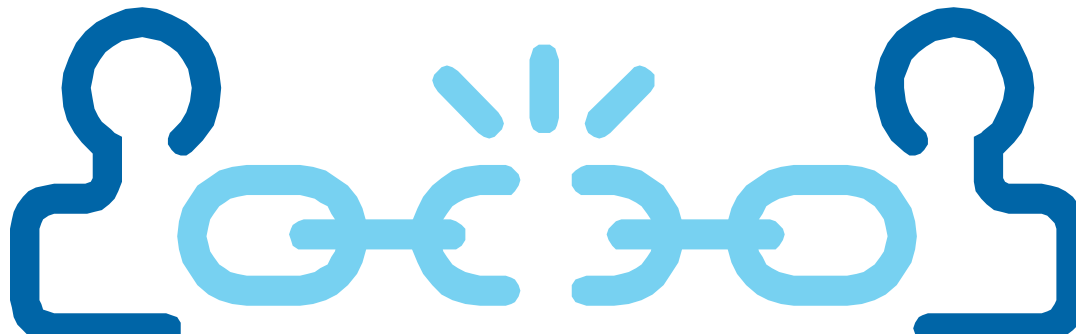
# Result of Litigation: Sanchez-Luna v. US (Dec. 2004)

- Officer pleads guilty
- Terminated from position
- 8<sup>th</sup> Amendment violation alleged
- Settlement of \$165,000 to plaintiff

When conducting operations – ensure you are in position to prevent or stop sexual conduct from occurring

# Elements of Failure to Protect

- Prison official knew that the inmate faced a substantial risk of serious harm
- Disregarded risk by failing to take reasonable steps to abate the risk





## Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)

- Inmate sued unit manager for not changing his cell assignment upon request
  - » Told unit manager that cellmate was predatory homosexual rapist
  - » Said he had been warned by other inmates
  - » Three days later forcibly raped

# Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)

## Unit Manager's Defense

- No record of cellmate as “designated” homosexual predator – past conviction
- Asked inmate if he had been solicited or threatened – answer was no
- Inmate only referred to rumor
- Didn't specifically ask for protection just cell change
- Would have been placed in segregation if he had asked

# Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)

## Court's Decision

- Allowed the case to proceed – no summary judgment
- Evidence inmate was affiliated with group known for preying on other inmates
- Defendant on notice there was a high risk of assault
- Reasonable claim of 8<sup>th</sup> amendment violation



## The 4<sup>th</sup> Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

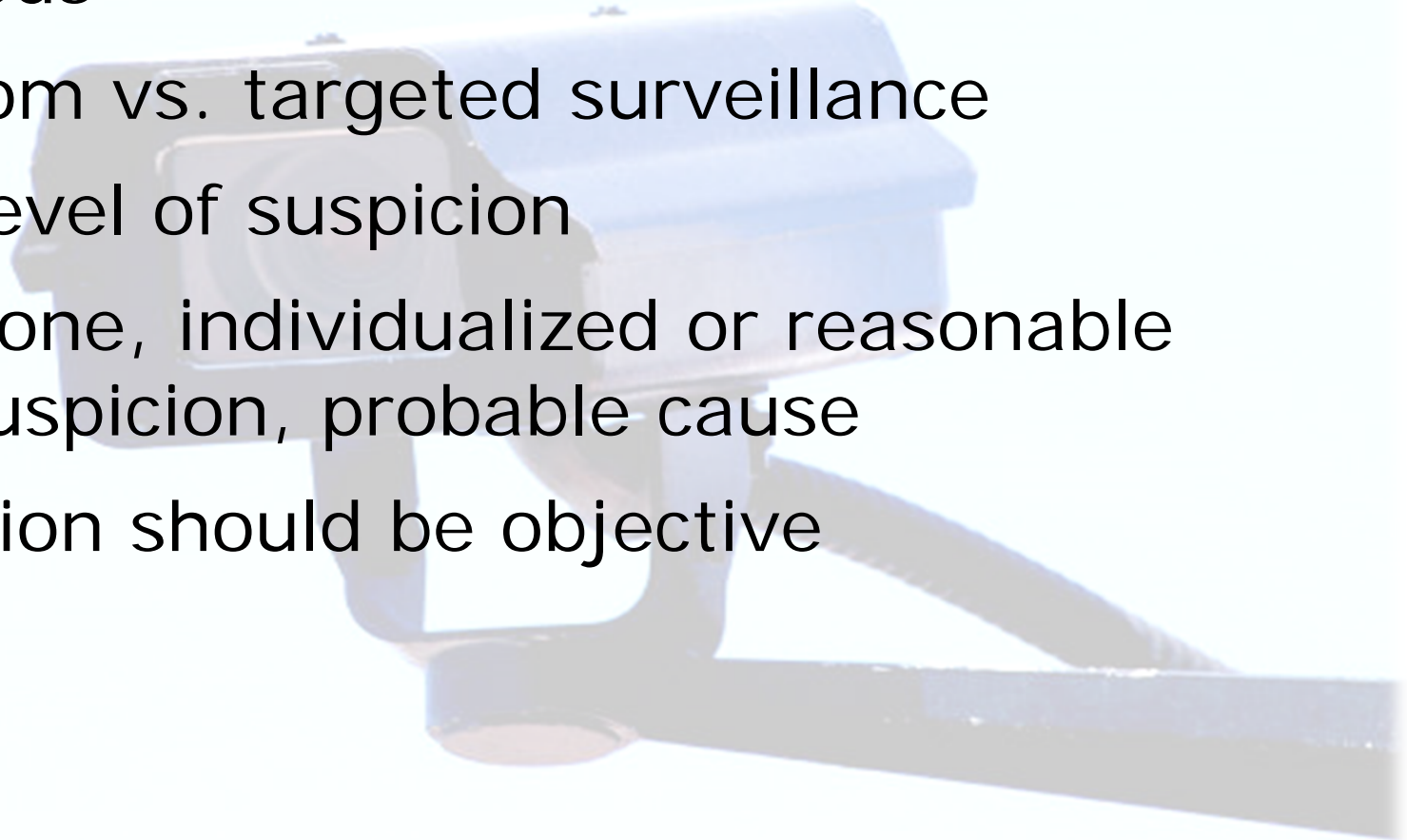


# Privacy

- Right to privacy is contextual
- In corrections, what constitutes a “reasonable expectation of privacy” is different than in the community
- Secure institutional settings vs. community corrections
- Correction officers working in secure areas have low expectations of privacy



# Surveillance

- Notice—Is it posted and in policy?
  - Methods
  - Random vs. targeted surveillance
    - Level of suspicion
    - None, individualized or reasonable suspicion, probable cause
  - Decision should be objective
- 

# Employee Surveillance

**If you are going to use employee surveillance in investigations, think about:**

- Notice to employees
- (e.g., that there are cameras present in the workplace)
- Methods used
- Random vs. targeted surveillance
- Objective cause
- Balance between intrusiveness and employer need



# Lessons Learned: Liability

- Corrections officials can and are held officially and personally liable
- Liability stems from failure to:
  - » Train
  - » Supervise
  - » Investigate, and
  - » Discipline
- Lawsuits are not just a legal issue but affect the reputation of an agency and the corrections profession



# Lessons Learned: Liability

- Examine patterns in your facility
- Same officer accused many times may mean different things
- Check many sources of information – medical, grievances, etc.
- History of inconclusive investigative findings can be problematic
- Lack of leadership – sometimes you have to take a risk

# Activity: Scenario



# Questions?

