

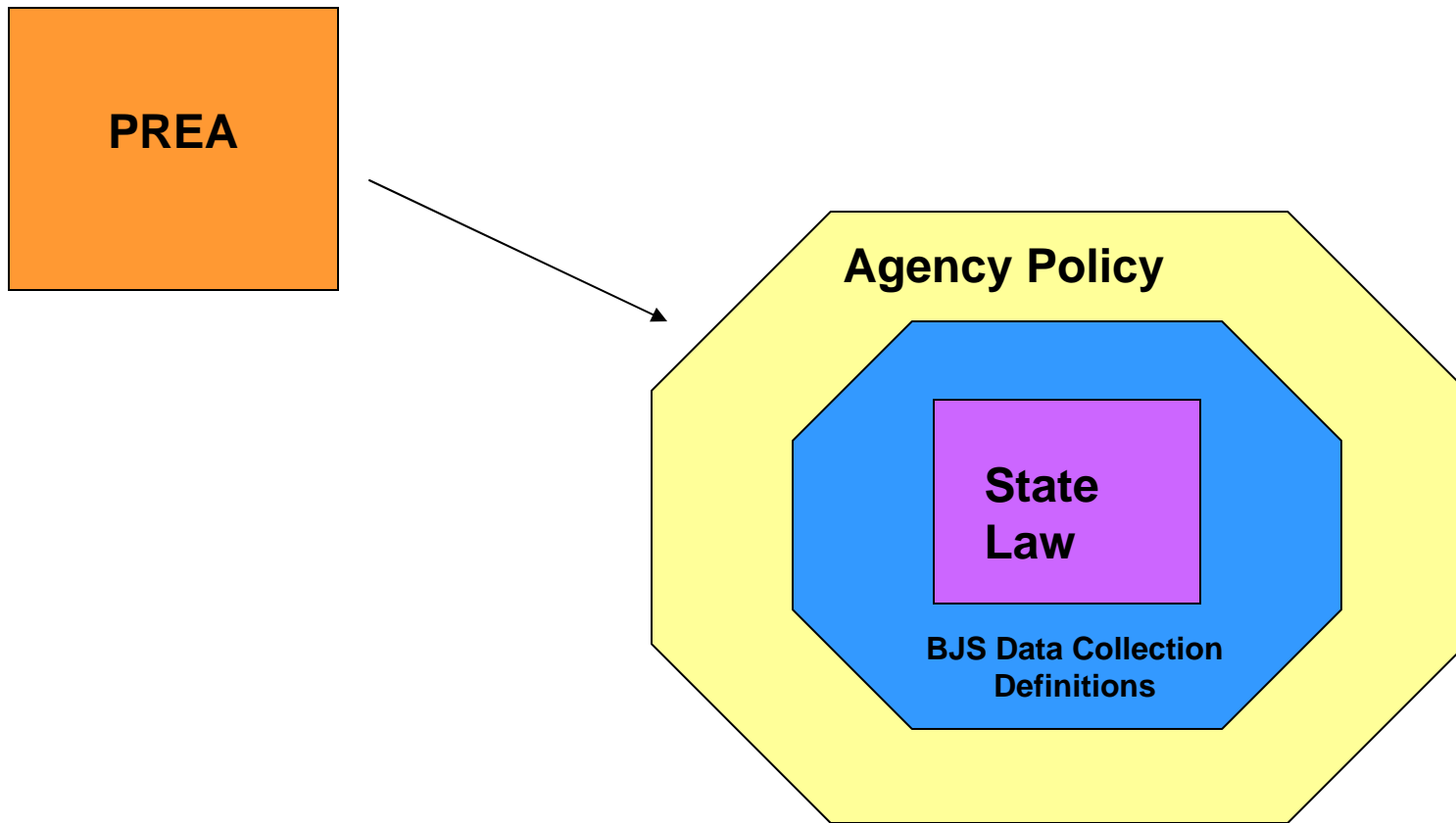
Liability for Sexual Abuse of
Persons in Custody – Criminal,
Civil and Administrative

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Vectors of Liability

- PREA
- Agency Policy
- State statutes prohibiting the abuse of persons in custody
- Laws enacted to Implement PREA
- Other State Laws
- Constitutional Law
- Prison Litigation Reform Act
- Human Resources Law

Sources of Legal limits on Sexual Abuse of Persons in Custody

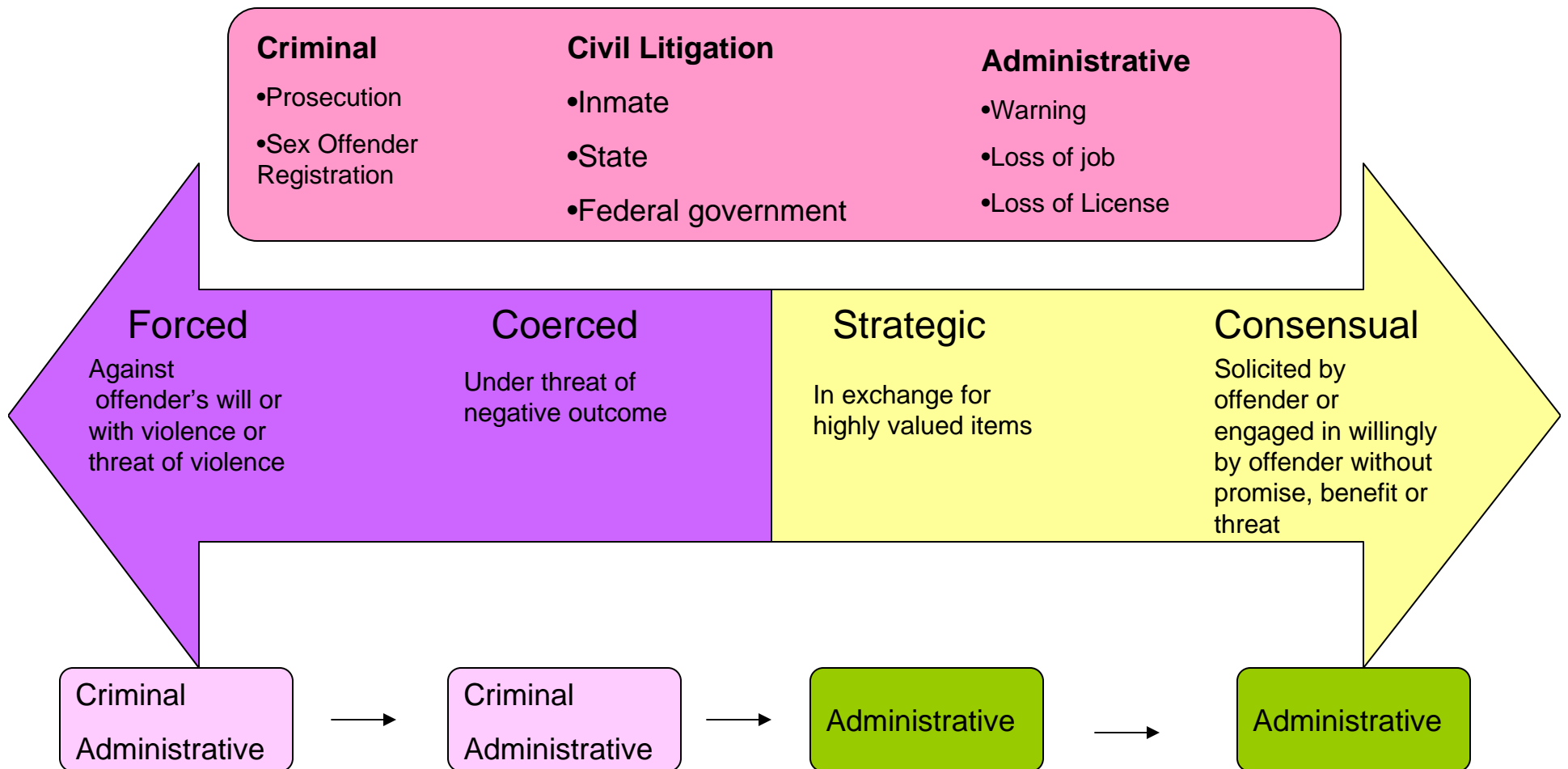


The Prison Rape Elimination Act

- Covers
 - prisons, jails, community corrections, juvenile facilities, residential settings
- Data collection by BJS
- Safe Communities Section
- Reporting Issues
- Accountability
- Standards

Continuum of Sexual Activity Involving Adult Offenders

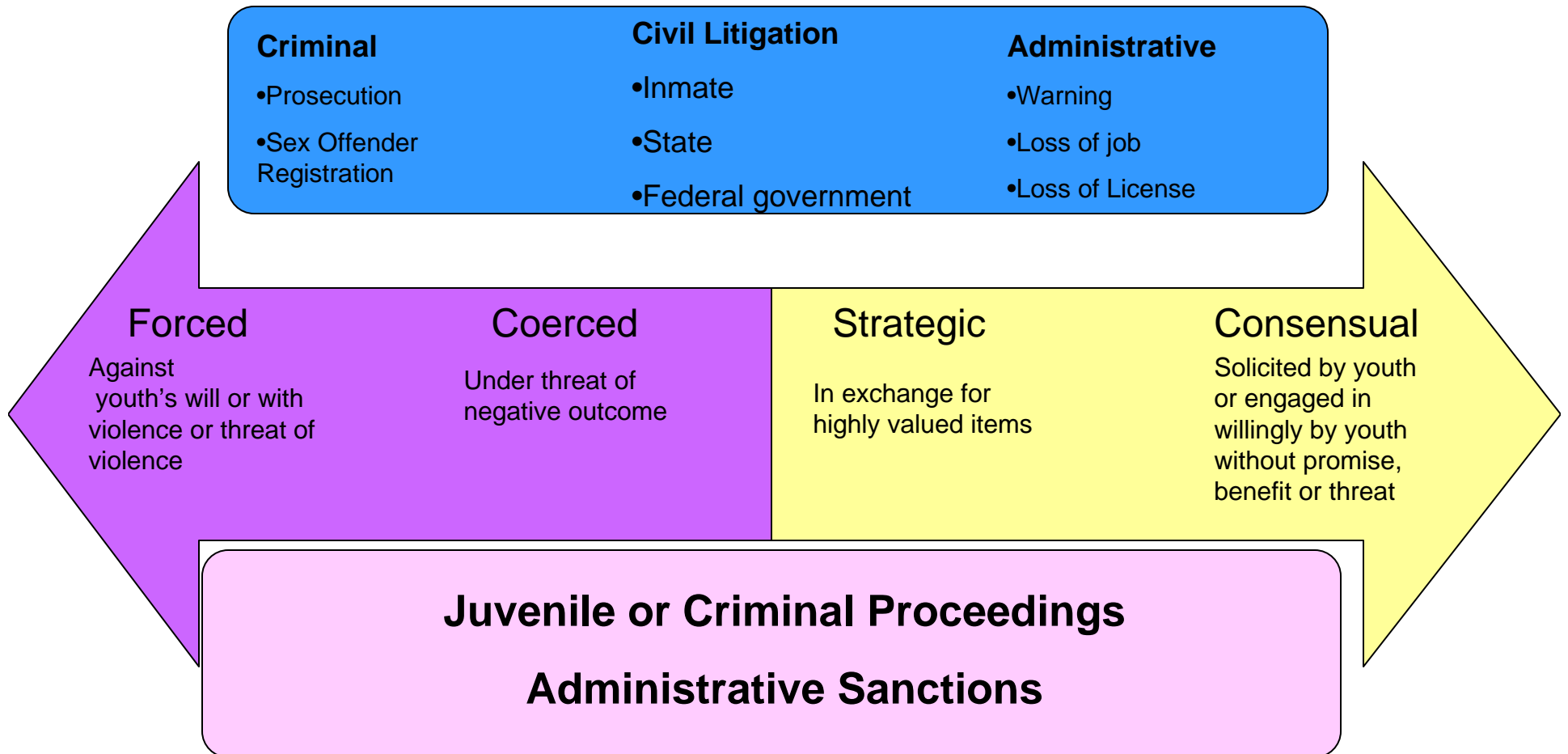
Staff on Inmate Sanctions



Inmate on Inmate Sanctions

Continuum of Sexual Activity Involving Youth

Staff on Youth Sanctions



Youth on Youth Sanctions*

NOTE: Sanctions for youth on youth sexual activity may depend on a state's mandatory reporting statutes and age of consent

State Criminal Laws Prohibiting the Sexual Abuse of Persons in Custody

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

State Laws Implementing PREA California Sexual Abuse in Detention Elimination Act (Chapter 303, 2005 California Statutes)

- Ensure accurate data collection concerning sexual abuse across all institutions which is accessible to the public; and
- Develop guidelines for the provision of resources and counseling from outside organizations to inmates and wards.
- Creates the Office of the Sexual Abuse in Detention Ombudsperson to ensure confidential reporting and impartial resolution of sexual abuse complaints in CDCR facilities.

State Laws Implementing PREA
California Sexual Abuse in Detention Elimination Act
(Chapter 303, 2005 California Statutes)

- Provide inmates and wards with informational handbooks regarding sexual abuse in detention;
- Adopts specified policies, practices, and protocols related to the placement of inmates, physical and mental health care of inmate victims, and investigation of sexual abuse;

Other State Criminal Laws

- Sexual Assault
- Statutory Rape
- Sodomy
- Sex Offender Registration
 - Juveniles
 - Adults
- Vulnerable Adult Statutes
- Licensing
- Malfeasance in Office/Official Misconduct
- Obstruction of Justice
- Making False Statements to a government official
- Mandatory Reporting
- Notification

Civil Liability – Constitutional Claims

- Most common legal bases for challenges
 - 42 U.S.C. 1983
 - Eighth Amendment
 - Fourth Amendment
 - Fourteenth Amendment
 - State tort claims

42 U.S. C. 1983

- Creates a federal cause of action for the vindication of rights found elsewhere
- Key elements
 - deprived or a right secured by the constitution or law of U.S.
 - deprivation by a person acting under color of state law
 - Don't forget volunteers and contractors

Eighth Amendment

- Prohibits cruel and unusual punishment
- Legal standard is deliberate indifference
 - established in a prison rape case Farmer v. Brennan
 - two part test
 - the injury must be objectively serious and must have caused an objectively serious injury
 - the official must have a sufficiently culpable state of mind and have acted with deliberate indifference or reckless disregard for the inmate's constitutional rights

What the court looks for

- Deliberate indifference to inmate vulnerability -- safety or health
 - official knew of and disregarded an excessive risk to inmate safety or health
 - official must be aware of facts from which an inference could be drawn that a substantial risk of harm exists and he must draw the inference

Smith v. Cochran, 339 F.3d 1205 (10th Cir. OK 2003)

- Driver's license examiner who supervised female prisoner on work release not immune from suit for sexual abuse of inmate. Oklahoma DOC delegated responsibility to agency, so can be liable under 8th amendment.

Fourth Amendment – Bell v. Wolfish, 441 U.S. 520 (1979)

- Did the individual have a legitimate expectation of privacy?
 - The scope of the intrusion
 - The manner in which it was conducted
 - The justification for the intrusion
 - The place in which it is conducted

Fourteenth Amendment – Substantive Due Process

- Was the individual deprived of a life, liberty or property without due process of law?
- Lower legal standard than 8th amendment
- Depending on situation – 14th amendment may apply – juvenile context in particular

State Tort Law Claims

- Assault
- Battery
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Negligent hiring, firing, supervision, training

Prison Litigation Reform Act – Pub. L. No. 104-134, 110 Stat 1321 (1995)

- Exhaustion requirement
- Limits on attorneys fees
- Limits consent decrees
- Limits on appointment of special masters
- Physical injury requirement
- Limits on proceeding IFP

PLRA

- Jones v. Bock, (Jan. 23, 2007) Court decides in a case involving Michigan DOC that the total exhaustion rule of 6th Circuit was not required by PLRA
<http://www.supremecourtus.gov/opinions/06pdf/05-7058.pdf>
- Porter v. Nussle, 122 S. Ct. 983, 986 (2002) (exhaustion requirement of PLRA)

PLRA

- Morris v. Eversley, 2002 WL 1313118 (S.D. N.Y. June 13, 2002) (woman challenging sexual assault during incarceration was not required meet PLRA exhaustion requirement once released)
- White v. Haines, 2005 WL 1571203 (S. Ct. App. W.VA) (July 7, 2005)(state can provide for different exhaustion scheme than federal government with regard to complaints of sexual abuse in custody)

PLRA Implications

- Inmates have to exhaust even when claim involves prison rape
- Must have credible procedure for them to do so
- Can't erect artificial barriers to bringing suit
- Inmates aren't going to report if they fear results

PLRA Implications

- Due to fear, inmates may wait until they leave to report
- No duty to exhaust if out of your system
- Go directly to litigation
- Agency is not in position to resolve and only option is settlement or litigation

Major Issues

- Staff Sexual Misconduct
- Inmate on Inmate Conduct
 - Rape
 - Sexual abuse
 - Voluntary sexual interaction
 - Consensual sex

Staff Sexual Misconduct

- Important Factors
 - who raises the issue
 - male inmate
 - female inmate
 - what has been your history
 - complaints about misconduct
 - complaints about other institutional concerns
 - community standing
 - the context in which the issue is raised
 - Litigation
 - Investigation
 - Agency oversight

Inmate on Inmate Conduct

- Who raises the issue
 - Male
 - Female
- Nature of the conduct
 - Forced
 - Coerced
 - Consensual

Liability

- Municipal
- Official
- Individual
- Personal

Municipal Liability

- Monell v. Department of Social Services, 436 U.S. 658 (1978)
 - municipality is a person who can be held liable under Section 1983
 - Officially executed policy or toleration of custom within municipality must inflict the injury
 - inaction
 - failure to train or supervise
 - Failure to investigate

Municipal Liability

- Can't be held responsible under respondeat superior or vicarious liability for:
 - Independent actions of employees
 - Wrongful conduct of single employee
 - Must make showing that this officer was likely to inflict a particular injury

Official Liability

- Will cause liability to municipality
- Did it happen on your watch
- Were you responsible for promulgating and enforcing policy
- Did you fail to act or ignore information presented to you
- Failure to TRAIN, SUPERVISE, FIRE

Individual Liability

- Officials sued in individual capacity may be protected from damages if the alleged wrongful conduct was committed while they performed a function protected by qualified immunity

Personal Liability

- Plaintiff must provide notice that the suit is against the official in her personal capacity
- Direct participation not required
 - Actual or constructive notice of unconstitutional practices
 - Demonstrated gross negligence or deliberate indifference by failing to act

Qualified Immunity

- No violation of federal law -- constitutional or otherwise
- Rights and law not clearly established at the time of the incident
- Official's action was objectively legally reasonable in light of clearly established legal rules at time of the action—
deliberate indifference

Riley v. Olk-Long 282 F.3d. 592 (C.A. 8 (Iowa)) 2002)

- Facts: Inmate brought Section 1983 action against prison warden and director of security under 8th amendment. Jury found in favor of inmate. Warden and director of security moved for judgment as matter of law or for a new trial.

Riley v. Olk-Long
282 F.3d. 592 (C.A. 8 (Iowa))
2002)

- Result: Prison warden and director of security were deliberately indifferent to the substantial risk of harm that guard presented to female inmates. Held personally liable to inmate in amount of \$20,000 against Sebek and \$25,000 in punitive damages from Olk-Long the warden

Riley v. Olk-Long

282 F.3d. 592 (C.A. 8 (Iowa))
2002)

- What happened?
 - Officer made inappropriate comments to inmate Riley about whether she was having sex with her roommate
 - He came into her room after lockdown and attempted to reach under her shirt
 - Grabbed her from behind and rubbed up against her

Riley v. Ok-Long

282 F.3d. 592 (C.A. 8 (Iowa))

2002)

- What happened?
 - Inmate didn't report above because "she doubted that she would be believed and feared the resulting discipline"
 - Officer entered cell and raped her. She performed oral sex so she wouldn't become pregnant
 - Another inmate witnessed incident and reported it
 - Inmate placed in administrative segregation during investigation.
 - Officer terminated.
 - Convicted under state law

Riley v. Olk-Long

282 F.3d. 592 (C.A. 8 (Iowa))
2002)

- Why?
 - Prior to this incident other female inmates had complained
 - Link had a history of predatory behavior
 - Four prior investigations closed as inconclusive
 - Collective bargaining unit precluded permanent reassignment
 - Sebek suspected but didn't take leadership
 - Sebek had opportunity to terminate but didn't

Riley v. Olk-Long

282 F.3d. 592 (C.A. 8 (Iowa))
2002)

- Why?
 - Olk-Long didn't think that officer posed a threat
 - Collective bargaining agreement was no defense to failure to protect inmate safety

Austin v. Terhune

2004 WL 1088293 (9th Cir. 2003)

- Correctional officer exposed his genitalia to male prisoner.
- Prisoner tried to file a grievance but was prevented from doing so by other officers
- The exposing officer apologized later and told him not to complain
- Inmate refused and officer filed a false disciplinary on inmate
- Inmate placed in segregation for six weeks and continued to file grievances
- Officials eventually investigated
- Officer suspended w/o pay for 30 days
- Court allowed inmate to proceed in law suit for the retaliation

Ice v. Dixon 2005 WL 1593899 (July 6, 2005)

- Facts

- Inmate sexually assaulted during incarcerated at Mahoning County Jail
- Bi-Polar Manic Depressive
- Defendant Dixon promised to arrange Ice's release from County Jail if she performed oral sex and other sex acts on him

Ice v. Dixon

2005 WL 1593899 (July 6, 2005)

- On motion for summary judgment
 - Mahoning County immune in official capacity
 - Defendant Wellington, Sheriff immune in official capacity and individual capacity
 - Defendant Dixon, perpetrator immune in official capacity
 - Dixon not immune in individual capacity and on claims of assault and battery against Ice

Why this result

- Specific Policy
- Training to staff
- W/in 48 hours of incident videotaped plaintiff in interview
- Took plaintiff to hospital for rape kit
- Called Ohio Bureau of Criminal Investigation
- Suspended Dixon
- Internal Affairs involved
- Sent to Mahoning County Prosecutor's Office

Brown v. Scott,
329 F.Supp.2d 905 (E.D. Mich. 2004)

- Inmate sued unit manager for not changing his cell assignment upon request
 - Told unit manager that cell mate was predatory homosexual rapist
 - Had been warned by other inmate
 - Unit manager says did he proposition you
 - 3 days later forcibly raped

Brown v. Scott
329 F.Supp.2d 905 (E.D. Mich. 2004)

- Unit managers defense
 - No record of cellmate as homosexual predator
 - Inmate only referred to rumor
 - Didn't ask for protection
 - Would have moved if he had asked
- Allowed suit to proceed

Williams v. Caruso,
2005 WL 2261602
(W.D. Mich Sep. 17, 2005)

- Inmate classified as homosexual predator sued about classification and lost
 - Had a major misconduct for sexual assault
 - Found involved
 - Shipped
 - Convicted for the assault
 - Procedural claim that at disciplinary he was not classified as homosexual predator and should not have been shipped and placed on current restrictions
- State prevails

Punishing Consensual Sex of Inmates

- State sodomy law constitutional as applied to sex in prison. Diminished expectation of privacy.
 - U.S. v. Brewer, 363 F.Supp. 606 (M.D. Pa. 1973);
 - People v. Frazier, 64 Cal.Rptr. 447 (Cal. Ct. App. 1967);
 - People v. Coulter, 288 N.W.2d 448 (Mich. Ct. App. 1980)

Prison Regulations Prohibiting Consensual Sex ARE Constitutional

- George v. Lane, 1987 U.S. Dist. Lexis 3659 (N.D. Ill 1987)

Three Cases Challenging Inmate on Inmate Abuse

- Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004)
 - Failure to protect claim allowed to proceed against Texas Department of Criminal Justice
 - Plaintiff ultimately lost

Three Cases Challenging Inmate on Inmate Abuse

- Croom v. Wagner, 2006 U.S. Dist. Lexis 64915 (E.D. Pa 2006)
 - Plaintiff and cellmate were involved in a violent altercation, as well as consensual sex [sex not challenged in suit]
 - 8th Amendment claim

Three Cases Challenging Inmate on Inmate Abuse

- Barnes v. Ozmint, 2005 U.S. Dist. Lexis 38173 (D.S.C. 2005)
 - Cellmate raped plaintiff.
 - Claim that agency failed to investigate the assault.
 - Dismissed claim for failure to show that the guards were subjectively aware of the risk to plaintiff from cellmate.
 - After the rape, prison officials became aware of cellmate's past sexual assaults on other inmates.

Conclusions

- Corrections officials can and are held personally liable for staff sexual misconduct with offenders
- Corrections agencies and officials can be held liable for failure to train, supervise, investigate and discipline in their official capacity

Emerging Issues--Code of Silence
Baron V. Hickey, 242 F.Supp.2d 66 (D.Mass. 2003)

- County Corrections officer harassed by co-workers after he reported misconduct
- Reported co-workers playing cards with inmates
- Referred to as “rat”; people dropped cheese in front of him; tires slashed
- Complained on 30 separate occasions
- Claimed that he was forced to resign

Code of Silence

Baron V. Hickey, 292 F.Supp.2d 248
(D.Mass. 2003)

- Jury awards Baron \$500,000 for severe harassment
- Affirmed 402 F.3d 225 (1st Cir.(Mass.))

Emerging Issues – Cross Gender Supervision

- Everson v. State of Michigan
Department of Corrections
 - 391F.3d 737 (6th Cir. 2004)
- In the Matter of Juvenile Detention
Officer Union County,
 - 837 A.2d 1101 (N.J. Super. A.D. 2003)
 - (creation of 8 male juvenile detention officer positions upheld)

Adam Walsh Child Protection and Safety Act of 2006

- Creates a national registration and notification system for sex offenders
- President signed in to law on July 27, 2006
- **REQUIRES** juveniles aged 14 and older who have been adjudicated delinquent for offenses comparable to aggravated sexual assault to be registered
- Creates 3-tiered classification system based on seriousness of crime committed – duration of registration tied to sex offender's tier classification – 15-25-life
- 3 years to comply or lose 10% federal law enforcement funds

Administrative Liability – Human Resources Issues

- Public Employer
- Private Employer
- Unionized e'ee's
- Non-unionized

Public Employer

- Constitutional protections
 - First Amendment – Freedom of Association
 - 4th Amendment Privacy Surveillance
 - 5th and 14th Amendment Due Process, Equal Protection
- Balancing test – weighing intrusion on employee's constitutional rights against weight of employer's interest

Is this Okay?

- Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction
- Denial of probation officer's request to attend baptism of child of longstanding friend whose older son had been placed on probation

Is this Okay?

- Termination of state corrections officer married to man subsequently incarcerated in state prison system for felony
- Termination of probation officer for buying car at a dealership where probationer under her supervision worked (though was not involved in the sale)
- Withdrawal of employment opportunity as probation officer upon finding that you are married to a former prisoner.

Nod to Employers in Each Case

- But, standards of analysis differ (e.g., rational basis, intermediate scrutiny)
- Still unsettled, evolving area of law; strong trend is to uphold no contact policies

Freedom of Association

- No contact policies
 - Courts of appeals have generally upheld such policies in light of security interests involved
 - There are a couple of contrary, “outlier” trial court decisions

Employer Interest in Supporting No Contact Policies

- Interests in on-the-job performance
- Interests in off-the-job conduct that implicates officer's fitness for duty
- Interests in public reputation of correctional institution or probation office

Privacy

- Reasonable expectation of privacy
- Reasonable expectations change with employment context
- Correctional officers in secure institutional settings vs. community corrections

Surveillance

- Notice
- Methods
- Random vs. targeted
 - Level of suspicion
 - none, individualized or reasonable suspicion, probable cause
- Objective decision-making
- Balance between intrusiveness and employer need

Most Cases Involve Contraband – Correctional Settings

- Search of employee lockers, cars employees choose to park in lots, pat down searches as employees enter institution, all okay
- Body cavity searches require at least reasonable suspicion
- What about requiring people to wear tracking devices?

Discipline

- Grievance and arbitration
- Due process rights under state law

Labor Context: Arbitration

- Both sides have right to legal representation and to present evidence
- Employer may not interfere with right of employees to testify at arbitration hearing
- Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court

Duplicitious Staff

- At an arbitration hearing on the termination of a corrections officer for having sexual relations with an offender, a fellow officer testifies that he never saw any evidence that his colleague engaged in improper conduct on his shift
- Based on all the evidence, you believe the fellow officer is lying to cover up for his friend
- What should you do?

Termination and Resignation

- Employee References
- Defamation
- Allegations of Discrimination

Exposure

- Defamation
- Discrimination

Defamation

- “Qualified privilege” protects representatives of employers who give out allegedly defamatory information for legitimate business purpose
- Applies to former employee reference checks, provided that employer can show
 - Lack of malice
 - Good faith
 - Belief in truth of statement made

Strategies

- Establish and adhere to policy limiting dissemination of information about employee discipline
- Limit dissemination to “Need to Know” basis
- Implement policies protecting employee personnel files
- Implement consistent policy on reference checks

Discrimination

- Requires showing employee was treated differently than others similarly situated
- Pretext: is the employer's reason the REAL reason?

Strategies

- Training supervisors
- Minimizing managerial discretion
- Treat like cases alike
- Consistently enforce disciplinary rules
- Maintain up-to-date personnel files
- Keep contemporaneous documentation of all infractions, even minor ones
- Protect employment information from general discussion