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The Fuzz(y) Lines of Consent: Police Sexual Misconduct with Detainees

Katherine A. Heil

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**THE FUZZ(Y) LINES OF CONSENT:
POLICE SEXUAL MISCONDUCT WITH DETAINEES**

Katherine A. Heil*

I. INTRODUCTION.....	942
II. BACKGROUND.....	945
A. <i>Sexual Misconduct by Staff in Correctional Facilities</i>	945
B. <i>Consent in the Context of Correctional Facilities</i>	948
III. THE PRESENCE OF THE LAW ENFORCEMENT CONSENT LOOPHOLE	951
A. <i>Consent in Police Custody Compared to Consent in Correctional Facilities</i>	951
B. <i>The Consent Loophole Creates Significant Problems</i>	954
1. <i>South Carolina is Not Immune</i>	956
C. <i>Consent is Problematic Under the Circumstances</i>	959
IV. HOW TO CLOSE THE CONSENT LOOPHOLE.....	963
A. <i>States that Have Closed the Loophole</i>	963
1. <i>New York</i>	964
2. <i>Kansas</i>	965
3. <i>Louisiana</i>	966
4. <i>Maryland</i>	967
5. <i>New Hampshire</i>	969
B. <i>Federal Attempt to Close the Loophole</i>	970
V. CLOSING THE LOOPHOLE IN SOUTH CAROLINA	971
A. <i>South Carolina Should Pass the Detainee Consent Bill</i>	971
B. <i>Other Ways South Carolina Can Address Police Sexual Misconduct</i>	973
VI. CONCLUSION.....	975

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I. INTRODUCTION

In October 2017, two New York City police officers were charged with the first-degree rape and kidnapping of an eighteen-year-old woman in their custody.¹ The alleged incident took place on the night of September 15, 2017 when Anna Doe, the eighteen-year-old victim, drove to a park in Brooklyn with two male friends to “smoke pot.”² As Anna and her friends drove down a dirt road in the park around 8:00 PM, she noticed an unmarked van following behind her in the dark.³ Police sirens flashed and the teens then realized the van was an undercover New York City Police Department (NYPD) van.⁴ Although “[n]o facts available to the police g[a]ve rise to reasonable suspicion that Doe was committing a crime,” Detectives Eddie Martins and Richard Hall pulled Anna’s vehicle over;⁵ the plainclothes officers approached her car and subsequently discovered the presence of marijuana.⁶

Minutes after pulling Anna and her friends over, Detectives Martins and Hall let the two male passengers go, but handcuffed Anna and placed her into the police van.⁷ The two Detectives then assaulted eighteen-year-old Anna and forced her to “expose parts of her body,” before driving her in the police van to a nearby restaurant parking lot.⁸ Thereafter, Detectives Martins and Hall forcibly sexually assaulted and raped her.⁹

The sexual assault did not end there. The Detectives drove Anna around Brooklyn, taking turns sexually assaulting her in the back of the police van.¹⁰ Once the attack was over, Detectives Martins and Hall released Anna near an NYPD precinct without charging her with a crime.¹¹ Anna went to the hospital

1. E.g., Editorial Board, *Close the Police Rape Loophole*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/opinion/police-rape-loophole.html>.

2. Doe v. City of New York, No. 18-cv-670, 2018 WL 3824133, at *5 (E.D.N.Y. Aug. 9, 2018) (quoting 50-h hr’g tr. 179–80).

3. *Id.* (citing 50-h hr’g tr. 185).

4. *Id.* (citing 50-h hr’g tr. 186).

5. *Id.* (citing 50-h hr’g tr. 185). 2018 WL 3824133, at *5 (citing 50-h hr’g tr. 185).

6. *Id.* (citing 50-h hr’g tr. 211); Crimesider Staff, *NYC Rape Case Highlights Loophole that Allows Police to Dodge Sex Assault Charges*, CBS NEWS (Feb. 19, 2018, 3:08 PM) [hereinafter *NYC Rape Case*], <https://www.cbsnews.com/news/nyc-rape-case-highlights-loophole-that-allows-police-to-dodge-sex-assault-charges>.

7. Alan Feuer, *Two New York Detectives Are Charged with Rape and Kidnapping*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/nyregion/nypd-detectives-rape-kidnapping-charges.html>; Crimesider Staff, *supra* note 6.

8. Third Am. Compl. & Jury Demand at ¶¶ 13–14, Doe v. City of New York, No. 1:18-CV-00670 (E.D.N.Y. May 28, 2018).

9. *Id.* at ¶ 14.

10. *Id.* at ¶ 15; Doe, 2018 WL 3824133, at *1 (citing Third Am. Compl. & Jury Demand, *supra* note 8, at ¶ 15).

11. Third Am. Compl. & Jury Demand, *supra* note 8, at ¶¶ 16–17.

later that same evening and “communicated to the hospital staff that she was raped by two plainclothes police officers.”¹² The hospital performed a rape test and the city medical examiner’s office concluded the DNA recovered from the teen “contained samples of both detectives’ sperm.”¹³

A fifty-count indictment was issued against the two NYPD detectives, charging them with rape, kidnapping, and official misconduct.¹⁴ At their arraignment in Brooklyn Supreme Court, Martins and Hall both pled not guilty and claimed the encounter was consensual.¹⁵ “The facts of [this] case are bad enough, but they also underscore another outrage: Vaguely written statutes in many states, including New York [at the time], permit police officers to escape sexual assault charges by claiming that the victims consented to the act.”¹⁶

Most would presume that states have laws prohibiting law enforcement officers from engaging in sexual acts with individuals in police custody.¹⁷ Thirty-one states, however, have an alarming “loophole” in their laws that allow for police officers to legally have consensual sex with individuals in

12. *Id.* at ¶¶ 37–38.

13. Feuer, *supra* note 7; *see also* Crimesider Staff, *Charges: On-Duty NYPD Detectives Handcuffed Woman, Then Raped Her*, CBS NEWS (Oct. 30, 2017, 5:47 PM) [hereinafter *Charges*], <https://www.cbsnews.com/news/charges-on-duty-nypd-detectives-handcuffed-woman-then-raped-her>.

14. Feuer, *supra* note 7; *see also* Shawn Cohen, *NYPD Cops Charged with Raping Woman in Police Van*, N.Y. POST (Oct. 27, 2017, 3:48 PM), <https://nypost.com/2017/10/27/nypd-cops-charged-with-raping-woman-in-police-van/> (the first article to report of the indictment).

15. *Charges*, *supra* note 13; Feuer, *supra* note 7; *Close the Police Rape Loophole*, *supra* note 1.

16. *Close the Police Rape Loophole*, *supra* note 1.

17. Rachel Leigh, *Sexual Encounters Between Police Officers and Detainees Are Never Consensual and Iowa Law Needs to Reflect This*, 21 J. GENDER, RACE & JUST.: BLOG, <https://jgrj.law.uiowa.edu/article/sexual-encounters-between-police-officers-and-detainees-are-never-consensual-and-iowa-law> (last visited May 6, 2019); *see also* Jamie Ducharme, *New Bill Would Prohibit Federal Law Enforcement Officials from Having Sex With People in Custody*, TIME (July 28, 2018), <http://time.com/5351964/closing-law-enforcement-consent-loophole-act> (“[W]hat should always be the legal standard—those in police custody should never be subject to sexual abuse or rape from law enforcement officers . . .” (citation omitted)); Matt Sedensky, *Hundreds of Officers Lose Licenses over Sex Misconduct*, ASSOCIATED PRESS (Nov. 1, 2015), <https://apnews.com/fd1d4d05e561462a85abe50e7eae4ec> (“Sexual misconduct by officers has largely escaped widespread notice due to a patchwork of laws . . .”).

their custody.¹⁸ “This oversight by lawmakers can be—and has been—detrimental to the application of justice.”¹⁹

Anna Doe’s horrifying experience recently brought to light the egregious consequences of this legal loophole.²⁰ This case underscores a “chronic problem” of police sexual misconduct²¹ and the failure of many states to provide laws necessary to protect their citizens from such a raw abuse of power.²² While the officers involved in such misconduct are not representative of the hundreds of thousands of officers who honorably serve and protect their communities each day, their wrongdoing is detrimental to the public’s relationship with law officials and “interferes with police officers’ ability to effectively perform their duties.”²³

Due to police officers’ uniquely powerful position over individuals in their custody,²⁴ any sexual interaction between the two is fundamentally non-consensual²⁵ and state laws need to reflect this fact.²⁶ The State of South Carolina is one of thirty-one states that does not have a law addressing sexual conduct between a police officer and an individual in police custody.²⁷ This

18. See *infra* section IV.A; Ducharme, *supra* note 17; Jesse Rifkin, *Closing the Law Enforcement Consent Loophole Act Would Jail Cops Who Have Sex with Someone in Their Custody*, GOVTRACK INSIDER (Aug. 30, 2018), <https://govtrackinsider.com/closing-the-law-enforcement-consent-loophole-act-would-jail-cops-who-have-sex-with-someone-in-their-78b8d11c2804>. In this Note, “loophole,” the “consent loophole,” and the “law enforcement consent loophole” all refer to the same loophole.

19. Leigh, *supra* note 17.

20. *NYC Rape Case*, *supra* note 6; Ducharme, *supra* note 17.

21. See Timothy M. Maher, *Police Sexual Misconduct: Officers’ Perceptions of Its Extent and Causality*, 28 CRIM. JUST. REV. 355, 357 (2003), for a definition of police sexual misconduct.

22. *Charges*, *supra* note 13; see also Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 U. FLA. J.L. & PUB. POL’Y 77, 93 (2010) (“The context of police misconduct provides a salient example in which sexual abuses of power typically occur.”); Rifkin, *supra* note 18 (stating that “such abuse of this power” should not be legal).

23. Maher, *supra* note 21, at 355; accord Sedensky, *supra* note 17 (stating that only a “tiny fraction” of police officers are involved in sexual misconduct, but their actions have “an outsized impact”).

24. *Closing the Police Rape Loophole*, *supra* note 1 (stating that police officers “hold enormous power” over people whom they have arrested); *NYC Rape Case*, *supra* note 6 (stating that police officers still hold power over individuals who haven’t been formally arrested or detained); Rifkin, *supra* note 18 (noting police officers “wield incredible power in their ability to detain individuals”) (citation omitted).

25. See Cara E. Rabe-Hemp & Jeremy Braithwaite, *An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence*, 16 POLICE Q. 127, 141 (2012) (referring to sexual activity between police officers and citizens as the “‘consensual sex’ myth”).

26. Leigh, *supra* note 17; see also Maher, *supra* note 21, at 378 (stating police sexual misconduct “has been neglected and tolerated for too long”).

27. See *infra* section IV.A; Ducharme, *supra* note 17.

Note argues that the South Carolina Legislature should pass a statute to criminalize sexual encounters between police officers and individuals in their custody and to explicitly reject consent as a defense to such acts. The enactment of such a law would provide individuals in police custody the same protections afforded inmates in South Carolina's correctional facilities.

Part II of this Note provides a background of sexual misconduct in correctional facilities, including the development of laws asserting that an inmate is not capable of providing consent to sexual acts with corrections staff. Part III explains how the law enforcement consent loophole is problematic. Part IV details the bills passed in other states to close the law enforcement consent loophole. Part IV further details the failed federal bill that would have addressed this issue. Finally, Part V provides a detailed overview of the proposed South Carolina bill that would close the consent loophole in the State's law and proposes broader recommendations intended to help the State address the problem of police sexual misconduct.

II. BACKGROUND

A. Sexual Misconduct by Staff in Correctional Facilities

Sexual misconduct by police officers has received relatively little legal or scholarship analysis.²⁸ In comparison, legal scholars and government entities have paid substantial attention to the sexual victimization of inmates by correctional staff.²⁹ Correctional administrators reported 24,661 allegations of

28. See Rabe-Hemp & Braithwaite, *supra* note 25, at 128 (stating that most of the research on police misconduct has "focused on corruption and graft"); Maher, *supra* note 21, at 357 (recognizing that "few researchers have focused their attention specifically on police sexual misconduct . . ."); Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 157 (2016) (noting that there is little scholarship on this issue and limited data available on police sexual misconduct).

29. See Margaret Penland, Note, *A Constitutional Paradox: Prisoner "Consent" to Sexual Abuse in Prison Under the Eighth Amendment*, 33 LAW & INEQ. 507, 508 (2015); RAMONA R. RANTALA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012-15, 1 (Brigitte Coulton and Jill Thomas eds., 2018); Kristine Schanbacher, *An Inside Job: The Role Correctional Officials Play in the Occurrence of Sexual Assault in U.S. Detention Centers*, 9 DEPAUL J. SOC. JUST. 38, 40 (2015) (citing Gary Hunter, *Sexual Abuse by Prison and Jail Staff Proves Persistent Pandemic*, 20 PRISON LEGAL NEWS 1, 1 (2009)). In addition to scholarship on the issue, the Court has acknowledged that correctional facilities owe an affirmative legal duty to protect prisoners against abuse. *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *Logan v. United States*, 144 U.S. 263, 284 (1892). Moreover, government administrators and institutions have acknowledged their duty to prevent staff-on-inmate sexual abuse. See Prison Rape Elimination

sexual victimization in adult correctional facilities in 2015 alone.³⁰ More than half (58%) of the allegations involved sexual victimization of inmates by correctional facility staff.³¹ Similarly, a survey conducted by the Bureau of Justice Statistics (BJS) found that more prisoners reported sexual victimization perpetrated by corrections staff than reported sexual victimization perpetrated by other inmates.³²

Sexual abuse of female inmates by male staff, in particular, is noted to be “notorious and widespread” in the United States.³³ While women constitute a small percentage of the total inmate population,³⁴ they are at a remarkably high risk of sexual assault by correctional staff.³⁵ Several factors account for

Act of 2003 §§ 1–9, 34 U.S.C.A. §§ 30301–30309 (2017); ALLEN J. BECK & TIMOTHY A. HUGHES, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, 2 (2005); NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, ADDRESSING STAFF SEXUAL MISCONDUCT WITH OFFENDERS, REMOTE CONFERENCE FOR INVESTIGATION AND PREVENTING STAFF SEXUAL MISCONDUCT IN A CORRECTIONS SETTING (2001).

30. RANTALA, *supra* note 29, at 1. The number of reported allegations in 2015 was nearly triple that recorded in 2011, which coincided with the release of the National Standards to Prevent, Detect, and Respond to Prison Rape in 2012. *Id.* The standards require correctional facilities to educate their staff and inmates on sexual victimization, investigate allegations, and to track and report such information on request. *Id.* “Due to significant barriers in reporting and investigating incidents of sexual assault, the estimated number of sexual assaults varies widely between different studies.” Schanbacher, *supra* note 29, at 38.

31. RANTALA, *supra* note 29, at 1.

32. JUST DET. INT’L, HOPE BEHIND BARS 3 (2015) [hereinafter HOPE BEHIND BARS]; accord James E. Robertson, *Sex in Jails and Prisons*, in SEX, SEXUALITY, LAW, AND (IN)JUST. 511, 529 (Henry F. Fradella & Jennifer M. Sumner eds., 2016) (“Among all state and federal prisoners, during an average exposure period of 8 months, 2% reported one or more sexual victimizations by inmates and 4% by staff.”).

33. See Schanbacher, *supra* note 29, at 41.

34. Sandy de Sauvage & Kelly Head, *Correctional Facilities*, 17 GEO. J. GENDER & L. 175, 176 (2016).

35. See Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 45 (2007) (quoting Angela Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350 (1998)) (“In the United States, sexual abuse by guards in women’s prisons is so notorious and widespread that it has been described as ‘an institutionalized component of punishment behind prison walls.’”); Christina Piccora, *Female Inmates and Sexual Assault*, JURIST (Sept. 15, 2014, 7:00 PM), <https://www.jurist.org/commentary/2014/09/christina-piccora-female-inmates> (“[A]lthough women comprise only 7 percent of the state prison population, they comprise 46 percent of sexual abuse victims.”). *But see* Robertson, *supra* note 32, at 531 (stating that the National former Prisoner Survey found that “a higher percentage of males (5.4%) than females (4.4%) reported staff sexual misconduct”); HOPE BEHIND BARS, *supra* note 32, at 5 (citing ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISON AND JAILS REPORTED BY INMATES, 2011–12, 17 (2013),

the high risk of sexual abuse by guards in women's prisons. Some explanations include the presence of cross-gender supervision,³⁶ poorly designed facilities,³⁷ and the fact that most prisoners have been sexually assaulted or physically abused in past relationships.³⁸

With the public's continued increased awareness of staff sexual misconduct with inmates,³⁹ the federal government—and all fifty states—criminalized sexual contact between guards and prisoners.⁴⁰ Nonetheless, these laws have proven to be largely ineffective and have failed to prosecute offending correctional officers effectively.⁴¹ Following an allegation of sexual

www.bjs.gov/content/pub/pdf/svpjri1112.pdf.) (“[M]ale inmates are more likely than female inmates to be sexually abused by corrections staff.”).

36. The enactment of the Civil Rights Act of 1964 opened the door for women to seek employment under Title VII in all-male prisons and in consequence, males could seek employment in all-women's facilities. Mary Ann Farkas & Kathryn R.L. Rand, *Female Correctional Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995, 995–96 (1997); Robertson, *supra* note 32, at 530. Male employees now outnumber their female counterparts in women's prisons. Robertson, *supra* note 32, at 530; de Sauvage & Head, *supra* note 34, at 186 (seventy percent of guards in federal women's correctional facilities are male). Consequently, female prisoners are at an increased risk of sexual assault by male staff. *Id.* at 186 (“In local jails, where women constitute thirteen percent of inmates, sixty-seven percent of victims of staff-on-inmate victimization were women while eighty percent of the staff perpetrators were male guards.” (citation omitted)); RANTALA, *supra* note 29, at 12; Piccora, *supra* note 35 (“Males are the perpetrators in ninety-eight percent of staff-on-inmate sexual assault of female inmates.”) (citation omitted).

37. The number of females incarcerated increased so drastically that women's facilities are often unequipped for such a high volume of inmates. Piccora, *supra* note 35. See also Buchanan, *supra* note 35, at 52, for a discussion on how the imprisonment of women has increased much faster than the imprisonment of men. “Between 1986 and 2004, the number of women in prison for all crimes increased 400%.” *Id.* (citing LENORA LAPIDUS ET AL., ACLU, BRENNAN CTR. FOR JUSTICE, & BREAK THE CHAINS, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 16 (2005)).

38. Buchanan, *supra* note 35, at 56 (first citing Louise Bill, *The Victimization and Revictimization of Female Offenders*, 60 CORRECTIONS TODAY, Dec. 1998, at 106–12; then citing Amy Laderberg, Note, *The “Dirty Little Secret”: Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338 (1998)). For a harrowing example of the sexual abuses that take place in one particular women's correctional facilities at the hands of correctional staff and the systematic deficiencies at play, see Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., to Gov. Bently, Investigation of Julia Tutwiler Prison for Women and Notice of Expanded Investigation (Jan. 17, 2014) [hereinafter Tutwiler Letter].

39. Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. FEMINISM 225, 236 (2003).

40. *E.g.*, Robertson, *supra* note 32, at 531.

41. Beth A. Colgan, *Public Health and Safety Consequences of Denying Access to Justice for Victims of Prison Staff Sexual Misconduct*, 18 UCLA WOMEN'S L.J. 195, 202 (2012); Lauren

victimization, correctional facilities conduct an investigation and classify it as fitting into one of three categories: unfounded (determined not to have occurred), substantiated (determined to have occurred), or unsubstantiated (insufficient evidence to determine if the sexual victimization occurred).⁴² Nearly half of staff-on-inmate sexual victimization cases from 2012 to 2015 were determined to be unsubstantiated.⁴³ For the small percentage of cases found to be substantiated, less than half were referred for prosecution.⁴⁴ The underlying belief that many of these sexual encounters between staff and inmates are consensual is one reason for the lack of prosecutions.⁴⁵

B. *Consent in the Context of Correctional Facilities*

Despite the common assertion that sexual encounters between correctional officers and inmates are often consensual,⁴⁶ by law, prisoners are generally considered unable to give consent to sexual conduct with correctional officers.⁴⁷ A prisoner's inability to give consent is based on several factors. First, staff members and inmates are in inherently unequal bargaining positions.⁴⁸ Second, staff members who engage in sexual relations

A. Teichner, Note, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 269 (2008).

42. RANTALA, *supra* note 29, at 4.

43. *Id.* at 8.

44. Robertson, *supra* note 32, at 533.

45. *Id.* at 534.

46. See Penland, *supra* note 29, at 508. Prison reports also characterize the relations as "willing," with eighty-six percent of male inmates characterizing their sexual conduct with female officers as "willing," whereas only 5.5% of female inmates reported the same for their sexual relations with male staff. Robertson, *supra* note 32, at 533 (citing Beck & Johnson, 2012). Alarming, sixty-two percent of these inmates that reported their relations as willing, also said, "that they experienced coercion or offers of special treatment from the involved staff members." *Id.*

47. *E.g.*, Robertson, *supra* note 32, at 531.

48. Even the Tenth Circuit in holding that consent could be a defense agreed that "[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion." *Graham v. Sheriff of Logan Cty.*, 741 F.3d 1118, 1126 (10th Cir. 2013) (quoting *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012)); see also OFFICE OF THE INSPECTOR GEN., DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 1 (2005) (explaining three factors that create the authority structure between prisoners and guards with such an imbalance of power that consent can never be a defense); NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 13 (2009) ("The power imbalance between staff and prisoners vitiates the possibility of meaningful consent . . ."); Gary Hunter, *Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic*, 20 PRISON LEGAL NEWS 1, 1 (May 2009) ("Due to the nature of prisons as 'total institutions,' it is impossible for prisoners to voluntarily consent to sexual advances by staff members who exert complete control over their lives—and in some cases over their release from prison.").

with inmates may be exploiting inmates' past sexual abuses or other vulnerabilities, whether knowingly or unknowingly.⁴⁹ Third, inmates may try to use sexual acts in exchange for prohibited items or privileges—which is dangerous to the safety and security of the prison.⁵⁰

Furthermore, laws prohibiting the consent defense are representative of contemporary “common standards of decency.”⁵¹ By 2006, all fifty states had statutes criminalizing sexual relations between prison staff and inmates,⁵² and the number of states prohibiting the consent defense to sexual contact between prison staff and inmates has increased over the past decade.⁵³ This increase is in keeping with the fact that “[a] majority of people in the United States . . . do not believe permitting legal ‘consent’ to sexual contact between prisoners and

49. OFFICE OF THE INSPECTOR GEN., *supra* note 48, at 3; *see also* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 48, at 153 (“For those with a history of sexual abuse, victimization in confinement may recall past experiences and replicate prior traumas, exacerbating negative outcomes.”); Buchanan, *supra* note 35, at 56 (“Because most prisoners have been sexually and physically abused in past family and romantic relationships, severe power imbalances may feel normal and familiar to a prisoner.”). In addition to prior sexual abuse, a significant percentage of prisoners have a history of mental health issues that further complicate the ability to give consent. *See* Tutwiler Letter, *supra* note 38, at 8.

50. OFFICE OF THE INSPECTOR GEN., *supra* note 48, at 1; *see also* Buchanan, *supra* note 35, at 56 (“The imbalance between guards and prisoners allows guards to coerce sex through material inducements that are strikingly petty.”); de Sauvage & Head, *supra* note 34, at 188–89 (citing AMNESTY INT'L, *Violence Against Women: A Fact Sheet*, AMNESTY USA (Apr. 11, 2012), http://www.amnestyusa.org/sites/default/files/pdfs/vaw_fact_sheet.pdf) (“Because prisoners are completely dependent on guards for basic necessities, guards sometimes offer them extra food or personal hygiene products in exchange for sex.”).

51. *See* Penland, *supra* note 29, at 526 (using the Supreme Court's decisions in *Gregg v. Georgia*, 428 U.S. 153, 176–87 (1976), and *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977) to reason that the action by a majority of state legislatures in rejecting the consent defense is indicative of common standards of decency).

52. Brenda V. Smith & Jaime M. Yarussi, *Legal Responses to Sexual Violence in Custody: State Criminal Laws Prohibiting Staff Sexual Abuse of Individuals under Custodial Supervision*, 256 ARTICLES L. REVS. OTHER ACAD. JS. 1, at 4 (2009), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1259&context=facsch_1awrev; Alysia Santo, *Preying on Prisoners*, MARSHALL PROJECT (June 17, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/06/17/preying-on-prisoners>.

53. *Compare State Criminal Laws Prohibiting Sexual Abuse of Individuals Under Correctional Supervision: Consent as a Defense*, NAT'L INST. OF CORRECTIONS & WASH. COLL. OF L. (Aug. 2009), <https://nicic.gov/state-criminal-laws-prohibiting-sexual-abuse-individuals-under-correctional-supervision-consent> (providing a map showing that a majority of state statutes did not address consent in the custodial context in 2009), *with* NAT'L INST. OF CORR. & WASH. COLL. OF LAW, PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (Sept. 10, 2013) [hereinafter FIFTY-STATE SURVEY], <https://nicic.gov/fifty-state-survey-criminal-laws-prohibiting-sexual-abuse-individuals-custody> (providing a chart of state criminal statutes demonstrating that a majority of states either rejected the consent defense or deemed prisoners incapable of consenting to sexual acts with correctional staff by 2013).

guards is a decent legal practice.”⁵⁴ Consequently, the consent defense—in the custodial context—is legally unsound and contrary to common standards of decency.⁵⁵

According to federal law, any sexual relations or sexual contact between a prisoner and a correctional staff is illegal.⁵⁶ Importantly, consent is never a legal defense under federal law for sexual acts between an inmate and correctional staff; therefore, all sexual relations between inmates and staff are considered abuse.⁵⁷ In addition to federal criminal statutes, the federal government—officially recognizing the problem of sexual abuse in prison—enacted the Prison Rape Elimination Act (PREA) in 2003.⁵⁸ The PREA required the gathering of national data on allegations of prison rape, called for national standards for the reduction and punishment of prison rape, and made grants to states for assisting in these efforts.⁵⁹ Most state laws are aligned with the federal standards and explicitly reject consent as a defense in the custodial context.⁶⁰

South Carolina law explicitly states that consent is never a defense to sexual acts between inmates and correctional staff.⁶¹ Although the South Carolina Department of Corrections (SCDC) has a zero-tolerance policy regarding sexual misconduct against inmates,⁶² inmates still fall victim to sexual assault in South Carolina correctional facilities every year.⁶³ SCDC

54. Penland, *supra* note 29, at 526.

55. *See id.*; *see also* Hannah Belitz, Note, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R.-C.L. L. REV. 291, 297 (2018) (“[I]n the custodial context, consent between correctional staff and inmates ‘is a legal impossibility.’”) (quoting Deborah M. Golden, *It’s Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN’S L.J. 37, 48 (2004)).

56. *See* 18 U.S.C. §§ 2241, 2243–2244 (2012).

57. *See id.* § 2243(c); OFFICE OF THE INSPECTOR GEN., *supra* note 48, at 1.

58. Prison Rape Elimination Act of 2003, 34 U.S.C.A. §§ 30301–30309 (2012). In recognizing the problem, Congress found, *inter alia*, the incidence of prison rape is high, even by conservative estimates. *See id.* § 30301(14).

59. *Id.*, §§ 30302(3), 30303, 30305.

60. *See* FIFTY-STATE SURVEY, *supra* note 53 (providing a chart showing twenty-eight states either explicitly reject the consent defense or define prisoners as legally incapable of giving consent in this context); CTR. FOR CONSTITUTIONAL RIGHTS & THE NAT’L LAWYERS GUILD, THE JAILHOUSE LAWYER’S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATION OF YOUR RIGHTS IN PRISON 39 (5th ed. 2010) (stating that the federal government and most states have statutes criminalizing sexual intercourse between a correctional employee and an inmate, regardless of the inmate’s consent).

61. S.C. CODE ANN. § 44-23-1150(A)(2) (2018).

62. S.C. DIV. OF OPERATIONS, PREVENTION, DETECTION, AND RESPONSE TO SEXUAL ABUSE/SEXUAL HARASSMENT, OP-21.12 (2014).

63. In practice, zero tolerance policies may not prevent all sexual assaults. Hannah Brenner et al., *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J.

submits annual reports regarding inmate sexual victimization to the BJS, which is responsible for collecting data under the PREA.⁶⁴ According to the SCDC survey responses, there were 330 reports of staff sexual misconduct and harassment of inmates from 2012 to 2017.⁶⁵ Of the 330 reported, over fifty-four percent were labeled unsubstantiated.⁶⁶

This high number of reported instances demonstrates that South Carolina is not immune from the problem of sexual misconduct by correctional facility staff. While South Carolina has attempted to address issues of staff sexual misconduct within correctional facilities, victims of police sexual misconduct are ignored outright.⁶⁷

III. THE PRESENCE OF THE LAW ENFORCEMENT CONSENT LOOPHOLE

A. *Consent in Police Custody Compared to Consent in Correctional Facilities*

A substantial majority of states—including South Carolina—have laws explicitly stating that inmates are not capable of consenting to sexual conduct with law enforcement officers.⁶⁸ At the same time, most states—and the federal government—do not have laws which determine whether those in police custody can consent to sexual acts with police officers or other law enforcement personnel.⁶⁹ This gap in the law—the “consent loophole”—allows for law enforcement officers, charged with sexual misconduct against an individual in their custody, to admit to the conduct but claim it was consensual.⁷⁰

GENDER & L. 521, 562 (2016). “Conflicts of interests and strong presumptions against inmate credibility thwart zero tolerance policies.” *Id.*

64. S.C. DEP’T CORRECTIONS, *Surveys of Sexual Violence (SSV) Reports*, http://www.doc.sc.gov/preaweb/prea_surveys.html (last visited May 6, 2019).

65. See S.C. DEP’T OF CORR., SURVEY OF SEXUAL VICTIMIZATION FORMS (2012–2017).

66. See *id.* (179 unsubstantiated reports out of 330 total incidences reported).

67. Unlike reports of sexual misconduct in correctional facilities, South Carolina—like most states—is not required to submit allegations of police sexual misconduct to the BJS, so the exact scope of the problem is unknown. See Press Release, Congresswoman Jackie Speier, Bipartisan Bill Also Incent States to Pass Similar Laws (July 26, 2018), <https://speier.house.gov/media-center/press-releases/reps-speier-comstock-introduce-ban-federal-officers-claiming-consensual>.

68. S.C. CODE ANN. § 44-23-1150 (2018); Penland, *supra* note 29, at 510.

69. Bipartisan Bill Also Incent States to Pass Similar Laws, *supra* note 67 (“[A] staggering 31 states still allow law enforcement officers to claim that a sexual encounter with someone in their custody was consensual to avoid criminal charges.”).

70. *Id.*

Currently, the consent loophole exists in South Carolina. South Carolina Code of Laws Section 44-23-1150 criminalizes “sexual misconduct with an inmate, offender or patient.”⁷¹ Under this statute, the only “actors” that can be guilty of sexual misconduct are “employee[s], volunteer[s], agent[s], or contractor[s] of a public entity that has statutory or contractual responsibility for inmates or patients confined in a prison, jail, or mental health facility.”⁷² The statute defines “victim” as an “inmate or patient who is confined in or lawfully or unlawfully absent from a prison, jail, or mental health facility, or who is an offender on parole, probation, or other community supervision programs.”⁷³ The statute continues to state that “[a] victim is not capable of consent for sexual intercourse or sexual contact with an actor.”⁷⁴ Therefore, this Section does not protect individuals who are neither inmates nor patients, but who are nonetheless in police custody, such as suspects.

South Carolina’s acknowledgment of an inmate’s inability to consent to sexual acts with law enforcement officers exemplifies a fundamental recognition of the imbalance of power between law enforcement officers and individuals in their custody.⁷⁵ Few people are aware that a consent loophole even exists for police officers and those in their custody.⁷⁶ Nonetheless, “[t]he policy rationale for barring consent as a defense to allegations of sexual misconduct against a police officer is similar to that for criminalizing sex between an inmate and a corrections officer.”⁷⁷

Like corrections officers, police officers—and other law enforcement officers—are in a position of high authority.⁷⁸ Police officers’ authority to detain and arrest citizens creates a power dynamic that makes on-duty sexual activity seem fundamentally forbidden.⁷⁹ Indeed, studies have found that physical violence is not a prerequisite for police sexual violence—police officers can “instead rely[] on threats and quid pro quo inherent in police authority and power.”⁸⁰ Police and correction officers encounter similar types

71. S.C. CODE ANN. § 44-21-1150.

72. § 44-21-1150(A)(1).

73. § 44-21-1150(A)(2).

74. *Id.*

75. See H. 3590, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019).

76. Albert Samaha, *An 18-Year-Old Said She Was Raped While in Police Custody. The Officers Say She Consented.*, BUZZFEED NEWS (Feb. 7, 2018, 5:31 AM), <https://www.buzzfeednews.com/article/albertsamaha/this-teenager-accused-two-on-duty-cops-of-rape-she-had-no>.

77. *Sherman v. State Dep’t of Pub. Safety*, 190 A.3d 148, 185 (Del. 2018). The International Association of Chiefs of Police (IACP) also recognized the two situations as comparably non-consensual. IACP, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT: EXECUTIVE GUIDE 6 (2011).

78. IACP, *supra* note 77, at 6.

79. *Id.*

80. Rabe-Hemp & Braithwaite, *supra* note 25, at 132.

of persons and personalities within their jobs—both encounter citizens engaged in criminal behavior, which according to researchers, increases the likelihood of police sexual misconduct.⁸¹ More generally, the citizens they encounter are particularly vulnerable because many are victims “or perceived as ‘suspicious’ and subject to the power and coercive authority granted to police.”⁸²

Moreover, police work inadvertently provides a job environment that is conducive for sexual misconduct.⁸³ Police officers are in a unique position to commit acts of sexual misconduct because of their inherent authority as enforcers of the law, frequent interactions with various citizens, and the unsupervised nature of patrol work.⁸⁴ Many researchers have also suggested that police departments’ “culture of misogyny and invulnerability” has further contributed to the problem.⁸⁵ In particular, research suggests that police culture has “masked” police sexual misconduct—and in turn—created an environment for predators to continue engaging in such behavior.⁸⁶ These aspects of police culture are present in both correctional facilities and police departments—perhaps a consequence of the male-dominated nature of the law enforcement field.⁸⁷ Accordingly, one study examined 548 cases involving police arrests for sex-related crimes between 2005 and 2007, and its results stated that male officers perpetrated nearly all of the acts.⁸⁸

81. *Id.* at 132.

82. Phillip Matthew Stinson, Sr. et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL’Y REV. 665, 666 (2015).

83. *See id.* at 665; IACP, *supra* note 77, at 4; Sedensky, *supra* note 17, at 4; Peter B. Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 JUST. Q. 85, 107–08 (1995).

84. Maher, *supra* note 21, at 355; *see also* Kraska & Kappeler, *supra* note 83, at 89.

85. Samaha, *supra* note 76; *see also* Rabe-Hemp & Braithwaite, *supra* note 25, at 132 (“Policing has long been confirmed as a site of hegemonic masculinity, which reinforces male power at the collective and cultural levels.”) (citing R. W. CONNELL, *MASCULINITIES* (1995)).

86. Rabe-Hemp & Braithwaite, *supra* note 25, at 132. The IACP also acknowledged that the culture of allegiance and loyalty inherent amongst police forces often leads police officers to not report fellow officers for misconduct. IACP, *supra* note 77, at 4; *see also* Maher, *supra* note 21, at 372 (citations omitted) (“Although most officers indicated that they did not feel pressure to engage in sexual misconduct from fellow officers, they did acknowledge that the workplace climate or atmosphere might influence some officers. Although there may not be a significant pressure to engage in [police sexual misconduct], there may be considerable pressure not to report such conduct due to the police cultural code of secrecy.”).

87. *See Gender Distribution of Full-Time Law Enforcement Employees in the United States in 2017*, STATISTICA (Sept. 2018), <https://www.statista.com/statistics/195324/gender-distribution-of-full-time-law-enforcement-employees-in-the-us> (around 87.5% of full-time officers were male).

88. Stinson et al., *supra* note 82, at 673 (99.1% of the officers arrested were male). Another study found that out of 700 credible cases of police sexual misconduct, all but five of

B. The Consent Loophole Creates Significant Problems

Sexual abuse, in general, is significantly underreported, and even more so when the perpetrators are the police.⁸⁹ The true scope of police sexual misconduct is unknown because—unlike instances of sexual abuse by corrections officers—there is no duty for police departments to record or report incidences of police sexual misconduct.⁹⁰ This underreporting is further perpetuated by a victim’s fear of reporting an assault by a police officer—to the police.⁹¹ There are a variety of reasons for victims’ reluctance to report assault, including fear of retaliation, fear of not being believed, and the idea that a sexual encounter with a police officer will always be deemed consensual.⁹²

Despite the “blue wall of silence,”⁹³ researchers have been able to find enough evidence to conclude that police sexual misconduct is a significant problem.⁹⁴ “Even police officers agree with this conclusion.”⁹⁵ Researchers have used several methods to tackle this blue wall of silence, including surveying police officers directly about their first and secondhand knowledge of police sexual misconduct and through reviews of news media reports.⁹⁶

the offending officers were men. *Abusing the Law*, BUFFALO NEWS, <https://s3.amazonaws.com/bncore/projects/abusing-the-law/data.html> (last updated Dec. 2016).

89. Josephine Ross, *What the #MeToo Campaign Teaches About Stop and Frisk*, 54 IDAHO L. REV. 543, 553 (2018).

90. Rifkin, *supra* note 18; Casey Quinlan, *Police Sexual Abuse Isn’t Just the Case of a Few ‘Bad Apples’—It’s Systemic*, THINKPROGRESS (Dec. 4, 2017, 8:47 AM), <https://thinkprogress.org/police-abuse-systemic-24d7bed99605/>. Consequently, there is no national database for researchers to consult when studying this issue. Ross, *supra* note 89, at 552. The data that is available is largely problematic because it primarily represents only cases where the officer was charged with a crime or fired from the police force. *Id.* at 553. This has made police sexual misconduct difficult to document and study. Stinson et al., *supra* note 82, at 666.

91. Fara Gold, *Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases*, 66 U.S. ATT’YS BULL. 77, 78 (2018).

92. See Samaha, *supra* note 76; Maher, *supra* note 21, at 358–59.

93. Maher, *supra* note 21, at 359 (“[T]he blue wall of silence, the blue curtain, the code of secrecy, or the ethos of secrecy as it is sometimes called, restricts citizens from learning about police business.”); see also Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html?utm_term=.c1aea118bff9 (“Police officers wield significant power and discretion, and are protected by a blue wall of silence when they abuse them.”); Rabe-Hemp & Braithwaite, *supra* note 25, at 129 (stating that state laws keep police internal investigations from the public and noting the “hidden nature” of police sexual misconduct).

94. See Ritchie, *supra* note 93; Penland, *supra* note 29, at 160.

95. Trombadore, *supra* note 28, at 160.

96. Stinson et al., *supra* note 82, at 666.

Although these research studies have had varying statistical results, one factor remains consistent: police sexual misconduct is relatively common.⁹⁷ In fact, sexual misconduct is the second most frequently reported type of police abuse.⁹⁸ The Cato Institute concluded that “sexual assault rates are significantly higher for police when compared to the general population.”⁹⁹ Police sexual misconduct is not a new observation, hence one study in 1978 which referred to the police car as a “traveling bedroom.”¹⁰⁰ This 1978 study found that forty-four percent of the officers participating in the study reported between ten percent to one hundred percent of their fellow officers have engaged in sexual conduct on duty.¹⁰¹ A more recent study in 2003 found that thirty-five percent of all officers engage in some form of sexual misconduct.¹⁰²

The most sweeping investigations into police sexual misconduct occurred in 2015 by both *The Associated Press* and *The Buffalo News*.¹⁰³ *The Associated Press* obtained records from forty-one states on police decertification and found that some 990 law enforcement officers were decertified between 2009 and 2014 for sexual misconduct.¹⁰⁴ *The Buffalo News* investigation used news reports and court records to compile a database of over 700 credible cases of job-related sexual misconduct by police officers in the past decade.¹⁰⁵ According to the database, “a law enforcement official

97. See Maher, *supra* note 21, at 365; SAMUEL WALKER & DAWN IRLBECK, POLICE PROFESSIONALISM INITIATIVE, “DRIVING WHILE FEMALE”: A NATIONAL PROBLEM IN POLICE MISCONDUCT 4–5 (2002); *Abusing the Law*, *supra* note 88; Trombadore, *supra* note 28, at 160. In actuality, police sexual abuse is even more rampant and widespread than statistics indicate. Samaha, *supra* note 76.

98. Rifkin, *supra* note 18. *But see* Sedensky, *supra* note 17 (stating that police sexual misconduct is the third most commonly reported form of police abuse).

99. Ross, *supra* note 89, at 553 (quoting CATO INST., NATIONAL POLICE MISCONDUCT REPORTING PROJECT: 2010 ANNUAL REPORT 3 (2013)).

100. Thomas Barker, *An Empirical Study of Police Deviance Other Than Corruption*, 6 J. POLICE SCI. & ADM. 264–72 (1978), *construed in* Rabe-Hemp & Braithwaite, *supra* note 25, at 129.

101. *Id.*

102. Maher, *supra* note 21, at 359.

103. See Samaha, *supra* note 76.

104. Over half of the cases involved sexual assault, including rape, sodomy, and sexual shakedowns. *NYC Rape Case*, *supra* note 6. The other included sex offenses such as possession of child pornography, peeping Tom, sexting juveniles, or on-duty intercourse. *Id.* Importantly, these cases do not include those considered consensual. *Id.* Moreover, the exact statistics are likely much more alarming because this total does not include New York or California. *Id.*

105. *Abusing the Law*, *supra* note 88.

was caught in a case of sexual abuse or misconduct at least every five days.”¹⁰⁶ Even more, researchers agree this number is just the “tip of the iceberg.”¹⁰⁷

Of even greater concern, studies have found that despite the high number of reports, “it is unlikely that most police officers will face major consequences for their actions.”¹⁰⁸ One reason for the lack of punishment is that many officers claim the sexual encounter was consensual when faced with overwhelming evidence of sexual abuse.¹⁰⁹ Indeed, consent is the most frequently used defense by police officers acquitted in sexual assault cases.¹¹⁰ Furthermore, one study found that one in every six police officers charged with sexual abuse were later acquitted—or had the charges dropped—in response to their claim that the sexual encounter occurred but was consensual.¹¹¹ Most states that allow consent as a defense can only charge the offending officer with “official misconduct,” a misdemeanor with a maximum sentence of only one year.¹¹² This too accounts for the lack of criminal prosecution.

1. *South Carolina is Not Immune*

South Carolina is not immune to the problem of police sexual misconduct, which is of consequence considering the presence of the consent loophole.¹¹³ From 2005 to 2013, fifty-seven police officers in South Carolina were arrested for “sex-related” offenses.¹¹⁴ Around half of these arrests also involved “violence-related” crimes, which suggests the other half supports the misconceived proposition that police sexual misconduct “frequently involves

106. *Id.*

107. Trombadore, *supra* note 28, at 164 (quoting Stinson et al., *supra* note 82, at 682); Ross, *supra* note 28, at 553 (“[W]e will likely learn that male victims are often the submerged part of the proverbial iceberg.”).

108. Quinlan, *supra* note 90. It is worth noting that like research on police sexual misconduct in general, research on the disposition of these criminal cases or police departments’ responses has also been limited. Stinson et al., *supra* note 82, at 668.

109. *See Abusing the Law*, *supra* note 88.

110. Samaha, *supra* note 76.

111. Rifkin, *supra* note 18.

112. Samaha, *supra* note 76.

113. Interestingly, studies have found higher instances of police sexual misconduct in the South. Stinson et al., *supra* note 82, at 683.

114. Philip Matthew Stinson Sr. et al., *The Henry A. Wallace Police Crime Database*, BGSU, <https://policecrime.bgsu.edu> (last visited Mar. 31, 2019) [hereinafter *Crime Database*] (database providing information on 10,287 criminal arrest from 2005–2014 involving individual nonfederal sworn law enforcement officers charged with one or more crimes in the United States).

consensual behavior.”¹¹⁵ Consequently, only twenty-nine of the fifty-seven officers arrested received convictions, illustrating how the availability and use of the consent defense hinder the enforcement of punishment for police sexual misconduct.¹¹⁶

More recently, the South Carolina legislature found that since 2010, at least ten South Carolina police officers resigned or were fired because of sexual misconduct allegations by individuals in their custody.¹¹⁷ Several of these cases were difficult to prosecute, as some officers claimed the sexual encounters were consensual.¹¹⁸ Also, a few of the officers only faced charges of “misconduct in office,” as opposed to sexual assault or rape.¹¹⁹ Available data shows that police sexual misconduct undoubtedly occurs within South Carolina—and the current law allows for police officers to escape liability and punishment for such harmful misconduct.

The case of Charleston, South Carolina police officer Joseph DiMeglio exemplifies the issues with consent, victim hesitation to report a police officer, and lack of punishment.¹²⁰ DiMeglio resigned amidst allegations of sexual assault of a twenty-three-year-old woman.¹²¹ DiMeglio admitted to having sex—while in uniform—with the woman on the trunk of his police cruiser but insisted the incident was consensual.¹²² The facts and circumstances surrounding the night of the incident, however, cast doubt on whether the encounter was in fact consensual. The alleged victim, drunk at the time of the sexual encounter, sent a text message following the incident to another Charleston police officer with the photograph of a large bruise on her thigh and the statement, “if you only knew how that happened.”¹²³ Later that same night, the alleged victim sent another text message to her former boyfriend stating that a city police officer had just raped her.¹²⁴ The former boyfriend then reported the incident to police.¹²⁵ When detectives questioned the woman, however, she claimed that she could not remember whether she

115. See Maher, *supra* note 21, at 366.

116. *Crime Database*, *supra* note 114.

117. H. 3590, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019).

118. *Id.*

119. *Id.*

120. See *Abusing the Law*, *supra* note 88.

121. See Glenn Smith, *Ex-Officer to Face Review to Return*, POST & COURIER (May 10, 2010), https://www.postandcourier.com/news/ex-officer-to-face-review-to-return/article_e0403f40-62e0-5605-b32c-98cfbdd16c6f.html.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

consented and stated that she did not want to file charges.¹²⁶ Despite a police investigation into this complaint, authorities determined the allegation was unfounded, and DiMeglio did not face any charges.¹²⁷

Another particularly disturbing case is that of Dereck Johnson.¹²⁸ Johnson was a police officer in Elloree, South Carolina when he responded to a domestic dispute call on June 12, 2016.¹²⁹ When Johnson and another officer arrived on the scene, they separated the couple, and Johnson remained inside the house with the woman while the other officer took the male outside.¹³⁰ The woman alleged that Johnson threatened her to perform an oral sex act or she would be sent to jail.¹³¹ Johnson admitted that the woman performed an oral sex act on him, but claimed it was consensual.¹³²

At the preliminary hearing, Johnson's attorney claimed the sexual act was consensual and further stated, "the true victim in this case arguably is Dereck Johnson" who was "seduced to do this activity."¹³³ Ultimately, Johnson pled guilty to misconduct in office and only received a suspended sentence of three years' probation and one hundred hours of community service.¹³⁴ This case is an unfortunate example of how the consent defense allows police officers in South Carolina to escape adequate consequences for on-duty sexual misconduct against the very citizens they are meant to protect. Research has shown that officers frequently "prey on domestic-violence survivors, who are particularly vulnerable to abuses by people they call on for protection."¹³⁵ Contrary to argument put forth by Johnson's attorney, the real victim is the domestic-violence survivor who was in no position to give consent to a police officer whose presence was to interrupt a domestic disturbance.

DiMeglio and Johnson are only two examples of sexual misconduct by police officers in South Carolina. Since 2006, at least 158 police officers in South Carolina were charged with sexual battery, sexual assault, or unlawful

126. *Id.*

127. *Id.*

128. See Martha Rose Brown, *Ex-Deputy Admits Sex Act on Domestic Call, Says It Was Consensual*, TIMES & DEMOCRAT (Sept. 14, 2017), https://thetandd.com/news/local/crime-and-courts/ex-deputy-admits-sex-act-on-domestic-call-says-it/article_565f6ccf-80d6-58db-ab6d-cf31a67d9743.html.

129. Brown, *supra* note 128.

130. *Id.* The woman's child was also present in the house. *Id.*

131. *Id.*

132. *Id.*

133. Times & Democrat, *Preliminary Hearing for Former Orangeburg County Deputy*, YOUTUBE (Sept. 13, 2016), <https://www.youtube.com/watch?v=h05HilFGMA4> [hereinafter *Preliminary Hearing*].

134. Brown, *supra* note 128.

135. Ritchie, *supra* note 93.

sexual contact with a person in custody.¹³⁶ Twenty-six of these officers were acquitted as a result of a consent defense.¹³⁷ The power imbalance between a police officer and an individual in their custody is so significant that consent should never be allowed as a defense to sexual misconduct by the police officer.¹³⁸ Moreover, the seriousness of the offense¹³⁹ necessitates action by the South Carolina General Assembly.

C. Consent is Problematic Under the Circumstances

The ability of police officers to claim that sexual acts with a person in police custody were consensual is problematic for moral and ethical reasons—and especially since it undermines the legal community and harmfully diverts law enforcement resources. Police officers and other law enforcement officers are tasked with the ever-important duty to serve and protect its citizens; “police sexual behavior at the very least violates widely accepted ethical standards commonly associated with law enforcement.”¹⁴⁰

The IACP described such behavior as “particularly egregious violations of trust and authority” and stated, “[s]ituations where officers engage in sexual misconduct and victimize those they are sworn to protect and serve amount to civil rights violations.”¹⁴¹ Police officers—and the power and respect that they wield as officers of the law—should not be able to offer the defense of consent as a defense to sexual acts perpetrated against those they have broad discretionary power over.¹⁴² Indeed, the judge in the Dereck Johnson case acknowledged that Johnson’s acts were against basic common sense and stated Johnson should know what is “absolutely inappropriate,” regardless of

136. H. 3590, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019).

137. *Id.*

138. *Id.*

139. Trombadore, *supra* note 28, at 158 (“While sexual assault carries devastating consequences in any context, the trauma of such abuse is especially crippling when the perpetrator is a police officer.”).

140. Maher, *supra* note 21, at 376.

141. IACP, *supra* note 77, at 2.

142. *See* Foley v. Connelie, 435 U.S. 291, 297–99 (1978) (“Police officers . . . are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgement and discretion, the abuse or misuse of which can have serious impact on individuals.”); *see also* Ducharme, *supra* note 17 (“It is common sense that those under arrest are legally incapable of consenting to sexual acts with officers who hold enormous power over them.”); Samaha, *supra* note 76 (“Our laws regarding sexual consent must be brought into line with basic common sense, empathy, and human decency . . .”).

a lack of police training on such a situation.¹⁴³ It is critical that laws regarding sexual consent reflect such a “common-sense principle that people whom the police have placed under arrest are legally incapable of consenting to sexual acts with officers, who hold enormous power over them.”¹⁴⁴

The power imbalance between a police officer and an individual in their custody is so significant that any sexual encounter between the two is fundamentally non-consensual and an egregious abuse of power.¹⁴⁵ The notion that many victims of police sexual misconduct are willing participants who initiate the sexual encounters¹⁴⁶—or offer sexual acts in exchange for favors or as a “get out of jail free card”¹⁴⁷—is undermined by the fact that the sexual act is nonetheless motivated by, or at the very least related to, the officer’s position of power.¹⁴⁸ Evidence suggesting that people do not feel free to decline police officer’s request to conduct a consent search supports the idea that a citizen cannot freely consent to sexual acts in such an inherently coercive situation.¹⁴⁹ If individuals are afraid to decline an officer’s request to search something as simple as their car, then it seems plausible that fears of a greater extent arise when consenting to sexual acts with a police officer. The Supreme Court recognized the inherently coercive nature of custodial surroundings in interrogation settings,¹⁵⁰ and yet, South Carolina law fails to

143. Brown, *supra* note 128.

144. *Close the Police Rape Loophole*, *supra* note 1.

145. *See* Buchhandler-Raphael, *supra* note 22, at 116 (“Sexual relations cannot be viewed as consensual whenever fears of harm, coercive pressure, and exploitation of imbalances in power prompt the complainant’s acquiescence to the perpetrator’s sexual demands.”); Leigh, *supra* note 17 (“Due to the power imbalance between a police officer and an arrested or detained individual, any legal encounter between the two would be non-consensual by the very nature of the relationship and should accordingly be treated as such.”).

146. Stinson et al., *supra* note 82, at 667.

147. *Id.* (quoting Barker, *supra* note 100, at 267–68).

148. *See* Sherman v. State Dep’t of Pub. Safety, 190 A.3d 148, 170 (Del. 2018); Buchhandler-Raphael, *supra* note 22, at 117; Sarah Eschholz & Michael S. Vaughn, *Police Sexual Violence and Rape Myths: Civil Liability Under Section 1983*, 29 J. CRIM. JUST. 389, 395 (2001). In early studies of police sexual misconduct, academics assumed that “police are a desired commodity who are routinely tempted by women willing to trade ‘sexual favors’ for leniency.” Trombadore, *supra* note 28, at 171 (quoting Kraska & Kappeler, *supra* note 83, at 88). “This gave rise to the problematic notion that victims of police sexual misconduct were willing participants in their abuse.” *Id.*

149. *See* Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 23.1 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (arguing that given the nature of police authority and the context of the citizen–police encounter, people are afraid to decline the officer’s request to search and feel compelled to accede to police request).

150. *See* *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

recognize the inherently coercive nature present in instances of on-duty sexual misconduct.¹⁵¹

Additionally, allowing police officers to engage in consensual sexual misconduct with individuals in police custody undermines the legal community.¹⁵² The law enforcement officers engaged in such acts have an enormous impact on both their departments and the community, “crippling relationships with an already weary public and scarring victims with a special brand of fear.”¹⁵³ Officers that engage in sexual conduct with individuals in police custody exceed the scope of authority entrusted in them by the public,¹⁵⁴ which damages the public’s trust in—and respect for—law enforcement.¹⁵⁵ Moreover, the lack of criminal prosecution for such conduct often allows the offender to continue in police employment, placing more citizens at risk and further undermining faith in the criminal justice system.¹⁵⁶ For example, in South Carolina, the Horry County Police Department conducted at least thirteen investigations into allegations of police sexual misconduct between 2006 and 2016.¹⁵⁷ The department allegedly failed to properly address the sexual misconduct and allowed the offending officers to resign, thereby permitting them to transfer to other law enforcement agencies without record of their alleged misconduct.¹⁵⁸

Furthermore, law enforcement time and resources are harmfully diverted as a result of police sexual misconduct.¹⁵⁹ Sexual misconduct “interferes with

151. See Natasha Lennard, *Police Reportedly Claim a Brooklyn Teen Consented to Sex in Custody. That’s Impossible.*, INTERCEPT (Oct. 20, 2017, 3:24 PM), <https://theintercept.com/2017/10/20/brooklyn-teen-police-rape-consent>.

152. See Sedensky, *supra* note 17 (arguing that the minority of officers engaging in sexual misconduct leads to costly litigation and settlements on departments).

153. *Id.*

154. Buchhandler-Raphael, *supra* note 22, at 91 (“These perpetrators are authorized by the government, the state, the city, or another public institution to perform a professional role and exceed the scope of this authority by engaging in private conduct of a sexual nature.”).

155. Maher, *supra* note 21, at 355; IACP, *supra* note 77, at 5.

156. See Rabe-Hemp & Braithwaite, *supra* note 25, at 128 (discussing the problem of the “officer shuffle” where officers accused of wrongdoing move between departments and jurisdictions in order to maintain their employment). One source compared this to the Catholic Church where failure to effectively deal with and report sexually abusive priests may have created an atmosphere where some men are drawn to priesthood because they anticipate opportunities to engage in sexual misconduct without significant fear of formal discipline or punishment. See Maher, *supra* note 21, at 372.

157. WPDE, *Documents Show 13 Investigations into Sexual Misconduct by Horry County Police Officers*, ABC 15NEWS (July 1, 2018) [hereinafter *Horry County Police Officers*], <https://wpde.com/news/local/documents-show-13-investigations-into-sexual-misconduct-by-horry-county-police-officers>.

158. *Id.*

159. See Sedensky, *supra* note 17.

police officers' ability to effectively perform their duties" and can even be a danger for fellow officers.¹⁶⁰ One police officer, in response to a survey of officers' perceptions and frequency of police sexual misconduct, reported that one night when he was on shift, he responded to other officers' calls because they were engaged in sexual misconduct while on duty.¹⁶¹ This police officer rightfully questioned, "What if I needed some back-up?"¹⁶² This concern is even more alarming given that a majority of cases involving adult victims of police sexual misconduct occur when the offending officer is on duty.¹⁶³ In response to a lack of criminal prosecution, many victims have also turned to civil remedies, "mirroring departments in litigation that leads to costly settlements."¹⁶⁴ The victim in the Dereck Johnson case brought civil actions against the Orangeburg County Sheriff's Office and former Deputy Johnson.¹⁶⁵ The civil matter settled for \$350,000 and was paid by the South Carolina Insurance Reserve Fund.¹⁶⁶

Finally, consensual sex is problematic between a law enforcement officer and an individual in police custody because individuals in police custody are often particularly vulnerable.¹⁶⁷ Perpetrators in the law enforcement context often target the most vulnerable people—specifically drug addicts, sex workers, women of color, victims of domestic abuse, young women, and people with a history of criminal activity—to reduce the risk that such abuse will be reported, and to ensure their credibility over that of the victim.¹⁶⁸ "In short, such an individual is the perfect victim against whom to commit a crime and get away with it."¹⁶⁹

Allowing consent as a defense to sexual acts between law enforcement officers and individuals in police custody is not only devastating to the

160. Maher, *supra* note 21, at 355.

161. *Id.* at 375.

162. *Id.*

163. Stinson et al., *supra* note 82, at 675–76 (noting that 82.3% of cases in the study with adult victims took place when the officer was on duty).

164. Sedensky, *supra* note 17; *see also* Rabe-Hemp & Braithwaite, *supra* note 25, at 131 (stating that "victims of police sexual violence have turned to civil remedies," leading to "departments [paying] out millions of dollars in punitive damages" (citations omitted)); Maher, *supra* note 21, at 358 ("[C]ivil liability for [police sexual misconduct] is currently more common than criminal litigation.").

165. Brown, *supra* note 128.

166. *Id.*

167. *See* Trombadore, *supra* note 28, at 159.

168. *See id.*; Gold, *supra* note 91, at 77; *NYC Rape Case*, *supra* note 6; Andrea J. Ritchie, *Police Sexual Violence*, in *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* Ch. 5 (2017); Quinlan, *supra* note 90; Walker & Irlbeck, *supra* note 97, at 4–5.

169. Gold, *supra* note 91, at 77.

victims,¹⁷⁰ but also encourages more of the same conduct.¹⁷¹ It is imperative that South Carolina close the consent loophole and enforce criminal punishment for police sexual misconduct. “Only then will predators with badges begin to think twice about how they behave toward the citizens they are meant to protect.”¹⁷²

IV. HOW TO CLOSE THE CONSENT LOOPHOLE

As societal and legal awareness of the prevalence of police sexual misconduct increases, more and more states will presumably adopt criminal statutes to explicitly reject the ability of individuals in police custody to consent to sexual acts with police officers or other law enforcement officials.¹⁷³ “Across the country, police departments are being pushed to confront longtime patterns of abuse.”¹⁷⁴ In recent years, more states have closed the consent loophole, “applying to cops the same rules already in place nationwide for probation officers and prison and jail guards.”¹⁷⁵ Many states, however—including South Carolina—have not, “partly because few people realize the loophole exists.”¹⁷⁶ Therefore, increasing the public’s awareness of the issue is an important step towards closing the consent loophole.

A. States that Have Closed the Loophole

The loophole present in many state laws gained public attention in late 2017 in wake of Anna Doe’s case in New York.¹⁷⁷ Prior to Anna’s case, only fifteen states¹⁷⁸ had statutes that provided an individual in custody may not

170. See Trombadore, *supra* note 28, at 158.

171. See IACP, *supra* note 77, at 5 (“Tolerance at any level will invite more of the same conduct.”).

172. *Close the Police Rape Loophole*, *supra* note 1.

173. Cf. Penland, *supra* note 29, at 525 (stating that in the related context of prison sex abuse, as societal and legal awareness increased, so did the number of states to reject consent between prisoners and guards).

174. Samaha, *supra* note 76. The lawsuit against the Horry County Police Department is one such example of past misconduct patterns coming to light. See Buchhandler-Raphael, *supra* note 22 and accompanying text.

175. Samaha, *supra* note 76.

176. *Id.*

177. *Id.*; *NYC Rape Case*, *supra* note 6; Ducharme, *supra* note 17; Rifkin, *supra* note 18.

178. See Samaha, *supra* note 76 (Washington, Oregon, California, Arizona, Utah, Alaska, Hawaii, North Dakota, Oklahoma, Indiana, Ohio, Connecticut, New Jersey, North Carolina, Georgia, and Florida).

give consent to sexual acts with a law enforcement officer.¹⁷⁹ In 2018, six more states passed statutes specifically providing that an individual in police custody cannot consent to sexual acts with a law enforcement officer.¹⁸⁰ Additionally, several other state legislatures proposed similar bills, indicating that the issue is gaining momentum in the other consent-defense states.¹⁸¹

1. *New York*

In March 2018, New York state lawmakers passed a bill titled “An act to amend the penal law, in relation to establishing incapacity to consent when a

179. Consider the examples of Oregon, Alaska, and Arizona. Oregon closed the loophole in 2005, defining “custodial sexual misconduct,” as a class C felony, to include sexual intercourse with a person “in the custody of a law enforcement agency following arrest,” and provided that consent is not a defense. OR. REV. STAT. ANN. § 163.452(1)(a)(A) (West, Westlaw through the 2018 Reg. and Spec. Sess. of the 79th Leg. Assemb.). Alaska closed the loophole in 2013, defining “sexual assault in the third degree” to include when a law enforcement officer “engages in sexual penetration with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.” ALASKA STAT. ANN. § 11.41.425 (West, Westlaw through 2018 Second Reg. Sess. of the 30th Leg.). Arizona did so in 2015, defining “unlawful sexual conduct” as a felony to include when a peace officer “knowingly engag[es] in sexual contact, oral sexual contact or sexual intercourse with any person who is in the officer’s custody or a person who the officer knows or has reason to know is the subject of investigation,” but provides an exception when “an officer is married to or in a romantic or sexual relationship with the person at the time of the arrest or investigation.” ARIZ. REV. STAT. ANN. § 13-1412 (Westlaw through legislation effective Apr. 28, 2019 of the First Reg. Sess. of the 54th Leg.).

180. *See* 2018 N.Y. Sess. Laws A. 9505-D (McKinney, Westlaw through L.2019, chapter 29); KAN. STAT. ANN. § 21-5512 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019); LA. STAT. ANN. § 14:41.1 (West, Westlaw through the 2018 Third Extraordinary Sess.); DEL. CODE ANN. tit. 11, § 780A(c) (West, Westlaw through 82 Laws 2019, chapter 7); MD. CODE ANN., CRIM. LAW § 3-314 (West, Westlaw through legislation effective Apr. 30, 2019 from the 2019 Reg. Sess. of the General Assmb.); N.H. REV. STAT. ANN. § 632-A:2(I)(n)(1) (Westlaw through Chapter 1 of the 2019 Reg. Sess.).

181. *See* H. 4772, 190th Gen. Court of Commonwealth (Mass. 2018) (would prohibit police officers from engaging in sexual conduct with those in their custody, supervision or with whom they interact in their professional capacity and punishable by imprisonment up to 5 years and/or a fine of \$10,000); H. 2856, 90th Leg. (Minn. 2018); and then S. 2755, 90th Leg. (Minn. 2018) (defining criminal sexual conduct to include sexual penetration and sexual contact with another person if “the actor is a peace officer . . . or a part-time peace officer” and “the officer physically or constructively restrains the complainant or the complainant does not reasonably feel free to leave the officer’s presence,” for which “consent by the complainant is not a defense”); Comm. on Judiciary 2691, 2018 Gen. Assemb., 2018 Sess. (Pa. 2018) (defining “custody” to include an “being detained by a peace officer, including being questioned, handcuffed or arrested by a peace officer or inside a vehicle designed for law enforcement purposes”).

person is under arrest, in detention or otherwise in actual custody.”¹⁸² The legislation unanimously passed in light of Anna Doe’s case.¹⁸³ Additionally, fears of opposition from police unions and law enforcement community were quelled by the NYPD’s strong support of the bill.¹⁸⁴ The Mayor of New York City, Bill de Blasio, agreed that the loophole was “very troubling,” and the Governor of New York, Andrew Cuomo, said the legislation “closes an egregious loophole and helps protect against abuse in our justice system.”¹⁸⁵

Introduced by Republican Senator Andrew Lanza with bipartisan sponsorship, the bill amended existing New York Penal Law in two different sections. First, the bill amended the definition of a person “deemed incapable of consent” to include an individual “detained or otherwise in the custody of a police officer, peace officer, or other law enforcement official”¹⁸⁶ Such an individual is incapable of consenting to sexual contact with “a police officer, peace officer or other law enforcement official who either (i) is detaining or maintaining custody of such person; or (ii) knows, or reasonably should know, that at the time of the offense, such person was detained or in custody.”¹⁸⁷ Second, the bill provides that it is a defense when the parties were married to each other.¹⁸⁸

2. *Kansas*

In May 2018, Kansas’ governor signed a similar bill closing the consent loophole,¹⁸⁹ but its scope exceeds even further than the New York bill. The Kansas bill amended the crime of unlawful sexual relations, which prohibits certain persons from engaging in “consensual sexual intercourse, lewd fondling or touching, or sodomy,” to include law enforcement officers when the person with whom they are engaging in such acts with is “a person 16

182. N.Y. PENAL Law § 130.05(3)(j) (McKinney, Westlaw through L.2019, chapter 29).

183. Jessica Chia, *State Lawmakers Pass Bill Barring Cops from Having Sex with Detainees*, N.Y. DAILY NEWS (Mar. 31, 2019), <https://www.nydailynews.com/new-york/ny-passes-bill-barring-cops-sex-detainees-article-1.3906874>.

184. Erin Durkin, *NYPD Supports Changing State Law to Make It Illegal for Cops to Have Sex with Someone in Custody*, N.Y. DAILY NEWS (Feb. 26, 2018, 6:27 PM), <https://www.nydailynews.com/new-york/nypd-supports-arresting-cops-sex-custody-article-1.3843347>.

185. *Id.*

186. N.Y. PENAL Law § 130.05(3)(j) (McKinney, Westlaw through L.2019, chapter 29).

187. *Id.* § 130.05(3)(j)(i)–(ii) (McKinney, Westlaw through L.2019, chapter 29).

188. *Id.* § 130.10(4) (McKinney, Westlaw through L.2019, chapter 29).

189. H. 2523, 78th Leg., Reg. Sess. (Kan. 2018). The bill was also unanimously passed by state legislature. KAN. STAT. ANN. §§ 19-801b, 21-5512, 74-5602, 74-5605 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019).

years of age or older who is interacting with such law enforcement officer during the course of a traffic stop, custodial interrogation, an interview in connection with an investigation, or while the law enforcement officer has such person detained.”¹⁹⁰ Such conduct is a level 5 person felony.¹⁹¹

Similar to New York law, the Kansas statute carves out an exception for situations in which the officer is married to the victim by stating unlawful sexual relations occur “with a person who is not married to the offender.”¹⁹² However, unlike the New York law, the Kansas law defined police custody to include specific situations that protect not only detainees, but also witnesses, victims, and individuals involved in a traffic stop.¹⁹³ To illustrate how these two laws can result in different outcomes, reconsider the South Carolina case of Dereck Johnson.¹⁹⁴ Under Kansas law, officer Johnson would be guilty of unlawful sexual relations, regardless of consent, because he engaged in sexual conduct with a person he was “interview[ing] in connection with an investigation” of the reported domestic violence.¹⁹⁵ Conversely, under New York law, the victim would be potentially capable of consenting to sexual acts with Johnson because she arguably was not under arrest—or in police custody—at the time, therefore allowing Johnson to potentially claim the acts were consensual.¹⁹⁶

3. Louisiana

The Louisiana Legislature unanimously passed¹⁹⁷ a bill providing that a person in police custody is incapable of giving consent.¹⁹⁸ The Louisiana

190. KAN. STAT. ANN. § 21-5512(a)(13) (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019).

191. *Id.* § 21-5512 (b)(2) (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019).

192. *Id.* § 21-5512(a) (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019).

193. *Id.* § 21-5512 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019).

194. *See supra* text accompanying notes 140–46.

195. KAN. STAT. ANN. § 21-5512(a)(13) (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019).

196. *Cf.* N.Y. PENAL LAW § 130.05 (McKinney, Westlaw through L.2019, chapter 29).

197. S. 105, 2018 Leg., 2018 Sess. (La. 2018) (detailing that on May 9, 2018 on final passage, the bill received 88 yeas and 0 nays). Similar to New York, the Louisiana bill received absolutely no pushback from police unions in the state. Albert Samaha, *Maryland is the Latest State to Pass A Bill Banning Cops from Having Sex with People in Custody*, BUZZFEED NEWS (Apr. 10, 2018, 12:24 AM), <https://www.buzzfeednews.com/article/albertsamaha/maryland-is-the-latest-state-to-pass-a-bill-banning-cops>.

198. 2018 La. Sess. Law Serv. 407 (West).

statute resembles New York's statute more than Kansas's. The act adds a new subpart that provides for purposes of the crimes of rape and sexual battery, "a person is deemed incapable of consent when the person is under arrest or otherwise in the actual custody of a police officer or other law enforcement official," and when the other party is the police officer or law enforcement official responsible for their arrest or for "maintaining the person in actual custody," or "knows or reasonably should know that the person is under arrest or otherwise in actual custody."¹⁹⁹

This act is very similar to the one passed by New York. Both require the individual to be under arrest or otherwise in actual legal custody and further provide that the offending officer be the arresting officer or otherwise have authority over or knowledge of the person's custody.²⁰⁰ Like New York, this statute potentially fails to protect witnesses and victims who may fall vulnerable to police sexual misconduct—but are not covered by the statute's definition of police custody. Furthermore, unlike both the Kansas and New York statutes, Louisiana does not include the availability of a marital exception.²⁰¹

4. *Maryland*

Also, in May 2018, Maryland unanimously passed a bill that states that "a law enforcement officer may not engage in sexual contact, vaginal intercourse, or a sexual act with a person in the custody of the enforcement officer."²⁰² Unlike the other state statutes previously discussed, the Maryland law does not explicitly state that such conduct is not consensual.²⁰³ Nonetheless, Baltimore Delegate Brooke Lierman, the Democrat who proposed the bill, assured that "[i]f police officers try to argue the sex was consensual, the new law will make it clear the conduct is still

199. LA. STAT. ANN. § 14:41.1(1)–(2) (West, Westlaw through the 2018 Third Extraordinary Session).

200. *Compare id.*, with N.Y. PENAL LAW § 130.05(3) (McKinney, Westlaw through L.2019, chapter 29).

201. *Compare* LA. STAT. ANN. §§ 14:41–14:41.1 (West, Westlaw through the 2018 Third Extraordinary Session) (providing no mention of a marital defense), with KAN. STAT. ANN. § 21-5512 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019) (implying marriage is a defense because the definition of "unlawful sexual relations" includes that the victim is "a person who is not married to the offender"), and N.Y. PENAL LAW § 130.10 (McKinney, Westlaw through L.2019, chapter 29) (expressly stating marriage is a defense to inability to consent).

202. MD. CODE ANN., CRIM. LAW § 3-314(e) (West, Westlaw through legislation effective Apr. 30, 2019 from the 2019 Reg. Sess. of the General Assemb.).

203. *See id.*

illegal . . . ‘Because you’re in custody, you can never give consent,’ Lierman said.”²⁰⁴

The main difference in Maryland’s statute is the penalty associated with such misconduct. “In most states with statutes specifically addressing sex in police custody, the crime is categorized as sexual assault or sexual battery, felonies that bring at least a few years in prison at a minimum.”²⁰⁵ The bill in Maryland, however, classifies the offense as a misdemeanor, “subject to imprisonment not exceeding 3 years or a fine not exceeding \$3,000 or both.”²⁰⁶

204. Luke Broadwater, *Maryland General Assembly Passes Bill Making It Illegal for a Police Officer to Have Sex with Person in Custody*, BALT. SUN (Apr. 10, 2018, 11:10 AM), <https://www.baltimoresun.com/news/maryland/politics/bs-md-ci-police-sex-ban-20180410-story.html>.

205. Tess Owen, *Louisiana Just Banned Cops from Having Sex with Anyone in Their Custody*, VICE NEWS (May 31, 2018), https://news.vice.com/en_us/article/nek3yg/louisiana-just-banned-cops-from-having-sex-on-duty-and-calling-it-consensual. See also CONN. GEN. STAT. ANN. § 53a-71 (Westlaw through General Statutes of Conn., Revision of 1958, Revised to Jan. 1, 2019) (sexual assault in the second degree); DEL. CODE ANN. tit. 11, § 780B (West, Westlaw through 82 Laws 2019, chapter 7) (class G felony); FLA. STAT. ANN. § 794.011 (West, Westlaw through chapters from the 2019 First Reg. Sess. of the 26th Leg. in effect through Apr. 26, 2019) (sexual battery); GA. CODE ANN. § 16-6-5.1(b) (West, Westlaw through Act 24 of the 2019 Leg. Sess.) (sexual assault); HAW. REV. STAT. ANN. §§ 707-731, 707-732 (West, Westlaw through Act 27 of the 2019 Reg. Sess.) (sexual assault in the second and third degree); IND. CODE ANN. § 35-44.1-3-10 (West, Westlaw through all legislation of the 2019 First Reg. Sess. of the 121st General Assem. effective through Apr. 25, 2019) (level 5 felony); KAN. STAT. ANN. § 21-5512 (level 5 felony) (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019); LA. STAT. ANN. § 14:41.1 (West, Westlaw through the 2018 Third Extraordinary Sess.) (rape and sexual battery); N.C. GEN. STAT. ANN. § 14-27.31 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-4 of the General Assem.) (class E felony); N.D. CENT. CODE ANN. § 12.1-20-06 (West, Westlaw through emergency effective laws from the 2019 Reg. Sess. of the 66th Leg. Assem. approved through Apr. 12, 2019, and results of the Nov. 6, 2018 election) (“sexual abuse of wards,” a class C felony); N.H. REV. STAT. ANN. §§ 632-A:2, I(n)(1) (Westlaw through Chapter 1 of the 2019 Reg. Sess.) (aggravated felonious sexual assault); N.J. STAT. ANN. § 2C:14-2(c)(2) (West, Westlaw through L.2019, c. 60 and J.R. No. 4) (sexual assault, a crime in the second degree); N.Y. PENAL § 130.05(3)(j) (McKinney, Westlaw through L.2019, chapter 29) (rape or sexual abuse); OHIO REV. CODE ANN. § 2907.03(B) (Baldwin, Westlaw through File 3 of the 113rd General Assem. (2019–2020)) (“sexual battery,” a felony of the third degree); OKLA. STAT. ANN. tit. 21, §§ 1111, 1116 (Westlaw through Chapter 179 of the First Reg. Sess. of the 57th Leg. (2019)) (rape in the second degree, a felony punishable by a minimum of one year and a maximum of fifteen years).

206. MD. CODE ANN., CRIM. LAW § 3-314(f) (West, Westlaw through legislation effective Apr. 30, 2019 from the 2019 Reg. Sess. of the General Assem.).

5. *New Hampshire*

New Hampshire passed a bill in June 2018 to close the consent loophole present in their law.²⁰⁷ The act defined “aggravated felonious sexual assault” to include when the actor has “authority authorized by law over,” or is directly responsible for “maintaining detention of,” the victim who is “detained” or otherwise “not free to leave.”²⁰⁸ The statute explicitly states that consent of the victim under these circumstances is not a defense.²⁰⁹ The statute, however, includes only the act of “sexual penetration” in its definition of aggravated felonious sexual assault and further states that the actor use his position of authority over the victim “[to] coerce the victim to submit.”²¹⁰ This language makes New Hampshire’s statute narrower than the other states to close the loophole, and it also suggests the prosecutor has the added burden of proving the use of coercion.²¹¹ Additionally, instead of providing marriage as a defense to such conviction, New Hampshire law states that upon proof that the parties were “intimate partners or family or household members,” the conviction is recorded as “aggravated felonious sexual assault-domestic violence.”²¹²

207. H. 1564, Reg. Sess. (N.H. 2018).

208. N.H. REV. STAT. ANN. § 632-A:2(I)(n) (Westlaw through Chapter 1 of the 2019 Reg. Sess.).

209. *Id.* (Westlaw through Chapter 1 of the 2019 Reg. Sess.).

210. *Id.* § 632-A:2(I)(c) (Westlaw through Chapter 1 of the 2019 Reg. Sess.). For the relevant definition of “sexual penetration,” see N.H. REV. STAT. ANN. § 632-A:1 (Westlaw through Chapter 1 of the 2019 Reg. Sess.). Consequently, New Hampshire’s statute fails to cover situations when a police officer and individual in police custody engage in sexual contact not rising to the level of sexual penetration. *See* N.H. REV. STAT. ANN. § 632-A:3 (Westlaw through Chapter 1 of the 2019 Reg. Sess.). Likewise, Connecticut and New Jersey’s relevant statutes only cover sexual intercourse with a person in custody of law. *See* CONN. GEN. STAT. ANN. § 53a-71(5) (Westlaw through General Statutes of Conn., Revision of 1958, Revised to Jan. 1, 2019); N.J. STAT. ANN. § 2C:14-2(c)(2) (West, Westlaw through L.2019, c. 60 and J.R. No. 4).

211. Colorado, Tennessee and Wyoming have similar language in their statutes, which require proof that the officer overtly abused his authority. COLO. REV. STAT. ANN. § 18-3-404(1)(f) (West, Westlaw through Ch. 96 of the First Reg. Sess. of the 72nd General Assem. (2019)) (“Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual conduct if: victim is in custody . . . and the actor uses this position of authority to cause the victim to submit.”); TENN. CODE ANN. § 39-13-527 (West, Westlaw through laws from the 2019 First Reg. Sess. of the 111th Tenn. General Assem., eff. through Apr. 8, 2019) (sexual battery by a person who had “custodial authority over the victim and used the authority to accomplish the sexual contact”); WYO. STAT. ANN. § 6-2-303(a)(vi) (West, Westlaw through chapters effective Mar. 15, 2019 of the 2019 General Sess.) (“[A]ctor . . . commits sexual assault in the second degree if . . . actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit.”).

212. N.H. REV. STAT. ANN. § 632-A:2 (Westlaw through Chapter 1 of the 2019 Reg. Sess.).

B. Federal Attempt to Close the Loophole

In 2018, federal bills to close the consent loophole in the context of federal law enforcement officers were introduced in both the House and the Senate but failed to be enacted before the close of the 115th Congressional Session.²¹³ Nonetheless, the “Closing the Law Enforcement Consent Loophole Act of 2018” was met with support and the federal government should reintroduce the bill to be enacted in the current Congressional Session.²¹⁴

Representative Jackie Speier introduced the House bill, “Closing the Law Enforcement Consent Loophole Act of 2018,” which would amend title 18 of the United States Code to make it a “criminal offense for Federal law enforcement officers to engage in sexual acts with individuals in their custody,” and “to encourage States to adopt similar laws.”²¹⁵ The bill would prohibit Federal law enforcement officers from engaging in sexual acts with an individual who is under arrest, detained, or otherwise in custody, regardless of that individual’s consent.²¹⁶ Punishment for such an offense would be a fine and/or a maximum term of imprisonment of fifteen years.²¹⁷

A nearly identical Senate bill was later introduced by Senator Richard Blumenthal and Senator Cory Booker.²¹⁸ The main difference between the Senate and the House bill is the Senate bill’s inclusion of the phrase “acting under color of law.”²¹⁹ Thus, the proposed law, in general, would prohibit individuals “acting under color of law, [from] knowingly engag[ing] in a sexual act with an individual . . . in the actual custody of any Federal law enforcement officer,” and would expressly prohibit consent as a defense.²²⁰ Furthermore, the bill would incentivize states to adopt similar laws and facilitate in the collection of data on reports of law enforcement officers

213. H.R. 6568, 115th Cong. (2018).

214. Rifkin, *supra* note 18.

215. H.R. 6568.

216. *Id.* § 2.

217. *Id.*

218. S. 3688, 115th Cong. (2018).

219. *Compare* H.R. 6568 (“Whoever, being a Federal law enforcement officer, knowingly engages in a sexual act with an individual who is under arrest, in detention, or otherwise in the actual custody of that Federal law enforcement officer, shall be fined under the title, imprisoned not more than 15 years, or both.”); *with* S. 3688 § 2 (“Whoever, acting under color of law, knowingly engages in a sexual act with an individual, including an individual who is under arrest, in detention, or otherwise in the actual custody of any Federal law enforcement officer, shall be fined under the title, imprisoned not more than 15 years, or both.”).

220. S. 3688, 115th Cong. § 2 (2018).

engaging in sexual acts with individuals in the custody of law enforcement, by providing funding to states that do so.²²¹

Even though the “Closing the Law Enforcement Consent Loophole Act of 2018” was not enacted, it is further evidence that the issue is gaining momentum and encourages those states which have not closed the consent loophole to take action as well.²²²

V. CLOSING THE LOOPHOLE IN SOUTH CAROLINA

South Carolina is among the twenty-eight states that still have the presence of the consent loophole.²²³ As such, the state of South Carolina should pass a bill providing that people in police custody are legally incapable of consenting to sexual acts with law enforcement officers.

A. *South Carolina Should Pass the Detainee Consent Bill*

Anna Doe’s case prompted South Carolina State Representative Mandy Powell Norrell to introduce a bill to amend Section 44-23-1150 of South Carolina Code of Laws.²²⁴ The “Detainee Consent Bill” was introduced in the House during the 2019 to 2020 Legislative Session.²²⁵ “The bill is based on the belief that crime suspects and victims should be given the same protection as inmates.”²²⁶ Therefore, the Detainee Consent Bill would close the consent loophole and affirmatively recognize that individuals in police custody are incapable of giving consent to sexual encounters with police officers and other law enforcement officials.²²⁷

The Detainee Consent Bill would amend the current section of South Carolina law that defines the crime of “Sexual misconduct with an inmate, patient, or offender.”²²⁸ First, the bill would amend the meaning of “actor” and classify it into three sub-parts.²²⁹ Part (a) and part (b) come directly from the current statutory meaning of “actor.”²³⁰ Part (c) is new matter that would be added to the meaning of actor: “a police officer or other law enforcement official,” who is responsible for either the arrest of the victim or “for

221. *Id.* § 3.

222. Rifkin, *supra* note 18.

223. *See infra* Figure 1.

224. H. 3590, Gen. Assemb., 123rd Sess. (S.C. 2019).

225. *Id.*

226. *Id.*

227. *Id.*

228. S.C. CODE ANN. § 44-23-1150 (2018).

229. *Id.* § 44-23-1150(A)(1)(a)–(c); H. 3590.

230. *Id.* § 44-23-1150(A).

maintaining the victim in actual custody,” or who “knows or reasonably should know that the victim is under arrest or otherwise in actual custody.”²³¹ This definition is comparable the ones found in the New York, Louisiana, and New Hampshire statutes, suggesting it is a sufficient change to the meaning of “actor.”²³² However, as noted in the comparison between the New York and Kansas bills, this definition of “actor” potentially would not extend to protect victims, witnesses, or suspects that are not arrested or “otherwise in actual custody.”²³³

Next, the Detainee Consent Bill would amend the meaning of “victim” to include “a person who is under arrest or otherwise in the actual custody of a police officer or other law enforcement official.”²³⁴ Like the definition of “actor,” this meaning would restrict “victim” to only those arrested or otherwise in actual police custody. Additionally, the proposed bill does not explicitly include an individual that is “in detention,” although several other state statutes explicitly provide this.²³⁵

The bill would also provide that “a victim is not capable of providing consent for sexual intercourse or sexual contact with an actor.”²³⁶ Importantly, the bill would cover both sexual intercourse and sexual contact; the definition of “sexual misconduct” would include when an actor knows the victim is a “person under arrest or otherwise in actual custody,” and, nonetheless, “voluntarily engages in sexual intercourse” or “other sexual contact” with the victim.²³⁷ In contrast to the New Hampshire statute, this would allow citizens more protection from various forms of police sexual misconduct. Furthermore, unlike several states that have closed the loophole, the Detainee Consent Bill would not provide a spousal exception.²³⁸

231. H. 3590.

232. *See id.*; N.H. REV. STAT. ANN. § 632-A:2(I)(n) (Westlaw through Chapter 1 of the 2019 Reg. Sess.); LA. STAT. ANN. § 14:41.1(1)-(2) (West, Westlaw through the 2018 Third Extraordinary Session); S. 7708, 2018 (N.Y. 2018).

233. H. 3590.

234. H. 3590.

235. *See* KAN. STAT. ANN. § 21-5512 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019); N.H. REV. STAT. ANN. § 632-A:2(I)(n) (Westlaw through Chapter 1 of the 2019 Reg. Sess.); N.Y. PENAL § 130.05(3)(j) (McKinney, Westlaw through L.2019, chapter 29); Closing the Law Enforcement Consent Loophole Act of 2018, H.R. Res. 6568, 115th Cong. § 2243(c) (2018).

236. H. 3590.

237. *Id.*

238. CONN. GEN. STAT. ANN. § 53a-71 (Westlaw through General Statutes of Conn., Revision of 1958, Revised to Jan. 1, 2019); HAW. REV. STAT. ANN. §§ 707-731(1)(d)(ii), 707-732(1)(c)(ii) (West, Westlaw through Act 27 of the 2019 Reg. Sess.); IND. CODE ANN. § 35-44.1-3-10 (West, Westlaw through all legislation of the 2019 First Reg. Sess. of the 121st General Assem. effective through Apr. 25, 2019); N.Y. PENAL § 130.05(3)(j) (McKinney,

If the Detainee Consent Bill had been enacted prior to the Dereck Johnson case, a different result might have occurred. First, in order for the bill to apply, the court must consider whether or not the victim was “in the actual custody” of a law enforcement official.²³⁹ To determine whether an individual is in custody, “the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of the interrogation, as well as whether the suspect was free to leave the place of questioning.”²⁴⁰ “The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody.”²⁴¹ Applying the Johnson case, this analysis would require more facts about the circumstances of Johnson’s interaction with the victim, but it also illustrates the potential shortfall in the bill’s protection of witnesses, suspects, and other individuals that come into official contact with on-duty police officers.

While the Detainee Consent Bill may not have led to the conviction of Johnson for sexual misconduct, it could potentially prevent incidences like this from happening in the first place. By officially criminalizing sexual acts between a police officer and an individual in police custody, the proposed bill may lead police departments to be more conscious of such conduct and increase training on the issue. In Johnson’s case, this could have prevented the argument that it was not included in the training manual and thus he did not know what to do in this particular scenario.²⁴² Furthermore, the availability of criminal prosecution for such acts could have alleviated the victim’s desire to file civil actions against Johnson and the Orangeburg County Sheriff’s Office.²⁴³

B. Other Ways South Carolina Can Address Police Sexual Misconduct

Passing the bill to close the consent loophole is a step in the right direction towards addressing police sexual misconduct. However, the lack of formal policies, recording systems, and research suggest that more needs to be done.

Westlaw through L.2019, chapter 29); OKLA. STAT. ANN. tit. 21, §§ 1111(6) (Westlaw through Chapter 179 of the First Reg. Sess. of the 57th Leg. (2019)); TEX. PENAL CODE ANN. § 39.04 (Vernon, Westlaw through Chapter 5 of the 2019 Reg. Sess. of the 86th Leg.).

239. S.C. CODE ANN. § 44-23-1150(A)(1)(a)–(c) (2018); H. 3590.

240. *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003) (first citing *Berkemer v. McCarty*, 468 U.S. 420 (1984); then citing *United States v. Helmelt*, 769 F.2d 1306, 1320 (8th Cir. 1985); and then citing *Kaupp v. Texas*, 538 U.S. 626 (2003)).

241. *Evans*, 354 S.C. at 583, 582 S.E.2d at 410 (citing *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493–94 (1994); and then citing *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (S.C. Ct. App. 1996)).

242. *Preliminary Hearing*, *supra* note 133; *Brown*, *supra* note 128.

243. *See supra* note 161 and accompanying text.

“Perhaps, formal policies addressing [police sexual misconduct] will be developed and become standard in policing only when law enforcement is pressured by the public, the media, and the courts to enact such policies.”²⁴⁴ The several cases within South Carolina that achieved media coverage were able to initiate some dialogue in the general public, but the lack of criminal punishment for the perpetrators suggests the system itself is flawed.²⁴⁵ Enacting legislation to better protect individuals against police sexual misconduct is the first step towards ensuring that victims do not go without remedies and perpetrators are held accountable.²⁴⁶

Additionally, South Carolina must develop a uniform system of investigating and reporting police sexual misconduct, namely, independent investigations of allegations—as opposed to internal investigations by police unions.²⁴⁷ Civilian oversight of such agencies could help ensure that investigations are done free from political and social influencers.²⁴⁸ After all, “[t]he propriety of the investigation is less likely to be questioned when an outside investigative agency is involved.”²⁴⁹ Furthermore, allegations of police sexual misconduct should be promptly investigated.²⁵⁰ This will help avoid the high-dollar law suit settlements resulting from ignored allegations and insufficient investigations.

Finally, South Carolina police departments need to restructure their police handbooks and policies in order to properly educate officers about restrictions on sexual interactions with those individuals they encounter while on duty. In fact, most police departments do not have policies or training in place which explicitly state that on-duty sexual misconduct against civilians is prohibited.²⁵¹ Indeed, formal written policies are the dominate approach in controlling police behaviors, and “[t]here is little doubt that written policies

244. Maher, *supra* note 21, at 378.

245. For example, Horry County Police Detective Allen Large was accused of sexually coercing women whose cases he was to investigate to engage in sexual behaviors with him. *See* Alex Lang, *Allen Large SLED Case File Released*, MYRTLE BEACH ONLINE (Apr. 19, 2018, 4:04 PM), <https://www.myrtlebeachonline.com/news/local/crime/article209334814.html>; Audrey Hudson & Joel L. Hughes II, *Former Horry County Police Detective Found Dead*, STATE (Columbia, S.C.) <https://www.thestate.com/latest-news/article194085249.html> (last updated Jan. 11, 2018, 2:57 PM). The local authorities were made aware of his behavior as early as 2003, but state law enforcement officials were not called to investigate until 2015. *Id.* Ultimately, the cases against Large never went to trial. *Id.*

246. But compare to Quinlan, *supra* note 90, for Andrea Ritchie’s argument that the focus needs to be on changing policies within police departments rather than changing the law.

247. *Id.*

248. Ritchie, *supra* note 93.

249. IACP, *supra* note 77, at 11.

250. *See* Tromadore, *supra* note 28, at 185.

251. *See* Ritchie, *supra* note 93.

specifically addressing sexual misconduct would help to establish a better understanding of this issue.”²⁵² Scholars agree that new policies and training programs within police departments are needed to address police sexual misconduct.²⁵³ “Creating and implementing a policy are key steps to ensure an agency is prepared to respond to allegations, reinforce officer accountability, and ultimately prevent abuses of power.”²⁵⁴

VI. CONCLUSION

The significant majority of police officers serve honorably, but the few who engage in sexual misconduct with individuals—many under their direct custody—while on duty have an outsized impact. The costs of passing South Carolina’s Detainee Consent Bill are marginal, especially considering the potential benefits of deterring, enforcing, and punishing police sexual misconduct with individuals in police custody.²⁵⁵ Research reveals that sexual misconduct by officers is a problem facing law enforcement agencies across the country, and South Carolina is not immune from these difficulties.²⁵⁶

By allowing police officers to use the consent defense, the State of South Carolina is ignoring the power disparity between a police officer and an individual in police custody which renders consent problematic—at best. South Carolina law currently recognizes that an inmate is not capable of providing consent for sexual conduct with law enforcement officers²⁵⁷ and the same protection should apply to individuals in police custody. The egregious consequences of the consent loophole were brought to light by the Dereck Johnson and Anna Doe cases, and a variety of factors explain why a crime suspect—or victim—is unable to consent to sexual acts with a law enforcement officer while in custody. The State of South Carolina should follow the example of other states that have closed the loophole and pass a law to provide individuals in police custody the same protection as inmates.

252. Maher, *supra* note 21, at 377.

253. See Trombadore, *supra* note 28, at 184.

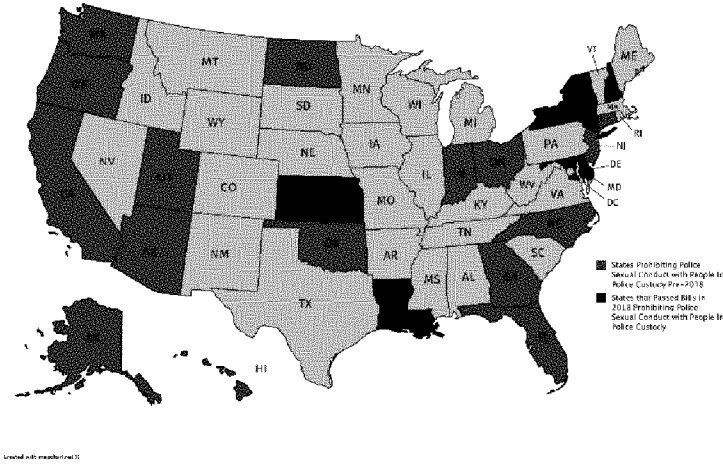
254. IACP, *supra* note 77, at 1.

255. For analyses of similar bills and the potential fiscal effects on those states, see Broadwater, *supra* note 204 (analyzing the potential fiscal effects of the bill in Maryland) and Casey McDermott, *N.H. Bill Seeks to Classify Sex Between Prisoners, Officers as Assault*, NHPR (Feb. 10, 2018), <https://www.nhpr.org/post/nh-bill-seeks-classify-sex-between-prisoners-officers-assault#stream/0> (analyzing the potential fiscal impact of the act in New Hampshire). Furthermore, if the federal government passes a bill similar to the Closing the Consent Loophole Act of 2018, South Carolina can receive federal funding if the state passes the Detainee Consent Bill. See H.R. 6568, 115th Cong. § 3 (2018).

256. See *Horry County Police Officers*, *supra* note 157.

257. S.C. CODE ANN. § 44-23-1150(B) (2018).

Figure 1: States Prohibiting Police and Detainee Sexual Conduct Regardless of Consent²⁵⁸



258. See DEL. CODE ANN. tit. 11, § 780A (West, Westlaw through 82 Laws 2019, chapter 7); KAN. STAT. ANN. § 21-5512 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Apr. 25, 2019); LA. STAT. ANN. § 14:41.1 (West, Westlaw through the 2018 Third Extraordinary Sess.); MD. CODE ANN., CRIM. LAW § 3-314 (West, Westlaw through legislation effective Apr. 30, 2019 from the 2019 Reg. Sess. of the General Assemb.); N.H. REV. STAT. ANN. § 632-A:2(1)(n)(1) (Westlaw through Chapter 1 of the 2019 Reg. Sess.); 2018 N.Y. Sess. Laws A. 9505-D (McKinney, Westlaw through L.2019, chapter 29); Samaha, *supra* note 76.