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Graham v. Sheriff of Logan County: Coercion in Rape and the Plight of Women Prisoners

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GRAHAM V. SHERIFF OF LOGAN COUNTY: COERCION IN RAPE AND THE PLIGHT OF WOMEN PRISONERS

ABSTRACT

Sex between a prison guard and a prison inmate is usually considered rape, and is thus adjudicated as an Eighth Amendment excessive force claim. When the Tenth Circuit heard *Graham v. Sheriff of Logan County*, it was tasked with determining whether sex between a prison inmate and two guards constituted excessive force, but instead, the court ignored the issue of force and improperly held that the female inmate consented to intercourse.

This Comment utilizes feminist dominance theory as a backdrop for analyzing the Tenth Circuit's discussion of whether Stacey Graham was raped by two prison guards. Dominance theory argues that, in criminal rape, gender inequality is a form of coercion. However, gender inequality is also greatly relevant when evaluating rape as an Eighth Amendment violation. Instead of recognizing the extreme inequality and gender asymmetry that exists between male guards and female inmates in prison, the Tenth Circuit bestowed the power of consent upon the inmate-plaintiff in *Graham* and insisted that she had the voluntary right and ability to consent to intercourse with a male guard. By disregarding the power imbalance the prison created and discounting the role of both gender and social inequality, the Tenth Circuit's decision subordinates female prisoners who seek justice as victims of rape.

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INTRODUCTION

> *Under law, rape is a sex crime that is not regarded as a crime when it looks like sex.*
>
> —Catherine MacKinnon[1]

Under the traditional view of rape, criminal law requires intercourse, coercion, and nonconsent.[2] This three-pronged requirement assumes that women can consent to forced sex.[3] What traditional rape law neglects to consider, however, is that force can transcend physical aggression; a woman's failure to display physical resistance to force is not indicative of consent.[4]

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1. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989).
2. *Id.*
3. CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 131 (2005); *see also infra* Part I.B.
4. *See, e.g.*, State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985), in which a jury questioned whether rape could occur post-penetration, to which the judge affirmed that "intercourse by compulsion" constitutes rape. The trial court continued, stating that "[t]he critical element there is the *continuation under compulsion*." *Id.* Thus, rape occurs based on compulsion, not necessarily based on a victim's physical displays of resistance to the offense. *Id.*

Feminist legal scholars find the deficiencies of rape law indicative of social inequality between men and women.[5] Gender asymmetry is exacerbated in prison where male guards have complete control over female inmates.[6] Under such circumstances, when rape occurs between a male guard and female inmate, the inmate is subordinated and powerless not only based on her gender, but further by her status as a prisoner.

In *Graham v. Sheriff of Logan County*,[7] Stacey Graham was a prisoner who claimed her male guards raped her in violation of the Eighth Amendment, which protects prisoners from cruel and unusual punishment.[8] The Tenth Circuit focused on the evidence of her consent to sex, holding that rape did not occur.[9] Though federal courts are split as to what constitutes consent to sex between prisoners and their guards, and whether consent may exist at all,[10] the Tenth Circuit's treatment of the matter disregarded both the power dynamic and gender asymmetry between female inmates and male guards, and the issue of evaluating force in rape. This Comment discusses how inequality is a form of coercion in rape and how the Tenth Circuit's decision in *Graham* subordinates wom-

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5. Many consider traditional rape law, as with other laws, a reflection of patriarchal society. *See infra* notes 51–52 (describing patriarchy and its impact). The legal system is among the institutions in society affected by patriarchy. Additionally, when the legal system must evaluate allegations of rape, its evaluation of consent exemplifies the social inequality embedded in our society:

> In determining "consent," as in making judgments about force, fear, intimidation, and "reasonableness," law's vague, abstract standards are especially troubling in this respect. Law has not simply opted for a neutral solution to these socially contested issues. In each instance, law has chosen sides. The law gives priority to the interest (the predominantly male interest) in seeking sexual gratification through advances backed by physical strength and social power. And the law gives priority to protecting sexually assertive individuals (predominantly men) from the risk of conviction without clear warning in advance.

STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 67 (1998); *see also* NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 10 (2006) (noting that "[d]ominance theorists cite the lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women").

6. "Gender asymmetry" refers to the disproportional imbalance of equality between genders.

7. 741 F.3d 1118 (10th Cir. 2013).

8. *Id.* at 1124. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See* Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (holding that sexual abuse of an inmate by an officer is an Eighth Amendment violation); Graham v. Sheriff of Logan Cnty., No. CIV–10–1048–F, 2012 WL 9509373, at *6 (W.D. Okla. Nov. 1, 2012) (noting that "[b]ecause Graham was incarcerated at the time of the alleged events . . . her claim is properly analyzed as an Eighth Amendment excessive force claim"); Fisher v. Goord, 981 F. Supp. 140, 172 (W.D.N.Y. 1997) ("Sexual abuse may violate contemporary standards of decency and can cause severe physical and psychological harm. For this reason . . . sexual abuse of an inmate by a prison official can . . . constitute an Eighth Amendment violation."); *infra* notes 47–48, 120–21 and accompanying text; *cf.* Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994) (stating that rape is "simply not part of the penalty that criminal offenders pay for their offenses against society" (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)) (internal quotation marks omitted)).

9. *Graham*, 741 F.3d at 1124.

10. *See infra* Part II.C.

en prisoners in the justice system by misapplying the law and failing to recognize the social constructs of gender in prison.

This Comment proceeds in three parts. Part I provides a background of postmodern dominance theory to explain how rape is a byproduct of institutionalized gender inequality. Further, by discussing how gender inequality is coupled with severe power dynamics in a restricted environment, Part I also demonstrates how the power imbalance is manifested in prison. Part II outlines the facts, procedural history, and unanimous majority opinion of *Graham*. Finally, Part III draws on the concepts of dominance theory to show how the Tenth Circuit improperly reviewed the issue of consent and to analyze how inequality between Graham and two guards functioned as a form of coercion to sex. Part III concludes by expanding the concepts of gender inequality to consider how Graham commoditized her sexuality in prison as a result of her extreme powerlessness.

I. BACKGROUND

Knowledge of the social environment that a prison creates is critical to understanding whether an inmate can consent to sexual behavior in prison. Thus, this Part begins by establishing how prisons create a framework in which inmates have little control over their lives, and considers the ways in which inmates respond to that lack of control. This Part continues with a background to distinguish rape law as a constitutional violation from rape law in the criminal context and concludes with a brief introduction of feminist legal theory to analyze how existing rape law is grounded in patriarchy, a social structure that is exacerbated in prison.

A. The Social Framework of Prison and the Inmate Response

When an inmate is admitted to prison, she must adjust to an environment where she faces high threat but lacks control.[11] Such an adjustment can result in severe psychological damage.[12] Prisoners respond to the lack of control in several ways, one of which is to suppress emotions and vulnerabilities to convince others that they are violent.[13] Despite suppressing emotion outwardly, one study revealed that internally, wom-

11. Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 535 (1997).

12. *Id.*; Barbara H. Zaitzow, *Pastel Fascism: Reflections of Social Control Techniques Used with Women in Prison*, 32 WOMEN'S STUD. Q. 33, 40 (2004) ("A woman inmate's feeling of inadequacy is heightened by the constant surveillance under which she is kept. The prisoner is confronted daily with the fact that she has been stripped of her membership in society at large, and then stands condemned as an outcast and outlaw such that she must be kept closely guarded and watched day and night. She loses the privilege of being trusted and her every act is viewed with suspicion by the guards.").

13. Haney, *supra* note 11, at 536–37 (citing prisoner research).

en inmates experience stages of grief comparable to those experienced by terminally ill patients.[14]

Beginning with denial, both patients and prisoners experience anger when they realize that they are no longer in control of their lives.[15] Because of the lack of control, the anger women experience during this stage is expressed through an increased need for self-assertion.[16] One way prisoners attempt to exercise control is by playing a game known as "being sneaky" in which they deceive guards to make them believe the women are doing what the guards want them to do.[17] Making a decision is deemed a luxury in prison; thus, the mere ability to decide when to play this game itself serves as an exercise of control.[18] As this Comment will show, the plaintiff in *Graham* often determined the amount and extent of inappropriate contact with her guards, which is reflective of her struggle for control as an inmate.[19]

While prisoners must cope to adapt to the psychological struggles of incarceration, prison guards present a separate but related challenge. Guards have nearly complete control within prisons, which allows them to exploit the power imbalance with inmates.[20] While in a free society, a woman can respond to harassment or abuse, in prison, inmates are forced to tolerate their guards' abuse because they depend on the guards for safety.[21] For example, inmates rely on guards for basic needs,[22] and

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14. Christina Jose-Kampfner, *Coming to Terms with Existential Death: An Analysis of Women's Adaptation to Life in Prison*, 17 SOC. JUST. 110, 112–13 (1990).

15. *Id.* at 115.

16. *Id.* at 115–16 (quoting a study in which a researcher notes that, similar to the ways in which a dying patient yearns for control over their medication and food, an inmate searches for ways to assert control over basic facets of her own life).

17. *Id.* at 116–17 (explaining that inmates play the game of "being sneaky" in how they respond to officers' orders; for example, if an officer punishes an inmate by forcing her to eat food in her cell, the inmate seeks to make the officer believe she prefers eating in her cell instead of the dining room).

18. *Id.*

19. The game is not more than a response to complete powerlessness. It is not necessarily indicative of an inmate's desires or wants; rather, it is a mind game by which the prisoner experiences some level of control over her own acts and, in turn, the acts of others. By "being sneaky," women deceive guards and encounter a minute fraction of control in an environment that otherwise restricts their behavior. *See id.*

20. *See* Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 WOMEN'S STUD. Q. 102, 107 (2004) (citing AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 7 (1999), *available at* https://www.amnesty.org/en/documents/amr51/019/1999/en/; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 43, 75 (1996), *available at* http://www.hrw.org/reports/1996/12/01/all-too-familiar) ("Correctional officers' absolute power over giving warnings, infractions, and punitive measures may provide opportunities for the development of exploitative relationships that hinge on 'favor-giving' and avoiding punishment."); Anthea Dinos, Note, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281, 282 (2001).

21. Katherine C. Parker, Note, *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, 444 (2002).

22. Zaitzow, *supra* note 12, at 39–40 ("The most obvious fact of life in women's prisons is that women are dependent on the officers for virtually every daily necessity, including food, showers, medical care, feminine hygiene products, and for receiving 'privileges' such as phone calls,

guards take advantage of that by often withholding goods and privileges to punish or compel behavior.[23]

Regardless of whether a guard actually withholds a prisoner's privileges, a guard's mere power to do so presents the same threat. Women inmates face both implicit and explicit threats if they disobey a guard's sexual advances.[24] Moreover, inmates may become emotionally attached to guards and find that sex with a guard is an opportunity to experience power and control.[25] Because a woman inmate faces complete powerlessness in prison, the decision to use her body as a commodity or trade sex for favors is an opportunity to exercise control.[26] In addition, because prisoners tend to have experienced physical or sexual abuse in past relationships, the power imbalance between inmates and guards often feels familiar and normal.[27] Prior victimization increases the likelihood that an inmate is influenced by a guard's control.[28]

In defining what constitutes legal and illegal force in sex, existing criminal rape law has established what is considered a "normal level of force."[29] By placing value on a male defendant's view of what constitutes rape, criminal law reflects the inequality between men and women, the role of patriarchy, and the legal subordination of women. The Tenth Circuit's analysis in *Graham* exemplifies this view, while reflecting the legal system's disregard for both the powerlessness of women prisoners and the social environment prison creates, where gender inequality is treated as an irrelevant factor to inmates.

B. The Criminal and Constitutional Violation of Rape

The crime of rape in the United States was originally adopted from English common law, which required use of force and lack of consent.[30]

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mail, visits, and attending programs. To ask another adult for permission to do things or to obtain items of a personal nature is demeaning and humiliating. . . . The women prisoners, like children, are told when to get up, how to dress, what to eat, where to go, how to spend their time—in short, what to do and what not to do.").

23. Dinos, *supra* note 20, at 283.

24. *See* Kim Shayo Buchanan, Note, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 56 (2007).

25. *Id.* at 67 (discussing a Rathbone study that discussed a prisoner who had sex with guards and reported that it gave her a sense of power).

26. *Id.* at 57 (noting that power dynamics in prison are based on the dichotomy between those in power (the prison guards) and those without power (the inmates)). Such powerlessness "serves as a constant reminder to women in prison that they do not have autonomy over their own bodies or well-being in prison," and that power and gender imbalance in prison is exacerbated by the control male correctional officers have "as women must rely on men for basic necessities, phone privileges, and visiting privileges." Dirks, *supra* note 20, at 106–07; *see also supra* notes 21–23.

27. Buchanan, *supra* note 24, at 56; Dirks, *supra* note 20, at 110 ("Women who have had previous experiences of victimization in their lifetimes are more likely to have repeated experiences of trauma in their lives.").

28. Dinos, *supra* note 20, at 283.

29. MACKINNON, *supra* note 1, at 173.

30. Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 (1988). Rape was initially

However, in determining what constitutes rape, different courts applied varied standards for the amount of force required and the necessary amount of resistance by the victim.[31] As rape law in the United States developed, state legislatures defined rape differently; while some focused on the element of nonconsent, others focused on requisite force.[32]

The traditional, criminal law view that rape requires intercourse, force, and nonconsent assumes that if sexual behavior involves two of the three elements, it would not constitute rape. For example, force during intercourse could be considered consensual, or nonconsensual intercourse could be acceptable absent force or coercion.[33] The existing laws imply that women may consent to forced sex.[34] By assuming this perspective, criminal law reveals the value of male dominance and the degraded status of both women themselves and their social worth.[35] While the law seeks to treat men and women equally, it arguably fails to realize social inequality between genders.

When requiring both physical force and nonconsent, the legal system suggests that nonconsensual sex is not rape or that forced sex may be consensual.[36] The Model Penal Code, which is among the leading rape reforms, defines rape as sexual intercourse that is compelled by either force, the threat of force, serious bodily injury, or extreme pain.[37] The Model Penal Code eliminates nonconsent as long as there is coercion.[38] While some states have followed the Model Penal Code's example by including coercion in their definition of force, the meaning of coercion has varied among jurisdictions.[39]

While the crime of rape is often adjudicated as a criminal offense, rape that occurs in prison may amount to a constitutional violation. A prisoner's treatment and the conditions of a prisoner's confinement must conform with the Eighth Amendment,[40] which states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

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defined as "the carnal knowledge of a woman forcibly and against her will." *Id.* at 401 n.16 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *210).

31. Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 19–20 (1996).

32. Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 150 (2011); *see also* Ann T. Spence, Note, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 58–59 (2003) (discussing the various approaches states use to evaluate rape claims).

33. MACKINNON, *supra* note 1, at 172.

34. MACKINNON, *supra* note 3, at 131.

35. *Id.* at 129 ("Availability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth.").

36. Spence, *supra* note 32, at 62 (citing examples).

37. MODEL PENAL CODE § 213.1(1)(a).

38. Murphy, *supra* note 31, at 20.

39. Spence, *supra* note 32, at 64–65.

40. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)).

punishments inflicted."[41] Asserting that rape in prison violates the Eighth Amendment is an allegation of cruel and unusual punishment.

For sexual misconduct in prison, the Supreme Court's ruling in *Farmer v. Brennan*[42] defines the prohibition against cruel and unusual punishment.[43] In *Farmer*, the transsexual plaintiff claimed prison officials violated his Eighth Amendment rights by placing him in a male prison where he was beaten and raped.[44] The Court reasoned that while the Eighth Amendment prohibits prison officials from using excessive physical force against prisoners, it also imposes a duty on officials to ensure the safety of prisoners and that they are treated humanely.[45] To that end, the Supreme Court held that sexual abuse of a prison inmate by a prison official constitutes an Eighth Amendment violation.[46]

However, to distinguish any injury a prisoner may sustain in prison from being a constitutional violation, the Supreme Court has determined that an offense must meet both an objective and subjective element to amount to an Eighth Amendment violation.[47] To satisfy the objective element, a court must first decide whether the alleged harm was objectively serious enough to establish a violation.[48] For the subjective element, a court must find that the prison official had a culpable state of mind, defined as a "'deliberate indifference' to inmate safety."[49] While a rape allegation under the Eighth Amendment must satisfy the elements required under a criminal rape claim, i.e., sexual contact, nonconsent, and force, it is evaluated narrowly to also meet the requirements of a constitutional violation.

C. Gender Inequality and Existing Rape Law

Some feminist theories hold that, because so much of our legal system and rules of civilization have been written by men, men exercise more control in society than women.[50] Postmodern feminist legal theory

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41. U.S. CONST. amend. VIII.

42. 511 U.S. 825 (1994).

43. Cheryl Bell et al., Recent Developments, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 211 (1999).

44. *Farmer*, 511 U.S. at 830; *see also* Cheryl Bell et al., *supra* note 43.

45. *Farmer*, 511 U.S. at 832.

46. *Id.* at 834 ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981))); *see also* Giron v. Corrs. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (citing *Farmer*, 511 U.S. at 834).

47. Bell et al., *supra* note 43, at 212.

48. *Farmer*, 511 U.S. at 834.

49. *Id.* at 834–35 (quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)).

50. LEVIT & VERCHICK, *supra* note 5, at 15–16 ("All feminist theories share two things . . . . First, feminists recognize that the world has been shaped by men, particularly white men, who for this reason possess larger shares of power and privilege. All feminist legal scholars emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. . . . Second, all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and on how to achieve it."). Levit and Verchick continue to describe various feminist

considers men's legacy of control as the basis for our society's patriarchal structure—which is manifested in the law's subordinate treatment of women who have been sexually violated through male dominance.[51]

Dominance theory finds that sexual violation is made possible by gender inequality.[52] Gender inequality is socially institutionalized and demonstrates the subordination of women.[53] For example, Catharine MacKinnon, a prominent feminist legal theorist, postulates that sexual assault occurs because of a hierarchy between the parties to the assault—in other words, the power of one gender over another.[54] A hierarchy existed in *Graham* not only because the plaintiff was a woman, but also because she was a prisoner, and the perpetrators were her male guards.

Nevertheless, awareness of a social hierarchy is seemingly absent in rape law where force is characterized by male dominance.[55] The defense of consent, for example, is focused on the *defendant's* belief of what a woman wanted, as opposed to the woman's understanding of the incident, which demonstrates the hierarchy between genders.[56] By discrediting the experience of the woman victim, rape law reflects how women

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legal theories, including equal treatment theory, which is "based on the principle of formal equality . . . namely, that women are entitled to the same rights as men," *id.* at 16; cultural feminism, which "argues that formal equality does not always result in substantive equality," *id.* at 18; dominance theory, which "focuses on the power relations between men and women," *id.* at 22; critical race feminism, which "argue[s] that legal doctrines in various areas, such as rape, sexual harassment, and domestic violence, do not adequately address discrimination based on the intersections of these categories," *id.* at 26; and additional theories, including lesbian feminism, ecofeminism, pragmatic feminism, and postmodern feminism, *id.* at 29–36.

51. *Id.* at 23 ("Patriarchy means the rule or 'power of the fathers.' It is a system of social and political practices in which men subordinate and exploit women. The subordination occurs through complex patterns of force, social pressures, and traditions, rituals, and customs. This domination does not just occur in individual relationships, but is supported by the major institutions in society.").

52. *See* MACKINNON, *supra* note 3, 127–29. Catharine MacKinnon first introduced this particular postmodern view in 1979. LEVIT & VERCHICK, *supra* note 5, at 22. Dominance theory argues that women are subordinated due to "patterns of male domination" that have resulted from our culture and social institutions, thus reinforcing patriarchy. *Id.* at 22–23.

53. LEVIT & VERCHICK, *supra* note 5, at 22–23.

54. MACKINNON, *supra* note 3, at 246. For this reason, MacKinnon writes that rape is "a crime of sexualized dominance on the basis of sex." *Id.*

55. *Id.* at 244.

56. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 842 (1990). In her article, Bartlett describes "the woman question," which is a method of exposing how the law subordinates women by "examining how the law fails to take into account the experiences and values that seem more typical of women than of men . . . or how existing legal standards and concepts might disadvantage women." *Id.* at 837 (internal quotation marks omitted). Bartlett points out that asking the woman question reveals that "the defense of consent focuses on the perspective of the defendant and what he 'reasonably' thought the woman wanted, rather than the perspective of the woman and the intentions she 'reasonably' thought she conveyed to the defendant," and such scrutiny reveals how the legal system subordinates women; thus, "the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate." *Id.* at 842–43. In *Graham*, the court emphasized the defendants' impressions of consent rather than scrutinizing the intent of the victim. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1123 (10th Cir. 2013).

are devalued in society.[57] Dominance theory adopts the view that force sufficient to overcome consent may transcend physical acts and include both nonphysical domination and psychological abuse.[58] The evidence presented in *Graham* exemplifies the need for courts to consider the dominance theory view that coercion can exist absent physical force.

II. *GRAHAM V. SHERIFF OF LOGAN COUNTY*

A. Facts

While Stacey Graham was imprisoned in solitary confinement at the Logan County Jail in Oklahoma, Rahmel Jefferies and Alexander Mendez, who were both prison guards, engaged in sexual intercourse with her.[59] While the intercourse was an isolated occurrence, both Jefferies and Mendez had separately associated with Graham beyond what is typical of a prison guard and an inmate.[60]

The relationship between Graham and Jefferies evolved over time.[61] The jail intercom system allowed a guard in a control tower to communicate with a prisoner in her cell, and Jefferies used the intercom system to have ongoing conversations with Graham.[62] Their conversations developed from discussing their families and interests to discussing sexual intercourse; eventually, the two also exchanged sexual notes.[63] At one point, Graham flashed her breasts at Jefferies; and on other occasions, Jefferies provided Graham with a candy bar and a blanket at her request.[64]

Graham's relationship with Mendez, on the other hand, was much more brief—it was limited to a matter of days before their sexual encounter.[65] A few weeks after Graham and Jefferies began communicating over the intercom, Mendez used the same intercom to initiate a conversation with Graham; he began to discuss his sexual fantasies and inquire about hers.[66] It was during that conversation that Graham told Mendez she wanted to "be with two men at the same time."[67] During that conversation, Mendez asked if he could look at Graham naked through the window of her cell, and she complied.[68]

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57. Bartlett, *supra* note 56, 842–43 ("[Rape law] reveals how the position of women reflects the organization of society," thereby exposing "how social structures embody norms that implicitly render women different and thereby subordinate.").
58. LEVIT & VERCHICK, *supra* note 5, at 180.
59. *Graham*, 741 F.3d at 1120.
60. *Id.* at 1120–21.
61. *See id.*
62. *Id.* at 1120.
63. *Id.*
64. *Id.* at 1121.
65. *Id.*
66. *Id.*
67. *Id.* (quoting Graham in the record).
68. *Id.*

That night, Mendez brought Jefferies to Graham's cell and the three engaged in sexual conduct.[69] Graham and Jefferies had intercourse while Graham "simultaneously performed oral sex on Mendez."[70] Jefferies and Mendez then switched positions.[71] While Mendez was trying to have sex with her, he dropped his radio.[72] Graham attempted to stand up when the radio dropped, but Mendez pushed her head back down toward Jefferies as he muttered a profanity toward Graham.[73] When Graham heard another female inmate get up and a coughing noise, Jefferies and Mendez immediately left Graham's cell.[74]

The next day a jail administrator questioned Graham, Mendez, and Jefferies, but all three denied inappropriate contact.[75] A few weeks later, however, Graham confessed about the incident to the jail administrator, though she stated that intercourse was consensual.[76] During the resulting investigation, Jefferies and Mendez both admitted to the incident and were terminated from their positions.[77] Thereafter, Graham was transferred to another prison, where she displayed signs of depression, post-traumatic stress disorder, and received psychological care, noting to a psychologist that "she had been raped by two jailers."[78]

B. Procedural History

On September 24, 2010, Graham filed suit for relief under 42 U.S.C. § 1983[79] claiming that Jefferies and Mendez's acts violated both her Eighth[80] and Fourteenth[81] Amendment rights, and that the Sheriff of Logan County "fail[ed] to discipline, supervise, and train" both Jefferies and Mendez.[82] The U.S. District Court for the Western District of Oklahoma concluded that Graham's claim should be analyzed under the

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69. *Id.*
70. *Id.*
71. *Id.*
72. Graham v. Sheriff of Logan Cnty., No. CIV–10–1048–F, 2012 WL 9509373, at *4 (W.D. Okla. Nov. 1, 2012), *aff'd* 741 F.3d 1118 (10th Cir. 2013).
73. *Id.*
74. *Graham*, 741 F.3d at 1121.
75. *Id.* at 1121–22.
76. *Id.* at 1122.
77. *Id.*
78. *Id.*; Appellant's Opening Brief at 9, *Graham*, 741 F.3d 1118 (No. 12-6302).
79. *See Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 1058, 1059 (2011) (describing how 42 U.S.C. § 1983 enables a prisoner to "seek redress when a person acting under color of state law deprives the prisoner of rights guaranteed by the Constitution" (footnote omitted)).
80. For a brief overview of the Eighth Amendment, see *supra* note 8 and accompanying text; *see also* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1818–21 (2012) (describing that the Supreme Court has interpreted the Eighth Amendment as a means for prisoners to challenge their confinement while in custody, and to do so they must establish both the objective and subjective prong of an excessive force claim).
81. U.S. CONST. amend. XIV, § 1 (stating that a State shall not "deprive any person of life, liberty, or property, without due process of the law").
82. *Graham*, 741 F.3d at 1122.

Eighth Amendment.[83] The District Court granted summary judgment for the defendants, stating there was no Eighth Amendment violation because the sexual activity was consensual.[84]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the district court's decision.[85] The court found that summary judgment was proper because there was no dispute as to any material fact, since Graham was not forced to have sex.[86] While the court stated that "Graham's focus on appeal is . . . whether a prisoner can *legally* consent to sex" with a guard, the opinion notes that some form of coercion is required.[87] However, based on "the overwhelming evidence of consent," the court held that there was no Eighth Amendment violation.[88]

C. Majority Opinion

In a unanimous decision, the Tenth Circuit was convinced that Graham had consented to sexual activity and that her consent negated the claim of an Eighth Amendment violation.[89] When the court considered whether Graham presented a question of fact, it weighed the issue of consent against what would constitute an excessive force violation of the Eighth Amendment.[90]

First, the court briefly reviewed the two prongs of an excessive force claim—one objective, the other subjective.[91] The objective prong looks at whether the "alleged wrongdoing was objectively harmful enough to establish a constitutional violation," focusing on the nature of force used.[92] The subjective prong looks at the *mens rea* of the offender, under which Graham would need to show that the guards acted with a culpable state of mind, used force "maliciously and sadistically," and intended to cause the harm.[93] Without applying facts to either prong, the court quickly assessed that because Graham was not forced to have sex, "all other issues [are] irrelevant."[94]

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83. Graham v. Sheriff of Logan Cnty., No. CIV-10-1048-F, 2012 WL 9509373, at *6 (W.D. Okla. Nov. 1, 2012) ("Because Graham was incarcerated at the time of the alleged events, the court concludes that her claim is properly analyzed as an Eighth Amendment excessive force claim." (discussing Smith v. Cochran, 339 F.3d 1205, 1210 n.2 (10th Cir. 2003))), *aff'd* 741 F.3d 1118 (10th Cir. 2013).

84. *Graham*, 741 F.3d at 1122; *see also Graham*, 2012 WL 9509373, at *9 (noting "the consensual sexual activity at issue in this case does not give rise to a violation of Graham's Eighth Amendment rights"). The court reasoned that pushing Graham's head down did not amount to excessive force. *Id.* at *9 n.4 (citing Hudson v. McMillian, 503 U.S. 1, 9–10 (1992)).

85. *Graham*, 741 F.3d at 1122.

86. *Id.* at 1123.

87. *Id.* at 1124–25.

88. *Id.* at 1126.

89. *Id.*

90. *See id.* at 1123.

91. *Id.*

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

93. *Id.*

94. *Id.*

While Graham relied heavily on the Tenth Circuit's decision in *Lobozzo v. Colorado Department of Corrections*,[95] the court refused to apply the case, stating that its unpublished opinion was not binding precedent.[96] Nonetheless, the court clarified, "we read [*Lobozzo*] as saying at most that the parties agreed that consent was not a defense, a moot point since the defendants prevailed anyway."[97]

Because the court neglected the *Lobozzo* decision, Graham's case was declared to be a matter of first impression for the Tenth Circuit.[98] The court quickly summarized the approaches other courts have taken to the issue, but greatly emphasized the evidence of Graham's consent when coming to its holding.[99]

The Tenth Circuit cited *Hall v. Beavin*[100] and *Freitas v. Ault*[101] when mentioning that the Sixth and Eighth Circuits held consensual intercourse could not be an Eighth Amendment violation.[102] The *Graham* court then noted that lower courts have found "a prison guard has no consent defense in an Eighth Amendment civil-rights case alleging sexual relations"[103] because any form of sexual activity "serves no legitimate penalogical [sic] purpose" and is therefore "contrary to the goals of law enforcement."[104] The court's analysis closed by citing three remaining cases lower court that found prison guards have no consent defense.[105]

Before declaring that there is no consensus on whether an inmate can consent to intercourse, the Tenth Circuit visited the Ninth Circuit's "middle ground" approach reached in *Wood v. Beauclair*,[106] by which the Ninth Circuit created "a rebuttable presumption of nonconsent."[107] Though the "middle ground" approach offers a presumption of nonconsent, the Tenth Circuit's opinion focused on the instances suggesting Graham's consent. The court reasoned that, even if it adopted the Ninth Circuit's approach, "the presumption against consent would be overcome by the overwhelming evidence of consent," and concluded that there was no Eighth Amendment violation.[108]

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95. 429 F. App'x 707 (10th Cir. 2011). *Lobozzo* also involved a female inmate who alleged an Eighth Amendment violation after sexual contact with a male prison guard. *See infra* Part III.A.2.

96. *Graham*, 741 F.3d at 1124.

97. *Id.*

98. *Id.* (noting that, because *Lobozzo* is not binding, "it is a matter of first impression in this circuit whether consent can be a defense to an Eighth Amendment claim based on sexual acts"),

99. *Id.* at 1124–26.

100. No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999).

101. 109 F.3d 1335 (8th Cir. 1997).

102. *Graham*, 741 F.3d at 1124. *See infra* Part III.A.3.

103. *Graham*, 741 F.3d at 1125 (citing Cash v. Cnty. of Erie, No. 04–CV–0182–JTC(JJM), 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009)).

104. *Id.* at 1125 (quoting Carrigan v. Davis, 70 F. Supp. 2d 448, 454 (D. Del. 1999)).

105. *Id. See infra* Part III.A.3.

106. 692 F.3d 1041 (9th Cir. 2012).

107. *Graham*, 741 F.3d at 1125 (reviewing *Wood*, 692 F.3d 1041). *See infra* Part III.A.3

108. *Graham*, 741 F.3d at 1126.

To explain its decision, the court summarized the instances of Graham's consent reflected in the record: that she did not contest the prior sexual conversations; that she told Mendez she desired being with two men; that she allowed Mendez to look at her naked; and that she did not resist engaging in the sexual activity.[109] The court pointed out that Graham "stated repeatedly and consistently that almost all of the sexual acts that occurred were consensual."[110] In fact, because the court found so many instances of consent, it chose not to explore other potential factors of the violation,[111] noting that they "cannot undermine the other overwhelming evidence of consent."[112]

The *Graham* court issued a unanimous decision. Finding that Graham consented to sexual activity, the court determined that the sexual incident was not rape.[113] The court ultimately held that Graham's consent negated the possibility of an Eighth Amendment violation; thus, it concluded that if there is evidence that an inmate consented to sexual intercourse, the court will not find a constitutional violation.[114]

III. ANALYSIS

In *Graham*, the Tenth Circuit concluded that the plaintiff did not have an Eighth Amendment claim because she consented to intercourse with two prison guards..[115] Consent, however, implies a voluntary permission; therefore, to give consent, a person must have free will and be treated with equality.[116] The *Graham* court disregarded that as a prisoner, Graham lacked both those things. When the court held that intercourse was consensual and there was no excessive force, it evaluated the circumstances of this case based on the laws of a society where all parties have equal rights, which is contrary to the prison environment.

When evaluating consent to sex, the *Graham* court did not consider whether the parties were social equals. As a result, the Tenth Circuit's decision manifests the ways in which the legal system affirms gender inequality and limits access to justice for female prisoners. By failing to review the power dynamic in prison, the court failed to consider the ways

109. *Id.* at 1123.

110. *Id.*

111. For example, the court did not discuss whether excessive force occurred, or whether Graham was coerced.

112. *Id.* at 1124.

113. *See id.* at 1126.

114. *Id.*

115. *See id.*

116. *See* M. Jackson Jones, *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*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 275, 306 (2014). Because guards and inmates are in fundamentally unequal positions, where a guard typically holds most of the power, inmates lack the ability to consent to a sexual relationship. *See id.* (citing OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 4 (2005), *available at* http://www.justice.gov/oig/special/0504/final.pdf).

in which inequality may function as coercion. As this Part will show, the *Graham* court thereby contributed to the legal system's subordination of women and disregard for female inmates.[117]

The Tenth Circuit's holding in *Graham* was ill-considered in three respects. Because the Tenth Circuit was so focused on whether there was consent, it failed to consider force. First, this Part begins by reviewing how the Tenth Circuit misapplied the case law dealing with sexual activity between prisoners and guards. Second, this Part will discuss how the Tenth Circuit's decision reflected the legal system's treatment of coercion in rape law. Because it employed a patriarchal definition of consent, the court ignored how Graham may have been coerced by the inequality and powerlessness she experienced as a female inmate. Third and finally, the court's decision treated the parties as equal and disregarded the gender asymmetry between a male prison guard and female prison inmate. Thus, this section ends by reviewing the power imbalance between male prison guards and female inmates and discussing how sex is commoditized in prison to postulate why sexual misconduct so frequently occurs.

A. The Tenth Circuit Misapplied the Law in Graham

As it evaluated Graham's excessive force claim, the Tenth Circuit cursorily examined the legal precedent and improperly focused on consent rather than force. This Subpart argues that Tenth Circuit was so overwhelmed by the indication of Graham's consent to sex that it misapplied the law. First, this Subpart considers how the Tenth Circuit wrongly emphasized what it believed to demonstrate consent. Second, this subpart analyzes how the issue of consent drove the Tenth Circuit's disregard for its earlier ruling in *Lobozzo*. Finally, it concludes by discussing how the Tenth Circuit's review of existing case law was deficient.

1. The Tenth Circuit's Focus on Consent

Unlike most crimes, rape is one in which the credibility of the victim is a decisive factor in determining whether any injury occurred.[118] In *Graham*, the Tenth Circuit focused much of its analysis on Graham's behavior as evidence of her consent to the sexual activity with Jefferies and Mendez rather than giving attention to whether any force or coercion occurred.[119] However, rather than focusing on her consent to the act of sex itself, the court emphasized her behavior before the sexual incident.[120] The court outlined Graham's behavior as evidence of her consent to sex, and by focusing on her behavior the court both undermined Graham's credibility as a victim and demonstrated the court's view that she

117. *See* MACKINNON, *supra* note 3, at 242.
118. *See* MACKINNON, *supra* note 3, at 131.
119. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1123–24 (10th Cir. 2013).
120. *See id.* at 1120–21, 1123.

invited the sexual encounter.[121] By doing so, the court essentially suggested that Graham did not experience coercion, but instead invited the crime she alleged.[122]

The court began by describing the relationship between Graham and Jefferies over the intercom system; yet instead of looking at what Jefferies may have told her, the court focused on what Graham said to him: "Ms. Graham told Jefferies that she would like a man to make love to her."[123] The opinion continued to explain that Graham and Jefferies exchanged sexually explicit notes; yet instead of reviewing what Jefferies wrote to Graham, the court quoted a note that Graham wrote, but never gave, to Jefferies.[124] The court made a point to state that "[a]lthough the notes she had previously delivered to Jefferies were less explicit, they had suggested that she wished to have sexual intercourse with him."[125] The court's opinion failed to discuss Graham's interest in the other guard, Mendez.

Nonetheless, the court continued to justify both Jefferies and Mendez's acts by undermining Graham's position as a victim and establishing her consent. The court pointed out that Graham testified "that she enjoyed the conversations and note-writing," and that it gave her "something to do."[126] The court also stated that Graham once "flashed her breasts at Jefferies, *although he did not ask her to do so*."[127] By highlighting that Graham engaged in behavior that was not prompted by Jefferies, the court called attention to Graham's responsibility for her actions and failed to consider how Jefferies may have invited that behavior.[128] While the court mentioned Jefferies and Mendez's interaction with Graham, it failed to acknowledge whether they did anything to compel Graham's behavior or coerce her to act, except to mention that Jefferies once gave Graham "a candy bar and a blanket."[129] As a result of disregarding any wrongdoing by Mendez or Jefferies, the court allocated responsibility for any misconduct to Graham.

As the court discussed its reasoning for affirming the lower court, it shifted from its focus on Graham's behavior before the sexual encounter and concentrated on her indications of consent at the time of the incident: "She never told either [Jefferies or Mendez] that she did not want to have

121. *See id.* at 1123–24.
122. *See id.* at 1123.
123. *Graham*, 741 F.3d at 1120.
124. *Id.* at 1120–21. Both the Circuit Court and the District Court note that Graham and Jeffries exchanged notes, but neither court mentions what Jefferies may have written; the courts highlight only that, in her notes to Jefferies, Graham suggested having sex. *See id.*; Graham v. Sheriff of Logan Cnty., No. CIV–10–1048–F, 2012 WL 9509373, at *3 (W.D. Okla. Nov. 1, 2012).
125. *Graham*, 741 F.3d at 1121.
126. *Id.* at 1121 (internal quotation marks omitted).
127. *Id.* (emphasis added).
128. *Id.* at 1120–21.
129. *Id.* at 1121.

sex;"[130] "Although she has said that she did not want to have sex with Mendez[,] . . . she has not suggested that she indicated any reluctance to Jefferies or Mendez;"[131] "She did nothing to indicate lack of consent when the guards entered her cell, when they removed her clothing, or when they touched her. She never told either of them that she did not want to have sex."[132] Though the court briefly mentioned that Graham did not want to have sex with Mendez, it continued to hold that Graham consented because she did not say or do anything to indicate otherwise.[133]

By first focusing on Graham's earlier behavior, the court justified Jefferies and Mendez's understanding that the act was consensual. Rather than analyze Jefferies or Mendez's behavior and the ways in which such behavior may have coerced Graham, the court discussed Graham's behavior *prior* to the encounter to show that her consent was freely given *during* the encounter. After establishing what it found to be evidence of consent, the Tenth Circuit's quick review of case law shows its eagerness to conclude there was no violation.

2. The Tenth Circuit's Decision to Ignore *Lobozzo*

The Tenth Circuit's holding in *Lobozzo* established that an inmate could not legally consent to sex with a guard,[134] but the *Graham* court dismisses that holding by stating, "[U]npublished opinions are not binding precedent."[135] While the court is correct that unpublished opinions are not binding,[136] the failure to consider an unpublished opinion in an in an area of law that lacks any other precedent is contrary to the doctrine of precedent.[137] By allowing a judge to review a case with similar facts to a

130. *Id.* at 1123.

131. *Id.*

132. *Id.*

133. "Although she has said that she did not want to have sex with Mendez and that Mendez pushed her head down just before the encounter ended, she has not suggested that she indicated any reluctance to Jefferies or Mendez." *Id.*

134. Lobozzo v. Colo. Dep't of Corr., 429 F. App'x 707, 711 (10th Cir. 2011); *see also Graham*, 741 F.3d at 1124.

135. *Graham*, 741 F.3d at 1124; *see also* Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 623 (2009) ("Unpublished opinions are opinions that a court has designated as having non-binding precedential effect. They are written resolutions to specific cases, prepared exclusively for the involved parties, and they are intended to have no binding precedential effect—or even persuasive effect, for some jurisdictions—on future cases." (footnote omitted)).

136. Weisgerber, *supra* note 135, at 632 ("Even if litigants may now *cite* to unpublished opinions in their briefs, judges need not accord unpublished cases the same precedential treatment as published cases, or any precedential treatment at all.").

137. *Id.* at 632–33 ("This inferior treatment of unpublished opinions is contrary to the role and understanding of precedent in America's constitutional and legal history."); *see also id.* at 644 ("[I]f an area of law is unsettled, future cases dealing with the same area of law will surely arise in the future. If these future cases deal with the same material facts and same legal issues, the prior case will be on all fours with the subsequent case; in such an instance, the doctrine of precedent demands that the prior case be binding on the subsequent one.").

prior decision yet arrive at a separate and distinct conclusion, the judge may essentially determine which holding becomes law.[138]

In *Lobozzo*, a female inmate had sexual contact with her male prison guard and later alleged an Eighth Amendment violation claiming she had not been protected against sexual assault.[139] Under the objective element of an excessive force claim, courts must determine if the wrongdoing was harmful enough to amount to a constitutional violation.[140] The Tenth Circuit found that the objective element was satisfied because "[i]t [was] uncontested that Lobozzo, an inmate, could not legally consent to sexual activity with . . . a guard" and "rape is sufficiently serious to constitute a constitutional violation."[141] However, while the Tenth Circuit found that the objective element of the excessive force claim was met, it did not find the subjective element was satisfied.[142]

The Tenth Circuit's opinion in *Graham* neglected to elaborate on the similarities between Graham's circumstances and those of *Lobozzo*.[143] Because *Lobozzo* held that an inmate cannot consent to sex with a guard, relying on *Lobozzo* would have shown that, as a prisoner, Graham could not consent to intercourse. Just as the objective element of the excessive force claim was met in *Lobozzo*, because the inmate and guard had sexual contact, so too would the same claim be satisfied in *Graham*, simply based on Graham's status as a prisoner.

When it disregarded *Lobozzo*, the Tenth Circuit demonstrated its struggle in accepting Graham's behavior as a prisoner reacting to a socialized power imbalance;[144] instead, the court perceived Graham to be a woman asking for sex. The Tenth Circuit saw consent based on what it believed consent to look like—in a free environment with gender equality, consent means voluntary permission. Based on Graham's behavior, the court understood that she voluntarily granted permission to Jefferies and Mendez. However, in prison, behavior that looks like consent is not the product of free will; rather, it is the result of a situational power im-

138. *Id.* at 632–33.

139. *Lobozzo*, 429 F. App'x at 708–09.

140. M. Jackson Jones, *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*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 275, 283 (2014).

141. *Lobozzo*, 429 F. App'x at 711.

142. Jones, *supra* note 116, at 288. To establish the subjective element was met, Lobozzo presented statistics on rapes that occur at Colorado Department of Corrections facilities, claiming that those statistics provided notice of the danger prisoners face. *Id.* (citing *Lobozzo*, 429 F. App'x at 711). The court reasoned that the statistics did not provide the officials with notice that Lobozzo's constitutional rights had been violated and stated "[t]he record simply does not support her allegations that the CDOC Defendants knew of and disregarded an excessive risk that she would be sexually victimized." *Lobozzo*, 429 F. App'x at 713.

143. *See Lobozzo*, 429 F. App'x at 711.

144. *See infra* Part III.B.

balance.[145] Unlike the *Lobozzo* court, the *Graham* court disregarded this fact because Graham's behavior satisfied its understanding of what consent looks like. As a result, the *Graham* court declared that *Lobozzo* did not apply and took *Graham* as an opportunity to revisit this contentious subject.

3. The Tenth Circuit's Dismissal of Cases Involving Sexual Conduct in Prison

While reaching its conclusion in *Graham*, the Tenth Circuit conducted a brief and cursory survey of case law from various jurisdictions. Though the court mentioned the Sixth and Eighth Circuits' holdings in *Hall* and *Freitas* that consensual intercourse could not constitute an Eighth Amendment violation, neither case explicitly involved intercourse.[146] The court then moved to a brief discussion of two district court cases, *Cash* and *Carrigan*, which held that consent is not a defense for guards having sexual contact with inmates.[147]

Both *Hall*[148] and *Freitas*[149] held that consensual intercourse was not a constitutional violation.[150] While the Eighth Circuit in *Freitas* explained in dicta that "welcome and voluntary sexual interactions . . . cannot as a matter of law constitute 'pain' as contemplated by the Eighth Amendment,"[151] the Tenth Circuit's reliance on both *Hall* and *Freitas* is misplaced, as neither decision explicitly discussed intercourse.[152] Instead, both cases deal with romantic relationships between guards and inmates—while the Sixth Circuit's decision in *Hall* references a "sexual relationship,"[153] the *Freitas* opinion discusses a nonsexual relationship.[154] Though the Tenth Circuit cited both opinions as instances in which other circuits reviewed consensual intercourse between prison guards and inmates, neither case involved a claim that rose beyond sexual harassment.[155]

The *Graham* decision also cited three lower court cases that found prison guards have no consent defense.[156] The court began by citing *Cash*

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145. *See infra* Part III.C for a discussion on how the social hierarchy in prison impacts inmate behavior.

146. *See* notes 117–18 and accompanying text.

147. *See* notes 119–22 and accompanying text.

148. No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999).

149. 109 F.3d 1335 (8th Cir. 1997).

150. *Graham*, 741 F.3d at 1124.

151. *Id.* at 1124 (quoting *Freitas*, 109 F.3d at 1339) (internal quotation mark omitted); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) (explaining that the Eighth Amendment forbids excessive punishment that involves "the unnecessary and wanton infliction of pain" or is "grossly out of proportion to the severity of the crime").

152. Jones, *supra* note 116, at 285–88.

153. Hall v. Beavin, No. 98-3803, 1999 WL 1045694, at *1 (6th Cir. Nov. 8, 1999).

154. *See id.* at 285.

155. *Id.* at 285–87.

156. *Id.*

v. County of Erie,[157] in which the United States District Court for the Western District of New York relied on state law to determine that an inmate lacked the ability to consent to intercourse.[158] Similarly, the *Graham* court then turned to *Carrigan v. Davis*,[159] in which the United States District Court for the District of Delaware looked to state law to determine that any sexual act between an inmate and a prison guard is a per se violation of the Eighth Amendment, regardless of consent.[160]

While the Tenth Circuit rightfully considered cases that found inmates cannot provide consent, the problem with both *Cash* and *Carrigan* is that the courts' decision in each is reflective of local, state laws. In citing these two cases with little analysis, the Tenth Circuit failed to clarify how these two cases that were based in state laws applied to Graham's constitutional claim. Because the *Graham* court saw evidence of consent in Graham's behavior, it declined to seriously consider any case law that held that prisoners are not able to consent to sexual activity.[161] Moreover, the court failed to consider why other courts, such as the Ninth Circuit, deem consent between a guard and inmate virtually impossible to distinguish from coercion.[162]

The Tenth Circuit finally reviewed the Ninth Circuit's decision in *Wood v. Beauclair*[163] for creating "a rebuttable presumption of nonconsent."[164] In *Wood*, the plaintiff was a male inmate who engaged in a romantic but nonsexual relationship with Martin, a female guard, and later filed a claim alleging an Eighth Amendment violation for sexual harassment.[165] In determining whether Wood could consent to his relationship with Martin, the Ninth Circuit thoroughly addressed whether prisoners are capable of giving consent, citing the lack of control prisoners have over most aspects of their life[166] and the resulting power dynamics.[167]

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157. *Cash* is a district court case in which the plaintiff claimed she was assaulted and raped as a pretrial detainee. Cash v. Cnty. of Erie, No. 04–CV–0182–JTC(JJM), 2009 WL 3199558, at *1 (W.D.N.Y. Sept. 30, 2009).

158. "Because plaintiff was incarcerated, she lacked the ability to consent to engage in sexual intercourse with Hamilton as a matter of law. Thus, even if Hamilton's defense was that the sexual intercourse with plaintiff was physically consensual, this may also constitute a constitutional violation." *Id.* at *2 (citation omitted) (citing N.Y. Penal Law § 130.05(3)(f)).

159. *Carrigan* is another district court case in which the plaintiff was an inmate and alleged that the defendant, Davis, sexually assaulted her in violation of the Eighth Amendment. Carrigan v. Davis, 70 F. Supp. 2d 448, 454 (D. Del. 1999).

160. *Id.* at 453.

161. *See supra* Part III.A.2.

162. *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1124–25 (10th Cir. 2013); Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012).

163. 692 F.3d 1041 (9th Cir. 2012).

164. *Graham*, 741 F.3d at 1125 (reviewing *Wood*, 692 F.3d 1041).

165. Jones, *supra* note 116, at 289–90.

166. "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." *Wood*, 692 F.3d at 1047.

167. A prisoner's ability to exercise free consent is inherently hindered by the power imbalance in prison. *Id.* ("The power dynamics between prisoners and guards make it difficult to discern consent from coercion. Even if the prisoner concedes that the sexual relationship is 'voluntary,' because

The Ninth Circuit therefore held a presumption of nonconsent for prisoners alleging sexual abuse by a guard.[168]

Though the Tenth Circuit mentioned the Ninth Circuit's "middle ground approach" in *Wood*, it failed to analyze the effect of the *Wood* holding in *Graham*. Had the Tenth Circuit relied on *Wood*, it would have given more consideration to whether Graham could actually consent as a prisoner, rather than focusing on how she gave consent as a woman. Moreover, the *Graham* court did not reconcile Graham's behavior as an inmate lacking basic freedoms and control over her life, and their impression of Graham as a woman, exercising control over her wants and desires by flirting and writing notes. Beyond the court's shallow consideration of related cases, the Tenth Circuit's focus on consent detracted from its consideration of the use of force in Graham's claim.

By failing to adequately consider related case law, the Tenth Circuit improperly neglected legal precedent. In reviewing Graham's claim, the court concentrated on whether Graham consented to sex, rather than scrutinizing if or how she experienced coercion. As the next section will show, gender inequality can function as coercion, and though traditional rape law often overlooks it, it is crucial to consider in the prison setting.

B. The Court's Misguided Understanding of "Coercion" in Rape Law

When considering rape in a criminal context, most courts require proof that there was coercion—that the threat of force or force itself resulted in penetration.[169] In adjudicating whether coercion occurred, several courts look to the victim's behavior and the extent to which the victim resisted the force, maintaining that the victim ought to have displayed physical resistance.[170] By requiring physical resistance, certain types of coercion are not evaluated in criminal rape cases.[171]

Very rarely have courts acknowledged that rape victims may be so overcome with fear, that their actions failed to resist the use of force against them or that there may be other explanations for a failure to struggle against the offender.[172] This Subpart begins by scrutinizing how the *Graham* decision examined the question of coercion when evaluating the excessive force claim and continues to consider dominance theory's

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sex is often traded for favors (more phone privileges or increased contact with children) or 'luxuries' (shampoo, gum, cigarettes), it is difficult to characterize sexual relationships in prison as truly the product of free choice.")

168. *Id.* at 1049.

169. LEVIT & VERCHICK, *supra* note 5, at 182; *see, e.g.*, United States v. Youngman, 481 F.3d 1015, 1020 (8th Cir. 2007); Miles v. Yates, No. CV 05-5459 DOC(JC), 2010 WL 2569190, at *7 (C.D. Cal. May 6, 2010); Leyja v. Oklahoma, No. CIV-09-265-W, 2010 WL 1881462, at *15 (W.D. Okla. Apr. 7, 2010); Williams v. State, 10 So. 3d 1083, 1086 (Ala. Crim. App. 2008); State v. Bryant, 965 P.2d 539, 545 (Utah Ct. App. 1998).

170. LEVIT & VERCHICK, *supra* note 5, at 183.

171. *Id.* at 182.

172. *Id.* at 183.

arguments of how coercion occurs beyond what criminal rape law defines.[173] While reflecting on Graham's testimony and trial court records, this Subpart shows that, regardless of a cognizable criminal or constitutional claim, Graham experienced coercion based on the view that inequality constitutes force.

In reviewing a rape claim and the issue of a woman's consent, the legal system will often categorize a woman based on her relationship with the offender.[174] For instance, if a woman claims nonconsensual sex with a stranger, the law puts her into a category in which the lack of a relationship to the stranger means that, most likely, she was raped. For Graham, the court considered evidence of her prior interactions with Jefferies to indicate that she had consented to the sexual activity with both Jefferies and Mendez.[175] Yet when a court assumes that a woman's relationship to a man can evidence her consent, it overlooks the reasons why she may not display resistance during intercourse or rape.

The Tenth Circuit's discussion of coercion in the crime of rape is limited at best in the *Graham* opinion. Instead of discussing how Graham may have been coerced, the court only stated that some form of coercion is required to constitute an Eighth Amendment excessive force claim.[176] The court simply focused on what it believed to evidence Graham's consent and relied on her admission that she was not "forced or given any promises."[177] By mainly focusing on Graham's behavior and lack of resistance, the court concluded that the sexual activity was not coercive, and ended its analysis.

When a court only asks whether consent occurred, it fails to consider that inequality between the parties may prevent a woman from displaying her nonconsent.[178] When inequality is a reflection of power dynamics, its existence between the offender and the victim can constitute coercion because such inequality prevents the victim from displaying nonconsent.[179] A woman may be "too surprised or too terrified or too learned in passivity or wants to get it over with too badly" to resist force.[180]

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173. This analysis will rely on Catharine MacKinnon's analysis, as her writings and research have brought the concerns of dominance theory into discussions of legal reform.

174. MACKINNON, *supra* note 1, at 175.

175. In the Oklahoma State Bureau of Investigation (OSBI) interview with Graham, she stated that the sex was consensual with Jefferies; "I didn't really want Mendez there." Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1122 (10th Cir. 2013).

176. *See Graham*, 741 F.3d at 1123.

177. *Id.* at 1122.

178. MACKINNON, *supra* note 3, at 247 ("[S]ex under conditions of inequality can look consensual when it is not wanted . . . . Men in positions of power over women can thus secure sex that looks, even is, consensual without that sex ever being wanted, without it being freely chosen . . . .").

179. *Id.*

180. MACKINNON, *supra* note 1, at 35.

There is no doubt that the inherent power imbalance of the prison environment fostered the inequality between Graham, Jefferies, and Mendez. Graham was a prisoner; she had very little agency, with no control over what she ate for dinner, what time she went to bed at night, or any other basic need. Both Jefferies and Mendez were prison guards. The severe inequality was undoubtedly apparent to all parties, evidenced by the lack of control Graham had over basic aspects of her life and the complete control Jefferies and Mendez, as prison guards, retained over her life.[181] Graham was clearly cognizant of her unequal status, as she testified "her rights were taken from her when she was incarcerated" and "[s]he had no control over [the sexual activity]."[182] Had the court recognized that power inequality is a form of coercion, it would have found that coercion occurred because a lack of power prevented Graham from displaying her nonconsent.

Moreover, Graham's medical records and notes from her counseling sessions show that Graham had been in a similar position before—a position where she was made unequal to her offender and subjected to sexual acts. As Graham's medical records reflect, "She was molested as a child by older cousins and an uncle" and "[s]he lived with a very abusive mother."[183] An expert witness also confirmed "important considerations for her vulnerability," which included a "mental health history," a diagnosis of bipolar disorder, and at least two suicide attempts.[184] As a victim of child molestation, Graham had experienced nonconsensual sexual contact in her personal relationships. Had it closely considered Graham's history, the court could evaluate the reasons for her failure to resist and physically struggle against Jefferies and Mendez. Such a review may have shown that, to Graham, "force" was not only limited to physical violence, but also included the exercise of sexual dominance over her.[185]

As dominance theorists note, most existing criminal laws treat passive silence, acquiescence, or resigning to sex as consent.[186] Both criminal and constitutional laws regarding rape fail to recognize reasons why Graham did not fight against Mendez or Jefferies, and fail to consider that the power imbalance between them may have been one of those reasons.[187] Among the reasons Graham may have submitted to the sexual

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181. Appellant's Opening Brief, *supra*, note 78, at 23–24 (discussing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989), which stated: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause").

182. Appellant's Opening Brief, *supra* note 78, at 3.

183. *Id.* at 4.

184. *Id.* at 13.

185. SCHULHOFER, *supra* note 5, at 52.

186. MACKINNON, *supra* note 3, at 243.

187. There may be speculation that Graham and Jefferies's behavior indicated a genuine interest and connection between them. Unfortunately, a genuine connection amidst the institutionalized

activity, there may have been intimidation or pressure associated with Jefferies and Mendez's status and authority.[188] Yet criminal rape law ignores power relationships that may influence the sexual encounter, just as it ignores nonviolent coercion.[189] Evaluations of rape in prison as excessive force take the same approach, likewise ignoring nonviolent coercion.

By failing to consider if or why Graham did not verbalize or show her nonconsent, the court implicitly decided that Graham's lack of physical resistance meant there was no coercion on the part of Jefferies and Mendez. According to most courts, intercourse is not a crime unless it includes force that amounts to physical injury.[190] As dominance theory seeks to show, sex is often nonconsensual, but the narrow requirements of rape hide the reality of many factors that prevent a victim from exhibiting nonconsent.

C. Commoditizing Sexuality in Prison: How and Why

In prison, a guard's extreme control contributes to his power over inmates and leaves inmates to control just one tangible good: their bodies.[191] As a result, women in prison use their bodies and sex as a commodity to exert some level of power, and evidence of Graham's behavior suggests she may have done the same. In addition, having received no "special treatment" from Jefferies or Mendez, Graham may exemplify non-tangible benefits inmates may receive for sexual contact with guards.[192]

It is possible that women prisoners are so used to being oppressed in past relationships and are so desperate for attention and love, that they

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hierarchy is illusory, and an inmate's romance puts her at risk for exploitation. Dirks, *supra* note 20, at 110 (citing Agnes L. Baro, *Spheres of Consent: An Analysis of the Sexual Abuse and Sexual Exploitation of Women Incarcerated in the State of Hawaii*, 8 WOMEN & CRIM. JUST. 61, 78 (1997); HUMAN RIGHTS WATCH, *supra* note 20) ("Arguing that cases of sexual misconduct that involve 'romance' or some level of consensual contact are too difficult to prosecute, those in the legal arena choose to do nothing to aid women who have been exploited or abused by male prison staff."). "These legal standards also attempt to jeopardize women's victim status by stigmatizing them as 'inmates' or 'bad girls,' thus occluding any opportunity for their experiences to fall under the purview of 'real rape.'" *Id.* (citing SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, *in* VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS 201 (Pauline B. Bart & Eileen Geil Moran eds., 1993)).

188. SCHULHOFER, *supra* note 5, at 52.

189. *Id.* at 59.

190. *Id.* at 71; *see also* MACKINNON, *supra* note 3, at 247 ("If force were defined to include inequalities of power, meaning social hierarchies, and consent were replaced with a welcomeness standard, the law of rape would begin to approximate the reality of forced and unwanted sex.").

191. Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 340–41 (1998).

192. While Graham received a candy bar and a blanket, the Tenth Circuit stated she did not get "special treatment." *See* Graham v. Sheriff of Logan Cnty., 741 F.3d 1118, 1120–21 (10th Cir. 2013).

are used to exchanging their bodies for attention.[193] While in prison, women tend to respond to male authority the same way they did before their incarceration.[194] A review of Graham's medical records shows that this may have been her own circumstance; not only was she molested and abused as a child, but she also married at fifteen years old.[195] This suggests she experienced oppression and abuse in her past relationships and may have believed that she needed to exchange her body for a sense of protection or attention.

Another explanation of why sex is commoditized in prison is because of the prisoner's own self-esteem.[196] Some inmates seek relationships with guards because of loneliness or as a way to pass time.[197] In *Graham*, the plaintiff testified that she felt "wanted and appreciated" when the defendant asked to see her naked.[198] She also testified that exchanging flirtatious notes with the guards was enjoyable and gave her something to do.[199] This demonstrates that, despite the circumstances, Graham found a way to get something else she needed through sex: self-esteem.[200] Women inmates are often unable to envision positive outcomes for themselves because of their powerlessness and the hopelessness of their situation;[201] thus, receiving attention from a guard can make a prisoner feel some self-worth.[202]

When a woman inmate uses her body to get what she needs—whether it is protection, safety, a piece of candy, or a fraction of confidence—she has not consented to sex. Prison creates an environment of coercion, and women are objectified not only because they are women, but further by virtue of their role as powerless inmates. Prisoners are deemed to lack entitlement to the rights accorded to ordinary citizens; they are deprived of their freedom to make choices or grant permission.[203] A lack of these basic freedoms includes lacking the capability to consent to intercourse.

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193. *See* Laderberg, *supra* note 189, at 339–40.

194. *Id.*

195. Appellant's Appendix at 68, Graham v. Sheriff of Logan Cnty., 741 F.3d 1118 (10th Cir. 2013) (No 12-6302) (reproducing Stacey Graham's medical records).

196. Buchanan, *supra* note 28, at 56.

197. *Id.* ("For some women, 'it seems as if sex is the only thing that keeps time clicking by.'" (quoting CRISTINA RATHBONE, A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS 49 (2005)).

198. *Graham*, 741 F.3d at 1121.

199. *Id.*

200. Interacting with the guards likely contributed to Graham's sense of self-worth because she was engaged and received attention from them. Note that acts to build self-esteem are not synonymous to consenting to a particular sexual act, though Graham may have engaged in sexual contact because self-worth depended on a need to feel desired.

201. Laderberg, *supra* note 191, at 339–40.

202. HUMAN RIGHTS WATCH, *supra* note 20.

203. Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 83 (2008).

CONCLUSION

When it determined that Graham consented to sex, the Tenth Circuit failed on several counts. First, the court misapplied the law. The Tenth Circuit was charged with evaluating an excessive force claim; but in reviewing Graham's claim the court neglected to evaluate excessive force; instead, it concentrated on Graham's consent.

Second, the court's review of Graham's consent was improper because the court focused only on Graham's behavior rather than considering her circumstances as a prisoner and the coercion she faced. As dominance theory reveals, the court used a patriarchal view of rape and consent. Its opinion overlooks how gender inequality results in coercion, especially in prison where women inmates are utterly powerless and incapable of consenting at all, and suggests that Graham invited the sexual conduct that was the basis of her claim.

Third, the court demonstrated the common disregard for both gender and social inequality when it placed the blame on Graham. The court did not give her status as a woman equal consideration or acknowledge how her status as a prisoner affected her behavior. Both existing criminal rape laws and courts evaluating rape as an excessive force claim ignore the power relationships that influence sexual encounters in prison. As a result of the power imbalance, inmates use their bodies as a commodity to experience control.*Graham* presents several challenges women prisoners face in the justice system—the limited definition of rape in criminal law, the inability to overcome institutionalized male dominance, and the struggle to assert control when all other personal rights have been restricted. Courts reviewing rape in prison under the Eighth Amendment must take a holistic and concentrated approach to the unique circumstances of the parties. A vital component to justice for prisoners depends on a comprehensive understanding of their plight. In order for women prisoners to gain autonomy and justice in the legal system, courts must come to terms with how prisons create an environment that interrupts how relationships are constructed. If a court tailors its analysis and opinion to fully acknowledge the experience of prisoners, women like Stacey Graham will have an opportunity for equality and justice in the legal system.

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