Power, Control, Cigarettes, and Gum: Whether and Inmate's Consent to Engage in a Relationship with a Correctional Officer Can Be a Defense to the Inmate's Allegation of a Civil Rights Violation under the Eighth Amendment

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POWER, CONTROL, CIGARETTES, AND GUM:  
WHETHER AN INMATE’S CONSENT TO ENGAGE IN A 
RELATIONSHIP WITH A CORRECTIONAL OFFICER CAN BE A 
DEFENSE TO THE INMATE’S ALLEGATION OF A CIVIL RIGHTS 
VIOLATION UNDER THE EIGHTH AMENDMENT 

M. JACKSON JONES

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of either his present or prior employers.
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INMATE’S CONSENT AS A DEFENSE

INTRODUCTION

Where you have power over a person, [sex] cannot be consensual . . . . You cannot be in the position of an inmate and make that kind of decision . . . . Eventually, [sexual relations between an inmate and a correctional officer] makes other people feel unsafe.²

A consensual relationship between a correctional officer and an inmate can be very complex. Even though the relationship could satisfy the traditional definition of consensual, the correctional officer’s position allows him or her to have power over the inmate that would not exist outside of the correctional facility’s walls.³ The complexity of this relationship, as it relates to an Eighth Amendment constitutional claim, has been the subject of discussion in several federal courts of appeals.⁴ In fact, these courts are split as to “whether a prisoner can consent to a relationship with a correctional officer[.]”⁵ This Article will answer this question by examining the Eighth Amendment, case precedent, sociological studies, and statutes relating to correctional officers and inmate relationships.

Part I will discuss the history of the Eighth Amendment by examining its British roots. In addition, this section will also discuss the text of the amendment, the three clauses contained within it, and the two-part test courts use to determine whether an inmate’s Eighth Amendment rights were violated.

Part II will examine cases from the federal courts of appeals that address the issue of whether inmates and correctional officers can engage in a consensual relationship. Currently, the Eighth and Sixth Circuit Courts of Appeals have held inmates and correctional officers can engage in a consensual relationship.

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³ See, e.g., “Consent,” MIRIAM-WEBSTER DICTIONARY, available at http://www.merriam-webster.com/dictionary/consent (last visited Feb. 22, 2014) (defining consent as “to agree to do or allow something: to give permission for something to happen or be done”).
⁵ Wood, 692 F.3d at 1046. For purposes of this Article, a “relationship” will include both sexual and non-sexual contact between an inmate and correctional officer.
consensual relationship. In contrast, the Tenth Circuit Court of Appeals has held inmates and correctional officers cannot engage in a consensual relationship. The Ninth Circuit Court of Appeals has not followed either approach. Instead, it has held inmates are entitled to a presumption that any relationship with a correctional officer is not consensual. However, the government can rebut this presumption by showing that the relationship “involved no coercive factors.”

Part III will provide an analysis of this issue. First, subsection III (a) will address this question by using the two-part test courts employ to evaluate an inmate’s Eighth Amendment claim. This test will require examination of the legislation penalizing relationships between inmates and correctional officers, as well as sociological studies that have analyzed the occurrences and ramifications of relationships between inmates and correctional officers. Subsection III (b) will use public policy arguments to explain the reasons an inmate can never consent to engage in a relationship with a correctional officer.

Lastly, the Conclusion will summarize the main arguments of this Article.

I. THE EIGHTH AMENDMENT

The following subsections will discuss three different aspects of the Eighth Amendment. First, subsection I (a) examines the history of the amendment, as well as its influence on the American colonies. Second, subsection I (b) discusses the three clauses contained within the text of the Eighth Amendment: the Excessive Bail Clause, the Excessive Fines Clause, and the Cruel and Unusual Punishments Clause. Third, subsection I (c) identifies the two-part test used to analyze an inmate’s Eighth Amendment claim.

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6 See Hall, 1999 U.S. App. LEXIS 29700, at *4; Freitas, 109 F.3d at 1339.
7 See Lobozzo, 429 F. App’x. at 711.
8 See Wood, 692 F.3d at 1049.
9 See id.
10 Id.
11 See id. at 1046.
12 See U.S. Const. amend. VIII.
A. HISTORY OF THE EIGHTH AMENDMENT

i. THE ENGLISH BILL OF RIGHTS OF 1689, LORD CHIEF JEFFREYS, AND TITUS OATES

The Eighth Amendment, which was ratified in 1791, “was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689” (“English Bill of Rights”). The English Bill of Rights was enacted for two separate reasons. First, it provided “an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court . . .”. Second, it “[was] a reiteration of the English policy against disproportionate penalties.”

Historians attribute the English Bill of Rights passage to one of two historical events. First, some historians believe it was passed in response to the punishments handed down by Lord Chief Jeffreys (“Jeffreys”) following the Bloody Assize. The Bloody Assize was a failed rebellion organized by the Duke of Monmouth.

As a result of this failed rebellion, “a special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents.” The executions consisted of extremely cruel punishments such as beheadings, burnings, and disembowelments. Interestingly, these punishments remained law even after the trials, thus causing some historians to believe the English Bill of Rights was not in response to the punishments themselves, but instead “the arbitrary sentencing power [Jeffreys] had exercised in administering justice from the King’s Bench . . .”

Second, some historians believe the English Bill of Rights was passed in response to the perjury trial of Titus Oates (“Oates”). In 1679, Oates falsely testified that several prominent Catholics were planning to

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15 Id. at 426 (quoting Gramucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 CALIF. L. REV. 839, 860 (1969)).
16 Id.
17 See id. at 425.
18 See Ingraham, 430 U.S. at 664.
19 See id.
21 See id.
22 Id.
23 See Ingraham, 430 U.S. at 664.
overthrow King Charles II. These false statements led to the deaths of fifteen Catholics. In 1685, Oates was tried and convicted of perjury. During his sentencing, Oates argued that his crime did not proscribe a penalty of death. The judges disagreed and ruled that “crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member.” Thus, the judges sentenced Oates “to be scourged to death.” The court also imposed several other punishments including: 1) requiring Oates to pay “1000 marks upon each Indictment;” and 2) “strip[ping Oates] of [his] Canonical Habits.”

Oates believed the punishments were illegal and asked the House of Lords to overrule them. The House of Lords disagreed and refused to intervene. However, the House of Commons agreed with Oates and passed a bill to overturn his punishments. Following the House of Common’s bill, “[a] ‘free conference’ was . . . convened in which representatives of the House of Commons attempted to persuade the Lords to reverse their position.” This conference was unsuccessful. Luckily for Oates, however, due to his requests to the Houses of Parliament, he was not killed.

ii. **The Colonies’ Response to Cruel and Unusual Punishments**

The English Bill of Rights served as the basis for many of the American colonies’ constitutional prohibitions against cruel and unusual punishment. In fact, “[i]n 1791, five State Constitutions prohibited ‘cruel or unusual punishments.’” For example, Article XXVI of the Massachu-

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24 See Harmelin, 501 U.S. at 969.
25 See id.
26 See id.
27 See id. at 970.
28 Id.
29 Harmelin, 501 U.S. at 970 (quoting 2 T. Macaulay, History of England 204 (1899)).
30 Id.
31 See id.
32 See id.
33 See id. at 971.
34 Harmelin, 501 U.S. at 971.
35 See id.
36 See id. at 970.
37 See id. at 966.
38 Id. (citing Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, § XXII (1776); Mass. Declaration of Rights art. XXVI (1780); N.C. Declaration of
sett Declaration of Rights, which was enacted in 1780, states “[n]o magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.” 39 Similarly, section ten of the North Carolina Declaration of Rights, provides “[t]hat excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” 40 Likewise, the Pennsylvania and South Carolina constitutions, which were both adopted in 1790, prohibited “cruel punishments.” 41

However, it was the Virginia Declaration of Rights, which served as the basis for the Federal Constitution’s Eighth Amendment. 42 Unlike the aforementioned state constitutions, the Virginia Declaration of Rights banned the imposition of “cruel and unusual punishments.” 43 More specifically, under section 9 of the Virginia Declaration of Rights, “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 44 This section is virtually verbatim to the Eighth Amendment’s text. 45

B. THE TEXT AND CLAUSES OF THE EIGHTH AMENDMENT

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 46

The Eighth Amendment is one sentence composed of three separate clauses mandating proportionality in the imposition of bails, fines, and sentencing. 47

i. EXCESSIVE BAIL CLAUSE

Under the first clause, which is called the Excessive Bail Clause, bail is excessive if it is not “proportional to the offense” or “set at a figure higher than an amount reasonably calculated to ensure the asserted gov-

39 MASS. DECLARATION OF RIGHTS art. XXVI (1780) (emphasis by author).
40 N.C. DECLARATION OF RIGHTS, § X (1776) (emphasis by author).
41 PA. CONST. art. IX, § 13 (1790); S.C. CONST. art. IX, § 4 (1790).
42 See Harmelin, 501 U.S. at 966.
43 VA. DECLARATION OF RIGHTS, § 9 (1776) (emphasis by author).
44 Id.
45 See U.S. CONST. amend. VIII.
46 Id.
ernmental interest.” Even though this clause governs the imposition of bail, it does not mandate that a person is entitled to it.

ii. EXCESSIVE FINES CLAUSE

Similarly, the second clause, which is known as the Excessive Fines Clause, prohibits the imposition of excessive fines. Under this clause, which states “nor excessive fines imposed,” the government is prohibited from imposing excessive fines for criminal and civil forfeiture cases. When determining the excessiveness of a fine, the Court, as it does in determining the excessiveness of bail, performs a proportionality analysis. Under this analysis, “[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” In addition, when determining proportionality, the court is not limited to merely examining the criminal offense against the fine. Instead, the court can also “consider[] the particular facts of the case, the character of the defendant, and the harm caused by the offense.”

iii. CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Cruel and Unusual Punishments Clause prohibits the infliction of “cruel and unusual punishments.” Under this clause, a person’s punishment must be proportional to the crime he or she committed. In other words, “punishment may not be cruel and unusual in relation to the nature and magnitude of the offense.”

In determining whether a punishment violates this clause, the court “must draw its meaning from the evolving standards of decency that mark

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50 See U.S. Const. amend. VIII.
51 Id.; see also Gov’t Printing Office, supra note 48, at 1691-92.
52 See Rolland, supra note 49, at 1383.
54 See id.
55 Id.
56 U.S. Const. amend. VIII.
57 See McAllister, supra note 47, at 791.
the progress of a maturing society." Generally, courts examine state and federal legislation when analyzing the evolving standards of decency.

The Cruel and Unusual Punishments Clause essentially serves three main purposes. First, it forbids the imposition of punishments that are both cruel and unusual. Second, it requires proportionality in the imposition of punishments. In other words, a punishment is unconstitutional if it is "grossly disproportionate to the severity of the crime . . . ." Third, it imposes substantive limits on what can be made criminal and punished as such.

C. THE TWO-PART TEST

Courts are required to analyze two elements when determining whether an inmate’s Eighth Amendment rights were violated. Under the first element, which is called the objective element, courts decide whether "the alleged wrongdoing was objectively ‘harmful enough’ to establish a constitutional violation." The second element is called the subjective element. This element requires courts to determine whether "the officials act[ed] with a sufficiently culpable state of mind."

II. FEDERAL CASE LAW

The next subsections examine opinions from the courts of appeals that have had to determine "whether a prisoner can consent to a relationship with a correctional officer[.]" First, subsection II (a) discusses cases from the Eighth and Sixth Circuit Courts of Appeals. These courts have determined inmates and correctional officers can engage in a consensual relationship.

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61 See id.
62 See id.
63 Id.
64 Id.
65 See Wood v. Beaulclaire, 692 F.3d 1041, 1046 (9th Cir. 2012).
66 Id. (quoting Hudson v. McMillian, 503 U.S. 1, 8 (1992)).
67 See id. at 1049.
68 Id. at 1046 (quoting Hudson v. McMillian, 503 U.S. 1, 8 (1992)).
69 Id.
relationship with each other. Subsection II (b) analyzes a case from the Tenth Circuit Court of Appeals. This is the only circuit that has held inmates and correctional officers cannot engage in a consensual relationship. Lastly, the Ninth Circuit Court of Appeals’ decision is discussed in subsection II (c). In the Ninth Circuit, inmates are entitled to a presumption that any relationship with a correctional officer is not consensual.

A. INMATES AND CORRECTIONAL OFFICERS CAN ENGAGE IN A CONSENSUAL RELATIONSHIP WITH EACH OTHER

i. EIGHTH CIRCUIT COURT OF APPEALS: FREITAS V. AULT (1997)

“[W]e hold that, at the very least, welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute ‘pain’ as contemplated by the Eighth Amendment.”

1. FACTS

Richard John Freitas (“Freitas”) was an inmate in an Iowa correctional facility. While at the facility, Freitas worked as a painter. His supervisor was a correctional employee named Irene Howard (“Howard”). At some point, Freitas and Howard began a non-sexual relationship that would mainly consist of hugging, kissing, and talking. In addition, “[a]t Ms. Howard’s request, Mr. Freitas would write her ‘hot sexy’ letters approximately every other day, and Ms. Howard occasionally dressed in tight skirts and high heels for Mr. Freitas’s benefit.”

During their relationship, Freitas learned Howard was sleeping...
with at least one other man. In response, Freitas ended the relationship and informed the prison’s warden, Mr. John Ault (“Ault”), about it. “[Ault] immediately transferred Mr. Freitas to the Iowa Men’s Reformatory in Anamosa . . . .”

Freitas filed a claim, under 42 U.S.C. § 1983, alleging Howard sexually harassed him. “After a bench trial, the district court found . . . for Ms. Howard on the sexual harassment claim.”

2. Analysis

On appeal, the Eighth Circuit Court of Appeals only analyzed the objective element of the Eighth Amendment’s two-part test. In analyzing this element, the court acknowledged it had held that sexual harassment or abuse could “constitute the ‘unnecessary and wanton infliction of pain,’” because it did not serve a “legitimate penological purpose” and subjected inmates to both physical and psychological harm. Hence, the court emphasized that the voluntary or consensual nature of the relationship was key to its analysis of this element.

In this case, the court held that Freitas could not establish a violation of the Eighth Amendment because his relationship with Howard was consensual. For instance, both Freitas and Howard shared a consensual kiss. In addition, Freitas voluntarily wrote Howard love letters. In fact, the court noted, Freitas even self-described his interactions with Howard as a “relationship.” The court believed these factors could have led the trial court to determine that Freitas’s relationship with Howard was consensual. Thus, it affirmed the denial of Freitas’s sexual harassment claim and “held that, at the very least, welcome and voluntary sexual interactions, no matter how inappropriate, cannot as matter of law constitute ‘pain’ as

See id.
See id.
Id.
See id.

Freitas, 109 F.3d at 1336.
See id. at 1338-39.
Id. at 1338.
See id. at 1339.
See id.
Freitas, 109 F.3d at 1338.
See id.
Id.
See id. at 1338-39.
contemplated by the Eighth Amendment.”

ii. SIXTH CIRCUIT COURT OF APPEALS:

**HALL V. BEAVIN (1999)**

“[T]he evidence establishes that Hall voluntarily engaged in a sexual relationship with Beavin. Thus, Hall’s Eighth Amendment claim is without merit.”

1. FACTS

Steven R. Hall (“Hall”) engaged in a sexual relationship with Department of Corrections (“DOC”) employee Kim Beavin (“Beavin”) while he was an inmate in an Ohio correctional facility. Once DOC officials learned of this relationship, they charged Hall with committing a prison infraction. He was found guilty “of having an improper relationship with a female employee.” This resulted in Hall being “placed in disciplinary control, given a higher security classification, and transferred to a high security facility.” Subsequently, Hall filed suit alleging the infraction board violated his Eighth Amendment rights by finding him guilty and imposing the aforementioned sanctions. The district court magistrate granted summary judgment to the defendants and dismissed Hall’s Eighth Amendment claim.

2. ANALYSIS

In affirming the magistrate’s ruling, the Sixth Circuit Court of Appeals did not even formally address either element of the Eighth Amendment test. However, its analysis makes it appear the court was addressing the first element. For instance, the court readily noted that Hall had not proven a physical injury occurred, because he did not prove that he

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95 Id. at 1339.
97 See id.
98 See id. at *2.
99 Id. (noting prison infraction board found Hall guilty).
100 Id.
102 See id.
103 See id. at *4.
104 See id.
“was a victim of sexual assaults by Beavin.” Instead, the court wrote, “the evidence establishes that Hall voluntarily engaged in a sexual relationship with Beavin. Thus, Hall’s Eighth Amendment claim is without merit.”

B. INMATES AND CORRECTIONAL OFFICERS CANNOT ENGAGE IN A CONSENSUAL RELATIONSHIP WITH EACH OTHER

i. TENTH CIRCUIT COURT OF APPEALS: LOBOZZO V. THE COLORADO DEPARTMENT OF CORRECTIONS (2011)

“It is uncontested that . . . an inmate, could not legally consent to sexual activity with . . . a guard.”

1. FACTS

In 2007, Laura Lobozzo (“Lobozzo”) was an inmate in the La Vista Correctional Facility in Colorado. While in the correctional facility, she engaged in a sexual relationship with correctional officer Anthony Martinez (“Martinez”). No one knew about this relationship until July 15, 2007, when Lobozzo and Martinez were found in a custodian’s closet by another officer. When this officer saw Lobozzo and Martinez “their clothes were rumpled and Martinez was in an obvious state of arousal.”

The officer reported her observations, which resulted in Martinez being suspended from his job and Lobozzo being placed in segregation within the La Vista Correctional Facility. Subsequently, she was placed in segregation at a different correctional facility.

Lobozzo filed a 42 U.S.C. § 1983 claim against several Colorado Department of Corrections officials (“officials”). She believed these officials “violated [her] Eighth Amendment rights by their deliberate indiff-

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105 Id.
107 Lobozzo v. Colo. Dept. of Corr., 429 F. App’x. 707, 711 (10th Cir. 2011).
108 See id. at 709.
109 See id.
110 See id.
111 Id.
112 See Lobozzo, 429 F. App’x at 709.
113 See id.
114 See id. at 708.
ference to the possibility of sexual abuse of inmates by custodial staff."  

The officials filed a motion for summary judgment, which was allowed by the district court judge. In ruling against Lobozzo, the judge held the officials “were entitled to qualified immunity because [she] failed to show how they caused any constitutional violation.”

2. Analysis

The court recognized Lobozzo’s allegations satisfied the first element, because it believed “an inmate, could not legally consent to sexual activity with . . . a guard.” Thus, the first element was met, so the court only had to determine “whether these defendants were aware of and ignored an excessive risk that Lobozzo would be subjected to sexual contact by a correctional officer.”

In order to prove the second element, Lobozzo relied on statistics reported by the Colorado Department of Corrections (“CDOC”). She thought these statistics, which “reveal[ed] an average of ‘one to two . . . rapes per month’ at CDOC facilities . . . gave the officials constructive notice of the danger.” The court of appeals did not believe these statistics, alone, provided a sufficient basis to conclude the officials “had actual or constructive notice that their action or failure was substantially certain to result in a constitutional violation . . .”

The court’s conclusion was based on two different reasons. First, the court noted that the CDOC report did not provide any documented instances of substantiated sexual misconduct between corrections officers and inmates at the La Vista Correctional Facility. Second, although Lobozzo identified twenty-two substantiated reports of sexual conduct between correctional officers and inmates, she failed to “present any evidence of the number of sexual conduct incidents which actually involved ‘sexual

115 Id. at 709.
116 See id.
117 Lobozzo, 429 F. App’x at 709.
118 Id. at 711.
119 Id.
120 See id. These statistics were from the years of 2005-2007. Id. at 712.
121 Id. at 711.
122 Lobozzo, 429 F. App’x at 712 (quoting Olsen v. Layton Hills Mall, 312 F.3d 1304, 1319 (10th Cir. 2002)).
123 See id. at 711-12.
124 See id.
Overall, the court believed Lobozzo could not solely rely on these statistics to prove the officials had constructive or actual knowledge of a violation of her constitutional rights. Instead, the court wanted Lobozzo to present additional evidence to prove the second element. It concluded that “there is no reason to assume the mere number of incidents is sufficient evidence of an unreasonable response to a substantial risk in an isolated case.”

C. INMATES ARE ENTITLED TO A PRESUMPTION THAT ANY RELATIONSHIP WITH A CORRECTIONAL OFFICER IS NOT CONSENSUAL

“The power dynamics between prisoners and guards make it difficult to discern consent from coercion.”

i. NINTH CIRCUIT COURT OF APPEALS: WOOD V. BEAUCLAIR (2012)

1. FACTS

Lance Wood (“Wood”) and correctional officer Sandra de Martin (“Martin”) were involved in a romantic non-sexual relationship while Wood was incarcerated in an Idaho state prison. During their relationship, “they would hug, kiss, and touch each other on the arms and legs, but they did not engage in sexual contact.”

Soon after the relationship began, Wood started to hear rumors that Martin was married. When Wood confronted Martin she denied being married. Even though Martin denied being married, Woods tried to end the relationship. However, Martin continued to pursue him. “She

125 Id. at 712.
126 See id.
127 Lobozzo, 429 F. App’x at 712.
128 Id.
129 Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012).
130 See id. at 1043.
131 Id. at 1044.
132 See id.
133 See id.
134 Wood, 692 F.3d at 1044.
135 See id.
subjected him to aggressive pat searches in front of other inmates on a number of occasions.” In addition, Martin also grabbed and stroked Wood’s penis. He rejected Martin’s advances and even complained about her behavior to another correctional officer. At some point, Wood formally reported the harassment and was transferred to a different prison.

Wood filed suit, under 42 U.S.C. § 1983, alleging Martin violated his Eighth Amendment rights by continuously sexually harassing him. “The district court granted summary judgment to defendants on Wood’s Eighth Amendment claims finding that the romantic relationship between Wood and Martin was consensual and, therefore, Wood implicitly consented to Martin’s sexual conduct.”

2. ANALYSIS

The Ninth Circuit Court of Appeals noted that Wood’s appeal was the first time it had to determine “whether a prisoner could consent to a relationship with a correctional officer[.]” However, prior to analyzing this issue the court discussed some decisions from “out-of-circuit” courts that “[h]ad recognized that prisoners are incapable of consenting to sexual relationships with a prison official.” It noted these circuits’ holdings centered on the power dynamic between the inmate and correctional officer. For example, the court wrote,

[p]risoners have no control over most aspects of their daily lives. They cannot choose what or when to eat, whether to turn the lights on or off, where to go, and what to do. They depend on prison employees for basic necessities, contact with their children, health care, and protection from other inmates.”

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136 Id.
137 See id. at 1045.
138 See id.
139 See id.
140 See Wood, 692 F.3d at 1045.
141 Id.
142 Id. at 1043-44.
143 Id. at 1046.
144 Id.
145 See Wood, 692 F.3d at 1046-47 (citing cases from Tenth Circuit, District of Delaware, and Western District of New York).
146 Id. At 1047.
Hence, the court believed that “[e]ven if the prisoner concedes that the sexual relationship is ‘voluntary,’ because sex is often traded for favors . . . or ‘luxuries’ . . . it is difficult to characterize sexual relationships in prison as truly the product of free choice.”\textsuperscript{146} In effect, the Ninth Circuit Court of Appeals held that a correctional officer’s control over everyday aspects of prisoners’ lives made it “difficult to discern consent from coercion.”\textsuperscript{147}

The Ninth Circuit expressed agreement with these policy rationales; however, it also expressed concern with “removing consent as a defense for Eighth Amendment claims.”\textsuperscript{148} To ease these concerns, the court developed a rule that presumes the inmate and correctional officer’s relationship was not consensual.\textsuperscript{149} “The state then may rebut this presumption by showing that the conduct involved no coercive factors.”\textsuperscript{150}

After establishing this rule, the Court made two findings in relation to Wood’s claim.\textsuperscript{151} First, it noted that Wood was “entitled to a presumption that the conduct was not consensual.”\textsuperscript{152} Second, because the government could not refute this presumption, Wood’s Eighth Amendment sexual harassment claims should not have been dismissed by the trial court.\textsuperscript{153}

III. ANALYSIS

This section will examine the issue of “whether a prisoner can consent to a relationship with a correctional officer . . .”\textsuperscript{154} Subsection III (a) will identify the two-part test courts use to determine whether an inmate’s Eighth Amendment constitutional rights have been violated.\textsuperscript{155} Subsection III (a)(i) will identify the reasons the first element would support the notion that an inmate can never consent to engage in relationship with a correctional officer. This subsection primarily analyzes criminal laws and sociological studies. Subsection III (a)(ii) will discuss the reasons the second

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 1048.
\textsuperscript{149} See Wood, 692 F.3d at 1049.
\textsuperscript{150} Id. The court did not identify a specific list of factors that would suggest the inmate and correctional officer’s relationship was not consensual. Id. However, it stated the courts could look for “favors, privileges, or any type of exchange for sex” in order to determine if the relationship was truly consensual. Id.
\textsuperscript{151} See id.
\textsuperscript{152} Id.
\textsuperscript{153} See id.
\textsuperscript{154} Wood, 692 F.3d at 1046.
\textsuperscript{155} Lobozzo v. Colo. Dept. of Corr., 429 F. App’x. 707, 710 (10th Cir. 2011).
Subsection III (b) will also analyze this issue. This subsection identifies and examines the policy reasons for finding an inmate can never consent to engage in a relationship with a correctional officer.

A. THE TWO-PART EIGHTH AMENDMENT TEST

The courts use a two-part test to determine whether an inmate’s Eighth Amendment constitutional rights have been violated. The first element requires the inmate to show “the alleged injury or deprivation [was] sufficiently serious.” This element is analyzed from an objective standard. A correctional officer’s actions are “objectively serious” under the Eighth Amendment if it is incompatible with “contemporary standards of decency.” The Supreme Court has found the “clearest and most reliable objective evidence of contemporary values [are] the actions of the Nation’s legislatures.”

The second element, which is commonly called the subjective element, requires the inmate to prove the correctional officer acted with “a sufficiently culpable state of mind to violate the constitutional standard.” In other words, the second element requires courts to examine the correctional officer’s state of mind or subjective intent when the alleged constitutional violation occurred. When analyzing this element, courts generally determine whether the correctional officer “acted with deliberate indifference or reckless disregard to an inmate’s constitutional rights, health or safety.”

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156 See id.
157 Id. (quoting Tafoya v. Salazar, 516 F.3d 912, 916 (10th Cir. 2008)).
158 See Wood, 692 F.3d at 1046.
161 Lobozzo, 429 F. App’x. at 710 (quoting Tafoya v. Salazar, 516 F.3d 912, 916 (10th Cir. 2008)).
162 See Wood, 692 F.3d at 1046.
163 Carrigan, 70 F. Supp. 2d at 452.
i. **OBJECTIVE ELEMENT: THE INJURY OR DEPRIVATION WAS OBJECTIVELY SERIOUS**

1. **A MAJORITY OF THE STATES AND THE DISTRICT OF COLUMBIA HAVE ENACTED LEGISLATION PROHIBITING SEXUAL CONTACT BETWEEN CORRECTIONAL OFFICERS AND INMATES**

The Supreme Court has noted that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” 164 Today, a majority of states and the District of Columbia have legislation criminalizing sexual contact between correctional officers and inmates. 165 For example, under Alabama Code section 14-11-31, it is illegal “for any employee to engage in sexual conduct with a person who is in the custody of the Department of Corrections, the Department of Youth Services, a sheriff, a county, or a municipality.” 166 Similarly, Alaska Statute section 11.41.425 forbids correctional facility employees from engaging in sexual intercourse with individuals in custody. 167 In Massachusetts, under General Laws 268, section 21A, 168

“[a]n officer or other person who is employed by . . . any penal or correctional institution . . . and who . . . engages in sexual relations with an inmate confined therein . . . shall be punished by imprisonment . . . or by a fine of $10,000 or both.” 168

Interestingly, the Massachusetts statute also notes that an inmate is “incapable of consent to sexual relations with [a correctional employee].” 169 A similar sentiment is expressed in several other state statutes. 170

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165 See generally Review of Applicable Federal and State Sex Offense Laws, JUST DETENTION INT’L (last visited April 8, 2014), http://www.justdetention.org/en/state_by_state_laws.aspx. This website provides a list of “each state’s custodial sexual misconduct law, as well as . . . criminal laws that may apply when a detainee is sexually assaulted, whether by a corrections official, other prison staff, a volunteer or a fellow inmate.” Id.
169 Id.
For example, under Indiana Code 35-44.1-3-10, “it is not a defense that an act . . . was consensual.” Likewise, Minnesota Statute section 609.344 states that “[c]onsent by the complainant is not a defense” to a violation of that statute.

The plain language of these criminal statutes accomplishes two goals. First, and most obvious, they all criminalize the sexual intercourse between correctional officers and inmates. Second, these statutes recognize the power dynamic between inmates and correctional officers. Indeed, a number of these laws use terms and phrases like “in custody,” “under the perpetrator’s supervisory . . . authority,” or “authority” to connote the relationship between the correctional officer and inmate. Rhode Island and South Dakota are two such states with statutes that use this language. Specifically, Rhode Island General Laws section 11-25-24 uses the phrases “under the direct custodial supervision” and “under the . . . control” to describe the correctional officer-inmate relationship. Additionally, South Dakota Codified Laws section 24-1-26.1 uses the words “custodial,” “supervisory,” and “disciplinary authority” when describing the relationship.

Overall, by passing the legislation, a majority of states and the Dis-

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170 See, e.g., IND. CODE § 35-44.1-3-10(d) (2014); MINN. STAT. § 609.344 (2013); MISS. CODE ANN. § 97-3-104 (2013); OR. REV. STAT. § 163.452 (2013).
171 IND. CODE § 35-44.1-3-10 (2014).
172 MINN. STAT. § 609.344 (2013).
173 See, e.g., ALASKA STAT. § 11.41.425 (2013); ARIZ. REV. STAT. ANN. § 13-1419 (2013); ARK. CODE ANN. § 5-14-124 (2013); CAL. PENAL CODE § 289.6 (2013); CONN. GEN. STAT. § 53a-71 (2013); D.C. CODE § 22-3013 (2013); FLA. STAT. ANN. § 794.011(9) (2013), amended by 2014 Fla. Sess. Law Serv. Ch. 2014-4 (April 1, 2014) (“[A]cquiescence to a person reasonably believed by the victim to be in a position of authority or control does not constitute consent, and it is not a defense that the perpetrator was not actually in a position of control or authority if the circumstances were such as to lead the victim to reasonably believe that the person was in such a position.”); GA. CODE ANN. § 16-6-5.1 (2013); HAW. REV. STAT. ANN. § 707-731 (2013); ILL. COMP. STAT. 5/11-9.2 (2013); IND. CODE § 35-44.1-3-10 (2013); IOWA CODE § 709.16 (2013); KAN. STAT. ANN. § 21-5512 (2011); KY. REV. STAT. ANN. § 510.120 (2013); MASS. GEN. LAWS. ch. 268, § 21A (2013); ME. REV. STAT. ANN. tit. 17-A, § 253 (2013); MICH. COMP. LAWS § 750.520c (2013); MINN. STAT. § 609.344 (2013); MISS. CODE ANN. § 97-3-104 (2013); MO. REV. STAT. § 566.145 (2013); MONT. CODE ANN. § 45-5-502 (2013); NEB. REV. STAT. § 28-322.03 (2013); NEV. REV. STAT. ANN. § 212.187 (2013); N.H. REV. STAT. ANN. § 632-A:2 (2013); N.C. GEN. STAT. § 14-27.7 (2013); OHIO REV. CODE ANN. § 2907.03 (2013); OR. REV. STAT. § 163.452 (2013); 18 PA. CONS. STAT. § 3124.2 (2013); R.I. CODE ANN. § 44-23-110 (2013); TENN. CODE ANN. § 39-16-408 (2013); TEX. PENAL CODE ANN. § 39.04 (2013); UTAH CODE ANN. § 76-5-412 (2013); VT. STAT. ANN. tit. 13, § 3257 (2013); VA. CODE ANN. § 18.2-64.2 (2013); WASH. REV. CODE § 9A.44.160 (2013); W. VA. CODE § 61-8B-10 (2013).
District of Columbia have expressed disapproval of relationships between correctional officers and inmates. Thus, the objective evidence strongly suggests that inmates are incapable of consenting to relationships with correctional officers.

2. **Several Studies Have Determined That Staff Sexual Misconduct is a Serious Problem in Correctional Facilities**

   a. **Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–2012**

   The National Prison Rape Statistics Program collects data involving sexual violence in correctional facilities. This program obtains its information from both correctional facility administrators’ records, and surveys provided to victims of sexual violence at correctional facilities.

   “Between February 2011 and May 2012, BJS completed the third National Inmate Survey (NIS-3),” which obtained information from various correctional facilities. Specifically, information was obtained from federal prisons, state prisons, jails, Immigration and Customs Enforcement confinement facilities, the U.S. military, and correctional facilities in Indian country.

   In addition, a significant number of inmates participated in the study. For example, Allen J. Beck, Marcus Berzofsky, Rachel Caspar, and Christopher Krebs (“Beck”), authors of the report, noted that “92,449 inmates age 18 or older” participated in this study. A majority of these inmates were in jail and a substantial number were in either state or federal correctional facilities. “38,251 inmates [were] in state and federal prisons, 52,926 in jails, 573 in ICE facilities, 539 in military facilities, and 160 in Indian country jails.”

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178 See id.
179 Id. BJS is an abbreviation for the Bureau of Justice Statistics.
180 See id.
181 See id.
182 BECK, BERZOFSKY, CASPAR & KREBS, supra note 177, at 8.
183 See id.
184 Id. Beck identified several issues with this study. Id. First, he recognized this study was both anonymous and confidential. Id. Thus, he could not perform any “follow-up investigation
Over 34,000 inmates and 13,000 jail inmates reported at least one incidence of sexual victimization while in correctional facilities.185

Beck found that 34,100 (2.4%) federal and state prison inmates “reported an incident [of staff sexual misconduct] involving facility staff.”186 An additional 5,500 (0.4%) prison inmates “reported both an incident by another inmate and facility staff.”187 The statistics for jail inmates were very similar.188 For instance, 13,200 (1.8%) jail inmates “reported an incident with staff. Approximately 0.2% of jail inmates (2,400) reported being sexually victimized by both another inmate and staff.”189

Beck provided a further analysis of both the 34,100 (2.4%) federal and state prison inmates and the 13,200 (1.8%) jail inmates who alleged staff sexual misconduct.190 They specifically examined these percentages in relation to two separate categories: 1) “unwilling activity” and “willing activity.”191 Of the 34,100 (2.4%) prison inmates, who alleged staff sexual misconduct, 21,500 (1.5%) believed the misconduct was an unwilling “result of physical force, pressure, or offers of special favors or privileges.”192 In contrast, 19,700 (1.4%) alleged the staff sexual misconduct was willing.193 These percentages were similar to those of jail inmates.194 For instance, 10,000 (1.4%) jail inmates alleged the staff sexual misconduct was unwilling.195 However, only 6,200 (0.9%) alleged the conduct was willing.196

or substantiation of reported incidents through review.” Id. Second, Beck recognized that the data might be incomplete, because some inmates could chose not to report any allegation of sexual violence. Id.

185 Id.
186 Id.
187 Id.
188 Id.
189 Id.
190 See id. at 9 (Table 1).
191 Id.
192 Id.
193 See id. at 9 (Table 1).
194 See id.
195 See id.
196 See id.
I. SIGNIFICANCE OF SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–2012

This report shows that a large number of prison and jail inmates were subjected to staff sexual misconduct. As previously written, over 34,000 inmates reported sexual victimization by correctional facility staff. An additional 5,500 inmates reported sexual victimization by both correctional facility staff and another inmate. More troublesome is that “an estimated 1.5% of prison inmates and 1.4% of jail inmates reported that they had sex or sexual contact unwillingly with staff as a result of physical force, pressure, or offers of special favors or privileges.” Hence, over 31,000 inmates noted their sexual victimization was the result of either duress or some other form of abuse associated with a member of the correctional facility staff exhibiting his or her power over the inmate.

b. SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007–2008

In January 2011, the Bureau of Justice Statistics (“BJS”) published a report entitled Sexual Victimization Reported by Adult Correctional Authorities, 2007–2008. This report, which was conducted pursuant to the Prison Rape Elimination Act of 2003, provided “a comprehensive statistical review and analysis of the incidence and effects of prison rape.”

In the report, Paul Guerino and Allen J. Beck (“Guerino”) analyzed survey forms provided by correctional authorities at various state correctional facilities, as well as the Federal Bureau of Prisons (“BOP”). They also reviewed surveys from the “state prison systems, public and private jails, private prisons, jails in Indian country, and facilities operated by the U.S. military and Immigration and Customs Enforcement (ICE).” Over-

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197 BECK, BERZOFSKY, CASPAR & KREBS, supra note 177, at 8.
198 See id.
199 Id. at 9.
200 See id. The actual total of inmates who alleged unwilling staff sexual misconduct is 31,500. Id.
202 Id. at 3.
203 See id. at 1.
204 Id.
all, Guerino collected information “from facilities containing 2.12 million inmates in 2007 and 2.17 million inmates in 2008.”

“Total allegations of sexual victimization increased significantly between 2005 (6,241 incidents) and 2008 (7,444).”

Guerino found that, in 2007, there were 7,374 allegations of sexual victimization in United States correctional facilities. In 2008, this number was slightly higher with 7,444 allegations of sexual victimization. These totals marked a significant increase in the numbers of sexual victimization reported from 2005 (6,241) and 2006 (6,528). Moreover, this “increase in the total number of reported allegations of sexual victimization corresponds with an increase in the rate of reported allegations over time, from 2.83 allegations per 1,000 inmates in 2005 to 3.18 incidents per 1,000 in 2008.”

Additionally, in 2008, 2,528 (33%) allegations of sexual victimization consisted of allegations involving staff sexual misconduct. This percentage remained at 33% in 2007. Also, in 2008, 1,169 (15%) allegations consisted of staff sexual harassment. This was a two percent (2%) decrease from 2007. “These percentages were nearly unchanged from those reported in 2005” when there were 3,470 allegations of staff sexual misconduct.

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205 Id. at 2.
206 GUERINO & BECK, supra note 201, at 1.
207 See id. at 3 (Table 1).
208 See id.
209 See id.
210 Id. at 3.
211 GUERINO & BECK, supra note 201, at 3 (Table 2). The statistics in this section will mainly focus on the years 2007-2008 because those are the most recent years of reported allegations of abuse. Id. at 2. Additionally, Guerino described staff sexual misconduct as:

Any sexual behavior or act directed toward an inmate by staff, including romantic relationships. Such acts include intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; or completed, attempted, threatened, or requested sexual acts; or occurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.

Id.
212 See id. at 3 (Table 2).
213 See id. “Staff sexual harassment includes repeated statements or comments of a sexual nature to an inmate by staff. Such statements include—demeaning references to an inmate’s sex or derogatory comments about his or her body or clothing; or repeated profane or obscene language or gestures.” Id. at 2, 3 (Table 2).
214 See id. at 3 (Table 2).
misconduct and staff sexual harassment.\textsuperscript{215}

Interestingly, a significant number of allegations of staff sexual misconduct and staff sexual harassment were either unsubstantiated or unfounded. More specifically, 2,324 (46\%) staff sexual misconduct allegations were unsubstantiated and 1,230 (24\%) were unfounded.\textsuperscript{216} In contrast, 1,475 (59\%) allegations of staff sexual harassment were unsubstantiated and 758 (30\%) staff sexual harassment allegations were unfounded.\textsuperscript{217} Overall, 940 (12\%) staff sexual harassment and staff sexual misconduct allegations were substantiated.\textsuperscript{218}

\textit{The relationship involved nonconsensual behavior in fifty percent (50\%) of substantiated incidents of staff sexual misconduct and staff sexual harassment.}\textsuperscript{219}

Guerino provided a detailed analysis of the substantiated incidents of staff sexual misconduct and staff sexual harassment.\textsuperscript{220} His analysis separated the incidents into different categories.\textsuperscript{221} For instance, he noted that eighteen percent (18\%) of the allegations involved “[s]exual harassment or repeated verbal statements of a sexual nature” and eight percent (8\%) involved “unwanted touching.”\textsuperscript{222} In addition, four percent (4\%) involved “[i]ndecent exposure, invasion of privacy, or voyeurism for sexual gratification,” six percent (6\%) consisted of “[p]ressure or abuse of power resulting in a nonconsensual act,” one percent (1\%) was “[p]hysical force resulting in a sexual act,” ten percent (10\%) was other, and three percent (3\%) resulted from and “[u]nknown level of coercion.”\textsuperscript{223}

Guerino also concluded that the correctional employee and inmate appeared to engage in a consensual sexual relationship in sixty-two percent (62\%) of substantiated allegations.\textsuperscript{224} This was a five percent (5\%) in-
Correctional officers were involved in sixty-five percent (65%) of incidents of staff sexual misconduct and staff sexual harassment.\textsuperscript{226} Guerino found that correctional officers were involved in staff sexual misconduct and staff sexual harassment in sixty-five percent (65%) of substantiated allegations.\textsuperscript{227} This percentage was further analyzed by correctional facility.\textsuperscript{228} For example, Guerino determined that correctional officers were involved in fifty-five percent (55%) of staff sexual misconduct and staff sexual harassment incidents in federal and state prisons.\textsuperscript{229} This percentage was increased to eighty-two percent (82%) for incidents occurring in jails.\textsuperscript{230}

Guerino also analyzed the percentage of correctional officers who committed either staff sexual misconduct or staff sexual harassment.\textsuperscript{231} He found that correctional officers were involved in sixty-six percent (66%) of incidents involving staff sexual misconduct and sixty-one percent (61%) of incidents involving staff sexual harassment.\textsuperscript{232}

Correctional officers were subjected to either legal action or job loss in over fifty percent (50%) of substantiated incidents of staff sexual misconduct and staff sexual harassment.\textsuperscript{233}

From 2007-2008, forty-five percent (45%) of substantiated incidents of staff sexual misconduct and staff sexual harassment resulted in legal action against the correctional officer.\textsuperscript{234} Legal action consisted of arrest (20%), referral for prosecution (37%), or being “[c]onvicted/charged/indicted” (3%).\textsuperscript{235} In addition to legal action, correc-

\textsuperscript{225} See BECK, HARRISON & ADAMS, supra note 215, at 6.
\textsuperscript{226} GUERINO & BECK, supra note 201, at 22 (Appendix Table 15).
\textsuperscript{227} See id.
\textsuperscript{228} See id.
\textsuperscript{229} See id.
\textsuperscript{230} See id. “Detail sums to more than 100% because multiple responses were allowed for this item.” Id.
\textsuperscript{231} GUERINO & BECK, supra note 201, at 22 (Appendix Table 15).
\textsuperscript{232} See id.
\textsuperscript{233} See id. at 23 (Appendix Table 17).
\textsuperscript{234} See id.
\textsuperscript{235} Id.
Correctional officers also voluntarily or involuntarily lost their jobs, as a result of allegations of staff sexual misconduct or staff sexual harassment. This occurred in seventy-nine percent (79%) of incidents. Similar to the “legal action” category, “loss of job” was further separated into three categories. For instance, correctional officers were discharged in thirty-seven percent (37%) of incidents, resigned prior to investigation of the incident in thirty percent (30%) of allegations, or resigned after investigation of the incident in thirteen percent (13%) of allegations.

Twenty-one percent (21%) of incidents resulted in an “other sanction.” An “other sanction” included being reprimanded, disciplined, “demoted/diminished responsibilities,” “transferred to another facility,” and “other.”

Twenty-five percent (25%) of inmates were “placed in administrative segregation or protective custody” as a result of substantiated incidents of staff sexual misconduct and staff sexual harassment.

Guerino also discussed the ramifications of staff sexual misconduct and staff sexual harassment on inmates. He found that, following an allegation of staff sexual misconduct or staff sexual harassment, twenty-five percent (25%) of inmates were placed in either administrative segregation or protective custody. Nineteen percent (19%) were transferred to another correctional facility.

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236 GUERINO & BECK, supra note 201, at 23 (Appendix Table 17).
237 See id. “Detail sums to more than 100% because multiple responses were allowed for this item.” Id.
238 Id.
239 See id.
240 Id.
241 GUERINO & BECK, supra note 201, at 23 (Appendix Table 17).
242 Id.
243 See id.
244 Id.
245 GUERINO & BECK, supra note 201, at 23 (Appendix Table 17). Staff sexual harassment and staff sexual misconduct also resulted in inmates being given medical examinations, subjected to rape kits, tested for sexually transmitted diseases, and being provided mental counseling. Id.
There are several conclusions that can be garnered from this report. First, staff sexual incidents, whether in the form of sexual misconduct or sexual harassment, is a serious problem in the correctional system. As this report noted, the total number of reported sexual allegations increased "over time, from 2.83 allegations per 1,000 inmates in 2005 to 3.18 incidents per 1,000 in 2008."  

Second, correctional officers are consistently a majority of the perpetrators in staff sexual misconduct and staff sexual harassment incidents. As previously written, correctional officers were primarily involved in fifty-five percent (55%) of incidents of staff sexual misconduct or staff sexual harassment arising in state or federal prisons. Similarly, they were the primary perpetrators in eighty-two percent (82%) of incidents arising from jails. Hence, correctional officers, who have both the responsibility and most contact with inmates, are the main sources of staff sexual misconduct and staff sexual harassment committed on inmates.

Third, substantiated incidents of staff sexual misconduct and staff sexual harassment are extremely disruptive to prison society. For example, correctional officers suffered adverse consequences in over seventy percent (70%) of substantiated incidents. These adverse consequences included arrest, loss of job, resignation, transfer, or demotion. These incidents were also disruptive to the inmate’s way of life, because it typically resulted in the inmate being transferred to another correctional facility, placed in administrative segregation, or placed in protective custody.

c. DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES, 2005

This report, which discussed the “sexual abuse of federal inmates by correctional staff,” analyzed a significant number of resources.\textsuperscript{254} For example, OIG staff examined OIG statistics concerning allegations of inmate sexual abuse, as well as “reviewed state laws on staff sexual abuse; court cases; and literature published by organizations, academics, journalists, and government agencies, including the BOP, the National Institute of Corrections (NIC), the Government Accountability Office (GAO), and the United Nations (U.N.).”\textsuperscript{255}

In addition, OIG staff also spoke with several individuals about inmate sexual abuse.\textsuperscript{256} These individuals included OIG investigators, who probed allegations of inmate sexual abuse in federal prisons, and several BOP officials.\textsuperscript{257} The investigators also visited and spoke with staff at a female only federal prison.\textsuperscript{258} During their visit to the prison, OIG investigators interviewed staff about allegations of staff sexual abuse of inmates.\textsuperscript{259}

The OIG report was separated into five different sections.\textsuperscript{260} Of these five sections, the second section examined “the nature, extent, and consequences of staff sexual abuse.”\textsuperscript{261}

\textit{“From fiscal years (FY) 2000 to 2004, the OIG opened sexual abuse investigations of 351 subjects who allegedly sexually abused inmates.”}\textsuperscript{262}

In its report, OIG investigators determined that staff sexual misconduct was a prevalent problem in the federal prison system.\textsuperscript{263} This conclusion was based on three main factors.\textsuperscript{264} First, the OIG report found that twelve percent (12\%) of its annual investigations involved allegations of staff sexual misconduct.\textsuperscript{265} In fact, between the years of 2000 and 2004,
“the OIG opened sexual abuse investigations of 351 subjects who allegedly sexually abused inmates.”

Second, OIG investigators also noted that one ex-BOP official recognized staff sexual misconduct was a prevalent problem in the federal system.

Kathleen Hawk Sawyer, former Director of the BOP, stated that “sexual abuse of inmates was the biggest problem she faced as Director.”

Third, a 1999 GAO report found that “the BOP received 236 allegations of staff sexual abuse of female inmates in calendar years 1995 to 1998.”

I. UNDERREPORTING

The OIG report also determined that female inmates underreported allegations of staff sexual misconduct. OIG staff identified several reasons for this underreporting. First, inmates underreported because they believed reporting allegations of staff sexual misconduct could result in correctional staff retaliation. Second, inmates did not think investigators would find them credible. Third, inmates believed reporting could result in the inmate not “receiving unauthorized privileges or contraband in exchange for the sexual acts.”

II. SIGNIFICANCE OF DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES, 2005

The OIG report is important, because it discussed and provided examples of the effects of staff sexual misconduct. First, it noted that staff sexual misconduct caused corruption within the federal prison. Second, it caused rivalry between inmates. Third, OIG investigators found that it led to an increase in illegal contraband entering federal prisons. They

266 Id.
267 See id.
268 OFFICE OF THE INSPECTOR GEN., supra note 253, at 3.
269 Id.
270 See id.
271 See id. at 3-4.
272 See id. at 4.
273 OFFICE OF THE INSPECTOR GEN., supra note 253, at 4. OIG investigators noted that typically there was no “physical evidence to corroborate allegations of staff sexual abuse.” Id.
274 Id.
275 See id. at 7.
276 See id.
277 See id.
278 OFFICE OF THE INSPECTOR GEN., supra note 253, at 7.
wrote, “[n]early half of the subjects in OIG sexual abuse cases also smuggled contraband into prisons for the inmates with whom they had sexual relationships.”

Fourth, OIG investigators determined staff sexual misconduct could lead to both emotional and psychological problems for the inmate. Staff sexual misconduct could also subject the inmate to severe penalties, including placement in “solitary confinement or undesirable transfers to another institution far from their families.” Lastly, staff sexual misconduct could result in lawsuits against the BOP. The OIG report even acknowledged one instance where the BOP settled two lawsuits for a total of $600,000.

ii. **SUBJECTIVE ELEMENT: THE CORRECTIONAL OFFICER ACTED WITH A CULPABLE STATE OF MIND**

1. **A RELATIONSHIP BETWEEN A CORRECTIONAL OFFICER AND INMATE DOES NOT SERVE A LEGITIMATE LAW ENFORCEMENT OR PENOLOGICAL PURPOSE**

When analyzing the second element, courts examine the correctional officer’s subjective intent when the alleged constitutional violation occurred. “[C]ourts have repeatedly recognized that ‘where no legitimate law enforcement or penological purpose can be inferred from the defendant’s alleged conduct,’ the conduct itself may be sufficient evidence of a culpable state of mind.” A relationship between a correctional officer and inmate is such behavior that serves “no legitimate law enforcement or penological purpose.”

The relationship does not serve either of these purposes for two reasons. First, “sexual conduct between prison guards and inmates destabilizes the prison environment by compromising the control and authority of the guard over the inmate, compromising the inmate’s health, security and well-being and creating tensions and conflicts among the inmates them-

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279 Id.
280 See id.
281 Id. at 7-8.
282 See id. at 8.
283 OFFICE OF THE INSPECTOR GEN., supra note 253, at 8.
285 Carrigan, 70 F. Supp 2d at 454.
286 Id.
Second, it is “simply not part of the penalty that criminal offenders pay for their offenses against society.”

B. PUBLIC POLICY RATIONALES

i. AN INMATE CANNOT CONSENT TO A RELATIONSHIP WITH A CORRECTIONAL OFFICER, BECAUSE THE INMATE IS IN AN UNEQUAL POSITION WITH THE CORRECTIONAL OFFICER, THE RELATIONSHIP DISRUPTS THE PRISON ENVIRONMENT, AND THE RELATIONSHIP COULD LEAD TO EXPLOITATION OF THE INMATE

There are several policy reasons for finding an inmate could never consent to engage in a relationship with a correctional officer. First, correctional officers “and inmates are in inherently unequal positions” where the correctional officer holds a majority, if not all, the power. Basically, a correctional officer controls an inmate’s life inside of prison. For instance, the correctional officer determines when an inmate eats, where an inmate eats, what an inmate eats, when an inmate sleeps, where an inmate sleeps, “whether to turn the lights on or off, where the inmate goes, and what the inmate does.” In addition, as the Ninth Circuit Court of Appeals recognized, “[inmates] depend on prison employees for basic necessities, contact with their children, health care, and protection from other inmates.”

Second, relationships between inmates and correctional officers disrupt the prison environment. It not only creates tension between the inmates, but also invokes jealousy amongst them. These relationships also “destabilize[] the prison environment by compromising the control and authority of the guard over the inmate [and] compromising the inmate’s health, security and well-being.” It also disrupts the prison environment

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287 Id.
289 OFFICE OF THE INSPECTOR GEN., supra note 253, at 4.
290 See Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012).
291 Id.
292 Id.
294 See id.
295 Id.
in other ways.\textsuperscript{296} For example, it could lead to an inmate being transferred to another unit or an entirely different facility.\textsuperscript{297} Similarly, relationships could also result in the transfer, suspension, or resignation of the correctional officer.\textsuperscript{298}

Third, the correctional officer and inmate relationship could lead inmates to “use sex to compromise staff and obtain contraband or unauthorized privileges.”\textsuperscript{299} Such privileges could include additional “phone privileges or increased contact with children.”\textsuperscript{300} In addition, inmates could use the relationship to request luxury privileges such as cigarettes and gum.\textsuperscript{301} Interestingly, OIG staff found that “[n]early half of the subjects in OIG sexual abuse cases also smuggled contraband into prisons for the inmates with whom they had sexual relationships.”\textsuperscript{302}

Fourth, both a majority of state legislatures and Congress have criminalized correctional officer and inmate relations.\textsuperscript{303} By criminalizing this behavior, these governments are expressing a very strong disapproval of it.

Fifth, the correctional officer and inmate relationship could lead to the correctional officer “exploiting inmates’ vulnerabilities or past sexual abuse.”\textsuperscript{304} In fact, OIG agents determined that correctional officers often

\begin{itemize}
\item \textsuperscript{296} See id.
\item \textsuperscript{297} See GUERINO & BECK, supra note 201, at 23 (Appendix Table 17).
\item \textsuperscript{298} See id.
\item \textsuperscript{299} OFFICE OF THE INSPECTOR GEN., supra note 253, at 4.
\item \textsuperscript{300} Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012).
\item \textsuperscript{301} See id.
\item \textsuperscript{302} OFFICE OF THE INSPECTOR GEN., supra note 253, at 7. OIG investigators recognized that contraband could include food, jewelry, drugs, and weapons. Id.
\item \textsuperscript{304} OFFICE OF THE INSPECTOR GEN., supra note 253, at 4.
\end{itemize}
obtain sex from inmates in a fragile mental state.\textsuperscript{305} “Such inmates included those who had drug addictions, who previously were physically or sexually abused, who had mental health issues, who had little experience in the criminal justice system, who were awaiting deportation, or who had previously engaged in prostitution.”\textsuperscript{306}

Sixth, the correctional officer and inmate relationship exposes the government to liability.\textsuperscript{307} The OIG report documented at least two lawsuits that resulted in the BOP paying a total settlement of $600,000.\textsuperscript{308}

Lastly, the correctional officer and inmate relationship does not serve a legitimate purpose.\textsuperscript{309} It neither helps rehabilitate the inmate, nor is it “part of the penalty that [inmates] pay for their offenses against society.”\textsuperscript{310}

\section*{Conclusion}

The correctional officer and inmate relationship is complex. However, irrespective of its complexity, it is unequivocally wrong and illegal, because inmates are incapable of consenting to engage in the relationship. This inability to consent is based on a number of factors. For instance, correctional officers hold a significant amount of power and authority over inmates. This makes the decision-making aspect of the relationship extremely one-sided. Additionally, the relationship provides adverse consequences to the both the inmate and correctional officer. Generally, correctional officers are subjected to prosecution or job termination; whereas, inmates are transferred to another correctional facility or placed in solitary confinement. The inmate’s life is further disrupted, because jealously could erupt from other inmates in the facility. This disruption has been noted in several government sponsored studies and reports. Most importantly, a majority of state governments have criminalized this behavior.

Overall, courts should always determine that an inmate is incapable of consenting to a relationship with a correctional officer. Such a rule could have a significant impact on our correctional system; however, the government has a duty to ensure all its correctional facility employees are acting within the provisions of the Eighth Amendment. Regardless of the

\begin{thebibliography}{9}
\bibitem{305} See \textit{id}. at 5.
\bibitem{306} Id.
\bibitem{307} See \textit{id}. at 8.
\bibitem{308} See \textit{id}.
\bibitem{309} See \textit{Wood} v. \textit{Beauchair}, 692 F.3d 1041, 1050 (9th Cir. 2012).
\end{thebibliography}
stereotypes and prejudices associated with inmates, one must always re-
member that their constitutional protections do not disappear once they be-
come incarcerated.