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ELIMINATING THE LOOPHOLE AND HOLDING POLICE ACCOUNTABLE: MAKING IT A CRIME FOR POLICE TO ENGAGE IN SEXUAL CONTACT AND ACTS WITH PERSONS IN THEIR CUSTODY

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I. INTRODUCTION

Imagine being an eighteen-year-old young woman named Anna in south Brooklyn just trying to hang out with two male friends in a parked car.¹ As this eighteen-year-old is hanging out with her friends, a gray van pulls up to the car she is parked in.² The occupants of the van were two plainclothes detectives and they approached the vehicle flashing their badges.³ As the detectives approached the car, they noticed weed in the front cup holder and ordered everyone out of the car.⁴ Next is where this story takes a turn; the three individuals were not just arrested

¹ Albert Samaha, *This Teenager Accused Two On-Duty Cops of Rape. She Had No Idea the Law Might Protect Them*, BUZZFEED NEWS (Feb. 7, 2018), https://www.buzzfeed.com/albertsamaha/this-teenager-accused-two-on-duty-cops-of-rape-she-had-no?utm_term=.lkPeooqNq&bftwnews#.yjOwRRqq1q (explaining incident that occurred in Brooklyn, New York with two detectives and eighteen-year old woman).

² *See id.*

³ *See id.*

⁴ *See id.*

and taken to the police station.⁵ Rather, after being ordered out of the car, the two male car occupants were free to go, while Anna was led to the back of the unmarked police van.⁶ In the backseat of the van, the detectives allegedly took turns raping Anna while she was handcuffed and telling them “no.”⁷ This eighteen-year-old was allegedly forced to perform oral sex on both of the detectives, after which they both raped her.⁸ About an hour after this ordeal began, Anna was dropped off less than a quarter-mile from the police station.⁹

The officers involved “made no arrest, issued no citation, filed no paperwork about the stop.”¹⁰ Later that evening, Anna finally went to the hospital with her mother, where she revealed that she had been sexually assaulted by two detectives.¹¹ While at the hospital, Anna reported that at least nine different police officers came to her room to try and dissuade her from going through with the rape kit.¹² The results of a rape kit revealed that the semen matched detectives Eddie Martins and Richard Hall of the Brooklyn South narcotics unit.¹³ Prosecutors ultimately brought charges against the detectives, including charges of rape, kidnapping and official misconduct.¹⁴ The indictment against the detectives also reveals that they “threatened her with

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*

⁸ *See* Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, THE WASHINGTON 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=.b52ccd6671d8 (detailing specific events and sex acts Anna was forced to perform on two detectives in Brooklyn while she was in police custody).

⁹ *See* Samaha, *supra* note 1.

¹⁰ *See id.*

¹¹ *See id.*

¹² *See* Ritchie, *supra* note 8.

¹³ *See* Samaha, *supra* note 1.

¹⁴ *See* Ritchie, *supra* note 8.

criminal charges if she didn't cooperate."¹⁵ Detectives Eddie Martins and Richard Hall have quit the police force.¹⁶

Most would think this was an easy case: on-duty officers had sex with a woman in their custody. Many would believe this was easily a sexual assault crime or a violation of police policies. However, at the time this incident occurred, New York was one of thirty-four states and the District of Columbia that does not make it unlawful for law enforcement officers to have sex with someone they arrest. Officers in one of these states and the District of Columbia are able to “evade sexual assault charges by claiming that such an encounter – from groping to intercourse – was consensual.”¹⁷ This means that in many states, officers can claim that the encounter was consensual in order to evade criminal charges of sexual assault.¹⁸ Many have referred to this problem as a “loophole” with the existing law.¹⁹

Currently in every state there are laws that “criminaliz[e] sexual contact between correctional officers and inmates” and allows correctional officers to evade sexual assault charges by claiming that the encounter was consensual.²⁰ The premise behind the laws for Department of Corrections officers is that people within their custody, i.e., inmates and probationers, are unable to consent to sexual intercourse with the offender.²¹ Nevertheless, thirty-two states and the District of Columbia do not have similar laws that include police officers, thus

¹⁵ See Ritchie, *supra* note 8.

¹⁶ See Ritchie, *supra* note 8.

¹⁷ See Samaha, *supra* note 1.

¹⁸ See Samaha, *supra* note 1.

¹⁹ See Samaha, *supra* note 1.

²⁰ See *Custodial Sexual Misconduct Laws: A State-by-State Legislative Review*, <https://static.prisonpolicy.org/scans/sprcsmstatelaw.pdf> (last visited April 23, 2018). See Samaha, *supra* note 1.

²¹ See *Deterring Staff Sexual Abuse of Federal Inmates*, Office of the Inspector General (April 2005), <https://oig.justice.gov/special/0504/index.htm> (discussing reason for federal law criminalizing sexual relations between staff and inmates).

creating a legal loophole. How is it that inmates and others under the control of someone working for the Department of Corrections is unable to consent, but someone put under arrest by an officer is able to consent?

This paper argues that individuals in police custody are unable to consent to sexual activity with police officers due to the inherent coercive nature of police interactions, and thus these types of sexual encounters should be deemed sexual assaults under the law and consent should not be a defense. There is a manifest imbalance of power that exists between police officers and community members being arrested that creates a coercive environment that makes it impossible for individuals to consent. There is an inherent coercive nature to police arrests that prohibits individuals in these circumstances from being able to consent to sexual intercourse with an officer. There are other areas in society that prohibit individuals from consenting to sexual activity with another person, due to the inability of that person to provide knowing, voluntary consent.

Part II discusses the pervasive nature police sexual misconduct, an overview of custodial sexual abuse laws, the problems associated with consent, and the coercive nature of police interactions.²² Part III explains the need to create laws prohibiting police from engaging in sex acts with persons in their custody.²³ It further discusses why consent should not be a viable defense to these types of sexual assaults. Lastly, Part IV concludes by discussing the recent changes made by state legislatures to fix this “loophole” and providing a solution to reduce police sexual misconduct incidents.²⁴

²² See *infra*, notes 25-89.

²³ See *infra*, notes 90-98.

²⁴ See *infra*, notes 99-113.

II. BACKGROUND

In some facets of society, law enforcement officials and other state employees are held to higher standards than the rest of society, in part due to their positions of power. Law enforcement officials are expected to abide by the law. States and the federal government have enacted laws to apply specifically to various levels of state employees, which include police officers and Department of Corrections employees.²⁵ Individuals are protected from coercive police tactics during custodial interrogations and are protected from unreasonable searches and seizures. Inmates and persons under the supervision and control of state facilities and departments are offered additional protections against sexual abuse, by not allowing persons in these supervisory positions to claim the sexual acts were consensual.²⁶

A. Pervasive Problem

Stories like Anna's are unfortunately not uncommon. Individuals in police custody are vulnerable to police sexual misconduct and some police officers take advantage of this situation.²⁷ The specific number officers who have been accused of sexual misconduct is unknown because the federal Bureau of Justice Statistics does not provide this information and the states are not required to collect this information.²⁸ According to reports, police sexual misconduct is likely the second most common form of police misconduct; the most commonly

²⁵ For an example of laws specifically focused on Department of Correction employees and police officers, see *infra* notes 43-58 and accompanying text.

²⁶ For a discussion of custodial or institutional sexual abuse laws that are enacted in every state, see *infra* notes 43-62 and accompanying text.

²⁷ See Liz Wolfe, *In Most States, It's Legal for Cops to Have Sex with People in Their Custody*, RARE (Feb. 9, 2018, 5:35 PM), <https://rare.us/rare-politics/rare-liberty/police-state/in-most-states-its-legal-for-cops-to-have-sex-with-people-in-their-custody/>.

²⁸ See Matt Sedensky, *AP: Hundreds of Officers Lose Licenses Over Sex Misconduct*, ASSOCIATED PRESS (Nov. 1, 2015), <https://apnews.com/fd1d4d05e561462a85abe50e7eaed4ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct>; see also Wolfe, *supra* note 27.

reported form of police misconduct is excessive force.²⁹ One study, by the Buffalo News, reported “more than 700 credible cases of sexual misconduct from law enforcement personnel over a 10-year period.”³⁰ It was reported that “at least 158 officers had been charged with unlawful sexual conduct with people under their control.”³¹ The International Association of Chiefs of Police recognized the problem of police sexual misconduct and created a program to address this issue and to help alleviate the problem.³²

One example highlighting this problem occurred in Oklahoma City, when Officer Daniel Holtzclaw allegedly sexually assaulted at least seven women while on duty.³³ Officer Holtzclaw coerced all of his victims, who were women, by threatening to arrest them if they did not engage in the sexual acts.³⁴ In particular, Officer Holtzclaw preyed on vulnerable women.³⁵ Another

²⁹ See 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, 153-55 (2016) (focusing on fact that police disproportionately threaten women of color in sexual misconduct incidents); see also Lincoln Anthony Blades, *Police and Sexual Assault: When Officers Are Perpetrators*, TEEN VOGUE (Nov. 22, 2017, 8:00 AM), <https://www.teenvogue.com/story/sexual-assault-police-officers>); Zoe Carpenter, *The Police Violence We Aren't Talking About*, THE NATION (Aug. 27, 2014), <https://www.thenation.com/article/police-violence-we-arent-talking-about/>.

³⁰ See *Abusing the Law*, BUFFALO NEWS, <http://projects.buffalonews.com/abusing-the-law/data.html> (last updated Dec. 2016) (providing cases and allegations of sexual misconduct by law enforcement personnel and accompanying data).

³¹ See The 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> (citing *Abusing the Law*, *supra* note 30).

³² See Trombadore, *supra* note 29, at 153-55 (focusing on fact that police disproportionately threaten women of color in sexual misconduct incidents).

³³ See Carpenter, *supra* note 29.

³⁴ See *id.*

³⁵ See Trombadore, *supra* note 29, at 154 (detailing Holtzclaw incidents). Trombadore explained the Holtzclaw trial, which included testimony from thirteen survivors. *Id.* She identified that he “took advantage of vulnerable women whose credibility he knew he could undermine based on their entrenchment in criminalized activities, poverty, or prior substance abuse problems.” *Id.* One victim described her encounter with Holtzclaw, in which she was coerced into engaging in oral sex with Holtzclaw. *Id.* According to the victim, Holtzclaw suggested “that he would drop

example comes from the San Diego Police Department where an officer was “accused of coercing sexual favors from women he’d stopped for driving while intoxicated.”³⁶

Although this is a pervasive problem that occurs all over the country, many victims do not report the crime.³⁷ The National Sexual Violence Resource Center states that rape, in general, is the most under-reported crime.³⁸ It is particularly problematic to report in situations where the attacker is a police officer.³⁹ Victims are be even more reluctant to report their sexual assault to the police when their attackers are the police.⁴⁰ A reason that victims may not want to report to police when the attacker is the police is due to the fear of retribution by the police officer.⁴¹ Many of these incidents are particularly problematic because they target vulnerable populations, such as sex workers or those who are committing a crime.⁴²

B. Overview of Laws Protecting Certain Vulnerable Groups

In all 50 States and the District of Columbia, there are laws currently on the books that prohibit Department of Correction employees and employees of other similar institutions from

her charges if she cooperated.” *Id.* To add to the horrific incident, one of the victim’s wrists was handcuffed to a bedrail. *Id.*

³⁶ See Carpenter, *supra* note 29.

³⁷ See *id.* See also *Statistics About Sexual Violence*, National Sexual Violence Resource Center (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (reporting that 63% of sexual assaults are not reported to police).

³⁸ See *Statistics About Sexual Violence*, *supra* note 37.

³⁹ See Blades, *supra* note 29.

⁴⁰ See Trombadore, *supra* note 29, at 154-55 (providing victim’s testimony about why she did not report rape to police). One victim in the Holtzclaw case testified at a pretrial hearing about why she did not immediately report the rape. *Id.* She asked, “[w]hat kind of police do you call on the police?” *Id.* at 155 (internal quotes omitted). This fully identifies the problem associated with victims reporting sexual assaults committed by police. *Id.* See also Blades, *supra* note 29.

⁴¹ See Roger Goldman, *Why Has Police Sexual Misconduct Escaped the #MeToo Movement?*, Newsweek (Dec. 22, 2017, 12:20 PM), <http://www.newsweek.com/metoo-ignore-police-sexual-misconduct-757033>.

⁴² See Trombadore, *supra* note 29, at 158-59. See also Carpenter, *supra* note 29.

engaging in sexual acts with inmates or individuals under their control.⁴³ Some states have created separate crimes for this type of conduct, referring to it as custodial sexual misconduct or institutionalized sexual abuse.⁴⁴ On the other hand, some states have included this type of abuse

⁴³ See generally, Nat'l Inst. of Corr. and 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), available at <https://nicic.gov/fifty-state-survey-criminal-laws-prohibiting-sexual-abuse-individuals-custody> [hereinafter Fifty-State Survey] (providing chart of every states' laws prohibiting sexual abuse of individuals in custody). See also Alaska Stat. § 11.41.427 (2017); Alaska Stat. § 11.41.425 (2017); Ariz. Rev. Stat. Ann. § 13-1419 (2011); Cal. Pen. Code § 289.6 (2015); Conn. Gen. Stat. § 53a-73a (2013); Fla. Stat. § 794.011 (2017); Ga. Code Ann. § 16-6-5.1 (2017); Haw. Rev. Stat. Ann. § 707-731 (LexisNexis 2016); Haw. Rev. Stat. Ann. § 707-732 (LexisNexis 2008); Ind. Code Ann. § 35-44.1-3-10 (LexisNexis 2014); N.J. Rev. Stat. § 2C:14-2 (2014); N.C. Gen. Stat. § 14-27.31 (2017); N.D. Cent. Code § 12.1-20-06 (2017); N.D. Cent. Code § 12.1-20-07 (2017); N.Y. Pen. Law § 130.05 (LexisNexis 2013); Ohio Rev. Code Ann. § 2907.03 (LexisNexis 2009); Okla. Stat. tit. 21, § 1111 (2017); Or. Rev. Stat. Ann. § 163.452 (2018); Or. Rev. Stat. Ann. § 163.454 (2017); Utah Code Ann. §76-5-412 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.44.160 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.44.170 (LexisNexis 2017); Ala. Code § 14-11-31 (LexisNexis 2018); Del. Code Ann. Tit. 11, § 1259 (2018); D.C. Code § 22-3014 (2018); D.C. Code § 22-3013 (2018); Idaho Code Ann. § 18-6110 (2018); 720 Ill. Comp. Stat. Ann. § 5/11-9.2 (LexisNexis 2017); Iowa Code § 709.16 (2015); Kans. Stat. Ann. § 21-5512 (2014); La. Stat. Ann. § 14:134.1 (2010); Md. Code Ann., Crim. Law § 3-314 (LexisNexis 2018); Mass. Ann. Laws ch. 268, § 21A (LexisNexis 2018); Miss. Code Ann. § 97-3-104 (2010); Mo. Ann. Stat. § 566.145 (LexisNexis 2017); Neb. Rev. Stat. Ann. § 28-322 (LexisNexis 2018); Neb. Rev. Stat. Ann. § 28-322.01 (LexisNexis 2018); Nev. Rev. Stat. Ann. § 212.188 (LexisNexis 2017); 18 Pa. Cons. Stat. Ann. § 3124.2 (LexisNexis 2011); 11 R.I. Gen. Laws Ann. § 11-25-24 (LexisNexis 2017); S.C. Code Ann. § 44-23-1150 (2001); S.D. Codified Laws § 22-22-7.6 (2013); S.D. Codified Laws §24-1-26.1 (2017); Tenn. Code Ann. § 39-16-408 (2017); Tex. Penal Code Ann. § 39.04 (LexisNexis 2017), Vt. Stat. Ann. Tit. 13, § 3257 (2017), Va. Code Ann. § 18.2-64.2 (2017); Va. Code Ann. § 18.2-67.4 (2017); W. Va. Code Ann. § 61-8B-10 (LexisNexis 2018); Colo. Rev. Stat. Ann. § 18-3-402 (LexisNexis 2013); Colo. Rev. Stat. Ann. § 18-7-701 (LexisNexis 2010), Kan. Stat. Ann. § 510.120 (2012), Me. Stat. Ann. tit. 17-A, § 260 (2016); Me. Stat. Ann. tit. 17-A § 255-A (2016); Me. Stat. Ann. tit. 17, § 253 (2017); Mich. Comp. Laws Serv. § 750.520c (LexisNexis 2013); Minn. Stat. Ann. § 609.345 (LexisNexis 2010); Minn. Stat. Ann. § 609.344 (LexisNexis 2014); Mont. Code Ann. § 45-5-502 (2011); N.H. Rev. Stat. Ann. § 632-A:3 (LexisNexis 2018); N.H. Rev. Stat. Ann. § 632-A:2 (LexisNexis 2018); N.M. Stat. Ann. § 30-9-11 (LexisNexis 2018); Wis. Stat. Ann. § 940.225 (LexisNexis 2013); Wyo. Stat. Ann. § 6-2-303 (LexisNexis 2017).

⁴⁴ See generally Fifty-State Survey, *supra* note 43 (identifying states that have separate custodial or institutional sexual abuse laws).

within the general sexual assault provisions of its criminal code.⁴⁵ In addition to laws applying to correctional officers, there are also laws that make it a sexual assault crime when a school official engages in sexual activity with a student.⁴⁶ States have acknowledged that there need to be laws in place that prohibit this type of conduct. Inmates in federal correctional facilities are unable to consent, according to federal law.⁴⁷ It is argued that individuals under the supervision and control of the Department of Corrections and students are unable to consent to sexual activity. This means that they are not able to consent to sex with a correctional officer, probation officer, or school employee. Detention facility inmates and students are unable to consent due to the imbalance of power associated with the unique relationships with Department of Corrections and school employees. These employees have authority over inmates or students, which makes it impossible for an inmate or student to knowingly and voluntarily consent. Thus, states have enacted laws that make it a sexual assault offense if school or detention center employees engage in sexual contact with a student or a person that is under the supervision of the Department of Corrections.

1. Custodial and Institutional Sexual Abuse Statutes

Although all 50 states plus the District of Columbia have laws that make it a sexual abuse crime for detention center employees to have sex with inmates or others under their supervision, these statutes vary in what is included in them. These laws vary in their degree and penalty,

⁴⁵ See *id.* (listing states and their statutes which include sexual abuse by Department Corrections employees within its general sexual assault statutes).

⁴⁶ See *infra*, notes 59-62.

⁴⁷ See *Deterring Staff Sexual Abuse of Federal Inmates*, *supra* note 21. In a special report from the Office of the Inspector General, it was made clear that consent is not a defense to sexual relations between prison staff and inmates under the federal law. *Id.*

ranging from misdemeanors to felonies, and from first degree to fourth degree sexual assault.⁴⁸

Some of the states specifically include consensual sex acts as prohibited, others provide that consent is not a defense to sexual abuse, while others make no mention of consent and do not require proof that the act is in violation of the victim's consent.⁴⁹ And still other laws vary by the types of sexual acts, like sexual contact versus sexual penetration, or only having one degree while others have multiple degrees.⁵⁰

a. States Without Statutes that Apply to Police Officers or Persons in Their Custody

In thirty-two states and the District of Columbia, the legislature has enacted laws that prohibit sexual contact between Department of Corrections employees or detention center employees and inmates or other individuals under their supervision or control.⁵¹ In these thirty-

⁴⁸ See generally Fifty-State Survey, *supra* note 43 (discussing penalties associated with custodial or institutional sexual abuse). See also Haw. Rev. Stat. Ann. § 707-731 (LexisNexis 2016) (identifying sexual penetration as sexual assault in the second degree); Haw. Rev. Stat. Ann. § 707-732 (LexisNexis 2008) (labelling sexual contact as sexual assault in the third degree).

⁴⁹ See D.C. Code § 22-3017 (2018) (providing defenses to sexual abuse of wards, patients, or clients). The District of Columbia has a separate statute that states “consent is not a defense to prosecution” under D.C. Code §§ 22-3013, 22-3014, which deal with sexual abuse of wards. *Id.* See also *Deterring Staff Sexual Abuse of Federal Inmates*, *supra* note 21 (explaining that under federal law consent is not a defense).

⁵⁰ See Neb. Rev. Stat. Ann. § 28-322.02 (LexisNexis 2018) (stating penalty for sexual abuse of inmate or parolee in first degree); Neb. Rev. Stat. Ann. 28-322.03 (LexisNexis 2018) (stating penalty for sexual abuse of inmate of parolee in second degree); Alaska Stat. § 11.41.427 (2017) (dealing with offenders that engage in sexual contact and how this contact is sexual assault in the fourth degree); Alaska Stat. § 11.41.425 (2017) (discussing offenders who engage in sexual penetration and how this sexual penetration is sexual assault in the third degree). See generally *Deterring Staff Sexual Abuse of Federal Inmates*, *supra* note 21 (providing rationale for federal law that does not allow for consent as defense).

⁵¹ See Ala. Code § 14-11-31 (LexisNexis 2018); Del. Code Ann. Tit. 11, § 1259 (2018); D.C. Code § 22-3014 (2018); D.C. Code § 22-3013 (2018); Idaho Code Ann. § 18-6110 (2018); 720 Ill. Comp. Stat. Ann. § 5/11-9.2 (LexisNexis 2017); Iowa Code § 709.16 (2015); Kans. Stat. Ann. § 21-5512 (2014); La. Stat. Ann. § 14:134.1 (2010); Mass. Ann. Laws ch. 268, § 21A (LexisNexis 2018); Miss. Code Ann. § 97-3-104 (2010); Mo. Ann. Stat. § 566.145 (LexisNexis 2017); Neb. Rev. Stat. Ann. § 28-322 (LexisNexis 2018); Neb. Rev. Stat. Ann. § 28-322.01 (LexisNexis 2018); Nev. Rev. Stat. Ann. § 212.188 (LexisNexis 2017); 18 Pa. Cons. Stat. Ann. §

two states and the District of Columbia there are no laws that include interactions involving police officers and persons in their custody.⁵²

Each state uses different language to prohibit sexual contact between detention center employees and persons under their supervision, but it has been interpreted that every state includes Department of Corrections employees and inmates.⁵³ Many states also include Department of Probation and Parole employees and persons and probationers, parolees, or other individuals under their supervision or control.⁵⁴

Many of these laws are different than every states' general sexual assault statutes because they do not allow for consent as a defense to these crimes.⁵⁵ These laws generally apply to individuals under the supervision of detention center employees, regardless of whether the act was consensual. Thus, some states recognize that inmates and persons under state supervision are unable to consent due to the nature of their relationship.⁵⁶

3124.2 (LexisNexis 2011); 11 R.I. Gen. Laws Ann. § 11-25-24 (LexisNexis 2017); S.C. Code Ann. § 44-23-1150 (2001); S.D. Codified Laws § 22-22-7.6 (2013); S.D. Codified Laws §24-1-26.1 (2017); Tenn. Code Ann. § 39-16-408 (2017); Tex. Penal Code Ann. § 39.04 (LexisNexis 2017); Vt. Stat. Ann. Tit. 13, § 3257 (2017); Va. Code Ann. § 18.2-64.2 (2017); Va. Code Ann. § 18.2-67.4 (2017); W. Va. Code Ann. § 61-8B-10 (LexisNexis 2018); Colo. Rev. Stat. Ann. § 18-3-402 (LexisNexis 2013); Colo. Rev. Stat. Ann. § 18-7-701 (LexisNexis 2010); Kan. Stat. Ann. § 510.120 (2012); Me. Stat. Ann. tit. 17-A, § 260 (2016); Me. Stat. Ann. tit. 17-A § 255-A (2016); Me. Stat. Ann. tit. 17, § 253 (2017); Mich. Comp. Laws Serv. § 750.520c (LexisNexis 2013); Minn. Stat. Ann. § 609.345 (LexisNexis 2010); Minn. Stat. Ann. § 609.344 (LexisNexis 2014); Mont. Code Ann. § 45-5-502 (2011); N.H. Rev. Stat. Ann. § 632-A:3 (LexisNexis 2018); N.H. Rev. Stat. Ann. § 632-A:2 (LexisNexis 2018); N.M. Stat. Ann. § 30-9-11 (LexisNexis 2018); Wis. Stat. Ann. § 940.225 (LexisNexis 2013); Wyo. Stat. Ann. § 6-2-303 (LexisNexis 2017).

⁵² For a list of the States' laws that do not include police officers, see *supra* note 51 and accompanying text.

⁵³ See *supra*, notes 43-52.

⁵⁴ See generally Fifty-State Survey, *supra* note 43 (outlining custodial sexual abuse laws).

⁵⁵ See *id.*

⁵⁶ See generally *id.* (discussing states that do not allow for consent as defense to sex acts between Department of Corrections employees and individuals under their supervision).

b. Statutes that Do Apply to Police Officers and Persons in Their Custody

While a majority of the States in the United States do not have laws like the Department of Corrections laws that extend to police officers and persons in their custody, there are eighteen states with laws that apply to police officers and individuals in their custody.⁵⁷ These statutes include language such as “peace officer” and “person in the custody or the apparent custody of the offender” or “in custody of law.”⁵⁸ Although each state uses different language within its statutes related to custodial sexual abuse, each of these eighteen states covers police officers and persons in their custody.

2. School Employees and Student Sexual Assaults

In addition to laws prohibiting sexual contact between Department of Correction employees and inmates, states have laws that make it a crime for school employees to engage in sexual acts with a student of the school.⁵⁹ According to a message from Pennsylvania Governor, Tom Corbett, one purpose of this type of law is to protect children from predators.⁶⁰ This is an example of the state legislature taking initiative to protect vulnerable persons in our society (i.e.,

⁵⁷ See Alaska Stat. § 11.41.427 (2017); Alaska Stat. § 11.41.425 (2017); Ariz. Rev. Stat. Ann. § 13-1419 (2011); Cal. Pen. Code § 289.6 (2015); Conn. Gen. Stat. § 53a-73a (2013); Fla. Stat. § 794.011 (2017); Ga. Code Ann. § 16-6-5.1 (2017); Haw. Rev. Stat. Ann. § 707-731 (LexisNexis 2016); Haw. Rev. Stat. Ann. § 707-732 (LexisNexis 2008); Ind. Code Ann. § 35-44.1-3-10 (LexisNexis 2014); N.J. Rev. Stat. § 2C:14-2 (2014); N.C. Gen. Stat. § 14-27.31 (2017); N.D. Cent. Code § 12.1-20-06 (2017); N.D. Cent. Code § 12.1-20-07 (2017); Ohio Rev. Code Ann. § 2907.03 (LexisNexis 2009); Okla. Stat. tit. 21, § 1111 (2017); Or. Rev. Stat. Ann. § 163.452 (2018); Or. Rev. Stat. Ann. § 163.454 (2017); Utah Code Ann. § 76-5-412 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.44.160 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.44.170 (LexisNexis 2017); H.B. 1292, 2018 Reg. Sess. (Md. 2018) (taking effect October 1, 2018); S.B. S7708, 2017-2018 Leg. Sess. (N.Y. 2018) (taking effect May 12, 2018).

⁵⁸ See Alaska Stat. § 11.41.427 (2017); Alaska Stat. § 11.41.425 (2017); Conn. Gen. Stat. § 53a-73a (2013).

⁵⁹ 18 Pa. Cons. Stat. Ann. § 3124.2 (LexisNexis 2011) (making institutional sexual assault a felony of the third degree).

⁶⁰ Pa. Gov. Mess., 195th Gen. Assemb. (Dec. 20, 2011).

children). Similar to the laws that apply to school officials, states have laws that apply to police officers and persons in their custody.⁶¹ These laws are similarly intended to protect persons who are vulnerable to the imbalance of authority in these situations.⁶²

C. Consent

Consent applies in many situations, from consent to searches to consent to engage in sex acts. In searches and seizures under the Fourth Amendment, individuals can provide consent for the search to be performed, but it must be knowing and voluntary. Sexual assault and rapes occur when an individual engages in a sex act without the other person's consent.

1. Consent to Search under the Fourth Amendment

Under the Fourth Amendment, individuals have the right to be free from unreasonable searches and seizures and search warrants should be obtained upon probable cause.⁶³ Although the Fourth Amendment generally requires a warrant in order to perform a search or seizure, there are many exceptions to this rule. One exception is consent of the individual for the police officer to perform the search.⁶⁴

⁶¹ For a discussion of states with laws that apply to police officers and persons in their custody, see *supra* notes 57-58 and accompanying text.

⁶² For a discussion of the coercive nature and imbalance of power associated with police interactions, see *infra* notes 77-89 and accompanying text.

⁶³ U.S. CONST. amend. IV. According to the Fourth Amendment,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

⁶⁴ See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 215-16 (Fall 2001/Winter 2002) (addressing consent exception to warrant requirement). Strauss acknowledges that there is disagreement over “whether the consent doctrine is actually an exception to the warrant requirement.” *Id.* at 216 n.11. Many believe the consent doctrine is an exception to the

The Supreme Court discussed the voluntariness of consent searches under the Fourth Amendment in *Schneckloth v. Bustamonte*.⁶⁵ In *Schneckloth*, the Court listed the requirements for a voluntary consent search and the factors to consider to determine that consent was not coerced.⁶⁶ Under the Fourth and Fourteenth Amendments, consent cannot be coerced, “by explicit or implicit means, by implied threat or covert force.”⁶⁷ The Court emphasized the two competing concerns associated with determining voluntary consent, which include the “legitimate need for such searches and the equally important requirement of assuring the absence of coercion.”⁶⁸

The Court recognized the coercive nature of police interactions and explained that to determine if consent were coerced, one must consider the use of “subtly coercive police questions” and the “vulnerable subjective state of the person who consents”⁶⁹ In order to decide whether consent was voluntary or coerced, all of the circumstances surrounding the consent must be analyzed.⁷⁰ Thus, the totality of the circumstances are analyzed to determine if consent to a search was voluntary or coerced.⁷¹ Courts have found it difficult to implement the totality of the

probable cause and warrant requirements, while others argue that when a person consents there is no “search” for constitutional purposes. *Id.* Others believe that consent searches are reasonable, which makes them valid under the Fourth Amendment. *Id.*

⁶⁵ 412 U.S. 218.

⁶⁶ *See id.* at 228-29.

⁶⁷ *See id.* at 228 (describing need for voluntary consent absent any form of coercion). If there is any coercion, even if subtly applied, “the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.” *Id.* (internal quotes omitted).

⁶⁸ *See id.* at 227.

⁶⁹ *See id.* at 229.

⁷⁰ *See id.* at 233.

⁷¹ *See id.* at 227. The Supreme Court agreed with the courts of California in that “the question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.” *Id.* at 227 (internal quotes omitted).

circumstances approach to determine if there was voluntary consent to search, and in these cases courts often do not invalidate a search on the basis that the consent was not voluntary.⁷²

2. Consent in Traditional Sexual Assault and Rape Cases

Consent can have multiple definitions, but for the purposes of sexual contact it can be explained that “[s]exual consent is an agreement to participate in a sexual activity.”⁷³ Specifically, consent is required during a sexual activity, otherwise it is considered sexual assault or rape.⁷⁴ But the big questions that arise are: what is consent and how does someone obtain it? Generally speaking, consent must be freely given, meaning that the person is not pressured or manipulated into giving consent to a sexual activity.⁷⁵

The Department of Justice defines sexual assault as “any nonconsensual sex act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.”⁷⁶ In traditional cases of sexual assault and rape consent plays an important role, as it is able to be raised as a defense to these allegations. Many defendants will argue that the sexual encounter was consensual, and thus cannot be a sexual assault or rape. In traditional cases of sexual assault or rape it can be difficult to determine if consent was knowing and voluntary, and it can be even more difficult to determine the voluntariness of consent in cases involving an authority figure. For these reasons, consent should not be a defense to sexual interactions between police officers and persons in their custody due to the coercive nature of these encounters.

⁷² See Strauss, *supra* note 64, at 221.

⁷³ See *Sexual Consent*, Planned Parenthood (last visited March 21, 2018), <https://www.plannedparenthood.org/learn/sex-and-relationships/sexual-consent>.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *Sexual Assault*, THE UNITED STATES DEPARTMENT OF JUSTICE (last updated April 11, 2018), <https://www.justice.gov/ovw/sexual-assault>.

D. Coercion

Coercion is a serious problem surrounding nearly all interactions with law enforcement officers. Initially, physical coercion was unconstitutional and a violation of an individual's rights.⁷⁷ Physical coercion included violence against a person. Over time, this idea of coercion has been expanded to include coercion that is mental.⁷⁸ The coercive nature of police interactions, particularly custodial interrogations, was highlighted in *Miranda v. Arizona*.⁷⁹ The Supreme Court focused on an individual's Fifth Amendment right against self-incrimination in *Miranda*, but the coercive nature of these interactions discussed in this case can be applied to multiple different police interactions.

The Court analyzed the coercive tactics used by police officers when conducting custodial interrogations and highlighted the psychological influence that officers have over individuals that are in their custody.⁸⁰ These types of custodial interrogations create an "atmosphere that carries its own badge of intimidation."⁸¹ The Court explained that there is "compulsion inherent in custodial surroundings," and expressed the need for protective devices to dispel this compulsion.⁸² Individuals in police custody often feel compelled to comply with an officer's orders and requests, such as disclosing information during an interrogation, which is why the Supreme Court established the *Miranda* warnings.⁸³ The Supreme Court recognized the

⁷⁷ See *Miranda v. Arizona*, 384 U.S. 436, 446-48 (1966) (outlining police use of force in order to obtain confessions).

⁷⁸ See *id.* at 448; see also *Blackburn v. State of Alabama*, 361 U.S. 199, 206 (1960) (citing *Chambers v. State of Florida*, 309 U.S. 227 (1940))

⁷⁹ See generally *Miranda*, 384 U.S. at 436.

⁸⁰ See *id.* at 456-58.

⁸¹ See *id.* at 457.

⁸² See *id.* at 458.

⁸³ See *id.* at 444-45, 467. The Supreme Court explained that "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the

problems associated with police interactions and the ramifications it can have for individuals in police custody.

The coercive nature of police interactions does not apply solely during custodial interrogations. It was emphasized that the “process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”⁸⁴ Coercion is also a problem with obtaining voluntary consent for a search. This situation highlights the problem that some citizens would not feel comfortable denying an officer’s request to search.⁸⁵

Individuals in police custody, but not involved in an interrogation, are under the same pressures that are found during an interrogation. There are inherently compelling pressures to comply with police officers when an individual is in custody.⁸⁶ These pressures can undermine an individual’s will to resist a police officer’s request to engage in sexual contact.⁸⁷ This can compel these individuals to engage in conduct that they would not otherwise do so freely: sexual activity with a police officer.⁸⁸ Some say that “common sense teaches that most of us do not have

techniques of persuasion described above cannot be otherwise than under compulsion to speak.” *Id.* at 461.

⁸⁴ *See id.* at 467.

⁸⁵ *See* Strauss, *supra* note 64, at 241. Strauss explained that judges have recognized that citizens may view a request to search as a demand that they cannot say no to. *Id.*

⁸⁶ *See id.* at 236. Psychological experiments have been performed to test obedience to authority. *Id.*

⁸⁷ *See id.* at 236-40. In particular, Stanley Milgram and Leonard Bickman have conducted psychological experiments that deal with obedience to authority. *Id.*

⁸⁸ *See id.* at 236 (citing STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 13-26 (1974) and Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974)). Studies by Stanley Milgram and Leonard Bickman both “support the general idea that obedience to authority is deeply ingrained, that people will obey authority even when it is not in their own best interest to do so, and that obedience increases with when the authority figure has visible trappings of authority, such as a uniform.” *Id.* Stanley Milgram’s experiments involved subjects

the chutzpah or stupidity to tell a police officer to ‘get lost.’”⁸⁹ People arrested and placed in police custody are involved in compulsive environments that cause them to engage in activities that they would not ordinarily engage in. There is an inherent coercive nature to interactions with police, at least in part due to the imbalance of power associated with these interactions.

III. ANALYSIS: CHANGE TO LAW FOR POLICE OFFICERS

State legislatures have recognized the problems that can arise between Department of Correction employees and those individuals in custody by the Department of Corrections and between school employees and students. One major problem is sexual contact between these employees and inmates or students. Although there is a law in all 50 States plus the District of Columbia that makes it a crime to engage in sexual activity under these circumstances, not all of these same states have laws that prohibit police officers from engaging in sexual contact with individuals in their custody.⁹⁰ In fact, thirty-two states and the District of Columbia do not currently have laws that prohibit police officers from engaging in sexual activity with people in

who, at the direction of the experimenters, gave progressively stronger electrical shocks to victims. *Id.* at 236 (citing Stanley Milgram, *Obedience to Authority* 19-21 (1974)). The “victims” were not actually subject to increasingly severe shocks, rather they were actors pretending to experience extreme pain. *Id.* at 236-37 (citing Stanley Milgram, *Obedience to Authority* 18-19, 22-23 (1974)). The study revealed that the subjects had high levels of obedience to authority, meaning that the subjects continued to shock their victims at the instruction of the experimenters even though the victims protested. *Id.* at 237-38 (citing STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 135-152 (1974)). Leonard Bickman studied “how the type of dress of individuals directing pedestrians to carry out simple tasks affected the degree of compliance to simple commands from uniformed or non-uniformed individual.” *Id.* at 238-89 (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 50 (1974)).

⁸⁹ See *id.* at 236 (quoting Tracy Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991)).

⁹⁰ For a list of states that have laws that apply to Department of Correction officers, see *supra* note 43 and accompanying text.

their custody.⁹¹ This means that it is not unlawful for police officers in these thirty-two states and the District of Columbia to engage in sexual contact with persons in their custody as long as the interaction was consensual, thus not violating other sexual assault criminal statutes.

While thirty-two states and the District of Columbia's laws do not apply to police officers and person in their custody, it does not mean that police officers are completely exempt from criminal prosecution. It is possible for police officers to be charged with sexual assault or rape under the state's general sexual offense laws. These laws generally allow alleged offenders to claim that the acts were consensual in nature, and thus do not constitute rape or sexual assault. This is where the problem lies – persons in police custody cannot consent to sex with an officer under these circumstances. If police officers are allowed to allege that the sex acts were consensual, then the coercive nature of the police interaction is not considered. In order to hold law enforcement officials accountable and prevent this type of egregious conduct from occurring in the future, consent should not be a defense to possible rape or sexual assault. In order to achieve this, the law should be amended to include police officers and persons in their custody under the statutes that already exist for Department of Corrections employees or new statutes should be enacted that deal with police officers and individuals in their custody.

Police sexual misconduct, like the kind described above, is not an uncommon phenomenon.⁹² According to The Buffalo News project, police officer sexual misconduct is not officially tracked, which makes it difficult to calculate how often this these types of incidents

⁹¹ For a list of the states that do not have laws that include police officers and person in their custody, see *supra* note 51 and accompanying text.

⁹² See Katharine Bodde and Erika Lorshbough, *There's No Such Thing as 'Consensual Sex' When a Person Is in Police Custody*, ACLU (Feb. 23, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/theres-no-such-thing-consensual-sex-when-person>.

occur.⁹³ Upon investigating news reports and court records, the project revealed that “a law enforcement official was caught in a case of sexual abuse or misconduct at least every five days.”⁹⁴ In many cases, consent can be used as a defense for police officers to escape liability for raping someone in their custody.⁹⁵

The consent defense does not take into account the imbalance of power between police officers and persons in their custody.⁹⁶ Police officers carry with them a power over civilians and persons in their custody.⁹⁷ This imbalance of power creates a coercive environment between law enforcement officials and persons in their custody.⁹⁸ This coercive nature makes it impossible for consent to be voluntarily and knowingly given to police to engage in sexual acts. Thus, consent should not be able to be used as a defense in these types of incidents. Police officers should not be able to raise this defense to evade criminal prosecution. Officers should be held accountable for their actions and conduct in order to enhance society’s trust in police. Police should not be above the law and allowed to use their positions of power to force individuals to engage in sexual acts that they would not have engaged in if the person was not a police officer.

⁹³ See Matthew Spina, *When a Protector Becomes a Predator*, The Buffalo News (Nov. 22, 2015) <http://projects.buffalonews.com/abusing-the-law/index.html>.

⁹⁴ See Spina, *supra* note 93 (nothing that nearly all law enforcement officials were men and nearly all of their victims were women). The data that was accumulated for this project only includes incidents that were linked to police work and omits cases that involve sexual abuse that is unrelated to their jobs. *Id.*

⁹⁵ See Bodde and Lorshbough, *supra* note 90. An analysis of The Buffalo News project revealed that “26 out of at least 158 law enforcement officers charged since 2006 with sexual assault...with a person in custody have been acquitted or had charges dropped against them...” based on the consent defense. *Id.*

⁹⁶ See Bodde and Lorshbough, *supra* note 92.

⁹⁷ See *id.* For a discussion of the coercive nature of different police interactions, see *supra* notes 77-89 and accompanying text.

⁹⁸ See *supra*, notes 77-89 (discussing coercive nature of various police interactions).

IV. CONCLUSION

Remember Anna- the eighteen-year-old woman from Brooklyn, New York- who allegedly engaged in consensual sexual acts with two detectives while she was in police custody. After the incident with Anna came out in October of 2017, individuals became outraged at the possibility of police officers being able to avoid criminal prosecution for their actions by using the “loophole” in the law. In order to try and close this loophole that is currently found in thirty-two states and the District of Columbia, state legislatures have begun proposing legislative amendments. These amendments generally involve making it illegal for police officers to have sex with individuals in their custody.

The incident that occurred in Brooklyn, New York encouraged Mark Treyger, a New York City Council member, to propose a bill and resolution “to make it illegal for police officers to have sex with anyone in their custody.”⁹⁹ The bill and resolution was introduced by the New York City Council on November 16, 2017, with Mark Treyger as the prime sponsor of the amendment.¹⁰⁰ Council member Treyger’s Council bill asked the State Legislature to make these changes to the law.¹⁰¹

In January, New York State Assembly Member, Ed Braunstein, introduced state legislation, which was based on Council member Treyger’s resolution.¹⁰² This bill faced the New York State Assembly in February, after which State Senator Andrew Lanza introduced Senate Bill S7708

⁹⁹ See Samaha, *supra* note 1 (discussing New York City Council member’s proposed legislation to close the current loophole for police officers).

¹⁰⁰ See Int. No. 1766, N.Y. City Council (N.Y. 2017), *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3213522&GUID=5F43866A-65E4-41F9-B5FB-0B78006DF53D&Options=ID%7cText%7c&Search=1766>.

¹⁰¹ See Julianne McShane, *Cuomo Pushes to Outlaw Police Officers Having Sex with People in Custody in Wake of Coney Rape Case*, BROOKLYN DAILY (Feb. 26, 2018), <https://www.brooklyndaily.com/stories/2018/9/bn-cuomo-treyger-rape-bill-2018-02-23-bk.html>.

¹⁰² See *id.*

based on Council member Treyger's resolution.¹⁰³ New York State Governor, Andrew M. Cuomo, stated on February 14, 2018 that he was going to seek to make the changes proposed by Council member Treyger.¹⁰⁴ Governor Cuomo included an amendment to the penal code in his Budget Bill on February 9, 2018.¹⁰⁵ The bill was meant to amend Section 130.05 of the New York Penal code.¹⁰⁶ The bill proposed that individual's detained or in the custody of a police officer, peace officer, or law enforcement official are incapable of consent.¹⁰⁷

This proposed legislation by the New York City Council, the New York State Assembly, the New York State Senate, and the Governor of New York highlights the issues surrounding states' laws that do not include police officers and persons in their custody.¹⁰⁸ But in March of 2018, New York lawmakers passed Senate Bill S7708, which prohibits officers from having sex with people in their custody and prohibits the consent defense.¹⁰⁹

New York is not the only state to amend its laws after the story about Anna broke in the Brooklyn.¹¹⁰ Shortly after news sources reported that Maryland was one of the states that

¹⁰³ See State A. 08823A, 2017-2018 Reg. Sess. (N.Y. 2017), available at http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08823&term=2017&Summary=Y&Text=Y; S.B. S7708, 2017-2018 Leg. Sess. (N.Y. 2018) available at https://www.nysenate.gov/legislation/bills/2017/s7708?utm_medium=web&utm_campaign=misclinks&utm_source=article_body&utm_content=intra; see also McShane, *supra* note 99.

¹⁰⁴ See McShane, *supra* note 101.

¹⁰⁵ See Budget Bill (N.Y. 2018) available at https://www.budget.ny.gov/pubs/archive/fy19/exec/30day/PPGGArtVIINewPartJJ.pdf?utm_medium=web&utm_campaign=misclinks&utm_source=article_body&utm_content=intra

¹⁰⁶ See Budget Bill, *supra* note 105.

¹⁰⁷ See *id.*

¹⁰⁸ See Matthew Chayes, *Ban Sex Between Police and People in Custody, City Council Committee Says*, AM NEW YORK (March 6, 2018), <https://www.amny.com/news/police-detainee-sex-ban-1.17153866>.

¹⁰⁹ See Albert Samaha, *New York Just Passed a Bill Banning Cops From Having Sex with People in Custody*, BUZZFEED NEWS (March 30, 2018), https://www.buzzfeed.com/albertsamaha/new-york-police-rape-sex-custody-banned-nypd?utm_term=.tamKggAArA#.fi6oVVggeg.

¹¹⁰ See Albert Samaha, *Maryland Is the Latest State to Pass a Bill Banning Cops from Having Sex with People in Custody*, BUZZFEED NEWS (April 20, 2018, 12:24 AM),

allowed police to evade criminal charges by claiming consent, state legislators proposed a bill to prevent police from having sex with individuals in their custody.¹¹¹ The Maryland Senate voted on HB 1291 in April, which 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 law enforcement officer.”¹¹² These states exemplify the changes that can be made to the law when the issues are brought to the forefront and individuals advocate for change.

Under the existing law in thirty-two states and the District of Columbia, the two detectives, who allegedly raped Anna, may be able to walk away without criminal prosecutions for sexual assault or rape.¹¹³ The current state of the law in these states protects police officers who engage in sex acts with someone who is in their custody by allowing the officers to claim that the sexual encounter was consensual. But police interactions contain elements of coercion, making it difficult for individuals in these scenarios to say “no” to a police officer when propositioned for sex. All 50 states and the District of Columbia have recognized the imbalance of power and coercive nature involved with detention center employees and inmates and other individuals that they control. The states have laws prohibiting Department of Corrections and detention center employees from engaging in sex acts with inmates or persons under their supervision or control. States also have laws that make sexual relations between school employees and students a crime. In these situations, inmates and other supervised persons are unable to voluntarily consent due to the imbalance of power between these employees and

https://www.buzzfeed.com/albertsamaha/maryland-is-the-latest-state-to-pass-a-bill-banning-cops?utm_term=.lyBEGG2262#.dcWkBB0ovo.

¹¹¹ *See id.* (discussing bill proposed and passed in Maryland).

¹¹² H.B. 1292, 2018 Reg. Sess. (Md. 2018), *available at* <http://mgaleg.maryland.gov/2018RS/bills/hb/hb1292t.pdf>.

¹¹³ For a discussion of the laws of states that do not include police officers or persons in their custody within their sexual assault laws, see *supra* notes 57-58 and accompanying text.

inmates. If inmates or persons under Department of Corrections supervision are unable to consent, then why does the law in thirty-two states and the District of Columbia currently allow for individuals in police custody to consent to engage in sex acts with police officers?

Individuals in these scenarios are under the same pressures and threatened with the same coercive nature of police interactions. Individuals in police custody are unable to consent to sexual encounters with police officers, thus the law should be changed to criminalize these specific types of sexual encounters and to prohibit police officers from raising the consent defense.