

WEB CHAT:

**Legal Tools for Addressing Sexual
Violence in Institutional Settings**

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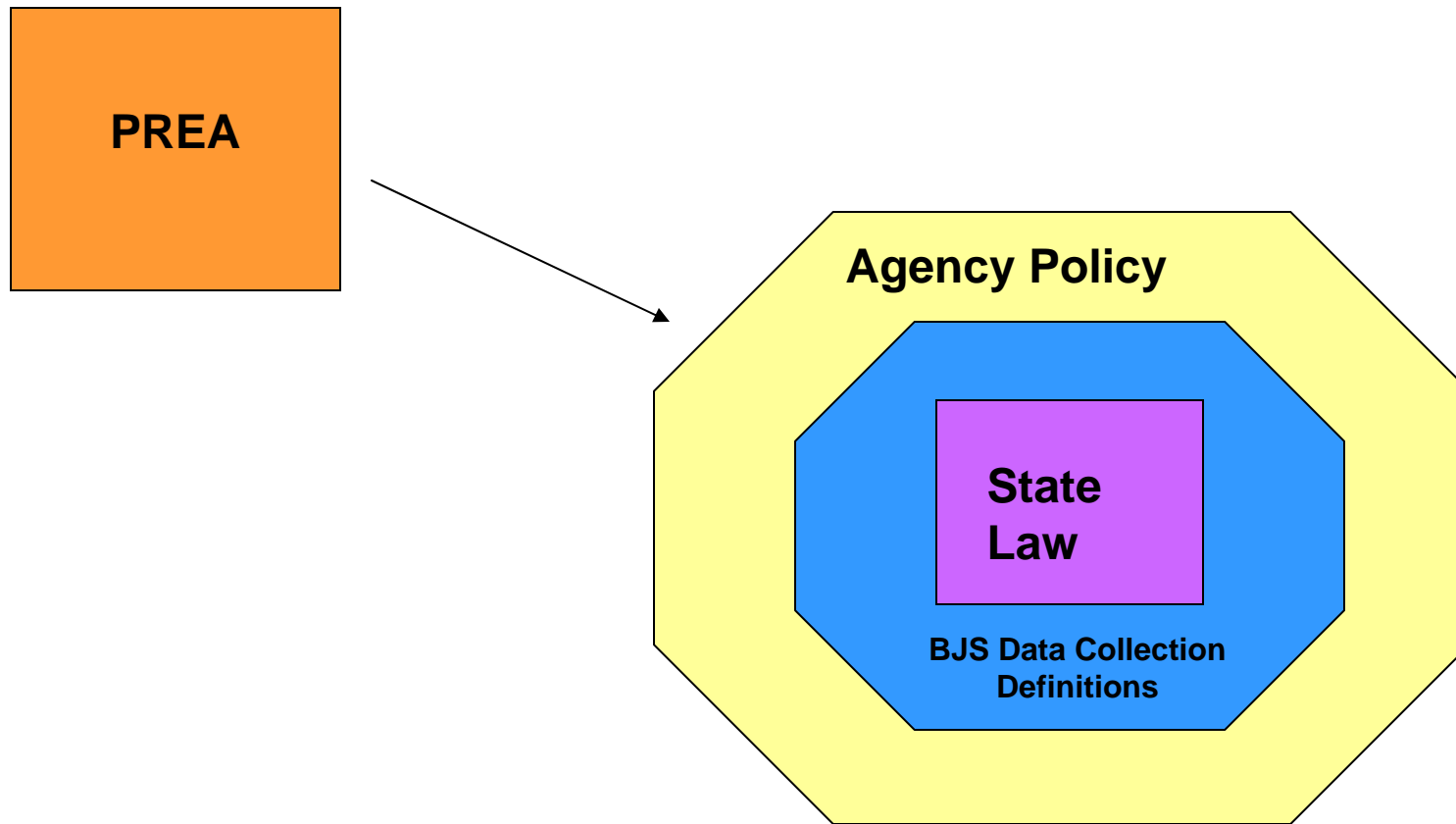
October 16, 2008

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Objective

Review the legal tools for addressing and sanctioning sexual violence in institutional settings –their content, importance and impact

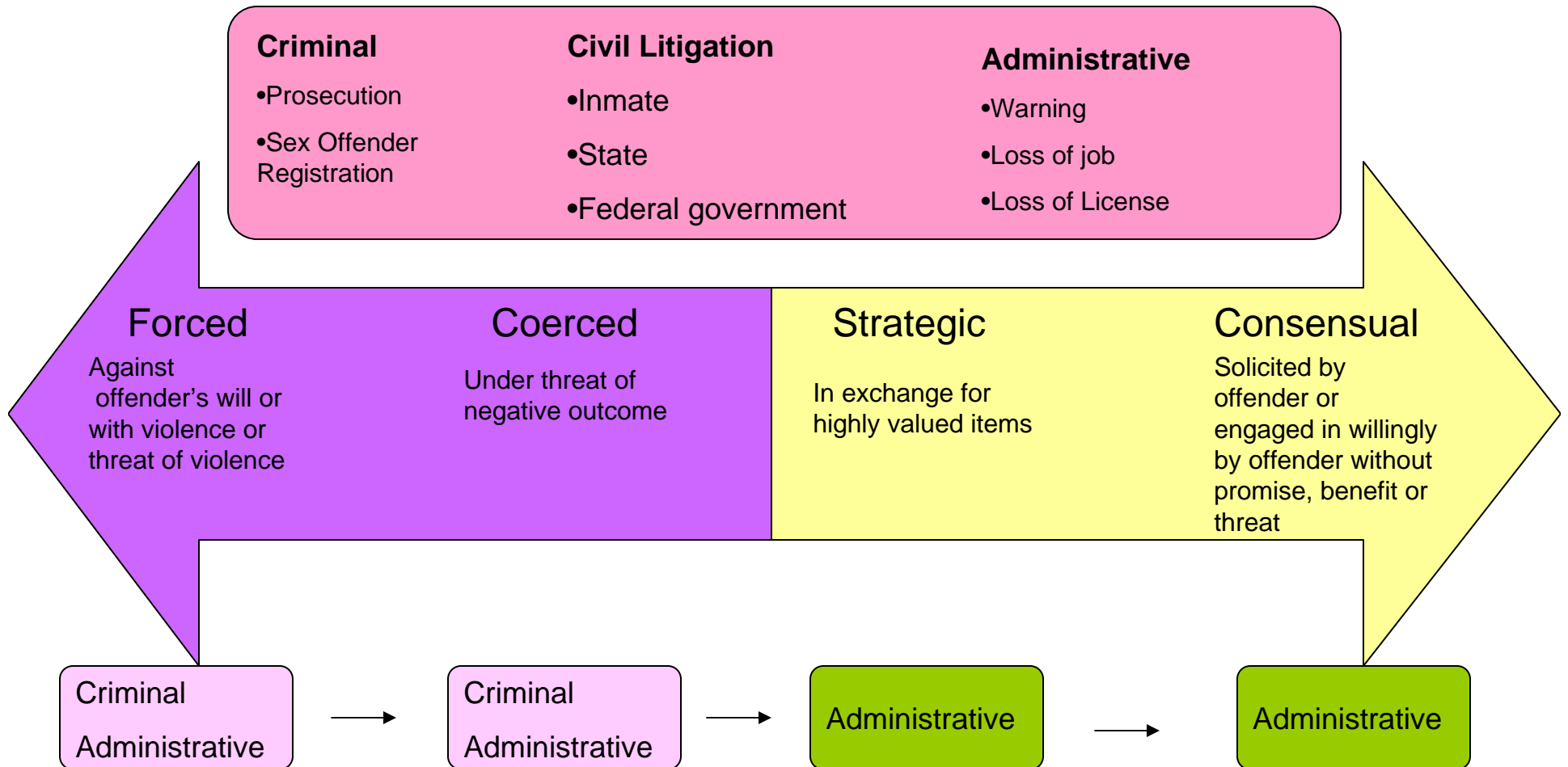
Governmental incursions on Sexual Activity in Institutional Settings



Developed by Brenda V. Smith Under NIC Cooperative Agreement 06S20GJJ1

Continuum of Sexual Activity Involving Adult Offenders

Staff on Inmate Sanctions



Inmate on Inmate Sanctions



Important Questions

- What are the legal tools for punishing staff sexual abuse of offenders?
- What are the legal tools for punishing offender on offender abuse?
- Are correctional staff mandatory reporters of sexual violence against youth and adults in custody?
- Are inmates considered vulnerable adults?
- What about juveniles in adult settings?

Legal Tools for Prosecuting Sexual Violence in Institutional Settings

- Staff sexual misconduct laws
- Sexual assault laws (including sodomy)
- Vulnerable Adult statutes
- Statutory Rape
- Mandatory reporting
- HIV Statutes
- Sex Offender registration
- Assault and battery



Staff Sexual Misconduct

- Felony in most states
- Victim credibility is an issue
- Code of Silence/ Lack of corroboration
- Lack of Physical Evidence and timely reporting

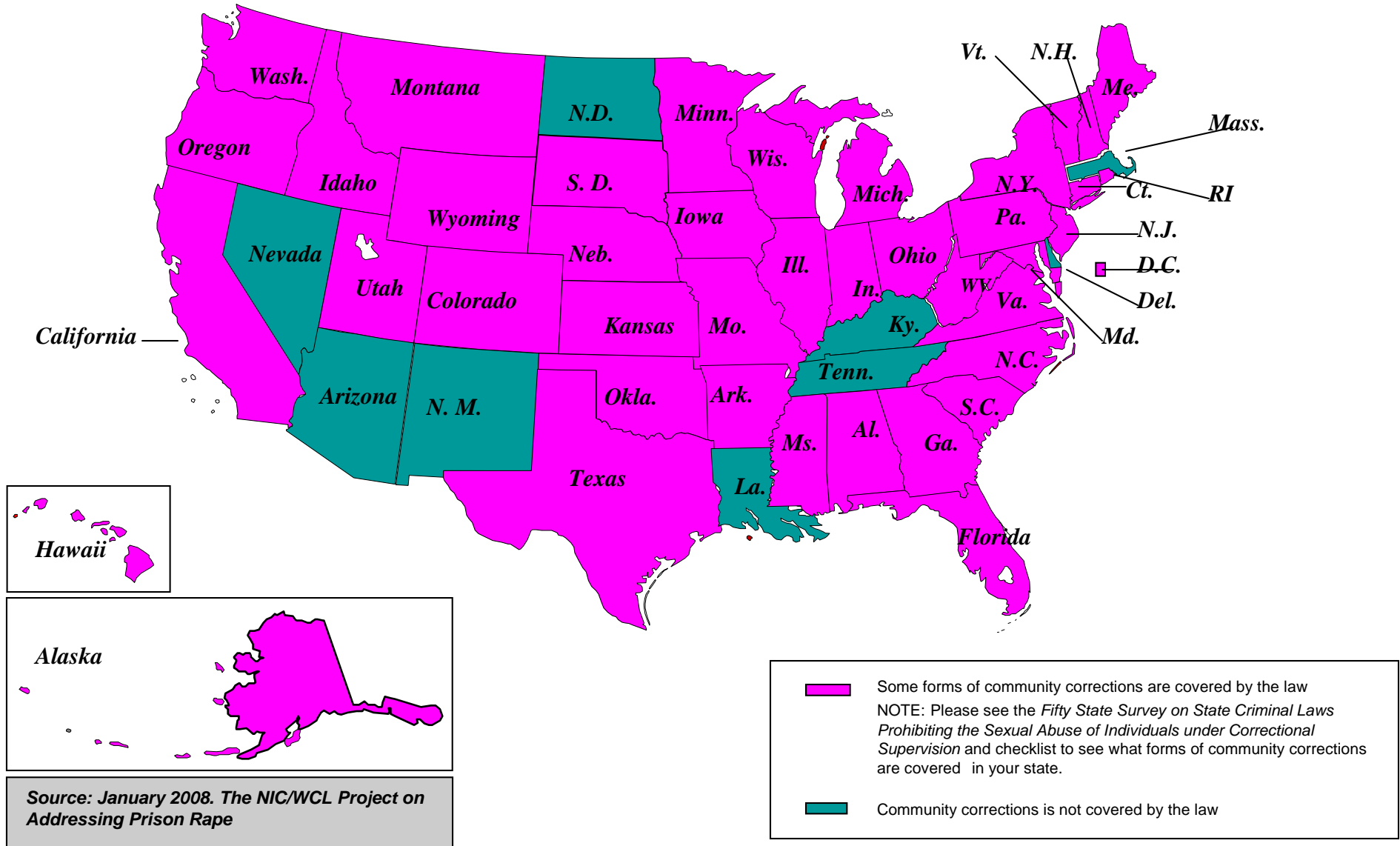
Staff Sexual Misconduct Laws— Optimal Elements



- Coverage
- Conduct
- Defenses
- Reporting
- Sanctions

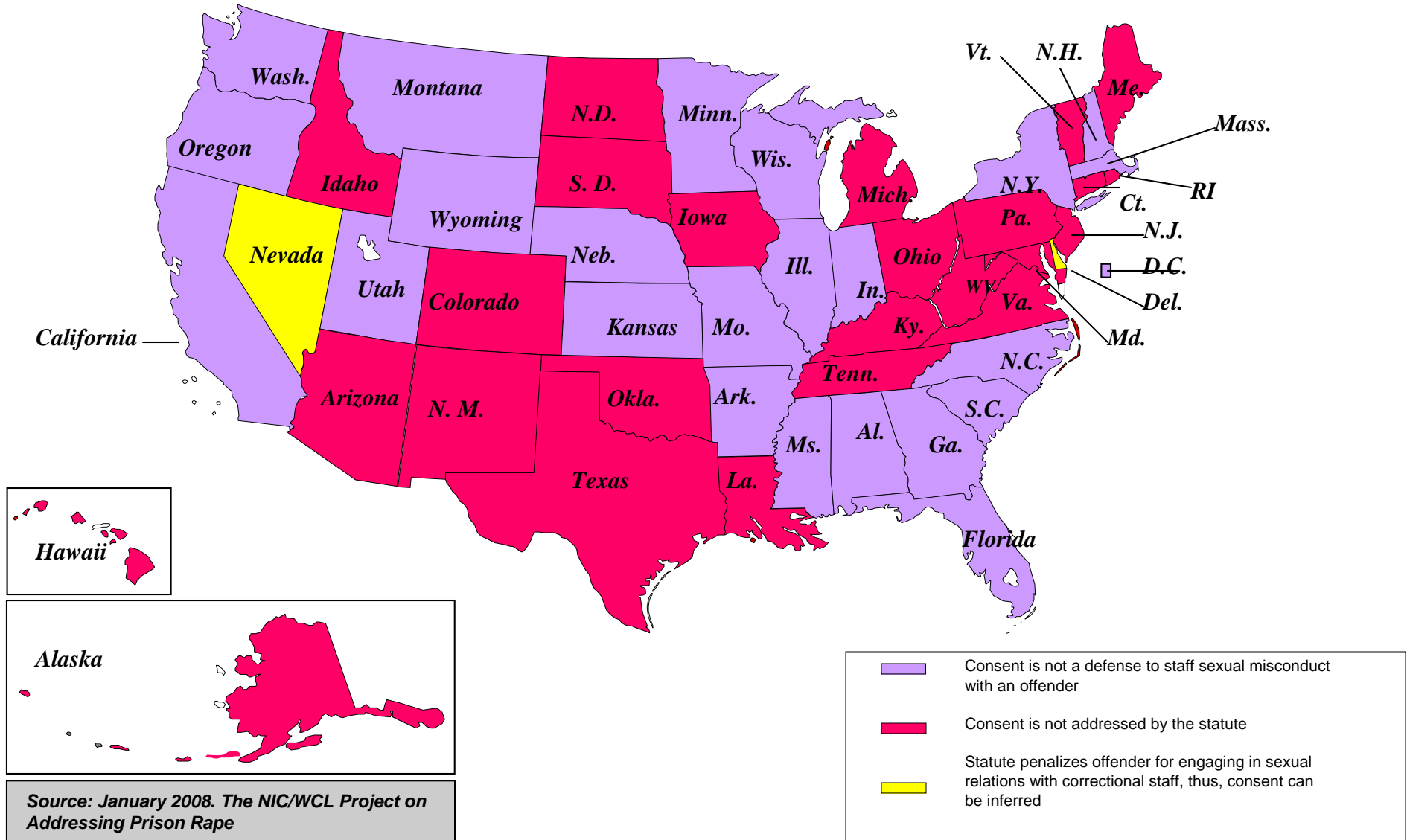
State Criminal Laws Prohibiting Sexual Abuse of Individuals Under Community Corrections Supervision

National Institute of Corrections/American University, Washington College of Law – January 2008



State Criminal Laws Prohibiting Sexual Abuse of Individuals Under Correctional Supervision: Consent as a Defense

National Institute of Corrections/American University, Washington College of Law – January 2008



Staff Sexual Misconduct Law: Nevada

- Voluntary sexual conduct between prisoner and another person.
 - NEV. REV. STAT. ANN. § 212.187 (West 2006).
 - A prisoner who is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation of the Department of Public Safety or residential confinement, and who voluntarily engages in sexual conduct with another person is guilty of a category D felony.
 - A person who voluntarily engages in sexual conduct with a prisoner who is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation of the Department of Public Safety or residential confinement, is guilty of a category D felony.

Staff Sexual Misconduct Law: Delaware

- Sexual relations in detention facility;
 - DEL. CODE ANN. tit. 11, § 1259 (West 2007).
 - A person is guilty of sexual relations in a detention facility when, being a person in custody at a detention facility or being a employee working at a detention facility, the person engages in sexual intercourse or deviate sexual intercourse on the premises of a detention facility.

Sexual Assault

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- Generally felony
- Lack of consent is element of crime
- Complainant credibility is an issue
- Lack of corroboration
- Sex offender registration usually required

Sexual Assault Law: Tennessee

- Rape

- Tenn. Code Ann. § 39-13-503 (2005).

- (a) Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:

- (1) Force or coercion is used to accomplish the act;
- (2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;
- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The sexual penetration is accomplished by fraud.



Sodomy

- Prohibits certain sexual practices
- Many states don't define oral and anal sex as intercourse
- Many states don't define same sex/sex as intercourse – even if it involves penetration

Sodomy Law: Kentucky

- First Degree Sodomy

- Ky. Rev. Stat. Ann. § 510.070(1) (2006).

- (1) A person is guilty of sodomy in the first degree when:

- (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
- (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
 - 1. Is physically helpless; or
 - 2. Is less than twelve (12) years old.



Vulnerable Adult Statutes

- Generally cover “special populations”
 - Mentally ill
 - Mentally retarded
 - Elderly
 - Youth
 - Those in treatment
- May have separate advocacy agency e.g. NAPA, NAMI, AARP, Senior Citizens Law Center
- May also have civil liability consequences

Vulnerable Adult Law: Louisiana

- Sexual Battery of the Infirm

- La. Rev. Stat. Ann. § 14:93.5 (West 2008)

- A. Sexual battery of the infirm is the intentional engaging in any of the sexual acts listed in Subsection B with another person, who is not the spouse of the offender, when:
 - (1) The offender compels the victim, who is physically incapable of preventing the act because of advanced age or physical infirmity, to submit by placing the victim in fear of receiving bodily harm.

Vulnerable Adult Law: Louisiana

- (2) The victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic or anesthetic agent administered by or with the privity of the offender.
- (3) The victim has such incapacity, by reason of stupor or abnormal condition of mind from any cause, and the offender knew or should have known of the victim's incapacity.
- (4) The victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act, and the offender knew or should have known of the victim's incapacity.
- C. Normal medical treatment and normal sanitary care shall not be construed as an offense under the provisions of this Section.

Vulnerable Adult Law: New York

- Mentally Ill Individuals in New York Prisons Will Get Better Care & Less Solitary Confinement Based on Settlement of Lawsuit
 - http://www.brennancenter.org/content/elert/mentally_ill_individuals_in_new_york_prisons_will_get_better_care_less_solitary_confinement_based_on_settlement_of_lawsuit

Vulnerable Adult Law: Michigan

- After more than a year of monitoring Michigan youth in prison, Michigan Protection and Advocacy Service (MPAS) filed litigation against the Michigan Department of Corrections (MDOC) to challenge and remedy the department's use of isolation, denial of adequate mental health services, and denial of appropriate educational services to young inmates with mental illness and/or developmental disabilities.

- <http://www.mpas.org/Article.asp?TOPIC=1098>

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Statutory Rape

- Generally creates strict liability offense for sex with youth under particular age
- Has impacts in both adult settings and youth settings



Mandatory Reporting Laws

- Mandatory reporting laws require certain individuals to report cases of physical or sexual abuse committed against children and vulnerable adults.
 - What does this mean for youth housed as adults?
- 24 states do not include correctional staff in their adult mandatory reporting statutes
 - 1 state has NO adult mandatory reporting statute at all
 - South Dakota

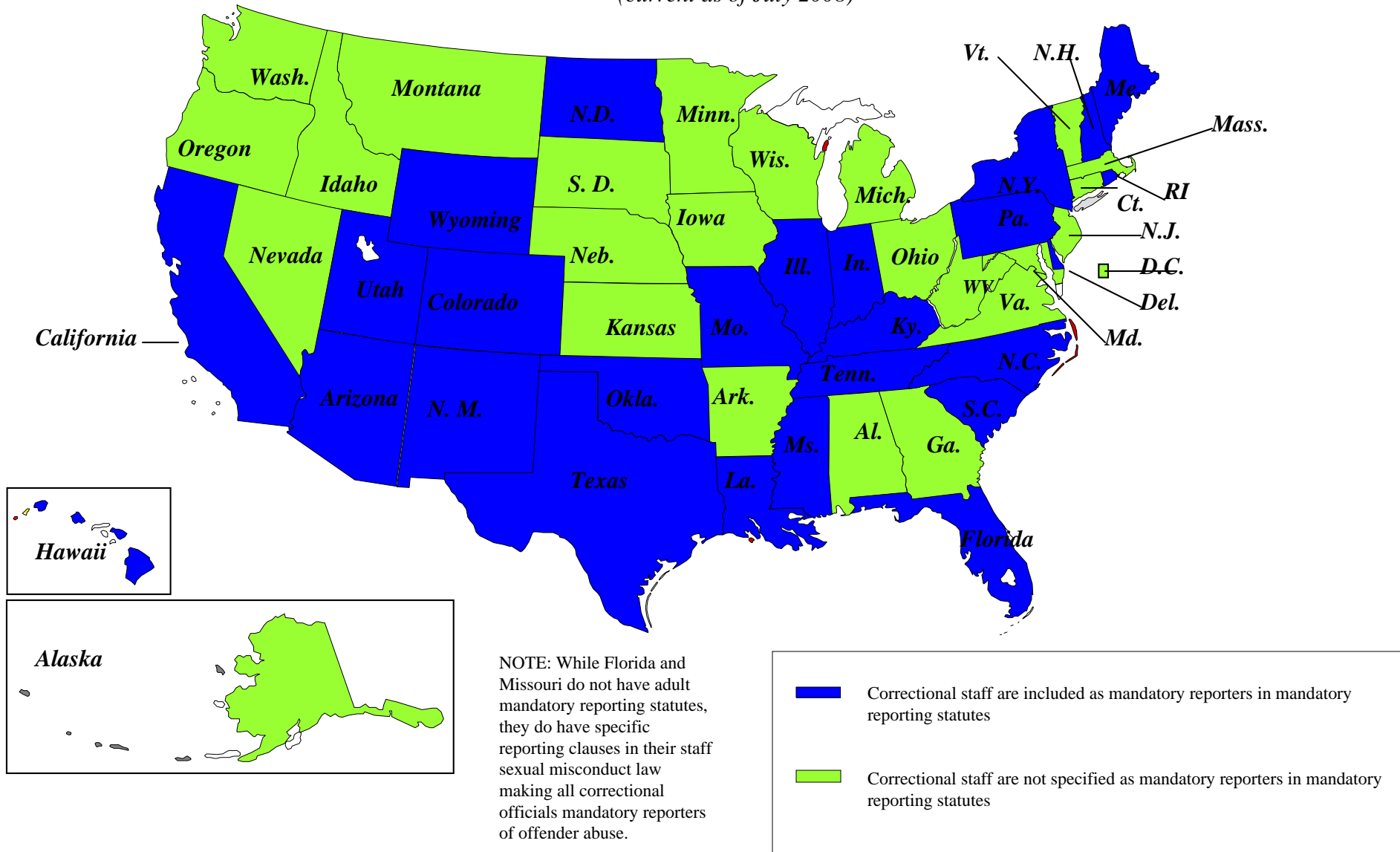
Mandatory Reporting Laws



- 26 state mandatory reporting laws include correctional staff as mandatory reporters
 - Hawaii and Mississippi explicitly name correctional staff in their law while the other 24 states imply it by stating “any person” or “all people”
- Florida, Missouri and South Carolina also have specific duty to report clauses under their staff sexual misconduct laws in addition to their mandatory reporting laws

Correctional Staff are Named as Mandatory Reporters in State Adult Mandatory Reporting Laws

Source: The NIC/WCL Project on Addressing Prison Rape Fifty State Survey of Mandatory Reporting Statutes (current as of July 2008)



Mandatory Reporting: Florida

- **Fla. Stat. Ann. § 944.35 (West 2006).**

- (3)(d) Witnessing, or reasonable cause to suspect, that an inmate or an offender under the supervision of the department in the community has been unlawfully abused or is the subject of sexual misconduct.

- **Fla. Stat. Ann. §944.35 (West 2006).**

- (3)(d) Each employee who witnesses, or has reasonable cause to suspect, that an inmate or an offender under the supervision of the department in the community has been unlawfully abused or is the subject of sexual misconduct.

Mandatory Reporting: Missouri

- Mo. Ann. Stat. § 217.410 (West 2005).
 - (1) Reasonable cause to believe that an offender in a correctional center operated or funded by the department has been abused.
- Mo. Ann. Stat. § 217.405 (West 2005).
 - (1) Any employee of the department of corrections.
- Mo. Ann. Stat. § 217.410 (West 2005).
 - (1) Immediately report offender abuse in writing to the director.
 - (5) Upon receipt of a report, the department shall initiate an investigation within twenty-four hours.

HIV Statutes

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- Separate offense or enhancement for knowingly infecting someone with HIV



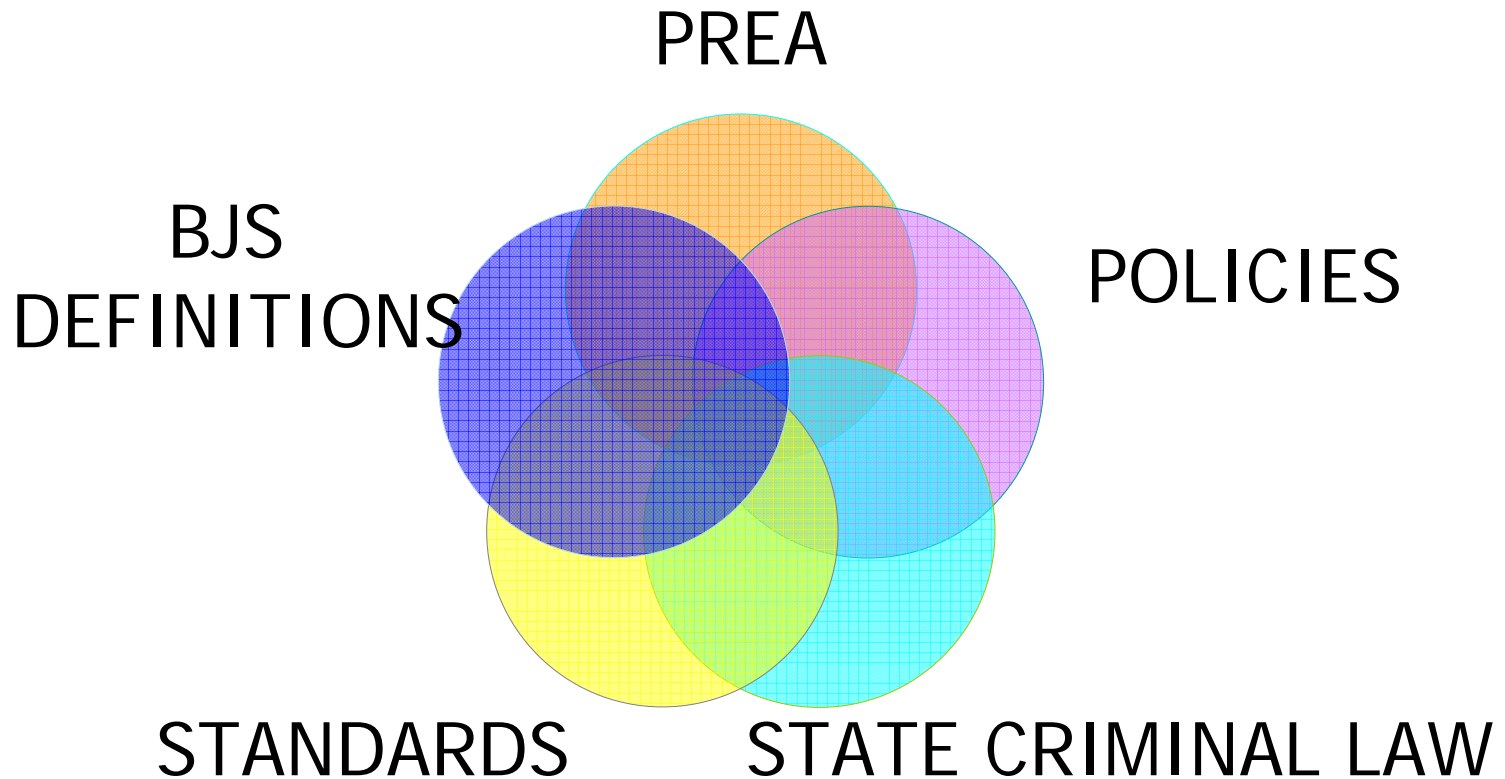
Sex Offender Registration

- Not considered a penalty
- Registration available for both youth and adults
- Many other requirements come with it depending on state
- In 18 states, staff sexual misconduct with offenders not registrable offense



Assault and Battery

Overlap Of: Law, Policy and Standards



Interaction Between Law, Policy and Standards



- Different purposes
 - Law is what is politically available
 - Policies are what is optimal
 - Standards are what is ideal
 - BJS definitions – data collection



Why is this Important?

- Prevention
- Training
- Deterrence
- Notice of prohibited conduct
- Evidence collection
- Investigation