



**Breaking the Code of**

# SILENCE

**Correctional Officers' Handbook on Identifying and Addressing Sexual Misconduct**

**Brenda V. Smith and Jaime M. Yarussi**

National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape  
American University Washington College of Law  
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We would like to thank the many contributors and reviewers who have given us insightful and honest commentary about the situations that correctional professionals face and how the code of silence surrounding staff sexual misconduct affects their jobs. In particular, we thank Darrell Alley, former NIC project consultant for his critical look and contributions to our understanding of the investigative process; Susan Carle, professor of law, American University Washington College of Law, for her help in explaining the legal rights that are available to correctional staff accused of staff sexual misconduct; Susan McCampbell, president, Center for Innovative Public Policy, Inc., for her editing assistance and contribution to our understanding of what matters to correctional professionals, both in administration and line staff; and A.T. Wall, director, Rhode Island Department of Corrections, for his insightful responses to our many requests for his expertise on matters of policy and practices in correctional institutions.

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***Breaking the Code of Silence: Correction Officers' Handbook on Identifying and Addressing Sexual Misconduct*** addresses rapidly developing areas of law and practice in the United States. The information in this publication is current as of January 2007. Both law and policies rapidly change. We will remain abreast of those changes and encourage you to contact us with new information as it becomes available.

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## Foreword

Since 1999, The American University Washington College of Law has had a cooperative agreement with the National Institute of Corrections to provide training to high-level correctional decision makers on key issues in addressing and investigating staff sexual misconduct. With the enactment of the Prison Rape Elimination Act in 2003 (PREA), the project's focus shifted to addressing prison rape—both staff sexual misconduct with offenders and offender on offender sexual violence and abuse.

This handbook is based on training we have conducted on staff sexual misconduct over the past eight years, and the feedback and comments that we have received from correctional professionals who have attended those trainings and implemented changes in their system to prevent sexual abuse of individuals under custodial supervision.

Since the passage of PREA in 2003, there has been increased national and international attention to the issue of sexual abuse of individuals in custody. States have strengthened criminal laws prohibiting the sexual abuse of individuals in custody. Reports on staff sexual misconduct have increased in number; non-governmental organizations such as Human Rights Watch, Amnesty International and Stop Prisoner Rape have documented the issue, and both print and visual media have covered sexual violence in correctional settings.

However, even with the enactment and strengthening of state and federal law, human rights reports, and media coverage, the fundamental question of whether conditions that enable staff sexual misconduct have changed, remains unanswered. While state correctional systems, the federal government and local jurisdictions have made a great deal of progress in addressing staff sexual misconduct, much work remains. A climate may still exist where sexual abuse of individuals in custody is permitted. Moreover, prosecutions and convictions for wrongdoing are rare, and sanctions for guilty correctional professionals are weak.

This important work must continue in order to ensure the safety and security of correctional agencies, staff who work in these agencies, facilities across the country and people under correctional supervision. Law and policy development and change, consistent enforcement, prosecution and punishment of wrongdoers, and training of staff and offenders will prevent and reduce staff sexual abuse of offenders.

This publication is a critical step in reaching out to rank-and-file correctional staff in order to address the code of silence that surrounds staff sexual misconduct with offenders. We hope that it will deepen the dialogue between line staff, administrators, community leaders, and criminal justice advocates about strategies to eliminate staff sexual misconduct with individuals under custodial supervision.



**Introduction** ..... 1

**Why are We Talking About This Now?** ..... 3

**What is Staff Sexual Misconduct with Offenders?** ..... 4

**Consequences of Staff Sexual Misconduct with Offenders** ..... 7

**Can Correctional Environments Enable Sexual Misconduct?** ..... 10

    What is Agency Culture? ..... 10

    The “Code of Silence” ..... 11

**Victimization** ..... 13

**Communication, Gender and Abuse Histories** ..... 15

**Tools for Defining and Identifying Inappropriate Relationships with Offenders** ..... 16

    Ethics ..... 17

    The Daily Dozen ..... 18

    Red Flags ..... 20

**What Happens When an Allegation of Staff Sexual Misconduct Is Made?** .... 21

    Demystifying the Investigative Process ..... 21

**What Are Your Rights During a Staff Sexual Misconduct Investigation?** .... 23

    The First Amendment ..... 24

    The Fourth Amendment ..... 24

    The Fifth Amendment and Statutory Due Process Rights ..... 25

    The Fourteenth Amendment ..... 25

    Union Member Rights ..... 26

    Employee Rights against Discrimination ..... 27

    Protections for Private Sector Employees ..... 28

    Former Employee Reference Checks ..... 28

**What are the Legal Consequences of Staff Sexual Misconduct with Offenders?** ..... 29

    Criminal Liability ..... 29

    Civil Liability ..... 30

**Prevention** ..... 33

**Conclusion** ..... 34

**Resources** ..... 35

    Government Reports ..... 35

    Publications for Legal and Correctional Professionals ..... 36

    Advocacy Group Reports ..... 37

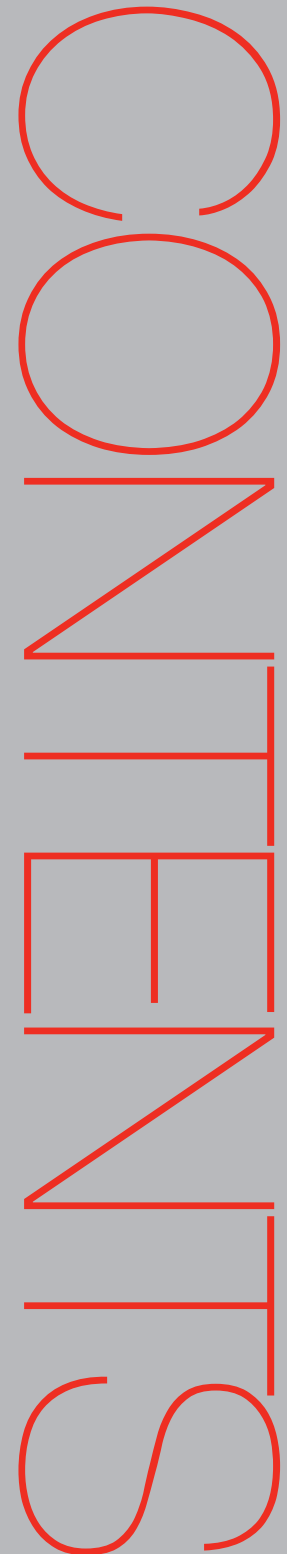
    Law Review and Journal Articles ..... 38

    Websites ..... 39

**Appendix**

    A. 50 State Survey of Criminal Laws Prohibiting the Sexual Abuse of Individuals Under Correctional Supervision ..... 43

    B. Evaluation ..... 117





## Introduction

Staff<sup>1</sup> sexual misconduct with offenders<sup>2</sup> is about more than sex. This behavior compromises your safety and security, the safety of the institution and offenders' safety. While you may never get involved in this unprofessional behavior which is illegal in all states – you should be aware of how staff sexual misconduct with offenders can affect you, your job, your family, offenders and the community.

Staff sexual misconduct with offenders is not a subject to read about and put aside. It needs to be an ongoing discussion involving partners from all correctional sectors. Staff sexual misconduct is a problem that involves facilities, offenders, administration and staff at all levels, as well as outside stakeholders such as law enforcement, the legislature and the community. It has legal and non-legal consequences as well as long-lasting emotional, economic, and mental and physical health effects for staff, offenders, agencies and the community.

This handbook aims to educate correctional professionals at all levels on:

- why correctional staff and administrators need to be concerned about staff sexual misconduct with offenders
- how agency culture and the workplace environment influence staff sexual misconduct
- the tools that will help identify and address staff sexual misconduct
- the consequences of staff sexual misconduct with offenders
- the investigative process that should follow an allegation of staff sexual misconduct
- how correctional staff members can keep the workplace safe

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<sup>1</sup> In this publication “staff” will include all of the following: officer, staff, contractor, food service employees, maintenance worker, volunteer, clergy member, medical staff member, and vendors.

<sup>2</sup> “Offender” refers to individuals (including youth) under custodial supervision, whether in secure confinement such as jails and prisons or under community supervision such as probation, parole, home detention and the like.





## Why are We Talking About This Now?

Staff sexual misconduct undermines the mission of corrections by creating unstable living and working environments for the offenders as well as their supervising staff members. Sexual misconduct is the most serious form of boundary violation in a correctional setting. Sexual misconduct is not about sex, but about safety and security. Both are compromised whenever boundaries break down and a staff member becomes personal or intimate with an offender.

Staff sexual misconduct with offenders affects correctional staff by:

- jeopardizing staff safety
- threatening agency and facility safety and security
- creating the risk of legal action – both criminal and civil
- creating health risks
- harming family relationships
- creating negative public views of corrections
- diminishing trust and morale of staff and offenders
- weakening respect for, and the authority of, correctional staff among offenders

Highly publicized legal cases involving women's prisons initially brought this issue to the attention of the national and international community. From civil penalties to incarceration, correctional staff members and correctional agencies have paid the price for staff sexual misconduct with offenders.

The National Institute of Corrections (NIC), a branch of the Department of Justice, has provided training and technical assistance to executive-level correctional professionals since 1996. National professional organizations, individual states, correctional officials and policy advocates have also taken steps to address staff sexual misconduct. Still, staff sexual misconduct persists in correctional settings.

Before we discuss staff sexual misconduct in custodial settings, it is important to acknowledge that staff sexual misconduct is not unique to correctional settings. Sexual misconduct is prevalent in organizations where one person or a group of people has power over others.

It is this imbalance of power that is a pivotal factor in enabling sexual misconduct. Instances of staff sexual misconduct have been reported in:

- religious institutions
- the foster care system
- the United States government
- the United States military

### Religious Institutions:

A former pastor from Trinity Baptist Church in Jacksonville, Florida was charged with two counts of capital sexual battery. Two women told police that the pastor had fondled them, touched their genitals and kissed them during visits to his office when they were six and attending school at the Trinity Christian Academy. Six other women also corroborated the abuse happening during the late 1970s and early '80s. At least 15 women have accused the pastor of molesting them. He has admitted to french kissing students years ago. (As reported by *The Florida Times Union* on May 21, 2006)

### Foster Care:

Omaha police arrested a 15 year old boy in February for allegedly molesting his three foster sisters ages three, five and seven. The abuse had allegedly been occurring since October and was finally reported in mid-February. The boy has entered a denial plea to three counts of first-degree sexual assault in family court. A spokesperson for the Nebraska Department of Health and Human Services said the girls were immediately removed from the home. (As reported by the *Omaha World Herald* on March 30, 2006)

### Military:

Recent allegations of sexual abuse by U.S. military personnel has some concerned that the Pentagon is cultivating a culture of sexual violence against women. More than 500 U.S. service-women who have been or are currently stationed in Iraq, Afghanistan or other countries say they have been assaulted by fellow soldiers since 2003. The Defense Department has stated that reports of sexual assault have risen 65 percent in the past two years. (As reported by *The Salt Lake Tribune* on July 19, 2006)

A jail guard at the Sixth District Jail was charged with raping a male inmate. Jail guard Espiridio Quinones, is accused of forcing a 25-year-old inmate to perform oral sex. The inmate was able to save some of Mr. Quinones' semen in a shoe for DNA evidence. The shoe and Mr. Quinones' blood sample were sent for DNA testing but the results are unavailable at this time. Mr. Quinones was arrested and suspended without pay. (As reported by *The Plain Dealer* on August 25, 2006)

A former North Carolina Department of Corrections official was sentenced by Buncombe County Superior Court to 22 to 36 months in prison. Judge Ronald Payne told Edith Pope that the potential security breach created by her sexual relationship with a convicted murderer created in the Craggy Correctional Center necessitated an active prison term. (As reported by the *Asheville Citizen Times* on August 8, 2006)

A former Illinois Youth Center worker faces up to 15 years in prison for having a sexual relationship with a juvenile offender. Barnett Gill testified in court that no sexual activity occurred between him and the youth resident back in 2004. Gill was convicted of four felony counts of sexual misconduct with a minor. (As reported by the *Chicago Sun-Times* on August 3, 2006)

## What is Staff Sexual Misconduct with Offenders?

Staff sexual misconduct with offenders is generally defined as any behavior or act of a sexual nature by:

- a correctional employee (sworn or civilian, managers, administrators, supervisors, line officers, supervisors of offenders on work release)
- a contractor
- a food service employee
- a maintenance worker
- a volunteer
- a medical or mental health staff member (clinical staff and counselors)
- a member of the clergy
- vendors
- youth workers
- teachers

Staff sexual misconduct can be directed towards:

- a person under the care or custody of any correctional authority
- any of the offender's family members
- any other person who has official contact with the department on behalf of offenders (lawyers, social workers, mental health professionals, victim advocates)

Correctional settings where staff sexual misconduct can occur include, but are not limited to:<sup>3</sup>

- prisons
- jails
- police lock-ups
- juvenile facilities
- immigration detention centers
- court holding facilities
- community corrections (home monitoring, probation, parole half-way houses)

<sup>3</sup> The Prison Rape Elimination Act of 2003. Pub. L. 108-79. 4 Sept. 2003. Stat. 117. 972. These settings are defined as correctional settings by the Prison Rape Elimination Act of 2003.

There are four sources of definitions of staff sexual misconduct:

- state law
- agency policy
- the Prison Rape Elimination Act of 2003 (PREA)
- the Bureau of Justice Statistics (BJS)

Staff sexual misconduct can include both physical and non-physical behaviors. It is important to remember that misconduct with an offender can include non-physical actions that precede physical sexual misconduct with offenders. While the criminal law in most states only covers punishment for the physical aspects of sexual misconduct, department policies and procedures address and provide sanctions for the non-physical actions.

Physical sexual misconduct includes, but is not limited to, acts or attempts to commit acts such as:

- sexual abuse or sexual contact (such as fondling of the breast, buttocks, or genitalia)
- sexual assault (such as rape, intercourse, oral and anal sex, or penetration of the vagina, mouth or anus by a penis or any object)
- actions designed for sexual gratification of either party (such as exposure or masturbation)

Non-physical sexual misconduct includes, but is not limited to, acts or attempts to commit acts such as:

- undue familiarity (such as flirting, inappropriate compliments, making suggestive sexual remarks or obscenities, doing favors for an offender, letters or notes which are sexual in nature and conversations with sexual undertones)
- conduct of a sexual nature that implies sex
- sexual harassment
- unreasonable invasion of privacy (such as inappropriate viewing, standing too close to the offender in an intimate space without touching)
- sexually suggestive comments about appearance

### **PREA defines sexual abuse of an individual in custody as:**

**“The rape of an inmate (defined as any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs) in the actual or constructive control of prison officials.”**

### **BJS defines staff sexual misconduct as:**

**Any behavior or act of a sexual nature directed toward an inmate by an employee, volunteer, official visitor, or agency representative. Romantic relationships between staff and inmates are included. Consensual and non-consensual sexual acts include:**

- **Intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to arouse or gratify sexual desire**
- **completed, attempted, threatened, or requested sexual acts**
- **occurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.**

One of two former Oakhill Correctional Institution (Wisconsin) guards, charged earlier this year with having sex with an inmate, was put on probation for two years and fined. Christine Roberge was charged with second-degree sexual assault in April after an investigation showed she was having sex with an inmate. The plea agreement allowed the defendant to enter a no contest plea to the felony charge and two misdemeanor counts. If she successfully completes probation she will be able to file a motion asking that the felony count be dismissed. That part of the plea bargain did not have the approval of the Department of Corrections, and Oakhill Warden Deirdre Morgan stated that the department would really like to see a felony conviction. Both officers were charged under the law passed in 2003 making sex with a prisoner an assault regardless of the nature of the act and carrying a maximum of 40 years in prison. (As reported by *The Capital Times* September 19, 2006)

Douglas Tower was sentenced to 20 to 40 years in prison for raping and sexually assaulting a female inmate while he was a sergeant at the Shea Farms Halfway House in Concord, New Hampshire. Tower was convicted in February of two counts of rape and four counts of felonious sexual assault. He faced a maximum of 34 to 68 years in prison. Tower is still accused of sexually assaulting 12 other female inmates and faces trials in those cases. (As reported by *The Concord Monitor* on April 19, 2007)

Some may feel that, given a staff member's daily contact with offenders and just "being human," the definition of staff sexual misconduct includes too many "normal" behaviors. Perhaps as you reflect on your career, you may find that you have engaged in one or more of these activities. Maybe you or one of your co-workers believes that sexual misconduct with an offender is not a problem within your agency. You may feel that an offender's actions invite staff sexual misconduct or that the offender manipulated the staff.

**If you are thinking one or all of these things, we urge you to reexamine some of your opinions about staff sexual misconduct with offenders.** Any conduct of a sexual nature with an offender, whether the offender invites it or not, is prohibited by law and in most states is prohibited by agency policy.

## Consequences of Staff Sexual Misconduct with Offenders

The legal, emotional and financial consequences of staff sexual misconduct can be severe, and include legal, emotional, personal and financial hardship. These consequences can be far-reaching, affecting:

- staff members
- offenders
- agency operations
- administrators
- the profession
- elected officials
- families of staff members and offenders
- the community and public

Staff members involved in a sexual relationship with an offender may face both legal as well as non-legal sanctions for their actions if they are found guilty.

Potential *legal* consequences for **staff members** may include:

- civil liability
- criminal prosecution
- incarceration
- fines
- sex offender registration
- community notification

Potential *non-legal* sanctions for **staff members** may include:

- administrative discipline
- loss of employment
- loss of professional license/certification
- difficulty in obtaining another job
- losing the trust of your family, friends, peers and the public
- contracting HIV, hepatitis or other sexually transmitted diseases (STDs)
- public shame and humiliation
- threat to personal safety during incarceration

Can you think of other consequences?

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To send us your answers go to:  
[http://www.wcl.american.edu/nic/co\\_handbookresponses.cfm](http://www.wcl.american.edu/nic/co_handbookresponses.cfm)

California inmates continue to contract HIV at rates of up to eight times higher than the general population. Statistics show that 20 to 26 percent of people living with HIV/AIDS in the United States have spent time in the correctional system. "The reality is that sex in prison is taking place and it is an undeniable public health issue and we must provide inmates with options for protecting their health and the health of their loved ones upon being released." (As reported by *Medical News Today* on August 19, 2006)

Incarcerated or formerly incarcerated persons are often involved in high-risk behaviors that can spread various infectious diseases. In correctional settings, the HIV infection rate alone is ten times higher than in the general U.S. population, Hepatitis B infection is three to four times greater and Hepatitis C infections are found in 16 to 41 percent of the inmate population. Additionally, 25 percent of the HIV-infected people in the U.S. are released from prison or jail each year. Gonorrhea, Syphilis and Chlamydia are also present in U.S. incarcerated populations. (Source: United States Department of Justice/ National Institute of Corrections. "Staff Sexual Misconduct: Medical Implications" Addressing Staff Sexual Misconduct with Offenders Training. Comp. Laura Worby. Washington, DC. (March 2006).

Consequences **for offenders** may include:

- punishment under agency policies and procedures
- criminal sanctions
- victimization
- mental health problems
- spreading and contracting disease (especially STDs, HIV, Hepatitis)
- pregnancy
- re-traumatization
- family and marital problems

Potential consequences **for agency operations** include:

- an imbalance of power in favor of offenders (offenders feeling they have a "secret" and can influence or control a staff member)
- breaches in safety and security
- erratic behavior from offenders thereby placing staff in danger
- loss of community, legislative and fiscal support
- loss of agency integrity and credibility
- difficulty in future recruitment of qualified employees
- unfavorable media attention
- undermining agency authority
- diminished respect for the agency and profession of corrections

Consequences **for administrators** may include:

- criminal liability
- civil liability
- alienation of staff
- loss of employment
- staff and offenders not trusting administrators to protect them
- doubts about the security of the agency
- unfavorable media attention



Consequences **for elected officials** may include:

- public mistrust in the criminal justice system
- loss of funding for correctional programming and training
- diminished support for reform funding
- demands for better oversight and accountability

Consequences **for staff members' families** may include:

- shame
- loss of income due to job termination
- loss of status with peers and in the community
- burden of paying monetary damages
- fear of retaliation
- loss of family member due to incarceration

Consequences **for the public** may include:

- fear for personal and community safety
- mistrust of the correctional system
- loss of confidence in the professionalism of correctional operations
- cost of treating infectious disease
- cost of paying civil damages to offenders
- cost of prosecution
- cost of incarcerating the staff member
- cost of training replacement staff

### What offenders think:

“Sex, just like drugs, is part of being in prison. There has to be a certain amount of that going on. What’s important is what the prison does when they discover someone having sex.”

“A lot of female staff come here looking for love. They don’t get a lot of support at home or at work. First they become friends with inmates and the next thing you know they are in love.”

“A lot of these offenders have low self-esteem. They don’t think a lot of themselves so they will settle for soda, candy or cigarettes.”

- Quotes from offenders. “An End to Silence” by Brenda V. Smith (1998)

### What staff think:

“Staff sexual misconduct involves using power to get what the staff member wants. We are supposed to be taking care of the offenders, not hurting them.”

“State prisoners are pretty upfront about how they will never have another woman because they are doing life. {Prison sex} is just meeting their needs.”

“Women engage in sexual activity here because of a history of previous abuse and sexual misconduct and are unaware of healthy sexual behavior. Most of the women have been victims; not just in prison, but on the outside also. Most women have been victims and they think that’s okay.”

- Quotes from staff members.  
“Staff Perspectives” by  
The Moss Group, Inc. (2006)

Interim Tennessee Department of Corrections Commissioner Gayle Ray says the fatal escape involving an inmate and his wife, a former prison nurse, reinforces the importance of policies prohibiting relationships between state employees and inmates. Jennifer Forsyth, who worked as a contractor LPN nurse, was fired last August from Northwest Community Services Agency for "suspicion of a relationship with an inmate." Officials say it's unclear how the two were able to plan the escape. With thousands of inmates, Ray said, phone calls are only taped randomly. Monitors and officers in the rooms during visitations mainly prevent exchange of contraband, Ray said, "but you can't overhear conversations." (As reported by the *Associated Press* on August 10, 2005)

Ralph Hill opened fire Wednesday on FBI agents who had come to arrest him and five other federal prison guards (at FCI Tallahassee) on charges of sex with female inmates in exchange for money and contraband. Officials said Hill fired with a personal weapon. Agents from the Justice Department's inspector general's office returned fire, killing the guard. Hill and the five other guards had been indicted Tuesday on sex-for-contraband charges in a scheme that went on for two years, according to prosecutors. Besides the sex charges, the guards were accused of threatening to plant contraband in inmates' belongings, or to have inmates sent to other institutions farther from their families, if they reported the illegal activity. (As reported by the *Associated Press* on June 22, 2006)

## Can Correctional Environments Enable Sexual Misconduct?

**YES.** The imbalance of power of staff-offender relationships, are a core feature of correctional culture. This culture affects both those who have power and those who do not, and may distort communication and interactions between and among staff and offenders. Offenders who lack power may engage in staff sexual misconduct in an attempt to equalize this power imbalance.

Over-familiarity and sexual interactions between staff and offenders can shift power from the staff to the offender. Since there are few secrets in correctional environments, offenders can gain a great deal of power when a staff member is involved in illegal or unethical behaviors. This power can translate into privileges and favors, including keys and freedom, that compromise the security of the facility, staff and offenders. These relationships can even result in serious injury or death.

### What is Agency Culture?

Agency culture is an organization's sum of attitudes, values, norms, beliefs, prejudices, history, personalities and ethics of staff – both past and present. It is the organization's character and the way it does business. In an unhealthy organization, inappropriate relationships between staff and offenders, including sexual misconduct, may be both ignored or accepted and thus reinforced as part of the culture of an agency. Changing the way an agency manages inappropriate relationships between staff and offenders can mean changing the culture of that agency.

In correctional agencies, there are often two types of culture:

- Ideal: the values held in principle, such as an organization's mission statement, policies and procedures, formal incentives and sanctions.
- Real: the way the agency actually works, the hidden, informal chain of command, how things get done and who has the power and leadership.

Influences on the culture of an agency include:

- the history and critical events that happen within an agency and how they are interpreted
- the hiring process
- the promotional process
- the disciplinary process
- the role played by middle management
- the physical environment (how the agency is kept up)
- behavior of staff with offenders and vice versa

- behavior of management with staff
- the tone and style of leadership
- staff-to-staff interactions
- staff-to-offender dynamics
- dress code
- language
- political support

Initiatives to prevent and address staff sexual misconduct through change in agency culture require a long-term commitment. Changing culture is not a short-term project; it involves a substantial and organized effort with all employees as well as with offenders.

### The “Code of Silence”

The “code of silence” has been defined as the unwillingness of staff and/or management to talk openly about other staff or incidences of an illegal, unethical or questionable nature. Staff may refuse to cooperate in the investigation of critical events, specifically the reporting and investigation of an allegation of staff sexual misconduct, in order to protect fellow staff members. Most staff members would rather risk discipline than violate the code of silence within the correctional community; this silence protects wrongdoers.

In the case of staff sexual misconduct, the code of silence may exist because:

- staff compromise their values in order to fit into an agency and to avoid becoming an outsider
- staff may find it easier to ignore the conduct
- staff may fear retaliation from the accused or other employees for violating the code
- staff may find it impossible to believe that a peer could have a sexual relationship with an offender
- staff may see internal investigations as unprofessional, untimely or even as a “witch hunt.”
- staff may believe offenders deserve what they get
- staff fear if they report misconduct, other staff may not protect them if they are involved in physical altercations with offenders in the future
- staff may not see relations with offenders as wrong

### ***Baron v. Hickey, 242 F. Supp. 2d 66 (D. Mass. 2003)***

In Suffolk County, Mass., a correctional staff member was allegedly harassed and forced to quit because he broke the code of silence. He claimed that he was being harassed by his co-workers after reporting an incident of misconduct as instructed by his supervisor. Co-workers referred to him as a “rat,” dropped cheese in front of him and slashed his tires. The officer complained on 30 separate occasions and was eventually forced to resign.

The court found in favor of the officer stating that reporting matters of misconduct within prison walls is a matter of great importance to the public. Therefore, “it is essential that staff members be able to speak out freely about misconduct without the pressure of a code of silence and fear of extreme retaliatory harassment sufficient to force resignation.” The officer was ultimately awarded \$500,000 in damages by a jury.

### **The Code of Silence**

Three whistleblowers from the California Department of Corrections (CDC) would not deny that they have felt ostracized, stigmatized and isolated as a direct result of breaking the code of silence and reporting the misconduct of co-workers in the CDC. Because of the reprisals and retaliation they endured, each filed whistleblower lawsuits against the department. The current status of those claims calls into question the sincerity of the CDC’s promises of “zero tolerance” for retaliation against officers reporting misconduct. Under the California Whistleblower Protection Act, “state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.” (As reported by the *Sacramento News and Review* on May 13, 2004)

What are some other signs of a Code of Silence?

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To send us your answers go to:  
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A former correctional officer and supervisor admitted to lying to high-ranking officials when he said he could not remember the names or faces of workers involved in a deadly attack on a detainee last year. The guard said, "The reason why is that I did not want to be the one up in this position now. Woods and Hatcher are good friends of mine. I have nothing against them." (As reported by the *Baltimore Sun* on September 28, 2006)

While there is disagreement about the power and pervasiveness of the code of silence, it does exist within most correctional environments. These unspoken rules often result in irreparable damage to the profession.<sup>4</sup> As previously mentioned, there are often consequences for those who choose not to report an incident due to this code of silence.

The primary mission of corrections is to provide safe and secure environments for persons under correctional supervision and the staff who supervise them. The code of silence, however, compromises agency security. Administrators and agency policy should be clear about the harm caused by the code of silence. The presence of unethical behavior, abuse of power and cover-ups may result in the institution becoming a dangerous place to live and work.<sup>5</sup> It allows a group to enforce the rules as they see fit without being accountable. It ultimately breeds anger and distrust and can destabilize an agency.

Another mission of corrections is to create an environment where people can contemplate and/or change behavior that resulted in their conviction and imprisonment. Staff sexual misconduct is at odds with the goal of behavioral change and rehabilitation by creating an unequal and sexualized environment where staff members fail to fulfill their duties as rehabilitators.

In order to address the unhealthy work environment caused by staff sexual misconduct with offenders, there must be a change in agency culture and a redefinition of staff sexual misconduct as a security issue. Even though staff may face pressure to be silent or ignore misconduct, it is necessary to understand the difference between loyalty to each other and loyalty to corrections as a whole. Loyalty to the group is important in fostering solidarity, enhancing safety and building trust. Ultimately though, loyalty to the mission of corrections – safe, secure and rehabilitative environments – is more important.<sup>6</sup>

<sup>4</sup> Martin, Keith. "Cracking the Code of Silence." *Corrections.com*. 6 July 2002. <[www.prisonerlife.com/articles/articleID=36.cfm](http://www.prisonerlife.com/articles/articleID=36.cfm)>

<sup>5</sup> Martin, Keith. "Cracking the Code of Silence." *Corrections.com*. 6 July 2002. <[www.prisonerlife.com/articles/articleID=36.cfm](http://www.prisonerlife.com/articles/articleID=36.cfm)>

<sup>6</sup> Martin, Keith. "Cracking the Code of Silence." *Corrections.com*. 6 July 2002. <[www.prisonerlife.com/articles/articleID=36.cfm](http://www.prisonerlife.com/articles/articleID=36.cfm)>

## Victimization

Many correctional staff do not view offenders as “victims” of staff sexual misconduct, especially when offenders initiate or appear to willingly engage in sexual or “romantic” interactions with a staff member. Yet, no matter what an offender says or does, the imbalance of power between staff and offender makes the offender the victim. What may appear to be consent or willingness to participate can often be a survival strategy or a response to prior or current victimization.

In fact, most offenders have prior histories of victimization. A 1999 report by the United States General Accounting Office found that 52 percent of state female prisoners had been physically or sexually abused prior to their current incarceration.<sup>7</sup>

A Bureau of Justice Statistics report from 1999 also indicated that 19 percent of state prison inmates, 10 percent of federal inmates and 16 percent of jail inmates (male and female) reported being physically or sexually abused in the past.<sup>8</sup> The report also found:

Female offenders who are survivors of abuse:

- report that nearly one-third of the abuse is suffered at the hand of a parent or guardian; prior abuse by spouses or boyfriends is also reported
- report that abuse continues through childhood into adulthood
- report abuse by both family members and intimates
- are more at risk for unhealthy relationships with authority figures, particularly men

Male offenders who are survivors of abuse:

- indicate being mistreated, mostly as children
- are more likely than women to be abused by someone outside of their family
- are less likely to report abuse or seek help
- may question sexual identity and preference as a result of the abuse

Some impacts of victimization on all offenders (male and female) are:

- questioning what is normal
- altered development of attitudes towards self, sexuality and relationships
- poor boundaries, including promiscuity
- substance abuse and addiction

<sup>7</sup> United States. General Accounting Office. Women in Prison: Sexual Misconduct by Correctional Staff. Washington, DC. June 1999.

<sup>8</sup> United States. Bureau of Justice Statistics. Prior Abuse Reported by Inmates and Probationers. Comp. Caroline Harlow. Washington, DC. April 1999.

## Offender Abuse Histories

### Men:

- Although men are more likely than women to be abused in childhood by someone outside of the family, more than half of male offenders reporting a history of abuse had been abused by parents or guardians.
- Sixty one percent of male state prisoners reporting abuse were serving a sentence for a violent offense, compared to 46 percent of those reporting no past mistreatment.
- Males are less likely to report abuse or seek help.
- The experience of sexual victimization may be even more stigmatizing for men than for women because these victimization experiences fall so far outside of the proscribed male gender role.

### Women:

- The majority of female offenders report prior sexual abuse, which appears to be a pathway to delinquency, addiction and criminality.
- Women are more at risk for unhealthy relationships (characterized by abuse, exploitation) with authority figures, particularly men.
- Female offenders report that they were most often abused by intimates or family members. Almost 91 percent knew their abuser, 40 percent of abuse was at the hands of a family member, and 27.2 percent of abuse at the hands of a parent or guardian. Sixty one percent of abuse was perpetrated by an intimate.

**Classes of persons vulnerable to sexual abuse include those who are:**

- Developmentally disabled
  - Hearing impaired
  - Limited language ability
  - Previously victimized
  - Gay and transgendered
  - Juveniles
  - Untreated addicts
  - The mentally ill
  - The elderly
- a “use or be used” philosophy
  - low self-esteem
  - feelings of powerlessness
  - feelings of mistrust, betrayal and fear
  - feelings of guilt or shame
  - susceptibility to further victimization
  - mental illness
  - suicidal tendencies



## Communication, Gender and Abuse Histories

A history of abuse for both staff and offenders will affect how women interact with men and how men interact with women. It will also affect how men and women interact with others of the same gender.

In addition, women and men differ in their behavior and communication styles even if they have not experienced abuse. By understanding how you behave and communicate, you will be more likely to avoid situations that could be misinterpreted or lead to sexual misconduct.

Some characteristics of male behavior and communication are that men often:

- guard information
- do not share thoughts and feelings
- are reluctant to ask for help
- are less verbal
- can be aggressive, competitive and less outwardly emotional
- have an ability to conceal vulnerabilities

Some characteristics of female behavior and communication are that women often:

- share thoughts and feelings
- build rapport, bond, and have closeness and intimacy with people
- are eager to talk about problems
- are caretakers
- can show feelings and emotions
- are more inclined to ask for help
- are willing to expose vulnerabilities

The interrelationship between communication, gender and abuse histories in correctional settings is important because it affects how offenders interact with you and how they do their time.

### Typology of Staff Involved in Sexual Misconduct:

**SITUATIONAL:** Good professional history, sudden change in life course, situational breakdown in judgment or control

**PSYCHOTIC:** Impaired reality, delusions of grandiosity and love

**NAÏVE:** Difficulty understanding or operating within professional boundaries due to poor social judgment

**NEEDY:** Emotionally dependent, overly involved, not initially driven by sexual desires

**THRILL-SEEKER:** Risk-taker, desires adventure, enjoys living on the edge

**PREDATOR:** Narcissistic, self-centered exploiter, manipulative, seeks to gratify own needs, lacks remorse

**LOVESICK:** Believes they are in love with the offender; deficiency in judgment confined to one particular offender

**RESCUER:** Believe they have special kinds of help that only they can offer to save/guide/help the offender

**BULLY:** Intimidates, dominates, finds victims' submission gratifying, exerts power and control

(Source: United States Department of Justice/National Institute of Corrections. "Gender Differences." Investigating Allegations of Staff Sexual Misconduct with Offenders Training: Comp. Melissa Turner. Washington, DC. (July 2006)).

Other examples of pressures correctional staff face are:

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Other strategies for supporting staff can include:

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## Tools for Defining and Identifying Inappropriate Relationships with Offenders

Correctional staff members are subject to many pressures. These pressures can make staff vulnerable to behaviors they may not normally engage in.

Pressures include but are not limited to:

- stress on the job (e.g. conflicts with other staff)
- personal stress (e.g. financial difficulties, marital difficulties, loneliness, mental health problems)
- substance abuse
- personal life changes
- issues of power and control
- balancing counseling and treatment responsibilities with surveillance and control
- inadequate preparation for supervising offenders and understanding their complex life experiences
- inadequate supervision and support from administration

Offenders have the right to be free from sexual advances by correctional staff. While there is no question that correctional environments are stressful and dangerous work places, personal factors can also weaken a staff member's resolve to avoid sexual misconduct with an offender.

If you are afraid you are in danger of having an inappropriate relationship with an offender you should find out what resources your agency has to support staff in these situations. You can:

- tell a supervisor and request help
- contact your employee assistance program (E.A.P.) or a private counselor
- tell a friend or other trusted staff member
- request a transfer of post
- request a transfer of the offender

## Ethics<sup>9</sup>

Ethics are the knowledge and guidelines used to make decisions based on a set of morals and values within a particular group. Correctional staff face many challenges that make day-to-day decisions difficult. Making ethical decisions are sometimes even harder.

In order to make an ethical decision it helps to:

- define the dilemma you are having
- gather data and information about the dilemma
- list the “pros and cons” if you make a decision either way
- ask yourself if your choices would be considered legal
- ask yourself if your choices feel consistent with your own values and moral compass
- ask yourself if your choices are consistent with your agency’s mission
- list the consequences for yourself, offenders, other staff, supervisors, administrators and the public

We face ethical dilemmas every day. Some examples of ethical decisions you may need to make are:

- Is it ethical for me to have dinner with the family of an offender?
- Is it ethical to cover for a colleague who is experiencing some personal problems at home and behaving in a questionable manner?
- Is it ethical to accept a reduced price meal from a local diner because I am a correctional staff member?
- Is it ethical to overlook a close friend’s violation of a petty department rule?
- Is it ethical to take a mental health day periodically?
- Is it ethical to have my car serviced at a garage where a former offender works?
- Is it ethical to tell a “little white lie” to protect a peer or colleague?
- Is it ethical to tell an offender s/he looks good or flirt if no one “gets hurt”?
- Is it ethical to find ways around departmental policy and procedures that get in the way of doing my job?
- Is it ethical to do favors for my supervisor?
- Is it ethical to do favors for an offender?

## American Correctional Association Code of Ethics

The American Correctional Association expects of its members unfailing honesty, respect for the dignity and individuality of human beings and a commitment to professional and compassionate service. To this end, we subscribe to the following principles. Members shall:

- Respect and protect the civil and legal rights of all individuals.
- Treat every professional situation with concern for the welfare of the individuals involved and with no intent to personal gain.
- Maintain relationships with colleagues to promote mutual respect within the profession and improve the quality of service.
- Make public criticism of their colleagues or their agencies only when warranted, verifiable, and constructive.
- Respect the importance of all disciplines within the criminal justice system and work to improve cooperation with each segment.

Please visit the American Correctional Association at [www.aca.org](http://www.aca.org) for the full Code of Ethics.

<sup>9</sup> Center for Innovative Public Policies. Addressing Staff Sexual Misconduct in Community Corrections. Comp. Susan McCampbell. 2002.

**Some headlines involving staff sexual misconduct with offenders have included:**

- Former Prison Nurse Springs Husband, Fatally Shoots Officer
- Escape Reinforces Rules Against Relationships with Inmates
- Prison Love Led To Deadly Shooting, 2 Days on the Run and Capture
- Virginia Ex-Deputy Guilty of Having Sex With Inmates
- Governor Fires Prison Chief Over Inmate Sex in Mansion
- Correctional Officers Accused of Sex Offenses with Inmates
- County Jail Guard Charged with Sexually Abusing Woman
- Ex-Officer Pleads Guilty to Sex with Inmate
- Deputy Sentenced in Sex Case
- Nurse Pleads Guilty in Prison Sex Case

The answers to these questions are not always clear or easy to determine. Avoiding staff sexual misconduct with offenders also involves ethical choices.

To determine if the decision you have made is ethical, ask yourself:

- Was my decision based on anger, lust, peer pressure or greed?
- Would I make the same decision if my family were standing beside me?
- Would I make the same decision if I were being videotaped or my supervisor was watching?
- Would my loved ones be ashamed of my decision?
- Can I look at myself in the mirror after the decision I made?

Some people find applying the *Headline Test* is a good way to determine whether a decision may be ethical or not. Ask yourself, “what would a headline in a newspaper look like if they were covering this story?” If the headline looks or feels bad or is one you would be ashamed to show your friends or family, the decision or action is probably not a good one.

### The Daily Dozen<sup>10</sup>

Asking yourself questions can be a good “check and balance” to see if pressure is clouding or affecting your good judgment. The purpose of these self-check questions is to help correctional staff members identify when they might be getting close to crossing ethical and professional boundaries.

The questions are as follows:

- Do you look forward to seeing a particular offender when you come to work?
- Have you done anything with an offender that you would not want your family or your supervisor to know about?
- Would you be reluctant to have a co-worker observe your behavior for an entire day?
- Do you talk about your personal matters with offenders?
- Do you believe you can ask an offender to do personal favors for you?
- Have you ever received personal advice from an offender?
- Have you said anything to an offender that you would not want tape recorded?
- Do you have thoughts or fantasies of touching a particular offender? Does this extend to planning how you can be alone with that offender?
- Do you think you have the right to touch an offender whenever and wherever you want to?

<sup>10</sup> Teena Farmon, a former warden and a national expert on staff sexual misconduct initially developed this questionnaire for correctional staff to use as a self-test daily.

- Do you look forward to sharing good/ bad news with a particular offender?
- Do you think offenders are not allowed to say “no” to you, no matter what you ask?
- Have you ever allowed an offender to talk to you about sexual experiences or sexual fantasies, or to tell sexual jokes in your presence? Have you ever shared these things with an offender?

If you answered “yes” to any of the above questions, you may be in danger – sexual misconduct often begins as over-familiarity with an offender. Even offering an offender something you may think is simple and harmless, such as candy or soda, can begin to break down professional boundaries. This is particularly important because in some facilities, correctional staff come from the same communities. You may share schools, friend, and sometimes even family. But it is your responsibility to treat all offenders the same and in accordance with your agency’s policies.

Correctional administrators also have a responsibility to assist and support staff members. Administrators need to ask if their agency does the following to prevent staff sexual misconduct with offenders:

- adequately train and supervise staff
- minimize role ambiguity within the agency (make it clear where boundaries between staff as helpers and staff as keepers should be drawn)
- have adequate staffing so staff are not required to work excessive overtime to fill gaps
- limit overcrowding and case loads as much as possible
- minimize the isolation of staff members from their peers
- minimize staff turn-over
- have zero tolerance for retaliation against those who report sexual misconduct
- develop a system of anonymous reporting of incidents of sexual misconduct
- offer safe avenues for staff who seek help
- protect staff who come forward to report misconduct

Are there other questions like the Daily Dozen you should be asking yourself?

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**Can you identify other red flags?**


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**Can you identify the red flags in this situation?**

(Answers on page 22)

Emily, the only female intern working on unit 4, came to work early on a Friday to work on some programming she was planning. That was the fourth day that week she came in early and worked late. She had appointments with four residents set up that day for review of discipline files. Each appointment took about 15 minutes.

As usual, she kept her office door open during those appointments. The fifth resident appointment took an hour and the door was closed. This particular resident had been in her office each day this week and she was unusually attentive to him when she was out on the unit. She always asked the unit advisor about this particular resident and his progress, even though he was not on her case load.

When questioned about her unusual work hours and specific interest in this particular resident, she responded that she was fighting a lot with her husband and did not want to be home much. She said her interest in this particular resident was because they were from the same neighborhood and she knew his sister.

When the resident was questioned about his relationship with Emily he revealed that he knew her phone number and that she had confided in him that she was thinking of getting a divorce. The resident stated that she looked sad one day, and, noticing that she did not interact with any other staff because they were all men, he thought he could be her friend.

**Red Flags**

Addressing staff sexual misconduct is important both individually and within an agency. While you may not be in danger of committing such an offense, one of your co-workers may be. Therefore it is very important to pay close attention to your colleagues' behavior as well as your own.

The following is an exercise developed over the years. It is a list of behaviors that may be signs that you or someone you work with is in danger of engaging in sexual misconduct. These behaviors or "red flags" may signal that there are problems ahead for you, your co-workers, or your agency.

Some examples of "red flags" are:

- deviating from agency policy for the benefit of a particular offender
- changes in the appearance of an offender or staff member
- overlooking infractions of a particular offender
- spending a lot of time with a particular offender
- trying to manipulate duty assignments in favor of a particular offender
- taking up an offender's cause or grievance
- doing favors for an offender
- getting into conflicts with co-workers over an offender
- withdrawing from co-workers
- consistently volunteering for a particular assignment or shift
- consistent overtime
- coming to work early
- staying at work late
- flirting with an offender
- feeling the effects of major life changes (such as the end of a relationship)
- less rigid body language or standing unusually close to an offender
- doing favors for an offender's family
- bringing things into the facility for the offender

Remember, it is a problem for every staff member when a co-worker is involved in sexual misconduct. By regularly looking for red flags and signs of over-familiarity, and by asking yourself the Daily Dozen questions, you will be doing a personal check of your feelings and emotions as well as those of your co-workers. This will help in the protection from and prevention of staff sexual misconduct with offenders.

## What Happens When an Allegation of Staff Sexual Misconduct is Made?

Because all states define staff sexual misconduct as a criminal behavior, sexual misconduct allegations must be treated like any other allegation of criminal conduct. While each investigating authority will have different protocols, there are some common investigative elements.

An investigation is a process to objectively gather the facts surrounding an allegation to prove or disprove, to the extent possible, its merits. Effective investigations of allegations of staff sexual misconduct with offenders are essential for the agency's security, the safety of offenders and staff, and the professionalism of corrections. Effective investigations also help the agency to prove the guilt or innocence of staff members.

### Demystifying the Investigative Process

The first few hours after an allegation is made are critical to the investigative process. Investigators should:

- secure the crime scene
- assure medical and mental health interventions are available
- collect and preserve physical evidence
- gather witness statements
- transfer the victim and/or staff member involved to ensure no further harm
- provide medical or mental health services to the victim if necessary
- implement the investigative plan

The plan put together by an investigative team may include:

- individual interviews with staff, the victim, and all other possible witnesses (staff and offenders)
- searches of staff and offender property
- reviewing account activity of the offender
- reviewing telephone activity of the offender and staff
- reviewing mail to the offender
- collection of DNA evidence (which includes blood, semen, saliva, skin and hair)
- the use of covert surveillance techniques<sup>11</sup>
- electronic monitoring and recordings

<sup>11</sup> Each jurisdiction's rules about surveillance are different. For more information on the rules for your agency consult your investigations department.

DNA can be collected from cups, chairs, floors and clothes and can be found years after an incident. One of the most important aspects of securing a crime scene in a correctional setting is to preserve the scene with minimal contamination or disturbance of any physical evidence. The first responder in a sexual assault incident should always treat the area in question as a crime scene. He or she should remain observant of any persons, events, potential evidence and environmental conditions, and pass this information on to the investigative team.

Polygraph results are often in question. The CIA, the FBI and many other agencies use polygraphs to screen applicants even though scientists are increasingly certain that the equipment is ineffective at accurately detecting when people are lying. Many researchers and defense attorneys say the technology is prone to a large number of false results that have stalled or derailed careers. (As reported by *The Washington Post* on May 1, 2006)

### Red Flags Answers (from page 20)

1. Unusual amount of office visits by an offender
2. Employee is isolated from other employees
3. Employee is in personal crisis
4. Employee is consistently working overtime
5. Employee is overly concerned about a particular offender
6. Employee is discussing personal information with an offender
7. Employee is involved with an offender's family
8. Closed door

- controlled calls between staff and offenders
- polygraph examinations

Staff members accused of sexual misconduct may face the following during an investigation:

- reassignment
- placement on administrative leave with or without pay
- required participation in an employee assistance program (E.A.P.)

Each agency has a unique investigative process. We suggest that you find out what the investigative process is in your agency. Consider the following:

- Who is responsible for investigating allegations of staff sexual misconduct?
- How can an offender or staff member make a complaint?
- To whom is the complaint made?
- Who collects evidence?
- How does evidence get collected?
- Who interviews witnesses?
- What are the guidelines for interviewing other staff?
- Does the interview policy allow the use of polygraphs?
- Who will manage the investigation?
- Is there a review of the investigation once it is completed?
- Does your agency have a victim advocate? If so, when are they called in?
- What are the procedures for handling unsubstantiated reports?

By learning the answers to these questions, you can demystify the internal investigative process for yourself. At the mere mention of internal affairs, many correctional staff have negative reactions. For a variety of reasons, including unfamiliarity with the investigative process, internal affairs investigations are suspect for most correctional staff members. However, if the internal investigative process is understood, staff are more likely to be cooperative and report suspicious activity and violations of policy. Remember, thorough and competent investigations can clear staff as well as convict them.



## What are Your Rights During a Staff Sexual Misconduct Investigation?

Your rights as a correctional staff member depend on your employment status. Consider the following:

- Are you a public or government employee?
- Are you a union member?
- Are you a private employee?
- Are you a new employee and on probation status?
- Are you on disciplinary status from a previous situation?

Public or government employees are those employed by a federal, state or local government. They have significant protections under federal and state law and also under federal and state constitutions.

Many correctional staff members belong to unions. If you are a union member, you have certain protections during investigations and/or disciplinary procedures that are governed by the collective bargaining agreement (the agreement between the union, the workers represented and the agency).

Still other correctional employees are workers in the private sector, who do not have rights against their employer under the federal constitution but have some protections under federal and state antidiscrimination and other laws.

As public sector **employers**, correctional facilities must balance your constitutional rights with the legitimate interests of your agency. Your constitutional rights as a public employee are guaranteed by the:

- First Amendment – Freedom of Association
- Fourth Amendment – Privacy and Surveillance
- Fifth and Fourteenth Amendments – Due Process and Equal Protection

### What is a "probationary employee"?

A worker may be considered "probationary" when:

1. the worker is first hired (whether under a union contract or based on the employer's personnel policies); or
2. the worker is being disciplined by the employer

### As a probationary employee, am I still covered by employment laws?

Generally, employment laws treat probationary and regular employees equally. Whatever the reason for an employee's probation, the employer is still required to abide by minimum wage, discrimination, and workers' compensation laws regarding that employee.

### I have been placed on probation by my employer for disciplinary reasons. What is the legal significance of being on probation?

If an employer places an employee on probation for disciplinary reasons, that employee still has the same legal rights as regular employees. There is no legal significance to this probationary status other than as notice to the employee that s/he is in danger of being fired.

*Ross v. Clayton County*, 173 F.3d 1305 (11th Cir. 1999). Demotion of a corrections officer who had allowed his probationer brother to live with him did not violate the officer's free association rights under the First Amendment.

*Keeney v. Heath*, 57 F.3d 579 (7th Cir. 1995). Plaintiff guard at a county jail, who had been forced to resign from her job when she married a former inmate, sued, arguing that the county jail regulation that prohibited employees from becoming socially involved with inmates in or out of jail violated her constitutionally protected right to marry under the First Amendment. The court upheld the agency rule as constitutional.

*Sacramento County Deputy Sheriff's Association v. County of Sacramento*, 51 Cal. App.4th 1468 (1996), cert. denied, 520 U.S. 1124 (1997). County jail employees sued for Fourth Amendment violations after discovering they had been subjected to video surveillance in the county jail's release office, which was off limits to inmates. A concealed video camera without audio capacity had been installed in this office after inmates' money was reported missing almost a dozen times. The court held that the employees had no objectively reasonable expectation of privacy while in the release office, especially given that they had accepted employment in a prison setting, and that the institution's security concerns weighed more heavily than officers' privacy rights.

## The First Amendment

The First Amendment to the U.S. Constitution protects your rights to free speech and free association against interference by government actors. If you work for a government employer, you carry some of these First Amendment protections to work. However, courts have recognized that staff rights to freedom of association may be limited by correctional facilities' legitimate interests in upholding staff professionalism and preventing fraternization between staff and offenders. Using this reasoning, courts have said correctional facilities' no-contact policies are appropriate even when challenged under the First Amendment. No contact policies typically prohibit correctional staff from having relationships, both while on and off duty, with persons under correctional supervision. The courts have held that the policies are reasonable as long as they are justified by:

- interests in on-the-job performance
- interests in off-the-job conduct that implicates officers' fitness for duty
- interests in the public reputation of correctional facilities

## The Fourth Amendment

The Fourth Amendment states that it is your right to be free from unreasonable searches and seizures. If you are a public employee, this means you have some privacy rights at work. However, the amount of privacy protection you are entitled to depends on what reasonable expectations of privacy are in your employment setting. Because correctional facilities are, by their very nature, work settings where employees can reasonably expect a high degree of surveillance, your reasonable privacy expectations as a correctional staff member are limited. Correctional staff are well aware that their employers often use various types of surveillance within and around the perimeters of the agency, and that those surveillance techniques are often likely to watch staff as well as offenders.

The courts have found the following in cases of surveillance and Fourth Amendment violations:

- employees who accept a job in a correctional setting have very limited expectations of privacy
- a correctional agency's security concerns weigh heavily in the balance between agency needs and employee privacy rights
- random drug testing of correctional employees is permissible provided that it is not administered in a discriminatory way

- employee vehicles parked where they are accessible to offenders can be searched without cause provided that the searches are not administered in a discriminatory manner
- employee vehicles not accessible to offenders can only be searched on the basis of reasonable suspicion that they may contain contraband
- searches of a staff member's home require probable cause, as would be the case for any citizen

### The Fifth Amendment and Statutory Due Process Rights

If you are a public employee, the Fifth Amendment gives you the right to due process of law. Due process includes the right to avoid self-incrimination, to have representation for yourself, and to have due process proceedings before negative employment action is taken against you. The hearing procedures to which you are entitled will be spelled out under your state or federal civil service laws that apply to government employees.

### The Fourteenth Amendment

The Supreme Court has held that the Fourteenth Amendment to the U.S. Constitution prohibits coerced statements in an internal investigation from being used in a later criminal prosecution. These rights are based on a U.S. Supreme Court case known as *Garrity v. New Jersey*, 385 U.S. 493 (1967). These rights apply only in the context of investigations of public employees. The Supreme Court set forth rules for interrogating public employees and said that public employees could not be forced, under threat of discipline, to violate their protection against self-incrimination. In simple terms, this means that an investigator cannot force you to talk to them in connection with a criminal matter by threatening you with the loss of your job or other employment-related discipline. If an investigator does this, any information you provide cannot be used against you in a later criminal proceeding. Asserting your *Garrity* rights during an administrative hearing where you can be disciplined is advised.

### Sample Garrity Notice

*"You are advised that you are being questioned as part of an official investigation by (insert agency name here). You will be asked questions specifically directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and Constitution of (the State) and the United States Constitution. This includes your right not to be compelled to incriminate yourself (for unionized agencies only) and to have a union representative present during questioning. I further wish to advise you that if you refuse to issue a statement or to answer questions relating to performance of your official duties or fitness for duty you will be subject to departmental charges which could result in your termination. If you do answer, neither your statements nor any information or evidence, which is gained by reason of such statements, can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent disciplinary actions." - Minnesota DOC Internal Affairs Division*

### Sample Waiver of Union/Association Representation

I have been offered the opportunity to have a Union/Association representative present prior to my being asked any questions during this investigation that may lead to my being disciplined in accordance with the collective bargaining agreement between \_\_\_\_\_ and the State/ local jurisdiction of \_\_\_\_\_.

I am hereby waiving my right to have Union/Association representation present while being asked questions during the investigation.

The burden is on the employee to assert *Garrity* and make clear to the employer that you are answering under threat of losing your job. Once an employee has asserted *Garrity* rights, a supervisor or investigating authority must:

- attempt to make the question specific and related to your employment
- advise you that the answers will not and cannot be used against you in a criminal proceeding

It is important to understand that *Garrity* rights apply only under certain circumstances. Important to the *Garrity* rule is the following:

- whether the employer actually ordered or required you to respond to questions
- whether you were compelled by the threat of discipline to answer the question

*Garrity* protections do not apply if you voluntarily give a statement. Unless you are compelled, you have no obligation to respond to the questions. If you do decide to respond to questions without being compelled, there is no immunity given for the later use of your answers in a criminal prosecution. It is also important to remember that *Garrity* does not protect you from employment discipline.

### Union Member Rights

If you are a union member, you also have a right to union representation at investigatory interviews. These rights were first announced by the U.S. Supreme Court in a 1975 case and have become known as *Weingarten* rights.<sup>12</sup> *Weingarten* rights apply during investigatory interviews. Investigatory interviews happen any time a supervisor questions an employee to obtain information that could be used as a basis for discipline, or asks an employee to defend his or her conduct.

If you have a reasonable belief that discipline or other adverse consequences may result from what you say in answering a supervisor's questions, you have the right to request union representation. Management is not required to inform you of your *Weingarten* rights; it is your responsibility to know and make the request.

When you make the request for a union representative to be present, your supervisor or the investigating authority has three options:

- stop questioning until the representative arrives
- call off the interview
- ask you to voluntarily give up your right to a union representative (*it is generally not a good idea to waive your rights*)

<sup>12</sup> *NLRB vs. Weingarten, Inc.* 420 U.S. 251, 88 LRRM 2689. University of Hawaii – Oahu. Center for Labor and Research.

Employers often claim that the only role of a union representative in an investigatory interview is to observe the discussion. However, according to the Supreme Court, your union representative may do any of the following:

- assist and counsel you during the interview
- seek information on the subject of the interrogation
- speak privately with you before the interview
- interrupt to clarify a question or to object to confusing or intimidating tactics
- advise you on how to answer a question, provided that this advice does not extend to telling you what to say
- add information to support your case at the end of the interview

The union representative may not be disruptive or obstructionist, and an employer may be within its rights to request that the representative leave if he or she acts this way.

Your collective bargaining agreement will also provide for a grievance procedure ending in arbitration of any disciplinary action. If you engage in arbitration to contest discipline imposed based on an allegation of sexual misconduct with an offender, remember the following:

- both sides have the right to representation. (Remember, the attorney or other representative your union provides for you works for the union. He or she is not your lawyer.)
- both sides have the right to present evidence
- your employer may not interfere with your or any employee's right to testify at an arbitration hearing
- your union owes you the duty of fair representation and may not refuse to take or defend your case vigorously

### Employee Rights against Discrimination

If you are a public employee, federal and state laws, and the Constitution, grant you protection against discrimination by your employer on the basis of race, sex, national origin or religion. In order to make a case of discriminatory treatment based on your employer's investigation of alleged sexual misconduct or disciplinary action, you must be able to prove that you were treated differently from other employees in the same situation but with different social identity characteristics. It is usually very difficult for employees to win discrimination cases. Most employees who file such cases lose them even when they have some evidence of discrimination. Nevertheless, the law does require employers to treat employees with an even hand regardless of race, sex, national origin or religion.

### Can an Employer Take the Following Actions?

(Answers on Page 28)

Withdraw a job offer to a probation officer applicant after learning the applicant is married to a former offender

Yes No

Terminate a probation officer for buying a car at a dealership where a probationer under her supervision works (even though he was not involved in the sale)

Yes No

Terminate a probation officer for exchanging letters with a man she once dated who is now serving a life sentence outside her jurisdiction

Yes No

Deny a probation officer's request to attend the baptism of a child of a long-standing friend whose older son had been placed on probation

Yes No

## Defamation and Qualified Privilege

“Qualified privilege” protects representatives of employers who give out allegedly defamatory information for legitimate business purposes. This applies to former employee reference checks, provided that employer can show:

- Lack of malice
- Good faith
- Belief in truth of the statement made

### Employee Polygraph Protection Act:

- Many states have rules limiting or prohibiting polygraph testing; check with your legal counsel
- Federal law prohibits most polygraph testing in the private sector, but exempts public employees

### (Answers from Page 27)

Courts upheld employers in all of these cases. While this is still a developing area of law, there is a strong trend in the courts toward upholding state no contact policies between correctional employees and offenders and ex-offenders.

If it appears that you are being wrongfully targeted for investigation based on your race, sex, national origin or religion, and others are treated differently, your rights may be being violated.

## Protections for Private Sector Employees

If you work for a non-government employer, such as a private contractor who provides services within a correctional agency, the constitutional protections discussed above will not apply to you. You will, however, still have significant protections under federal and state antidiscrimination laws. Almost all employers are prohibited from discriminating on the basis of race, sex, national origin or religion. Generally, employment in the private sector however, is on an “at will” basis, which means that your employer is free to fire you for any reason except a discriminatory one, at any time.

## Former Employee Reference Checks

If you are terminated based on allegations of sexual misconduct, your former employer will have “qualified privilege”<sup>13</sup> to provide information about your termination to future employers who are conducting reference checks. Your former employer must act in good faith and may not be vindictive or spread information about the circumstances of your termination beyond those who have a legitimate “need to know.” Your employer can ask you to sign a waiver before agreeing to provide information about your employment to prospective employers. If you are investigated for alleged staff sexual misconduct and the investigation does not conclude that the allegations are true, be sure that it is clear in your employee record that the allegations were unfounded. You should also save copies of any reports or other written materials you receive in the course of any such investigation in your personal files at home.

<sup>13</sup> Qualified Privilege is applied to material that is of public concern and for the public benefit.

## What are the Legal Consequences of Staff Sexual Misconduct with Offenders?

There is legal liability for staff sexual misconduct with offenders. That liability can come in a number of ways. Correctional staff members who are found guilty of sexual misconduct with an offender could face:

- criminal;
- civil; and
- administrative sanctions

When discussing legal consequences for staff sexual misconduct, it is important to know the following:

- sex between staff and offenders violates state and federal criminal laws
- sex in correctional settings between staff and offenders can violate the U.S. Constitution
- correctional staff have a special responsibility to offenders; therefore as a matter of law, offenders cannot consent to sex with staff
- correctional agencies have a responsibility to protect employees and offenders who report sexual misconduct

It is important to remember that however you may feel about offenders, there are legal ramifications for any actions taken with or against an offender.

### Criminal Liability<sup>14</sup>

Each state has a law that makes staff sexual misconduct with offenders a crime. While each state's law is different in its coverage and penalties, it is essential that you know the following about the laws in your state:

- which employees are covered under the law
- which correctional settings are covered under the law
- what conduct is covered under the state's sexual misconduct law
- if staff are considered mandatory reporters
- what are the legal sanctions and penalties defined for those found guilty
- is there a strict liability defense

A former Livingston County jail (Illinois) correctional officer will serve fifteen weekends in jail, pay a fine of \$300.00 and register as a sex offender after pleading guilty to having sexual contact with a female inmate. In 2002 the officer was the jail's correctional officer of the year. (As reported by the *Pantagraph of Bloomington*, on November 2, 2004)

A former corrections lieutenant fathered the child of an incarcerated woman. DNA tests proved that veteran Virginia Department of Corrections Officer Bobby Gordon Brown, Jr. fathered a child while the child's mother, Sheron Montrey, was imprisoned at the Pocahontas Correctional Center in 2005. Brown will serve six months in jail and pay restitution. (As reported by *The Richmond Times Dispatch* on July 27, 2006)

A former jail guard plead guilty to rape and lying to the FBI about sexually abusing female inmates at the Rensselaer County Jail (New York). David Rohrmiller admitted to the Rensselaer County Court that he lied to the FBI and the grand jury. He faces one to three years in prison for third-degree rape. (As reported by the *Associated Press* on March 24, 2006)

Jimmie Harris Knight, a former Federal Correctional Institute (FCI) officer, was sentenced to three years probation and six months home detention for a sexual incident that occurred with a female inmate on June 6, 2005. Other FCI guards were charged separately with conspiracy and staff sexual misconduct, which spurred a deadly shootout in June. (As reported by the *Tallahassee Democrat* on August 29, 2006)

<sup>14</sup> A 50 State Survey of Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody developed by the NIC/WCL Project on Addressing Prison Rape under NIC Cooperative Agreement 06S20GJJ1 is located in the appendix of this handbook.



A suit filed in federal court by the Civil Rights Division of the U.S. Department of Justice accuses former Inmate Systems Manager, Rick Bernard, of sexual contact with female inmates at the Bryan Federal Prison Camp. He is charged with two counts of sexual abuse of a ward, two counts of abusive sexual contact with a ward and one count of making a false statement to a federal agent. (As reported by the *Houston Chronicle* on October 3, 2006)

Prosecutors can also use the following areas of law to charge correctional staff who engage in sexual abuse of individuals under correctional supervision:

1. Witness Tampering
2. Bribery
3. Perjury
4. Malfeasance in Office

The legal consequences you could face if convicted of felony or misdemeanor staff sexual misconduct with an offender may include:

- fines
- imprisonment for “less than one year” up to “a term not to exceed life in prison”
- loss of professional license
- sex offender registration

It is important to remember that in cases of staff sexual misconduct, prosecutors can seek a conviction under sexual assault, statutory rape, sodomy and sexual misconduct laws. In addition, prosecutors can charge you for official misconduct.

If you fail to report the misconduct or assist another staff member in facilitating the conduct – either by hiding their conduct, lying about conduct you’ve witnessed, or participating in it – you can be charged with:

- obstruction of justice
- conspiracy
- making a false statement to a government official

## Civil Liability

The U.S. Constitution, state constitutions and state and federal laws protect offenders from correctional officials’ actions and actions of other individuals whom correctional authorities have given authority over offenders.

Federal Constitutional provisions are:

- 42 U.S.C. §1983
- The Fourth Amendment
- The Eighth Amendment
- The Fourteenth Amendment

Correctional staff are “persons acting under color of state law” under 42 U.S.C. §1983, so they can be liable for violating offenders’ rights. This is true even if you are not security staff or if you don’t work for the corrections agency. Persons acting under color of state law can include:

- volunteers
- contractors
- food service workers



- clergy
- staff in other agencies where offenders work (such as supervisors of offenders on work release)
- teachers
- nurses

In sexual misconduct cases, offenders typically claim that correctional staff or agents violated their rights under:

- The Fourth Amendment
- The Fourteenth Amendment
- The Eighth Amendment
- State law

The Fourth Amendment prohibits unreasonable search and seizures. Typical actions challenged under the Fourth Amendment are:

- inappropriate or intrusive searches
- cross-gender supervision
- inappropriate viewing of offenders

The Fourteenth Amendment prohibits states from depriving “any person of life, liberty or property without due process of law.” Typical actions challenged under the Fourteenth Amendment are:

- sexual abuse by staff or other offenders
- discipline or retaliation for reporting misconduct
- any action that puts the offender at risk

Most often, though, offenders challenge staff sexual misconduct under the Eighth Amendment of the Constitution. They claim that sexual abuse is “cruel and unusual punishment” in violation of the Eighth Amendment. Courts favor offenders using the Eight Amendment. Offenders must show that the harm is serious and that persons acting under color of state law were deliberately indifferent to their safety, health or a known vulnerability.

Typical actions challenged under the Eighth Amendment are:

- sexual abuse by staff or other offenders
- retaliation
- inadequate medical treatment
- conditions of confinement that contribute to an unsafe environment

*Colman v. Vasquez*, 142 F. Supp.2d 226 (2d. Cir. 2001). A female inmate was incarcerated at FCI Danbury in a special unit for victims of sexual abuse, where they were subjected to random pat searches by male staff. A victim filed a complaint after a staff member made sexual advances, but the complaint was ignored. The court found that there was a failure to protect inmates and adequately train staff. The motion to dismiss on the basis of qualified immunity was dismissed.

*Torres v. Wisconsin DOC*, 859 F.2d 1523 (7th Cir. 1986). A male correctional officer at a maximum security women's prison challenged the DOC's exclusion of male employees from posts in the living units. The court upheld the prison's decision.

*Morris v. Eversley*, 2002 WL 1313118 (S.D. N.Y. June 13, 2002). The court found that women challenging sexual assault during incarceration are not required to meet the Prison Litigation Reform Act (PLRA) exhaustion requirement once released.

*Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003). An inmate who was assigned to work in a state driver's license bureau as part of her sentence was able to sue the state driver's license examiner for sexual misconduct under the Eighth Amendment. The court found that a state agency that is delegated the responsibility of care and confinement of an inmate of the DOC can be liable under Eight Amendment.

*Austin v. Terhune*, 2004 WL 1088293 (9th Cir. 2003). A correctional officer exposed his genitalia to a male prisoner. The prisoner tried to file a grievance but was prevented from doing so by other officers. The exposing officer apologized later and told the inmate not to complain but the inmate refused. The officer filed a false disciplinary report on the inmate. As a result, the inmate was placed in segregation for six weeks. During that time, the inmate continued to file grievances. Officials eventually investigated, and suspended the officer without pay for 30 days. The court found that there was no Eighth Amendment violation for the exposure, but allowed the inmate to proceed in an Eighth Amendment law suit for the retaliation against him.

*Campos v. Nueces County*, 162 S.W. 3d 778 (2005). The court found that female prisoners in a county substance abuse treatment facility could sue guards and the county under the Civil Rights Act and Texas Tort Claims Act for non-functional and improperly placed security cameras, doors, rooms and enclosures, when those defects resulted in prisoners' sexual abuse and harassment.

- malfunctioning of unmonitored cameras
- poorly trained staff
- poor investigations
- failure to fire staff who harm offenders
- failure to supervise or train staff properly

Offenders also challenge sexual misconduct using state laws including:

- State constitutions
- State tort laws
  - assault and battery
  - negligent hiring, firing and supervision
  - intentional infliction of emotional distress
  - negligent infliction of emotional distress

Sexual misconduct can result in criminal and civil liability for correctional staff, officials, and agencies. Staff can face sentences ranging from probation to 40 years in prison – in addition to loss of license, sex offender registration and civil liability. Civil liability means that the state will have to pay monetary damages to the harmed offender and/or take actions to remedy the sexual abuse. More often than not, damages incurred by agencies and officials are paid by the state. However, damages incurred by the staff who directly harm the offender or who assist in harming the offender by covering up the misconduct are paid by those staff from their own financial resources.

## Prevention

Although staff sexual misconduct may be difficult to control, internal policies and training<sup>15</sup> for both staff and offenders can help. The purpose of internal policies is to deter behavior that may lead to the violation of your agency's standards for conduct, and ultimately to prevent you from violating the law. Your agency has policies regarding use of force, searches and seizures, and confidentiality of records. Likewise, most facilities have internal policies prohibiting staff sexual misconduct with offenders.

We suggest that you find and read your facility's policy regarding this matter. It may also be helpful to read some representative policies from other facilities and compare and contrast the language and behaviors outlined in those policies.<sup>16</sup> Then consider the following:

- Does your agency's internal policy measure up to others?
- Do you see gaps in your agency's policy that may leave you or your co-workers vulnerable to committing, and being found guilty of, sexual misconduct with an offender?
- Is your agency's policy outdated or otherwise lacking?

To prevent and address staff sexual misconduct, you can:

- ask your agency's policy review board to review, revise and update your written policies and procedures to include updated definitions of illegal and unethical behaviors
- ask for training about policies and procedures as well as state laws governing staff sexual misconduct
- ask for training to improve your skills in offender management
- ask for training on offender abuse histories and how it impacts them and you during their incarceration
- work to diminish the "code of silence" in your agency
- research and learn more about the resources available to you through your employee assistance program (E.A.P.) and resources available to your agency through the National Institute of Corrections
- report sexual misconduct in your agency
- do not commit sexual misconduct

<sup>15</sup> The National Institute of Corrections (NIC) is a useful resource for training on staff sexual misconduct. To view these opportunities please go the NIC website at [www.nicic.org](http://www.nicic.org).

<sup>16</sup> If you would like to get a copy of policies and procedures from other jurisdictions please go to [www.wcl.american.edu/nic](http://www.wcl.american.edu/nic).

### Prevention Strategies Include:

1. Following agency policies and procedures
2. Triaging your organization
3. Reviewing policies and procedures
4. Training
5. Knowing investigative protocols
6. Zero tolerance

Are there other prevention strategies that you use or are aware of?

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To send us your answers go to:  
[http://www.wcl.american.edu/nic/co\\_handbookresponses.cfm](http://www.wcl.american.edu/nic/co_handbookresponses.cfm)

For further information on anything discussed in this handbook or to give us your comments please email us at [nic@wcl.american.edu](mailto:nic@wcl.american.edu). We are interested in hearing from you.

## Conclusion

Staff sexual misconduct with offenders can be prevented. It is not inevitable. Staff and agencies have the tools to prevent this harmful conduct.

This handbook addresses and explains:

- why staff sexual misconduct is an important topic for discussion individually and agency-wide
- how correctional culture can allow sexual misconduct to flourish
- which tools can help you identify and address sexual misconduct
- what will happen if there is an allegation against you and what your rights are
- what the consequences of staff sexual misconduct with offenders are for you personally and for your agency

We hope that we have provided information that assists you in understanding and addressing this problem. This issue cannot be ignored. It is not just a legal issue; it is an issue of public safety and security. We hope that you commit to eliminating inappropriate relationships and staff sexual misconduct in your agency.

## Resources

### Government Reports

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American Correctional Health Services Association: [www.achsa.org](http://www.achsa.org)  
American Jail Association: [www.aja.org](http://www.aja.org)  
American Probation and Parole Association: [www.appa-net.org](http://www.appa-net.org)  
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National Prison Rape Elimination Commission: [www.nprec.us](http://www.nprec.us)  
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National Youth Court Center: [www.youthcourt.net](http://www.youthcourt.net)  
Office of Juvenile Justice and Delinquency Prevention: [www.ojjdp.ncjrs.org](http://www.ojjdp.ncjrs.org)  
Prisons Foundation: [www.prisonfoundation.org](http://www.prisonfoundation.org)  
Prison Legal News: [www.prisonlegalnews.org/visitors](http://www.prisonlegalnews.org/visitors)  
Rape Abuse and Incest National Network (RAINN): [www.rainn.org](http://www.rainn.org)  
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Stop Prison Rape: [www.spr.org](http://www.spr.org)  
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United States Department of Justice: [www.doj.gov](http://www.doj.gov)  
Urban Institute: [www.urban.org](http://www.urban.org)  
Vera Institute of Justice: [www.vera.org](http://www.vera.org)

