# WE CAN DO BETTER: THE STATE OF CUSTODIAL MISCONDUCT BY CORRECTIONAL STAFF IN NEW YORK

TANYIKA BRIME*

## INTRODUCTION

On January 28, 2003, the Legal Aid Society filed a class action lawsuit on behalf of Lucy Amador and fourteen other current and former female New York State inmates against the New York Department of Correctional Services ("DOCS") and various employees of the DOCS, on behalf of all women in DOCS custody.[1] The inmates alleged that correctional officers at their correctional facility were guilty of committing various illegal or inappropriate sexual acts, including forcible and non-forcible sexual intercourse, oral sexual acts, anal intercourse, sexual touching, voyeurism and sexual harassment.[2] They asserted that their constitutional right to be protected against cruel and unusual punishment, and their right to due process and free speech had been violated.[3] The harms alleged in the complaint included "sexual assault, abuse and harassment, pain, shame, humiliation, degradation, emotional distress, embarrassment and psychological distress."[4]

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* J.D. Candidate, Benjamin N. Cardozo School of Law, 2009; B.S., Cornell University, 2001. Professor Alexander Reinert has my profound gratitude for his invaluable input. In addition, I would like to thank my mother, family, and friends for their limitless support.

[1] Complaint, Amador v. Andrews, No. 03-0650 (S.D.N.Y. Jan. 28, 2003). The correctional officers, sued in their individual capacity, were employed at four different women's prisons: Albion Correctional Facility, Bayview Correctional Facility, Bedford Hills Correctional Facility and Taconic Correctional Facility. The First Amended Complaint added two more plaintiffs and four more defendants. First Amended Complaint, Amador v. Andrews, No. 03-0650 (S.D.N.Y. Oct. 14, 2003). On September 13, 2005, the court dismissed some of the inmates' claims for lack of standing. Memorandum and Order, Amador v. Andrews, No. 03-0650 (S.D.N.Y. Sept. 13, 2005). On December 3, 2007, the court dismissed all injunctive and declaratory claims in the complaint except for those of one of the named plaintiff against one of the line officer defendants. Opinion and Order, Amador v. Andrews, No. 03-0650 (S.D.N.Y. Dec. 3, 2007). The court determined that this inmate was the only named plaintiff who fully exhausted her administrative remedies before the commencement of this action. The court ruled that since her grievance only complained of one of the defendants, "that grievance is not sufficient to exhaust all administrative remedies as against other defendants later claimed to have been aware of the systematic problems and who failed to correct them." *Amador* Opinion and Order at 31.

[2] *Amador* Complaint, *supra* note 1, at 2.

[3] *Id.* at 49-50.

[4] *Id.* at 54.

In New York's correctional system, countless female prisoners are likely to have similar stories to those alleged by the named plaintiffs in *Amador v. Andrews*. As of the end of 2005, New York had the fourth largest inmate and seventh largest female inmate population in the United States.[5] In the last two decades, growth of New York's female inmate population has outpaced the growth rate of the male inmate population.[6] There are currently six correctional facilities that are exclusively female or co-ed within the New York DOCS.[7] Despite the comprehensive correctional system in New York, the state has one of the lowest percentages of female correctional officers nationwide.[8] This holds true even though New York's correctional system has a high correctional officer-inmate ratio, in comparison to the other states with large inmate populations in the United States.[9] The large percentage of male correctional officers that are employed in women's prisons is arguably one of the main factors contributing to the prevalence of custodial sexual misconduct at women's prisons.[10] Some argue that this creates a "highly sexualized and hostile environment that invites disaster"[11] where sexual abuse of women prisoners is more likely to occur.

This Note will analyze the impact that New York's custodial sexual misconduct statute, New York Penal Code Section 130.05(3)(e), has had on

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[5] ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 215092, *PRISONERS IN 2005* 3, 5 (Nov. 2006, revised Jan. 18, 2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf. For total inmate population, New York's numbers are only exceeded by Texas, California and Florida. For incarcerated women, New York's numbers are exceeded by Texas, California, Florida, Georgia, Ohio and Florida.

[6] NEW YORK STATE DEP'T OF CORRECTIONAL SERVICES, DIVISION OF PROGRAM PLANNING, RESEARCH AND EVALUATION, RESEARCH HIGHLIGHT: FEMALE OFFENDERS: 2005-2006 2 (Jan. 2008), *available at* http://www.docs.state.ny.us/Research/Reports/2008/Female_Offenders_2005-2006.pdf. [hereinafter FEMALE OFFENDERS].

[7] New York State Dep't of Correctional Services homepage, Facility Listing, http://www.docs.state.ny.us/faclist.html (last visited July 28, 2008). The six female prisons are Albion Correctional Facility (medium security), Bayview Correctional Facility (medium security), Beacon Correctional Facility (minimum security), Bedford Hills Correctional Facility (maximum security), and Taconic Correctional Facility (medium security). The only co-ed facility is Lakeview Shock Incarceration Correctional Facility (minimum security).

[8] AMNESTY INTERNATIONAL, AI INDEX: AMR 51/124/00, USA [NEW YORK STATE]: AMNESTY INTERNATIONAL CALLS FOR RESTRICTION OF THE ROLE OF MALE GUARDS IN FEMALE FACILITIES (2000), *available at* http://www.amnesty.org/en/library/asset/AMR51/124/2000/en/dom-AMR511242000en.pdf. It was estimated that approximately nine percent of the correctional officers in New York facilities were female. In New York's female correctional facilities, only approximately twenty-none percent of the correctional officers are female.

[9] GLENN S. GOORD, NY STATE DEP'T OF CORRECTIONAL SERVICES REPORT, PRISON SAFETY IN NEW YORK 27 (Apr. 2006), *available at* http://www.docs.state.ny.us/PressRel/06CommissionerRpt/06PrisonSafetyRpt.pdf [hereinafter PRISON SAFETY IN NEW YORK]. In December, 2005, New York staffed 19,576 correctional officers and had 62,732 inmates, making the state's correctional officers-inmate ratio 1:3. In comparison, during the same time period, California and Texas's correctional officers-inmate ratio was 1:6. Florida had the highest ratio among the states with the highest inmate population at 1:7. *Id.* at 22.

[10] Press Release, Human Rights Watch, Sexual Abuse of Women in U.S. State Prisons (Dec. 7, 1996), *available at* http://hrw.org/english/docs/1996/12/07/usdom4164.htm.

[11] Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 203 (1999).

improving the lives of female inmates in the custody of the DOCS.[12] While New York has taken steps to improve sexual abuse by correctional officers, major improvements are still necessary to maximize the effectiveness of criminalizing sexual contact between inmates and staff. Part I of this Note will provide an overview of the conditions female inmates in New York prisons faced before the state's custodial misconduct statute was enacted.[13] Part II will focus on the applicable law to female prisoners in New York who are subject to sexual assault by correctional staff. Part III will discuss the varied approaches taken to curb custodial sexual misconduct in California, Texas, and Florida. Part IV will focus on the New York DOCS' statistics regarding prisoner sexual abuse by staff and the aspects of sexual assault that are not reflected in these statistics. Part V concludes with proposed policy changes that the DOCS should implement to further safeguard inmates from custodial sexual misconduct.

## I. SEXUAL ABUSE IN NEW YORK'S WOMEN'S PRISONS PRIOR TO THE ENACTMENT OF THE CUSTODIAL MISCONDUCT STATUTE

Prison sexual abuse is not a new problem in the correctional facilities in the United States. Even before the first separate women's prison in the United States was established in New York in 1835,[14] sexual abuse of female prisoners was a problem in the United States.[15] Before the enactment of the 1972 amendment of the Civil Rights Act of 1964, female prisoners in New York were guarded only by female correctional staff.[16] While the amendment, which prohibited sex employment discrimination in the public sector, was initially used to allow women access into male prisons as prison guards, it also became the justification for the influx of male correctional staff in women's prisons.[17] In February 1977, the

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[12] Although custodial sexual misconduct perpetrated on male inmates is a very serious problem, it is outside the scope of this Note.

[13] This section provides only a cursory overview since this Note could not address all the problems that existed and continue to exist for female inmates in NY DOCS facilities.

[14] Jack W. Brown, *The Female Inmate*, *in* INTERNATIONAL ENCYCLOPEDIA OF JUSTICE STUDIES, June 2003, http://www.iejs.com/Corrections/female_inmate.htm. While administratively affiliated with Sing Sing Correctional Facility, Mount Pleasant Female Prison opened in 1835 in Ossining, New York. There is disagreement as to whether this facility was really the first women's prison in America. Some state that Indiana's Women's Prison was established as the first female correctional facility in the country in 1873. *See* Flyn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free From Rape*, 13 WM. & MARY J. WOMEN & L. 841, 848 (2007).

[15] *See* Nancy Kurshan, *Women and Imprisonment in the U.S.: History and Current Reality*, http://www.prisonactivist.org/women/women-and-imprisonment.html (last visited July 28, 2008). In 1826, a female inmate became pregnant while serving her sentence in solitary confinement. At that time, the few female prisoners were housed in separate cells in male prisons.

[16] Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U.J. GENDER SOC. POL'Y & L. 1, 21 (1999). Under Title VII, employers can not deny a person a job based only on gender unless gender is a bona fide occupational qualification ("BFOQ") for the particular job.

[17] *Id.* at 23. A form of illegal employment discrimination is requiring certain qualifications that either directly or indirectly excludes one gender from certain employment opportunities. Previously, females were not allowed to work directly with inmates at the male correctional facilities because of fear

DOCS began allowing male correctional officers to work in female housing units.[18] In an effort to comply with Title VII of the Civil Rights Act, the DOCS allowed cross-gender guarding in all New York correctional facilities.

The practice of allowing male correctional guards to directly supervise female inmates is contrary to international standards. Under the United Nations Standard Minimum Rules for the Treatment of Prisoners, one of the international authoritative guides for the treatment of prisoners, cross-gender guarding of female prisoners is prohibited.[19] Almost immediately after the DOCS' change in policy to allow relatively unrestrictive cross-gender guarding, a lawsuit was brought to challenge the range of access that this new policy gave to male guards in female correctional facilities.[20] Within months of implementing male guards in female housing units, ten female inmates at Bedford Hills Correctional Facility brought an action against the State, certain correctional staff unions, and union officials.[21] To support their claim that they had been deprived of their constitutional right to privacy, the inmates provided evidence showing that conditions at the facility allowed male guards to view them at various stages of undress and in compromising situations in both the toilet facilities in their cells and the central showering areas.[22] Ultimately, the Second Circuit Court of Appeals held that by implementing certain remedies, such as appropriate sleepwear for the inmates and translucent shower curtains, the facility could balance the male guards' rights to equal employment opportunities with the inmates' privacy interests.[23]

Beginning in the mid-1980s, the female prison population in New York experienced a surge in numbers.[24] The reason for this sharp increase in the number of female prisoners in New York has more to do with politics than with the notion that many more women were committing crimes. The main contributing factor to

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for these officers' safety.

[18] HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (Dec. 1996), *available at* http://hrw.org/reports/1996/Us1.htm#_1_2.

[19] United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 53 (3), U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) *available at* http://www.unhchr.ch/html/menu3/b/h_comp34.htm. "Women prisoners shall be attended and supervised only by women officers." *Id.*

[20] Forts v. Ward, 434 F. Supp. 946, 947 (S.D.N.Y. 1977).

[21] *Id.* at 947. These conditions that existed at Bedford Hills were contrary to the purposes of the "Guidelines for Assignment of Male and Female Correction Officers" directive, which went into effect after cross-gender guarding was allowed in DOCS facilities. One of the goals of the directive was to "avoid unnecessarily invading the privacy of inmates of the opposite sex." Forts v. Ward, 471 F. Supp. 1095, 1097 (S.D.N.Y. 1979).

[22] *Forts*, 434 F. Supp. at 948.

[23] Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980). The District Court initially granted the plaintiffs preliminary injunctive relief, which restricted the male correctional officers from directly observing the female inmates in their cells during the nighttime hours of 10:30 p.m. to 6:30 a.m. On appeal, the Court of Appeals reversed and remanded. Forts v. Ward, 566 F.2d 849 (2d Cir. 1977). On remand, the District Court made the injunctive relief permanent. *Forts*, 471 F. Supp. at 1102-1103.

[24] HUMAN RIGHTS WATCH, *supra* note 18, at 282 (stating that in the seven-year period between 1985 and 1992, New York's female prison population rose by 230%).

this population explosion was the increase in drug convictions during this time, attributable to the enactment of drug laws with stiffer penalties—the New York state legislature's response to the "war on drugs."[25]

Despite this large influx of women offenders in the state correctional system, female prisoners had no state legislation to protect them from sexual abuse in prison. Abusive correctional officers had acclimated to their almost absolute power over the inmates, and misused this power to sexually abuse inmates with impunity. Abusers knew they could sexually abuse inmates without substantial fear of institutional sanctions by correctional officials. Prior to 1996, the only prohibition on custodial sexual misconduct was a vague provision, Section 2.15 in the New York DOCS Employees Manual, which stated that no employee "shall knowingly . . . associate or have any dealings with criminals . . . [or] engage in any conversation, communication, dealing, transaction, association or relationship with any inmate . . . in any form which is not necessary or proper for the discharge of the employees duties."[26]

Unsurprisingly, staff-inmate sexual contact was fairly commonplace at women's prisons in New York.[27] While some of these sexual relationships were considered consensual sexual relations, others were not. Many of these inmate-staff relationships were strategic arrangements entered into by inmates to acquire additional privileges or contraband while in custody.[28] Other inmates involved in sexual relationships with staff simply felt powerless to stop such sexual contacts. These women submitted to such sexual relationships by force or from the fear of the unknown consequences of refusing such contacts.[29]

Many female inmates became pregnant while in custody,[30] which further illustrated the seriousness of the sexual abuse problem in New York women's correctional facilities. In these instances, where it was clear that the female inmate has had sexual contact with a male while in the custody of the DOCS, these women

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[25] *Id.* The Rockefeller Drug Laws played a pivotal role in the increase of women offenders. Enacted in 1973, it was viewed as one of the harshest drug laws in the country. These laws eliminated judicial discretion in sentencing by requiring lengthy mandatory sentences for many first-time drug offenders. For example, the Rockefeller Drug Laws required that a judge impose a prison term of no less than fifteen years to life for anyone convicted of selling two ounces or possessing four ounces of a narcotic substance. The penalties apply without regard for the circumstances of the offense or of the individual's background. Drug Policy Alliance Network Home Page, http://www.drugpolicy.org/statebystate/newyork/rockefellerd/ (last visited July 28, 2008).

[26] HUMAN RIGHTS WATCH, *supra* note 18, at 283-84. At this time, the DOC employee manual never specifically mentioned sexual relationship with inmates. In comparison, the prison handbook clearly stated that sexual relationships with staff were prohibited. In addition, the employee manual did not detail the penalties for violating the provision.

[27] *Id.* at 290. The report cites allegations of sexual abuse at all of New York's women prisons, which then totaled four correctional facilities.

[28] *Id.* at 293 ("[A]n environment in the prisons in which prisoners engage in sexual relations with staff in exchange for favorable treatment or for various items, including gum . . . cigarettes, and drugs.").

[29] *Id.* at 293. A former employee stated that "women who did not want to get involved are coerced, upon threats of harassment or retaliation."

[30] *Id.* at 296.

were penalized for their involvement with staff.[31] Impregnated inmates were typically punished by being sentenced to disciplinary segregation or the special housing unit for a relatively long period, ranging from several months to several years.[32] In addition, several of these impregnated women also alleged that DOCS employees pressured them to have an abortion.[33] In contrast, the staff members responsible for impregnating them usually escaped with no punishment or were subjected to minor disciplinary actions, such as warnings or transfers to other facilities.[34]

Women offenders in the New York correctional system were not only subjected to physical acts committed by prison staff, but were also subjected to sexual harassment by correctional staff, which ranged from inappropriate sexual comments to offensive gestures directed towards the female inmates.[35] These types of behavior violate provisions in the DOCS employer manual, which states that "an employee shall refrain from the use of indecent, profane or abusive language or gestures while on duty or on State property."[36] Acts of sexual harassment, such as a guard exposing his genitalia, generally went unpunished by administrators.[37]

Several of these alleged victims took legal action. In 1984, the Prisoners Legal Services, on behalf of the inmates, filed a class action lawsuit against the DOCS challenging the conditions at the Bayview Correctional Facility.[38] In addition to claims regarding substandard food quality and inadequate medical services, the plaintiffs provided evidence that certain correctional officers at the facility were sexually assaulting inmates and were also involved in sexual relationships with inmates.[39] In 1993, Prisoners Legal Services settled the lawsuit with the DOCS.[40]

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[31] HUMAN RIGHTS WATCH, *supra* note 18, at 296-99.

[32] *Id.* at 297.

[33] *Id.* at 297-98.

[34] *Id.* at 298.

[35] *Id.* at 299-301.

[36] HUMAN RIGHTS WATCH, *supra* note 18, at 299.

[37] *Id.* at 315.

[38] *Id.* at 288 (*citing* Blackman v. Coughlin, Civil Action No-84-5698, Complaint, (S.D.N.Y 1984)); *see also* Prisoners' Legal Services of New York, Selected Successful Litigation (2008), http://www.plsny.org/whatwedo.htm (describing the lawsuit).

[39] HUMAN RIGHTS WATCH, *supra* note 18, at 288.

[40] *Id.* at 289. As result of the settlement, the sanitary and medical conditions at Bayview Correctional Facility were improved.

## II. HISTORY OF THE NEW YORK CUSTODIAL MISCONDUCT STATUTE AND OTHER APPLICABLE LAW

### *A. New York Penal Code Section 130.05(3)(e)*

On July 2, 1996, Governor Pataki signed into law New York's Custodial Sexual Misconduct Statute, which amended the Penal Code[41] The relevant text of the amendment is as follows:

> 1. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim . . . .[42] 3. A person is deemed incapable of consent when he or she is: . . . (e) committed to the care and custody of the state department of correctional services or a hospital, as such term is defined in subdivision two of section four hundred of the correction law, and the actor is an employee, not married to such person, who knows or reasonably should know that such person is committed to the care and custody of such department or hospital . . . . For purposes of this paragraph, "employee" means (i) an employee of the state department of correctional facility consisting of providing custody, medical or mental health services, counseling services, educational programs, or vocational training for inmates.[43]

The 1996 amendment added prison inmates to the list of people who are incapable of consent to sexual relations, while previously only the physically incapacitated, the mentally disabled, the physically helpless, and minors were held as unable to consent to sex.[44] This amendment, in effect, makes sexual relations between inmates and select correctional staff in any New York correctional facility a strict liability crime, similar to statutory rape.[45] While the New York DOCS was supportive of this amendment, the correctional officer's union Council 82 vehemently opposed the enactment of such measures.[46]

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[41] *Id.* at 284.

[42] *See* N.Y. PENAL CODE § 130.00 (1996). The sexual offense is sexual conduct, which includes sexual intercourse, oral sexual conduct, anal sexual conduct, or sexual abuse based on sexual contact (sexual touching) or insertion of a "foreign objects."

[43] N.Y. PENAL CODE § 130.05(3)(e) (1996). Sections 130.05(3)(e)(ii) and 130.05(3)(e)(iii) make this law applicable to parole officers and mental health professionals at prisons, respectively. § 130.05(3)(f) is nearly identical to § 130.05(3)(e), except that § 130.05(3)(e) deals with inmates in the custody of the state department of correctional services, while § 130.05(3)(f) is applicable to inmates in the custody of local correctional facilities.

[44] N.Y. PENAL CODE § 130.05(3)(a)-(d) (1996).

[45] *See* N.Y. PENAL CODE § 130.25 (rape in the third degree) (2000), N.Y. PENAL CODE § 130.30 (2000) (rape in the second degree), and N.Y. PENAL CODE § 130.35 (2000) (rape in the first degree).

[46] HUMAN RIGHTS WATCH, *supra* note 18, at 286. The union believed that the custodial sexual misconduct statute was simply unnecessary as a supplemental measure to internal disciplinary actions. *See also* Letter from John R. Patterson, Jr., Executive Deputy Comm'r, Dep't of Correctional Services, to Michael Finnegan, Counsel to the Governor (June 24, 1996) (on file with author).

The supporters of the bill believed that this new law would make it easier for inmates to seek a remedy from correctional staff having inappropriate sexual relationships with them.[47] Prior to this amendment, one of the elements of prison rape was the victim's forced compulsion to engage in the sexual act.[48] The sponsors of the bill felt that the nature of the correctional staff-inmate relationship made it almost impossible for inmates to meet this material element of rape.[49] Most of the inmates having sexual relationships with correctional staff were not in the position to refuse "because of the power the officer has over all aspects of their daily lives."[50] In one New York federal court decision, the court stated that "the law presumes that even if an inmate says 'yes,' she is doing so not because she wants to, but because the disparity in power makes it impossible for her to say 'no.'"[51] It is difficult to imagine how a sexual relationship between an inmate and a correctional officer could be consensual "[b]ecause prisoners are completely dependent on officers for the most basic necessities, the offer or, by implication, threat to withhold privileges or goods is a very powerful inducement."[52] The focus must be on the disparity of power in the inmate-correctional staff relationship since one of the most extreme forms of sexual abuse—rape—is not about sex, but about power. With rape, the offenders are imposing their will on their victims.

The simplest approach to effectively reduce all such inappropriate relationships would have been to extend the scope of this bill to all correctional employees. Unfortunately, this bill was intentionally made inapplicable to all employees at New York correctional facilities. One of the bill's sponsors wrote that "[t]he bill is drafted narrowly to ensure that its provisions only apply to employees who are in such a power relationship with inmates."[53] This suggests that supporters did not want to eradicate all sexual contact between correctional staff and inmates, just those contacts that had an obvious coercive nature. By making the 1996 amendment only applicable to correctional staff who provided direct services to inmates, the New York legislature overlooked the possibility that coercion would play a role in sexual relationships between inmates and the remaining correctional staff not covered by the statute. According to the Human Rights Watch 1996 report, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, "[i]n many instances, the use of force by correctional employees to secure sexual relations from a prisoner takes the form of an offer of privileges or goods."[54] By simply working in a correctional facility, all correctional staff have the ability to

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[47] *See* Memorandum from Sen. Michael F. Nozzolio, N.Y. State Senate, to Michael C. Finnegan, Counsel to the Governor (June 25, 1996) (on file with author).

[48] N.Y. Sponsor's Memorandum, 1996 Chapter 266, N.Y. State Assembly, 219th Leg., Reg. Sess., at 1-2 (1996).

[49] *Id.* at 2.

[50] *Id.*

[51] Morris v. Eversley, 2004 WL 171337 (S.D.N.Y. 2004).

[52] HUMAN RIGHTS WATCH, *supra* note 18, at 4.

[53] Memorandum from Sen. Michael F. Nozzolio, *supra* note 47.

[54] HUMAN RIGHTS WATCH, *supra* note 18, at 4.

unduly influence an inmate's capacity to enter consensually into a sexual relationship while in custody. Almost all of the correctional staff at a facility can avail themselves of the opportunity to promise to supply goods and services to the inmate, which can be too strong a temptation to resist. Due to the inherent unequal positions of correctional staff and inmates, inmates do not have the same ability as staff to consent to a sexual relationship.

While the supporters of the bill agreed that the 1996 amendment would be an effective deterrent to custodial sexual misconduct in prisons, its sponsors had varied opinions on the prevalence of inappropriate correctional staff-inmate sexual relationships. The sponsor in the New York State Senate, Senator Michael F. Nozzolio, wrote that "the actual number of instances of improper employee/inmate sexual relationships is very small."[55] Senator Nozzoli failed to provide support for this assertion, but presumably this opinion was based on the number of the available statistics of custodial sexual misconduct in prisons.[56] In contrast, one of the sponsors in the New York State Assembly, Assemblyman Keith L.T. Wright, wrote that he was personally familiar with "numerous claims that illicit sex occurs between prison officials/correctional officers and inmates."[57] Despite the various opinions on the frequency of sexual assaults committed by correctional staff, supporters of the bill were united in the belief that such sexual conduct was unacceptable.

### *B. Recently Enacted Amendment*

On July 18, 2007, Governor Spitzer signed into law Chapter 335 of the Laws of New York, 2007, which became effective on November 1, 2007.[58] By adding a new subparagraph (iv) to section 130.05(3)(e), Chapter 335 expands the definition of "employee." The relevant text of this amendment is as follows:

> (iv) a person, including a volunteer, providing direct services to inmates in the state correctional facility in which the victim is confined at the time of the offense pursuant to contractual agreement with the state department, provided that the person received written notice concerning the provisions of this paragraph.[59]

The language in Chapter 335 demonstrates the New York legislature's ongoing unwillingness to create an all-inclusive law, which makes the custodial

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[55] Introducer's Memorandum in Support of S.B. 5912, N.Y. State S., 219th Leg., Reg. Sess. (1996) (on file with author).

[56] HUMAN RIGHTS WATCH, *supra* note 18, at 306-07 (stating that before this law, no allegations of sexual misconduct by correctional staff were forwarded to local law enforcement for consideration of possible criminal charges). At the time this legislation was proposed, all allegations of staff sexual misconduct by inmates were solely handled internally by the DOCS.

[57] Letter from Assemb. Keith L.T. Wright, N.Y. State Assemb., to Michael C. Finnegan, Counsel to the Governor (June 24, 1996) (on file with author).

[58] N.Y. PENAL LAW § 130.05 (2007).

[59] *Id.*

sexual misconduct statute applicable to all volunteers and contractors performing services in the correctional facilities of New York DOCS. Instead, this law covers only certain volunteers and contractors, just as it covers only certain correctional officers: those who provide direct services to inmates. However, this legislation takes positive steps to widen the statute's scope by focusing on all the potential non-inmate sexual perpetrators who have legitimate access to inmates.

Governor Spitzer's expansion of New York's custodial sexual misconduct statute has been applauded by prisoner's rights advocates.[60] There were two main factors that contributed to the 2007 amendment to the state's statute. First, a federal law redefined the definition of "staff sexual misconduct" to include not only correctional employees.[61] After the enactment of the Prison Rape Elimination Act ("PREA") in 2003, many jurisdictions amended their custodial sexual misconduct statutes to align with the definitions followed by the federal government.[62] The PREA created a system of incentives and disincentives for states and their correctional systems to conform to a developing national standard for "the detection, prevention, reduction and punishment of prison rape."[63] Second, New York was one of the few states that still had a narrow definition of "employee" in the context of prison staff sexual misconduct.[64] In essence, this law is New York's attempt to keep up with its sister states.

### *C. Proposed State Legislation*

In the same legislative session, the New York legislature proposed several bills that were relevant to the discussion of sexual misconduct in prisons. On February 2, 2007, Assembly Bill ("A.B.") 4483 was introduced, to amend Section 137 of the Correction Law.[65] A.B. 4483 eliminates pat frisking of female inmates

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[60] *See* Press Release, Stop Prisoner Rape, Stop Prisoner Rape Applauds Expansion of New York's Custodial Sexual Misconduct Statute (July 24, 2007), *available at* http://www.spr.org/en/pressreleases/2007/press_releases_2007.asp (last visited July 28, 2008). Lovisa Stannow, the organization's executive director stated that "this amendment is critically important. Until now, these employees have been beyond the reach of the sanctions provided under the state's custodial sexual misconduct law." *Id.*

[61] *See* NY Sponsor's Memo. in Support of S.B. 5012, S., 230th Leg., Reg. Sess. (2007). In compliance with the Prison Rape Elimination Act ("PREA"), the Bureau of Justice Statistics ("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." *Id.*

[62] *See id.*

[63] Prison Rape Elimination Act of 2003 [hereinafter PREA], Pub. L. No. 108-79, 117 Stat. 972, § 3(3) (2003). Under PREA, the Attorney General is authorized to give grants to states that conform to these national prison rape standards, and to provide additional funding for expenses such as "personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape." *Id.* at § 6(a).

[64] *Id.* Before the enactment of Chapter 335, New York was one of the last four states with custodial sexual misconduct statutes, which did not include volunteers and contractors in their definition of prison staff employees.

[65] Assem. 4483, 2007 Leg., 230th Reg. Sess (N.Y. 2007), *available at* http://public.leginfo.state.ny.us/menugetf.cgi (Insert "A4483" as the search term, with "2007" as the year).

by all male New York DOCS correctional officers, except in certain circumstances.[66] The sponsors of this bill recognize that current New York DOCS regulations allow male correctional staff to pat frisk female inmates for basically any reason, in many areas of the prison.[67] Supporters felt that prohibiting "unnecessary and inappropriate pat frisks" would prevent the escalation of further sexual abuse.[68] The bill was referred to the Assembly Committee on Correction immediately after its introduction, and no further action has been taken.[69]

Both A.B. 4109 and Senate Bill ("S.B.") 2117 were introduced on January 31, 2007. These bills create a temporary state commission "to study and investigate sexual misconduct" in New York DOCS facilities.[70] The New York legislature recognized the strong possibility that current New York DOCS procedures are not truly effective in preventing sexual misconduct. They acknowledged in their legislative findings that "additional rules and regulations may be necessary to reduce the risk of sexual misconduct by employees of such facilities."[71] The commission would devise new procedures to make the New York DOCS inmate grievance procedure more effective, in terms of allegations of custodial sexual misconduct.[72] Another obligation of the commission would entail developing additional safeguards to prevent sexual misconduct in New York prisons. Members of this temporary commission would be appointed by select New York legislators, the Chief Judge of the New York Court of Appeals and the Governor.[73] A.B. 4109 was passed by the Assembly and was delivered to the New York State Senate, where it was referred to the Committee on Rules.[74] On January 9, 2008, the bill died in the New York State Senate and was returned back to the New York State Assembly. S.B. 2117 was referred to the Committee on Finance and no further action was taken.[75]

Lastly, S.B. 335 was introduced to amend the Correctional Law.[76] This bill creates an affirmative duty for New York DOCS employees to report any sexual

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[66] *Id.* Male correctional officers would be allowed to perform pat frisks on female inmates only when there is probable cause that such a measure is necessary for immediate safety reasons or to prevent the inmate's escape.

[67] *See* NY Sponsor's Memo. in Support of A.B. 4483, Assem., 230th Leg., Reg. Sess. (2007).

[68] *Id.*

[69] New York State Legislature website, http://public.leginfo.state.ny.us/menugetf.cgi (last visited Feb. 4, 2009) (Insert "A4483" as the search term, with "2007" as the year). On January 9, 2008, the bill was again referred to the Committee on Correction.

[70] Assem. 4109, 2007 Leg., 230th Reg. Sess (N.Y. 2007); S.2117, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

[71] *Id.*

[72] *See* NY Sponsor's Memo. in Support of A.B. 4109, Assem., 230th Leg., Reg. Sess. (2007).

[73] *See* A. B. 4109, *supra* note 70.

[74] New York State Legislature website, http://public.leginfo.state.ny.us/menugetf.cgi (last visited Jan. 13, 2007) (Insert "A4109" as the search term, with "2007" as the year).

[75] New York State Legislature website, http://public.leginfo.state.ny.us/menugetf.cgi (last visited Jan. 13, 2007) (Insert "S2117" as the search term). On January 9, 2008, the bill was again referred to the Committee on Finance.

[76] S. 335, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

contact between an employee and an inmate.[77] Employees that fail to report their reasonable beliefs of such inmate-staff abuse to the appropriate DOCS official are not only subjecting themselves to disciplinary action, but may also be found to have committed a class A misdemeanor.[78] This proposed legislation imposes a "duty to report" upon New York correctional staff that already exists for other professionals nationwide in relation to child abuse.[79] The supporters believe that such a duty is needed, given the power dynamic between correctional staff and inmates.[80] This bill was passed by the New York State Senate on June 7, 2007, and moved to the New York State Assembly, where it was referred to the Assembly Committee on Correction.[81] On January 9, 2008, the bill died in the New York State Assembly and was returned back to the New York State Senate.[82]

## III. ANALYSIS OF THE MODELS USED BY CALIFORNIA, FLORIDA AND TEXAS

One of the best approaches for evaluating the effectiveness of New York's custodial sexual misconduct statute is to study the existing models used in states with comparable facilities. Since the inmate populations of California, Florida, and Texas account for more than a quarter of the nation's total inmate population,[83] an analysis of these three states' approaches to combating sexual misconduct in prisons may help shed light on the procedures and legislation that are effective in large-scale correctional systems. The similarities do not end at the sheer size of the inmate populations in these four states. All of these states have another common characteristic associated with their inmate population: each of these states' inmate populations consist of racially diverse inmates. For example, as of December 31,

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[77] *Id.* A.B. 8189, introduced on May 8, 2007, expands this affirmative duty to report to registered volunteers at DOCS facilities. This bill was immediately referred to the Assembly Committee on Codes, where no further action was taken. On January 9, 2008, the bill was again referred to the Assembly Committee on Codes. New York State Legislature website, http://public.leginfo.state.ny.us/menugetf.cgi (last visited Jan. 13, 2007) (Insert "A8189" as the search term, with "2007" as the year).

[78] *Id.*

[79] *See* NY Sponsor's Memo in Support of S.B. 335, N.Y. S., 230th Leg., Reg. Sess. (2007) (citing that many jurisdictions have enacted "duty to report" applicable to professionals such as teachers and pediatricians).

[80] *See id.* (stating that "inmates are dependent upon the [correctional] departments for the fulfillment of every basic human need). Important to note that according to the same memo, the bill's sponsor, Senator Nozzolio, still believes that staff sexual misconduct is not prevalent in New York prisons. He wrote that "instances of sexual relationships between an employee and an inmate are infrequent." *Id.*

[81] New York State Legislature website, http://public.leginfo.state.ny.us/menugetf.cgi (last visited Jan. 13, 2007). (Insert "S335" as the search term, with "2007" as the year).

[82] On the same day, the bill was referred to the New York State Senate's Crime Victims, Crime and Correction Committee.

[83] PAIGE M. HARRISON ET. AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 217675, PRISON AND JAIL INMATES AT MIDYEAR 2006 (June 2007, revised June 27, 2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf.

1998, each of these four states' Caucasian inmate population totaled less than fifty percent.[84]

### *A. California*

At the end of 2005, the California Department of Corrections and Rehabilitation ("CDCR") had a female inmate population more than four times that of New York.[85] California has the second largest female inmate population in the United States.[86] In 1994, California enacted its custodial sexual misconduct statute. The relevant text is as follows:

> (a) . . . (2) An employee or officer of a public entity detention facility, or an employee, officer, or agent of a private person or entity that provides a detention facility or staff for a detention facility, or person or agent of a public or private entity under contract with a detention facility, or a volunteer of a private or public entity detention facility, who engages in sexual activity[87] with a consenting adult who is confined in a detention facility, is guilty of a public offense . . . . (e) Consent by a confined person or parolee to sexual activity proscribed by this section is not a defense to a criminal prosecution for violation of this section.[88]

This statute deals with all "consensual" non-inmate-inmate sexual relationships, excluding legally sanctioned conjugal visits. With regard to non-consensual sexual acts, the California Penal Code has a specific provision under certain sexual offenses, which specifically addresses inmates.[89]

There are two shortcomings with California's laws applicable to sexual relationships between inmates and correctional staff. First, California may impose

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[84] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 192929, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1998 55, tbl. 5.6 (Sept. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus98.pdf. As of December 31, 1998, the Caucasian inmate populations in these states were as follows: New York: 44%; California: 30%; Florida: 43%; and Texas: 29%. The African-American inmate populations in these states were as follows at the end of 1998: New York: 55%; California: 31%; Florida: 55%; and Texas: 45%. The Hispanic inmate populations in these states at the same time period were as follows: New York: 32%; California: 34%; Florida: 8.75%; and Texas: 26%. *See id.* at 58 (Table 5.9). In 2006, the racial makeup of New York's female inmate population was as follows: African-American: 46%, Hispanics: 22%; and Caucasians:30%. FEMALE OFFENDERS, *supra* note 6, at 2.

[85] BECK & HARRISON, *supra* note 5, at 5 (stating that as of Dec. 31, 2005, California's female inmate population was 11,667, while New York's female inmate population was 2,802).

[86] *See id.* at 5, tbl. 6. As of December 31, 2007, there was a total of 11, 416 female inmates in custody in California's correctional system. *See* CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION, DATA ANALYSIS UNIT, MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 31, 2007 (Jan. 3, 2008), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0712.pdf.

[87] *See* CA. PENAL CODE § 289.6 (a)(5) (2008). "Sexual activity" includes sexual intercourse, sodomy, oral copulation and sexual penetration and sexual touching.

[88] CA. PENAL CODE § 289.6 (2008).

[89] *See* CA. PENAL CODE § 288a(e) (2008) (oral copulation). CA. PENAL CODE § 286(e) (2008) (sodomy).

criminal liability on inmates for certain sexual conduct with non-inmates.[90] The California DOC may recommend to the prosecutor that inmates be charged with "oral copulation" and "sodomy" after it has made a determination that these inmates were involved in consensual sexual relationships with staff. Secondly, the custodial sexual misconduct statute places California in a small group of states that treat custodial sexual misconduct as a misdemeanor.[91] A person needs two violations to be criminally charged with a felony in California.[92] In comparison, New York's statute penalizes custodial sexual misconduct as a class E felony, which carries a maximum sentence of between one to four years imprisonment.[93] California's custodial sexual misconduct statute provides that "[a]nyone who is convicted of a felony violation of this section who is employed by a department, board, or authority within the Youth and Adult Correctional Agency shall be terminated in accordance within the State Civil Service Act."[94] Since the first violation is only a misdemeanor, according to the statute, correctional officers in the state shall not be terminated from their position until they have violated the statute twice.[95] In addition, correctional staff that violate California's custodial misconduct statute once are not likely to be prosecuted when there is no evidence of force or overt threats. Generally, prosecutors are reluctant to prosecute correctional staff when the criminal penalty is only a misdemeanor.[96]

On September 22, 2005, California became a pioneering state in the fight to prevent custodial sexual misconduct when Governor Schwarzenegger signed the Sexual Abuse in Detention Elimination Act.[97] This Act presents the most comprehensive approach used to date; it includes an educational component and clearly indicates to the corrections department the areas that need improvement. The law requires the CDCR to review informational handbooks on prison sexual abuse published by external organizations, and to distribute to inmates those handbooks that receive the approval of the CDCR.[98] Additionally, the CDCR must develop guidelines to allow outside organizations to directly provide resources to

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[90] *See* AMNESTY INTERNATIONAL USA, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING PREGNANT WOMEN (2006), *available at* http://www.amnestyusa.org/Womens_Human_Rights/Abuse_of_Women_in_Custody/page.do?id=1108288&n1=3&n2=39&n3=720. California is one of only three other states that allow inmates to be held criminally liable for engaging in sexual relations with non-inmates.

[91] *See id.* Only five states' custodial misconduct statues do not treat violations as felonies. In California, the first violation is punishable "by imprisonment in a county jail not exceeding one year, or in the state prison, or by a fine of not more than ten thousand dollars ($10,000) or by both that fine and imprisonment." CA. PENAL CODE § 289.6(h) (2008).

[92] *See* CA. PENAL CODE § 289.6(i) (2008).

[93] N.Y. PENAL CODE § 130.05(3)(e) (2008).

[94] CA. PENAL CODE § 289.6(j) (2008).

[95] *Id.*

[96] *See* STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES, A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE 7 (2006), http://www.justdetention.org/pdf/in_the_shadows.pdf.

[97] CA. PENAL CODE § 2635-643 (2008) (effective Jan. 1, 2006).

[98] *See* CA. PENAL CODE § 2635 (2008).

inmates.[99] These resources will typically come in the form of counseling for the inmates. The Act does not just focus on the prevention of custodial sexual misconduct. It also establishes guidelines to be followed after sexual abuse has occurred, including protocol for staff responses, physical and mental health care for victims, investigative procedures pertaining to sexual abuse allegations and the collection of data on sexual abuse in the CDCR.[100] Lastly, the statute established that the Office of Sexual Abuse in Detention Elimination Ombudsperson must work to "ensure the impartial resolution of inmate and ward sexual abuse complaints."[101] The law mandates that information on how to confidentially contact the Ombudsperson be clearly posted in all CDCR facilities, so that inmates can write confidential letters to the Ombudsperson detailing allegations of sexual abuse.[102] One of the purposes of this measure is to counteract the inmates' fear of retaliation, which is one of the main reasons why inmates do not report sexual abuse.[103]

### *B. Florida*

Florida has the third-largest female inmate population in the country.[104] By 2006, Florida's female inmate population was over 6,000.[105] On May 31, 1996, Florida's custodial sexual misconduct bill became law. The relevant text is as follows:

> 2. Any employee of the department who engages in sexual misconduct with an inmate or an offender supervised by the department in the community, without committing the crime of sexual battery, commits a felony of the third degree . . . . 3. The consent of the inmate or offender supervised by the department in the community to any act of sexual misconduct may not be raised as a defense to a prosecution under this paragraph. [106]

A violation of Florida's custodial sexual misconduct statute constitutes a felony of the third degree, which is punishable by a maximum sentence of five years imprisonment.[107] Unlike the custodial sexual statutes enacted in New York,

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[99] *See* CA. PENAL CODE § 2642 (2008). These organizations include rape crisis agencies, hospitals, gay rights organizations, HIV/AIDS service providers, civil rights organizations and human rights organizations.

[100] *See* CA. PENAL CODE § 2637-640 (2008).

[101] *See* CA. PENAL CODE § 2641 (2008).

[102] *See* CA. PENAL CODE § 2641(c)-(d) (2008).

[103] *See* Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 227 (2003).

[104] *See* WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 219416, PRISONERS IN 2006 15 (Dec. 2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf. Florida's female inmate population increased by 8.4% during the time period of 2000-2005. *Id.*

[105] BECK & HARRISON, *supra* note 5, at 5.

[106] FLA. PENAL CODE § 944.35(3)(b)(2)-(3) (2008). Fla. Penal Code § 951.221 is almost identical, except Fla. Penal Code § 944.35(3)(b)(2) applies to Florida DOCS employees, while § 951.221 is applicable to employees at either county, municipal or private detention facilities.

[107] FLA. PENAL CODE § 775.082 (2008).

California, and Texas, Florida's statute does not cover all relevant forms of sexual abuse, since it excludes sexual abuse that consists of sexual touching.[108] Therefore, Florida's current definition of "sexual misconduct" within the statute creates the increased potential for correctional staff to abuse their dominant relationship over inmates without facing criminal liability.

When it was passed, Florida's custodial sexual misconduct statute had a more expansive scope than New York's statute in that it applied to all employees of Florida's DOC. In addition, Florida DOC employees have had a duty to report reasonable suspicions of sexual misconduct since 1996.[109] Furthermore, Chapter 2001-92, which created the "Protection Against Sexual Violence in Florida Jails and Prisons Act" added a provision requiring Florida's DOC correctional officers to be provided with special training regarding sexual assault identification and prevention methods and techniques.[110] However, New York's recent passing of Chapter 305 made the New York statute applicable to more non-inmates in correctional facilities than Florida's because the Florida statute is not applicable to volunteers or outside contractors of the DOC.

### *C. Texas*

With over 13,500 female inmates in custody at the Texas Department of Criminal Justice's ("TDCJ") facilities, the state of Texas houses the most female prisoners in the United States.[111] Texas' custodial sexual misconduct statute went into effect on September 1, 1997. The relevant text is as follows:

> (a) An official of a correctional facility, an employee of a correctional facility, a person other an employee who works for compensation at a correctional facility, a volunteer at a correctional facility, or a peace officer commits an offense if the person intentionally: . . . . (2) engages in sexual contact, sexual intercourse or deviate sexual intercourse with an individual in custody . . . .[112]

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[108] *See* FLA. PENAL CODE § 944.35(3)(b)(1) (2008) ("sexual misconduct" means the oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . . .").

[109] FLA. PENAL CODE § 944.35(3)(d)-(4)(c) (2008). A failure to report, or report inaccurately, is a first-degree misdemeanor. Any individual who coerces a person who is required to report a reasonable suspicion commits third-degree felony.

[110] FLA. PENAL CODE § 944.35(4)(c) (2008). Prior to this amendment, correctional staff training on sexual assault addressed only assaults committed by other inmates.

[111] *See* SABOL, *supra* note 104, at 15. Texas's high inmate population is believed to be the result of a low percentage of eligible Texan offenders actually being released through parole, combined with high rate of nonviolent offenders housed in TDCJ. *See* NICOLE D. PORTER, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, TOUGHER THAN EVER, BUT ARE WE SAFER? 3 (Mar. 28, 2007), *available at* http://www.spr.org/pdf/ACLUTexas2007.pdf.

[112] TEX. PENAL CODE § 39.04 (2008). A 2001 amendment, Chapter 1070, extended the scope of the statute to cover volunteers and contractors. It took six years for New York to add similar, yet narrower, provisions to their custodial misconduct statute.

In May 2007, Texas legislature House Bill ("H.B.") 1944 was passed and took big strides to prevent prison sexual abuse.[113] The legislation makes inmate grievance regarding sexual assault exempt from the fifteen day deadline the TDCJ imposed for the rest of inmate grievances.[114] In addition, the law creates the position of a sexual assault ombudsperson who is charged with coordinating the TDCJ's "efforts to eliminate the occurrence of sexual assault in correctional facilities."[115] The ombudsperson's position is not under the authority of the TDCJ and the ombudsperson is mandated to supervise administrative sexual assault investigations and collect statistical data on such assaults.[116] Thus, Texas became the second state to implement an external monitoring system for prison sexual assault.[117]

## IV. STATISTICS ON CUSTODIAL MISCONDUCT AND THE HIDDEN REALITY

### *A. New York DOC's Inmate Grievance Procedures*

According to the Prison Litigation Reform Act ("PRLA"), an inmate must follow the state's formal inmate grievance procedures and exhaust all such procedures before filing a lawsuit.[118] New York's DOCS has issued two directives that detail the New York Inmate Grievance Program ("IGP").[119] The IGP was created in 1975 through the New York Legislature's enactment of Correction Law Section 139. The creation of this program is attributed to the results and recommendations that came from the state-sponsored investigation into the underlying causes of the Attica Prison riot in 1971.[120] The program's purpose is to

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113 H.B. 1944 was signed by Governor Rick Perry and became effective on June 15, 2007.

114 TEX. GOV'T CODE § 501.174(5) (Vernon 2007).

115 TEX. GOV'T CODE § 501.172 (Vernon 2007).

116 TEX. GOV'T CODE § 501.173 (Vernon 2007).

117 *See* TEX. GOV'T CODE § 501.174 (Vernon 2007). Like California's recent statute, this law mandates that the TDCJ clearly post in all facilities the details on confidentially contacting the Ombudsperson, so that inmates can write confidential letters to the Ombudsperson detailing allegations of sexual abuse. *Id.*

118 42 U.S.C. § 1997e(a) (2008) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). After the enactment of the PLRA, there was debate surrounding the term "prison conditions" in the federal statute. In *Nussle v. Willette*, the Second Circuit held that the PLRA's exhaustive requirement for prison conditions did not apply to assault and excessive force claims. 224 F.3d 95 (2d Cir. 2000). The Supreme Court clarified this issue with its decision in *Porter v. Nussle*, in which the Court held that "the PLRA's exhaustive requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." 534 U.S. 516 (2002).

119 *See infra* note 145, at 1. While Directive No. 4040: Inmate Grievance Program deals with the guidelines for the general inmate grievance program, Directive No. 4041: Inmate Grievance Program Modification Plan is applicable when inmates are unable to utilize the general problem based on special circumstances. The policies, procedures and rules in Directives 4040 and 4041 are also in N.Y. COMP. CODES R. & REGS. TIT. 7, § 701-702 (2008).

120 *See* PRISON SAFETY IN NEW YORK, *supra* note 9, at 31. New York created the McKay Commission to determine the factors that led to the Attica riot. The commission determined that the

"promote mediation and conflict reduction in the resolution of grievances."[121] The IGP consists of three levels of authority: the Inmate Grievance Resolution Committee ("IGRC"), the facility Superintendent, and the Central Office Review Committee ("CORC").[122]

Every DOC facility is required to have an IGRC to address prisoner grievances.[123] This committee is made up of five members consisting of a non-voting chairperson, two voting prisoners, and two voting staff members.[124] Before an inmate files a formal grievance,[125] the inmate should first attempt to resolve her grievance on her own.[126] The official process starts when an inmate files a complaint with the Grievance Clerk, within twenty-one days of the incident described in the complaint.[127] The complaint must include the inmate's identifying information, detailed description of the grievance, and steps taken by the inmate to rectify the grievance.[128] IGRC's representatives may try to solve the grievance informally within sixteen days of the filing of the complaint.[129] If there is no resolution of the inmate's grievance, the full IGRC will consider the complaint at a hearing held within sixteen days of the complaint filing.[130] After the IGRC judges the relevance and importance of the evidence offered, the matter is deliberated privately.[131] When the IGRC reaches a decision, the inmate must be informed, in writing, within two working days.[132] If the decision requires action by the facility's Superintendent or CORC, the IGRC will make recommendations for the Superintendent.[133] Also, if a majority of the IGRC cannot agree on a decision, the complaint is sent to the Superintendent for a response.[134]

Within seven days of receiving the IGRC's written response to the grievance, an inmate may appeal to the Superintendent by filing an appeal with the Grievance

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largest contributing factor was the "lack of nonviolent means of resolving inmate grievances." *Id.*

121 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.1(b) (2008). The regulation specifies that IGP "is not intended to support an adversary process." *Id.*

122 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.1(c) (2008).

123 *See* PRISON SAFETY IN NEW YORK, *supra* note 9, at 31.

124 *See id.* at 32. *See also* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.4(a) (2008).

125 New York DOCS' definition of grievance is "a complaint filed with an IGP clerk, about the substance, application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units, or the lack of a policy, regulation, procedure or rule." N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.2 (2008).

126 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.3 (2008) ("[T]he failure of an inmate to attempt to resolve a problem on his/her own may result in the dismissal and closing of a grievance at an IGRC hearing.").

127 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(a)(1) (2008).

128 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(a)(2) (2008).

129 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(b)(1) (2008). If matter is resolved informally, resolution of the grievance is then entered, with inmate's consent and the process ends.

130 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(b)(2)(i)-(ii) (2008).

131 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(b)(2)(c)(iii) (2008).

132 *Id.*

133 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(b)(2)(c)(iii) (3)(ii) (2008).

134 *Id.*

Clerk.[135] The Superintendent's response will vary depending on whether the grievance is regarding a "departmental issue" or an "institutional issue."[136] With departmental issues, where the inmate seeks to alter or revise departmental policy, the Superintendent immediately forwards the file with recommendations to the CORC for further review and notifies the inmate of this action.[137] For all other appeals involving departmental issues, the Superintendent will render a decision within twenty days of the appeal.[138] For all appeals involving institutional issues, the Superintendent must also make a decision within twenty days of the appeal. [139]

If the inmate is not satisfied with the Superintendent's decision, she may appeal the decision to the CORC by again filing with the Grievance Clerk within seven days of receipt of the Superintendent's written response.[140] The members of the CORC are appointed by each of the DOC's five Deputy Commissioners and act on behalf of the Commissioner of the DOCS.[141] The CORC has thirty days from the day of receiving the appeal to render a decision and provide the inmate with written notification, including the rationale for the CORC's decision.[142] The CORC is the final appellate level of the Inmate Grievance Program. The decisions by the CORC have the same effect as DOCS directives.[143] Not until the receipt of a final decision from New York's highest grievance committee, CORC, is the inmate's available inmate grievance procedures exhausted in compliance with PRLA.[144] At this point in the chronology, the inmate may file a complaint in court.

In 2005, while New York's total inmate population decreased, the number of inmate grievances filed continued to increase. Almost 12% of the 45,000 grievances filed that year by the inmates were informally resolved by IGRC within the sixteen days following the filing of the complaint.[145] In addition, another 6% of the grievances filed in 2005 were dismissed by IGRC in the initial stage of the grievance process. More than half of the IGRC's determinations were challenged, resulting in these grievances moving forward to the first appellate stage in the

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135 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.5(c)(1) (2008). If the appeal is not filed in the specified time period, it will be presumed that the inmate has accepted the IGRC's decision.

136 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701.2(b)-(c) (2008). A departmental grievance is "a grievance which affects an inmate during his/her confinement at various facilities throughout the department." An institutional grievance is "a grievance in which the grievant is only affected as long as he/she remains a resident of the facility in which the grievance is filed." *Id.*

137 N.Y. COMP. CODES R. & REGS. TIT. 7, § 701. 5(c)(3)(i) (2008). The Superintendent must forward these specific grievances to the CORC within seven days of receiving the inmate's appeal. *Id.*

138 *Id.*

139 *Id.*

140 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701. 5(d)(1)(i) (2008).

141 See PRISON SAFETY IN NEW YORK, *supra* note 9, at 32. *See also* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701. 5(d)(2)(i)-(ii) (2008).

142 *See* N.Y. COMP. CODES R. & REGS. Tit. 7, § 701. 5(d)(3)(ii) (2008).

143 *See* N.Y. COMP. CODES R. & REGS. TIT. 7, § 701. 5(d)(2)(ii) (2008) ("CORC decisions have the effect of directives").

144 42 U.S.C. § 1997e(a) (2008).

145 NEW YORK STATE DEP'T OF CORRECTIONAL SERVICES, INMATE GRIEVANCE PROGRAM ANNUAL REPORT 2005 (on file with author) [hereinafter INMATE GRIEVANCE].

process, reviewed by the IGP Supervisor at the facility. Only one-third of the grievances filed in 2005 proceeded to the CORC, the last administrative hurdle before the inmate is allowed to commence an action. Overall, at least one-third of all the grievances filed were determined to be at least partially meritorious, which tends to legitimatize the inmate's complaints regarding sexual abuse.

### *B. New York DOCS' Statistics on Custodial Sexual Misconduct*

As a result of the enactment of the 1996 amendment, the New York DOCS' Inspector General's Office established a Sex Crimes Unit in 1996.[146] The Sex Crimes Unit is responsible for investigating complaints of sexual misconduct by DOCS employees.[147] From 1996 to 2006, the DOCS referred seventy-five cases of custodial sexual misconduct for criminal prosecution, which have resulted in the conviction of thirty-eight correctional officers thus far.[148]

In 2005, the DOCS issued a directive which outlined the "zero tolerance" policy for staff sexual misconduct.[149] Unfortunately, detailed DOCS data regarding the breakdown of custodial sexual misconduct grievances filed by inmates, on a yearly basis, is very difficult to ascertain. All grievances filed by inmates are classified using a code system, which consists of fifty-five different codes grouped into six larger categories.[150] The DOCS' current classification system does not provide a format for distinguishing staff sexual misconduct from other types of staff misconduct. Code 49, Staff Conduct, covers all the grievances alleging inappropriate staff conduct.[151] As a result, the latest DOCS report providing statistics on New York's inmate grievance program failed to specifically discuss the frequency of grievances alleging staff sexual abuse. The report simply states that there were over 7,000 staff conduct grievances filed in 2005.[152]

The New York DOCS should consider restructuring the code classification system used by the IGP. Code 49 should be broken up into several different codes, with each representing a distinct form of inappropriate behavior. This change would result in the various forms of staff misconduct that constitute sexual misconduct receiving their own code classification. At the very least, custodial sexual misconduct grievances should be given its own code, separate from the grievances alleging various forms of non-sexual staff misconduct. This would be feasible since it is not the first time the DOCS has restructured a code

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146 *See* PRISON SAFETY IN NEW YORK, *supra* note 9, at 34.

147 *Id.*

148 *Id.* at 39. Fifteen of those cases were pending as of 2006.

149 DOCS DIRECTIVE 4028A, SEXUAL ABUSE PREVENTION & INTERVENTION—STAFF-ON-INMATE (June 15, 2005), *available at* http://www.docs.state.ny.us/Directives/4028A.pdf. This directive focuses on the prevention of sexual abuse, sexual threats and voyeurism committed by correctional staff.

150 INMATE GRIEVANCE, *supra* note 145. The six categories of grievances concern the following: Program Services, Health Services, Facility Operations, Administrative Services, Counsel, and Executive Direction.

151 *Id.* at 8.

152 *Id.*

classification.[153] Statistical data in corrections function as a learning tool about the rate of incidence and prevalence of crime. Better code classification would allow the DOCS to perform more meaningful statistical analysis of the effectiveness of New York's approach to combating prison sexual abuse. With this proposed change, the DOCS would be able to determine, both on a system-wide and individual facility basis, whether some forms of custodial sexual misconduct take precedence, requiring immediate attention to alleviate their impact on the inmates. Furthermore, more accurate data collection would enable legislators and scholars to identify more effective corrective measures to address the problem.

### *C. The Unique Aspects of Sexual Assault and Its Impact on the Inmate Grievance Program*

Sexual assault is the most underreported violent crime in the United States.[154] One of the relevant characteristics of sexual assault is that the victim is the person most likely to report the crime to law enforcement. The reasons for the low reporting rate by victims vary: victims feel like it is a personal matter, victims fear reprise from their attackers, and/or victims feel the police will not believe them.[155] Correctional staff control the prison surroundings and have the ability to arrange situations in which they are alone with inmates. Since sexual assault by staff in prisons usually occurs with no witnesses, the low reporting rates of sexual assault have a negative impact on combating prison sexual abuse. With the nature of other violent crimes, the inmate-victim's failure to report the crime will not reduce the probability of detection by the proper correctional officials. But with sexual assault, the effects of the crime will most likely not be visible. With no obviously apparent physical evidence of abuse, like black eyes, bruises or lacerations, the chances of third-party reporting of the crime become slim. To truly combat the problem of sexual violence in prison, the DOCS must examine and address the underlying reasons that deter victims from reporting these crimes.

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[153] *See* INMATE GRIEVANCE, *supra* note 145, at 3. In 1994 and 2000, the following categories were added as new codes: Code 25.1 (Strip Search), Code 25.2 (Strip Frisk), and Code 25.3 (Pat Frisk, Female Inmates).

[154] *See* LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 2, (Feb. 1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf (stating that in 1994 and 1995, only 32% of rape/sexual assault victims reported the crime to law enforcement). *See also* MICHAEL RAND & SHANNON CATALANO, PH.D., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 219413, CRIMINAL VICTIMIZATION, 2006 5, tbl.8 (Dec. 1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv06.pdf.

[155] CALLIE MARRIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 3 (Aug. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf.

### *D. Rape and Its Effects*

While sexual misconduct includes acts, such as sexual assault, unwarranted sexual touching, and sexual harassment, one of the most egregious forms of sexual misconduct is rape. Under federal law, most of prison custodial abuse is a form of "prison rape."[156] Rape is different from other types of criminal offenses because of its effects. Victims of rape do not only suffer physical injuries, but rape survivors experience both distinctive physiological and psychological effects at higher degrees compared to victims of other crimes. Consequences from such sexual abuse can range from the relatively minor occurrence of insomnia to severe effects, such as depression and suicide.[157] A 2004 study evaluated a sample of female rape victims, with a comparable control group comprised of victims of a variety of non-sexual violent crimes.[158] The researchers found that the rape victims experienced post-traumatic stress disorder ("PTSD") at a significantly increased frequency than the other female crime victims.[159] The researchers concluded that rape has specific psychopathological consequences on rape victims.[160] This condition itself has been termed "rape related post-traumatic stress disorder."[161]

#### i. Post Traumatic Stress Disorder ("PTSD")

One of the prerequisites to a diagnosis of PTSD is that the individual has experienced a traumatic event which produces intense fear or helplessness in the person.[162] Rape has been universally recognized as a traumatic event.[163] In the

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[156] PREA, Pub. L. No. 108-79, 117 Stat. 972, 988 (2003). The relevant text of this section of the PREA reads:

The term "prison rape includes the rape of an inmate in the actual or constructive control of prison officials . . . . The term "rape" means—(A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will; (B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity . . . .

[157] Carlo Faravelli et al., *Psychopathology After Rape*, 161 AM. J. PSYCHIATRY 1483, 1484 (2004).

[158] *Id.* at 1483.

[159] *Id.* at 1484 (citing that 95% of the rape victims were found to suffer from PTSD, compared to 47% of the non-sexual violent crime victims).

[160] *Id.* at 1484. *See also* D.S. Riggs et. al., *Long-Term Psychological Distress Associated with Marital Rape and Aggravated Assault: A Comparison to Other Crime Victims*, 7 J. FAM. VIOLENCE 283 (1992).

[161] *See e.g.*, National Center for Victims of Crime, *Rape-Related Posttraumatic Stress Disorder*, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32366 (last visited October 30, 2008).

[162] Karen Lynne Mahoney, Trauma, Post-Traumatic Stress Disorder, and Disorders of Extreme Stress (DES) Among Incarcerated Men and Women 3 (2004) (unpublished Ph.D. dissertation, Fielding Graduate University) (on file with author). Rape is a universally recognized as a traumatic event. *See* Friedman, *infra* note 163.

[163] Matthew J. Friedman, National Center for PTSD, *Posttraumatic Stress Disorder: An Overview* (updated May 22, 2007), http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fsptsd_overviewprof.html?opm=1&rr=rr14&srt=d&echorr=true. *See also* People v. Taylor, 75 N.Y.2d 277, 286 (1990) (The "relevant scientific community has generally accepted that rape is a highly traumatic event that will in many women trigger the onset of

most prominent manual used by mental health professionals, the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), PTSD is defined by its three clusters of symptoms.[164] The first cluster is intrusive symptoms, where the individual re-experiences the trauma through nightmares, flashbacks, or other physiological or psychological distress associated with memories of the traumatic event.[165] With the avoidance symptoms, the affected individual avoids situations, people, or objects that are reminders of the traumatic event, in order to decrease their psychological effects to such stimuli.[166] As a result, the affected person will be unable to recall important aspects of the traumatic event. This category of symptoms involves the concept of emotional "numbing" where the individual becomes detached or estranged from others, which negatively impairs her interpersonal relationships.[167] Lastly, hyper-arousal symptoms are a result of the person's nervous system being over-activated.[168] These symptoms include irritability, poor sleeping habits, hyper-sensitivity to noise and heightened startle response.[169] In the aggregate, these symptoms perform one main function for the victim: a survival mechanism.

These specific effects of rape can have significant impact on an inmate's ability to follow the DOCS grievance procedure. The prison setting exacerbates the effects of the trauma on the sexual abuse victim. Unlike other victims, inmates are trapped in the same surroundings where the trauma occurred. These inmate-victims do not have the option of removing or distancing themselves from their abusers and must share their living quarters with them. This can result in situations in which inmates are continuously the victims of sexual assault. In 1997, researcher Dr. Judith Herman developed the concept of "complex post-traumatic stress disorder," which is found among individuals who have been exposed to prolonged trauma.[170] Whereas PTSD sufferers have experienced one traumatic event or short-lived trauma, complex PTSD sufferers have been exposed to long-term chronic traumas, lasting for months, or even years at a time.[171] Although complex PTSD sufferers have symptoms almost identical to those associated with PTSD, this relatively new diagnosis was created because medical professionals believed that a PTSD diagnosis did not accurately reflect "the severe psychological harm that occurs with

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certain identifiable symptoms.").

[164] Friedman, *supra* note 163.

[165] Mahoney, *supra* note 162, at 3.

[166] Friedman, *supra* note 163.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *See* Julia Whealin & Laurie Slone, National Center for PTSD, *Complex PTSD*, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_complex_ptsd.html?opm=1&rr=rr89&srt=d&echorr=true.

[171] *See* National Center for PTSD, *What is Posttraumatic Stress Disorder (PTSD)?*, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html.

such prolonged, repeated trauma."[172] The common experience is that the severity of PTSD generally varies with the victim's length of exposure to the trauma.

## V. RECOMMENDATIONS

While progress has been made over the last decade, New York must create laws and regulations that take a comprehensive approach to the problem of prison sexual abuse by correctional staff. Such a systemic approach would require focusing on a variety of relevant areas such as medical and mental health services, correctional staff training, and investigation techniques. The following are a few recommendations that might make New York's approach to curbing custodial sexual abuse more effective.

### *A. Extending the Reach of the New York's Custodial Sexual Misconduct Statute*

Even with the recent amendment to New York's custodial sexual misconduct statute, not all potential non-inmate abusers of female prisoners are covered. Correctional officers are not the only individuals in a position to abuse the existing power differential in order to coerce inmates into sexual relationships. With the New York legislature focusing only on non-inmates that provide direct services to inmates in facilities, the recent amendment obscures the fact that access to inmates is not necessarily restricted to this category of correctional employees. Stemming from the deprivatory nature of the prison environment, persons who are in a position of authority over inmates include not only those who directly provide services to inmates, but all individuals who have access to inmates, including contractors and volunteers. Therefore, New York's current statute can be improved by amending the statute to cover all custodians and staffs at New York correctional facilities. All sexual assaults committed against inmates are violations of an inmate's fundamental rights, which should be punishable.

### *B. Implementation of Technical Advancements in Monitoring Staff in Correctional Facilities*

The 1990s brought the advent of super-maximum security facilities, also known as "Supermax" prisons.[173] These facilities house the nation's most dangerous inmates in almost permanent solitary confinement, with inmates having only one hour out of their cell each day. Technology provides correctional staff in Supermax prisons with the ability to control inmates who are viewed as "the worst

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172 *Id.*

173 *See e.g., New Thinking on 'Supermax' Prisons: Financially Strapped States Shifting Focus*, Nov. 5, 2003, http://www.msnbc.msn.com/id/3403793/ (stating that a dozen states "built Supermax prisons in the 1990s").

of the worst."[174] These Supermax facilities utilize a modern approach of intensive surveillance with specialized computer systems that allow staff to account for these inmates at all times.[175]

This same "accountability" approach should be applied on a smaller scale to members of the corrections industry. The Supreme Court has stated that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[176] The correctional system's ability to meet its constitutional duty to inmates could be improved by increasing the tracking of the movements of DOCS correctional officers. The DOCS should follow the lead of many other large employers and implement a wide-scale security key card system that would monitor individual's staff movement in correctional facilities. Each swipe of the card would read the identifying information and grant or deny staff access to a various areas of the facilities, leaving an electronic footprint that can be easily traced and establish staff accountability. In facilities with video surveillance systems, the key card system would also allow correctional officials to narrow their efforts when reviewing video footage. Furthermore, this recommendation could be implemented to complement the recent DOCS' employee initiative. In 2007, the DOCS and New York's largest state worker unions entered into an agreement to provide personal alarms to civilian employees at medium- and maximum-security correctional facilities.[177] The basic purpose of these alarms is to protect these employees from the inmates, by pinpointing "a worker's precise location and direction of travel."[178] While employee safety should be a top priority of the DOCS, correctional facilities must not lose sight of their duty to protect all individuals, including the inmates in their custody.

### *C. Special Emphasis on the Most Vulnerable Sections of the Female Inmate Population*

An inmate's attempt to complete her sentence may be analogized with "playing the game of prison"—this game is not only a game of luck or chance, but also a sophisticated game of skill. What makes it a game of chance is that every inmate could be sexually assaulted while in custody. However, there are some female inmates that have an advantage at the start of this game by having assets, such as education, financial resources, and social networks that enable these women to serve an easier prison sentence. The more marginalized sections of the

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174 *Id.*

175 *Id.*

176 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989).

177 GOVERNOR ELIOT SPITZER, 2007 REPORT TO THE PEOPLE OF NEW YORK STATE 45 (Jan. 8, 2008), *available at* http://www.ny.gov/governor/press/2007ReportToThePeople.pdf. These new personal alarms, which are expected to be provided to close to 10,000 employees over the next three years, are designed to provide information about the employees' exact location. *Id.*

178 *Id.*

female inmate population are unable to tap into this reserve of social capital. The DOCS must place special focus on protecting the female inmates most vulnerable to prison sexual abuse: youthful offenders, inmates with drug addictions, lesbian and transgender inmates, inmates with a history of mental illness, physical or sexual abuse, and inmates convicting of sexual offenses.

While all victims of sexual abuse should have access to mental health services and counseling after their experience, mental health services are also an important component to the prevention of custodial sexual abuse. With regard to these at-risk inmates, a mental health component can supplement the existing rehabilitative programs tailored to these inmates. By addressing their unique emotional and psychological needs, these categories of inmates will be less likely to fall prey to predatory correctional staff. In addition, the DOCS might consider tailoring housing arrangements in female facilities according to these special categories of at-risk inmates. The DOCS can look to California's Sexual Abuse in Detention Elimination Act as a model for structuring these housing procedures.[179] Under this act, CDCR must develop housing procedures that minimize the risk of sexual abuse by taking into account several risk factors.[180] To further protect these inmates, correctional staff with access to these inmates' housing units or common areas could be subjected to more frequent staff reviews.

*D. Implementing an External Monitoring Structure as an Additional Safeguard*

The continued prevalence of prison sexual abuse in New York's correctional facilities suggests that this serious problem is inadequately addressed by the current internal mechanisms such as the IGP and the DOCS' Sex Crime Unit. The discretion to handle allegations of sexual abuse should not be solely placed in the hands of the correctional facilities. Since the investigators of the Sex Crimes Unit are "employees of DOCS, inmates' complaints of sexual exploitation and harassment may not be appropriately and thoroughly investigated."[181] New York should follow California's lead and establish an ombudsperson program. But to be truly effective, this prison ombudsman program must have independent oversight of both the DOCS and its correctional facilities, such as the ombudsman position created in Texas.

To alleviate the reasons for underreporting of sexual violence in New York prisons, all inmates and staff should have direct and unrestricted access to this external ombudsperson program. By implementing confidential procedures, maintained solely by the external agency, such as a grievance hotline and locked grievance boxes, participants can feel safer knowing that their grievance is being

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[179] CA. PENAL CODE § 2635-643 (2008) (effective Jan. 1, 2006).

[180] *See* CA. PENAL CODE § 2636(a) (2008).

[181] CORRECTIONAL ASSOCIATION OF NEW YORK, COALITION FOR WOMEN PRISONERS 2006 PROPOSALS FOR REFORM 35 (April 2006), *available at* http://www.correctionalassociation.org/WIPP/publications/Proposals_for_Reform_2006.pdf.

handled by impartial investigators. Overall, the creation of this external monitoring program would lend credibility to the process and foster the belief among inmates and staff that prison sexual violence will no longer be ignored or tolerated.

### *E. Educating Inmates about the Myths, Realities, and Procedures Regarding Sexual Abuse*

The inmates themselves play an important role in curbing the problem of custodial sexual misconduct. Inmates are more willing to report abuse when they feel that administrators and staff take their claims seriously and fully investigate these matters. DOCS has the duty to make inmates aware that sexual abuse will not be tolerated. Educating inmates about sexual abuse must start during the intake process and be continuously supplemented. The DOCS should create a specialized orientation program,[182] including lecture and informational materials, to immediately equip inmates with the tools to recognize the types of inmates targeted by staff and other inmates. These information sessions can use detailed "real world" scenarios to highlight the types of social interactions that can quickly lead to inappropriate relationships. Inmates must be consistently provided with accurate and detailed information regarding the procedures for reporting sexual violence. Finally, inmates must be aware that confidential medical and mental health services will be available to them at the onset of filing a grievance to assist in coping with the alleged abuse.

### *F. Bringing Staff Sexual Misconduct to the Public's Attention*

A major hindrance to the prevention of sexual abuse in prisons is the lack of public support behind this objective. Many former and current inmates lack a political voice in this country,[183] which has caused prisoners' rights to be ignored in American public life. For many years, the misconceptions regarding prison rape has often reduced this serious crime to trivial humor, including variations of "don't drop the soap" jokes. Sexually abused inmates seem to be the last acceptable context in which rape is an appropriate subject for humor. This stems from a pervasive view that prisoners are vastly different from the "average" American, and as hardened criminals, they cannot possibly be the victims of crimes.[184] Unfortunately, since the reality of prison sexual abuse has remained hidden to the

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[182] The DOCS might look into a culturally responsive program, since African-Americans and Hispanics make up 68% of New York's female inmate population. FEMALE OFFENDERS, *supra* note 6, at 2.

[183] While prisoners cannot vote in prison, many states strip released offenders of their voting rights after the completion of their sentence. The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, Sept. 2008, *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

[184] *See* Stop Prisoner Rape, *Myths and Realities About Sexual Violence in Detention*, Oct. 2007, *available at* http://www.spr.org/en/factsheets/Myths%20and%20Realities.pdf.

general public, many citizens' perceptions come only from the distorted images in the popular media, which are rarely sensitive to the plight of inmate-victims.

To bring prison sexual abuse into the public conscience, prisoners' rights advocates and correctional officials should look at the approach used by non-custodial rape advocates. "What began as consciousness-raising among victims of rape soon expanded to an effort to gain a more public, collective voice to articulate the victim's experiences . . . ."[185] In the last thirty years, rape has been transformed from a hidden shame carried by the victims, who somehow invited their assault, to a socially recognized evil.[186] Therefore, prison rape will only become relevant to the general American public when prisoner sexual abuse is promoted as a criminal and human rights violation in the mass media. The DOCS and prisoner rights advocates in New York must launch advertising campaigns to counter the public's misinformed views of prison sexual abuse. Media exposure will put a human face on prisoners subject to sexual abuse and show the public a startling reality that should not be easily ignored. Only after receiving the public's support in the fight to prevent custodial sexual misconduct can the correctional system and legislature be held truly accountable for their treatment of sexual abuse in prisons.

## CONCLUSION

Custodial sexual misconduct in correctional facilities not only affects the violated inmates, but also causes serious harm to other inmates, correctional staff, the correctional system, and society. Correctional staff who sexually abuse inmates disregard the professional responsibilities of their employment, including the care, custody, and control of the inmates. The effects of sexual abuse on inmates have already been discussed in this Note. Custodial sexual abuse impairs the correctional system in several ways. When correctional staff members engage in inappropriate sexual behavior at facilities, employees neglect their jobs, and security at these correctional facilities is compromised. In these prohibited sexual inmate-staff relationships, inmates may be able to obtain contraband and unauthorized privileges. In addition, custodial sexual abuse de-legitimizes the correctional system. In a correctional system where custodial sexual abuse is allowed to happen without harsh consequences for the abuser, the abused inmate's experiences reaffirm their mistrust in correctional staff and the system. This mistrust adds to the increasing polarization of the prison environment, resulting in unnecessarily adversarial relationships between inmates and staff.

Custodial sexual abuse also impairs society. Assaulted inmates have higher recidivism rates as compared to inmates who were not victimized in detention.

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[185] LISA M. CUKLANZ, RAPE ON TRIAL: HOW THE MASS MEDIA CONSTRUCT LEGAL REFORM AND SOCIAL CHANGE 3 (Mary E. Brown & Andrea Press eds., 1996).

[186] *See* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1051 (2008).

Congress made the following finding: "[p]rison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released."[187] In addition, due to the psychological effects of sexual abuse, these inmates will often have extreme difficulty acclimating back into society when released. Overall, we all have a vested interest in preventing custodial sexual misconduct.

[187] PREA, Pub. L. No. 108-79 §2(8), 117 Stat 972, 973 (2003).