University of Chicago Legal Forum

Volume 2019 Article 11

2019

Consent behind Bars: Should It Be a Defense against Inmates' Claims of Sexual Assault?

Nika Arzoumanian

Consent behind Bars: Should It Be a Defense against Inmates' Claims of Sexual Assault?

Nika Arzoumanian[†]

I. INTRODUCTION

Understanding what constitutes "consent" sits at the heart of the #MeToo Movement, but consent can take on a variety of meanings depending on the context in which parties give and receive it.[1] The #MeToo Movement gained initial traction when women spoke out against harassment in the workplace and Hollywood, but the questions #MeToo raises apply far beyond those boundaries. Specifically, prison inmates are largely left out of the #MeToo discussion, particularly women and gender minorities.[2]

Exploring #MeToo in the prison context is critical for two reasons. First, considering whether consent is possible when bodily autonomy is severely restricted will expand our understanding of consent's outermost bounds. Second, almost 2.2 million American adults were in prison or jail at the end of 2016; the impact of prison on issues relevant to the #MeToo Movement applies to a significant proportion of Americans.[3]

Startling statistics reflect high and rising numbers of sexual assault allegations in correctional facilities.[4] In 2011, prisoners made

---

[†] B.A. 2016, New York University; J.D. Candidate 2020, The University of Chicago Law School. Many thanks to Professor John Rappaport for his thoughtful feedback throughout the Comment writing process, as well to Professor Daniel Hemel for his insightful advice on this piece. I would also like to thank the members of the 2018–2019 Board of *The University of Chicago Legal Forum* for their constant guidance and commitment to excellence in legal scholarship.

[1] *See* Lee Tunstall, *#MeToo Ushers in the Age of Consent*, THE SEATTLE TIMES (June 7, 2018), https://www.seattletimes.com/opinion/metoo-ushers-in-the-age-of-consent/ [https://perma.cc/5XZZ-YTH9].

[2] *See* Marisa Endicott, *'No Longer Human': Women's Prisons Are a Breeding Ground for Sexual Harassment, Abuse*, THINK PROGRESS (Aug. 29, 2018), https://thinkprogress.org/sexual-harassment-abuse-womens-prisons-me-too-5231b62c1785/ [https://perma.cc/4GD3-3VVT].

[3] Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (July 10, 2018), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/K2UU-3K5G].

[4] *See* Alysia Santo, *Prison Rape Allegations Are on the Rise*, THE MARSHALL PROJECT (July 25, 2018), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise [https://perma.cc/FV2G-4FNV].

8,768 allegations of sexual assault and harassment across the United States, whereas by the end of 2015, prisoners made 24,661 allegations of sexual assault and harassment.[5] Yet, the possibility of consensual sexual contact in prison—particularly between inmates and guards—is less often a topic of discussion.

Much of the time, sexual contact between inmates and correctional officers in prison is identified at the time as "consensual" or "appear[ing] to be willing."[6] That being said, many scholars and prisoners' rights advocates argue that a significant proportion, if not all, of seemingly consensual sexual contact between guards and inmates is nonconsensual, the product of either physical force or non-physical coercion.[7] Prisoners are bringing claims of excessive force under the Eighth Amendment on these same grounds. Often characterized by gift-giving and special treatment, the relationships they describe may seem consensual in the outside world. However, the fact that they develop in prison raises a series of unique concerns: specifically, can consent even exist in prison, particularly between guards and inmates?

Uncertainty regarding the definition of consent has given rise to a dispute both within the judiciary and among scholars as to whether consent is or should be a defense to an Eighth Amendment excessive force claim based on sexual acts between inmates and correctional officers. In order to resolve this issue, I will argue in favor of the mixed approach taken by the Ninth Circuit: prisoners are "entitled to a presumption that any relationship with a correctional officer is not consensual," but the defendant can "rebut this presumption by showing that the relationship 'involved no coercive factors'" beyond the background coercion that prison already imposes.[8]

This Comment champions a prisoner-centered approach using theories of bodily autonomy and also explores why a per se rule is inappropriate in the inmate-guard context, despite being accepted in regulating other forms of sexual contact. I will review the current status of legislation pertaining to prison sexual assault, as well as the general structure under which a prisoner may bring an Eighth Amendment sexual assault claim. I will also explain the various perspectives circuit courts

---

[5] *Id.*

[6] Margaret Penland, *A Constitutional Paradox: Prisoner "Consent" to Sexual Abuse in Prison Under the Eighth Amendment*, 33 LAW & INEQ. 507, 508–09 (2015).

[7] Merideth J. Hogan, *If Orange is the New Black, is Coercion the New Consent? An Analysis of the Tenth Circuit's Decision to Allow Guards to Use an Inmate's Alleged Consent as a Defense to a Sexual Abuse Allegation*, 54 WASHBURN L.J. 425, 425 (2015).

[8] 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. ADV. 275, 278 (2014) (citing Wood v. Beauclair, 692 F.3d 1041, 1049 (9th Cir. 2012)).

and scholars have put forth to determine whether inmate consent should be a defense to prison sexual assault claims and explore the factors that differentiate consent in prison from consent in the outside world. I will then advocate for the Ninth Circuit's mixed approach, focusing on the harms of limiting bodily autonomy in prison, how the mixed approach operates to ensure prisoner safety, and how prisoner-guard relationships differ from other contexts where per se rules against sexual contact are enforced.

II. AN OVERVIEW OF CONSENT IN PRISON

A. Federal and State Legislation

The Prison Litigation Reform Act (PLRA)[9] and the Prison Rape Elimination Act (PREA)[10] are the two most relevant pieces of federal legislation passed in recent history on the issue of prisoner sexual assault. The PLRA places restrictions on inmates seeking to bring suit in federal court. Most notably, the PLRA requires that inmates must exhaust all available administrative remedies, including internal grievance systems within their prisons before bringing any claim in federal court.[11] The Supreme Court has interpreted exhaustion as "proper exhaustion," requiring that "prisoners must follow all of the procedural rules that detention agencies have developed for internal grievances before suing."[12] This process often involves very short timelines for filing grievances, a particularly dangerous roadblock in the context of sexual assault where inmates may struggle emotionally to bring claims in a timely manner.[13]

---

[9] 42 U.S.C. § 1997e (2012).

[10] 28 C.F.R. § 115 (2012).

[11] 42 U.S.C. § 1997e(a) ("[N]o action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

[12] Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 809–10 (2014) (citing Woodford v. Ngo, 548 U.S. 81, 94 (2006)).

[13] *Id.* at 810. Furthermore, since the passage of an amendment to the Violence Against Women Act (VAWA) in February 2013, a "prior showing of physical injury or the commission of a sexual act" is necessary for recovery under the PLRA for mental or emotional injury. The PLRA defines a "sexual act" as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand

The conversation regarding sexual assault in prison would be incomplete without at least a brief discussion of the PREA, which established a "zero tolerance" policy for rape and sexual assault perpetrated by both prisoners and prison staff across various forms of detention.[14] The PREA calls for wide-sweeping data collection about rape in prison, as well as increased surveillance, policing, and criminalization of prison rape.[15] However, the PREA does not create a private right of action or an affirmative defense.[16] For this reason, courts often do not explicitly consider the PREA when adjudicating Eighth Amendment prisoner sexual assault claims.[17] Instead, the penalty is targeted towards state detention agencies: if they fail to comply with the PREA, they will receive a reduction in federal funds.[18]

Most states have passed legislation that prohibits sexual relationships between inmates and correctional officers regardless of consent, and many states have passed legislation that prohibits sexual activity between inmates as well.[19] A few states' statutes even explicitly stipulate that inmates are "*incapable* of consent to sexual relations with a [correctional employee]."[20] In contrast, Arizona, Nevada, and Delaware not only acknowledge inmate consent but also allow for the prosecution of inmates who "willingly" engage in sexual contact with prison staff.[21]

B. Sexual Assault in Prison and the Eighth Amendment

Inmates typically bring claims of sexual abuse in prison through 42 U.S.C. § 1983 on Eighth Amendment grounds, which requires that the

---

> or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C. § 2246(2)(a)–(d) (2012). Prior to 2013, "the Prison Litigation Reform Act (PLRA) required physical injury before a claim for emotional or mental violation could be heard. This created a loophole for some sexual assault cases in which the victim could not prove physical injury, since the court defined injury not to include penetration, thereby blocking a claim even for emotional or mental damages. An amendment to the Violence Against Women Act (VAWA), however, eventually closed this loophole, barring courts from defining sexual violence as less than physical injury by explicitly listing sexual acts as injury." Hannah Belitz, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R.-C.L. L. REV. 291, 295 n.29 (2018).

[14] Gabriel Arkles, *supra* note 12, at 804–05 (citing 42 U.S.C. § 15602 (2012)).

[15] *Id.*

[16] *Id.* at 802.

[17] *Id.* at 811.

[18] *Id.* at 806.

[19] Jones, *supra* note 8, at 293.

[20] *Id.* (citing Mass. Gen. Laws ch. 268, § 21A (2013)) (emphasis added).

[21] Hannah Brenner, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 546 n.151 (2016).

inmate meet two prongs.[22] First, the abuse must be "objectively harmful enough to establish a constitutional violation" under "societal standards of decency."[23] Second, the alleged assaulter must have had "actual knowledge of danger to the prisoner and [chose] not to prevent it."[24] However, the test is simplified in the excessive force context. In *Hudson v. McMillian*,[25] the Supreme Court decided that if the alleged assaulter had actual knowledge of danger to the prisoner and chose not to prevent it, the court should assume the abuse was objectively harmful enough to establish a constitutional violation under societal standards of decency.[26] Essentially, if the second prong is met, the first prong is also met.

In *Hudson*, the Court held in favor of an inmate who brought an Eighth Amendment excessive force claim under 42 U.S.C. § 1983 after he sustained minor injuries from being beaten by guards while handcuffed.[27] The Court held that whether the second prong is met in an excessive force analysis hinges on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[28] If force was applied in order to maliciously and sadistically cause harm, societal standards of decency are always violated, regardless of the severity of the injury.[29] The Court explained that if this rule were not established, the Eighth Amendment "would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury"; the significance of the injury does not matter.[30]

Sexual assault is always sufficient to meet the second prong of the test because courts assume sexual assault is always force applied maliciously and sadistically to cause harm, and therefore violates societal standards of decency, regardless of the assaulter's actual state of mind or the severity of the injury.[31] However, this merely shifts the excessive force inquiry when abuse claims are made to whether the guard has in fact sexually abused the inmate, making the uncertainty over whether

---

[22] Gabriel Arkles, *supra* note 12, at 804–05 (2014) (citing Robinson v. California, 370 U.S. 660, 667 (1962)).

[23] Hogan, *supra* note 7, at 432–33 (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992) (emphasis added)).

[24] Arkles, *supra* note 12, at 807–08 (2014) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994) (emphasis added)).

[25] 503 U.S. 1 (1992).

[26] *Id.* at 9.

[27] *Hudson*, 503 U.S. at 12.

[28] *Id.* at 6.

[29] *Id.* at 9.

[30] *Id.*

[31] Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (holding sexual abuse constitutes "conduct which itself establishes . . . sufficient evidence" of malicious intent).

consent is a defense to an inmate-guard sexual assault claim even more critical to address.

C. The Majority Approach: Consent *Is* a Defense to Eighth Amendment Sexual Assault Claims

The Eighth, Sixth, and Tenth Circuits have found that "voluntary" consensual relationships between inmates and correctional officers do not violate the Eighth Amendment.[32] In *Freitas v. Ault*,[33] a male inmate entered into a seemingly voluntary intimate relationship with a female correctional officer, during which they would regularly kiss, hug, talk, and write "hot sexy" letters to one another.[34] The inmate ended the relationship upon learning the correctional officer was sleeping with another man and subsequently alleged that she had sexually harassed him.[35] The Eighth Circuit decided in favor of the correctional officer and held 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."[36] Similarly, in *Hall v. Beavin*,[37] a male inmate claimed an Eighth Amendment violation after he was disciplined for his sexual relationship with a female correctional officer.[38] The Sixth Circuit held in favor of the defendants because the inmate did not prove the correctional officer had sexually assaulted him, but rather that he "voluntarily" engaged in the sexual relationship.[39]

Initially, the Tenth Circuit's approach was diametrically opposed to that of the Eighth and Sixth Circuits. Until 2013, the Tenth Circuit had held the Eighth Amendment precludes, as a per se rule, inmates and correctional officers from entering into sexual relationships with one another, regardless of consent.[40] For example, in *Lobozzo v. Colorado Department of Corrections*,[41] a female inmate entered into a sexual relationship with a male correctional officer that appeared to involve no coercive factors. The Tenth Circuit ruled per se in favor of the inmate.[42]

---

[32] *See* Hall v. Beavin, No 98-3802, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997).

[33] 109 F.3d 1335, 1339 (8th Cir. 1997).

[34] *Id.* at 1336.

[35] *Id.*

[36] *Id.* at 1339.

[37] No. 98-3802, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999).

[38] *Hall* at *4.

[39] *Id.*

[40] *See* Lobozzo v. Colo. Dep't of Corr., 429 F. App'x. 707, 711 (10th Cir. 1997).

[41] 429 F. App'x. 707, 711 (10th Cir. 1997).

[42] *See id.* at 711.

However, the Tenth Circuit changed course in *Graham v. Sheriff of Logan County*[43] and adopted the standard held by the Sixth and Eighth Circuits.[44] In *Graham*, an inmate and guard exchanged "sexually explicit notes" and regularly spoke about wanting to have sexual intercourse with one another.[45] On two occasions, the guard fulfilled the inmate's requests for a candy bar and a blanket, but the inmate stated at trial that she "did not think that she had received any special treatment from [the guard]."[46] Ultimately, the inmate engaged in sexual intercourse with the guard she had been speaking with and another male guard after she was placed in solitary confinement for an unrelated offense.[47] The inmate said the intercourse was consensual as it pertained to the guard she had been speaking with prior to the incident, but "didn't really want [the other one] there."[48] In its opinion, the court emphasized:

> [The inmate] 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. She has stated repeatedly and consistently that almost all the sexual acts that occurred were consensual.[49]

The Tenth Circuit bolstered its departure from its decision in *Lobozzo* by emphasizing that *Lobozzo* was an unpublished opinion and not binding in the Tenth Circuit.[50] The court also relied on the fact that the judiciary had not reached a consensus as to whether consent is a defense to Eighth Amendment sexual assault claims.[51] The court treated the case as a matter of first impression and held that "absent contrary guidance from the Supreme Court . . . it [is] proper to treat sexual abuse of prisoners as a species of excessive-force claim, requiring at least some

---

[43] 741 F.3d 1118 (10th Cir. 2013).

[44] *Id.* at 1126.

[45] *Id.* at 1120–21 (the court included in its opinion the text of a note the inmate had written to the guard: "Hey Sexy, Damn you look good in that uniform. I just want to rip it off of you. I can only imagine what you'll look like in that deputy uniform. Mmm . . . the state troopers uniforms are real sexy! The hat and all. I look forward to f**king you in, or around your patrol car. Damn, just the thought of that gets my nipples hard. I'm such a nympho! Can you deal with that? Because I want it all the time. Seriously, I think I might be a sex addict. So there's a little bit more you know about me. Have I freaked you out yet? I hope not cuz that's not my intention. . . . You haven't smiled for me. What's up? You down? Cheer up handsome. Peace.").

[46] *Id.* at 1121.

[47] *Id.* at 1120.

[48] *Id.*

[49] *Id.* at 1123.

[50] *Id.* at 1124.

[51] *Id.*

form of coercion (not necessarily physical) by the prisoner's custodians," adopting the Sixth and Eighth Circuit approach.[52] Today, under this majority approach, the inmate bears the burden to prove the sexual conduct was not consensual, otherwise known as the "burdened-inmate" rule.[53]

D. The Proposed Per Se Rule: Consent Is *Never* a Defense to Eighth Amendment Sexual Assault Claims

Although no circuit court has endorsed a per se rule under which prisoners are incapable of consent to sexual relations with a guard, the scholarship on this topic overwhelmingly supports a rule stipulating consent is never a defense to an Eighth Amendment sexual assault claim.[54] Some district courts have endorsed this view as well. In *Carrigan v. Davis*,[55] a female inmate alleged she had been raped by a guard, whereas the guard alleged he had been seduced by the inmate and engaged in consensual oral sex with her.[56] The District Court of Delaware held as a matter of law that "an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment."[57] The court emphasized that the Delaware legislature had "concluded that such action, whether consensual or not, constitutes a criminal offense,"[58] and the legislature is the "clearest and most reliable objective evidence of contemporary values."[59] The court also reaffirmed that sexual conduct between prisoners and guards "destabilizes the prison environment by compromising the control and authority of the guard over the inmate, compromising the inmate's health, security and well-being and creating tensions and conflicts among the inmates themselves."[60] The Western District of New York took an approach similar to *Carrigan* in *Cash v. County of*

---

[52] *Id.* at 1126.

[53] Hogan, *supra* note 7, at 426.

[54] *See generally* Brenda V. Smith, *Prison and Punishment: Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185 (2006); Hannah Brenner et al., *supra* note 21; M. Jackson Jones, *supra* note 19; Joanna E. Saul, *Of Sexual Bondage: the "Legitimate Penological Interest" in Restricting Sexual Expression in Women's Prisons*, 15 MICH. J. GENDER & L. 349 (2009); Hogan, *supra* note 7; Kristen Seddiqui, *Graham v. Sheriff of Logan County: Coercion in Rape and the Plight of Women Prisoners*, 92 DEV. U.L. REV. 671 (Fall 2015); 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 (2014).

[55] 70 F. Supp. 2d 448 (D. Del. 1999).

[56] *Id.* at 451.

[57] *Id.* at 452–53.

[58] *Id.* at 453.

[59] *Id.* (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

[60] *Carrigan*, 70 F. Supp. 2d at 454.

Erie,[61] quickly rejecting the guard's defense that the sexual contact between himself and the inmate had been "physically consensual" on per se grounds under New York state law.[62]

E. The Ninth Circuit's Mixed Approach: Consent *May* Be a Defense to Eighth Amendment Sexual Assault Claims

The Ninth Circuit has taken a mixed approach to resolving this issue: consent may be a defense to an Eighth Amendment sexual assault claim, but an inmate is entitled to a strong presumption that any inmate-guard relationship is non-consensual.[63] In *Wood v. Beauclair*,[64] the Ninth Circuit held "inmates are entitled to a presumption that any relationship with a correctional officer is not consensual," but the defendant can "rebut this presumption by showing that the relationship 'involved no coercive factors.'"[65] The court did not "attempt to exhaustively describe every factor that could be fairly characterized as coercive."[66] However, it did state that while "explicit assertions of non-consent indicate coercion," "favors, privileges, or any type of exchange for sex" may also indicate coercion.[67]

In *Wood*, a male inmate entered into an intimate relationship with a female correctional officer that appeared to involve no coercive factors at its onset.[68] They "conversed often about personal topics" and occasionally hugged, kissed, and touched each other on the arms and legs.[69] Upon learning that the correctional officer was married, the inmate attempted to end the relationship, but the correctional officer responded by beginning to make explicit sexual advances towards the inmate, including cupping his groin.[70]

The Ninth Circuit held that inmates are entitled to the presumption that any inmate-guard relationship is non-consensual.[71] The defendant, however, may rebut that presumption with evidence that his or her conduct was not coercive.[72] Under this standard, the correctional officer bears the burden of proving both parties consented to the sexual

---

[61] No. 04-CV-0182(M), 2009 U.S. Dist. LEXIS 134049 (W.D.N.Y. Sept. 4, 2009).

[62] *Id.* at *6.

[63] Wood v. Beauclair, 692 F.3d 1041, 1047 (9th Cir. 2012).

[64] 692 F.3d 1041 (9th Cir. 2012).

[65] Jones, *supra* note 19, at 278 (citing *Wood*, 692 F.3d at 1049 (9th Cir. 2012)).

[66] *Wood*, 692 F.3d at 1049.

[67] *Id.*

[68] *Id.* at 1047.

[69] *Id.* at 1044.

[70] *Id.*

[71] *Id.*

[72] *Id.*

contact.[73] In this case, the state could not show that the guard's behavior was not coercive, so the court ruled in favor of the inmate.[74] The court was particularly concerned with the fact that "the power dynamics between prisoners and guards make it difficult to discern consent from coercion" and wanted to establish a rule that "explicitly recognize[d] the coercive nature of sexual relations in the prison environment."[75]

Numerous opinions from lower courts in the Ninth Circuit positively cite *Wood*, but they usually do so for its presumption that any inmate-guard relationship is presumptively non-consensual rather than its test for consent.[76] The exception to this rule is *Manago v. Williams*,[77] decided in 2013 by the Eastern District of California. An inmate alleged prison guard Mary Brockett had verbally harassed him in a sexual manner.[78] After the verbal harassment, he agreed to take part in an investigation of her misconduct in compliance with prison officials.[79] The inmate alleged that Brockett "'French kissed' him, touched his genitals, slapped his buttocks, and orally copulated him" without his consent while the investigation was proceeding.[80] Even though the inmate seemingly consented to the behavior and at times initiated sexual contact, he did so because he was directed by officials to "snar[e] Brockett in official misconduct."[81]

The court held that the *Wood* test required a ruling against Brockett because her behavior was coercive.[82] Further, the court emphasized that "any allegedly personal interest that [the] plaintiff may have had in a consensual sexual relationship with Brockett, which [the] plaintiff denies, is overshadowed by [the investigation's] reliance on [the] plaintiff, underscored by [the] plaintiff's officially facilitated recording of his interactions with Brockett."[83] The court did not find compelling the argument that the inmate was discouraged from engaging in sexual conduct.[84] The inmate also testified that he engaged in sexual activity with

---

[73] Hogan, *supra* note 7, at 426.

[74] *Id.* at 1049.

[75] *Id.*

[76] *See, e.g.*, Cleveland v. Curry, No. 07-cv-02809-NJV, 2014 U.S. Dist. LEXIS 22402, at *49 (N.D. Cal. Feb. 21, 2014) ("under *Wood*, [defendant's] sexual conduct 'itself constitute[d] sufficient evidence that force was used 'maliciously and sadistically' for the very purpose of causing harm'").

[77] No. 2:07-cv-2290 LKK KJN P, 2013 U.S. Dist. LEXIS 183734 (E.D. Cal. March 13, 2013).

[78] *Id.* at 57.

[79] *Id.*

[80] *Id.* at 59.

[81] *Id.* at 57.

[82] *Id.*

[83] *Id.*

[84] *Id.*

Brockett solely for the purposes of the investigation and took active steps to request the cessation of the investigation.[85]

III. FACTORS WEIGHING AGAINST THE POSSIBILITY OF CONSENT IN THE PRISON ENVIRONMENT

A wealth of scholarship addresses consent from a variety of angles, the breadth of which is impossible to cover comprehensively in a Comment of this scope. I will highlight the arguments flagged by scholars focusing on issues of consent in prison.

A. Power Imbalance and Consent

Most scholars who advocate for a per se rule against consent as a defense to Eighth Amendment sexual assault claims argue an "inherent power imbalance between guard and inmate" exists that is "analogous to the inherent power imbalance between adult and child."[86] Prison exerts extreme levels of control over inmates' day-to-day lives: correctional officers control "every aspect of the inmates whom they supervise, from privacy to opportunities to eat or bathe or interact with others, culminating in the ultimate amount of time the inmates must stay in prison."[87] Correctional officers also utilize their authority to "provide goods and privileges as a method of compelling sexual relations or withholding goods and privileges as punishment for not engaging in sexual contact."[88] Scholars advocating for the per se rule also worry about the impact of the "social hierarchy" of prison on inmates' ability to consent.[89] The pecking order of the inmates, based on the length of time spent in prison and the nature of their criminal history, can increase the likelihood of sexual coercion taking place, though most scholars discussing the social hierarchy are concerned about its effect on relationships between inmates.[90]

Much of the scholarship in favor of a per se rule at least acknowledges that power differentials exist between sexual partners outside of prison as well.[91] One partner may be in a far better financial situation than another or hold a position of social or professional authority over

---

[85] *Id.*

[86] Brenner, *supra* note 21, at 546.

[87] *Id.*

[88] *Id.*

[89] Saul, *supra* note 54, at 381–82.

[90] *See id.* ("Within this structure, partners of the most powerful inmates rise in social stature. Thus, not only might there be pressure from a more powerful inmate to engage in sex, but there might also be pressure to accede in exchange for the social lift.").

[91] Saul, *supra* note 54, at 379 ("any power differential, however, has a coercive element that may impair consent").

the other. That being said, there are compelling arguments as to why the prison context is unique. In prison, inmates lack freedom of association. They must continue to interact with guards based not on their own preferences but on those of the correctional facility.[92] If a guard is assigned to a particular role that requires him or her to interact with a particular inmate on a regular basis, the inmate has limited means by which to remove him or herself from that situation. In addition, relationships that were once consensual can transform as conditions change, and these changes are almost never subject to the control of the prisoner. As one inmate put it, "sometimes it starts off being consensual, but then later it becomes an abusive situation."[93] Furthermore, some scholars argue that the total deprivation of liberty inherent in imprisonment requires the correctional system to shield inmates from "sexual pressure."[94] Because the prison system strips inmates of much of their autonomy, the prison system also has a heightened responsibility to protect them from sexual coercion.

Scholars are also concerned that relationships between inmates and guards can "disrupt the prison environment," bringing about jealousy from other inmates who believe, whether correctly or incorrectly, that the inmate is receiving extra privileges as a result of a sexual relationship with a correctional officer.[95] Much of the coercive sexual contact in prison is not characterized by physical force but is rather in exchange for privileges or power.[96] In fact, "nearly half of the [correctional officers] in . . . sexual abuse cases also smuggled contraband into prisons for the inmates with whom they had sexual relationships."[97]

Exchanging sex acts for increased privileges is a particularly strong form of coercion in the prison context, where freedoms many take for granted in the outside world become luxuries. Privileges exchanged for sexual contact range from additional phone usage and greater contact with an inmate's children to desired goods such as cigarettes or gum.[98] In the often austere prison environment where inmates have little autonomy over their own lives, such privileges are particularly valuable. This reality can lead to a dynamic that is not only coercive in nature but also to significant underreporting of sexual assault, as many in-

---

[92] *Id.*

[93] Brenner, *supra* note 21, at 569.

[94] Saul, *supra* note 54, at 379.

[95] Jones, *supra* note 8, at 306.

[96] Alice Ristroph, *Prison and Punishment: Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 141 (2006).

[97] Jones, *supra* note 8, at 307.

[98] *Id.*

mates believe reporting could result in not "receiving unauthorized privileges or contraband in exchange for the sexual acts [he or she committed]."[99]

Scholars raise other concerns about the prison environment's impact on consent: for example, overcrowding increases the probability of sexual coercion taking place.[100] At first blush, this concern may seem counter-intuitive: overcrowding means decreased privacy, supposedly leading to more potential witnesses when a sexual assault takes place. However, this reduction of privacy and less supervision can actually make it easier for guards and inmates to commit sexual abuse.[101] There are "more bodies in the showers, more eyes of the guards and other inmates, more inmates being strip-searched together after visitation, and greater need to place more inmates together in sleeping arrangements that may increase an inmate's vulnerability."[102] Over-crowding leads to a higher inmate-to-guard ratio and greater anonymity within the prison, making it easier for guards and inmates to engage in sex acts without being detected, regardless of consent.

B. The Relationship Between Incarceration and Sexuality

Some scholars argue incarceration is "inherently a sexual punishment" because of the extent to which prisons exercise control over prisoners' bodily autonomy and integrity, and that sexual coercion is "an inherent aspect of mass confinement."[103] Violence and social hierarchies are essential to the functioning of prison, not merely "accidental or superfluous" elements of the prison experience.[104] Therefore, any efforts to increase bodily autonomy of prisoners or legislate to protect them from sexual violence will be incomplete at best.[105] Because the American prison system relies on "total control over the bodies and behaviors of prisoners" and depriving prisoners of any self-determination, incarceration cannot exist without total control over prisoner sexuality and depriving prisoners of any sexual self-determination as well.[106]

---

[99] *Id.* at 304.

[100] Saul, *supra* note 54, at 380–81.

[101] *Id.* at 381.

[102] *Id.*

[103] *See* Alice Ristroph, *supra* note 96, at 140.

[104] Arkles, *supra* note 12, at 809–10.

[105] *Id.*

[106] *Id.*

C. The Impact of Stereotyping on Determining Consent

Some scholars argue stereotyping of correctional officers as "good guys" and of prisoners as "bad guys" more likely to be sexual aggressors negatively impacts prisoners' likelihood of success in bringing sexual assault claims. Juries and judges tend to favor correctional officers, who, given their position as law enforcement officers, are considered to have a "moral and upstanding character" and are assumed to comply with the rules.[107] In contrast, the benefit of the doubt usually cuts against the claims of prisoners, who—assuming the justice system is working properly—have engaged in at least some criminal behavior in the past and society often deems "inherently deviant."[108] If they have broken rules in the past, the thought goes, why would they not do so again? Because of inmates' perceived "deviance," juries and judges may be subject to implicit bias and more likely to make incorrect judicial decisions by assuming these characters are both more likely to be the sexual aggressor or want to consent to sex.[109]

D. Mental Illness, Family History, and Consent

Some scholars emphasize the prevalence of mental illness among inmates and that inmates with mental illness are "at an increased risk of sexual victimization."[110] Furthermore, histories of physical and sexual abuse are common among inmates, particularly women: "of female inmates in state prisons, 57.2% reported being abused prior to admission; 46.5% reported physical abuse, and 39% reported sexual abuse. Of those who reported abuse, 40.1% experienced abuse at the hands of a family member, and 60.1%, by an 'intimate' [partner]."[111] Some argue that "it is possible that these women may transpose their expectations and experiences from their real family onto their prison family and be accepting of abuse as part of the family dynamic."[112]

IV. THE MERITS OF THE NINTH CIRCUIT'S MIXED APPROACH

This Comment will argue the Ninth Circuit's mixed approach preserves prisoner autonomy as much as possible while maximizing prisoner safety, as well as explain why prisoner autonomy—particularly prisoner bodily autonomy—is so critical for prisoner wellbeing. Prisoner

---

[107] Brenner, *supra* note 21, at 544.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 382.

[112] *Id.*

bodily autonomy is paradoxical by definition. To have autonomy and bodily integrity, prisoners must be free from nonconsensual sex acts. At the same time, prisoners must have the ability to welcome consensual sex acts in order to be autonomous. On one hand, prohibitions on consensual sex devalue consent by restricting an inmate's control of his or her body.[113] Simultaneously, implicitly granting others a sense of entitlement to an inmate's body is also a horrific violation of bodily integrity.[114] The Ninth Circuit's mixed approach should be adopted uniformly by the circuit courts because it ensures prisoner autonomy by balancing these factors.

Scholars promoting greater deference to inmate consent generally limit their arguments to relationships between inmates due to the power imbalances addressed earlier in this Comment.[115] However, under the dignity and sexual autonomy arguments these scholars support, it seems that consent in the inmate-guard context is indeed possible, though exceptionally rare. While supporting prisoner wellbeing is what motivates most advocates of the per se rule, precluding prisoners from the ability to give consent in any guard-inmate context whatsoever further punishes prisoners by stripping them of some of the deepest layers of their bodily autonomy rather than shifting the focus to keeping guards accountable. To preserve autonomy while keeping inmates safe from sexual violence, the Ninth Circuit's mixed approach strikes the right balance by adopting a strong presumption against consent while still promoting some degree of case-by-case analysis. The focus must be on how the prison context creates conditions that may ultimately be coercive and mask assault under a guise of consent rather than imposing a per se rule.

A. The Harms of Limiting Sexual Autonomy in Prison

The Supreme Court has acknowledged that adults have a right to personal autonomy and their bodily integrity.[116] Though the Court has not explicitly addressed whether this right extends to prisoners, numerous lower courts have determined inmates are indeed entitled to such

---

[113] Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 66, 92 (2015).

[114] *Id.*

[115] *Prison Reform: Commission on Safety and Abuse in America's Prisons: Confronting Confinement*, 22 WASH. U. J.L. & POL'Y 385, 416 (2006) ("While [prison] plays an undeniable role in creating inequality amongst inmates, just as it creates inequality between inmates and staff, the power differentials are not as stark [as those between inmates and staff] and are therefore less concerning in this context.").

[116] *See* Planned Parenthood v. Casey, 505 U.S. 833, 843 (1992) (citing McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (C.P. 1978) (holding defendant was not required to engage in bone marrow transplant with his cousin despite being the only potential matching donor)).

protection.[117] Though courts primarily apply this principle in the context of prisoners' right to refuse medical treatment, the Tenth Circuit has extended it to the prison sexual assault context, holding inmates have "a constitutional right to be secure in [their] bodily integrity and free from attack by prison guards."[118] That said, incarceration in reality often strips inmates' of their sexual autonomy by both limiting their ability to welcome wanted sexual interaction and placing them at high risk for sexual assault.

This denial of bodily autonomy has significant negative consequences for inmates. First, some scholars argue that absolving inmates of their sexual autonomy is a missed opportunity: greater sexual autonomy may help inmates achieve better societal integration upon release.[119] Decriminalizing sexual interactions and treating truly consensual sex acts as something positive for prisoners can support the development of healthy social skills and help mitigate the often traumatic nature of the current American prison system.[120] In general, greater prisoner autonomy is linked to greater productivity in society after release.[121] Increased autonomy can be empowering and healing.[122]

Second, greater prisoner autonomy is linked to reductions in prison violence, particularly sexual violence.[123] Some scholars argue bodily integrity in the form of "sexual self-determination"—meaning the ability to say both "no" and "yes" to sexual interactions—is critical to preventing sexual violence in the prison context.[124] Additionally, prohibiting consensual sex can discourage prisoners from reporting instances of sexual assault.[125] Instead, they often choose not to report for fear of being punished for engaging in any sexual activity at all.[126]

Third, the mechanisms used to enforce limitations on sexual autonomy often require further infringement on prisoner bodily integrity, and

---

[117] *See* Zant v. Prevatte, 286 S.E. 2d 715, 716–17 (Ga. 1982) (holding the state did not have a compelling interest that overpowered the prisoner-plaintiff's right to reject a medical treatment when he was found to be sane); Singletary v. Costello, 665 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1996) (holding state did not have a compelling interest that overpowered the prisoner-plaintiff's right to reject a medical treatment even though the prisoner chose to engage in a hunger strike).

[118] Hovater v. Robinson, 1 F.3d 1063, 1064–65 (10th Cir. 1993).

[119] Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 258 (2017); *see also* Arkles, *supra* note 113, at 96.

[120] Nielsen, *supra* note 119, at 258.

[121] Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUMAN RIGHTS L. REV. 167, 212 n.224 (2006); *id.* at 275.

[122] *Id.*

[123] *Id.*; *see also Prison Reform*, *supra* note 115.

[124] Arkles, *supra* note 113, at 68.

[125] *Id.*

[126] *Id.*

the PREA's emphasis on surveillance of prison rape has exacerbated this issue.[127] Prison surveillance systems are dehumanizing and simultaneously do not correct the problematic reporting mechanisms available to victimized prisoners, nor do they remedy inadequate prison policies on consensual sex and rape.[128] Surveillance often involves examining, touching, or even penetrating the prisoner's naked body through searches or exams.[129] After being discovered, prisoners may be placed in solitary confinement or lose "good time credits," forcing them to remain in prison for a longer period of time.[130] Both solitary confinement and longer prison terms can render prisoners more vulnerable to sexual violence.[131] Increased surveillance and greater restrictions on prisoner autonomy may reduce incidents of violent rape, but these benefits require placing different yet significant limitations on inmate bodily autonomy.[132]

The need to protect prisoner autonomy as much as possible seems especially relevant in the context of a 2003 program developed by the National Institute of Corrections to provide training to correctional facilities. Throughout the program, only six of fifty-nine problems the participating prison wardens and directors raised were about prisoner behavior, whereas thirty-two were about "staff-related" issues, including "staff sexual misconduct, staff morale, staff assaults on prisoners, confrontational episodes between staff and prisoners, the lack of ethnic diversity among staff, and difficulty recruiting and retaining quality staff."[133]

Because the party most at issue here is the prison guards, and more broadly the prison system that makes possible the coercive factors at play in guard-inmate relationships, it seems the legal system is responsible for protecting prisoners as fully as possible. What it means to "protect," however, is uncertain. The per se rule protects inmate autonomy, if autonomy means freedom from nonconsensual sex acts. The rule followed by the Sixth, Eighth, and Tenth Circuits supposedly also protects

---

[127] Nielsen, *supra* note 119, at 262–63.

[128] *Id.*

[129] Arkles, *supra* note 113, at 94.

[130] *Id.*

[131] *Id.*

[132] Ristroph, *supra* note 96, at 184.

[133] John J. Gibbons, *Confronting Confinement Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 416 (2006).

inmate autonomy,[134] if autonomy means the ability to welcome consensual sex acts.[135] Both rules are incomplete and limit prisoner freedom in some way, which seems inappropriate given prisoners' extremely limited role in contributing to the problem of prison sexual assault.

B. How the Ninth Circuit's Mixed Approach Ensures Prisoner Safety

For the compelling reasons enumerated above, this Comment emphasizes the importance of preserving as much prisoner bodily autonomy as possible while ensuring prisoner safety. This Comment also acknowledges that true consent between a correctional officer and a prisoner is rare. If courts were omniscient, they would probably observe that a significant proportion of prisoner-guard relationships that seem consensual at first glance are rooted in promises for prison contraband, protection, or special privileges or influenced by other coercive factors.[136] However, the Ninth Circuit approach succeeds by acknowledging the serious risks intimate relationships between guards and inmates pose. The mixed approach creates a meaningful mechanism by which prisoners can raise claims of sexual assault and plausibly succeed while cultivating greater respect for their autonomy. The Ninth Circuit's rule encompasses the benefits of the per se rule without diminishing the value of inmate consent.

The Ninth Circuit's approach addresses the concerns raised by the most passionate advocates of the per se rule. The Ninth Circuit will find coercion occurred between a prisoner and guard if favors, privileges, or any type of exchange for sex is present, encompassing the less tangible factors that could render a seemingly consensual sexual relationship non-consensual.[137] In addition, the correctional officer bears the burden of proving both parties consented to the sexual contact, reducing the burden on the inmate to gain access to information and representation that is more difficult to obtain in the prison context.[138]

---

[134] *See* Hall v. Beavin, No 98-3802, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997); Graham v. Sheriff of Logan Cty, 741 F.3d 1118, 1126 (10th Cir. 2013).

[135] That said, the "burdened-inmate" rule the Sixth, Eighth, and Tenth Circuits utilize (the inmate bears the burden to prove the sexual conduct was not consensual) is a significant encumbrance to inmates succeeding in bringing Eighth Amendment excessive force claims given limited access to representation and information, as well as concerns about stereotyping by judges and juries related to inmate credibility.

[136] Saul, *supra* note 54, at 380 ("[M]ost prison sex, especially with women, comes not from physical force or the threat of physical force, but from a bargain—a bargain made purely in the context of prison conditions.").

[137] *Wood*, 692 F.3d at 1049.

[138] Hogan, *supra* note 7, at 426.

Furthermore, inmates are "entitled to a presumption that any relationship with a correctional officer is not consensual."[139] The presumption against consent is very strong: though numerous opinions from lower courts in the Ninth Circuit positively cite *Wood*, they do so for its presumption that sexual assault occurred, not its test for determining whether the inmate consented to the sex act in question.[140] Furthermore, the deterrent effect of the Ninth Circuit rule is significant. If correctional facilities are on notice that the presumption in the Ninth Circuit cuts strongly in favor of inmates, they will be incentivized to put in place policies that minimize inappropriate guard behavior.

Furthermore, the court has chosen not to "attempt to exhaustively describe every factor which could be fairly characterized as coercive."[141] This functionalist approach leaves plenty of room for lower courts to assess the facts of each inmate's situation as a whole and determine whether coercion has taken place. Lower courts are not bound by a specific list of behaviors that constitute coercion, but rather are guided by the example of the short list of behaviors the Ninth Circuit did include in its opinion in *Wood*: "favors, privileges, or any type of exchange for sex," which is already a very expansive definition of what constitutes coercion.[142] The serious risks posed by inmate-guard relationships demand a rigorous standard for inmate consent. Under the Ninth Circuit's rule, the facts would have to be overwhelmingly in favor of consent in order for a court to find that the inmate was not influenced by outside factors more than he or she would be beyond the confines of the prison or jail.

The Ninth Circuit's mixed approach undeniably raises a question about judges' and juries' institutional capacity. Can courts effectively weigh competing concerns to determine whether a personal relationship between a guard and an inmate included "coercive factors?" The facts alleged in prison sexual assault cases are often disputed and unclear, making it even more challenging for courts to come to case-by-case conclusions regarding inmate consent. However, the Ninth Circuit's presumption against consent is helpful in this regard. By requiring that the facts be overwhelmingly in favor of consent in order for a court to find that the inmate was not influenced by coercive factors, the Ninth Circuit's mixed approach reduces some of the burden on judges

---

[139] Jones, *supra* note 19, at 278 (2014) (citing *Wood*, 692 F.3d at 1049).

[140] *See, e.g.*, Cleveland v. Curry, No. 07-cv-02809-NJV, 2014 U.S. Dist. LEXIS 22402, at *49 (N.D. Cal. Feb. 21, 2014) ("[U]nder *Wood*, [defendant's] sexual conduct 'itself constitute[d] sufficient evidence that force was used 'maliciously and sadistically' for the very purpose of causing harm.'").

[141] *Id.*

[142] *Wood*, 692 F.3d at 1049.

and juries to make fine-grain factual determinations to accurately resolve prisoner sexual assault claims.

C. How the Ninth Circuit Rule Increases Prisoner Autonomy: Defining Consent in the Prison Context

The Ninth Circuit's approach effectively achieves the aims of the per se rule, yet its greater preservation of prisoner autonomy is what sets it apart. The approach allows for greater inmate autonomy by acknowledging that the fundamental human ability to welcome mutually agreed upon sexual interaction still holds some muster in the prison context, even if that ability is abridged. Whether consent is possible in the prison context is a highly controversial topic, particularly because inmate autonomy is so drastically constrained upon entry into the prison or jail. Inmates' daily activities are constantly monitored and controlled by the prison system: they are told when to work, eat, sleep, and shower. [143] The state becomes inmates' "landlord, employer, tailor, neighbor, and banker."[144] Prison is by design a harsh environment intended to constrain what inmates can and cannot do. Some scholars describe prisons as "barren landscapes devoid of even the most basic elements of humanity."[145]

Given the austerity of the prison environment, every deprivation the prison system inflicts on prisoners is meaningful. One scholar lists seemingly little things like "missing family photos, confiscation of magazines deemed contraband, broken radios, opened mail, and cold meals" as ways prisoners have said they are reminded of their lack of power and dignity.[146] Importantly, it is difficult to determine from beyond prison walls what is most important to each individual prisoner. Poignantly, one inmate has said:

> What's small to one man might be great to another. [An officer] goes home every day to his wife, to his mistress, to his boyfriend, to whatever. So, what he might think be small might be major to a guy who's bein' told when to eat, when to go to sleep, when to boo-boo, when not to boo-boo.[147]

It is nearly impossible to effectively determine what deprivations of liberty will most dramatically impact a prisoner's sense of dignity.

---

[143] Valerie Jenness and Kitty Calavita, *"It Depends on the Outcome": Prisoners, Grievances, and Perceptions of Justice*, 52 LAW & SOC'Y REV. 41, 62 (2018).

[144] *Id.*

[145] *Id.*

[146] Jenness, *supra* note 143, at 62.

[147] *Id.*

Most decision makers in courts and prisons have not been incarcerated themselves and can only understand to a certain extent what it means to have things that may seem insignificant to others but are important to them taken away. Therefore, minimizing restrictions on prisoner autonomy—even those that seem negligible in their impact—is critical to prioritizing inmate wellbeing.

As previously explained, the extreme power inequality between prisoners and guards is reason for concern when considering prisoners' ability to consent, as well as prisoners' greater susceptibility to stereotyping and physical abuse. Some argue that because the American prison system relies on "total control over the bodies and behaviors of prisoners" and depriving prisoners of any self-determination, incarceration cannot exist without total control over prisoner sexuality and depriving prisoners of any sexual self-determination as well.[148] However, scholar Michele C. Nielsen's analysis of whether consent is possible in constrained circumstances is helpful here. She explains that the claim that when "men construct the meaning of sexuality, they must also construct the meaning of consent and even women's experience of consent" is mistaken.[149] Rather, she argues that "while much of the world is constructed by men, women can still maintain some autonomy within the warped system.[150]

Similarly, prisoners are capable of consent in an imperfect, but adequate, matter in some particular circumstances.[151] Nielsen argues this imperfect consent is limited to inter-inmate relationships and that inmate-guard relationships are too steeped in power imbalance for even imperfect consent to be possible.[152] However, claiming consent is completely impossible between any guard and any inmate is arbitrarily drawing a line. Although rooted in meaningful concerns about the power imbalance between guards and inmates generally, there are some specific circumstances where the coercive effects advocates of the per se rule are worried about are less relevant. For example, a guard may be stationed at a post unrelated to where the prisoner is being held, a situation that is especially possible in some of the country's largest prisons. Alternatively, the guard may not engage in any exchange of special privileges or may not even have the access necessary to provide the inmate with the special privileges he or she desires.

Some scholars argue that the constraints inmates face are more similar to those imposed on free women than they appear: significant

---

[148] Arkles, *supra* note 12, at 809–10.

[149] Nielsen, *supra* note 119, at 254.

[150] *Id.* at 254–55.

[151] *Id.* at 256–57.

[152] *Id.*

economic inequality and a heightened risk of being the victims of violent crime constrain women's autonomy in the outside world.[153] Though there may be some similarities that connect the experience of some inmates to some free women, they are very general in nature. The vast majority of inmates experience greater constraints on their personal autonomy than most other members of society.[154] Though societal and economic pressures certainly impact how and why women consent in the outside world, their bodily autonomy is not constrained to the same degree as that of the prisoner population: in most typical circumstances, they may decide for themselves when they want to eat, sleep, or shower.

That said, there is a connection between the way inmates and free women consent. For both groups, their environment inherently impacts what constitutes a coercive factor and what consent must look like in order to bring about a truly voluntary—rather than a seemingly voluntary—interaction. In order to be a meaningful term, consent cannot maintain the same definition across circumstances. Rather, it must reflect the constraints the environment imposes on the individual in question. Consensual sex is "life affirming, restorative, and rejuvenating."[155] Nonconsensual sex is dehumanizing and traumatizing. This distinction is mobile: it changes based on the context in which the individual in question is giving consent.

In order to appropriately define what consent looks like in a particular situation, courts must strive to understand how individuals actually resist sexual advances given the constraints of that situation. In the prison context, sociologists have found that when inmates push back on correctional officers' harassment, they do so in a subtle manner to avoid retaliatory action, either through avoiding the problematic guards or appearing indifferent to their advances.[156] However, under the framework advanced by the Eighth, Sixth, and Tenth Circuits, these subtle methods of resistance are insufficient for a prisoner to show he or she did not consent to the guard's advances.[157]

Proponents of the per se rule may argue that the Ninth Circuit's approach does not really afford prisoners greater autonomy because it is unlikely a guard-inmate relationship will reach the threshold necessary to be deemed consensual given the rigor of the test. However, prioritizing greater prisoner autonomy does not mean disregarding prisoner safety. Prisoner-guard relationships are at high risk for becoming

---

[153] *Id.* at 257.

[154] *Id.* at 255.

[155] Nielsen, *supra* note 119, at 256–57.

[156] Camille Gear Rich, *What Dignity Demands: the Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 41 (2009).

[157] *Id.*

coercive, and this reality must be taken into account when developing legal rules surrounding those relationships. Rather, the legal system must prioritize prisoner autonomy as much as ensuring prisoner safety allows. Here, a rebuttable presumption rule provides for greater—albeit imperfect—prisoner autonomy to welcome consensual sexual relationships while maximizing prisoner autonomy to be free from unwelcome sexual contact.

D. Power Imbalances and Consent Outside the Prison Context

Despite the advantages of the Ninth Circuit rule for prisoner autonomy, advocates of the per se rule argue inmates are similar enough to other groups whose sexual autonomy is constrained by the law or private policies to justify a per se approach. In order to flesh out this distinction, it is helpful to compare the per se rule in the inmate-guard context to more widely accepted per se rules against certain forms of sexual contact, such as those against statutory rape of minors under the age of consent, university policies against intimate relationships between students and professors, and workplace policies against intimate relationships between employees and their superiors.

1. Statutory rape

Minors' inability to consent to sexual contact is not a compelling analog to the validity of inmate consent to sexual relations with a guard. This Comment certainly does not purport to argue prisoners are in the same position to consent to sex acts as two fully autonomous adults, but rather that comparing them to children as a means of justifying a per se rule is too extreme of an analogy.

Accepting an argument that compares inmates to children, as much of the scholarship on this topic has, is a devastating blow to prisoner autonomy. It is understandably tempting to characterize inmates this way when so much of their lives are dictated by the prison system. However, labeling members of marginalized groups as child-like while stripping them of their autonomy is a familiar tool utilized by oppressors throughout history to demean the disfavored. In addition, labeling prisoners as child-like disregards the reality that prisoners continue to have the normal sexual desires of adulthood upon entering prison, as well as a desire to develop romantic relationships and reap the benefits of connection with others. Prisoners often view prison regulations as

intentionally "diminish[ing] their maturity" by "treating them like children and fostering dependency."[158] An inmate-centric approach to resolving the epidemic of sexual assault in prison should take into account this concern; the Ninth Circuit does so by weighing prisoner autonomy in the rule-making calculus while accounting for the ways prison gives rise to the power imbalances that make guard-inmate relationships high risk.

2. Student-professor and employee-supervisor relationships

Relationships between students and professors or employees and supervisors are a closer analog to inmate-guard relationships. In these relationships, an imbalance in power exists between two adults, increasing the likelihood of coercive factors making a seemingly consensual relationship more harmful than it first appears. However, some significant differences exist between the position of prisoners and that of students and employees that render the analogy between these groups an incomplete one.

For students and employees, classrooms and workplaces comprise one aspect of their lives. At the end of the day, they are able to go home and have alternative avenues to pursue sexual pleasure completely unrelated to academic or professional life. They have access to dating applications and social events and may come and go as they please. In contrast, inmates do not have the same luxury. Their pool of options is limited to the people who live or work in the prison or jail, and the overwhelming majority of prisons and jails prohibit all inmate sexual activity of any kind anyways, often including self-stimulation.

Furthermore, in the case of minors, university students, and employees, they are unable to consent as a result of either being in a position they have chosen to enter with some degree of control or a position they are in as a virtue of a relatively normal stage of life. This is often not the case with prison. A variety of factors influence an individual's likelihood of incarceration. For example, people living in rural areas are 50 percent more likely to be incarcerated than city dwellers.[159] In addition, African Americans are "incarcerated at more than five times the rate of whites," and African American women are incarcerated at two times the rate of white women.[160] In fact, "if African Americans and Hispanics were incarcerated at the same rates as whites, prison and jail

---

[158] Brenner, *supra* note 21, at 546 (citation omitted).

[159] Eli Hager, *A Mass Incarceration Mystery*, MARSHALL PROJECT (Dec. 15, 2017), https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery [https://perma.cc/26XQ-76ZF].

[160] *Criminal Justice Fact Sheet*, NAACP (last visited Feb. 2, 2019), https://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/6EBY-SB7D].

populations would decline by almost forty percent."[161] Moreover, scholars estimate 20,000 American inmates are wrongfully incarcerated, comprising one percent of the American prison population.[162] Though most inmates have made voluntary choices to engage in criminal activity, acknowledging the flaws within the American criminal justice system is critical to developing policies that adequately ensure prisoners' rights and wellbeing.[163]

It is true some employees may be coerced into sexual activity out of fear of losing their jobs, knowing they need to provide for themselves or for their families. This Comment fully acknowledges the significant power of economic coercion. However, the total loss of control inherent in the prison context is simply greater than it is in universities and most places of work. Though it is by no stretch of the imagination easy to leave one's job for another or transfer universities, that option is available to students and employees. In contrast, prisoners have *no control* over their conditions and often have no means of changing their circumstances. Particularly for those prisoners serving decades-long sentences, it seems unreasonable to compare restrictions on their sexual activity to those on students and employees.

E. Weighing Other Proposed Solutions in the Context of the Ninth Circuit Rule

At first glance, conjugal visits appear to be a meaningful way to improve prisoner sexual autonomy. However, this system disfavors inmates that enter prison without a long-term partner willing to visit them, especially those inmates serving longer prison terms. Another potential solution is permitting consensual sexual relationships between inmates:[164] decriminalizing inter-inmate sexual contact may decrease incidents of sexual assault by reducing the "ideal victimhood" of inmates starved for physical intimacy.[165]

---

[161] *Id.*

[162] *How Many Innocent People are in Prison?*, INNOCENCE PROJECT (Dec. 12, 2011), https://www.innocenceproject.org/how-many-innocent-people-are-in-prison/ [https://perma.cc/CU3C-SFRR].

[163] These concerns are particularly salient in the context of the #MeToo Movement, where many woman are incarcerated for reasons beyond their control. *See* Helene Ferris, *Female Prisoners and #MeToo*, N.Y. TIMES (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/opinion/letters/female-prisoners-metoo.html [https://perma.cc/R8BF-TL7Q] ("Many of the women . . . are incarcerated because of what the men in their lives have forced them to do. Some are serving long sentences for defending themselves against abuse and rape; some have agreed to take the rap for their spouses because the spouse is the wage earner; some have been led into drug-dealing and prostitution because they wanted to please their men, or were afraid of them. And some of them were just silent about the men who perpetrated horrible acts against them.").

[164] Nielsen, *supra* note 119, at 258.

[165] *Id.*

Ultimately, this Comment does not purport to suggest the Ninth Circuit rule alone is sufficient to create an environment where prisoners' bodily and sexual autonomy is honored. If carefully implemented, policies permitting relationships between inmates may be an effective way to balance prisoner protection and autonomy, but determining the legitimacy of that solution is beyond the scope of this Comment. The Ninth Circuit rule does not attempt to resolve the question of inter-inmate relationships' legitimacy. Rather, it specifically addresses the abridged ability to consent that prisoners maintain upon entering the correctional system in the context of inmate-guard relationships. Balancing this autonomy against its risks is an important step towards cultivating greater respect for prisoner bodily integrity.

F. The Discursive Effects of the Ninth Circuit Rule

Courts' decisions as to whether consent is possible in the prison context between inmates and correctional officers have effects far beyond specific Eighth Amendment sexual assault cases that come before the judiciary. In fact, if the Ninth Circuit approach will result in very few cases in which a prison guard may effectively utilize inmate consent as an affirmative defense, the outcomes for prisoners bringing sexual assault claims will be only slightly different than if there were a per se rule. As a result, one could argue prisoner autonomy is not really better preserved under the Ninth Circuit's rule than it would be under a per se rule against consent.

However, prisoners are not the only population to consider when weighing which legal rule is appropriate in these circumstances. Courts should also consider the rule's impact on judges, policymakers, attorneys, and high-level officials within correctional facilities. These are the individuals who develop the regulations that impact inmates on a daily basis and who are most likely to be aware of changes in the law pertaining to prison issues. If the law dehumanizes prisoners and creates an image of them as incapable of making decisions about their own bodily integrity and autonomy, that image will be reflected in the rules these stakeholders establish. Instead of granting prisoners more control over their lives in prison—a step critical to improving inmate quality of life—imbuing into the law a child-like image of inmates and their capabilities incentivizes stakeholders to enact regulations that further constrain prisoner autonomy, an outcome that will ultimately act as a detriment to prisoner wellbeing.

V. CONCLUSION

Ultimately, the Ninth Circuit rule is a step forward in preserving prisoner autonomy by both protecting inmates from unwanted advances

and allowing them to make decisions core to their bodily integrity for themselves. While a per se rule is appropriate in some contexts, it is telling that no circuit court has adopted it to understand how consent operates between inmates and guards in the prison environment. Perhaps most importantly, the Ninth Circuit rule reflects an important reality about the definition of consent. It is fluid and hinges on the situation in which an individual is giving it to another. While the consent between a guard and inmate differs from the consent between individuals elsewhere, the ultimate aim is the same across contexts: to utilize consent as a tool to protect individual autonomy, both to be free from forced sexual advances and to welcome those that are wanted.