

News Stories: Criminal Convictions for Staff Sexual Misconduct with Offenders

Note: This is a representative sample of relevant news stories. This is not meant to function as an exhaustive list.

State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/Charge	Outcome and Penalty
California	The County of San Francisco	5/2005	Gay Inmates Complain of Abuse at San Bruno Jail	Gay inmates were inappropriately touched	San Bruno Lock Up	Deputies	Prisoner Abuse	<i>Outcome unknown at this time</i>
California	San Diego County	9/20/2006	Trial Ordered for Officer Accused of Soliciting Favors from Detainees	Officers solicited sexual favors from detainees in return for their freedom	El Cajon Detention Center	Police Officer	Rape and Sexual Battery Is facing up to 19 years in prison	<i>Outcome unknown at this time</i>
California	Contra Costa County	2/13/07	Former Prison Psychologist Sentenced in Inmate Sex Case	Having sex with an inmate	Folsom Prison- CA DOC	Prison Psychologist	One felony count of having Sex with an inmate	Plead guilty- 90 days in jail and 3 years of probation. California Board of Psychology suspended her license
Colorado	Douglas County	12/26/07	Deputy Accused of Sexual Encounter with Female Inmate	Deputy at the county jail has been arrested on charges of having a sexual encounter with a female inmate	Douglas County Jail	Deputy	Sexual assault, sexual conduct in a correctional facility, unlawful sexual contact, introducing contraband into a correctional facility and official misconduct.	<i>Outcome unknown at this time</i>
Colorado	Pueblo County	3/20/2008	Guard Accused of Sex with Inmates	Male guard allegedly had sexual relations with two female inmates	LaVista Correctional Facility	Correctional Officer	Sexual Misconduct in a Penal Institution	<i>Outcome unknown at this time</i>
Connecticut	New London County	5/26/07	Prison Officials Probe Sex Allegations	State DOC investigating 8 employees for alleged sexual contact between guards and female inmates at the state's prison for women. The case has been	York Correctional Institution	Prison Guards	Sexual Assault, inappropriate touching, undue familiarity and inappropriate sexual contact	<i>Outcome unknown at this time</i>

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Connecticut Cont'	New London County Cont'			forwarded to the state police for possible criminal charges.				
Connecticut/ Federal	Fairfield County	2/1/2008	Danbury Federal Prison Guard Accused of Having Sexual Relations with Inmate	Male officer accused of engaging in sex (oral) with a female inmate	FCI Danbury	Correctional Officer	Sexual Abuse of a Ward	<i>Outcome unknown at this time</i>
District of Columbia	Washington	7/22/2006	Sexual Assault Case	A male inmate forced to have oral sex with a male guard	DC Jail-CTF	Correctional Officer		1 st Degree Sexual Abuse of a Ward 7 years
Florida	Charlotte County	5/27/2006	Guard Admits Misconduct, Officials Say: Accused of Sex with Inmate	Guard had sex with an inmate while on duty	Jail	Corrections Officer	Sexual Misconduct	<i>Outcome unknown at this time</i>
Florida	Polk County	11/7/2006	Drug Trading Ends Deputy's Career	A Female deputy offered money and sex in exchange for pain killers and had relationships with men in her chain of command	Central County Jail	Detention Deputy	Conspiracy for unlawful compensation involving official behavior	<i>Outcome unknown at this time</i>
Florida	Collier County Collier County Cont'	4/19/07	Collier Correctional Officer Charged with Sexual Misconduct with female inmate	Correctional officer was arrested after a female inmate told investigators she performed oral sex on him during work detail.	Work Detail	Correctional Officer	Sexual misconduct with an inmate	<i>Outcome unknown at this time</i>
Florida/ Federal	Leon County	8/29/06 10/4/06 and	FCI Guard Sentenced for Sex Act Guilty Plea in	Sex between a male guards and female inmates- sex for contraband scandal	Federal Correctional Institution-Tallahassee	Prison Guards	Engaging in a sex act with an inmate Mail Fraud- Guilty	3 years of probation, 6 months of home detention and fined \$10,000.00 1 year of home

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Florida/ Federal Cont'	Leon County Cont'	2/21/07 11/4/07 and 1/11/07	Florida Prison Sex Scandal Guards Guilty in Prison Sex-for- Contraband Trial				plea in lieu of charges of witness tampering, bribery and witness intimidation. Bribery, witness tampering, conspiring to accept illegal gratuity, accepting illegal gratuity	detention and 3 years of probation Guilty- each received a sentence of 1 year in prison
Georgia	Colquitt County	12/15/2006	Jailer Admits Sex with Inmate	A female jailer had sex with an inmate then transported marijuana for him and crossed guard lines with contraband	Colquitt County Jail	Jailer	Sexual Assault and Marijuana possession with intent to sell	<i>Outcome unknown at this time</i>
Idaho	Canyon County	9/12/2006	Deputy Accused of Lewd Conduct	No details released	Canyon County Jail	Sherriff's Deputy	Lewd conduct with an inmate	Terminated
Illinois	Jefferson County	8/26/2007	Jefferson County Correctional Officer Jailed for Sexual Misconduct	Sexual Assault of an inmate	Jefferson County Jail	Correctional Officer	Aggravated Criminal Sexual Assault, Custodial Sexual Misconduct and Official Misconduct	Held in the county jail pending outcome of trial or posting bail
Illinois	Will County	5/25/06	Guard Guilty of Sex with Inmate	Guard had sex with inmate in a closet at the prison	Stateville Correctional Center- IL DOC	Prison Guard	Felony custodial Sexual Misconduct	Guilty- not yet sentenced
Illinois	Cook County	6/11/2006	County Jail Guard Charged with Sexually Abusing Woman	Guard sexually abused a visitor in the jail elevator while escorting her out of the facility	Cook County Correctional Facility	Jail Guard	Criminal Sexual Abuse and Official Misconduct	Suspended without pay

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Kansas	Atchinson County	2/2006	Former Inmate Accuses Deputy of Rape	Deputy has sex with a female inmate	Atchinson County Jail	Sherriff's Deputy	Unlawful sexual relations with an inmate Faces 22 mos. and \$2 million in damages	<i>Outcome unknown at this time</i>
Kansas	Sedgewick County	5/23/2006	Former Deputy Faces Charges in Connection with Jail Sex	Male guard is accused of having sex with 2 female inmates	Sedgewick County Jail	Detention Deputy	2 Felony counts of sexual relations with an inmate	<i>Outcome unknown at this time</i>
Kansas	Butler County	8/2006	2 Butler County Sherriff's Officers Fired	Sexual Abuse of inmates	Butler County Jail	Sherriff's Officials	Sexual Misconduct Currently on administrative Leave pending outcome	<i>Outcome unknown at this time</i>
Kansas	Butler County	8/31/2006	Lieutenant Arrested on Sex Charges	Lieutenant had sex with two female inmates at jail- 2 of the 4 shifts were involved in the scandal	Butler County Jail	Lieutenant	5 counts of sexual misconduct and unlawful sexual relations	Currently only administrative sanctions- 1 resignation and 3 terminations
Kentucky	Floyd County	10/15/2007	Corrections Officer Facing Sexual Abuse Charges	Sexual abuse of a female inmate by a male correctional officer	Otter Creek Correctional Facility	Corrections Officer	Sexual relationship with an inmate	Arrested but final outcome is unknown
Kentucky	Daviess County	8/2/2006 10/4/2006	Jail Worker Charged with Misconduct Ex Jail Worker Pleads Guilty to Misconduct	Jail worker having ongoing sexual relations with a male inmate	Davies County Detention Center	Medical Technician	1 st Degree Official Misconduct and 2 nd Degree Sex Abuse Inmate may face administrative sanctions	1 st degree official misconduct 1 year in jail (suspended) and 2 years of probation
Kentucky	Kenton County	1/20/07	Deputy Jailer Accused of Rape	Jailer was accused of raping and sodomizing two female inmates while on the job.	Kenton County Jail	Deputy	3 counts of first-degree rape and three counts of first-degree sodomy.	<i>Outcome unknown at this time</i>

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Louisiana	Cowley County	7/15/06	Former Prison Guard Sentenced to Five Years	Male guard coerced a male inmate into giving him oral sex with the threat of housing him with violent inmates	Winn Correctional Center-CCA	Prison Guard	Sex with an inmate and lying to the FBI	Five Years in Prison
Maryland/ Federal	Cumberland County	11/3/06	Prison Worker Sentenced for Sex	Male X-Ray technician (contract employee) had sex with male inmates	Federal Correctional Institution-Cumberland	Medical Contract Personnel	Engaging in Sex with Inmates Under his Control	10 months in prison, \$1,500.00 fine and sex offender registration.
Maryland	Cecil County	11/6/2006	2 nd Ex-Guard Pleads Guilty in Jail Case	3 guards are involved in a sex with female inmates scandal	Cecil County Detention Center	Jail Guards	Misconduct in Office, Correctional Employee engaging in intercourse with an inmate while on duty, 4 th degree sex offense, 2 nd degree sex abuse	Fired after completion of investigation
Massachusetts	Hampton County	12/6/2006 12/27/2006	Guard, 3 Former Guards Indicted Former Guard Denies Sex Count	Guards accused of having “consensual” sex with female inmates	Ludlow Jail	Guards	Sex with a female inmate while on duty. Faces five years in prison and a \$10,000.00 fine	Indicted by a grand jury- One fired and others on unpaid leave. <i>Final outcome pending</i>
Massachusetts	Berkshire County	12/20/2006	Officer Charged with Sex Abuse	The guard allegedly had sexual relations with two female inmates while employed at the county jail.	Berkshire County Jail	Major	Sexual relations with an inmate. If convicted he is facing up to 20 years in state prison.	Currently suspended <i>Final outcome pending</i>
Massachusetts	Hampden County	1/2/2008	Former Prison Officer Gets Jail in Sex Case	Male guards having sex with female inmates	Hampden County Correctional Center-Ludlow	Correctional Officer	Sex with an inmate	2 years in the county house of correction

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Michigan	Manistee County	1/2003	Rape Case Dropped Against Sherriff's Deputy	Sexual assault of female inmate	Jail	Sherriff's Deputy	Sexual Assault	Charges Dismissed
Michigan	Ionia County	12/5/2006	Jail Officer Fired, Investigation for Sexual Misconduct with Inmate	Officer engaged in inappropriate sexual relations with 2 female inmates	Ionia County Jail	Jail Correctional Officer	Criminal charges pending for oral sex and lewd sexual behavior while on the job	<i>Outcome unknown at this time</i>
Mississippi	Harrison County	8/11/2006	Jailers Need Monitoring and Deserve Adequate Training	Jailers accused of sex with female inmates	Pascagoula Municipal Jail	Jailer	Sex with inmates	<i>Outcome unknown at this time</i>
Mississippi	Noxubee County	6/20/2006	MBI Checks Allegations Females Raped at Noxubee Jail	Allegations of female inmates being raped by male inmates are being investigated by the Mississippi Bureau of Investigations	Noxubee County Jail	Inmate on Inmate	Prisoner Rape	<i>Outcome unknown at this time</i>
Missouri	Pulaski County	3/10/2006	Jailer Accused of Sexual Assault	Jailer has sex with female inmate	Pulaski County-Central Jail	Jailer	Sexual Assault	<i>Outcome unknown at this time</i>
Montana	Cascade County	7/6/2006	Cascade County Detention Officer Faces Rape Charges	Sexual relations with female inmates	Cascade County Regional Jail	Detention Officer	3 Felony counts of Rape	<i>Outcome unknown at this time</i>
New Hampshire	Merrimack County	2/2/07	Former Half-way House Guard Guilty of Inmate Rape	Jury found a former sergeant guilty of assaulting an inmate in his office and in a half-way house van.	Shea Farm Half-way House	Sergeant	Two counts of rape and four counts of felonious sexual assault	20 to 40 years in prison

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New Hampshire	Merrimack County Cont'	4/19/07	Ex-guard gets 20 to 40 in Rape	The former sergeant is still accused of sexually assaulting 12 other female inmates and is facing trials in each of those cases.				
New York	Rensselaer County	3/24/2006	Ex-Jail Guard Convicted of Raping Female Inmates	Guard coerced inmate into having sex, fondled inmates, made phone calls to former inmates	Rensselaer County Jail	Jail Guard	Rape and Lying to FBI Faces 1-3 years for rape and up to 11 for Lying	3 RD Degree Rape
New York	Rensselaer County	11/17/2006	Jail Guard Sentenced for Sex with Inmates	Jail guard raped female inmates	Rensselaer County Jail	Correctional Officer	Supplying Contraband, Official misconduct and lying to a grand jury and the FBI	3 RD Degree Rape 1-3 years
New York	Onondaga County	5/3/07	Jail Deputy Sentenced in Sex Abuse Case	Inappropriate touching of two female inmates	Justice Center Jail		Two misdemeanor counts of sexual abuse and official misconduct	6 years of probation, 45 days in jail and sex offender registration.
North Carolina	Buncombe County	8/3/06	Former Craggy Prison Official Pleads Guilty to Inmate Sex	Sex with a prisoner over several months	Craggy Correctional Center- NC DOC	Top Prison Official	Seven Counts of Sexual Activity by a Custodian	Pled guilty in exchange for only being sentenced on two of the seven counts.
North Carolina	New Hanover County	12/28/06	Former Sherriff Deputy Sued by Woman Claiming Sexual Assault	Jail guard had sex with a female inmate	Jail	Sherriff's Deputy		One felony count of sex offense by a custodian. Sentenced to 6 mos. in jail
North Dakota	Barnes County	10/27/2006	Murder Suspect Charged with Sex Abuse of Inmates	Sexual abuse of female inmates while on duty at the jail	Barnes County Jail	Jailer	Sexual conduct with a female inmate, gross sexual	<i>Sexual Abuse Case on Hold (while standing trial for</i>

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North Dakota Cont'	Barnes County Cont'	2/7/07	Former Barnes County Jailer Pleads Not Guilty to Sex Charges	Abuse of five women while working at the jail			imposition, sex abuse of a ward, sexual assault, also linked by DNA to a 2004 Rape	<i>murder)</i>
Ohio	Cuyahoga County	8/25/2006	Cleveland Jail Guard Accused of Raping Inmate	Guard forced a male inmate to perform oral sex after threat of violence	Cuyahoga County Jail	Jail Guard	Rape of an Inmate	<i>Outcome unknown at this time</i>
Oklahoma	Tulsa County	9/19/2006	Sherriff Vows to Investigate Alleged Abuse of Jailed Teems	Allegations of abuse of juveniles held as adults	Tulsa Jail	Tulsa Sherriff's Office	Abuse	<i>Outcome unknown at this time</i>
Oklahoma	Garfield County	2/4/2007	Former Enid Jailer Faces Rape Charges	Former jailer charged with rape and sodomy for allegedly having sex with an inmate	Garfield County Detention Facility	Guard	One count of rape by instrumentation and one count of sodomy	<i>Outcome unknown at this time</i>
Oklahoma	Washington County	4/14/2008	Ex-guard faces Sodomy, Rape Charges	Sodomy and rape of an inmate	Eddie Warrior Correctional Center	Correctional Officer	Three counts of sodomy and three counts of rape	<i>Outcome unknown at this time</i>
Oregon	Clackamas County	9/21/2006	Prison Guard is Charged with Sex Misconduct	Male correctional corporal having an ongoing sexual relationship with a female inmate	Oregon's Women's Prison	Prison Guard	Three Counts of first-degree custodial sexual misconduct	<i>Outcome unknown at this time</i>
Pennsylvania	Monroe County	11/2/2007	Ex-guard pleads no contest in prison sex scandal	Sex with inmates and giving contraband to inmates involving 10 staff members	County correctional facility	Corrections Officers	Sex with an inmate	No contest awaiting sentencing Guilty- 23 mos. 1 yr. probation and \$500.00 fine

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Pennsylvania	Allegheny County	1/31/06	Cleared of Sex Charge, Jail Guard Gets Job Back	13 guards were accused in 2004 of trading sex for contraband with female inmates at the jail. Specifically, an arbitrator ruled in favor of Donald Stupka, and settled a union grievance by reinstating him. The warden tried to block this.	Allegheny County Correctional Facility	Jail Guard	One count of Institutional Sexual Assault	Thus far, 5 guards were found guilty and five have been acquitted. Three remain to be tried for the allegations. Stupka, was cleared of all charges and won reinstatement and \$88,924.00 in back pay
Pennsylvania	Monroe County	12/23/2006	High Official at Monroe Jail Fired, Sources Say	The lieutenant has been fired for allegedly seeking social contacts with ex-inmates. He is accused of violating prison policies by emailing former inmates suggesting that they meet socially for drinks. Emails were sent from his correctional facility computer.	Monroe County Jail	Lieutenant	Seeking social contacts with ex-inmates	Fired
Pennsylvania	Beaver County	3/1/07 3/5/07 3/28/07	Report Alleges Wrongdoing at Beaver County Jail Top Jail Official to be Questioned Beaver County Jail Warden Suspended One Week After Probe	A private investigation found wrongdoing including sexual encounters between guards and inmates, physical abuse and drug use. Top jail officials are being questioned before county officials begin with discipline.	Beaver County Jail	Guards	“Wrongdoing”- including 19 inmates testing positive for cocaine and both male and female guards accused of inappropriate relations with inmates	Warden suspended without pay for one week and is on probation for one year for failure to properly manage the facility.

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Pennsylvania	York County	4/28/07	Sex Assault Alleged at Prison	Medical PA is charged with having inappropriate sexual contact with a female inmate after he called her down to the medical room	York County Prison	Medical Physician's Assistant	Two counts of institutional sexual assault	<i>Outcome unknown at this time</i>
South Carolina	Saluda County	7/26/2006	Saluda County Jail Guard Arrested	Jail guard had sexual conversations with and fondled an inmate	Saluda County Jail	Guard	Sexual Misconduct with an Inmate	<i>Outcome unknown at this time</i>
Tennessee	Raone County	8/9/05	Former prison Nurse Springs Husband	A former prison nurse helped her inmate husband escape by shooting a correctional officer. The nurse was fired from her position because of her relationship with the inmate.	Riverbend Maximum Security Prison	Prison Nurse (former)	Facilitating Escape and Murder	<i>Outcome unknown at this time</i>
Tennessee	Jackson County	12/14/2006	TBI Investigates Jackson County Sherriff	Investigation (ongoing) of a series of complaints by former jail inmates	Jackson County Jail	Sherriff	Sexual Abuse	<i>Outcome unknown at this time</i>
Texas/ Federal	Brazos County	8/17/06	Prison Officer Charges in Sex with Inmate	Sexual activity between a male guard and female inmate	Federal Prison Camp-Bryan	Prison Guard	3 counts of improper sexual activity with a person in custody. While the U.S. Attorney for the Southern District of Texas refused the case the Brazos County DA has agreed to prosecute the case.	
Utah	Washington County	6/22/2006	Former Deputy Sentenced in Sex Scandal	Female inmate and probationer raped by deputy	Purgatory Correctional Facility	Sherriff's Deputies	Sexual Misconduct	3 rd Degree Felony Custodial Relations, Custodial Sexual

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Utah	Washington County Cont'	7/20/2006	Second Deputy Sentenced for Sex with Inmate, Probationer					Misconduct 120 days, mental health evaluations and \$1500.00 fine
Utah	Iron County	10/29/2006	Sex Offenses Ensnaing Officers	Guard had oral sex with inmate- also reported were decertification of guards in Davis County for sex with a probationer, South Salt Lake for in appropriate touching of a female while off duty and in Washington County, felony and misdemeanor sex with inmates	Iron County Jail	Guard	Custodial Sexual Misconduct Loss of Certification	<i>Outcome unknown at this time</i>
Vermont	Merrimack County	9/21/2007	Former Guard Charged with Sex Abuse	Male correctional officer assaulted three female inmates	State Prison	Former Prison Guard	5 counts of aggravated felonious sexual assault, two counts of felonious sexual assault and one count of simple assault	Fired in 2005 after an investigation. Criminal Charges just brought- faces up to 60 years in prison
Virginia	Fairfax County	2004	VA Ex-Deputy Guilty of Having Sex With Inmates	An ex-deputy intimidated 2 female inmates into having sex	Alexandria City Jail	Deputy	Carnal knowledge of an inmate, Abduction	6 years in prison, 3 years on probation and an \$840.00 fine
Virginia	Chesterfield County	7/27/06	Guard to Serve Six Months in Jail for Sex with Inmate	"Consensual" sex with an inmate and fathering her child	Pocahontas-VA DOC	Prison Guard	Sexual Relations with a prisoner	Five years suspended for 10 years on the condition that the guard serve six months in jail and pay \$66,917.28 in restitution.

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Washington	Pierce County	12/19/07 12/20/2007	Female Inmates Claim Sex Abuse by Prison Guards Abuse Claims Rattle Women's Prison	Male guards allegedly sexually assaulted female inmates. Allegations of failure to investigate and fear of reporting and retaliation.	Washington Department of Corrections – Purdy Prison	Guards	Sexual Abuse	Paid Leave
Washington	King County	8/31/2006	Jurors Deadlock in Jail Sex Case	Sex with 5 Female inmates	King County Jail	Jail Guard		Mistrial- New trial set for January, 30, 2007
Washington	King County	8/10/2006 12/2/2006	Sex Claims Outlines at Guard's Trial County Jail Officer to Become an Inmate	Guard exposed himself, fondled and had sex in a storage closet with 2 female inmates	King County Jail	Guard	Custodial Sexual Misconduct	Custodial Sexual Misconduct 12 months in jail 8 months suspended
Washington	King County	1/6/2007	Former Jail Guard Sentenced in Sexual Misconduct Case	The guard was accused of making sexual comments to a female inmate in March of 2005 and receiving oral sex from her. The charges also involve another woman who the guard had sexual contact with while she was on work release in 1999.	King County Jail	Guard	Second-degree custodial sexual misconduct and third degree assault	6 months in jail and had to resign his position at the jail.
Washington	Clallam County	7/26/2006	Sex Incident in Jail Prompts Changes	Inmates conspired to have sex in jail	Callam County jail	Inmate on Inmate	Security Lapse	Male inmate disciplined

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Washington	King County	3/6/07	Feds Investigating King County Jail	Federal Investigators will be at the King County Jail looking into sexual abuse of inmates, allegations of inadequate suicide prevention and contagious disease control.	King County Jail	All	Sexual abuse of inmates, allegations of inadequate suicide prevention and contagious disease control.	<i>Outcome unknown at this time</i>
West Virginia	Marshall County	4/29/2006	Female Guard Accused of Having Sex with Inmate	Female jail guard is accused of having sex with male inmate in her office	Jail	Guard	Felony charge of imposing intercourse on an incarcerated person and bringing a cell phone to jail and letting an inmate use it- Facing 1-5 years and a \$5,000.00 fine	<i>Outcome unknown at this time</i>
Wisconsin	Dane County	4/5/06, 9/18/06 and 10/27/06	Former Prison Guards Charged with Sex Assault	Two female correctional officers allegedly had sex with a male inmate while on duty	Oakhill Correctional Institution	Prison Guards	Second degree sexual assault	Two years of probation and a \$1,000.00 fine
Wisconsin	Dane County	10/26/06	Prison Cook Faces Charge; Sex with Inmate at Oakhill Alleged	Sexual relationship with an inmate	Oakhill Correctional Institution	Prison Cook	Second degree sexual assault by correctional staff	<i>Outcome unknown at this time</i>
Wisconsin	Milwaukee County	7/27/2006	Milwaukee Deputy Convicted of Sexually Assaulting an Inmate in 2005	Deputy forced female inmate to perform oral sex in jail	Milwaukee County Jail	Sherriff's Deputy	Faces up to 40 years	2 nd Degree Sexual Assault of an inmate by a CO, 2 nd Degree Sexual Assault with the use of force
Wyoming	Platte County	9/27/2006	Two Others Face Trial in Platte Jail Sex Case	Sex with female detainees and stealing mail	Platte County Detention Center	Guards	2 nd degree sexual assault, mistreating a person in an institution, bribery, larceny and reckless endangerment	<i>Outcome unknown at this time</i>

Unwanted Sex

The Culture of Intimidation
and the Failure of Law

STEPHEN J. SCHULHOFER

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England 1998

The professor's objectivity in grading is at risk every time he makes a sexual advance, regardless of whether the student responds positively or rebuffs him.

The refusal of most universities to take a firm stand against the "no harm in asking" approach is difficult to understand, except in terms of faculty self-interest. It is true that such a rule can squelch some mutually desired relationships, because the weaker party, though willing, might hesitate to take the initiative. But the costs of a rule against "just asking" are even more limited in an academic environment than in the workplace. Restrictions on supervisor-subordinate liaisons at work can put a large proportion of an employee's potential relationships off limits, because many other employees may have higher rank or potential supervisory authority, and supervisory relationships are likely to be long-lasting. In academic settings, the line between peers and superiors (students and teachers) is more clearly marked, and few relationships are precluded by a rule against professors' dating their current students, because the restriction expires as soon as the student completes the course. If a professor discovers a genuine attraction for a current student, little will be lost by requiring him to defer any sexual advance until the end of the semester. (An attraction between a graduate student and her adviser is different in this respect, especially if there are no other professors qualified to supervise research in her specialty.)

Universities should provide that it is never appropriate for a professor to initiate a sexual relationship with a current student. Policies that merely "discourage" such conduct have little value because they are difficult or impossible to enforce, especially against tenured professors.⁸⁰ The prohibition should be unequivocal.

Whether universities should ban sexual contacts initiated by the student is more debatable. If conflict-of-interest rules make clear that the student can't gain preferential treatment through the liaison, there might be reason to accept her preferences as genuine. And if the professor can no longer supervise her work, there might be little risk of coercion or harm to the academic enterprise. It is usually better to emphasize policies that empower students to choose freely, rather than trying to protect them from their own choices by prohibiting sexual encounters altogether.

Nonetheless, businesses often ban supervisor-subordinate relation-

ships even when the lower-ranking employee invited the relationship, partly to avoid difficult judgments about which party really took the initiative. In an academic setting, there is even stronger justification for a similar rule. Unlike most workers, college students are not yet fully mature or independent, psychologically or financially. In addition, teachers, more than most job supervisors, have a mentoring role that depends on trust, and they usually have some responsibility for the emotional development of the whole person. (Again, graduate students in some fields may be different in these respects.) And a ban on all intimate liaisons between teachers and their current students would stifle few important relationships over the long run, because the student, like the teacher, would be free to act on her attraction as soon as the semester ended.

At the undergraduate level in particular, the best answer to these questions is unlikely to vary from one college to another. Adequate protection of sexual autonomy requires direct personal liability for sexual harassment, together with a flat ban, as a matter of university policy, on any sexual liaison between a professor and his current student.

Prisons

Remote from most people's everyday life and experience, sexual abuse in prisons is an unseen but serious problem. In many states, male inmates face constant risk of violent rape at the hands of fellow prisoners. Abuse of women prisoners by their male guards is also widespread, and in many jurisdictions it appears to be increasing. Yet unlike the rape of male inmates, the abuse of women prisoners often takes forms that are not considered illegal.

Rapidly escalating numbers of women in prison have exacerbated the problem. From 1980 to 1996, a period when the male prison population rose by 295 percent, the number of women in prison grew by 455 percent.⁸¹ Today there are more than 70,000 women in state and federal prisons and another 55,000 serving short sentences or awaiting trial in local jails.⁸² The 1980s and 1990s also witnessed growing sensitivity to employment discrimination, and the field of corrections work was not exempt. Vigorous enforcement of antidiscrimination laws opened opportunities for female corrections officers to work in all-male prisons,

where control problems are more serious and opportunities for experience and promotion are greater. As female guards moved out of women's prisons and as gender-neutral assignment policies led to increasing numbers of male guards to be posted there, more and more women inmates came under the control of male guards. During the same period when the number of female inmates was rising steeply, prison officials' ability to use female officers to guard the women drastically contracted. The results were predictable:

In the District of Columbia, female inmates finally resorted to a class-action lawsuit to challenge the pervasive pattern of rape, sexual assault, and other mistreatment. In a 1994 decision, Federal Judge June Green found that sexual abuse was a recurrent problem at the District's prisons for women. Male guards and other staffers coerced women into sexual submission by overt force, by threats to file disciplinary charges, and by providing inmates with cigarettes, candy, food, and money. Many of the women became pregnant as a result of these relationships.

Judge Green also found that when sexual misconduct occurred, administrative responses were inadequate: Department of Corrections policies contained no clear prohibition of sexual contact between guards and prisoners, and an atmosphere of general acceptance of these relationships prevailed. The procedures in place to prevent sexual abuse were of little value because the Department responded to complaints with "cursory investigations and timid sanctions."⁸³ When female corrections officers tried to protect inmates from abuse, their male supervisors threatened to retaliate against them.⁸⁴

To remedy the problems, Judge Green required the Department of Corrections to adopt clear policies against sexual harassment and to train personnel accordingly. She also appointed a special monitor to investigate complaints of sexual misconduct. In a 1996 appeal challenging that decision, the U.S. Court of Appeals upheld the judge's factual findings but ruled that most of the remedies she had ordered, including her appointment of a special monitor, were "overly intrusive" and therefore beyond the court's power.⁸⁵ The Department of Corrections promulgated a new policy prohibiting "unwelcome" sexual contact, and a District of Columbia statute that took effect in 1995 now makes it a felony for a correctional officer to have any sexual contact with an inmate, even with consent. But enforcement of both regulations remains

ineffective, in part because legislation enacted in 1996 limits the authority of federal courts to remedy custodial abuses.⁸⁶

Similar problems are probably common throughout the country. Human Rights Watch, the organization that monitors human rights issues around the world, recently investigated sexual abuse of women prisoners in six American jurisdictions—California, Georgia, Illinois, Michigan, New York, and the District of Columbia. Its report, issued in December 1996, documents pervasive abuses in each of the six prison systems.⁸⁷ Forcible rapes and brutal sexual assaults against female prisoners occur in every jurisdiction. More subtle forms of coercion are also common. Inmates submit to sex with their guards just to get such privileges as a few ice cubes or candy bars, a chance to make an extra phone call, or a little time outside their cells after hours. Many of the women have been abused for much of their lives before coming to prison and see nothing unusual in such relationships. One inmate, Susan R., said that she became involved with a male guard primarily out of loneliness: "when a male figure shows you a little attention it made me feel special, worthy of something . . . I wanted the attention."⁸⁸ Yet prisoners who initially welcomed these encounters later found they had difficulty extricating themselves from the guards' control. Fear of reprisals tends to keep inmates tied to these relationships.

The prevalence of rape and other physically brutal mistreatment underscores a widespread failure to make a reality of legal standards that are universally accepted in theory. But many of the abuses described in the Human Rights Watch report are not illegal. When a guard asks a prisoner for sex in return for liquor, cigarettes, or extra time outside her cell, his demand—like any corrupt offer—should be considered coercive in its practical effect. But sex obtained in this way is seldom treated as a form of rape, and in many states it is not illegal at all. When a lonely, vulnerable inmate initiates a sexual encounter to get a bit of affection and attention, it is even harder to consider the guard's behavior "coercive," and again, his conduct is not necessarily illegal.

A few states have long-standing prohibitions on sexual contact between prisoners and their guards. As the number of women prisoners has grown, many states have enacted new laws to address the issue. Nonetheless, roughly a third of the states still have no statute making it a crime for a prison guard to have sex with an adult inmate under his

control.⁸⁹ In Maryland and Virginia, recent efforts to enact such a prohibition were rejected in the legislature.⁹⁰

Several states, in moving to confront the problem, have enacted statutes that are severely flawed. Colorado, Texas, and Wyoming criminalize guard-inmate relationships only when it can be proved that the officer “coerce[d] the victim to submit.”⁹¹ Three other states—Arizona, Delaware, and Nevada—permit criminal punishment of *both* the guard and the prisoner.⁹² The provision for punishment of the inmate is fatal to hopes for effective enforcement, because it requires the prisoner to pay a steep price for reporting the offense. All told, roughly half the states still have no criminal statute effectively prohibiting sexual contact between guards and their prisoners.⁹³

The reason for this resistance to criminalizing sexual contact with inmates is obscure. Some union officials representing corrections officers worry that a statutory ban will encourage prisoners to file false charges. In debates over the prohibition that New York finally enacted in 1996, state assemblyman Michael Balboni objected, “You’re handing one of the most litigious populations a powerful tool. You’re talking about people who are not particularly believable.”⁹⁴ But if consensual sex is not prohibited, inmates interested in making false claims can just as easily charge rape.⁹⁵ If anything, false charges and ambiguous factual disputes are probably more likely when threats must be proved than when any sex act is automatically illegal. Moving to even shakier ground, Balboni also raised the familiar specter of the helpless male, at the mercy of his own sex drive, victimized by the power of a woman’s sexual allure: “I don’t want to sound like a Neanderthal, but what about seduction?”⁹⁶

Efforts to safeguard sexual autonomy typically pose a dilemma, pitting the need to avoid *potential* abuses of power against the need to respect the desires of the affected individuals themselves. But most sexual encounters between guards and inmates probably are not voluntary, and even when the inmate’s desire for the encounter is genuine at the outset, coercion may enter the picture later if the inmate wants to end the relationship and the guard does not. Though some voluntary relationships undoubtedly exist, the prison setting makes them hard to distinguish from sexual submission motivated primarily by fear. And voluntary relationships are never legitimate in any event. Society has

deliberately deprived the inmate of her freedom, including her sexual freedom. Married prisoners are deliberately denied conjugal visits, in part because this deprivation is seen as a legitimate aspect of their punishment. A rule prohibiting sexual contact does not *improperly* restrict the inmate’s freedom, even when it blocks a truly desired relationship.

The guard’s freedom is also constrained, of course. But if the innocent wife of an imprisoned male offender can lose her right to sexual fulfillment with her spouse during his confinement, as the law on conjugal visits currently permits, the prison guard can hardly claim that *his* legitimate freedom of action is impaired when he loses the right to have sex with a prisoner under his control.

The inmate who willingly has sex with a guard is (in theory) an offender, not a victim of sexual abuse. But voluntary encounters are likely to be a small minority of the total, and any attempt to punish inmate-participants in “voluntary” cases will chill reporting and impede enforcement in the more frequent situations in which the inmate was coerced to submit. Genuine consent could be a mitigating factor in sentencing the guard, but it should never provide a defense for the guard or a reason to prosecute the inmate.

Administrative bans and criminal penalties for guards will mean little, however, if inmate complaints are not taken seriously. Prisoners who complain must be assured of confidentiality and protected from reprisals. Administrators must make serious efforts to prosecute guards who engage in misconduct.⁹⁷ Perhaps even more important are steps to reduce the opportunities for abuse. Prisoners should be informed of the limits that guards must respect, male guards should no longer be permitted to serve in women’s housing units, and male guards should be accompanied by female guards whenever they are in contact with female prisoners.⁹⁸ Vigorous efforts to ban all sexual contact will support the prisoners’ right to be free of sexual coercion and in no way impair the legitimate autonomy claims of either the inmates or their guards.

78. Such a claim could be made, however, if the professor creates an expectation that students must "offer" themselves in order to be treated fairly. The situation would be comparable to that of the New Jersey political machine discussed in Chapter 8.
79. *Naragon v. Wharton*, 737 F.2d 1403, 1405 (5th Cir. 1984).
80. Sutes, "University Policies" at 158.
81. U.S. Dept. of Justice, Bureau of Justice Statistics, "Prisoners in America 1996" (1997); Stan C. Proband, "Rapid Increase in Woman Prisoners," *Overround Times*, April 1997, at 4.
82. U.S. Dept. of Justice, Bureau of Justice Statistics, "Prison and Jail Inmates at Midyear 1996" 4, 6 (Jan. 1997).
83. *Women Prisoners of D.C. Dept. of Corrections v. District of Columbia*, 877 F. Supp. 634, 640 (D.D.C. 1994), *rev'd* on other grounds, 93 F.3d 910 (D.C. Cir. 1996).
84. See Human Rights Watch Women's Rights Project, *All too Familiar: Sexual Abuse of Women in U.S. State Prisons* 1117-18 (New York, 1996) (hereafter HRW). See also Neal v. Director, D.C. Dept. of Corrections, 1996 WL 293525 (D.D.C.) at *1 (reporting court's finding that the department "engaged in a pattern or practice of retaliation against employees who challenged or complained of sexual harassment").
85. *Women Prisoners*, 93 F.3d 910.
86. Prison Litigation Reform Act of 1996, P.L. 104-134, 18 U.S.C. §3626. Human Rights Watch found that the department began responding more effectively to sexual abuse complaints after the 1994 court decree, but that allegations of sexual misconduct persisted. See HRW at 124-125.
87. *Id.* for similar findings, see Agnes L. Baro, "Spheres of Consent: An Analysis of the Sexual Abuse and Sexual Exploitation of Women Incarcerated in the State of Hawaii," 8 *Women & Crim. Just.* 61 (1997); "Crucel and Unusual: A Special Report on Women and the Prison System," *Women's Review of Books*, July 1997, at 3-25.
88. HRW at 77.
89. See *id.* at 38-43. Illinois enacted a prohibition in July 1997. See Ill. Comp. Stat. §5/11-9.2 (St. Paul: West, 1997).
90. Stephen Andrews, "The Criminalization of Sexual Relations between Guards and Inmates" (1997), paper on file, DiAngelo Law Library, University of Chicago, p. 5.
91. Colo. Rev. Stat. 18-3-403 (1986 & Supp. 1995). See Andrews, "Guards and Inmates" at 5-6. The language of the statutes in Texas and Wyoming is slightly different, but both have the effect, like Colorado's statute, of making some guard-inmate sexual relationships permissible.
92. Andrews, "Guards and Inmates" at 6-7.
93. *Id.*
94. *New York Times*, April 23, 1996, at A12.

95. In a 1997 case, the federal government charged Joe McManus, a guard at a federal detention facility in Oklahoma, with having sex with an inmate. Although such conduct is a federal offense regardless of whether the inmate consents, McManus denied the inmate's claim that he threatened her with transfer to a disciplinary unit and said that the sex was voluntary. John Parker, "Federal Guard Freed while Sex Charge Is Pending," *Daily Oklahoman*, March 26, 1997, at 14.
96. *New York Times*, April 23, 1996, at A12.
97. See HRW at 13-16. For examples of prosecutors' reluctance to bring charges, even after laws were amended to eliminate inmate consent as a defense, see Baro, "Spheres of Consent" at 71-78.
98. HRW at 338.
- 10 PSYCHIATRISTS AND PSYCHOLOGISTS
1. Carolyn M. Bates & Annette M. Brodsky, *Sex in the Therapy Hour: A Case of Professional Incest* (New York: Guilford Press, 1989).
2. *Id.* at 35.
3. *Id.* at 114.
4. S.D. Codified Laws §22-22-29.
5. Ariz. Stat. §13-1418; Wis. Stat. Ann. §940.22.
6. Idaho Code §18-919; Cal. Bus. & Prof. Code §729.
7. Cal. Civ. Code §51.9.
8. H.R. 3646, 104th Cong., 2d sess., §2(b)(3) (1996).
9. *Id.* at §2(b)(2).
10. *State v. Leiding*, 812 P.2d 797, 805 (N.M. App. 1991).
11. N.M. Stat. Ann. §30-9-10(A) (1984).
12. *Leiding*, 812 P.2d 797.
13. Interview with Michael E. Virgil, attorney for Leiding, June 18, 1997.
14. William Masters & Virginia Johnson, *Human Sexual Inadequacy* 389, 391 (Boston: Little, Brown, 1970).
15. See, e.g., Susan Baur, *The Intimate Hour: Love and Sex in Psychotherapy* 84 (Boston: Houghton Mifflin, 1997) (citing 1973 code of the American Psychiatric Association, 1977 code of the American Psychological Association, and similar codes of other groups of mental health professionals); Kenneth S. Pope & Jacqueline C. Bounoutsos, *Sexual Intimacy between Therapists and Patients* 31 (New York: Praeger, 1986) (citing in addition the 1980 code of the National Association of Social Workers and the 1982 Code of the American Association for Marriage and Family Therapy).
16. Baur, *Intimate Hour* at 90; Nanette Gartrell et al., "Psychiatrist-Patient Sexual Contact: Results of a National Survey. I: Prevalence," 143 *Am. J. Psychiatry* 1126 (1986).
17. Gartrell et al., "Psychiatrist-Patient Sexual Contact" at 1126, 1128.
18. E.g., *id.* at 1126; see also Baur, *Intimate Hour* at 152.

PROSECUTING SEXUAL VIOLENCE IN CORRECTIONAL SETTINGS:

EXAMINING PROSECUTORS' PERCEPTIONS[†]

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Introduction

The Prison Rape Elimination Act of 2003¹ (PREA) is the first piece of federal legislation, which expressly and exclusively addresses sexual abuse of persons in custody. Notwithstanding passage of the Act, there is clear belief, echoed by correctional leaders, that prosecutors are reluctant at best, and unwilling at worst, to prosecute cases of sexual violence in correctional settings. In order to gather information on prosecutor interest in and capacity to prosecute these cases, the National Institute of Corrections Project on Addressing Prison Rape at the Washington College of Law the (the NIC/WCL Project) collected data from state and federal prosecutors.

This article draws on that research and data to examine the perception that prosecutors are unwilling to prosecute cases of sexual violence in custody, discusses barriers to prosecution identified by prosecutors regarding investigating and prosecuting allegations of sexual abuse of persons under correctional supervision, and recommends tools to overcome those barriers.

Background and Methodology

Background

In 2000, the NIC/WCL Project began training high-level correctional administrators on identifying, addressing, and investigating allegations of staff sexual misconduct with offenders. Each year eight training teams from different states fielded three-person teams composed of key correctional decision makers for the state or agency, e.g., sheriffs, wardens, commissioners, and heads of human resources, investigations and training. Relatively quickly, correctional leaders acknowledged that staff sexual misconduct was an important safety issue that agencies needed to address. However, strengthening investigations and sanctions remained challenging. While investigators and correctional administrators knew they had much work to do to improve investigations, they complained that prosecutors were unwilling to take cases to trial. As a result, often their only tool was termination of the employee in strong cases and allowing the employee to resign in others.²

After hearing for some time that investigations were fruitless because of a lack of prosecutorial interest in sexual violence against persons under custodial supervision, the NIC/WCL Project required each three-person team that attended its investigative training to include a state or local prosecutor. They believed this inclusion would create collaboration and

help each—corrections leaders and prosecutors—understand the other's challenges in addressing sexual violence in custody. Segments of the training, *Investigating Allegations of Staff Sexual Misconduct with Offenders*, were specifically designed to identify the barriers to prosecuting cases of sexual abuse of individuals under correctional supervision and strategies for overcoming those barriers.³

While training eight prosecutors a year for each of the state teams was helpful to the states, the NIC/WCL Project sought to have a larger impact. Seeking to address the lack of information on prosecuting sexual violence in custody, the NIC/WCL Project sought, and was granted, funding from the National Institute of Corrections (NIC) to work with prosecutors to develop a report addressing the existing relationships between law enforcement, correctional professionals, and prosecutors in addressing and prosecuting cases of prison rape.

Methodology

The NIC/WCL Project used three methods to compile information for the report. First, it conducted a literature review in order to identify previously identified barriers to prosecuting cases of sexual abuse of individuals in custody. Second, a NIC/WCL Project consultant conducted telephone and in-person, one-on-one interviews of prosecutors from February to May of 2006. Finally, the Project conducted a series of focus groups with federal and state/local prosecutors.

Literature Review

The NIC/WCL Project reviewed five kinds of resources: (1) case law; (2) statutes; (3) government reports; (4) reports by advocacy groups; and (5) news stories. The literature review provided background on sexual abuse of individuals in custody and validated barriers that prosecutors later identified in interviews and focus groups. The literature review also assisted in drafting questions to be asked during interviews of individual prosecutors and during focus groups of federal and state/local prosecutors.

Interviews

An NIC/WCL Project consultant conducted both telephone and face-to-face interviews with state/local and federal prosecutors from around the country. Eight formal interviews and twelve informal interviews were conducted. The interviewees were selected based on the following criteria: (1) jurisdiction; (2) experience prosecuting sex cases; (3) experience prosecuting prison cases; and (4) referrals by other legal and correc-

tional professionals in the field.

Interview participants were asked the following questions:

1. What is your experience in the area of prisons (prosecutions, sexual abuse, contract facilities)?
2. Why are allegations of sexual abuse of prisoners rarely prosecuted?
3. What barriers exist to prosecuting these cases?
4. What can be done to lift the barriers and improve the likelihood of prosecuting these cases?
5. What is the response of judges and juries regarding the sexual abuse of prisoners?
6. What about cases involving inmate-on-inmate sexual violence - are these cases successfully prosecuted?

Focus Groups

After holding a series of “breakout sessions” with prosecutors during NIC/WCL Project training sessions, it was apparent that group discussions with prosecutors would yield rich information on this subject. In the interest of reaching a greater population of prosecutors, the NIC/WCL Project held focus groups with federal and state/local prosecutors. The focus groups also generated discussions and encouraged the exchange of ideas between prosecutors, which could not be accomplished through one-on-one interviews. Twenty-seven prosecutors attended the focus group meetings—seven federal and twenty state and local prosecutors.⁴

Federal Focus Group

The federal focus group consisted of seven federal prosecutors, two federal investigators and one federal victim services coordinator. The NIC/ WCL Project extended invitations to individuals based on recommendations from former prosecutors and the United States Department of Justice (DOJ). During the first session of the meeting, prosecutors identified their experience with prosecuting cases from correctional agencies with a focus on sexual assault and abuse. During the second session, prosecutors addressed issues of barriers to federal prosecution and tools available to overcome those barriers.

State Focus Group

The state focus group consisted of nine state and local prosecutors. The NIC/WCL Project extended invitations to individuals based on recommendations from correctional practitioners and past participants of NIC/WCL Project trainings. Specifically, the NIC/WCL Project sent a request to its listserv for contact information of prosecutors who had either prosecuted these cases or were particularly helpful in getting these cases heard. The NIC/WCL Project received over twenty responses from correctional professionals across the country. In extending the final invitations, the NIC/WCL Project considered geo-

graphic location and prosecutorial success. While all of the prosecutors who received invitations were interested in the Project, many could not attend the focus group because of scheduling conflicts. Issues addressed during the state prosecutors’ focus group mirrored those from the federal prosecutors’ meeting. Findings from the study are detailed below.

The Perception that Prosecutors Are Unwilling to Prosecute Cases of Sexual Violence in Custody

The perception that prosecutors are either reluctant or unwilling to prosecute cases of sexual violence in custody is well-founded. Both government reports⁵ and testimony by current⁶ and former prosecutors⁷ reveal that these cases present significant challenges in the current prosecution environment. First, these cases are not high profile, high value cases; they do not increase the stature of the prosecutor within his office and the community at large. In fact, prosecuting these cases could significantly weaken a prosecutor’s standing in the community by making her appear to be soft on criminals. Additionally, in many jurisdictions correctional staff are sworn peace officers who, as alleged sexual offenders, are the same individuals that prosecutors must rely on to testify in their other criminal cases.

Second, unsympathetic victims, delayed reports of the assault, lack of physical evidence, poor investigations, and conflicting testimony in these cases make them high risk cases. Prosecutors often measure their success by their wins.⁸ Sexual assault cases are notoriously hard to win.⁹ Custodial sexual abuse cases are even more difficult and expose prosecutors to the possibility of expending valuable resources on a case that may not have a high likelihood of prosecutorial success – either a plea or conviction.

Third, prosecutors often see their role as securing significant sentences for hardened criminals. Some may even believe that being assaulted, physically or sexually, is a part of the penalty for the crime. However, the more informed view is that prosecutors must ensure that individuals who are sentenced to imprisonment are in safe and secure environments. Either way, prosecutors may be reluctant to pursue prison sexual assault cases because they see their job as done after securing the conviction or because they do not view crimes that occur in confinement as part of their purview.¹⁰

Barriers to Prosecuting Prison Sexual Assault Cases

Differences between Administrative and Criminal Cases

One of the major barriers identified by both state and federal prosecutors is the difference in standards of proof required for discipline in administrative proceedings and the burden of proof that prosecutors must meet in criminal proceedings. In administrative proceedings, the standard of proof required by the person seeking the administrative action is generally “preponderance of the evidence.”¹¹ In criminal cases, prosecutors will only secure convictions if they prove each

element of an offense “beyond a reasonable doubt.”¹² Both Inspector General Glenn Fine and Senator Jeff Sessions discussed the lack of prosecutions in custodial sexual abuse cases in their testimony before the National Prison Rape Elimination Commission (NPREC).¹³ They both noted the importance of prosecutions, yet acknowledged the difficulty in bringing these cases.¹⁴ Each raised the standard of proof as one of the major difficulties in prosecuting prison sexual assault cases.¹⁵

Staff Sexual Abuse of Offenders

During focus groups held with state and federal prosecutors, attendees pointed out that proceedings to impose administrative sanctions often preceded criminal prosecutions in staff sexual misconduct cases. They agreed that this timing often creates a problem for criminal prosecutions.¹⁶

First, the burden of proof in an administrative proceeding is lower. If a staff member is successful in the administrative proceeding, it often implicitly discourages additional action in the criminal matter, given the lower burden of proof in administrative cases. Second, investigations that are conducted for purposes of the administrative proceedings can often taint later criminal prosecutions, particularly if the suspect employee is compelled to testify under threat of losing employment. Case law makes clear that, employee testimony secured under threat of firing is compelled and cannot be used in a later criminal prosecution.¹⁷ Finally, often correctional staff are allowed to resign, an administrative sanction, in lieu of being criminally prosecuted for sexual abuse with persons in custody. Prosecutors generally recognize that with the burden of proof so high for a criminal case, administrative sanctions will be the most likely outcome in many cases and thus recommend harsher administrative penalties as a substitute for prosecution.¹⁸

While this may seem to be an appropriate solution, it creates a number of problems. In particular, staff who resign or are even fired are often rehired in other correctional environments, potentially importing their predatory behavior with even more vulnerable populations. Moreover, in the absence of a criminal conviction, it is difficult to flag predatory staff. Agency fears of employee lawsuits for libel or slander,¹⁹ mean that in practice employers provide little information other than the dates of employment for past employees, giving little notice to others of the reason for termination. Finally, the resignation creates a sense among employers and prosecutors that the matter is resolved. Given the high burden of proof in criminal cases, many prosecutors see this as a just result, failing to realize that prosecution accomplishes other goals – a public recognition that sexual abuse of offenders rises to the level of a crime, that prisoners are victims who deserve their day in court as well, and that no one is above the law.

Inmate-on-Inmate Sexual Abuse

Most prosecutors, federal and state, who were interviewed and attended focus group meetings, had not tried inmate-on-inmate sexual abuse cases. Federal investigators and prosecutors noted that they may not have seen inmate-on-inmate cases because investigation of those incidents in Federal Bureau of Prison (BOP) facilities are handled by the Federal Bureau of Investigations (FBI). Both federal and state prosecu-

tors agreed though, that a more likely scenario is that the incidents of inmate-on-inmate sexual abuse are not being reported or are handled administratively. While federal prosecutors stated that they would prosecute a forcible rape case if one was brought to them, none who participated in the focus groups or individuals interviewed had ever done so.²⁰

“Consensual” v. Forced Sex

Another barrier to prosecuting cases of sexual violence in custody is the issue of consent.²¹ The defense of consent is a major factor in the decision to prosecute these cases, according to both federal and state prosecutors. This is true whether the case involves staff sexual abuse of inmates or inmate-on-inmate abuse.

Staff Sexual Abuse of Offenders

All fifty states, the District of Columbia, and the federal government prohibit staff sexual abuse of offenders.²² Twenty-five states and the District of Columbia specifically provide that inmates cannot consent to sex with staff.²³ The large majority of states recognize that staff have tremendous control over every aspect of an offender’s custody. That imbalance of power negates consent. However, two states, Nevada and Delaware, have laws which recognize that inmates can consent to sex with staff. In Delaware and Nevada, inmates can be prosecuted for consensual sex with staff members.²⁴

Even though statutes, were enacted to address the issue of inmate consent by creating separate crimes for this offense, prosecutors still find it difficult to prosecute these cases. Both state and federal prosecutors noted that while it was easier for juries to understand the abuse of power issue, juries have problems accepting the credibility of inmates. Juries perceived inmates as liars with a bias against corrections staff, as well as having a financial motive for making the allegations. Additionally, prosecutors reported that juries often viewed both male and female inmates as seducers of correctional staff.²⁵ Often, both male and female inmates have histories of work in the sex industry, and histories of physical and sexual victimization.²⁶ These histories make them more vulnerable to sexual abuse and at the same time more willing to use sex to bargain for better treatment.²⁷ For example, in a 2005 Bureau of Justice Statistics (BJS) publication on correctional authorities’ reports of sexual violence in custody, correctional agencies classified two-thirds of all staff sexual abuse of inmates as romanti; in 2007, they classified fifty-seven percent of staff sexual abuse of inmates as “appeared willing.”²⁸

Inmate-on-Inmate Sexual Abuse

Inmate-on-inmate sex in correctional settings presents a different barrier to prosecution. In correctional settings, there is a continuum of sexual behavior between inmates that goes from rape to completely consensual sex. Between those ends of the spectrum are coerced and strategic sex.²⁹ Complicating matters, consensual sex today can become forced, coerced or strategic at some other point. In other words, the behavior and the motivation of the parties are not static and often change. This flux in the conduct creates tremendous bar-

riers to prosecution both in the community and in prison. One federal prosecutor stated that she would be unlikely to prosecute a case of inmate-on-inmate sexual abuse unless there was physical evidence of violence such as injuries or eyewitness testimony.³⁰ Prosecutors reported less interest in a case where “consent” is an available defense unless there was also evidence of additional crimes, such as the presence of contraband or the threat of violence.

While consensual sex between inmates may be a conduct code violation punishable administratively, it is generally not a crime. Even in those places where it is a crime,³¹ it is not a high priority for prosecutors. If one offender claims that the sex was consensual, prosecutors complain that they become “he said, she said” cases involving two inmates, both convicted offenders with clear issues of credibility.

Deficiencies in Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody

Prior to 1990, most state and federal jurisdictions did not have laws which specifically prohibited the sexual abuse of individuals under correctional supervision by correctional staff. As a result, few corrections staff could be prosecuted for the sexual abuse of persons in custody. Today, each of the fifty states and the federal government have passed laws making it a crime for correctional staff members to engage in any sexual conduct with a person in custody.³²

Even after this conduct was criminalized, however, sexual abuse of persons in custody by corrections staff carried relatively lenient sentences compared to sexual assault statutes covering rape in the community.³³ This was especially true under federal law, where prior to 2006, sexual abuse of a ward was a misdemeanor.³⁴ Not surprisingly, federal prosecutors cited low penalties as the primary reason for not prosecuting custodial sexual abuse cases.³⁵ Recent amendments to state and federal laws have substantially increased the penalties for sexual abuse of offenders, but it is difficult to determine the effect of these enhancements on prosecution, particularly in the federal system where the changes are so recent and prosecution statistics for these cases have not been studied.³⁶

Federal Law

In April 2005, the Office of Inspector General (OIG) issued a report which found federal laws prohibiting sexual abuse of persons in custody deficient in two respects. First, while the federal law³⁷ criminalized all sexual relations or contact between prison staff and offenders, those acts were classified as misdemeanors, and thus punishable by a maximum sentence of one year, unless the conduct involved force or overt threats. Second, the OIG report noted that the federal laws did not apply to employees of contract facilities,³⁸ further hampering OIG and federal prosecutors in “obtaining prosecutions” of sexual abuse in those facilities.³⁹ Compounding the problem was the fact that state prosecutors often had limited resources which they could focus on prosecuting sexual abuse in correctional facilities at the state level. This lack of resources fore-

closed them from prosecuting cases that occurred in private contract facilities which often housed federal inmates.

OIG recommended that federal law be amended to correct these deficiencies. Amendments were passed and became effective on January 5, 2006, making sexual abuse of an offender by corrections staff, absent force or overt threats, a felony punishable by up to five years imprisonment. The amendment also expanded federal jurisdiction to include sexual abuse of federal prisoners housed in private correctional facilities. Another piece of legislation, The Adam Walsh Child Protection and Safety Act, also passed in 2006. This Act increased penalties for the sexual abuse of a minor or ward to fifteen years.⁴⁰

The new legislation should result in more cases involving allegations of sexual abuse in BOP facilities being investigated⁴¹ and presented to United States Attorney’s Offices (USAOs) for prosecution. However, the likelihood of full prosecution on the merits after a case is presented remains to be seen. Still, prosecutors faced with limited resources must consider investing time and resources in cases where victim/witness reliability is an issue and where potential defendants are law enforcement officers who are community members without criminal records. Prosecutors are also concerned about jury and judge appeal for the reasons identified above. The combination of these two factors creates a perceived and real risk that prosecutions will fail. Additionally, sex offender registration requirements, while providing stronger penalties,⁴² also makes judges and juries more reluctant to convict these law enforcement defendants in the absence of exceptionally strong evidence.⁴³

State Law

While all states have criminalized, in some form, the sexual abuse of persons in custody, these laws are not uniform and vary widely. State prosecutors report that often state statutes still do not cover custodial sexual abuse in a number of settings--parole and probation for example.⁴⁴ Some states allow consent as a defense in staff abuse of inmates⁴⁵ and still others impose minimal sanctions.⁴⁶

In some states, prosecutors voiced frustration with their statutory scheme that only made prosecution of sex offenses of persons in custody a misdemeanor. With low maximum penalties, i.e., misdemeanor status, prosecutors believed it signaled that the offense was not serious, or at least not a priority. Others felt it gave them far less bargaining power in plea negotiations. Moreover, in many states, corrections officers cannot be terminated simply because they have a misdemeanor conviction.⁴⁷

Some state prosecutors pointed out that other tools such as revoking peace officer certifications or licenses may help. Additionally, they felt that sex offender registration could act as a bargaining chip because fewer people would risk going to trial if they knew they might be required to register as a sex offender if convicted. Ultimately however, state prosecutors agreed with their federal counterparts that, especially in cases of staff sexual misconduct, mandatory sex offender registration

could hinder successful prosecutions because agencies are more likely to keep incidents in house and because defendants are more likely to go to trial.

Lack of Prosecutorial Experience

Trying Sex Abuse Cases

Prosecutors face a number of difficulties proving allegations of sexual abuse of persons under correctional supervision. Prosecutors recognize that sex crimes are among the most difficult cases to prosecute regardless of the status of the victim. Many prosecutors and investigators interviewed for this article articulated the unique difficulties in prosecuting allegations of sexual abuse or assault, whether or not those crimes occurred in institutional settings. They noted that these cases are difficult to prosecute because they rely on many aspects of a good investigation to corroborate the victims' reports including: proper processing of crime scenes; collection and preservation of evidence; knowledge of physical, medical and scientific evidence; prompt reporting and cooperation from the victim; proper interviewing of victims and witnesses; and corroboration of the victim's testimony by other witnesses or physical evidence. Unfortunately, these ingredients are often missing in institutional investigations of custodial sexual abuse.

Prosecutors believe that obtaining a thorough and prompt investigation is more difficult in the corrections environment. This difficulty is compounded by the lack of training that correctional investigators receive in responding to sexual assaults in custody.

Additionally, most states lack staff or units who primarily prosecute sex cases. These cases are often assigned to prosecutors who must take any case that comes to them. Prosecutors who lack experience trying sexual assault cases may not fully understand the dynamics of sexual violence, which is important at every stage of the investigation and prosecution from the first interview with the victim, to crafting opening statements, direct examinations, and closing arguments. Moreover, understanding the dynamics of sexual violence and a jury's possible reaction to the victim or circumstances of a particular case, can inform prosecutors' decisions about cases. Familiarity with forensic evidence, like DNA, and special rules of evidence that apply in sexual assault cases, such as rape shield laws, are also important for successful prosecutions.

One former federal prosecutor illustrated the need for experience and training by describing a case that he tried and lost involving the sexual abuse of a fourteen-year old girl by a corrections official at a halfway house. The prosecutor said that at the time of the trial he was surprised at the loss because he thought the case was strong, but realized in hindsight that his lack of experience trying sexual assault cases led him to misjudge the strength of his evidence and how the jury would view the credibility of the victim.⁴⁸

State prosecutors reported that sex crimes in general require a very specialized knowledge. Even seasoned prosecutors expressed concern that prosecutors know little about corrections institutions making prosecuting sex crimes an even more daunting task.⁴⁹ These cases, according to state prosecutors, require prosecutors to learn an entirely new culture. In

some ways, prosecuting sexual abuse of an offender is at odds with prosecutors' culture and belief systems. State prosecutors noted that they spend most of their career sending people to prison, and it is a shift in culture and way of thinking to advocate for offenders by prosecuting their abusers.⁵⁰

Trying Cases from Correctional Settings

Prosecutors and investigators noted that prosecutors are not sufficiently knowledgeable about prisons, prison culture or correctional practices. Federal investigators also felt that prosecutors did not have sufficient knowledge of issues such as the coercive influence of contraband on sex and security in the institution, and admittedly, many prosecutors and investigators have never been inside a correctional facility prior to their involvement in these cases.

One prosecutor, who has seen many cases from her state prison system, said that it took prosecutors in her office some time just to understand the prison's record keeping system. She said that every time they prepared for trial and assured defense counsel and the judge that all documentation from the prison had been provided in discovery, they learned of new documents. Finally, her office learned that the prison kept two sets of records, one for the prison and a second to provide to prosecutors and police. She said that in some cases, they also described crimes in a third set of documents created and maintained by the intelligence branch of the prison. The prosecutor said that until all of the document problems were resolved with the prison, the prosecutors had trouble meeting their discovery obligations in these cases.

Lack of Understanding About the Correctional Environment

Some corrections administrators and investigators believe that prosecutors do not have a full appreciation of the impact of sexual abuse on inmates.⁵¹ Sexual abuse of persons in custody violates constitutional rights, creates psychological and emotional trauma,⁵² may result in disciplinary actions against the victim, and undermines the safety and security of the institution.⁵³

Sexual abuse of persons in custody also undermines the system of security of the institutions because often it is not limited to sexual abuse. Nearly half of the subjects in federal staff sexual misconduct cases also smuggled contraband into prisons for the offenders with whom they had sexual relationships.⁵⁴ Many of these staff members helped offenders conceal contraband by alerting the offenders to unannounced searches or by storing contraband with the staff's possessions.⁵⁵ This quid pro quo relationship for the purpose of engaging in sexual conduct with an inmate compromises safety barriers and subjects the remaining prison population and correctional staff to substantial risk.

Witness Credibility

Credibility of witnesses is paramount in any sexual assault case. The credibility of an inmate witness in cases of sexual abuse in correctional settings is immediately suspect because of his status as an offender.

Both state and federal prosecutors have reported that in cases where the only evidence is the victim's report with no corroboration—the case is virtually untriable. Credibility issues that are not supported by physical evidence, corroborated by correctional staff, or have multiple victim incidents become a case of “he said, she said.”⁵⁶ According to prosecutors, the risk of trying these cases is great. The high likelihood of an acquittal may offset the deterrent effects of investigating these cases as well as discourage prompt reporting of sexual assaults for fear of retribution following an acquittal at trial.

Multiple interviews of victims that generally happen in the correctional setting can also have an impact on whether prosecutors accept a case. Inconsistencies in statements and the victim's credibility in general led one federal prosecutor to believe a victim was lying.⁵⁷ That prosecutor indicated that there are many cases of sex between staff and offenders that are not presented to prosecutors because there was often no evidence. In order to corroborate the victim's story, prosecutors want physical evidence and contemporaneous reporting, or the knowledge that the staff member had assaulted more than one offender.⁵⁸

Federal prosecutors also agreed that if there is no physical evidence or non-inmate proof of the abuse, they are less likely to take the case generally because of credibility issues with the victim.⁵⁹ Prosecutors admitted that even if they do prosecute, witnesses who are incarcerated are often immediately impeached with past convictions. One prosecutor felt that jurors assess the credibility of a witness from a correctional setting the same way they assess the credibility of any witness, but because they are felons, they are presumed to lack credibility by many jurors and indeed jury instructions direct that jurors may consider previous convictions in assessing credibility.⁶⁰

Recommendations for Improving Prosecutions of Correctional Sex Abuse Cases

Train Prosecutors on the Dynamics of Sexual Abuse in Correctional Settings

Training prosecutors on techniques for prosecuting custodial sexual abuse cases is critical. Additionally, while it is important to train prosecutors, it is essential to take a team approach and include federal and state level investigators, law enforcement, facility administrators and correctional staff, and victim advocates to have a collaborative effort in understanding the dynamics of prison rape.

The Civil Rights Division of the Department of Justice recommends that U.S. Attorneys team with them in order to train prosecutors on the unique techniques used in sex crimes cases such as the use of a grand jury, interview techniques, and the benefits of having an OIG investigator involved—techniques that are not used in other cases. They suggested curricula that included: (1) correctional culture; (2) prosecuting a sex crime; (3) security implications; (4) understanding sexuality in a correctional setting; (5) corroboration and alternative evidence to DNA; (6) helping judges and juries to sympathize

with your victim; and (7) creative tools for prosecution.

Finally, prosecutors and investigators need to understand that investigating and prosecuting custodial sexual abuse cases are important. These prosecutions are essential to maintaining safe, secure and humane institutions and communities. Custodial sexual abuse closely correlates with other issues such as contraband, coercion and use of force. In order to protect other staff and inmates in these environments, it is important to prosecute these cases.

Build Relationships with Others in the Field

In order to overcome barriers to prosecuting these cases, it is important for correctional officials, investigators and prosecutors to understand each other's roles and challenges. In order to build these relationships, focus group participants recommended forming agency task forces, composed of investigators, prosecutors, correctional staff, law enforcement and victim services.

Specific to federal prosecutions, focus group participants recommended having an investigative agent housed in the U.S. Attorney's Office in order to reduce problems prosecutors have identified in regards to resources—staff time and cost for the prosecutor's office. For state systems, using outside law enforcement can help gain credibility. Many agencies recommend using third-party investigative units in state prisons and local jails. Establishing an investigative protocol that includes outside law enforcement, who often have special sexual assault units, adds credibility to the case because they often bring special skills and resources and are not perceived as allied with correctional agencies.

Amend State and Federal Criminal Law

Prosecutors have noted deficiencies in both federal and state criminal law in this area. First, prosecutors recommend stronger penalties. Prosecutors feel that misdemeanor sanctions for these offenses are inappropriate for the crime and limit their bargaining power; staff will not accept a plea and inmate defendants will only receive limited penalties in addition to current sentences. On the other hand, especially where correctional officers are concerned, jurors may be reluctant to convict staff members of a felony for sexually abusing inmates.

Additionally, laws need to be amended to cover all personnel in all correctional settings, and provide that inmate consent is not a defense to sexual abuse. Furthermore, correctional administrators should sanction behavior that may not be criminal, but which is sexually abusive – such as inappropriate viewing or photographing of inmates.

Utilize a Variety of Laws as Tools for Prosecuting Sexual Abuse

Both investigators and prosecutors pointed out that sex cases in prisons do not “sell.” Often, only the introduction of other violations—such as contraband, bribery or malfeasance in office—committed by staff members or inmate defendants

result in convictions. Prosecutors should be encouraged to use all of the tools available to them when prosecuting sexual abuse of persons in custody. Mandatory reporting, obstruction of justice, malfeasance in office, statutory rape, sexual assault and conspiracy are all legal tools which are available to prosecute custodial sexual abuse and surrounding circumstances. In addition, prosecutors could look to loss of license and sex offender registration, as ways to either secure pleas or impose additional sanctions, which ensure that the staff defendant does not secure employment in other institutional settings.

Develop Special Prosecution Units for Sexual Abuse Cases

In general, federal prosecutors rotate through a variety of assignments, while state prosecutors often prosecute whatever case they are assigned. Federal and state prosecutors recommend having dedicated staff who are familiar with sex cases or having allegations of sexual abuse of a person in custody referred to specialized sex crimes or civil rights units⁶¹ where they exist. At a minimum, there should be a designated prosecutor in every jurisdiction who is trained and prepared to prosecute these crimes when they occur. Historically, the types of experience and support provided by specialized units has improved the rate of successful prosecution for crimes once considered difficult to prosecute, such as domestic violence, sexual assault, and crimes against children.

Increase Resources for Prosecution of Sexual Abuse

Federal prosecutors have suggested a resource shift would be most helpful for them. To begin to elevate this issue, federal prosecutors have suggested that an OIG agent be assigned to each USAO, and funds to prosecute cases of sexual violence in institutions be increased. While federal prosecutors recognize that there are staff and budgetary limits, they suggest that moving the resources, both funding and personnel, to offices that have more of these cases, would improve prosecution outcomes.

State prosecutors have stated that the only way to prosecute these cases with any expertise would require an increase of resources. In addition to needed financial support and manpower, state and local prosecutors called for some clarity on the responsibility of prosecuting these cases—are they state cases, federal cases, local cases and who pays for prosecution and who investigates.

Change the Culture of Prosecutors and Judges Regarding Sexual Abuse in Correctional Settings

Prosecutors agreed that a cultural shift would elevate this issue on the political agenda of many elected prosecutors as well as appointed and elected judges.⁶² Investigators and corrections officials report that the likelihood that a particular case will be prosecuted often has a lot to do with the perception of the individual prosecutor and his or her office about the importance of these cases, especially in relation to the case prosecution priorities in her jurisdiction.

The Attorney General, United States Attorneys, and

the heads of state and local prosecutors' offices must send the message to their prosecution staff that sexual abuse of persons in custody will be prosecuted vigorously, and they must provide them with the resources and training to do it.

Conclusion

Prosecutors believe that, in addition to training and resources to improve investigations and prosecutions of allegations, decision makers must have the political will to change prosecutorial and investigative responses to custodial sexual violence. Prosecutors requested that policy makers at the highest levels of government put their authority behind this issue because where the interest of such persons lie, so go the resources. Organizations like Human Rights Watch,⁶³ The Commission on Safety and Abuse in America's Prisons,⁶⁴ and a myriad witnesses testifying before the NPREC have echoed this sentiment.⁶⁵

†This article relies heavily on the work of current and former state and federal prosecutors, in particular the work of Roy Austin, Diane Berman, Deborah Connor, and Julie Grohovsky. We particularly want to thank Deborah Connor for her feedback and insights on this article. Ms. Connor's deep experience litigating sex offenses and domestic violence offenses was invaluable. In particular, her experience securing a conviction in *United States v. Robert White*, which involved the sexual assault of a transgendered inmate by a correctional officer, informs this article. We were ably assisted in this endeavor by Julie Grohovsky, a former federal prosecutor who worked for several years in the United States Attorney's Office for the District of Columbia prosecuting domestic violence and sexual assault cases. Ms. Grohovsky also worked in the Office of the Inspector General. Her experience and knowledge were invaluable in making contacts and collecting this information.

¹ Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).

² See generally The National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape (NIC/WCL Project), Addressing Staff Sexual Misconduct with Offenders (March 2006), Investigating Allegations of Staff Sexual Misconduct with Offenders (March 2005, 2004), Responding to Inmate – on – Inmate Sexual Violence (March 2007), and Addressing Sexual Abuse of Youth in Custody (July 2007, Nov. 2005), under National Institute of Corrections (NIC) cooperative agreements 01P18G108 through 07S24GJQ1.

³ See NIC/WCL Project, Investigating Allegations of Staff Sexual Misconduct with Offenders, *Prosecutor Break Out Sessions* (July 9-14, 2006), under NIC Cooperative Agreements 06S20GJJ1 (meeting notes on file with author) [hereinafter 2006 Prosecutor Breakout Sessions]; NIC/WCL Project, Investigating Allegations of Staff Sexual Misconduct with Offenders, *Prosecutor Break Out Sessions* (July 15-20, 2007), under NIC Cooperative Agreement 07S24GJQ1 (meeting notes on file with author) [hereinafter 2007 Prosecutor Breakout ses-

sion].

⁴ See NIC/WCL Project, Improving Prosecutions of Allegations of Sexual Abuse in Correctional Settings, *A Meeting with Federal Prosecutors* (Oct. 13, 2006), under NIC Cooperative Agreements 06S20GJJ1 (attendance list on file with author) [hereinafter Federal Meeting]; NIC/WCL Project, Improving Prosecutions of Allegations of Sexual Abuse in Correctional Settings, *A Meeting with State Prosecutors* (Oct. 27, 2006), under NIC Cooperative Agreements 06S20GJJ1 (attendance list on file with author) [hereinafter State Meeting].

⁵ See U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) [hereinafter OIG REPORT] (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent).

⁶ See The Honorable Kim Worthy, Prosecuting Attorney for Wayne County, Michigan at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (August 3, 2006), available at http://nprec.us/docs/detroit_testimony_worthy.pdf [hereinafter NPREC Worthy Testimony] (elaborating on why Wayne County is unable to continue to prosecute inmate sexual abuse cases); see also The Honorable Gregory Miller, United States Attorney for the Northern District of Florida at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (August 3, 2006), available at http://nprec.us/docs/detroit_issues_miller.pdf (discussing the many issues which make it difficult for prosecuting sexual assault within prisons).

⁷ See Senator Jeff Sessions, Address at the *Public Hearing Before the National Prison Rape Elimination Commission: The Cost of Victimization: Why Our Nation Must Confront Prison Rape* (June 14, 2005), available at http://nprec.us/docs/SenatorJeffSessionsRemarks_Vol_1.pdf [hereinafter NPREC Sessions Testimony] (encouraging the criminal justice system to take the problems of incarcerated sexual abuse seriously).

⁸ See generally Mary De Ming Fan, *Disciplining Criminal Justice: The Peril and Promise of Numbers*, 26 YALE L. & POL. R. 2 (2007) (explaining that the seemingly favorable statistics regarding criminal justice prosecutions do not necessarily signify success).

⁹ See Rape, Abuse and Incest National Network, Reporting Rates, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 26, 2008) (finding that if a sexual assault is reported there is a 50.8% chance of an arrest; if there is an arrest made, there is an 80% chance of prosecution; and if there is a prosecution there is a 58% chance of a conviction). Factoring in unreported rapes, only 6% of sexual assault perpetrators will spend time incarcerated—15 of 16 perpetrators walk free. *Id.*

¹⁰ See NPREC Worthy Testimony, *supra* note 6 (explaining that in the wake of budgetary constraints, prosecution of crimes between inmates is not a priority for Wayne County).

¹¹ See *Steadman v. S.E.C.*, 450 U.S. 91 (1981) (finding that in

an administrative proceeding, matters in issue need only be established by a preponderance of the evidence).

¹² See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (finding that the standard of proof beyond a reasonable doubt “is an ancient and honored aspect of our criminal justice system”).

¹³ See NPREC Sessions Testimony, *supra* note 7; see also Glenn Fine, Inspector General, Address at the *Public Hearing Before the NPREC: The Cost of Victimization: Why Our Nation Must Confront Prison Rape* (June 14, 2005), available at http://www.nprec.us/docs/InspectorGeneralGlennFine_Vol_1.pdf (admonishing that the laws criminalizing staff sexual relations with federal inmates are not sufficient).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Garrity v. State of New Jersey*, 385 U.S. 493 (1967) (discussing employees’ rights against criminal self-incrimination).

¹⁸ See Federal Meeting, *supra* note 4 (discussing that while investigators in general agreed with the need to increase administrative penalties, they complained that more often than not, those were met with opposition by unions).

¹⁹ See *Robinson v. Robinson*, No. 05-CV-01433, 2006 WL 726296 (D. Colo. Mar. 20, 2006) (issues included: malicious prosecution, defamation, 14th Amendment Due Process); *Corona v. Lunn*, No. 00-CIV-7330, 2002 WL 550963 (S.D.N.Y. Apr. 11, 2002) (issues included: false arrest and malicious prosecution).

²⁰ See Federal Meeting, *supra* note 4 (noting the lack of experience in prosecuted forcible prison rape cases).

²¹ See *id.*; see also State Meeting, *supra* note 4 (discussing and indentifying consent as one of the most difficult issues in prosecuting prison rape).

²² Brenda V. Smith, Fifty State Survey of State Criminal Laws, *Prohibiting the Sexual Abuse of Individuals Under Custodial Supervision* (January 2008), under NIC Cooperative Agreement 07S27GJT7 [hereinafter 50 State Survey].

²³ *Id.*; see, e.g., CAL. PENAL CODE § 289.6 (2001) (“Consent by a confined person or parolee to sexual activity proscribed by this section is not a defense to a criminal prosecution for violation of this section.”); FLA. STAT. ANN. § 944.35 (2006) (“The consent of the inmate or offender supervised by the department in the community to any act of sexual misconduct may not be raised as a defense to a prosecution under this paragraph.”); WIS. STAT. ANN. § 940.225 (West 2005) (“Consent is not an issue in alleged violations . . .”).

²⁴ See 50 State Survey, *supra* note 22; see, e.g., DEL. CODE ANN. tit. 11, § 1259 (1995) (“A person is guilty of sexual relations in a detention facility when, being a person in custody at a detention facility or being an employee working at a detention facility, the person engages in sexual intercourse or deviate sexual intercourse on the premises of a detention facility.”); NEV. REV. STAT. ANN. § 212.187 (1997) (“A prisoner who is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation of the Department of Public Safety or residential confinement, and who voluntarily engages in sexual conduct with another person is guilty of a category D felony.”);

see also *Phillips v. Bird*, Dept. of Corrs. of the State of Del., 2003 U.S. Dist. LEXIS 22418 (D. Del. Dec. 1, 2003).

²⁵ See Federal Meeting, *supra* note 4; State Meeting, *supra* note 4; see also *Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999).

²⁶ See generally CAROLINE HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf> (detailing the statistical results of prior sexual abuse in state and federal prisons).

²⁷ See DC Rape Crisis Center, Effects of Sexual Abuse: Internal, <http://dcrcc.org/effects.htm> (last visited Feb. 6, 2008) (discussing the internal effects of sexual abuse as including: depression, low self-esteem, anger or control issues, anxiety, shame, guilt); Angela Browne & A.J. Sabree, NIC/WCL Project, Responding to Inmate-on-Inmate Sexual Violence, *Presentation on the Impact of Victimization* (March 2007), available at http://www.wcl.american.edu/nic/conference_march_07/modules/11_impact_of_past_victimization.pdf?rd=1 (noting the links between incarceration and victimization); Brenda V. Smith, NIC/WCL Project, *Continuum of Sexual Behavior in Institutional Settings* (2006), under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) [hereinafter Smith, *Continuum of Sexual Behavior*] (illustrating that strategic sex or sex as a bargaining tool is used).

²⁸ See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 9 (2005) [hereinafter BECK & HUGHES 2004]; see ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 6 (2007) [hereinafter BECK, HARRISON & ADAMS 2006].

²⁹ See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 225 (2006) [hereinafter Smith, *Rethinking Prison Sex*] (discussing the continuum of sexual expression in correctional environments the main concern of which is whether the state has an ability to regulate that expression); see also Smith, *Continuum of Sexual Behavior*, *supra* note 27 (analyzing (through a visual) the limits placed on prisoners' ability to sexual express themselves).

³⁰ See Federal Meeting, *supra* note 4.

³¹ See generally *U.S. v. Brewer*, 363 F. Supp. 606 (M.D. Pa. 1973); *People v. Frazier*, 64 Cal. Rptr. 447 (1967); *People v. Coulter*, 288 N.W.2d 448 (Mich. Ct. App. 1980) (holding the state sodomy law constitutional as applied to sex in prison); *George v. Lane*, No. 82 C 7084, 1987 U.S. Dist. LEXIS 3659 (N.D. Ill. Apr. 30, 1987) (finding that prison regulations prohibiting consensual sex are constitutional); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Croom v. Wagner*, No. 06-1431, 2006 U.S. Dist. LEXIS 64915 (E.D. Pa. Sept. 11, 2006); *Barnes v. Ozmint*, 3:04-21836-CMC-JRM, 2005 U.S. Dist. LEXIS 38173 (D.S.C. Nov. 7, 2005); *People v. Rollins*, 569 N.E.2d 1251 (Ill. App. 1991); *U.S. v. Robert White* (Criminal Action

No. F130-05, 2006).

³² See 50 State Survey, *supra* note 22.

³³ See, THE NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, INVESTIGATING STAFF SEXUAL MISCONDUCT WITH OFFENDERS TRAINING MATERIALS: IN THE NEWS : CRIMINAL CONVICTIONS CHART STAFF SEXUAL MISCONDUCT WITH OFFENDERS (2007) (illustrating that prosecutions and the sentence received by staff in sexual misconduct cases are relatively low); see also, Rape Abuse and Incest National Network, Reporting Rates, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited March 30, 2008) (providing statistics regarding the reporting and prosecution of sexual assaults).

³⁴ See 18 U.S.C. §§ 2243(b), 2244(a)(4), 2244(b) (2006) (raising the penalty for sexual abuse of a ward from misdemeanor to felony punishable levels).

³⁵ OIG REPORT, *supra* note 5, at 8.

³⁶ See Interview with Federal Prosecutor (Feb. 28, 2006) [hereinafter FP Interview] (stating that “[t]here have not been enough cases since the penalties were enhanced, to make any type of meaningful judgment about the impact the amended law will make on the rate of prosecutions); see also OFFICE OF THE INSPECTOR GENERAL, TRAINING: INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDER (June 2006), under NIC cooperative agreement 06S21GJL7.

³⁷ 18 U.S.C. §§ 2241, 2243-2244.

³⁸ OIG REPORT, *supra* note 5, at 18.

³⁹ *Id.* at 19.

⁴⁰ See Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat 587 (2006) (codified in scattered sections of 18 U.S.C.).

⁴¹ Federal investigators are concerned that these amendments may decrease prosecutions due to the increased severity of the sentences. See generally OFFICE OF THE INSPECTOR GENERAL TRAINING: INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDER (June 2006), under NIC cooperative agreement 06S21GJL7.

⁴² See *Smith v. Doe*, 538 U.S. 84, 101 (2003) (holding that “[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Ac’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant”).

⁴³ See Federal Meeting, *supra* note 4.

⁴⁴ See State Meeting, *supra* note 4; see also Brenda V. Smith & Jaime M. Yarussi, NIC/WCL Project, Breaking the Code of Silence, A Correction Officers’ Handbook on Identifying and Addressing Sexual Misconducts 4 (June 2007) [hereinafter CO HANDBOOK] (highlighting that agencies include but are not limited to: jails, lock-ups, prisons, community facilities for adults or juveniles, juvenile detention centers, immigration detention facilities and community corrections agencies including probation, parole, half-way homes, electronic or home monitoring,

work release, pre-release centers or pre-trial release and contract facilities). Personnel includes but is not limited to: correctional officers, administrators and staff, volunteers, medical and mental health personnel, contract employees and maintenance and food service workers. *Id.*; see also 50 State Survey, *supra* note 22.

⁴⁵ See 50 State Survey, *supra* note 22; see also DEL. CODE ANN. tit. 11, § 1259 (2008); NEV. REV. STAT. ANN. § 212.187 (LexisNexis 2007).

⁴⁶ See 50 State Survey, *supra* note 22 (indicating that while the

⁴⁶ See 50 State Survey, *supra* note 22 (indicating that while the vast majority of states define staff sexual misconduct as a felony, some also still only charge it as a misdemeanor or define the crime as a graduated sanction allowing the prosecutor to charge either a misdemeanor or a felony depending on the facts of the case).

⁴⁷ See State Meeting, *supra* note 4.

⁴⁸ NIC/WCL Project, The Role of Prosecutors in Cases of Staff Sexual Conduct with Offenders, *Investigating Allegations of Staff Sexual Misconduct with Offenders* (July 2005), available at http://www.wcl.american.edu/nic/Training/Curriculum/July_2005/Prosecution.ppt?rd=1 (“On the day of her testimony, the victim dressed provocatively and giggled nervously. Because of the prosecutor’s lack of experience he had not instructed her on how to dress for court, did not ask her questions on direct examination that would help her to explain to the jury why she was giggling and not crying and that in general he felt that he had misjudged the amount of time it would take to prepare her to testify.”).

⁴⁹ See State Meeting, *supra* note 4.

⁵⁰ *Id.*

⁵¹ See Federal Meeting, *supra* note 4; 2006 Prosecutor Breakout Sessions, *supra* note 3; 2007 Prosecutor Breakout Sessions, *supra* note 3.

⁵² See generally WOMEN’S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996); WOMEN’S RIGHT’S PROJECT, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE (1998), available at <http://www.hrw.org/reports98/women/>; HUMAN RIGHTS WATCH REPORT, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter NO ESCAPE]; AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE,” VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999); AMNESTY INT’L, USA: THE FINDINGS OF A VISIT TO VALLEY STATE PRISON FOR WOMEN, CALIFORNIA (1999); AMNESTY INT’L, CHILDREN AND WOMEN ABUSED IN CORRECTIONAL FACILITIES (1998).

⁵³ OIG REPORT, *supra* note 5, at 7-8; see also CO HANDBOOK, *supra* note 44, at 8.

⁵⁴ See Federal Meeting, *supra* note 4.

⁵⁵ OIG REPORT, *supra* note 5, at 7; see also Chitra Subramanyam, *FCI Guard Sentenced for Sex Act*, TALLAHASSEE DEMOCRAT, Aug. 29, 2006 (noting that in a case in the Federal District Court in Tallahassee, Florida, Bureau of Prison guards were charged with and found guilty of crimes arising out of trading contraband for sex with at least ten offenders). In this same case, an OIG agent was shot and killed at the Federal Correctional Institution in Tallahassee as he and another law enforcement agent were in the process of arresting one of the guards. *Id.* This is an indication of how such activities can lead

to corruption and violence in correctional settings.

⁵⁶ See Federal Meeting, *supra* note 4; State Meeting, *supra* note 4.

⁵⁷ See FP Interview, *supra* note 36 (noting that initially the inmate was believed, but that after a thorough investigation it was determined that she was lying). The prosecutor said that the inmate never admitted to lying, but that a “huge amount” of information, including inconsistencies in her statements as well as statements of other prisoners that discredited her version of events and her credibility, generally led prosecutors to believe the inmate was lying. *Id.*

⁵⁸ *Id.*

⁵⁹ See Federal Meeting, *supra* note 4.

⁶⁰ See FP Interview, *supra* note 36 (stating that because they are felons by virtue of their status as a prisoner, you need to corroborate their testimony).

⁶¹ See Federal Meeting, *supra* note 4 (discussing Washington, DC’s prosecution unit and how some specialize in sex crimes). Prosecutors noted that because of the difficulty prosecuting sex crimes, many prosecutors’ offices have specialized sex crimes units or at least one or two veteran sex crimes prosecutors who handle these cases. *Id.* In addition, while state and local prosecutor’s offices are more likely to have experience trying these cases, the depth of that experience depends on the number and types of cases that occur in their districts and the resources they are able to devote to those cases. *Id.*; see also Gina DeBottis, Chief Prosecutor, Special Prosecution Unit, Texas at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (Aug. 3, 2006), available at http://nprec.us/docs/detroit_issues_debottis.pdf (describing the special sex crimes prosecution unit in Texas and their experience with prison sex cases).

⁶² CO HANDBOOK, *supra* note 44, at 7.

⁶³ See NO ESCAPE, *supra* note 52, at 68-75.

⁶⁴ See generally JOHN J. GIBBONS AND NICHOLAS DE B. KATZENBACH, VERA INSTITUTE OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS (2006), available at <http://www.wcl.american.edu/nic/documents/4.VERACommisionReport.pdf?rd=1> (reporting on the violence and abuse in U.S. jail and prisons).

⁶⁵ See generally National Prison Rape Elimination Commission Hearings, available at <http://nprec.us/proceedings.htm> (listing the nationwide public hearings which discuss the elimination of prison rape).

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