Minnesota Journal of Law & Inequality

Volume 33 | Issue 2 Article 9

December 2015

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A Constitutional Paradox: Prisoner "Consent" to Sexual Abuse in Prison Under the Eighth Amendment

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Introduction

In a recent Tenth Circuit case, a prisoner, Stacy Graham ("Graham"), brought suit after two prison guards at an Oklahoma county jail had sex with her while she was in solitary confinement.[1] One of the guards had built a social relationship with Graham, and the two had engaged in some conversations that were sexually explicit in nature.[2] One night, both guards showed up in her cell in solitary confinement and engaged in simultaneous sexual acts with Graham.[3] At one point, the guard with whom Graham had not had a previous personal relationship pushed her head down and said, "Bend over, bitch," and "Shhh."[4] Soon after, Graham reported the incident.[5] Later, she filed suit against the guards individually under 42 U.S.C. § 1983 for a violation of the Eighth Amendment's prohibition against cruel and unusual punishment and against the Sheriff of the County for failure to discipline, supervise, and train the guards.[6] The district court granted the defendants' motion for summary judgment, finding there was no genuine factual dispute that Graham had consented to the sexual acts.[7] Graham appealed, arguing that, as a factual matter, she had not consented, and, as a legal matter, consent is not an available defense to a prisoner's Eighth Amendment sexual abuse claim.[8] The Tenth Circuit agreed with the district court on both counts, finding not only that Graham had indisputably consented to the sexual acts, but also that a

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†. J.D. Candidate, University of Minnesota Law School, 2016. Thank you to the editors and staff of *Law and Inequality: A Journal of Theory and Practice* for the time and effort they put into reviewing and editing this Note.

1. Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013).
2. *Id.* at 1120.
3. *Id.* at 1121.
4. *Id.*
5. *Id.* at 1122.
6. *Id.*
7. *Id.*
8. *Id.*

prisoner *can* consent to sexual contact with a prison employee, thus shielding the prison from liability for an Eighth Amendment violation.[9]

This case provides an excellent example of not only the difficulties in conceptualizing factual and legal standards for a prisoner's[10] "consent" to sexual contact with prison officials,[11] but also the injustice that is reinforced and perpetuated when these precarious standards are applied. *Graham* demonstrates how courts struggle to create and apply a rational and just standard of a prisoner's "consent" to sexual acts in the context of Eighth Amendment excessive-force claims where the necessary focus on "force" has inevitably led to a complicated and possibly inappropriate focus on "consent." Recognition and appreciation of the issues demonstrated in *Graham* is vitally important to addressing and rectifying the larger problem at issue, guard-on-inmate sexual abuse in prison,[12] which is a rampant and undiminishing problem in the United States.[13] Often, the sexual contact that occurs between prisoners and prison guards or staff is labeled as "consensual," or according to prison reports, at least

9. *Id.* at 1126.

10. This Comment uses the words "prisoner" and "inmate" interchangeably to apply to any person incarcerated in a public correctional institution.

11. This Comment uses the words "official," "guard," "staff," and "employee" interchangeably to mean any person subject to suit under Section 1983 actions. This Comment addresses Eighth Amendment claims brought through Section 1983 actions, which permit prisoners to bring a constitutional claim against *any person* acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983 (2006). Thus, the law applies to any person exercising power for the government and can even include private citizens, such as a doctor, contracted to work with a government correctional facility. West v. Atkins, 487 U.S. 42, 57 (1988) (holding that a private doctor with whom the state contracts to provide treatment to a prisoner can be sued using Section 1983).

12. This Comment uses the terms "prison," "jail," and "correctional facility" interchangeably to mean any government-run correctional facility subject to Section 1983 actions. Section 1983 is invoked when a person acts under local or state law, which includes individuals employed or associated with any public, government-run facilities. 42 U.S.C. § 1983 (2006). Thus, these terms are meant to encompass all public correctional facilities subject to these actions.

13. *See* BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL FACILITIES, 2009–2011 (Jan. 2014), *available at* http://www.bjs.gov/content/pub/pdf/svraca0911.pdf [hereinafter BJS SPECIAL REPORT] (reporting that substantiated incidents of sexual abuse in correctional facilities have largely remained the same from 2005 to 2011); Marisa Taylor, *Government: Guards May Be Responsible for Half of Inmate Sex Assaults*, AL JAZEERA AM. (Jan. 26, 2014), http://america.aljazeera.com/articles/2014/1/26/guards-may-be-responsibleforhalfofprisonrapes.html (discussing a 2014 Department of Justice study reporting that forty-eight percent of sexual abuse allegations from 2009–2011 were perpetrated by prison staff on inmates).

that it "appeared to be willing."[14] The legal, court-approved validation of the notion that sexual contact between a prisoner and a prison guard can be consensual has significant implications for how legal authorities, prison officials, and society in general view and respond (or fail to respond) to sexual abuse in prison.

This Comment seeks to show that the *Graham* court's decision that consent is an available defense to a prisoner's Eighth Amendment claim is not only legally unsound but also unwise and unjust due to significant implications and repercussions this holding has for broader gender and equality concerns. Section I provides the laws and principles surrounding sexual abuse in prison and the Eighth Amendment, as well as how these legal doctrines have developed and been applied by courts dealing with the "consent" issue. This Section also presents the potential problematic implications and repercussions of the "consent" defense in Eighth Amendment prison sex abuse claims. Section II provides an in-depth analysis of the Tenth Circuit's holding and ruling in the *Graham* case. Section III critiques and analyzes the *Graham* court's holding that consent is an available defense to an Eighth Amendment sex abuse claim. This Section argues that the *Graham* holding is not only legally flawed, but also grounded in unjust reasoning that validates and perpetuates continued injustice and inequality. Ultimately, this Comment argues that all sexual contact between prisoners and prison officials is coercive, non-consensual contact, and in order to uphold standards of law, morality, and gender equality and to promote structural reform in the prison system, courts must categorically and unconditionally reject the consent defense in the context of Eighth Amendment sexual abuse claims.

I. The Eighth Amendment and Sexual Abuse in Prisons

A. Statutory Law on Sexual Abuse in Prison

The *Graham* court's holding that consent is an available defense to a prisoner's Eighth Amendment sex abuse claim aligns with the decisions of other circuit courts that have considered the issue.[15] The circuit courts' rulings in favor of the legality of

14. BJS SPECIAL REPORT, *supra* note 13, at 2 ("Among all substantiated incidents between 2009 and 2011, 84% of those perpetrated by female staff [and] 37% of those perpetrated by male staff, involved a sexual relationship that 'appeared to be willing'.").

15. *See* Hall v. Beavin, No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997).

consensual sexual contact between prisoners and prison staff, however, starkly contrast with the state and federal statutory law regulating and criminalizing sexual abuse in prisons.[16] In fact, many state statutes explicitly reject consent as a defense to sexual contact between inmates and correctional facility employees.[17] Although a majority of states have opted to criminalize sexual contact between prison employees and prisoners regardless of whether there was "consent,"[18] a fair amount of states maintain statutes that do not prohibit a "consent defense" to custodial sexual misconduct.[19] Thus, a majority of states have criminal laws that reject the notion that prisoners are capable of consenting to sexual contact with prison employees, but some states have retained statutes that preserve a "consent" defense to this category of criminal prosecution.[20] Regardless of each state's view on the "consent" defense, however, almost every state has enacted a law that specifically addresses and criminalizes sexual interaction in some form between prison guards and prisoners.[21]

Despite the fact that almost all of the states have legislation criminalizing sexual contact or sexual abuse between an inmate and prison custodians, states very rarely criminally prosecute correctional staff for custodial sexual misconduct.[22] Additionally,

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16. *See, e.g.*, CTR. FOR CONSTITUTIONAL RIGHTS AND THE NAT'L LAWYERS GUILD, THE JAILHOUSE LAWYER'S HANDBOOK, HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATION OF YOUR RIGHTS IN PRISON 39 (5th ed. 2010), *available at* http://ccrjustice.org/files/Report_JailHouseLawyersHandbook.pdf ("Today, the federal government and most states have statutes making it a crime for a correctional employee to have intercourse with an inmate, regardless of whether or not he or she consents.").

17. NAT'L INST. OF CORR. & WASH. COLL. OF LAW, PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (Sept. 10, 2013), *available at* http://nicic.gov/library/browse.aspx?View=CORP&CORP=NIC/WCL%20Project%20on%20Addressing%20Prison%20Rape%20(Washington,%20DC [hereinafter FIFTY-STATE SURVEY] (providing a chart specifying twenty-eight states' statutes as either explicitly rejecting consent as a defense or deeming prisoners incapable of consenting to sexual acts with correctional employees or officials).

18. *Id.*

19. *See, e.g.*, *id.* at 18 (reporting that COLO. REV. STAT. § 18-3-404(1)(a) explicitly provides "[c]onsent is a defense"). Wyoming and New Hampshire also recognize consent as a legal defense to custodial sexual misconduct. *Id.* at 164–66, 107–09; *see also* JUST DETENTION INTERNATIONAL, *REVIEW OF APPLICABLE FEDERAL AND STATE SEX OFFENSE LAWS* (2014), *available at* http://www.justdetention.org/en/state_by_state_laws.aspx (providing an overview of state custodial sexual misconduct laws as well as other criminal laws that could apply to sexual contact or abuse in prison).

20. FIFTY-STATE SURVEY, *supra* note 17.

21. *Id.*

22. BJS SPECIAL REPORT, *supra* note 13, at 2 (reporting that, nationally, of all

there are a plethora of other obstacles that contribute to the ineffectiveness of these state laws beyond state authorities' failure to prosecute sexual contact between inmates and guards.[23] First, before a prison guard or prison employee can even be prosecuted, the sexual abuse must be reported, and underreporting of prison sexual abuse is a significant problem.[24] Out of the incidents of sexual abuse that are reported, very few are "substantiated" by the correctional facility officials, or determined to be true after an investigation.[25] One report by the Department of Justice released in 2014 stated that only *ten percent* of sexual abuse allegations are "substantiated."[26] Out of this increasingly minimized pool of sexual abuse allegations, as has already been stated, arrest or criminal prosecution is uncommon.[27] Even when a prisoner beats all of these odds, and his or her sexual abuse claim is prosecuted, the criminal penalties imposed are often minimal and depend on the amount of force that was used.[28]

Although state laws prohibiting sex abuse in prisons have proven to be generally ineffective, there are also federal laws aimed at combatting this prevalent issue.[29] The federal

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substantiated reports of sexual incidents, or those determined to be true, only fifty-six percent of sexual misconduct reports result in arrest or prosecution, and only six percent of sexual harassment reports result in the same).

23. *See* STOP PRISON RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 4 (2006), *available at* http://www.justdetention.org/pdf/in_the_shadows.pdf [hereinafter STOP PRISON RAPE] (mentioning "the absence of basic confidentiality standards within detention facilities; inadequate grievance procedures; and a lack of access to effective legal remedies" as some obstacles); *see also id.* at 17 (explaining that, even in cases where legal action is considered, the prison guards are usually terminated or merely resign instead).

24. *See id.* at 1 ("[A] 'code of silence' adhered to by both corrections officials and inmates continues to keep prisoner rape shrouded in secrecy both inside prisons and jails and in society at large.").

25. BJS SPECIAL REPORT, *supra* note 13, at 1.

26. *Id.*

27. *Id.* at 2.

28. *See* STOP PRISON RAPE, *supra* note 23, at 7 ("The criminal penalty under custodial sexual misconduct statutes is often limited to a fine and a one-year prison sentence . . . ."); *see also, e.g.*, Matt Clarke and Alex Friedmann, *State-by-State Prison Rape and Sexual Abuse Round Up*, PRISON LEGAL NEWS (Oct. 22, 2014), https://www.prisonlegalnews.org/news/2012/apr/15/state-by-state-prisoner-rape-and-sexual-abuse-round-up/ (reporting a sexual abuse scandal at a Pennsylvania prison in 2011 involving eighty-nine charges of sex abuse where eight guards were merely suspended and four prison administrators were fired or allowed to resign rather than pursuing criminal prosecution for the individuals involved).

29. *See* Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 268–73 (2008) (describing the general ineffectiveness of state custodial sexual misconduct laws as well as outlining the federal legal scheme regarding sex abuse of inmates).

government has enacted laws that make it a felony for a person to engage in a "sexual act" with a person under his or her "custodial, supervisory, or disciplinary authority."[30] Federal laws 18 U.S.C. §§ 2241–2245, like the majority of state criminal laws, do not permit a perpetrator to raise "consent" as a defense to a claim.[31] The federal statutes, while in theory just as advantageous as states' criminal laws, have unfortunately proved to be equally disappointing and ineffective in practice.[32]

In addition to the federal criminal statutes, the federal government also enacted the Prison Rape Elimination Act in 2003 ("PREA"). PREA was designed to combat what Congress had finally recognized as a significant problem: sexual abuse in prisons.[33] PREA imposed requirements on all correctional facilities, including state and federal prisons, jails, police lock-ups, private facilities, and immigration detention centers.[34] Primarily, the Act called for national standards in combatting prison rape, required the gathering of nationwide data about the problem, and provided grants for states to prevent sexual abuse in prison.[35] Not only did the enactment of PREA demonstrate a federal recognition and response to this overwhelming issue, it also officially recognized and validated another way to fight the problem: Eighth Amendment excessive-force claims.[36] PREA plainly recognized an area of law that had already begun to form—that sexual assault of inmates by correctional facility authorities could constitute a violation of the Constitution under the Eighth Amendment.[37]

B. Eighth Amendment Excessive-Force Jurisprudence

The Eighth Amendment of the Constitution guarantees to every citizen of the United States the right to be free from "cruel

30. 18 U.S.C. §§ 2241–45 (2007).

31. *Id.* (providing defenses for individuals who commit sexual assaults against minors only, in 18 U.S.C § 2243(c)).

32. *See* Teichner, *supra* note 29, at 269 ("Despite efforts put forth by states and the federal government to criminalize staff sexual misconduct, the legal system habitually fails to enforce these statutes.").

33. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–09 (2006); *see also* JUST DETENTION INT'L, FACT SHEET: THE PRISON RAPE ELIMINATION ACT, 1 (Feb. 2009) [hereinafter PREA FACT SHEET], *available at* http://www.justdetention.org/en/factsheets/Prison_Rape_Elimination_Act.pdf (reporting that PREA was enacted "to address sexual violence behind bars").

34. PREA FACT SHEET, *supra* note 33, at 1.

35. *Id.* at 1–2.

36. *Id.*

37. *Id.*

and unusual punishment."[38] The Eighth Amendment is the fundamental legal tool for prisoners to bring civil actions against the correctional facilities and officials in charge when they have experienced sexual abuse.[39] Inmates can file for redress under 42 U.S.C. § 1983, which provides a federal cause of action against persons who "under color of any [state] statute, ordinance, regulation, custom, or usage" deprives any person of his or her "rights, privileges, or immunities secured by the Constitution and laws."[40] These civil actions provide prisoners with the opportunity to seek damages for their injuries as well as allow for broader structural impact by holding the prison authorities and officials, rather than individual perpetrators, responsible for the sexual abuse.[41]

A decade before PREA acknowledged that sexual assault in prison can constitute a violation of the Eighth Amendment, the Supreme Court had already affirmed this legal theory in *Farmer v. Brennan*.[42] A prisoner's Eighth Amendment claim, however, faces the hurdle of meeting all of the standards that the Supreme Court has imposed on the establishment of an Eighth Amendment violation.[43] The overarching standard is that for a prison official to

38. U.S. CONST. amend. VIII.

39. *See* JUST DETENTION INT'L, FACT SHEET: SEXUAL ABUSE IN DETENTION AND THE LAW (July 2013) http://www.justdetention.org/en/factsheets/Legal_Fact_Sheet_FINAL.pdf.

40. 42 U.S.C. § 1983 (2006). Though this Comment does not address this legal action, it is important to note that Section 1983 claims apply to state government actors, but that inmates can also bring a *Bivens* action under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), which permits inmates in federal prisons to bring suit for violation of their federal constitutional rights by federal government employees. *See* Megan Coker, *Common Sense About Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 VA. L. REV. 437, 440–41 (2014).

41. *See* Coker, *supra* note 40, at 440–42 (describing the remedies available to plaintiffs bringing Eighth Amendment prisoner sex abuse claims).

42. Farmer v. Brennan, 511 U.S. 825, 828 (1994) (holding that a prison official's "deliberate indifference to a substantial risk of serious harm" to inmate-on-inmate sexual abuse violates the cruel and unusual punishment clause of the Eighth Amendment). It should be noted that the Supreme Court has never decided a case concerning guard-on-inmate sexual abuse, but *Farmer* is considered to extend to these claims as well. *See* Coker, *supra* note 40, at 444. The contention that sexual abuse by a *guard* constitutes an Eighth Amendment violation has also been upheld by a variety of lower courts. *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (recognizing legitimacy of Eighth Amendment claims to guard-on-inmate sexual abuse); Giron v. Corr. Corp. of Am., 191 F.3d 1281 (10th Cir.1999) (holding that sexual abuse of an inmate by an officer violates the Eighth Amendment of the Constitution).

43. *See* Katherine C. Parker, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 453–57 (providing an overview of the court-imposed standards for Eighth

be held liable under the Eighth Amendment, the official must display "deliberate indifference" to a "substantial risk of serious harm."[44] This overarching standard is known as the "deliberate indifference" test and thus has two parts: an objective part and a subjective part.[45] A prisoner must demonstrate 1) the alleged wrongdoing was, objectively, sufficiently serious enough to pose a "substantial risk of serious harm;" and 2) the prison officials were "subjectively aware of the risk" and deliberately chose to ignore it[46] (or, in other words, the prison officials possess what has been deemed by some courts as a "sufficiently culpable state of mind").[47]

When courts apply this test to guard-on-inmate prison sexual abuse cases, the subjective prong can be met if the "prison employee's alleged conduct, including but not limited to sexual abuse or rape" served "no legitimate penological purpose."[48] Thus, once it is shown that the abuse occurred, since it has no penological purpose, the subjective prong of the test is satisfied. The subjective prong poses its own set of legal issues,[49] but the major area of contention for the purposes of this Comment involves the application of the objective prong of the Eighth Amendment test.

The lower state and federal courts' applications of the objective prong to prison sexual abuse cases have overwhelmingly concentrated on physical injury.[50] The Supreme Court has provided guidance, however, that the objective prong does not require "serious" or "significant" injury, but that the real inquiry under the objective prong Eighth Amendment analysis is whether "force" is applied with a malicious or sadistic intent to cause

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Amendment claims).

44. *Farmer*, 511 U.S. at 834–35.

45. *Id.*

46. *See* Teichner, *supra* note 29, at 275 (outlining the Eighth Amendment "deliberate indifference" standard).

47. *See, e.g.*, *Farmer*, 511 U.S. at 834–35 (discussing requirements for a prison official's state of mind in sexual abuse claims); Hudson v. McMillian, 503 U.S. 1, 8 (1992).

48. Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1289 (10th Cir. 1999) (citing Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (discussing the application of the subjective prong to a prisoner's Eighth Amendment claim based on a guard shooting him in the leg during a prison riot)).

49. *See generally* Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281 (2000) (addressing the "demanding nature" of the subjective prong of Eighth Amendment claims in the context of custodial sexual abuse).

50. *See* Coker, *supra* note 40, at 450–56 (comparing several successful prison sex abuse cases involving physical injury to unsuccessful cases involving psychological injury).

harm.[51] Lower courts, however, have continued to impose somewhat harsh standards for the type of conduct that constitutes an Eighth Amendment violation, often explicitly or implicitly requiring some minimum level of injury.[52] For example, the Second Circuit has imposed a rule that in order for a prisoner to satisfy the objective prong of the test for claims of sexual abuse, the abuse must be "severe and repetitive."[53] Courts' harsh requirement that an inmate show a threshold level of physical injury under the objective part of the Eighth Amendment test might be rooted in, or at least validated by, the Prison Litigation Reform Act ("PLRA") which explicitly requires that federal civil actions brought by prisoners include some "showing of physical injury."[54]

Based on many courts' explicit or implicit requirement that some quantum of injury is sustained by a prisoner in order for him or her to bring a successful Eighth Amendment claim generally, it should be unsurprising that courts have also struggled to identify and apply clear standards for the quantum of "force" or "non-consent" that is required to support prisoners' *sexual abuse* Eighth Amendment claims.[55] Though injury and force are two separate requirements requiring different judicial inquiries, and the Supreme Court has explicitly called for judicial focus on the latter in Eighth Amendment claims,[56] it is not difficult to understand why and how courts have intermingled these standards resulting in an inconsistent and perplexing body of prison sex abuse case law.

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51. Wilkins v. Gaddy, 559 U.S. 34, 37–38 (2010) (per curiam) (holding that the Eighth Amendment's objective prong does not require that a prisoner show significant injury); Hudson v. McMillian, 503 U.S. 1, 4 (1992) ("This case requires us to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury. We answer that question in the affirmative.").

52. *See, e.g.*, Boxer X v. Harris, 437 F.3d 1109, 1111 (11th Cir. 2006) (holding that a male inmate who was forced to perform sexual acts for a guard suffered only "de minimus" injury); Adkins v. Rodriguez 59 F.3d 1034, 1037 (10th Cir. 1995) (finding that sexual harassment without violence did not fall within the context of the Eighth Amendment).

53. Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997).

54. 42 U.S.C. § 1997(e) (2013).

55. *See, e.g.*, Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013) (discussing issues of force and consent in context of a prisoner's sexual abuse claim).

56. *See Hudson*, 503 U.S. at 4 (reiterating the Whitley standard "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm") (citing Whitley v. Albers, 475 U.S. 312, 320–21 (1986)).

C. Case Law on Sexual Abuse in Prison: The Consent Defense

Even though state and federal legislatures,[57] as well as many scholars,[58] dictate that sexual contact in prison between inmates and staff cannot be consensual, the circuit courts that have taken up the issue have unanimously disagreed.[59] Not all of the circuit courts have considered the issue, and the circuits that have considered it come to slightly different conclusions about the parameters of the consent defense. Nonetheless, the Sixth, Eighth, Ninth, and Tenth Circuits have all found that consent is at least an available defense to an Eighth Amendment prison sex abuse claim.[60] Some lower district courts, however, more in line with statutory law and popular opinion, have ruled that consent is not a defense to a prisoner's claim of sexual abuse or rape, and that all sexual contact between prisoners and prison staff is a violation of the Eighth Amendment.[61]

The Sixth and Eighth Circuits have ruled, outright and unconditionally, that prisoners are fully capable of consent and that consent *is* an available defense to a prisoner's claim of sexual abuse or rape.[62] In *Hall v. Beavin*, the Sixth Circuit concluded that where a prisoner "voluntarily engaged" in a sexual relationship with a female prison employee, his Eighth Amendment claim was entirely "without merit."[63] Not only was Hall barred from bringing an Eighth Amendment claim, but the Ohio correctional facility where the sexual contact occurred

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57. *See* FIFTY-STATE SURVEY, *supra* note 17; 18 U.S.C.A. § 2243.

58. *See, e.g.*, Coker, *supra* note 40, at 443 ("[In] short, the coercive environment of imprisonment and the position of power guards enjoy over inmates suggest inmates cannot really consent to sexual contact with their guards.").

59. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013); Wood v. Beauclair, 692 F.3d 1041 (9th Cir. 2012); Hall v. Beavin, No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997).

60. *Graham*, 741 F.3d at 1122; *Wood*, 692 F.3d at 1046; *Hall*, 1999 WL 1045694 at *1; *Freitas*, 109 F.3d at 1339.

61. *See, e.g.*, Cash v. Cnty. of Erie, No. 04–CV–0182, 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that all sex between an inmate and facility staff may be a violation of the Eighth Amendment); Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (holding as a matter of law that intercourse between an inmate and her officer is a "per se violation of the Eighth Amendment").

62. *Hall*, 1999 WL 1045694 at *1; *Freitas*, 109 F.3d at 1339. Lower courts have come to the same conclusion, barring Eighth Amendment claims for prisoners who "consented" to sexual acts with prison employees. *See, e.g.*, Fisher v. Goord, 981 F. Supp. 140 (W.D.N.Y. 1997) (holding that a woman's consent to sex negated her Eighth Amendment claim).

63. *Hall*, 1999 WL 1045694 at *1–2.

actually *punished* Hall for engaging in the sexual relationship.[64] The Eighth Circuit, in *Freitas v. Ault*, came to a similar conclusion by holding 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."[65] Thus, without extensively considering the issue of a prisoner's "consent," and how this might be achieved, these courts held that as a matter of law, consent was an available defense to Eighth Amendment claims effectively blocking the prisoners' relief in these cases.[66]

In *Wood v. Beauclair,* the Ninth Circuit provided a little more consideration than the Sixth and Eighth Circuits to the problems associated with the idea of prisoner "consent" to sexual contact.[67] This court ruled that a prisoner is entitled to a presumption that a sexual act was nonconsensual, but that an accused prison employee can rebut that presumption with a valid defense of consent.[68] The Ninth Circuit acknowledged that the "power dynamics between a prisoner and a guard" problematize the concept of prisoner "consent," but nevertheless held that a per se rule making prisoners legally incapable of consent went too far.[69] The Ninth Circuit thus opted for a presumption of non-consent, stopping short of entirely removing the consent defense from the table.[70] Though the *Graham* Court, the Tenth Circuit, did not adopt the Ninth Circuit's presumption of non-consent test, the *Graham* court did, like the Ninth Circuit, recognize the problematic nature of prisoner "consent."[71] In line with the Sixth, Eighth, and Ninth Circuits, however, the *Graham* court came to the final conclusion that the consent defense was available, and

64. *Id.* at *2.

65. *Freitas*, 109 F.3d at 1339.

66. *Hall*, 1999 WL 1045694 at *2; *Freitas* 109 F.3d at 1339.

67. Wood v. Beauclair, 692 F.3d 1041 (9th Cir. 2012).

68. *Id.*

69. *Id.* at 1048–49.

70. *Id.* Note that some lower courts have chosen a similar "middle ground" presumptive approach as in *Wood*, in which the courts recognize the problem associated with the consent defense, but remain wary of completely eliminating the consent defense. *See, e.g.*, Chao v. Ballista, 772 F. Supp. 2d 337, 349 (D. Mass. 2011) ("I will not say that consensual sex is *never* an Eighth Amendment violation, nor will I say that it is *always* one.") (emphasis in original).

71. Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1126 (10th Cir. 2013) ("We agree with the Ninth Circuit that '[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion.'").

"voluntary" sexual contact between a prisoner and prison official barred an Eighth Amendment claim.[72]

Though the circuit courts are all in agreement, some lower courts have held that sexual contact between a prison guard or employee and a prisoner is a *per se* violation of the Eighth Amendment, thus explicitly prohibiting a consent defense.[73] Interestingly, in one such case (an unpublished opinion preceding the *Graham* decision) the Tenth Circuit previously stated that an inmate "could not legally consent to sexual activity" with a guard.[74] Other than these few lower court opinions, however, the circuit courts have made clear that "consensual" sexual activity between prisoners and those in authority positions over them cannot be addressed under the Eighth Amendment.[75]

D. The Problems with the "Consent" Defense

The circuit courts' general acceptance of the consent defense poses a variety of problems for individual victims of sexual abuse in prison. This Comment will later argue that the problems with the consent defense that are noted in this Section validate and perpetuate harmful gender stereotypes. The goal of this Section, however, is only to point out the issues that are generally faced by individual victims of prison sex abuse who attempt to bring claims under the Eighth Amendment, and how the consent defense contributes to those issues.

The leading and most recognizable issue with the consent defense is one that has already been noted in the case law,[76] as well as written about by a variety of scholars[77]—the authority

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72. *Id.*

73. Cash v. Cnty. of Erie, No. 04–CV–0182–JTC (JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that all sex between an inmate and facility staff is a per se violation of the Eighth Amendment); Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D.Del. 1999) (holding as a matter of law that intercourse between an inmate and her officer violated the Eighth Amendment).

74. Lobozzo v. Colorado Dep't of Corr., 429 Fed. Appx. 707, 711 (10th Cir. 2011). The *Graham* court circumvents this contradictory case law, however, by pointing out that unpublished opinions are not binding precedent. In addition, *Graham* interprets *Lobozzo* to have merely stated that the fact that a prisoner could not consent was uncontested by the parties, and that the court did not make a holding as such. *Graham*, 741 F.3d at 1124.

75. *Graham*, 741 F.3d at 1118; Wood v. Beauclair, 692 F.3d 1041 (9th Cir. 2012); Hall v. Beavin, No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997).

76. *See, e.g.*, *Wood*, 692 F.3d at 1047–49 (recognizing the "power dynamics" between inmates and prison employees).

77. *See, e.g.*, Dinos, *supra* note 49, at 282–83 ("Guards have virtually absolute authority within prisons . . . . This imbalance of power between guards and inmates

structure between prison employees and prisoners which problematizes the concept of prisoner "consent."[78] Inmates in correctional facilities are in an inherent position of inferiority and subordination to the authority and power of prison guards and other employees.[79] Prison employees are able to explicitly exert this authority over inmates to obtain sex or sexual favors.[80] When prison employees utilize this authority, their conduct can encompass a broad range of action from aggressive physical force[81] to quid pro quo exchanges.[82] The consent defense does recognize this type of conduct, especially explicit physical force, as coercion, and where coercion exists, a consent defense can be defeated and a prisoner can prevail.

What the consent defense does not adequately address, however, is the existence of coercion within the prison structure regardless of whether or not a prison employee chooses to utilize their authority in some way.[83] Regardless of how a prison

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allows guards to take advantage of a prisoner's dependency on them for basic necessities by giving guards the opportunity to withhold privileges."); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 582 (2006) ("Because of the imbalance of power inherent to the position of authority that captors hold over the captured, the concept of consent may have only limited value in evaluating these relationships.").

78. *See* Smith, *supra* note 77, at 586 ("Correctional staff, like slave owners, determine the ways in which women will serve their time: where they will be housed; where they will work; how much contact they will have with the outside; what they will eat; and how they will be clothed. This exercise of dominion and control severely limits—if not obviates—consent."). Smith discusses the authority structure, specifically focusing on female prisoners, but the logic extends to male inmates as well.

79. *See id.*

80. *See, e.g.*, Carimah Townes, *Alabama Looked the Other Way as Prison Staff Habitually Raped Women, Demanded Sexual Favors, DOJ Finds*, THINK PROGRESS (Jan. 28, 2014), http://thinkprogress.org/justice/2014/01/28/3211551/horrifying-sex-crimes-alabama-womens-prison/ (discussing a fairly recent occurrence in which prison guards at Alabama's Julia Tutwiler Prison for Women used their authority to commit rampant and gruesome sexual abuse on at least twenty-five percent of women prisoners in the facility).

81. *See id.*

82. *See* Boxer X v. Harris, 437 F.3d 1109, 1109 (11th Cir. 2006) (considering whether a female guard's offer of a quid pro quo exchange for better food if the inmate would show her his penis, was objectively serious enough for an Eighth Amendment violation); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE'S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES 1 (Sept. 2009) ("In fact, in most cases prison employees obtain sex from prisoners without resorting to the use of overt threats or force.").

83. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (Apr. 2005) [hereinafter DETERRING STAFF SEXUAL ABUSE] (explaining the theory underlying the inherent power inequalities in the prison system outside of prison employee's explicit use of authority and outlining three factors that contribute to this inherent power

employee chooses to act, or if they choose to abuse their authority, the authority *structure* of prison still exists.[84] An inmate is always aware of his or her lack of freedom and his or her inferiority within the confines of prison.[85] As such, a prison employee may not know if a prisoner has truly consented to a sexual act, or if the prisoner is acting out of fear or obligation based on his or her inherent understanding of his or her inferior position. In fact, prisoners themselves may not be able to adequately discern or understand the motives behind their own actions in such a situation.[86] Based on these understandings of the inherent authority structure of prison, it is clear that courts may find it challenging to identify when and how a prisoner has consented to sexual contact. This challenge poses a substantial problem for consistent application of the consent defense.

Another issue facing individual victims of prison sex abuse that problematizes the consent defense is the individual history that prisoners bring with them when they are incarcerated. Individuals entering the jail and prison system carry with them extremely high rates of mental health issues[87] as well as prior histories of sexual abuse.[88] Both mental health and history of sexual abuse complicate the capacity of a prisoner to consent to

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imbalance: 1) unequal position of staff and prisoners; 2) inmates could use sex to get favors; and 3) prison staff members can exploit inmates vulnerabilities and past sexual abuse).

84. *See id.*

85. *See, e.g.*, *Survivor Testimony, Loretta – Virginia*, JUST DET. INT'L (2014), http://www.justdetention.org/en/survivortestimony/stories/loretta_va.aspx (explaining her feelings of helplessness when a prison guard began harassing her).

86. *See, e.g.*, Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1122 (10th Cir. 2013). In this case, the female inmate gave inconsistent testimony about what sexual acts she had consented to and with whom she had consented to acts. She explained that she had wanted to engage in sexual acts with a guard she had a previous personal relationship with, but not the other guard that had intercourse with her. The facts of the case lend support to the idea that a prisoner may themselves be confused in these types of situations about what they are comfortable with, or "consented" to.

87. JUST DETENTION INT'L, FACT SHEET: MENTAL ILLNESS AND SEXUAL ABUSE BEHIND BARS (Sept. 2009), *available at* http://www.justdetention.org/en/fact_sheets.aspx ("People with mental illnesses are drastically overrepresented in U.S. prisons and jails. In a recent study, the Bureau of Justice Statistics (BJS) found that 36 percent of prisoners and 43 percent of jail inmates had a mental health disorder.").

88. *See* Kim Shayo Buchanon, *Impunity: Sexual Abuse in Women's Prisons,* 42 HARV. C.R.-C.L. L. REV. 45, 56 (2007) ("Because most prisoners have been sexually and physically abused in past family and romantic relationships, severe power imbalances may feel normal and familiar to a prisoner. Many prisoners have previously engaged in sex work in order to obtain money, drugs, or a roof over their heads.").

sexual contact with an authority figure, and also problematize the validity of any "consent" awarded.[89] These issues, like the inherent authority structure of prisons, makes it even more difficult for courts to discern what constitutes adequate prisoner "consent" to sexual contact with a prison employee.

The issues just discussed—authority structure, mental health, and prior sex abuse—can make it difficult for courts to identify and apply a clear standard for what constitutes prisoner "consent" to sexual contact. Regardless of the reason(s) causing judicial confusion about the consent defense, however, it is undeniable that the courts that consider these claims apply this defense highly inconsistently.[90] It has already been discussed that courts do not agree about whether or not they will even permit consent defenses to Eighth Amendment prison sex abuse claims.[91] In addition, of the courts that do allow a consent defense, courts have interpreted and applied widely varying conceptions of what constitutes "consent."[92] The inconsistent application of this defense, regardless of the reasons behind the inconsistency, makes it very difficult for prisoner sex abuse victims to adequately understand and utilize the law when bringing Eighth Amendment claims.

All of these issues posed by the consent defense—authority structure, mental health, prior sex abuse, and judicial inconsistency—hinder prisoner victims' abilities to bring effective claims under the Eighth Amendment.

II. Case Description

In 2013, the Tenth Circuit joined the Sixth, Eighth, and Ninth Circuits in deciding that a defendant could shield from a prisoner's Eighth Amendment excessive-force claim by arguing that the prisoner had "consented" to sexual contact with a prison

89. *See, e.g.*, *id.*

90. *Compare* Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997) (holding that voluntary sexual interactions between prisoners and staff can never violate the Eighth Amendment), *with* Cash v. Cnty. of Erie, No. 04–CV–0182–JTC (JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that all sex between a inmate and facility staff is a per se violation of the Eighth Amendment).

91. *Id.*

92. *Compare* Hall v. Beavin, No. 98-3803, 1999 WL 1045694, at 1112 (6th Cir. Nov. 8, 1999) (holding that even where a guard had sex with an inmate, the act could be "voluntary," with no substantial review of the record to establish consent), *with* Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (holding as a matter of law that intercourse between an inmate and her officer violated the Eighth Amendment).

employee.[93] The Court analyzed the claim under the Eighth Amendment excessive-force test, requiring that the prisoner prove both an objective harm and subjective culpability.[94] In its analysis under this test, and its ultimate conclusion that the prisoner, Graham, legally could and factually did consent to the sexual intercourse with two prison guards, the Court unintentionally highlighted some of the major issues of allowing and applying the consent defense.

First, the Court reiterated that sexual abuse of an inmate by a prison officer is a well-established violation of the Eighth Amendment.[95] To assess whether the case before it constituted such a violation, the Court applied the two-pronged excessive-force test established by the Supreme Court as the controlling standard for this type of Eighth Amendment claim.[96] The *Graham* court characterized the test as requiring: "(1) an objective prong that asks if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and (2) a subjective prong under which the plaintiff must show that the officials acted with a sufficiently culpable state of mind."[97] The court quickly found that the subjective prong had been met, because this prong only requires a showing that the prison official's conduct has "no legitimate penological purpose," and the court found that a penological purpose is indisputably lacking in regard to sexual intercourse between prisoners and guards.[98]

As for the objective prong, the court recognized the Supreme Court's direction and advice that whether or not conduct is considered objectively harmful enough does not require a showing of "significant injury," but instead has more to do with the "nature of the force."[99] Despite this explicit recognition of a more lenient standard of analysis for the objective prong, the *Graham* court found that, on the arguably contentious facts of the case, there was no "force" involved.[100]

The lack of force, the court reasoned, was evidenced by Graham's "consent" to the sexual acts.[101] The court argued that

93. Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013).

94. *Id.* at 1123.

95. *Id.* at 1122.

96. *Id.* at 1123.

97. *Id.* at 1123 (quoting Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1289 (10th Cir. 1999)).

98. *Id.* at 1122–23 (quoting *Giron*, 191 F.3d at 1290).

99. *Id.* at 1123 (quoting Wilkins v. Gaddy, 559 U.S. 34, 37–39 (2010)).

100. *Id.* at 1123–24.

101. *Id.* at 1123.

Graham had consented to the sexual contact because she had previously had sexual conversations with the prison guards, had exposed herself to both prison guards, "did nothing to indicate her lack of consent" during the sexual contact, and had stated that "almost" all of the sexual acts were consensual.[102] In coming to the conclusion that Graham had consented, the court openly discounted Graham's prior mental health history, history of sex abuse, and the small gifts that Graham had received from one of the guards. The court found that all of these facts taken together constituted "overwhelming evidence of consent."[103]

After finding that Graham had "consented" to the intercourse as a factual matter, the court additionally rejected Graham's argument that, *legally*, a prisoner cannot consent to sexual contact with her custodians.[104] The court acknowledged Graham's argument that prisoners are incapable of consent as a persuasive argument as a matter of "public policy," and contended that sexual activity between a prison official and a prisoner is "highly inappropriate," but nevertheless found that some sexual activity between prison officials and prisoners is permissible under the Constitution.[105] The court's expressed reservation in barring all consent defenses in prisoners' Eighth Amendment sex abuse cases was setting a precedent for elevating torts and crimes to full-blown constitutional violations.[106] This concern led the court to ultimately conclude that Eighth Amendment sexual abuse claims would not be successful unless a prisoner could show "some form of coercion (not necessarily physical) by the prisoner's custodians."[107]

III. The Consent Defense Is an Unsound Legal Choice and a Disconcerting Policy Choice

The consent defense to prisoners' sexual abuse claims under the Eighth Amendment should be unconditionally and categorically rejected. Legally, allowing a consent defense for this type of claim is an unsound judicial choice because 1) courts are required to interpret the Eighth Amendment such that it complies with "contemporary standards of decency,"[108] and the consent

102. *Id.* at 1123.
103. *Id.* at 1124.
104. *Id.* at 1125.
105. *Id.*
106. *Id.* at 1125–26.
107. *Id.* at 1126.
108. Hudson v. McMillian, 503 U.S. 1, 2 (1992) ("[Under] the 'objective component' of Eighth Amendment analysis: whether the alleged wrongdoing is

defense does not adhere to this standard; and 2) allowing the consent defense is a misapplication of the current Eighth Amendment excessive-force doctrine that has been explicitly laid out by the Supreme Court.[109] In addition to these legal issues, the consent defense should also be rejected by the courts because of the far-reaching and concerning implications of policy and practice that this defense has on prisoners, the prison system, and society in general. Courts' validation and application of the consent defense fails to protect prisoners from sexual abuse, inhibits reform in the prison system, and perpetuates and reinforces harmful gender stereotypes that injure not only individual prisoners, but society as a whole.

The *Graham* decision highlights all of the issues of the consent defense: both legal and practical. All of the issues implicated by the consent defense will be evaluated and scrutinized with an eye toward how these issues played a role in the *Graham* decision, and this analysis will explain why the *Graham* decision was incorrect. The legal and practical problems with the consent defense are not only relevant to the Tenth Circuit's conclusion, but are more broadly applicable to the consent defense generally. Thus, the legal and practical issues discussed will explain not only why the *Graham* decision was decided incorrectly, but also why the consent defense should be rejected by courts altogether.

A. The Consent Defense Is Legally Unsound

i. Violation of Contemporary Standards of Decency

The first reason why the *Graham* decision upholding a consent defense to Eighth Amendment sexual abuse claims is legally unsound is because it does not comply with contemporary standards of decency. The objective prong of an Eighth Amendment excessive-force claim is met when a plaintiff can show that he or she has suffered an objectively, sufficiently serious

objectively 'harmful enough' to establish a constitutional violation . . . is contextual and responsive to 'contemporary standards of decency.'") (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

109. Wilkins v. Gaddy, 559 U.S. 34, 37–38 (2010) (per curiam) (holding that the Eighth Amendment's objective prong does not require that a prisoner show significant injury, but is more concerned with the nature of the force used); Hudson v. McMillian, 503 U.S. 1, 4 (1992) ("[T]he use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury.").

"harm."[110] The Supreme Court has held that courts' determinations of whether or not a "harm" is objectively serious enough must be rooted in "contemporary standards of decency."[111] Pinpointing "contemporary standards of decency" is no easy task, and in this case, courts are prohibited from relying merely on their own personal judgment and opinions.[112] Rather, courts are advised to rely on "objective factors to the maximum possible extent."[113] In numerous cases, one of the main "objective factors" that courts have turned to as an indicator of "contemporary standards of decency" is the laws enacted by state legislatures.[114]

As enumerated in Section I of this Comment, a majority of the states have passed laws that explicitly reject consent as a defense to sexual contact between inmates and custodial staff in jails and prisons.[115] These states prohibit individual guards, or other correctional facility employees, from avoiding criminal prosecution by claiming that an inmate "consented" to the sexual contact. The number of states that prohibit the consent defense in their laws criminalizing sexual contact between inmates and their custodians has also increased in recent years.[116] As societal and legal awareness of the prevalence of prison sex abuse has expanded,[117] more and more states have adopted criminal statutes that reject the idea that prisoners can consent to sexual activity with prison guards and custodians.[118] This expansion of the prohibition against the consent defense by state legislatures is

110. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

111. *Hudson*, 503 U.S. at 8.

112. Rummel v. Estelle, 445 U.S. 263, 275 (1980) ("Eighth Amendment judgments should neither be nor appear to be merely the subjective views [of judges].").

113. Coker v. Georgia, 433 U.S. 584, 592 (1977).

114. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 176–87 (1976) (considering the state legislative response regarding death penalty as an "endorsement" of this practice, and not in violation of the Eighth Amendment); *Coker*, 433 U.S. at 593–96 (considering state law imposing the death penalty for rape to determine if this punishment violated contemporary standards of decency).

115. FIFTY-STATE SURVEY, *supra* note 17.

116. *Compare* Teichner, *supra* note 29, at 268 (discussing a study from 2006 in which only twenty-five states had criminal laws rejecting the consent defense), *with* FIFTY-STATE SURVEY, *supra* note 17 (providing a chart specifying that twenty-eight states' criminal statutes rejected the consent defense by 2013).

117. *See* Parker, *supra* note 43, at 461 (explaining how the Prison Litigation Reform Act was passed in 1996 "in an attempt to respond to the explosion of prison litigation in the last few decades").

118. *See supra* note 16 and accompanying text.

highly representative of evolving "common standards of decency" on this subject.[119]

The Supreme Court has instructed lower courts in numerous cases that the action by state legislatures is representative of "common standards of decency," and these common standards indicate what constitutes objectively serious harm under the Eighth Amendment.[120] Thus, the fact that a majority of state legislatures unconditionally reject a consent defense to sexual contact between prisoners and their custodians is a very good indication that these laws reflect "common standards of decency." A majority of people in the United States, through their state legislatures, have made clear that they do not believe permitting legal "consent" to sexual contact between prisoners and guards is a decent legal practice.

Because of this, the *Graham* court was incorrect in its conclusion that permitting the consent defense complies with common standards of decency and should be available against the Eighth Amendment. Instead, the *Graham* court, and all other courts considering this question, should recognize the evolving standards of decency evidenced by state laws that reject consent defenses to prisoners' sexual abuse claims, and should align the Eighth Amendment analysis with this standard. For this reason, the *Graham* court was incorrect, and the consent defense is legally unsound and should be rejected.

ii. Misapplication of Excessive-Force Jurisprudence

The second reason the *Graham* court's decision that prisoners can consent to sexual contact with prison guards under the Eighth Amendment is legally problematic is because the court incorrectly applied the excessive-force doctrine by misinterpreting the concept of "force." The Supreme Court has provided guidance to lower courts analyzing Eighth Amendment excessive-force claims; meeting the objective prong does not rely upon "the extent of the injury," but rather on the "nature of the force."[121] The Supreme Court has advised that "the core judicial inquiry" is not whether a certain threshold level injury is inflicted, but rather "whether force

119. *See, e.g.*, *Gregg*, 428 U.S. at 156 (advocating for the use of state legislation to determine "contemporary standards of decency" under the Eighth Amendment).

120. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 593–96 (1977); *Gregg*, 428 U.S. at 176–87.

121. Wilkins v. Gaddy, 559 U.S. 34, 39 (2010) (per curiam); *see also* Hudson v. McMillian, 503 U.S. 1, 2 (1992) (finding that the use of force against a prisoner may constitute a violation of the Eighth Amendment regardless of whether the prisoner suffered "serious injury").

was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[122] Thus, the Supreme Court has held that if some sort of "force" is used, then the "core judicial inquiry" turns on the subjective prong of the excessive-force inquiry: whether the officials acted "maliciously and sadistically."[123] As previously noted, the subjective prong of prison sexual abuse cases is met automatically "[w]here no legitimate penological purpose can be inferred from a prison employee's alleged conduct, [which] include[es] but [is] not limited to sexual abuse or rape."[124]

The *Graham* court acknowledges that this guidance from the Supreme Court effectively means that "when a prisoner alleges rape by a prison guard, the prisoner need prove only that the guard forced sex in order to show an Eighth Amendment violation."[125] The court contends that "some form of coercion (not necessarily physical)" must be shown in order for a prisoner to prevail under this type of claim.[126] Despite this acknowledgement that the prisoner need only prove some sort of "force" or "coercion," the *Graham* court nevertheless comes to the conclusion that no force or coercion occurred in this case.[127] What the *Graham* court ignores or fails to understand, however, is the force and coercion inherent in the relationship between an inmate and a guard.[128]

The *Graham* court does not recognize the fundamental power discrepancy between inmates and their custodians, and in doing so, comes to the conclusion that no "force" occurred; as such, the Eighth Amendment was not violated.[129] The ever-present

122. *Hudson*, 503 U.S. at 7.

123. *Id.*

124. Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1123 (10th Cir. 2013) (quoting Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999)).

125. *Id.*

126. *Id.* at 1126.

127. *Id.*

128. *See, e.g.*, Dinos, *supra* note 49, at 282 ("Guards have virtually absolute authority within prisons. . . . This imbalance of power between guards and inmates allows guards to take advantage of a prisoner's dependency on them for basic necessities by giving guards the opportunity to withhold privileges.").

129. *Graham*, 741 F.3d at 1126. One example of the *Graham* court clearly not considering how the inherent authority structure of prison affected Graham's "consent" is the fact that she was in *solitary confinement* when the two guards, Jefferies and Mendez, showed up at her cell and began engaging in sexual acts with her. *Id.* at 1121. This is an explicit example of the lack of power that Graham had in this situation, and for the Tenth Circuit to not even consider this fact in coming to the conclusion that Graham legally could, and factually did "consent" to the sexual contact shows a lack of awareness or appreciation for the significance of the inherent authority structure in correctional facilities.

atmosphere of coercion in prisons, however, creates a situation in which every act of sexual contact between a prisoner and his or her custodian is inherently *forceful*.[130] By ignoring this power difference, the *Graham* court incorrectly applies the excessive-force doctrine,[131] and fails to appreciate or understand that allowing a consent defense ignores the inherent force that occurs in *any* sexual interaction between a prisoner and his or her custodian.[132] Furthermore, any court that accepts the consent defense to prisoners' Eighth Amendment sex abuse claims, is ignoring the inherent "force" created by the authority structure of prison[133] and as such is incorrectly applying the Eighth Amendment excessive-force test. For this reason, the *Graham* court, and any court that accepts the consent defense, violates the well-established excessive-force doctrine.

Because of the inherent authority structure of prison, the consent defense *always* violates the Eighth Amendment under a correct application of the excessive-force doctrine.[134] Courts, including the *Graham* court, have misapplied this doctrine by concluding that the consent defense does not violate the Eighth Amendment.[135] In addition, courts have consistently misapplied the excessive-force doctrine by discrediting less explicit forms of "force" and implicitly requiring prisoners to show a certain level of force or non-consent in order to bring successful Eighth Amendment claims.[136] The courts' implicit requirement that prisoners prove some threshold amount of force or injury also directly contradicts the Supreme Court's guidance on Eighth Amendment excessive-force analysis.[137] This legal problem, unlike

130. *See supra* note 78 and accompanying text.

131. *See* Wilkins v. Gaddy, 559 U.S. 34, 39 (2010) (explaining how the excessive-force analysis is concerned with whether malicious force occurred, rather than how significant the force or injury is).

132. *See supra* note 83 and accompanying text.

133. *See id.*

134. *See Wilkins*, 559 U.S at 39.

135. *See, e.g.*, Graham v. Sheriff of Logan Cnty., 741 F.3d 1126 (10th Cir. 2013); Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997).

136. *See Graham,* 741 F.3d at 1124 (declining to consider a guard's special favors to a prisoner as a form of coercion); McGregor v. Jarvis, No. 9:08–CV–770, 2010 WL 3724133, at *1, *10 (N.D.N.Y. Aug. 20, 2010) (explaining that even where a guard explicitly engaged in quid pro quo exchanges and at one point threatened retaliation if the inmate stopped the sexual relationship, the court concluded that the relationship was "by all accounts . . . consensual").

137. *Wilkins*, 559 U.S. at 37–38 (per curiam) (holding that the Eighth Amendment's objective prong does not require that a prisoner show significant injury); Hudson v. McMillian, 503 U.S. 1, 4 (1992) ("[T]he use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when

the previous one, does not invalidate the consent defense *altogether*, but only problematizes the way that courts have applied the excessive-force doctrine based on specific factual circumstances. This legal issue is still significant, however, because the misapplication of the doctrine demonstrates another good reason why the consent defense is an unsound legal doctrine that should be rejected: courts are not very good at applying it.

This Comment has already addressed that the excessive-force doctrine, promulgated by the Supreme Court, does not require plaintiffs to show a certain "quantum of injury,"[138] but is more concerned with whether force occurred, and the nature of that force, i.e., whether it was applied for a "legitimate penological purpose."[139] Courts applying the excessive-force doctrine, however, have implicitly required prisoners to show a certain amount of force or injury when their prison custodians have sexually abused them.[140] This application is a violation of the Eighth Amendment excessive-force doctrine.

The facts and analysis in *Graham* provide a classic example of how courts have misapplied this doctrine by disregarding less overt forms of coercion, thus creating an implicit requirement of a certain level of "force."[141] For instance, Graham clearly stated at one point that the sexual contact with one of the guards was not consensual.[142] She later implied that she did not feel that her contact with either guard was fully consensual because the guards were supposed to protect her.[143] The court found that she had consented, however, because she expressed consent to "*almost* all [of] the sexual acts that occurred."[144] In addition, Graham had received special favors, including a blanket and chocolate from one of the guards, but the court found that these favors were not

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the inmate does not suffer serious injury.").

138. *See Wilkins*, 559 U.S. at 37–39.

139. *Graham*, 741 F.3d at 1123.

140. *See id.* at 1124 (declining to consider a guard's special favors to a prisoner as a form of coercion); McGregor v. Jarvis, No. 9:08–CV–770, 2010 U.S. Dist. WL 3724133 at *1, *10 (N.D.N.Y. Aug. 20, 2010) (explaining that even where a guard explicitly engaged in quid pro quo exchanges and at one point threatened retaliation if the inmate stopped the sexual relationship, the court concluded that the relationship was "by all accounts . . . consensual").

141. *See Graham*, 741 F.3d at 1124 (declining to consider a guard's special favors to a prisoner as a form of coercion).

142. *See id.* at 1122. When asked by the Oklahoma Board of Investigations if sex had been consensual, Graham responded, "[It was w]ith Jefferies. I didn't really want Mendez there." *Id.*

143. *Id.*

144. *Id.* at 1123.

enough to show coercion.[145] Furthermore, Graham also had history of mental illness and sexual abuse.[146] The court discounted these facts as well as the facts about one of the guards pushing her head down and saying, "Shhh," and, "Bend over, bitch," because they did not think that the arguments about the relevancy of these facts had been adequately developed by Graham's attorney.[147] Finally, it is important to note that the court repeatedly stated that one of the reasons that force had not occurred was because Graham "did nothing to indicate lack of consent."[148]

Despite all of these facts indicating coercion, force, and lack of consent, including the physical force used during the sexual acts, the court concluded that it was unequivocally clear that no force was used and that Graham undeniably "consented" to the sexual contact with her guards.[149] This conclusion implies that the *Graham* court did not consider the many examples of force and coercion to be significant enough and were requiring a certain threshold level of force or coercion that they felt had not been met on the facts of Graham's case. This approach, however, is an incorrect application of the excessive-force doctrine endorsed by the Supreme Court,[150] and the *Graham* court misapplied the doctrine by ignoring or discounting the numerous examples of force and coercion in Graham's case.

The Tenth Circuit is not the only court to misapply the excessive-force doctrine. Other courts have discounted less explicit forms of force and coercion and thereby implicitly required that a prisoner prove some threshold level of force in order to ultimately prove lack of consent and succeed under the Eight Amendment.[151] For example, the Eighth Circuit in *Freitas v. Ault* completely discredited the prisoner's assertion that he felt coerced

145. *Id.* at 1124.

146. *Id.*

147. *Id.* at 1121.

148. *Id.* at 1123. The Court also stated, "[s]he has not suggested that she indicated reluctance to Jefferies or Mendez." *Id.*

149. *Id.* at 1124 (finding that there was "overwhelming evidence of consent").

150. Wilkins v. Gaddy, 559 U.S. 34, 37–38 (2010) (per curiam) (holding that the Eighth Amendment's objective prong does not require that a prisoner show significant injury); Hudson v. McMillian, 503 U.S. 1, 4 (1992) ("[T]he use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even if] the inmate does not suffer serious injury.").

151. *See* McGregor v. Jarvis, No. 9:08–CV–770 (GLS/RFT) 2010 U.S. Dist. WL 3724133, at *1, *10 (N.D.N.Y. Aug. 20, 2010) (explaining that even where a guard explicitly engaged in quid pro quo exchanges and at one point threatened retaliation if the inmate stopped the sexual relationship, the court concluded that the relationship was "by all accounts . . . consensual").

to a guard's advances because "he feared the possible negative consequences of reporting her actions."[152] The *Freitas* court found the inmate's testimony essentially irrelevant and concluded that the sexual contact was nothing more than "voluntary sexual interactions."[153] The consistent misapplication of the excessive-force doctrine, by the *Graham* court and other courts, when considering whether or not to allow a consent defense, demonstrates another convincing reason why the consent defense should be rejected: courts have proven to be inadequate at correctly applying the excessive-force doctrine.

B. The Damaging Effects of the Consent Defense

The consent defense should be rejected because it is an unstable and invalid legal doctrine. In addition to the legal issues, the consent defense should also be discarded because courts' validation and application of the consent defense to Eighth Amendment claims fails to protect prisoners from sexual abuse, inhibits reform in the prison system, and perpetuates and reinforces harmful gender stereotypes that are injurious not only to individual prisoners, but to society as a whole.

The consent defense fails to protect prisoners from sexual abuse for many reasons that have already been discussed in this Comment.[154] First, the consent defense ignores the inherent authority structure of correctional facilities and the automatic power discrepancy between inmates and their facility custodians, which severely problematize the concept of "consent."[155] In other words, the consent defense allows courts to characterize sexual contact between prisoners and guards as "consensual" when coercion is clearly present.[156] In addition, permitting a consent defense to prisoners' Eighth Amendment sex abuse claims sends a clear message to correctional facility officials, employees, and society as a whole that at least *some* sexual contact between prisoners and prison guards is acceptable under the

152. Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997).

153. *Id.*

154. *See supra* Part III.

155. *See* Laurie A. Hanson, *Women Prisoners: Freedom from Sexual Harassment - A Constitutional Analysis,* 13 GOLDEN GATE U. L. REV. 667, 685 (1983) ("Sexual relationships between inmates and guards are the product of sexual exploitation and cannot be defined as voluntary.").

156. *See, e.g.*, Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1126 (10th Cir. 2013) (ignoring special favors, a declaration of lack of consent, and mental health and sexual abuse history in determining that a prisoner undeniably consented to sexual contact with two guards).

Constitution.[157] This legal validation of sexual contact between prisoners and guards creates a theoretical space in the morality and perspectives of prison guards and officials, as well as society in general, in which sexual contact between prisoners and prison guards can be an acceptable and appropriate activity.[158] Thus, the consent defense leads individuals and society to accept sexual contact between prisoners and their custodians as normal, and this societal perspective contributes to the inadequate protection of prisoners from sexual abuse by their custodians.[159]

Some courts have acknowledged that the power differential in correctional facilities problematizes consent, and the consequences of recognizing consent can be detrimental.[160] These courts, however, have upheld the consent defense because they are "concerned about the implications of removing consent as a defense for Eighth Amendment claims."[161] The courts that have expressed these "concerns," however, do not elaborate on exactly what the negative policy implications of absolutely prohibiting the consent defense are.[162] Due to the lack of explanation, one can only assume that the "concern" is a fear that prison guards and officials will be punished too harshly if there is an absolute prohibition against sexual contact between prisoners and custodians, or that prisoners will strategically seduce prison guards in order to bring frivolous claims against them.

A prohibition of the consent defense would concededly make *all* contact between prison staff and inmates a punishable activity. Though an absolute prohibition may not rid prisons of sexual abuse, it would certainly draw a clear line such that no prison guard need ever question whether a prisoner has "consented," or if they are engaging in punishable behavior. The guard who engages in sexual activity with a prisoner will always be violating the law.

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157. *See, e.g.*, Chao v. Ballista, 772 F. Supp. 2d 337, 349 (D. Mass. 2011) ("I will not say that consensual sex is *never* an Eighth Amendment violation, nor will I say that it is *always* one.") (emphasis in original).

158. *Cf.* Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) (discussing how the law validates societal perspectives in the context of a California referendum that denied same-sex couples the right to be legally designated as "married").

159. *See, e.g.*, *Graham*, 741 F.3d at 1123–26 (failing to consider various forms of coercion in finding that a prisoner "consented" to sex with two guards).

160. *See id.* at 1125 ("We cannot imagine a situation in which sexual activity between a prison official and a prisoner would be anything other than highly inappropriate."); Wood v. Beauclair, 692 F.3d 1041, 1048 (9th Cir. 2012) ("[W]e understand the reasons behind a per se rule that would make prisoners incapable of legally consenting to sexual relationships with prison officials . . . .").

161. *Wood*, 692 F.3d at 1048.

162. *Id.*

Is this scenario, where all sexual activity is absolutely prohibited, really a cause for "concern"? Is it necessary for the courts to protect *some* sexual contact, so that prison employees will continue to engage in sexual contact with prisoners, when they believe the prisoner has "consented"? It is arguable, if not clear, that based on the power disparity in prison,[163] sexual contact between prisoners and guards is really not the type of activity that deserves protection by the courts, and the "concern" of the courts that cling to an Eighth Amendment consent defense is misunderstood at best.

The second negative implication of the consent defense to Eighth Amendment sex abuse claims is that it hinders correctional facilities from establishing effective reforms to stamp out sex abuse in prison. As noted previously, 42 U.S.C. § 1983 permits prisoners to bring sex abuse claims under the Eighth Amendment against the officials and authorities in charge of the facility where they were abused.[164] When prisoners are successful under these claims that target prison authorities in addition to the individual perpetrators, the impact of the litigation is much more likely to push those in charge of the correctional facilities to institute policies that will avoid future litigation (i.e., policies that will prevent sex abuse).[165] The consent defense, however, inhibits prisoners from bringing successful Eighth Amendment claims, because it provides prison official defendants with an "out," or a way to avoid a judgment against them by claiming that the inmate "consented" to the sexual activity.[166] Thus, the consent defense inhibits valid sex abuse claims from being successful under the Eighth Amendment.[167] Further, the lack of success of these types

163. *See* Hanson, *supra* note 155, at 678–87.

164. *See* Coker, *supra* note 40, at 440 (describing the remedies available to plaintiffs bringing Eighth Amendment prisoner sex abuse claims including injunctive relief in which they can request that the court order the facility to take certain action to prevent future sexual abuse). For example, in *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, a class action of female prisoners requested, and the court ordered, that the prison institute a variety of reforms including medical and educational resources as well as regular compliance investigations. 877 F. Supp. 634, 666, 679–81 (D.D.C. 1994), *vacated in part and modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995).

165. *See, e.g.*, *Women Prisoners*, 877 F. Supp. at 679–81 (ordering the prison to institute a variety of structural reforms to improve conditions and prevent sex abuse).

166. *See, e.g.*, Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1123–26 (failing to consider various forms of coercion in finding that a prisoner "consented" to sex with two guards).

167. *Id.*

of claims impede potential structural reform in the prison system aimed at reducing sex abuse.[168]

The third and final detrimental policy effect of the consent defense is that its application by the courts is perpetuating and reinforcing gender stereotypes that are harmful to prisoners, as well as society as a whole. First, the consent defense fails to protect men because it has been applied by the courts to promote the idea that male prisoners are capable of protecting themselves and do not require the help of the law.[169] In addition, the consent defense has been applied in a way such that if a male prisoner has sexual contact with a female prison guard, the court presumes that he desired that contact, because he would have been able to reject the sexual activity if he had wanted.[170] When the consent defense is applied in cases in which a male prisoner is bringing the claim, the courts are more likely to disregard evidence of non-consent and find that the male prisoner consented to sex with the female guard.[171] The consent defense is also, however, reinforcing

168. *See* Coker, *supra* note 40, at 440.

169. *Compare* Hall v. Beavin, No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999) (asserting outright that a male inmate consented), *and* Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997) (finding a male inmate consented even though he testified that he felt pressured), *with* Cash v. Cnty. of Erie, No. 04–CV–0182–JTC (JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that all sex between an inmate and facility staff is a per se violation of the Eighth Amendment in a case with a *female* prisoner), *and* Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (holding as a matter of law that intercourse between an inmate and her officer violated the Eighth Amendment also in a case with a *female* prisoner). It cannot be unimportant that the two cases that most vehemently uphold the consent defense, *Freitas* and *Hall*, involve male prisoners alleging non-consent, and the two district court cases that have rejected the consent defense, *Cash* and *Carrigan*, involve female prisoners. It is also important to note that in the two cases, *Graham* and *Wood*, where the courts upheld the consent defense but nevertheless acknowledged the power disparity between inmates and guards, the prisoners were also female. *Graham*, 741 F.3d at 1125; Wood v. Beauclair, 692 F.3d 1041, 1048 (9th Cir. 2012).

170. *See, e.g.*, Petty v. Venus Corr. Unit, 2001 WL 360868, at *2 (N.D. Tex. Apr. 10, 2001) (holding that a male inmate who was forced to masturbate for female prison guards and even threatened with reprimand if he didn't do so had brought a "frivolous" claim and characterizing the activity as a "'welcome and voluntary sexual interaction[]'") (quoting Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997)).

171. *Compare* Hall v. Beavin, No. 98-3803, 1999 WL 1045694, at * 1 (6th Cir. Nov. 8, 1999) (asserting outright that a male inmate consented), *and* Freitas v. Ault, 109 F.3d 1335 (8th Cir. 1997) (finding a male inmate consented even though he testified that he felt pressured), *with* Cash v. Cnty. of Erie, No. 04–CV–0182–JTC (JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that all sex between an inmate and facility staff is a per se violation of the Eighth Amendment in a case with a *female* prisoner), *and* Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (holding as a matter of law that intercourse between an inmate and her officer violated the Eighth Amendment also in a case with a *female* prisoner).

negative stereotypes for female prisoners.[172] First, courts are more inclined to see women as victims and find that a female inmate has not consented to sexual activity.[173] The consent defense has been applied, however, to additionally assume that if a female inmate indicates in any way that she desires sexual contact, or fails to indicate that she does not want sex, then the courts have interpreted this to mean that the female prisoner has "consented" to or deserves whatever sexual contact occurred.[174] Thus, the courts' application of the consent defense has proved to be a troublesome policy choice because it has been applied to reinforce and perpetuate gender stereotypes that inhibit the success of prisoners' Eighth Amendment sex abuse claims and promote and validate harmful stereotypes accepted by society as a whole.

IV. Conclusion

This Comment sought to prove that the Tenth Circuit's holding in *Graham v. Sheriff of Logan County* upholding the consent defense to prisoners' Eighth Amendment sexual abuse claims was legally unsound, as well as unwise and unjust due to the detrimental policy implications of this judicial choice. By focusing on the analysis and factual circumstances of the *Graham* decision, this Comment also demonstrated not only that the *Graham* decision was incorrect, but that the consent defense should be rejected altogether. For the reasons laid out in this Comment, all sexual contact between prisoners and prison officials

172. *See, e.g.*, Fisher v. Goord, 981 F. Supp. 140, 150 (W.D.N.Y. 1997) (finding that the female prisoner could not have been raped or abused because during the time that she reported being abused she got a tattoo saying "Sexy" and also wrote love letters to another officer). Courts, such as the *Fisher* court, discredit the validity of female prisoners sex abuse claims, and find that they "consented" to sexual activity, if they display any sexual behavior at all. *Id.* In *Fisher*, the mere fact that the prisoner got a tattoo saying "Sexy" was evaluated as substantial evidence proving that she had consented to the multiple instances of rape and sexual abuse by her prison custodians. *Id.*

173. *Compare* Hall v. Beavin, No. 98-3803, 1999 WL 1045694, at *1–2 (6th Cir. Nov. 8, 1999) (asserting outright that a male inmate consented), *and* Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997) (finding a male inmate consented even though he testified that he felt pressured), *with* Cash v. Cnty. of Erie, No. 04–CV–0182–JTC (JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009) (holding that all sex between an inmate and facility staff is a per se violation of the Eighth Amendment in a case with a *female* prisoner), *and* Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (holding as a matter of law that intercourse between an inmate and her officer violated the Eighth Amendment also in a case with a *female* prisoner).

174. *See, e.g.*, *Graham*, 741 F.3d at 1123 (holding that because the female prisoner had consented to "almost" all of the sexual activity, she effectively consented to all of it).

is coercive and unconstitutional. In order to uphold standards of law, morality, and gender equality and to promote structural reform in the prison system, courts must categorically and unconditionally reject the consent defense in the context of Eighth Amendment sexual abuse claims.