

Criminal Justice

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Feature***30 SEXUAL ABUSE AGAINST WOMEN IN PRISON**Brenda V. Smith [\[FNa1\]](#)

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***31** Over the past decade one of the most startling phenomena in the criminal justice system has been the increased incarceration of women. One of the by-products of this influx of women into correctional settings has been the emergence of sexual misconduct against women in prison as a major issue for corrections officials and attorneys who represent women. Although sex in prison has been a long-standing feature of the criminal justice system, the visibility this issue has received in the past 10 years is unprecedented.

Several reasons account for the emergence of this issue. The sheer numbers of incarcerated women have meant that issues affecting them have become more visible. Moreover, the public tends to view women in prison in a more favorable light than men. They are viewed as less culpable--no doubt because they are much more likely than men to be serving time for nonviolent economic offenses. Also, news coverage focuses much more on the reasons women find themselves in the criminal justice system, such as past physical and sexual abuse, and the personal consequences of their incarceration, such as having their children cared for by relatives or in foster families. This coverage has meant that the public and policymakers may be more concerned about what happens to women during incarceration. In addition, the public is more willing to accept that such sexual misconduct can happen given the very visible evidence of similar abuses in other institutions, including foster care, the church, the military, and government. Finally, emerging dialogue on the pervasive climate of violence and harassment that exists against women, not only in this country but also in other countries, has increased the public's willingness to believe that such abuses occur. In particular, the public discourse on partner violence, rape, and sexual harassment has educated and informed the public and policymakers about sexual abuse against women prisoners.

Litigation

One of the first contemporary cases to address widespread sexual misconduct against women was [Cason v. Seckinger, 231 F.3d 777 \(11th Cir. 2000\)](#). That case was originally filed in 1984 as a class action by both men and women housed by the Georgia Department of Corrections at the Middle Georgia Correctional Complex. The lawsuit sought injunctive relief to remedy numerous alleged constitutional violations related to conditions of confinement. In 1990, allegations of widespread sexual abuse of women in the Milledgeville State Prison emerged. These allegations included claims that women were forced to have sex with staff, routinely exchanged sex for favors, and experienced verbal harassment. One woman claimed that she had been impregnated by a staff member and was forced to have an abortion. Some women alleged that they were placed in physical restraints and seclusion for days at a time, during which they were often stripped naked and observed on camera by male officers. Women also alleged that their complaints about the abuse went unheeded and were never investigated. Women complained that they suffered emotional and psychological harm, but did not receive appropriate counseling to deal with the trauma.

As a result of the litigation, the state indicated 17 staff members for sexual abuse of women inmates. Six of those indicted pled guilty to the offenses. The state also entered a series of consent decrees from 1992 to 1995 that: (1) allowed women to

report misconduct confidentially and protected them from retaliation; (2) provided for counseling to women who had experienced sexual abuse by staff members; (3) established protocols for the use of physical restraints and seclusion for mentally ill women; (4) prohibited the stripping of women except in very limited circumstances; (5) established procedures for investigation of sexual contact, sexual harassment, and sexual abuse of women inmates; and (6) established training of employees and female inmates about sexual abuse, sexual contact, and sexual harassment. The court entered an order on March 7, 1994, that permanently enjoined sexual contact, sexual harassment, and sexual abuse of women inmates by staff. The women's prison was also relocated from Milledgeville to Atlanta.

On the heels of Cason another important case was filed, [Women Prisoners v. District of Columbia](#), 877 F. Supp. 634 (D.D.C. 1994), vacated by, in part, remanded by [320 U.S. App. D.C. 247, 93 F.3d 910 \(D.C. Cir. 1996.\)](#) In that case a class of women incarcerated in the District of Columbia correctional system alleged that they were denied equal access to educational, vocational, work, apprenticeship, and religious opportunities on the same basis as men. As in Cason they also alleged that they were subjected to a widespread pattern of sexual abuse and harassment in violation of the Eighth Amendment, Title IX of the Education Amendments Act, and the Fourteenth Amendment. In 1994 the United States District Court for the *32 District of Columbia found on behalf of the women, ruling that within the District of Columbia Department of Corrections there existed a sexualized environment in the institution that was sufficiently severe and pervasive to violate the Eighth Amendment. The district court found that there had been "many incidents of sexual misconduct between prison employees and female prisoners in all three of the women's facilities in this case." These incidents included inappropriate comments of a sexual nature; touching of women's breasts, buttocks, and vaginal areas; sex in exchange for food, cigarettes, and privileges; and sexual assault. The court found that while the D.C. Department of Corrections had policies in place to protect against sexual abuse, those policies were of little value because of the lack of staff training, inconsistent reporting practices, inadequate investigation, and timid sanctions. ([Id. at 666.](#))

Those cases precipitated a host of other actions by individual women inmates and by the federal government challenging sexual misconduct in prison. These cases have met with mixed success. In [Carrigan v. Davis](#), 70 F. Supp. 2d 448 (D. Del. 1999) Delores Carrigan sued the state of Delaware, the Delaware Department of Corrections, several administrative officials in their official and individual capacities, and Peter Davis, a former corrections officer at the Women's Correctional Institute in Delaware whom she alleged had sexually assaulted her while she was an inmate at the facility. She alleged that Davis had violated her constitutional rights under the Fourth, Eighth, and Fourteenth Amendments and had acted with gross and wanton negligence. Carrigan later dropped the claims against all the defendants except Davis. A jury directed a verdict for Carrigan. Davis appealed the decision, arguing that while he had sexual contact with Carrigan, the contact was consensual. He claimed that Carrigan's consent rendered permissible what otherwise would have been a violation of her constitutional rights. The court concluded "as a matter of law, that an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not is a per se violation of the Eighth Amendment."

In determining whether Carrigan had waived her constitutional rights, the court found that a "special relationship" exists between prisoners and prison staff because of the utter lack of control that an inmate has over basic aspects of his or her life and the complete control that the prison and its employees assume over the inmate. In such circumstances the court ruled that the appropriate analysis was that of waiver. Therefore, the party asserting the waiver, in this case Davis, had to demonstrate that Carrigan's consent was voluntary, knowing, and intelligent. The court for purposes of its analysis credited Davis's testimony and ruled that, as a matter of law, the plaintiff was incapable of giving a voluntary waiver. In finding the prisoner incapable of consenting, the court relied on the enactment of a Delaware state law specifically criminalizing sexual contact, notwithstanding the consent of the prisoner (11 Del. Code Ann. [tit. 11 § 1259 \(2000\)](#)) and the totality of the prison environment: "the control the institution maintained over her, and the lack of control she maintained over her own life."

Monitoring

In addition to developments in case law, sexual abuse of women in custody has generated intense scrutiny by human rights organizations, domestically and abroad, and by the federal government. In 1996 Human Rights Watch released a report, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, analyzing the response of the United States to the problem of sexual abuse of female prisoners. The report examined six jurisdictions: California, the District of Columbia, Georgia, Illinois, Michigan, and New York. The report, which was sharply critical of the practices in each of these places, made recommendations for changes in the areas of training, legislation, and policy. Due in large part to the well-publicized litigation and the Human Rights Watch report, the special rapporteur for violence against women, Radhika Coomaraswamy, issued a stinging report on the treatment of women in U.S. prisons and focused most particularly on the issues of sexual misconduct and cross-gender supervision.

This report was followed by a report by Amnesty International, "Not Part of My Sentence": Violations of the Human Rights of Women in Custody, in 1999 that focused on a number of issues affecting women in custody, including sexual abuse. The Amnesty report reached essentially the same conclusions as the Human Rights Watch report and called for: (1) same-sex supervision of female inmates; (2) more explicit policies and laws prohibiting sexual abuse of inmates; (3) stronger mechanisms for investigating and prosecuting sexual abuse of prisoners; (4) appropriate supportive services and redress for sexual abuse; and (5) greater protection from retaliation for inmates who reported sexual misconduct.

The federal government initiated its own study of the incidence of sexual misconduct by correctional staff in 1999. The Government Accounting Office (GAO) examined four correctional systems: Texas, the Federal Bureau of Prisons, California, and the District of Columbia. The GAO found that although sexual misconduct occurs in prisons, the full extent of the problem is unknown because many female inmates may be reluctant or unwilling to report staff sexual misconduct. The investigators found that the jurisdictions' lack of systemic data collection and analysis of reported allegations also hampered efforts to know the full extent of staff-on-inmate sexual misconduct. Even more importantly, the report found that "the systemic absence of such data or reports makes it difficult for lawmakers, correctional system managers, relevant *34 federal and state officials, inmate advocacy groups, academicians, and others to effectively address staff sexual misconduct issues." (See GENERAL ACCOUNTING OFFICE, *WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF* (1999).) The report found that the absence of such information impeded efforts in a number of key areas: (1) monitoring the incidence of the sexual misconduct; (2) keeping track of employees accused and found to be involved in staff sexual misconduct; (3) monitoring the enforcement of state law and corrections policies and procedures; and (4) identifying corrective actions to address misconduct.

Criminalizing sexual abuse of prisoners

One of the most important outcomes of this scrutiny has been the enactment of legislation that specifically criminalizes the sexual abuse of prisoners. As recently as 1990, only 10 states and the federal government had laws that specifically made sexual abuse of inmates a criminal offense. In the past five years, primarily in response to litigation--or to stave off litigation--states have passed laws that make sexual contact between inmates and correctional staff an offense. At present, only six states, Vermont, Minnesota, Utah, Oregon, Kentucky, and Alabama, have no laws that specifically prohibit such conduct.

States responded to the difficulty in prosecuting these cases under their existing statutes by enacting legislation that specifically criminalized sex between staff and inmates and in some instances specifically provided that consent was not a defense to the conduct. Three states, Arizona, Nevada, and Delaware, also separately prosecute inmates who engage in sexual misconduct with staff. In the majority of states these offenses are defined as felonies. Yet some accord only misdemeanor status to

these violations.

The logical question is, why was such legislation required? Wouldn't a state's existing sexual assault statute cover this conduct? Unfortunately, sexual abuse in institutional settings is even less likely to be reported and prosecuted than sexual assault in the community. All of the barriers to prosecution of sexual assault cases in general, such as issues of credibility, the shifting nature of consent, and the difficulty in proving the cases, intensify when the complaint is made by a prisoner. And many of the cases involving prisoners do not fit the construct of a "typical" rape complaint. In particular, it's often the case that no physical force is used. Sex between staff and inmates often occurs as an exchange for highly valued items in the institution, such as food, better work assignments, telephone access, clothing, or drugs. Sex may have also been coerced, such as when a staff member uses either promises of better treatment or threats of poor treatment. Therefore, sexual interactions often appear to be "consensual" and outside of the scope of most state sexual assault statutes. Moreover, notwithstanding the enactment of the legislation, prosecution of these cases in many jurisdictions is lethargic at best. Corrections officials cite the difficulty of overcoming the "code of silence" within the institution among both staff and inmates, and the difficulty of gaining the interest of either law enforcement or state and federal prosecutors in these matters.

Also complicating agency response are issues related to investigations and the right against self-incrimination of public employees who are accused of criminal offenses. ([Garrity v. New Jersey, 87 S. Ct. 616 \(1967\)](#).) Many states proceed administratively against correctional employees and then turn over the results of the administrative investigation to state police. Often employees make statements in the context of administrative proceedings as a condition of maintaining their employment and are not informed that these statements can be used against them in parallel or later criminal proceedings. These uncertainties about how to structure investigations have meant that many investigations do not happen in a timely fashion. By the time the decision to prosecute criminally is made, witnesses have disappeared, either through release from prison in the case of inmates, or termination for employees. What physical evidence exists may have been compromised, and often the chain of custody for the evidence cannot be established. Even when investigations do occur, the information obtained may be tainted by the failure to inform the employee or inmate (in the case of jurisdictions that prosecute inmates as well) of his or her Miranda rights.

Implications for inmates' counsel

The implications for counsel for inmates are clear. Sexual misconduct in prison occurs. It can have a devastating impact not only on the inmate, but also on the culture of an institution. It creates an environment where the boundaries of conduct for both prisoners and staff are not clear. It also can hinder very important correctional goals, such as rehabilitation or security. In many cases the misconduct masks other serious problems, such as drugs or weapons coming into correctional institutions. In still other cases, correctional staff has assisted in the escape of prisoners with whom they were involved sexually. Also, given the well-documented histories of physical and sexual abuse for women inmates, sexual misconduct in prison can further injure individuals who have already been harmed by past abuse. From a very practical point of view, this can expose corrections departments, state and local governments, and public officials to both civil and criminal liability, particularly when there is a history of failing to respond appropriately to allegations of sexual misconduct.

When confronted by a claim from an inmate that sexual misconduct has occurred, counsel should take several important steps. First, ask the inmate what she wants to happen. Often the inmate may not want to report the conduct. She may fear negative consequences, *35 such as physical and verbal harassment or removal from the institution. Although removal may seem to be the logical solution, it may have disastrous results for the inmate. She may lose employment or be removed from rehabilitative or educational programs. Removal can, in some instances, increase her time in custody because she cannot earn important credits to reduce her period of incarceration.

If the inmate wants to report the conduct, counsel should ask if she knows the reporting mechanism for her institution. For most institutions there is an inmate grievance process, but often this process is not confidential or lacks integrity. In several cases, inmates have complained that grievances are ignored or never resolved. In still others they complain that the target of the inmate's grievance may be informed and that the inmate or fellow inmates suffer retaliation. In those institutions with a confidential hotline or other process for reporting incidents of sexual misconduct, counsel should encourage the inmate to make use of it. Counsel can also intervene and make the complaint to the appropriate official: the warden of the facility, the director of the department of corrections, the internal affairs division of the corrections department, the state attorney general or inspector general, or the police, depending on the procedures in the particular jurisdiction. Counsel should also inform the inmate that reporting is not only important for putting the institution on notice about the incident, but that she may be precluded from later bringing a civil suit if she fails to exhaust existing administrative remedies. (But see [Peddle v. Sawyer](#), 64 F. Supp. 2d 12, 16 (D. Conn. 1999) (holding that exhaustion of administrative remedies is not required for sexual abuse under Prison Litigation Reform Act (PLRA), as sexual abuse is not a condition of confinement under the PLRA).)

Whether or not the inmate decides to report the incident, it is important that she be informed of the availability and need for both medical and psychological counseling related to the incident. Many of the interactions between staff and inmates can have medical consequences, including exposure to HIV and other sexually transmitted diseases and pregnancy. An incident of sexual misconduct may also exacerbate existing mental health problems or cause anxiety or depression.

It is important to follow up to determine the outcome of the investigation and to ensure that the prisoner does not suffer negative consequences as a result of the report. This follow-up could include gaining the inmate's permission to communicate with corrections officials about the matter. Counsel might also, at the client's request, ask that she be released or moved to supervision in the community as a result of the conduct. Although not widely publicized, this has occurred in several cases. Most recently, several female Immigration and Naturalization Service detainees were released after they complained of the pervasive sexual misconduct in the Krome Detention Center in Florida. Any change in custody will likely have to be negotiated with the court, the paroling authority, and the prosecutor.

The inmate may also want to pursue either civil or criminal action against the corrections employee and some combination of state officials and agencies. Many criminal attorneys do not have experience in civil litigation. Counsel may want to refer the inmate to a local bar association or law school, or assist her in locating an attorney to evaluate the prospects of successfully litigating a claim challenging the misconduct.

Implications for prosecutors

The implications for prosecutors are different, but just as critical. Notwithstanding that sexual contact may have occurred for "strategic" reasons, such as gaining benefits or privileges, it is still a violation of the law and a violation of the trust that the public places in state officials who have custody over inmates. Prosecutors can and should play an important role in vindicating the interests of citizens in custody and in providing safe and appropriate custodial care for inmates.

Prosecutors should form relationships with corrections departments to establish protocols for reporting and investigating these cases. Because of competing interests in sanctioning the employee administratively and criminal prosecution, prosecutors and corrections officials are often working at cross-purposes. In many instances, the only evidence that the conduct occurred is the statement of inmates and staff members. It is important to investigate these cases, obtaining statements quickly before witnesses can change their stories. This is particularly critical in these cases because of the well-known culture of silence among both staff and inmates.

Establishing procedures for the collection of physical evidence is also critical. Often there is blood, semen, saliva, or hair

evidence. Corrections departments typically do not have the resources, training, or technology to preserve the physical evidence in a manner that satisfies chain-of-custody concerns or for further scientific analysis. Clear guidelines for who collects, preserves, and conducts the analysis of evidence would begin to remedy these problems.

Finally, vigorous prosecution of these cases is critical. Aggressive prosecution sends the message to both staff and inmates that the state does not condone this conduct and that sexual abuse of prisoners will be prosecuted with the same degree of vigor as other *36 sex offenses. Prosecution is particularly important because correctional staff who are accused of misconduct often resign from their positions. In many states the administrative investigation halts at that point. A correctional officer is then free to seek employment in another institution that is unaware of his or her past misconduct. A conviction could send the message that the staff member is not an appropriate hire. In several states, those convicted of sexual abuse of prisoners are also listed in the sex offender registry for the state. These prosecutions can also make a tremendous difference in the culture of the institution and the regard that both prisoners and staff have for the rule of law.

Conclusion

The extent of sexual misconduct in prisons in the United States is difficult to know. The problem is serious enough, however, to have been the focus of litigation, research, and advocacy. Although corrections decision makers and state and federal policymakers have made strides in recognizing the issue, much work remains. All states should pass laws specifically criminalizing the sexual abuse of persons in custody, whether in prison, juvenile detention facilities, community-based settings, or on probation or parole. These laws should specifically provide that the "consent" of the inmate is not a defense to the criminal conduct. State and federal corrections authorities should implement policies and procedures to prevent and address sexual misconduct in their institutions. This includes training both staff and inmates on sexual misconduct, providing a safe and confidential process for the investigation, and resolution of allegations of staff sexual misconduct with inmates. State and federal corrections authorities must also implement systemic data collection to document the number, nature, and resolution of sexual misconduct allegations in their institutions. Finally, these cases must be vigorously prosecuted and those convicted must receive sanctions commensurate with the crime and the breach of their duty of care to the public and to this population.

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