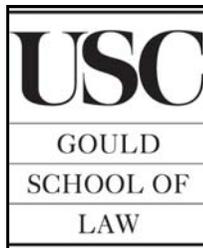


**What Dignity Demands: The Challenges of  
Creating Sexual Harassment Protections for  
Non-Workplace Settings**

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## **What Dignity Demands: The Challenges of Creating Sexual Harassment Protections For Non-Workplace Settings**

### **ABSTRACT**

In the more than twenty years since the Supreme Court created Title VII's sexual harassment protections, judges and feminist legal scholars have struggled to create a clear conceptual account of the harm sexual harassment inflicts. Many courts and scholars were content to justify sexual harassment law by arguing that it vindicates women's interest in workplace equality; however, several feminist legal scholars revealed the inadequacy of this account by the late 1990s, suggesting instead that harassment should be understood as inflicting dignitary harm. The failure to reach consensus about sexual harassment law's purpose appeared without significant consequence until courts began developing sexual harassment law for non-workplace settings. Operating without clear conceptual mooring posts, courts have created narrow, cabined sexual harassment protections governing settings like prisons, often without principled justifications for doing so. To address this problem, this Article argues that we should return to the dignity-based account of sexual harassment law introduced by workplace sexual harassment scholars in the late 1990s. However, in order to use this dignity analysis for non-workplace settings, the analysis used must be expanded and particularized to account for the different dignity expectations a person may reasonably hold in different institutional contexts. To this end, this Article offers a nuanced, context-specific analysis that will allow courts to determine "what dignity demands" in each institutional setting. The Article demonstrates that this dignity framework will allow courts to identify the key considerations that should be weighed when creating sexual harassment doctrine for locations other than the workplace.

# What Dignity Demands: The Challenges of Creating Sexual Harassment Protections For Non-Workplace Settings<sup>1</sup>

## Introduction

What's wrong with sexual harassment?<sup>2</sup> Twenty years after the Supreme Court created Title VII's sexual harassment protections in the *Meritor* decision,<sup>3</sup> the question remains. Most practitioners see the issue as fairly settled. It is generally understood that sexual harassment is wrong because it denies it's victims the right to workplace gender equality.<sup>4</sup> This definitional account has proven sufficient to adjudicate most workplace sexual harassment claims. However, some feminist legal scholars have cautioned that the workplace gender equality account inadequately captures the fundamental nature of the wrong inflicted by sexual harassment.<sup>5</sup> They argue that our

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<sup>2</sup> Katherine Franke posed this question more than ten years ago, spurring a firestorm of controversy among feminist legal theorists and workplace discrimination scholars. See Katharine M. Franke, *What's Wrong With Sexual Harassment*, 49 STAN. L. REV. 691, 691 (1997).

<sup>3</sup> The claim for hostile environment sexual harassment was first recognized by the Supreme Court twenty years ago in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>4</sup> This understanding is based on Catharine MacKinnon's seminal work *Sexual Harassment of Working Women: A Case of Sex Discrimination*, published in 1979. For an updated version of the equality argument MacKinnon makes, see Franke, *supra* note 2 (arguing sexual harassment is used to deny equality rights to both women and men when they fail to comply with social expectations about the performance of gender).

<sup>5</sup> Instead, these scholars have argued that sexual harassment should be understood to inflict a kind of dignitary injury. See, e.g., Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 487 (1997) (arguing the judicial definition of harassment would be improved if it focused on vindicating a worker's right to dignity rather than her right to workplace equality); Rosa Ehrenreich, *Dignity and Discrimination: Towards a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L. J. 1(1999) (same); Catharine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001)(arguing for broader understanding of all workplace harassment protections, including sexual harassment law, as based on dignity concerns). Cf. Orit Kamar, *Dignity, Respect and Equality in Israel's Sexual Harassment Law* in NEW DIRECTIONS IN SEXUAL HARASSMENT LAW 561, 564 (2004); Susan Baer, *Dignity or Equality: Responses To Workplace Harassment in European, German and U.S. Law* in NEW DIRECTIONS IN SEXUAL HARASSMENT LAW 582, 591 (2004) (arguing in favor of an equality approach informed by dignity concerns). Baer, however, has also noted that an definition of harassment that stresses dignity considerations runs the risk of decreasing the special status harassment claims enjoy by virtue of being connected to the larger project of racial and gender equality. See also, Gabrielle Friedman and James Whitman, *The European Transformation of Sexual Harassment Law: Discrimination versus Dignity*, 9 COL. J. OF INT'L L. 241 (2003) (discussing costs and benefits of shifting from an equality based sexual harassment framework to one that stresses dignity concerns).

failure to think more deeply about the nature of this wrong has rendered sexual harassment law fundamentally unstable. The rising tide of non-workplace sexual harassment cases has brought a new urgency to these scholars' concerns, as courts forced to adjudicate non-workplace cases seem to be deeply unsure about how individuals' are injured by sexual harassment that occurs outside of the employment setting.<sup>6</sup> Simply put, because courts are unsure about the primary wrong sexual harassment inflicts, they are unsure about the proper substance and scope of non-workplace sexual harassment protections, as well as the reasons justifying their creation.

Invariably, courts adjudicating the non-workplace sexual harassment cases turn to Title VII doctrine for direction; however the Title VII doctrinal tools were not designed to analyze anything other than sexual harassment's workplace effects. In order to properly adjudicate these non-workplace cases, courts and legal scholars, again, will have to face the key question in this area: What is the nature of the wrong inflicted by sexual harassment?<sup>7</sup> This time, the answer provided must be one of a broader, more generalizable nature.

Courts' confusion about this issue should not come as a surprise, as neither American law nor American legal scholarship has identified a foundational definition of the core injury in sexual harassment cases that can be interpreted and applied across different institutional settings.<sup>8</sup> However, the non-workplace cases make the need for a foundational definition of injury clear. Without this foundation, courts cannot make consistent principled assessments when claimants petition for sexual harassment protections in different institutional settings. Also, courts have no way to gauge whether the harassment protections created for one set of institution-specific cases will seem fair and justified in light of the protections provided in other institutional settings. As the number of sexual

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<sup>6</sup> The most frequently litigated non-workplace cases are cases involving prisons and schools. In both sets of cases, courts have drawn on Title VII standards to craft new kinds of sexual harassment doctrine. *See, e.g., Davis v. Monroe Board of Education*, 526 U.S. 629 (1999) (explaining that schools will not be held liable under Title IX for peer sexual harassment unless the harassment was "severe, pervasive and objectively offensive"). For a list of prison cases using Title VII styled tools, such as the unwelcomeness" doctrine and the "severe or repetitive" standard, see *infra* notes 46-51.

<sup>7</sup> Thus far the debate has focused on whether workplace sexual harassment law should be understood as vindicating the right to gender equality or the right to dignity. The equality framework posits that harassment is wrong because it compromises a worker's right to equal access to employment opportunities. The dignitary framework, in contrast, posits that the harasser's sexualization of the worker is a form of indignity and humiliation. I argue that the dignitary framework is the superior framework for understanding harassment disputes once one *steps outside of the employment setting*. For example, in the prison context, there is no gender equality issue to be resolved when a guard sexually harasses inmates of both genders. This scenario reveals that sexual harassment is being used as a tool of subordination, a way of controlling both male and female prisoners. In such circumstances it is more accurate to treat sexual harassment as causing dignitary harm, as a form of indignity that uses sex subordination to achieve its ends. This dignitary account also works well for harassment claims raised in other environments, in particular where there is no comparator group of other-gendered persons to compare one's treatment against.

<sup>8</sup> Feminist legal scholars have tended to confine their analyses to discussions of the workplace. For examples, see sources in *supra* notes 3 - 4.

harassment doctrines proliferate, the judiciary runs the risk of creating inconsistent and unjustifiable distinctions between the sexual harassment protections provided in various institutional settings.

Fortunately, some of the initial work necessary to identify this core foundational injury has already been done. Several feminist legal scholars have compellingly argued that we should abandon the framework that justifies workplace sexual harassment law as a way of vindicating gender equality interests and adopt an approach that justifies workplace sexual harassment law as a means to prevent individuals from suffering dignitary harm.<sup>9</sup> This Article makes new use of this body of scholarship, showing that this idea of dignitary injury is central to understanding the role of sexual harassment protections in *non-workplace sexual harassment cases*. However, to be truly helpful the account of dignity offered must be expanded and particularized, as dignitary injury is always context-specific and contingent. As this Article explains, in order to fully comprehend the potential for dignitary injury in a harassment case outside of the workplace, courts must ascertain the proper scope of each harassment target’s dignity expectations in a particular institutional space and the institution’s responsibility to assist the individual in maintaining these dignity interests.

Some may claim that the global approach to sexual harassment protections I propose is unnecessary. They would argue that the current judicial approach – in which courts borrow language and constructs from the Title VII sexual harassment cases, is sufficient to resolve the non-workplace sexual harassment cases. To illustrate the dangers of proceeding in this fashion, my Article explores one set of sexual harassment cases that borrows language and doctrinal constructs from the Title VII workplace sexual harassment framework — the Eighth Amendment sexual harassment doctrine federal courts use to review prisoners’ sexual harassment claims against guards.<sup>10</sup>

Unsurprisingly, the Eighth Amendment cases illustrate that the current Title VII “borrowing” approach used to develop non-workplace sexual harassment doctrine yields troubling, unprincipled results. The Title VII modeled standards used in the Eighth Amendment analysis: “the severe or repetitive” standard<sup>11</sup> and the “unwelcomeness” standard,<sup>12</sup> provide far weaker sexual harassment

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<sup>9</sup> The most prominent scholars making this argument are Bernstein, Fiske, and Ehrenrich. *See sources, supra* note 4. The accounts they have offered, however, have solely focused on workplace harassment concerns.

<sup>10</sup> This article solely concentrates on inmates Eighth Amendment claims raised against prison guards or staff members. It does not consider prisoners’ sexual harassment claims concerning sexual abuse from other prisoners. For a discussion of inmate perpetrated sexual abuse *see*, Alice Ristorph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006) (discussing naturalization of male inmates’ abuse of other male inmates)

<sup>11</sup> The “severe or pervasive” standard first appeared in the Eighth Amendment prisoner sexual harassment cases in modified form, as the severe or repetitive standard. *See Boddie v. Schneider*, 105 F.3d 857 (2d Cir. 1997).

<sup>12</sup> The Title VII unwelcomeness standard, as modified for Eighth Amendment prisoner sexual harassment cases, first appeared in *Freitas v. Ault*, 109 F.3d 1335 (8<sup>th</sup> Cir. 1997).

protections for prisoners than their Title VII analogues make available to workers.<sup>13</sup> Prisoners are afforded only narrow protection from the vast majority of sexual harassment, including voyeurism, verbal abuse,<sup>14</sup> unwanted touching,<sup>15</sup> and even coerced sexual activity.<sup>16</sup> This result is disturbing as

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<sup>13</sup> Thus far, no one has published an article that analyzes the effect that Title VII sexual harassment doctrine has had on Eighth Amendment analysis used to assess prisoners' sexual harassment claims against guards. Previous feminist scholarship is primarily policy-oriented work suggesting changes in prison administration practices and procedures. *See e.g.*, Cheryl Bell, Martha Coven, et. al. *Rape and Sexual Misconduct In The Prison System: Analyzing America's Most "Open" Dirty Little Secret*, 18 YALE L. & POL'Y REV. 195 (1999) (discussing prevalence of inmate sexual harassment by guards and need for improved guard disciplinary procedures); Katharine C. Parker, Note, *Female Inmates Living In Fear: Sexual Abuse By Corrections Officers In The District of Columbia*, 10 AM. U.J. GENDER SOC. POL'Y 443 (2002) (same). Other scholars have focused in particular on cross gender prison search and surveillance policies, and their effect on women prisoners. *See e.g.*, Teresa A. Miller, *Surveillance: Gender, Privacy and the Sexualization of Power in Prison*, 10 Geo. Mason U. Civ. Rts. L. J. 291 (2000) (discussing Fourth Amendment challenges to cross gender prison surveillance policies); Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates To Be Free From Cross Gender Pat Frisks*, 33 SETON HALL L. REV. 31 (2002) (discussing Fourth and Eighth Amendment challenges to cross gender pat frisk policies); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45 (2007)(arguing cumulative effect of these policies creates subordination conditions that replicate "status hierarchy" regimes used to control women of color in earlier historical periods).

<sup>14</sup> Several courts have held that verbal harassment by prison guards is insufficient to support a claim under § 1983, even when that language is threatening. *See e.g.*, *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10<sup>th</sup> Cir. 1995) (dismissing female inmate's sexual harassment claim alleging that male officer constantly looked at her inappropriately, made sexual comments to her, and snuck into her cell one night to watch her sleep and to tell her that she had "nice breasts."). In contrast, sexual language without any explicit threats is sufficient to state a claim for hostile environment under Title VII. *See Penry v. Federal Home Loan Bank of Topeka*, 970 F. Supp. 833 (D. Kan. 1997) (ruling plaintiff stated a claim for sexual harassment when she alleged that her supervisor had asked female employees whether they had "wet dreams" and inquired about what plaintiff was wearing under her dress); *DeJesus v. K-Mart Corp.*, 9 Fed. Appx. 629 (9th Cir. 2001) (unpublished) (ruling plaintiff could establish her Title VII sexual harassment claim with evidence showing that supervisor flashed a sign at her saying "show me your tits," commented on her breasts, suggested they attend a party nude and insinuated that she should perform oral sex on him).

<sup>15</sup> *See Boddie*, 105 F.3d at 857 (dismissing prisoner's Eighth Amendment sexual harassment claim alleging that female officer touched his penis, and pressed her genitals and breasts against him). *Compare Stewart v. Cartessa Corp.*, 771 F. Supp. 876 (S.D. Ohio 1990) (recognizing female employee stated a valid Title VII sexual harassment claim based on supervisors' failure to address her complaints about coworker's unwanted touching, staring, and habit of following her around the office); *Pease v Alford Photo Industries, Inc.* 667 F. Supp. 1188 (W.D. Tenn. 1987) (holding that supervisor's touching, rubbing, fondling, stroking of hair, neck, shoulders, breasts, and buttocks of female employees, and grabbing female employees' bodies, if proven, was sufficient to establish a hostile environment, and no reasonable person could find otherwise).

<sup>16</sup> *See Fisher v. Goord*, 982 F. Supp. 140 (S.D.N.Y. 1997) (rejecting inmate's Eighth Amendment sexual harassment claim against guards on the ground that she "consented" to sex, despite plaintiff's testimony that she was warned to "play along" with the guards or they would retaliate against her). *Compare with Huffman v. City of Prairie Village, Kan.*, 980 F. Supp. 1192 (D. Kan. 1997) (holding that female police department employee alleged facts sufficient to state a Title VII sexual harassment claim despite her admitted "consensual" performance of oral sex on police lieutenant because she alleged that the lieutenant engaged in subtle coercion and stated that she could have a promotion if she "played her cards right").

prisoners face greater risk of sexual harassment than workers, given guards' broad discretionary authority to intimately touch prisoners and guards' immense retaliatory power.<sup>17</sup> Courts, however, have offered no principled explanation for the different level of protection provided in each context, and instead fail to even acknowledge the relationship between the two sets of sexual harassment standards. More troubling, they have not identified the changes they have made to the original Title VII standards that have produced the extremely narrow Eighth Amendment standards.

The narrow sexual harassment protections afforded prisoners would be of less concern if they reflected some measured consideration of the prisoners' specific dignity interests, or the institutional limitations that shape dignity expectations in prisons. Instead, the Eighth Amendment analysis appears to be the product of a variety of unintended side effects and errors caused by its use of Title VII modeled standards. Courts apparently have acted in an *ad hoc* manner, borrowing some questionable portions of the Title VII analysis while ignoring more helpful principles. In some cases, they have even revived discredited principles from the early Title VII cases. Simply put, one cannot identify any clear principles courts are using to select which aspects of Title VII doctrine should be borrowed and employed in prisoner harassment cases.

By cataloguing the problems that stem from this Title VII borrowing approach,<sup>18</sup> my analysis highlights the need for a theoretical account of sexual harassment that treats harassment as a unified concept, a social problem that appears in distinctly different but related permutations in different institutional contexts. I argue that we cannot expect courts to create coherent sexual harassment doctrine if we do not arm them with a larger theory of sexual harassment that allows them to fully understand the competing interests at stake in each institutional space. Modern workplace sexual harassment law would not exist as it does today were it not for Catherine MacKinnon's attempt to articulate a coherent theory of workplace sexual harassment in the 1970s, as her work unquestionably shaped courts' understanding of sexual harassment as a social problem.<sup>19</sup> Now scholars must provide a *more expansive* theoretical account of why harassment is wrong if we

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<sup>17</sup> Ironically, under the current Title VII and Eighth Amendment standards, the female prisoner has less protection from guard sexual harassment than the harasser's own co-workers. If a guard sexually harasses his female co-worker by using verbal epithets and touching her in a sexually inappropriate manner, the worker has a Title VII claim. An inmate alleging similar abuse would more than likely have her claim dismissed under the Eighth Amendment sexual harassment standards.

<sup>18</sup> To be clear, I am not arguing that Title VII has no relevance to courts creating non-workplace sexual harassment doctrine. Certainly courts will want to compare the level of protection offered in the workplace with the amount proposed in another institutional location. Rather, I merely argue that judges have been preoccupied by technical questions, such as quantifying and measuring the amount of harassment using Title VII styled tools. Instead, their attention should be focused on the foundational dignity paradigm on which workplace sexual harassment law (like all harassment law) is based.

<sup>19</sup> See Reva B. Siegel, *A Short History of Sexual Harassment* in NEW DIRECTIONS IN SEXUAL HARASSMENT LAW 9-11 (describing MacKinnon's work as "a stunningly brilliant synthesis of lawyering and legal theory [which] played a crucial role" in getting courts to recognize sexual harassment claims). Lin Farley also played a key role in this process. *Id.*

are to assist courts in crafting and justifying new sexual harassment doctrine for new social contexts and institutional locations.

Skeptics may worry that my dignity framework encourages judges to stray too far afield from existing sexual harassment law. They may argue that judges are unlikely or unable to reconsider existing common law sexual harassment doctrines or subject new harassment cases to the cross institutional analysis I propose. However, those resistant to using a dignity framework should reconsider when they recognize that the analysis I am proposing is based on a broader reading of the principle the Supreme Court outlined as a mandatory analytic consideration to be weighed in all Title VII workplace sexual harassment cases —the understanding that context is key in evaluating sexual harassment claims.<sup>20</sup> Indeed, in *Oncale*, the Supreme Court reiterated that different working environments have different social norms, and carry different expectations with regard to the manner in which coworkers should relate to one another. These social norms can and do affect one’s ability to raise a claim of harassment. Stated alternatively, the justices implicitly recognized that a worker’s dignity expectations are shaped by his or her institutional location. In essence, they directed courts to determine what *dignity demands* in each institutional space when analyzing a sexual harassment claim.

In summary, the analysis of Eighth Amendment sexual harassment doctrine offered here is simply a jumping off point, a vehicle we can use to talk about larger concerns that threaten the future development of sexual harassment law governing a range of contexts.<sup>21</sup> The Article begins this conversation by showing how the Title VII constructs used in Eighth Amendment cases have compromised our ability to fairly adjudicate prisoners claims. It then shows how courts could develop better insights in the prisoner sexual harassment cases if they used the kind of context-specific dignity based analysis I propose. The dignity framework I offer directs courts to focus on prisoners’ context-specific dignitary interests, as well as the scope of prison officials’ alleged responsibility for ensuring the protection of these dignity concerns.

Part I of my analysis lays the groundwork for understanding the analytic errors caused by the use of the Title VII modeled constructs in the Eighth Amendment analysis of prisoner sexual harassment claims. After describing the severe or pervasive standard and the unwelcomeness doctrine as they are outlined under the Title VII workplace sexual harassment framework, the discussion examines the versions of these constructs created in the seminal Eighth Amendment prisoner sexual harassment cases. The discussion then shows how these seemingly similar standards provide different levels of protection in prison cases as compared to workplace sexual harassment cases. Despite the obvious facial similarities in the Title VII and the Eighth Amendment sexual harassment standards, courts have provided no guidance regarding what relationship, if any,

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<sup>20</sup> See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) (explaining that the Title VII sexual harassment analysis is a context-specific inquiry)

<sup>21</sup> This observation should not be read to mean that I am unconcerned with the specific problems in Eighth Amendment sexual harassment law. Rather, as the Article shows, this is an area of sexual harassment law in desperate need of attention.

exists between the two. Courts fail to explain why the Eighth Amendment sexual harassment standards and the corresponding Title VII standards provide such different protections for a problem that, doctrinally speaking, is characterized in nearly identical terms.<sup>22</sup>

Part II begins by showing that courts are primarily using the Title VII styled tools they have created as a cover in the Eighth Amendment sexual harassment cases. They have uniformly instituted heightened standards for prisoners bringing sexual harassment claims against guards, far beyond what is required under Title VII of workplace sexual harassment plaintiffs. Even more disturbing, the heightened burdens imposed on prisoners fundamentally contradict the general guidance the Supreme Court has offered in Title VII cases about the considerations that should structure sexual harassment protections. After demonstrating that these heavier burdens are not required by the Eighth Amendment’s doctrinal norms, Part II notes that readers of the Eighth Amendment sexual harassment cases are left to speculate about the courts’ logic, as *no* explanation is offered in these cases for any of the changes they make to the Title VII harassment standards. Ultimately, I conclude that, because these new onerous standards are articulated in language associated with the more protective Title VII workplace constructs, they have largely escaped critical scrutiny.

Part III explores another set of problems that stem from the Title VII styled tools used in Eighth Amendment prisoner sexual harassment cases. Section A shows that, despite the alterations to the standards catalogued in Part II, the Title VII styled standards in the Eighth Amendment cases still are premised on certain inappropriate workplace-specific assumptions. As a consequence, the Title VII modeled constructs lead courts to ask the wrong questions in prisoner sexual harassment cases, ignore relevant facts, and produce analyses that leave a broad range of inappropriate officer conduct inactionable and without remedy. Here again, I would argue, the Eighth Amendment sexual harassment standards’ linguistic similarity to the original Title VII standards allows them to enjoy an unwarranted legitimacy. This unwarranted legitimacy has discouraged us from challenging the current determinations made about the scope and substance of inmates’ sexual harassment protections. Section B also shows that the interjection of the Title VII modeled standards into the prisoner sexual harassment cases has interfered with the normal “organic” development of these claims that might have occurred, had they been subjected to a traditional Eighth Amendment “cruel and unusual punishment” analysis.

Part IV lays out my proposed dignity framework, showing that it can guide courts in creating more principled sexual harassment doctrine. Section A begins with a discussion of the basic propositions that inform the concept of dignity that should be employed in sexual harassment cases.

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<sup>22</sup> Both the Eighth Amendment analysis and the Title VII analysis suggest that there are two fundamental questions in sexual harassment cases: (1) the amount of harassment alleged under the “severe or pervasive” (or severe or repetitive standard) and, (2) the employee’s communication of resistance, as interpreted under the unwelcomeness standard—a doctrinal formulation used in both contexts. These constructs, on their face, appear to simply measure conditions that are critical to assessing whether harassment has occurred. However, as my analysis shows, these seemingly neutral measurement tools are based on certain workplace specific assumptions that make them inappropriate for use in prison cases.

Section B introduces the idea of a context-specific dignitary inquiry, explaining that courts conducting a sexual harassment analysis must examine the dignity expectations that an individual may reasonably hold in a particular institutional context, and the scope of the institution's responsibility to ensure that the individual's right to dignity is protected. These questions require one to weigh the institution specific facts that bear on the dignity analysis, which include the doctrinal norms that may limit parties' dignity expectations or the institution's responsibility to maintain these interests. By addressing these questions, courts will be able to develop a better understanding of what a harassment plaintiff should be able to demand of an institution in the form of dignitary protections as a consequence of her involvement in the institution's enterprise. Section C applies this context-specific dignity framework in the prison cases, showing how it focuses our attention on the primary institution specific considerations in sexual harassment cases in new institutional contexts. This section also uses the dignity framework to highlight the unique complicating factors that must be considered when conceptualizing new doctrinal tools that can be used in adjudicating prisoners' Eighth Amendment sexual harassment claims.

## PART I

### A. The Title VII Hostile Environment Standards

The groundwork for the Title VII sexual harassment claim and its Eighth Amendment analogue was laid a little more than twenty years ago, ironically, in the same Supreme Court term. Specifically, in 1986 the Supreme Court reviewed *Meritor Savings Bank v. Vinson*,<sup>23</sup> a case that established that two forms of sexual harassment – *quid pro quo* and *hostile environment* sexual harassment– would be recognized as sex discrimination under Title VII. In the same year, the Court also decided *Whitley v. Albers*,<sup>24</sup> the case in which it recognized prisoners' right to a remedy under the Eighth Amendment for injuries suffered as a consequence of officers' use of excessive force. This excessive force claim eventually evolved into the right to recompense for injuries from sexual abuse/harassment perpetrated by guards and staff members. Our analysis, however, must begin with *Meritor*, the foundational case for sexual harassment doctrine. The doctrinal specifics of the *Whitley* case are discussed in more detail in the sections that follow.

#### 1. The Title VII Severe or Pervasive Standard

In *Meritor*, a female bank teller sued her employer under Title VII alleging that a supervisor coerced her into having sexual relations some forty to fifty times over several years, fondled her in front of others, exposed himself in the workplace, and eventually raped her several times.<sup>25</sup> In addition to bringing a claim based on the employer's actual demands for sex — which the Court

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<sup>23</sup> See *Meritor*, 477 U.S. at 67.

<sup>24</sup> See *Whitley v. Albers*, 475 U.S. 312 (1986). The precise contours of the claim were later clarified in *Hudson v. McMillan*, 503 U.S. 1 (1992).

<sup>25</sup> *Meritor*, 477 U.S. at 64 (internal quotation marks and citations omitted).

agreed was an actionable “quid pro quo” claim under Title VII — the teller also sought relief under the theory that the supervisor’s actions created a sexually harassing hostile environment. The *Meritor* Court agreed to recognize plaintiff’s “sexual harassment” hostile environment claim. It explained that its decision was consistent with Congress’s intention to make Title VII a statutory regime that addressed a variety of discriminatory actions that compromise the sexes’ equal enjoyment of the “terms, conditions and privileges of employment;” therefore, the statute should be interpreted to include a prohibition against the “practice of creating a working environment heavily charged with . . . [sex-based] discrimination.” Analogizing to the barriers to equal employment opportunity posed by racial harassment, the court concluded that “sexual harassment which creates a hostile or offensive environment for one sex is every bit . . . [an] arbitrary barrier to . . . equality at the workplace.”<sup>26</sup> In the course of outlining the claim, the Court stressed that sexually harassing conduct must meet a certain standard of seriousness before it can be treated as a factor compromising an employee’s right to workplace equality.

To this end, the *Meritor* Court laid out two concepts designed to test for whether the sexual harassment alleged was sufficient to pollute the workplace.<sup>27</sup> The first, the severe or pervasive standard, provides that the harassment complained of “must be sufficiently severe or pervasive to alter the terms and conditions of employment and create an abusive working environment.”<sup>28</sup> The Supreme Court sought to clarify the standard several years later in the *Harris v. Forklift Systems* decision. The Court stressed that, while the severe or pervasive standard serves as a measure for determining when a plaintiff has suffered a legally cognizable harm, it does not require a showing of emotional or psychological injury in order for her to establish her claim.<sup>29</sup> Rather, sexual harassment is actionable under the statute when it has reached a level sufficient to impact the plaintiff’s ability to perform her job, enjoy her position, or when it is sufficient to offend our understanding of workplace equality.<sup>30</sup>

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<sup>26</sup> *Id.* at 67 (internal quotation marks and citations omitted).

<sup>27</sup> *See Meritor*, 477 U.S. at 68-69. These basic standards are now part of a five part test courts use on review of a sexual harassment hostile environment claim. In order to make out a prima facie case of hostile environment sexual harassment, the plaintiff must show that: (1) she is a member of a protected class; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment; and (5) her employer should be held liable for the harassment.

<sup>28</sup> *Id.* at 67.

<sup>29</sup> *Harris*, 510 U.S. at 20.

<sup>30</sup> *See Harris*, 510 U.S. at 22 (explaining that the protections of “Title VII come[] into play before the harassing conduct leads to a nervous breakdown.”). The *Harris* Court explained that even an abusive working environment “that does not seriously affect employees’ psychologically well-being, can and often will detract from the employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” The threshold for fair and equal participation in the workplace, not the psychological injury to the victim, sets the substantive baseline for determining what types of conduct are subject to remedy under the statute.

The severe or pervasive standard was revisited some years later in the *Oncale v. Sundowner* decision,<sup>31</sup> in which the Court emphasized that the severe or pervasive standard is interpreted in a context-specific manner, and therefore does not allow the development of absolute and static descriptions of prohibited behavior. Consequently, the Court explained, the weight given to a set of sexual harassment allegations depends on the circumstances in which the harassment allegedly occurred.<sup>32</sup> The harassment’s “objective severity” the Court held, should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances,” including “consideration of the social context in which a particular behavior occur[s]” and the manner in which it is experienced by the target.<sup>33</sup>

## 2. The Title VII Unwelcomeness Standard

The second construct the *Meritor* Court created was the unwelcomeness standard.<sup>34</sup> The unwelcomeness standard is largely a doctrine of excuse; it inquires whether the harasser had reasonable basis to believe that his sexual advances were welcome. Plaintiff, in kind, must demonstrate that she made it clear to the alleged harasser that his attentions were “unwelcome.”<sup>35</sup> The unwelcomeness doctrine was created based on the understanding that the workplace has traditionally been a place where people meet their spouses and form sexual relationships, and this socially valued activity should not be altogether prohibited.<sup>36</sup> The Court, however, also recognized

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<sup>31</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).

<sup>32</sup> *Oncale*, 523 U.S. at 82. In his rather colorful discussion of this principle, Justice Scalia, explains “A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.” *Id.* My argument is distinguishable from Justice Scalia’s position in that I stress that the institutional circumstances in which the harassment claims arise should also be interrogated to determine whether parties have naturalized sex-specific bias or gender based indignities as part of the normal institutional backdrop. In such circumstances, the institutional arrangements should be challenged as well. Therefore, extending Justice Scalia’s football example, if the coach has engaged in this “butt-smacking” practice over the years, similar to his peer coaches and predecessors, as a way of humiliating players who do not conform to a masculine gender stereotype, the coach’s actions should form the basis for a claim, regardless of the fact that this behavior has been naturalized as a normal institutional practice.

<sup>33</sup> *Id.*

<sup>34</sup> *Meritor*, 477 U.S. at 68-69.

<sup>35</sup> This evidentiary requirement has been the subject of a great deal of criticism, in particular because it has been used in cases concerning general gender based hostility, as opposed to the paradigmatic sexual harassment cases—cases where the question of desire is prominent. See Vicky Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683 (1998).

<sup>36</sup> The Court reminded litigants that Title VII may not be “expand[ed] into a general civility code,” *Oncale*, 523 U.S. at 75. It explained that Title VII “does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same-sex and of the opposite sex.” *Id.* “It forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.” *Id.*

that this interest must be balanced against the interests of workers who face “unwelcome” overtures or comments that interfere with the performance of their jobs. The standard therefore provides that an employer will not be held liable for what appears to be low-level or small scale flirtation between employees, including incidents in which the alleged harasser misperceives the target’s interest, provided that these advances do not continue after it is clear that the alleged harasser’s advances are “unwelcome.”<sup>37</sup>

Importantly, when the Supreme Court introduced the unwelcomeness standard it explained that the inquiry conducted under this test should not be confused with an inquiry into “consent” or “voluntariness.” The Court noted that, in a Title VII case the “correct inquiry is whether respondent, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her participation in the sexual intercourse was voluntary.”<sup>38</sup> “[V]oluntariness in the sense of consent is not a defense,”<sup>39</sup> it reasoned, because in some cases the voluntary nature of the target’s submission is a direct result of a prior campaign of intimidation and harassment. Courts, consequently, are advised to keep in mind that the unwelcomeness inquiry is distinct and separate from the question of whether the parties ultimately had a “voluntary” sexual relationship.

Taken together, the severe or pervasive standard and the unwelcomeness doctrine are two of the most significant hurdles a plaintiff must overcome in order to bring a Title VII sexual harassment claim. As Section B explains, they ultimately played a key role in shaping the Eighth Amendment sexual harassment standards.

## **B. The Eighth Amendment Hostile Environment Analysis**

In the same year as *Meritor*, the Supreme Court held in *Whitley v. Albers* that prisoners could sue for officers’ use excessive force in the performance of their duties under the Eighth Amendment, a cause of action that ultimately became the primary vehicle for prisoners’ sexual abuse and harassment claims. The *Whitley* Court based its ruling on the fact that the Eighth Amendment was intended to protect against “cruel and unusual punishments” and, it explained, the “excessive and wanton” use of force was a kind of punishment sufficient to raise constitutional concerns. Over time, the doctrine evolved into a more formal test. To establish an Eighth Amendment excessive force claim a prisoner now is required to show that the pain she suffered in the forcible encounter was “objectively, sufficient serious” to be worthy of constitutional concern;<sup>40</sup> and that the defendant

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<sup>37</sup> A plaintiff is required to present proof of the other elements of her hostile environment claim before her employer will be held liable. She additionally may have to offer proof that she timely reported the harassment if she alleges she was harassed by a coworker. See *Faragher v. Boca Raton*, 524 U.S. 775 (1998) (outlining employer’s affirmative defense based employee’s failure to use the employer’s complaint procedure for reporting coworker harassment).

<sup>38</sup> *Meritor*, 477 U.S. at 68.

<sup>39</sup> *Id.*

<sup>40</sup> *Hudson v. McMillan*, 503 U.S. at 7 (citing *Farmer v. Brennan* 511 U.S. 825, 843 (1994)).

officer subjectively acted with “a culpable state of mind” – namely, with “malicious and sadistic” intent, “rather than in a good faith effort to maintain or restore discipline.”<sup>41</sup>

It is not entirely clear why the Eighth Amendment excessive force claim became the primary vehicle for prisoners’ sexual harassment claims against guards.<sup>42</sup> No single reason can be cited for this development; however, at least two factors played a role. First, courts often cite the Eighth Amendment as the most explicit textual source of constitutional protection for prisoners, and therefore prefer to review prisoners’ sexual harassment claims under an Eighth Amendment analysis.<sup>43</sup> Second, the Supreme Court has indicated that when prisoners raise claims based on an officer’s physically tortious conduct, these claims should be analyzed under the Eighth Amendment.<sup>44</sup> This second rationale proved particularly persuasive for the early sexual harassment cases, which primarily were based on more on clearly violent conduct, such as rape.<sup>45</sup>

The Eighth Amendment sexual harassment analysis however proved more complicated when courts were presented with sexual harassment cases concerning more diverse allegations, including violation less invasive than rape. Many of these allegations involved a combination of verbal harassment, voyeurism, improper pat frisks, unwanted touching and psychologically coerced sexual activity. The Eighth Amendment excessive force inquiry provided no guidance in determining whether the level of sexual harassment in these cases inflicted “pain” of constitutional dimension. Two seminal cases addressed this issue by introducing Title VII modeled doctrinal constructs into the Eighth Amendment analysis.<sup>46</sup>

#### 1. Boddie v. Schneider and the Eighth Amendment “Severe or Repetitive” Standard

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<sup>41</sup> *Id.*

<sup>42</sup> Litigants still attempt to bring sexual harassment claims as Fourth Amendment invasion of privacy claims and Fourteenth Amendment anti-discrimination claims, but these claims are primarily disregarded in favor of an Eighth Amendment analysis. *See, e.g., Jordan v. Gardner*, 986 F.2d 1521, 1524-31 (9th Cir. 1993) (*en banc*) (rejecting Fourth Amendment sexual abuse challenge and analyzing claim as an Eighth Amendment violation). *See also, supra* sources at note 13.

<sup>43</sup> *See, e.g., Jordan*, 986 F.2d 1521, 1524-31 (9th Cir. 1993) (*en banc*) (identifying the Eighth Amendment as the primary textual source of protection for prisoners in the Constitution).

<sup>44</sup> *Graham v. Connor*, 490 U.S. 386 (“The Fourth Amendment’s prohibition against unreasonable seizures of the person, [and] the Eighth Amendment’s ban on cruel and unusual punishments . . . are the two primary sources of constitutional protection against physically abusive governmental conduct.”)

<sup>45</sup> *Giron v. Corrections Corporation of America*, 191 F.3d 1282 (10<sup>th</sup> Cir. 1999).

<sup>46</sup> The discussion of constitutionally significant injury is distinct from the physical “significant injury” requirement that was used in Eighth Amendment excessive force cases. This issue is discussed in more detail in the sections that follow.

In the first case, *Boddie v. Schneider*,<sup>47</sup> the Second Circuit created the “severe or repetitive” test, which is used to determine whether an allegedly sexually abused prisoner has suffered sufficient “pain” to trigger the protection of the Eighth Amendment. In *Boddie*, a male prisoner brought an Eighth Amendment sexual harassment claim alleging that his rights were violated when a female officer rubbed his genitals and called him a “sexy black devil;” rubbed her crotch and her breasts against him in a sexually suggestive manner; ordered him to remove his shirt under pretext of a prison rule; and then retaliated against him for failing to respond to her sexual advances.<sup>48</sup> The *Boddie* court began its analysis by recognizing that the Eighth Amendment does provide a remedy for inmates that are subject to this kind of harassing behavior. The court held that “sexual abuse *may* violate contemporary standards of decency and *can* cause severe physical and psychological harm.”<sup>49</sup> “For this reason,” it explained, “there can be no doubt that *severe or repetitive* sexual abuse of an inmate by a prison officer can be objectively sufficiently serious enough to constitute an Eighth Amendment violation.”<sup>50</sup> The *Boddie* court concluded, however, that “[n]o single incident that [Boddie] described was severe enough to be objectively sufficiently serious, nor were they cumulatively egregious in the harm they inflicted.” Consequently, the Second Circuit ruled that Boddie’s claim “did not involve a harm of federal constitutional proportions as defined by the Supreme Court.”<sup>51</sup>

Although the Second Circuit made no mention of the *Meritor* Court’s severe or pervasive test in *Boddie*, the Eighth Amendment analysis it produced was clearly influenced by this Title VII standard. Each standard weighs the frequency and severity of harassing conduct to determine whether the acts alleged, individually or collectively, rise to the level of a legally cognizable injury. Despite the two standards’ similar function, the tenuous connection between the two became clear upon application. Courts in Title VII cases routinely conclude that a plaintiff has stated an actionable claim under the severe or pervasive standard when she alleges a coworker fondled her genitals or rubbed his body against her in a sexual manner.<sup>52</sup> In Eighth Amendment cases, however,

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<sup>47</sup> *Boddie*, 105 F.3d at 861. Similar to the *Boddie* Court, lower courts often describe harassment in the prison cases as sexual abuse rather than sexual harassment. However, because the conduct alleged in the prison cases is very similar behavior characterized as sexual harassment in workplace cases, I have used harassment interchangeably with abuse throughout this piece.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.* The *Boddie* decision is vague in several ways. For example, the Second Circuit does not explain what, if anything, may be intended by the difference between actions that are “repetitive” as distinct from those that are “pervasive.” This issue is not discussed in either of the two cases it refers to in support of its position, as these cases concerned prison policies that required male guards to search female inmates, policies that were held to violate the Eighth Amendment. See *Jordan v. Gardner*, 986 F.2d at 1524-31; *Women Prisoners of the District of Columbia Dep’t of Corrections v. District of Columbia*, 877 F. Supp. 634, 644-67 (D.D.C. 1994).

<sup>51</sup> *Id.*

<sup>52</sup> For examples, see *supra* note 11.

courts routinely reject prisoners' claims under the severe or repetitive standard for the same behavior.<sup>53</sup> The distinction is stark even in the *Boddie* decision, as one cannot imagine the court dismissing as inconsequential a Title VII plaintiff's claim that a supervisor rubbed her genitals while uttering a racially coded innuendo, particularly when combined with the claim that the supervisor retaliated against her for failing to respond to his advances. Yet, this is precisely what *Boddie* alleged — and the court concluded that he failed to state a claim.

## 2. *Freitas v. Ault* and the Eighth Amendment Unwelcomeness Standard

The second case that shaped the Eighth Amendment inquiry is *Freitas v. Ault*.<sup>54</sup> In *Freitas*, the Eighth Circuit used a modified version of the unwelcomeness standard to determine whether the sexual harassment plaintiff in that case had alleged a cognizable injury.<sup>55</sup> In the *Freitas* case, a male inmate alleged that he had been sexually abused by a female civilian worker employed at the prison where he was incarcerated. *Freitas* did not claim he had sexual relations with the worker, but described other sexual interactions, explaining that he would “kiss and hug” with the worker for long periods of time. The worker also told *Freitas* that they might live together after his release from prison. *Freitas* reported his sexual interactions with the worker when he discovered that the worker had a “real” relationship outside of the prison. When making his report to prison officials he acknowledged that he was partly at “fault” for what occurred. However, he noted that the worker had initiated the relationship. He also explained that he initially responded to her advances because she was his supervisor, and he feared the negative consequences of reporting her. He could not, however, point to any specific threats she made.

On review of his claim, the Eighth Circuit held that in order to prevail on a sexual harassment claim under the Eighth Amendment one must establish that, as an objective matter, the alleged abuse or harassment caused “pain.” “Without deciding at what point unwelcome sexual advances become serious enough to constitute pain,” the court explained, “we hold that, at the very least, welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute pain

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<sup>53</sup> In the years since *Boddie*, district courts in the Second Circuit have faithfully applied the severe or repetitive standard, and have required plaintiffs to allege conduct capable of causing severe physical or emotional pain to sustain a claim of sexual abuse. For examples of district court cases, see *infra* notes 47 & 48. Additionally, several other circuits have explicitly adopted the standard or quietly relied on its analysis in unpublished cases. See, e.g., *Boxer X. v. A. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (explaining that under *Boddie* “a female prison guard's solicitation of a male prisoner's manual masturbation, even under the threat of reprisal, does not present more than *de minimis* injury.”). See also *Jackson v. Madery*, 158 Fed. Appx. 656 (6th Cir. 2005); *Allen v. Johnson*, 2000 U.S. 25680 (10th Cir. Oct. 16, 2000) (unpublished).

<sup>54</sup> *Freitas*, 109 F.3d 1335; *Petty v. Venus Correctional Unit*, 2001 WL 360868 at \*2 (N.D. Tex. April 10, 2001) (dismissing inmate's § 1983 claim because “plaintiff has not shown the alleged [sexual] harassment to have caused him pain”).

<sup>55</sup> The *Freitas* Court also introduced a more amorphous standard courts occasionally use to substitute for the *Boddie* severe or repetitive standard.

under the Eighth Amendment.”<sup>56</sup> On review of Freitas’s claim, the court did not credit Freitas’s testimony that he did not report the overtures because he feared the worker would retaliate against him, pointing to the evidence showing his obvious consensual participation over the course of the relationship. Based on this finding, the Eighth Circuit concluded that the evidence on the whole established that Freitas was a disaffected “spurned lover,” that his relationship was “consensual,” and that he had “welcomed” the worker’s attentions.

Taken together, *Boddie* and *Freitas* are the gatekeepers to relief, and have served as the basis for dismissing a large number of prisoners’ Eighth Amendment sexual harassment claims. *Boddie* has had the most impact of the two cases. Invoking the severe or repetitive standard, district courts have dismissed a number of Eighth Amendment sexual harassment claims involving inappropriate acts that would easily be actionable if alleged by a worker as part of a Title VII claim.<sup>57</sup> Courts also have faithfully applied the *Freitas* Court’s version of the unwelcomeness standard, despite evidence of exploitation and subtle coercion that would allow prisoners’ claims to survive under a standard more similar to that used in a Title VII analysis.<sup>58</sup>

Critics, at this point, may argue that it is inappropriate to compare the statutory constructs used in the Title VII sexual harassment cases and the constitutional standards used in Eighth Amendment prisoner sexual harassment cases because each area of law is controlled by different

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<sup>56</sup> *Freitas v. Ault*, 109 F.3d 1338.

<sup>57</sup> See, e.g., *Holton v. Moore*, 1997 WL 642530 (alleging he was sexually violated during a search by a guard); *Joseph v. United States Fed. Bureau of Prisons*, 2000 U.S. App. LEXIS 25680, No. 00-1208, 2000 WL 1532783, at \*1 (10th Cir. Oct. 16, 2000) (corrections officer’s exposure of her breasts to inmate was not “objectively, sufficiently serious to demonstrate a use of force of a constitutional magnitude”) (internal punctuation omitted); *Anderson v. Nassau County Correctional Center*, 2004 U.S. Dist. 15098 (EDNY May 13, 2004) (dismissing inmate’s claim alleging that corrections officer called him a “retard,” cursed at him, and exposed his penis to him while making lewd suggestions); *Smith v. Menifee*, 2001 U.S. Dist. LEXIS 13887, \*4 (S.D.N.Y. September 7, 2001)(unpublished) (alleging corrections officer “entered plaintiff’s protective custody unit, grabbed plaintiff’s buttocks,” and called the inmate obscene names in front of other inmates); *Young v. Coughlin*, 1998 U.S. Dist. LEXIS 764, 1998 WL 32518 (S.D.N.Y. January 29, 1998) (alleging “preacher at [the] prison chapel placed [plaintiff’s] hand on the preacher’s buttocks,” that a fellow inmate “attempted to place his penis on [plaintiff’s] leg[,]” and that a corrections officer “hunched his pelvis out as if he wanted [the inmate] to play with his penis.”). See also *Collins v. Graham*, 377 F. Supp. 2d 241 (D. Me. June 24, 2005) (dismissing inmate’s complaint because, when viewed independently, the separate incidents of alleged harassment, which included an attempt to grab the inmate’s penis, and the guard’s exposure of his penis, were not serious enough to raise constitutional concerns). *Austin*, 367 F.3d at 1172 (dismissing inmate’s claim alleging that a corrections officer exposed his penis to him for 30-40 seconds). The court explained that this act was not sufficiently serious to constitute an Eighth Amendment violation because the corrections officer never physically touched the inmate.

<sup>58</sup> See e.g., *Fisher v. Goord*, 982 F. Supp. 140 (S.D.N.Y. 1997) (dismissing several Eighth Amendment claims because of inmate’s failure to establish that sexual attention from guards was unwelcome); *White v. Ottinger*, 2006 WL 2291717 (E.D. Pa. Aug. 9 2006) (interpreting *Freitas* to allow further discovery in plaintiff’s case to determine whether the evidence as a whole established that plaintiff’s participation in sexual interactions with guard was voluntary).

doctrinal norms.<sup>59</sup> This challenge is dealt with more directly in Part II, which demonstrates that the Eighth Amendment norms simply do not compel the extremely restrictive standards currently in use in the Eighth Amendment sexual harassment cases. The Eighth Amendment protections cannot be distinguished from Title VII protections solely on this basis. However, other responses to this challenge are more important at this juncture.

First, one must recognize that the linguistic similarity between the Eighth Amendment and Title VII sexual harassment standards and their similar functions invite comparisons between the two sets of standards. Second, even if the Eighth Amendment doctrinal norms do require the creation of narrower protections in prison cases, the parties deserve a clear explanation regarding how courts are reconciling the remedial norms of workplace sexual harassment law with the more limited protections of the Eighth Amendment. This disclosure seems even more important when we consider that neither party in either the *Boddie* or the *Freitas* case requested use of these Title VII inspired constructions to analyze the Eighth Amendment claims at issue. Rather, the appellate panels reviewing these cases, on their own initiative, decided to borrowed constructs from the Title VII doctrine.<sup>60</sup> If courts are going to borrow from Title VII analysis in this matter, it is essential that they be required to explain how and why they have modified the Title VII standards, and why Title VII figures at all in their decisions. The *Boddie* and *Freitas* court declined do so, and their silence raises questions about how they attempted to align the normative commitments of workplace sexual harassment law with the normative commands of Eighth Amendment doctrine.<sup>61</sup>

The need for this explanation becomes even more clear when one considers that the proper constitutional reference point for Title VII is the Fourteenth Amendment. Arguably then, the proper constitutional source for prisoners' sexual harassment claims is the Fourteenth Amendment, rather than the Eighth Amendment.<sup>62</sup> Litigants and scholars, however, failed to fully reflect on this

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<sup>59</sup> I provide a more detailed discussion about the potential conflict between the Eighth Amendment and Title VII's interpretational norms in a later section of Part II.

<sup>60</sup> Parties' briefs (on file with author)

<sup>61</sup> Critics may argue that I've fallen victim to the same analytic mistake I argue courts have made: my analysis urges the adoption of certain propositions from the Title VII workplace sexual harassment cases when analyzing prison sexual harassment cases, while recommending against the adoption of other elements of the Title VII analysis. This argument is based on two fundamental mistakes. First, I do not propose that courts simply borrow the propositions offered in the *Meritor* case. Rather, I argue that, if the Supreme Court has warned about the problems associated with a particular analytic approach to understanding workplace sexual harassment, these considerations must be accounted for and weighed when creating non-workplace sexual harassment protections. Second, I am not arguing that workplace sexual harassment law has nothing to teach us about non-workplace sexual harassment doctrine. Rather, I am urging courts to adopt a more mindful stance when they consider borrowing certain Title VII doctrinal elements, ensuring that they question whether workplace specific assumptions are shaping their analyses and whether the protections they create are appropriate in light of the individual's relative power and dignity-based expectations in her given institutional context.

<sup>62</sup> Prisoners retain robust Fourteenth Amendment rights, including the right to be free from race discrimination perpetrated by prison officials. *See Johnson v. California*, 543 U.S. 499 (2005).

consideration because of the creation of Eighth Amendment sexual harassment doctrine. Stated more simply, the courts, through slight of hand, effectively subordinated inmates' Fourteenth Amendment right to protection against sexual harassment, forcing them to articulate this interest within the confines of the doctrinal norms of the Eighth Amendment. They did so without ever explaining the repercussions of their decisions.

## PART II

Part II explores some of the complications and errors that stem from the use of the Title VII modeled standards in the Eighth Amendment sexual harassment analysis. Section A identifies the primary distinctions between the Eighth Amendment standards and their Title VII progenitors. It shows that certain propositions federal courts incorporated into the Eighth Amendment sexual harassment analysis fundamentally contradict general guidance offered by the Supreme Court in Title VII cases about the considerations that courts should weigh when creating sexual harassment doctrine. Courts have failed to explain why doctrinal features of sexual harassment law that the Supreme Court rejected in early Title VII cases are now being revived and used to analyze prisoners' Eighth Amendment sexual harassment claims.

### A. Back To The Future: The Revival of Discredited Propositions From Title VII Sexual Harassment Analysis.

#### 1. The Eighth Amendment Unwelcomeness Inquiry

The Eighth Amendment unwelcomeness standard, on its face, appears identical to its Title VII analogue. In the most general sense, both standards are intended to inquire whether the alleged victim's behavior somehow excuses that of the alleged harasser. When parsed more finely, however, the distinct features (or distortions) in the Eighth Amendment standard become clear. In introducing the standard, the *Freitas* Court proclaims that "welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute pain under the Eighth Amendment."<sup>63</sup> This reading of the unwelcomeness standard is fundamentally different than the standard the Supreme Court set forth for Title VII cases, as "voluntariness" and "consent" are not dispositive questions in ascertaining whether the alleged harasser's attentions were unwelcome under a Title VII workplace analysis. As the Supreme Court explained in *Meritor*, the "correct inquiry [under Title VII] is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, *not whether her participation in the sexual intercourse was voluntary.*"<sup>64</sup> The Supreme Court explained that a standard that provided otherwise would only reward the harasser if his target ultimately relented and succumbed to the inappropriate advances.

The Eighth Circuit's decision to treat voluntariness as central to the analysis of prisoners' sexual harassment claims is particularly disturbing, given the Supreme Court's recognition that this

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<sup>63</sup> 109 F.3d at 1339.

<sup>64</sup> *Meritor*, 477 U.S. at 68.

interpretation of the unwelcomeness standard benefits harassers who are successful in dominating their targets — a very real danger in the prison cases. The *Freitas* court offers no explanation for discounting this concern.<sup>65</sup> Also, in reshaping the unwelcomeness standard, the *Freitas* Court invited courts and juries to engage in a detailed review of the inmate’s entire “relationship” with an officer to identify evidence of voluntariness and dismiss a plaintiff’s claim.<sup>66</sup> In this way, the Eighth Amendment unwelcomeness inquiry shifts our attention away from the most important part of a traditional Title VII unwelcomeness analysis — the inquiry into whether the target perceived she had choice or agency at the time when the harassment was initiated.<sup>67</sup>

## 2. The Eighth Amendment Severe or Repetitive Standard.

### a. *The Severe Physical or Psychological Harm Requirement*

Similar to the *Freitas* case, no guidance is offered in *Boddie v. Schneider* about the relationship between the Eighth Amendment “severe and repetitive” standard, and its Title VII analogue, the severe or pervasive standard. Indeed, in many ways, the *Boddie* decision appears purposely vague.<sup>68</sup> It generally provides that prisoners may only bring claims based on sexual abuse or harassment *capable of inflicting* “severe” emotional and psychological harm. Therefore, while the plaintiff is not actually required to make a showing of physical or emotional injury to state her claim,

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<sup>65</sup> The *Freitas* Court mentions the Eighth Amendment “pain” standard in a manner that suggests that this constitutional standard requires it to create a tougher unwelcomeness standard. However, this justification for modifying the standard proves untenable when one examines the Supreme Court’s Eighth Amendment jurisprudence, an issue I will explore in Part III. Additionally, the *Freitas* Court never explicitly makes this claim. If it had clearly articulated this claim about the Eighth Amendment as a basis for modifying the Title VII standard, it would have opened the door for precisely the kind of honest institution specific comparative analysis that I believe is required to create non-workplace sexual harassment doctrine.

<sup>66</sup> See also *Petty*, 2001 WL 360868 at \*2 (dismissing inmate’s § 1983 claim because “plaintiff ha[d] not shown the alleged [sexual] harassment to have caused him pain”).

<sup>67</sup> See *Freitas*, 109 F.3d 1335. If the Eighth Circuit had adopted the traditional Title VII unwelcomeness analysis, the outcome of the case might have been substantially different. The court recognized that the civilian worker had initiated the relationship with Freitas, and acknowledged Freitas’ claim that he feared the consequences if he rejected the worker or reported her behavior. Under the Eighth Amendment analysis, the court apparently weighed the fact that Freitas described the interaction with the worker as a “relationship,” and only reported the relationship after the worker demonstrated that she was using him in an instrumental manner. However, these facts go to Freitas’ perceptions of agency and his emotional feelings during the course of the relationship, not when the relationship was initiated. Because no detailed discussion is offered regarding the proof Freitas provided regarding his initial feelings of compulsion, we cannot know whether the court’s conclusion about Freitas’ claim was correct.

<sup>68</sup> Although the court in *Boddie* never explicitly requires a showing of emotional or physical harm to establish an Eighth Amendment sexual abuse claim, its analysis, for several reasons, invites this conclusion. For one, the *Boddie* analysis solely relies on cases in which evidence of severe psychological harm was presented, and proved pivotal to establishing plaintiffs’ sexual harassment claims. Also, the *Boddie* Court’s own analysis suggests that its focus is on the actual harm the *Boddie* plaintiff suffered, as it finds that none of the acts plaintiff alleged were “severe” enough to do damage nor were they “cumulatively egregious” in terms of the *harm they inflicted*.

she must identify behavior that, objectively viewed, is capable of inflicting injury of this magnitude. The benefit of this reading is that it permits inmates who were not themselves severely physically or psychologically injured to bring Eighth Amendment claims against guards. Prisoners, however, are severely limited in the kinds of inappropriate guard behavior they may challenge. Specifically, the standard provides no relief to prisoners who want to challenge guard actions intended to humiliate them — actions that, while degrading, do not inflict severe physical or psychological injury. Stated alternatively, the focus on behavior causing “severe” harm still causes courts to ignore prisoners’ basic dignitary interests, and focus solely on the potential for serious emotional and physical injury.

This description of the *Boddie* standard reveals the sharp break the standard makes from the injury standard in Title VII sexual harassment cases. In *Harris*, the Supreme Court rejected the claim that a plaintiff must allege harassment sufficient to inflict emotional harm to seek relief under Title VII. The Court explained that it would be a mistake to focus the Title VII harassment analysis on emotional (much less physical) injury, as actionable harassment affects workers in many ways: by decreasing a worker’s motivation or productivity, or by seriously compromising plaintiffs’ working environment. Consequently, while allegations establishing emotional injury are helpful, Title VII’s protections are triggered before this kind of harm occurs. The Supreme Court’s insights about the limits of an emotional harm standard should have pushed courts reviewing prison sexual harassment cases to ask whether the protections of the Eighth Amendment encompass more than “severe” physical and psychological injury. The *Boddie* Court, however, failed to acknowledge this concern.<sup>69</sup>

The severe physical/psychological harm standard also has practical limitations. First, it presents interpretational problems. The *Boddie* Court failed to offer any guidelines that would allow one to determine whether the harassment a prisoner alleges is capable of inflicting severe harm. What are courts to do when inmates are subject to harassment that does not cause them severe physical or psychological injury, but may trigger severe emotional harm if inflicted on more sensitive inmates? Does the court imagine we should refer to a “reasonable inmate standard?” Second, even if we assume this standard exists, courts are given no guidance about how to determine what the reasonable expectations of prisoners are. Consider that many prisoners are already severely traumatized by cross gender and sexualized touching by guards in the prison context. They routinely experience severe psychological harm because of the ways that they are touched under authorized intimacy violating prison procedures.<sup>70</sup> What happens then when a guard uses the authorized

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<sup>69</sup> The *Boddie* Court’s decision to institute a firm “emotional or physical harm” standard ensures that many of the difficulties the Supreme Court avoided in the *Harris* case will play out in the Eighth Amendment prisoner sexual harassment cases. Courts will focus on identifying actions that cause severe emotional (or worse) physical harm. They will ignore harassment that is more generally demeaning and might otherwise raise Eighth Amendment concerns.

<sup>70</sup> For example, how should a court treat a plaintiff’s Eighth Amendment sexual harassment claim alleging that a guard invited other officers to watch her naked while she was in four point restraints? If the analysis turns on whether the act is sufficient to inflict severe physical or psychological damage, the court would likely reject the claim because prison surveillance procedures already authorize guards to watch inmates when they are in restraints and for inmates to be stripped as a calmativ measure. Consequently, the court would likely conclude that the prisoner has not suffered any “severe” emotional injury other than the injury she always suffers when subject to

intimacy violating procedure<sup>71</sup> as a cover to gratify a sexual impulse, or merely to humiliate the prisoner because she is a woman.<sup>72</sup> The prisoner's inability to show a discrete psychological injury (as currently required under the Eighth Amendment analysis) seems irrelevant for justice reasons. If the officer abuses his discretion, he inflicts a kind of dignitary injury on the prisoner, one created by the prisoner's required showing of submission in unnecessary circumstances. It matters little that there is no discrete "severe" injury at issue in this hypothetical case.

Third, as a practical matter, courts will end up requiring proof of serious physical and psychological harm in cases where they are skeptical about whether the behavior complained of could actually inflict severe harm. For example, what should a court do in a case where a prisoner alleges she was not allowed out to smoke until she flashed her breasts at an officer?<sup>73</sup> Is this coerced "flashing," as an objective matter, capable of inflicting severe psychological pain? Faced with a skeptical judge, an inmate raising this complaint might feel compelled to present evidence of severe harm to demonstrate that the action can and has caused injury. However, even if she made this showing, the plaintiff's claim will be complicated by the fact that she "consented" to the sexual encounter. Looking at the encounter, a court might just as easily conclude that her severe injury resulted from her own bad choices, as opposed to the officer's request. Yet all of this seems beside the point. Although it may be difficult to show that the request caused emotional injury, it is clearly a dignitary assault. The inmate has been encouraged to trade sexual favors for a pittance, certainly a humiliating circumstance.

#### b. *Implications*

Taken together, the *Boddie* and *Freitas* cases provide us with compelling evidence of the ways in which courts can borrow from Title VII sexual harassment doctrine in non-workplace cases in selective and deeply problematic ways. These cases, and subsequent cases relying on them as authority, force us to ask more questions about the ways in which judges have used Title VII doctrine in attempting to understand the stakes in non-workplace harassment cases. I argue that, if courts intend to borrow from Title VII, *at the very least* they should acknowledge and evaluate the general guidance the Supreme Court has offered to assist courts in creating sexual harassment protections. However, as Part II shows, the *Boddie* and *Freitas* courts have failed to heed the

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authorized surveillance. While the presence of unnecessary guards is unfortunate, this factor is insufficient to inflict severe harm. Even skeptics would recognize that, in this case, the prisoner has still been injured despite her inability to show severe injury beyond the embarrassment she is otherwise subject to under the surveillance rules.

<sup>71</sup> The term "authorized intimacy violating procedure" is being used to refer to prison policies that allow male guards to touch female prisoners breasts or private parts, or conduct surveillance of inmates when the inmates are nude or only partially clothed.

<sup>72</sup> I am indebted to Vicky Schultz for this insight.

<sup>73</sup> *Hammond v. Gordon County*, 316 F. Supp. 2d 1262 (N.D. Ga. 2002)(denying inmate's Eighth Amendment sexual harassment claim based on guard's requirement that she flash her breasts in order to get cigarettes). See also, *supra* note 174.

Supreme Court's guidance, and instead incorporated extremely stringent and rejected aspects of the Title VII doctrine in Eighth Amendment sexual harassment cases. The courts' failure to acknowledge the guidance the Supreme Court offers in Title VII cases would be of less concern if it were shown that this advice cannot be applied to prison sexual harassment claims because of the Eighth Amendment's doctrinal norms.<sup>74</sup> The remainder of this Part, however, demonstrates that Eighth Amendment doctrine neither requires nor supports the use of the restrictive Title VII styled standards.

## B. Justifications For the Eighth Amendment Distinctions

Our discussion of the Eighth Amendment's doctrinal norms begins with a review of the core purpose served by the Eighth Amendment: preserving the *dignity* of convicted and incarcerated persons.<sup>75</sup> This may come as a surprise given the central role "pain" has taken in contemporary Eighth Amendment prisoner sexual harassment cases, a development stemming from its relationship to the Eighth Amendment excessive force doctrine. The *Boddie* decision, in particular allows one to see how much dignity concerns have been overshadowed in the examination of prisoners' Eighth Amendment tort claims against guards, as the decision focuses exclusively on "pain" determinations. Indeed, the *Boddie* Court interprets the Eighth Amendment to only provide protection against "pain" stemming from sexual abuse when the nature of the abuse is extreme enough to potentially cause "severe harm."<sup>76</sup> The *Freitas* decision also relies on the "pain" standard as a justification for its stringent version of the unwelcomeness standard. It explains that interactions that appear "welcome and voluntary" cannot cause "pain" and therefore cannot serve as the basis for an Eighth Amendment sexual harassment claim. One might challenge the court's decision to treat sexual harassment as a kind of injury covered by the excessive force doctrine. However, assuming *arguendo* that sexual harassment is properly addressed under this line of doctrine, a close examination of the "pain" standard used in the Eighth Amendment excessive force analysis reveals that the doctrine does not prevent the creation of broad sexual harassment protections

### 1. The Eighth Amendment "Pain" Standard

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<sup>74</sup> *Boddie*, 105 F.3d at 861. Importantly, *Harris* also indicates that the potential injury in a harassment case should be assessed with reference to its ability to compromise or interfere with the substantive values that inform the statutory or constitutional right that gives rise to the proposed sexual harassment protections. Therefore, the question is, does the *Boddie* Court's focus on harassment capable of inflicting "severe" pain accurately capture the substantive values protected by the Eighth Amendment?

<sup>75</sup> *Trop v. Dulles*, supra, 356 U.S., at 100 (recognizing that the "the dignity of man" is the "basic concept underlying the Eighth Amendment."). *Gregg v. Georgia* 428 U.S. 153, 173 (1976) (explaining that any penalty imposed must be in accord with the "dignity of man").

<sup>76</sup> *Id.*

As explained in Part I, the excessive force inquiry is based the Eighth Amendment’s prohibition on the “wanton and unnecessary infliction of pain.”<sup>77</sup> This “wanton infliction of pain” standard has been reduced to a doctrinal test. Under this test plaintiffs are required to make two showings. The first, the objective component, requires that the harm inflicted (or the behavior complained of) compromise a constitutionally protected interest in a significant manner. The second component of the test is subjective, requiring a showing that the actor who inflicted this harm acted with the requisite intent. This intent requirement varies from malice to deliberate indifference, depending on the actor’s role in the alleged wrongful conduct, or the kind of pain or deprivation alleged.

The *Freitas* and the *Boddie* cases are significant because of the manner in which they interpret the “objective” portion of the Eighth Amendment excessive force analysis, the pain requirement. The two cases are based on the proposition that, objectively viewed, certain behavior cannot inflict constitutionally significant “pain.” The question is, do the Eighth Amendment “pain” standards require these categorical conclusions about the nature of the harm required? I submit that the answer is no.

The pain requirement in the Eighth Amendment analysis has been the source of much debate. Controversy increased after *Hudson v. McMillan*,<sup>78</sup> a Supreme Court which established that prisoners need not suffer a physically “significant injury” before bringing an Eighth Amendment excessive force claim. In the *Hudson* case, the plaintiff had been kicked and punched by guards, but had not suffered any “serious” or long term physical injury. When the Fifth Circuit reviewed Hudson’s excessive force claim, it held that he could not secure relief unless he had suffered a physically “significant” harm. The Supreme Court rejected this standard on appeal, explaining that excessive force plaintiffs need only show that they have suffered something more than *de minimus* harm.<sup>79</sup> The Supreme Court not only rejected the “significant harm” standard for excessive force claims, it held that no litmus test should take it’s place. Instead, it held that the Eighth Amendment “pain” standard must be interpreted in a context-specific manner, and admits of no absolute limitations. Determinations regarding the importance of the harm alleged should be assessed based on “contemporary standards of decency as marked by a maturing society” as well as the core value of human dignity.<sup>80</sup>

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<sup>77</sup> This standard is also used in conditions of confinement cases to ascertain whether the conditions complained of compromise a constitutionally significant interest in a meaningful manner.

<sup>78</sup> See 503 U.S. 1 (1992) As reflected by the Eighth Amendment excessive force analysis, courts have recognized that, even a guard’s individual discretionary choices about the degree of force required in a given circumstance may be assessed to determine whether they constitute excessive punishment under the Eighth Amendment. Once the Court permitted Eighth Amendment excessive force claims, it opened the door to other claims challenging guards’ *ultra vires* action and abuse of their discretionary authority, including guards’ sexual harassment of prisoners.

<sup>79</sup> 503 U.S. 1, 7- 8 (1992)( “the absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it.”).

<sup>80</sup> See, e.g., *Gregg*, 428 U.S. at 173 (explaining that any penalty imposed must be in accord with the principle of human “dignity”).

As a practical matter, the interpretive principles articulated in *Hudson* establish that the category of injuries that raise Eighth Amendment concerns will shift and expand over time. The decision emphasizes that courts should interpret the “pain” standard in a dynamic manner, and that the analysis “should be conducted with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.”<sup>81</sup> With this in mind, the court creates a dynamic proof standard for these claims, explaining that the show of proof will “var[y] according to the nature of the alleged violation.”<sup>82</sup> By recognizing that the pain standard is variable and context-specific,<sup>83</sup> the Supreme Court opened the door to legal challenges based on a broad array of officer actions, including those which specifically inflict dignitary harm. Indeed even under the most conservative reading of *Hudson*, it is clear that the *Boddie* and *Freitas* courts had wide latitude under the Eighth Amendment to recognize as actionable verbal and physical harassment causing less than “severe physical or psychological harm.”<sup>84</sup> One is forced to conclude that the courts’ refusal to create more generous prisoner sexual harassment protections reflects certain unspoken presuppositions the judges held about the value of prisoners’ injuries, rather than the dictates of Supreme Court precedent.<sup>85</sup>

### PART III

Part III explores additional problems that stem from using the Title VII modeled standards in the Eighth Amendment cases. Section A shows that these standards still carry the residue of their workplace origins and, consequently, cause courts to import entirely inappropriate workplace specific assumptions about harassment into the prison cases. Section B shows that, because of the Eighth Amendment tools’ linguistic similarity to their Title VII progenitors, the standards enjoy a

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Hudson*, 503 U.S. at 11. Certainly, the reading of *Hudson* provided here does not establish that harassment which inflicts only dignity based harm must be recognized under the Eighth Amendment. However, it does establish that the Eighth Amendment standards *permit* sexual harassment claims based on the infliction of dignitary harm.

<sup>84</sup> Certainly, the reading of *Hudson* provided here does not establish that harassment which inflicts only dignity based harm must be recognized under the Eighth Amendment. However, it does establish that the Eighth Amendment standards *permit* sexual harassment claims based on the infliction of dignitary harm.

<sup>85</sup> The use of the excessive force standards ultimately may have stunted the development of sexual harassment doctrine under the Eighth Amendment. Prison sexual harassment by guards arguably violates Eighth Amendment standards whether one focuses on an evolving standards of decency inquiry or relies on a more abstract dignity analysis. The considerations that should inform the court’s analysis of whether sexual harassment violates the Eighth Amendment’s dignity guarantee are explored in Part IV. The Eighth Amendment evolving standards of decency inquiry typically turns on how states and other countries have treated a particular prison practice, to determine whether it violates our fairness norms. Because the majority of states have passed statutes making guards criminally liable for sexually abusing prisoners, the Court would likely conclude that sexual harassment by prison guards violates prisoners’ Eighth Amendment interests.

certain undeserved legitimacy, and discourage questions about the baseline level of protection afforded under the Eighth Amendment analysis. Indeed, as we will see, these constructs serve as an effective cover for serious inconsistencies and holes in the Eighth Amendment analysis.

## **A Problems Caused By Workplace- Specific Assumptions**

### **1. The Unwelcomeness Doctrine and Workplace Assumptions**

#### *a. Assumptions About Voluntary Sexual Activity*

The first workplace assumption that is incorporated into the Eighth Amendment doctrine is related to the unwelcomeness standard, as this Title VII construct creates a safe harbor for voluntary sexual interaction that is inappropriate in prison cases. The safe harbor created by the unwelcomeness doctrine makes more sense in Title VII cases. Recognizing the important role that the workplace plays in introducing people to their spouses (or significant others), the Title VII unwelcomeness standard creates a space for this conduct.<sup>86</sup> Its purpose is to ensure that employers will not be held liable for sexual advances that appear to be welcome.

This same assumption, about the value of voluntary sexual relationships, does not hold when we think about guards' sexual relationships with prisoners. Inmate rules and officer disciplinary rules prohibit guard-inmate sexual relationships. Additionally, virtually all of the states have passed laws making guards criminally liable for engaging in sex with prisoners.<sup>87</sup> These statutes are based on the understanding that the power imbalance between a guard and a prisoner makes a prisoner incapable of volunteering or "consenting" to a sexual relationship. These laws reflect the fact that a prisoner is dealing with a person whom, at his discretion, can use violence to command compliance with his sexual requests. Therefore a guard's invitation or request for sex may be fairly viewed by an inmate as a kind of command, one that is coupled with the implicit threat of violent reprisal if the guard is rejected.<sup>88</sup>

Ironically, rather than changing the unwelcomeness standard to reflect the specific institutional conditions in prisons (including the inmate's diminished capacity to resist or consent to

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<sup>86</sup> This proposition is often explicitly discussed in sexual harassment opinions. *See e.g., Nicholas v. Frank*, 42 F.3d 503, 510 (9<sup>th</sup> Cir. 1994) (explaining that "courts are understandably reluctant to chill the incidence of legitimate [workplace] romance[s]). The court explains that "people who work closely together and share common interests often find that sexual attraction ensues. It is not surprising that those feelings arise even when one of the persons is a superior and the other a subordinate." *Id.*

<sup>87</sup> *See* Amnesty International, USA *Abuse of Women In Custody: Sexual Misconduct and Shackling of Pregnant Women* at 9 (2001). At the time of the report only Minnesota, Oregon, Utah, Vermont and Wisconsin did not have criminal laws prohibiting guards from engaging in this misconduct. 43 states have made voluntary sex with inmates a felony; the remainder treat it as a misdemeanor. *See* U.S. Dept. of Justice Office of the Inspector General, *Deterring Staff Sexual Abuse of Inmates* 3-4 (April 2005)

<sup>88</sup> See sources collected at *infra* notes 82-84.

sexual interactions), the Eighth Circuit creates an even broader safe harbor for so-called consensual relationships. It gives guards additional leeway to demonstrate that the inmate willingly participated in the relationship by showing consent or voluntariness. However, this consent or voluntariness inquiry is simply insufficient to address the subtle coercive power harassing guards use to control prisoners.

The power dynamics in prison sexual harassment cases are well illustrated in *Fisher v. Goord*,<sup>89</sup> a Southern District of New York case decided under the *Freitas* standard. Fisher testified that upon admission to prison, one guard lectured her at length that she needed to play along with guards, and that she should not oppose them or the guards would not protect her from other inmates. He also claimed that the guards would write false disciplinary reports about her that could affect her eligibility for parole. He explained that she needed all of the guards to be “her friends.” Ultimately, two guards, including the one who made the speech, made sexual advances to Fisher, and she submitted to their advances. When she brought Eighth Amendment sexual harassment claims against the two guards, the court ruled that since Fisher never said no or actually resisted the guards, the sexual interactions she had with the two men were welcome and voluntary.

Given the coercive backdrop against which this “voluntary” sexual interaction occurred, Fisher’s claims of duress should have been given more weight. The Eighth Amendment unwelcomeness doctrine, however, encouraged the court to minimize the evidence of subtle coercion Fisher presented. As a consequence, it ended up recasting behavior spurred by the implicit threat of force and retaliation as voluntary sexual behavior. The unwelcomeness standard used here seems particularly unfair given the Supreme Court’s recognition in *Meritor* that consent in sexual harassment cases is often the product of subtle or long term coercion. The *Freitas* opinion fails to provide any explanation for why the analysis in the Eighth Amendment prison sexual harassment cases does not make allowances for this problem.<sup>90</sup>

#### b. *Assumptions About Resistance*

The Eighth Amendment unwelcomeness standard also is based on certain workplace related assumptions about the harassment target’s agency. The Title VII analysis implicitly assumes that the availability of Title VII protections levels the playing field between the victim and the harasser, making resistance a realistic option. Consequently, courts conclude that it is reasonable to require that the alleged target affirmatively demonstrate resistance and/or report harassing activity to a supervisor. This level playing field, however, doesn’t exist in prison cases. Rather than empower

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<sup>89</sup> The plaintiff in the Fisher case was Amy Fisher, the Long Island Lolita who fell in love with Joey Buttafuoco and was imprisoned for attempted murder after trying to kill his wife. *Fisher v. Goord*, 981 F. Supp. 140.

<sup>90</sup> Some courts have issued opinions attempting to explain why officers should be held criminally liable for engaging in consensual sex with inmates, but not be civilly liable for damages under the Eighth Amendment. See *Carrigan v. Davis*, 70 F. Supp.2d 448 (D. Del. 1999)(arguing that the current criminal and civil sanctions for prisoner sex abuse are intended to deter similar conduct but for different reasons); *Phillips v. Bird*, 2003 WL 22953175 (D. Del. Dec. 1, 2003)(same).

inmates, the harassment reporting procedures in prisons are often transparent and lead to retaliation from guards.<sup>91</sup> Consequently, one of the major categories of resistance the court looks for — evidence of reporting — is often not present in prison harassment cases.

Additionally, courts fail to realize that in the prison cases the power imbalance between harasser and target is so great that it substantially reduces the number of inmates willing to explicitly refuse sexual overtures.<sup>92</sup> The threat of retaliation is far more serious than in workplace cases: the harasser often exercises control over nearly all of the harassment target's basic life necessities.<sup>93</sup> In a context where a guard may beat a non-compliant prisoner, file false disciplinary charges against her that can increase her sentence, or otherwise take action that can make her lose basic privileges, explicitly refusing a guard or complaining about his behavior is an action fraught with risk. Sociologists who study women prisoners report that many prisoners believe that their very physical safety is at risk if they rebuff a guard's advances.<sup>94</sup> Even when a guard does not explicitly threaten an inmate with violence, they explain, the inmate quite reasonably may conclude that the guard's gentle requests are backed up by the threat of force or administrative sanctions.

This is not to say that prisoners never resist guards' harassment or requests for sexual favors. However, sociologists explain that when prisoners do register opposition, they find that the most prudent course is to attempt to do so subtly, by avoiding harassing guards or appearing passive, as these strategies minimize the potential for retaliation. Unfortunately, claimants who adopt these more prudent strategies find they cannot survive the Eighth Amendment unwelcomeness inquiry, and their sexual harassment claims fail.<sup>95</sup> The unwelcomeness standard is simply too wedded to

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<sup>91</sup> See e.g., *Amador v. Andrews*, 03 Civ. 0650 (KTD) (GWG) (plaintiff's complaint) (describing transparency of prison administrative complaint procedures which resulted in retaliation against complaining inmates by guards); The UN Refugee Agency, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* 4 (1998) (discussing female inmates' complaints about false disciplinary reports after reporting sexual abuse).

<sup>92</sup> Avery J. Calhoun & Heather D. Coleman, *Female Inmates Perspectives on Sexual Abuse by Correctional Personnel: An Exploratory Study* 13 *Women & Criminal Justice* 101,114 (2002) (discussing inmate interviews in which they indicated that part of the "survival strategy" in a women's prison is avoiding having to ever say no to a guard).

<sup>93</sup> The UN Refugee Agency, *supra* note 82 at 4 (noting that "guards wield near absolute power over the women [and] retaliation can be devastating to women's security, health and psychological well-being.") Calhoun & Coleman, *supra* note 94 at 105 (noting that inmates are constantly aware that a "staff person's authority can ultimately be backed by state sanctioned use of force," and the officers' uniforms and access to weapons reinforces inmates' understanding of their subordination.).

<sup>94</sup> Avery J. Calhoun & Heather D. Coleman, *Female Inmates Perspectives on Sexual Abuse by Correctional Personnel: An Exploratory Study* 13 *Women & Criminal Justice* 101,114 (2002). In addition to fearing for their own personal safety, inmates sometimes fear that guards will retaliate against their families because they believe that guards have a great deal of access to inmates' personal information. *Id.* at 115-116.

<sup>95</sup> The difficulties prisoners face under this workplace specific understanding of resistance is well illustrated in the *Freitas* case, as the complaining inmate was largely passive in response to the guard's advances. The Court discounted Freitas' claim that he was intimidated by the civilian worker's power; however, a more careful review of the sanctions available to the civilian worker makes Freitas' concerns seem more reasonable. Prison work

workplace specific assumptions about harassment victims' agency. It fails to take account of the coercive environment in prison that makes subtle attempts to avoid officers' advances the far more reasonable approach to prison harassment.

## 2. The Severe or Repetitive Standard and Workplace Assumptions

Similar to the unwelcomeness standard, the "severe or repetitive standard" shifts the courts' attention to workplace specific assumptions and, consequently, radically recharacterizes the parties' relative power in the prison cases. As explained in Part I, in Title VII cases, in order to establish a claim for a sexually harassing hostile environment, a plaintiff must show that she was subject to severe or pervasive sexual harassment. The standard attempts to establish a fair baseline for holding an employer liable for sexually inappropriate conduct. Consequently, the severe or pervasive standard is preoccupied with a particular kind of sorting – namely, sorting out minor sexual flirtation or stray inappropriate remarks from actionable conduct for which an employer should be held liable. This sorting in the Title VII context is appropriate, as not all workplace flirtation is prohibited. The Supreme Court created a more relaxed standard to permit workplace sexual relationships, given their general social value. The problem, however, is that the severe or repetitive standard encourages the courts to characterize inmate complaints about *de minimus* but offensive guard abuse as minor flirtation. In reality, however, this conduct is quite different.

Because of the dramatic power inequality between guards and prisoners, a guard's flirtation is always backed up with the implicit threat of sanctions if the prisoner does not respond.<sup>96</sup> Consequently, a prisoner is likely to experience a guard's "flirtation" as far more threatening than flirtation by a co-worker in a workplace situation. Review of the *Fisher* case, discussed above, shows how quickly seemingly small scale flirtation can change to violent and intimidating behavior, as Fischer claimed that some guards who were friendly in initial interactions began grabbing her breasts and engaging in other violent conduct when she failed to realize these "friendly" overtures were an attempt to secure sexual favors.<sup>97</sup> Also, the *de minimus* sexual conduct inmates complain of typically involves more degrading behavior that, although not physically harmful, increases inmates' feelings of anxiety and powerlessness, and is clearly intended as a display of power and domination. The severe or repetitive standard, however, encourages the perception that these *de minimus* intrusions do not constitute serious harm.

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details often give civilian workers the power to hire, fire, reassign or demote prisoner-workers. .") Calhoun & Coleman, *supra* note 94 at 105. Also, the civilian worker could have manufactured false disciplinary charges against Freitas, causing him to be put in lockdown, lose valuable privileges or, in a worst case scenario, affect his eligibility for parole. Given the range of sanctions available to her and the serious repercussions of these sanctions, Freitas reasonably could have concluded that compliance and passivity was the most viable strategy for dealing with the staff member's advances.

<sup>96</sup> See sources collected at *supra* note 79.

<sup>97</sup> *Fisher v. Goord*, 982 F. Supp. 140

In addition to causing courts to mischaracterize the harassment in these cases, the severe or repetitive standard is misguided because, unlike in the workplace cases, there is no consensus that “minor” sexual harassment should be ignored. Rather prison administrators recognize that this conduct is generally quite dangerous because it subjects prisoners to a high risk of sexual exploitation and puts guards at risk for engaging criminal activity. One wonders why the civil standard does not mirror this understanding. Instead, the severe or repetitive standard effectively creates a “safe harbor” for “low level” sexual harassment.

The severe or repetitive standard is additionally disturbing because it distracts courts from the sorting problem that should command their attention in prison cases: cases that require them to negotiate what I call the “sexualized baseline” in prisons. By sexualized baseline, I am referring to the climate created by guards’ broad discretionary power to touch inmates of the opposite gender and to watch inmates in various states of undress.<sup>98</sup> Guards are authorized in the normal course of duty to engage in cross gender surveillance of partially clad prisoners, and can conduct a pat frisk or an invasive search whenever they can identify a security reason to justify it.<sup>99</sup> These facts make the inquiry into illicit conduct complicated. The primary challenge for courts is to remain sensitive to the offensive nature of *ultra vires* acts, despite guards’ discretion to engage in authorized invasive touching.<sup>100</sup>

The second special challenge courts face is identifying a way of sorting through sexual harassment claims that involve officers gratifying sexual impulses under cover of authorized cross gender search procedures.<sup>101</sup> Courts must develop an analysis that clarifies how to determine when an inmate has presented sufficient evidence or pled sufficient facts to support a claim that a guard has abused his discretionary authority to touch a prisoner for the purpose of sexually harassing that prisoner. The severe or repetitive standard provides no assistance with this problem. Instead, it suggests that courts should conclude that an officer’s episodic abuse of authorized search procedures is not serious enough to inflict an injury of constitutional concern. Even worse, the severe or repetitive standard suggests wholly *ultra vires* sexual touching is not of constitutional concern if it merely occurs on an episodic basis. This analysis seems fundamentally misguided.

In summary, the concerns I have raised about the severe or repetitive standard show that it serves as a distraction, lulling courts into a false sense of security when analyzing harassing conduct in prison cases. The construct distracts courts from what should be the core inquiry in prison sexual

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<sup>98</sup> Admittedly, this construct is based on certain heterosexist presumptions. Similar abuses of authority occur in same gender situations as well, but cross gender supervision creates a comparatively greater risk of abuse.

<sup>99</sup> See Coleman & Calhoun, *supra* note 83.

<sup>100</sup> Indeed, court desensitization to prisoners’ injuries is key in *Boddie*, as the court discounts the plaintiff’s experience of violation because it recognizes that guards constantly touch inmates in an offensive manner.

<sup>101</sup> See e.g., *Holton v. Moore*, 1997 WL 642530 (NDNY) (rejecting male inmate’s Eighth Amendment sexual harassment claim alleging that a guard pat frisked him in an offensive manner by touching his buttocks and anus).

harassment cases — the abuse of discretionary power, and it recasts wholly inappropriate (and potentially criminal) sexual overtures by guards as innocuous flirtation.

## B. Undertheorization

### 1. A Standard in Search of a Value: Re-examining the Severe or Repetitive Standard

The problems I have identified as stemming from the Title VII modeled standards counsel against the current borrowing strategy courts use when developing Eighth Amendment sexual harassment doctrine. However, the use of these standards also masks important conceptual problems in the Eighth Amendment analysis. These problems are discussed in the section below.

As explained in Part I, in Title VII cases, the severe or pervasive inquiry is conducted with an eye towards vindicating a specific baseline right or guaranteed interest – the plaintiff’s right to workplace gender equality. The *Meritor* Court specifically explains that it is concerned with conditions that are severe or pervasive enough to compromise a person’s ability to work because of her gender. It is looking for harassment severe or pervasive enough to “*affect a . . . term, condition or privilege of employment.*”<sup>102</sup> Consequently, the proof a plaintiff offers in support of a sexual harassment claim tends to show that the harassment compromised the plaintiff’s work performance or her motivation to participate in her workplace. Alternatively plaintiff can show that harassment was sufficient to discourage her from remaining at her job or keep her from attempting to advance in her career.<sup>103</sup> Given that the *Boddie* Court’s Eighth Amendment severe or repetitive test is based on the *Meritor* Court’s severe or pervasive standard, we must ask: what is the specific baseline interest that informs the interpretation of severe or repetitive standard? Courts conducting the Eighth Amendment sexual harassment inquiry are looking for harassment severe or repetitive enough to do what? The *Boddie* opinion provides no satisfactory answer.

Some may argue that the Second Circuit did identify the baseline interest vindicated by Eighth Amendment sexual harassment doctrine — the *Boddie* standard created requires court to look for harassment severe or repetitive enough to cause “pain” cognizable under the Eighth Amendment. But, how do we determine when sexual harassment inflicts “severe” pain, sufficient to trigger Eighth Amendment concerns? The reference to the “pain” standard merely raises more questions. The Eighth Amendment’s doctrinal norms require that we be told what substantive interest is being invaded by the harassment in order to determine whether it causes pain worthy of concern under the Eighth Amendment.<sup>104</sup> Without some basic guiding principle, some understanding of the interests the court recognizes as meriting constitutional protection, the resort to the classic Eighth

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<sup>102</sup> *Meritor*, 477 U.S. 57

<sup>103</sup> *Id.*

<sup>104</sup> Indeed, this analysis is even more suspect when we recognize that the *Hudson* Court has established that severe pain is not necessarily required to establish an Eighth Amendment claim. *See supra* page 16.

Amendment inquiry is simply an empty rhetorical strategy that provides no real answers. Of course, the *Boddie* Court, consistent with the doctrinal norms of the Eighth Amendment, could have identified dignity as the core concern that determines when prison harassment triggers the Eighth Amendment pain standard. However, it failed to do so. It offers no guidance on how to identify inconsequential sexual harassment that does not constitute “pain” under the Eighth Amendment, and why these injuries are not worthy of federal constitutional concern.

The severe or repetitive standard also does not work if we attempt to analogize from *Meritor* to identify the baseline interest at stake in the prisoner sexual harassment cases. The workplace sexual harassment standard is premised on the idea that workers have some affirmative participatory interest that is compromised by workplace harassment. In the prison cases, it is difficult to identify any similar participatory interest prisoners possess that gets compromised by sexual harassment. Rather, prisoners are in an environment they do not want to be in and are forced to perform work and engage in activities they typically do not prefer. Any “motivational” standard created for purposes of using the severe or repetitive standard would have to control for the imperative to participate that informs prison activities. The interpretive challenges created by this version of the severe or repetitive standard are illustrated in the scenario provided below.

If we assume that the severe or repetitive standard is testing for harassment sufficient to interfere with a prisoner’s motivation to participate in prison life, this motivation-based standard would fail to identify all of the persons actually injured in prison sexual harassment cases. Consider the challenges an extremely unmotivated and difficult prisoner would face in establishing her claim. This prisoner might not display any motivational changes after she is one day forced to shower in front of a guard for his amusement. She may be just as surly, angry and disinterested in prison activities as she was prior to the incident. However, is no question, that the showering incident has caused her to be injured. As the above example shows, the injury women prisoners suffer in sexual harassment cases is not based on their decreased desire to “participate” in prison life. The *Boddie* Court certainly must have recognized the unpersuasive nature of this “motivational” or “participation-based” account of harm. However, it provides no affirmative value in its place, and offers no assistance in determining what is actually being protected by the severe or repetitive test. Instead, it leaves courts wondering what interest is protected by the Eighth Amendment sexual harassment protections.

The conceptual defect I’ve identified in the severe or repetitive standard is much more than an academic problem; it has had clear and troubling repercussions for courts ruling on prisoner sexual harassment claims. Because courts applying the test have no idea what kind of injury they are testing for, they have begun to treat the allegations in the *Boddie* case as providing a stable metric or floor identifying the kinds of harassment allegations that are sufficient to state an Eighth Amendment claim. If the acts alleged in a particular case are less than or equal to the harassing acts identified in *Boddie*, the court dismisses the plaintiff’s claim. In effect, this application of the

*Boddie* test transforms the analysis under the severe or repetitive standard into a purely mechanical inquiry.<sup>105</sup>

This interpretation of *Boddie* is particularly disturbing as it contradicts the basic interpretive guidelines that inform the severe or repetitive standard's analogue – the Title VII “severe or pervasive” test. In introducing the standard, the Supreme Court held that the severe or pervasive inquiry is always a fact-specific, case by case inquiry that considers the context or surrounding circumstances in which the alleged harassment occurs. It would reject the analyses courts have produced under *Boddie*, or any analysis that proposed to test sexual harassment allegations against some pre-existing litmus test or standard. Courts applying the severe or repetitive test, however, have no choice. Because the standard as currently stated is not based on the vindication of any particular interest, courts must resort to a mechanical examination of the allegations made to provide some basis for their decisions.

Again, because of the severe or repetitive standard's linguistic similarity to its Title VII progenitor, it has not been challenged. The use of the severe or repetitive standard, however, allows courts to avoid the hard questions in Eighth Amendment cases about when liability should be triggered by guard sexual harassment. The standard effectively shifts litigants' focus to quantitative questions, such as weighing the amount of harassment at issue. The standard distracts from the more important normative question: where has the judiciary drawn the dividing line in the Eighth Amendment sexual harassment analysis between actionable and inactionable behavior? Of course, one could imagine any number of Eighth Amendment regimes for prisoner sexual harassment claims. The choices range from a generous standard that would make all harassment injuries actionable to a more draconian standard that only permitted inmates to raise claims concerning rape. Despite the wide variety of options, no discussion has been offered in the seminal cases about where the current Eighth Amendment regime draws the line for actionable conduct. Rather, the Title VII modeled standards are used to focus litigants' energies on meeting some pre-established but undisclosed standard of seriousness that the courts have selected. As a result, the normative questions that are central to the Eighth Amendment sexual harassment analysis remain masked.

## 2. Double Duty: The Severe or Repetitive Standard in Establishing Individual and Institutional Liability

The severe or repetitive standard is undertheorized in a second related manner. In the Eighth Amendment analysis it functions as a standard for establishing both individual liability and institutional liability. However, as explained in Part I, the Title VII severe or pervasive standard was created to establish a fair baseline for holding an *employer* liable for creating or maintaining a workplace polluted with harassing behavior. The standard was created with the understanding that, even if some low level harassment causes harm, the employer should not be held liable because Title VII charges the employer with the responsibility to generally control workplace conditions, not

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<sup>105</sup> *Holton v. Moore*, 1997 WL 642530 (holding that plaintiff's allegation that two guards threw him up against the wall and felt his buttocks and anus involved conduct that was less than what was alleged in *Boddie* and therefore no claim was stated).

monitor every intermittent annoyance various employees visit upon a single worker. In contrast, in the Eighth Amendment cases, two kinds of claims turn on the severe or repetitive standard. It is used to determine whether a prisoner has alleged conduct sufficient to merit holding prison officials liable for injunctive relief. This inquiry, which typically involves larger complaints about prison officials' responsibility for prison conditions, is similar to the inquiry conducted to assess employers' liability for employment conditions. However, when the severe or repetitive standard is used to review inmates' Eighth Amendment damages claims against *individual* officers it raises serious concerns, as the cautionary reasons that require the high Title VII standard do not exist in the individual Eighth Amendment cases against guards.

The concerns I have raised about the use of the severe or repetitive standard to review claims against individual harassing officers are never addressed in *Boddie*. However, by using the standard in this manner, the *Boddie* court is effectively giving officers a free pass for sexually harassing conduct unless it meets the severe or repetitive standard. However, we must ask, why individual officers are not required to pay damages for behavior that, while harmful, fails to meet this standard? Indeed, fairly viewed, the severe or repetitive standard serves an entirely different function in the Eighth Amendment analysis than it does under the Title VII inquiry: it creates a heightened pleading and proof standard for inmates alleging sexual harassment under the Eighth Amendment analysis — one that does not govern other kinds of “excessive force” claims. Because this heightened standard is articulated in terms that appear consistent with a Title VII inquiry, it has not been challenged.

Of course, my criticism of the current Eighth Amendment analysis is made with the understanding that courts will have to establish some baseline to identify harassment sufficient to state an actionable Eighth Amendment claim. The judiciary must establish some standard for identifying offensive behavior that does not inflict constitutionally significant harm for Eighth Amendment purposes. My goal in this analysis simply is to make it clear that the severe or repetitive test does not set the standard in a fair and principled way.

### **C. Consequences**

Thus far this discussion primarily has explored how courts' use of workplace sexual harassment law had distorted their ability to understand the Eighth Amendment sexual harassment cases. However, in order to fully make the case for my dignity framework, I also will show that when judges *do* consider institution specific conditions without sufficient guidance, they can create additional problems. For, one could argue that the *Boddie* and *Freitas* Courts, despite their silence, created sexual harassment standards that are based on prison specific institutional concerns. This section attempts to read the *Boddie* and *Freitas* cases as practical responses to prison specific concerns. Unfortunately, my analysis shows that the constructs the two courts created only aggravated certain conditions that violate prisoners' constitutional rights. As this section shows, courts need a conceptual framework if they intend to incorporate institution specific concerns into their analyses. In the absence of this kind of framework, they risk responding to institution specific realities in unexamined and problematic ways.

1. Analyzing the Severe or Repetitive Standard as a Response to Prison Conditions.

Certainly, the *Boddie* Court was sophisticated enough to know that its deployment of the *severe or repetitive* standard in the Eighth Amendment cases was unorthodox, at least as compared to the role its analogue plays in establishing employer liability in the Title VII analysis. The question is, why would the *Boddie* Court subject prisoners to this heightened pleading standard when they raise damages claims against individual guards? The standard may be justifiable based on some institution-specific reason, but this reason is not disclosed.

In the absence of any court justification for the standard, we can explore one reasonable reading – namely, that the court believed that prisoners’ individual damages claims should be governed by a higher standard informed by employer liability principles, because guards typically are indemnified by the state for tortious acts committed in the normal course of their duties. Since these prisoner claims actually require a draw on the public fisc (i.e. they require payment by the State), the Title VII modeled standard it has created makes sense. Under this logic, prisoners should be subject to stringent requirements before they are able to make a claim that requires a draw on public funds.

However, close review of this public fisc argument shows that it fails to pass muster. First, the justification simply does not work for claims made against guards for unquestionably *ultra vires* harassing acts that serve no legitimate penological purpose because the State provides no indemnity under these circumstances. Why then are prisoners forced to satisfy this heightened standard for *ultra vires* claims that will be paid by individual guards? Second, it is simply wrongheaded to decide what an individual’s constitutional protections are based on an unarticulated proposition that purports to accurately describe the current indemnity arrangements between officers and the State — these indemnity arrangements describe a temporary factual circumstance that could change at any given time.

Alternatively, one could argue that the Second Circuit was justified in the creation of the higher severe or repetitive standard because invasive sexual touching constantly occurs in prisons and, rather than sort through all allegations of invasive touching, the court should only be concerned with the most serious sexual violations. On its face, this analysis seems reasonable. However, on closer examination, this line of reasoning reveals its flaws. For one, this argument fails to acknowledge prison officials’ role in creating a prison environment that will give birth to a large number of claims. By instituting cross gender staffing policies in prisons, and allowing cross gender searches and surveillance, prison officials have created institutional conditions that will, quite naturally, result in a large number of claims of injury.<sup>106</sup> This justification for the high standard fails to address the institution’s responsibility to inmates as a consequence of creating these conditions.

Also, the logic used to justify the heightened standard is problematic because it makes a fundamental mistake about the priorities that should govern in the Eighth Amendment cases. One wonders why the court’s interest in avoiding the administrative challenge of dealing with the

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<sup>106</sup> See *Jordan v. Gardner*, 986 F.2d 1521(1993) ("a commonsense understanding of the different experiences of men and women in the society leads to the inescapable conclusion that invasive searches of the bodies of female prisoners by male guards . . . constitute and reinforce gender subordination")

potentially high number of prison abuse cases should figure at all in its analysis. Under a proper analysis, the only principles that should be used in setting the severe or repetitive standard are principles that reflect some value or interest embedded in the Eighth or Fourteenth Amendments. Additionally, this concern about the high number of cases has already been addressed by the administrative exhaustion requirement created by the Prison Litigation Reform Act.<sup>107</sup> The PLRA regime is a more proper means for dealing with concerns about the administrative challenges of managing prisoner litigation, rather than allowing courts to arbitrarily cabin prisoners' Eighth Amendment rights based on this concern.<sup>108</sup>

Moreover, to the extent the heightened standard is justified by concerns about the volume and interpretational challenges of prisoner suits, the court's analysis is based on a distorted understanding of these problems. Claims based on discretionary touching are likely to be numerous in number, and they will be difficult to adjudicate. However, it is unclear why concerns about the volume of abuse of discretion cases justifies creating a heightened standard for cases involving *ultra vires* touching. The severe or repetitive standard does not just create a higher standard for stating an actionable claim in the abuse of discretion cases; it also establishes a heightened standard for cases involving clearly *ultra vires* harassing conduct.

In summary, because of the borrowed legitimacy the Eighth Amendment constructs draw from the Title VII framework, the Court was not required to engage in a thorough review of the issues at stake in prison cases. In this way, the *Boddie* decision illustrates the risk that courts using these borrowed Title VII doctrinal tools and constructs will allow unspoken and unexamined assumptions about prisons to shape their analyses.

#### PART IV

Part II and Part III highlight the costs of selectively borrowing from Title VII sexual harassment doctrine to create non-workplace sexual harassment protections. Part IV offers a new approach for courts creating non-workplace sexual harassment doctrine, laying out a three-part context-specific inquiry that will help courts incorporate into their analyses an understanding of how an individual's dignity interests are framed by institutional circumstances. The framework is intended to help courts identify the institution specific facts that should play a role in their analyses,

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<sup>107</sup> See 42 U.S.C. § 1997(e). This observation does not mean that the Prison Litigation Reform Act is without its problems. The statute's administrative exhaustion requirement has proven to be an extremely high hurdle for prisoners with sexual harassment claims as, they are often confused by prison complaint procedures and reluctant to use them given the risk of retaliation. Additionally, victims of sexual harassment very often delay reporting, because of shame, fear or ambivalence about their experiences. See Testimony of Lisa Freeman & Dori Lewis in Support of Reform of the Prison Litigation Reform Act, Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, April 22, 2008.

<sup>108</sup> Indeed, Justice Blackmun's concurrence in the *Hudson* case emphasized this point. He explained that judicial doctrines like the "significant injury" requirement in the Eighth Amendment analysis should not be used as "docket-management measures," as a way of limiting the number of actionable claims to a "reasonable" level. *Hudson*, 112 S.Ct. at 1003.

as well as the distinct value assumptions and norms that govern parties' interactions in a given institutional setting.

### A. Defining Dignitary Injury

One of the challenges in creating an anti-discrimination regime based on dignity is the broad, undefined nature of this value. Despite the central role it plays in international law, appearing in various anti-discrimination covenants and conventions,<sup>109</sup> dignity has no one shared, universal definition.<sup>110</sup> Rather, dignitary interests are necessarily context-specific, as they are defined by shared cultural assumptions, religious concerns, politics, and the history of the specific community in which the claim is made.<sup>111</sup> The continuously shifting, evolving nature of the concept is apparent, particularly in litigation,<sup>112</sup> as parties characterize a broad array of concerns as implicating dignitary interests, in circumstances as varied as criminal cases,<sup>113</sup> right to life cases,<sup>114</sup> right to die cases,<sup>115</sup>

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<sup>109</sup> See Office of the High Commissioner for Human Rights, United Nations, *International Covenant on Civil and Political Rights* 1 (1976) (calling for the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” and arguing that the right to basic civil rights “derive[s] from the inherent dignity of the human person.”); Charter of the United Nations, *Preamble* (affirming its commitment to protect “fundamental human rights [and] . . . the dignity and worth of the human person.”) (1980); United Nations Convention on the Elimination of all Forms of Discrimination Against Women, *Preamble* at 1 (1976) (explaining that “discrimination against women violates the principles of equality of rights and respect for human dignity, [and] is an obstacle to the participation of women on equal terms with men.”).

<sup>110</sup> Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 849 (1983) (explaining that “we do not find an explicit definition of the expression ‘dignity of the human person’ in international instruments, or (as far as I know) in national law. ) He explains that “its intrinsic meaning has been left to intuitive understanding.” *Id.* R. George Wright, *Consenting Adults: The Problem of Enhancing Dignity Non-Coercively*, 75 B.U. L. Rev. 1397, 1398 (1995) (noting the difficulty of defining dignity “precisely because of the range of ways in which people think about dignity.”) As Wright explains “[a] follower of Immanuel Kant will not think of dignity in the same way as, say, a follower of Gandhi, and neither of them will fully agree with a contemporary human rights activist.” *Id.* See also, Gloria Zuniga, *An Ontology of Dignity* (2003) (reprint of English translation available and on file with author) (explaining that the “meaning of dignity is just assumed to be understood or too obvious to require an explanation.”)

<sup>111</sup> Baer, *supra* note \_\_ at 591 (explaining that the role dignity plays in the German constitution is a response to the Holocaust”). Dignity is a similar culturally specific notion as embodied in Israeli law. See *The Basic Law: Human Dignity and Liberty 1992*, S.H. 1391 (“The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state.”)

<sup>112</sup> See, e.g., Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEBRASKA L. REV. 740, 758 (2006). For example, dignity claims may be used to challenge the material conditions of one’s existence, if one is challenging poverty conditions. It may be used as a basis to justify one’s right to control certain aspects of one’s life, as in right to die cases. Alternatively, it may be offered as a reason to remedy status-based assaults, a consideration I explore in more detail in the next section.

<sup>113</sup> Lois Shepard, *Dignity & Autonomy After Washington v. Glucksberg: An Essay About Abortion, Death & Crime*, 7 CORNELL JOURNAL OF LAW & PUBLIC POLICY 431 (1998); Goodman, *supra* note 106 (cataloguing various constitutional claims (including Fifth Amendment claims) that have used dignity as a basis for their arguments).

prisoners' rights cases,<sup>116</sup> and anti-discrimination cases.<sup>117</sup> Given the array of dignity based arguments being mobilized at any one time, a resort to dignity, broadly understood, means almost nothing. To conduct a more precise inquiry, we must ask: What do we mean by dignitary injury in the context of American sexual harassment law?

Feminist legal scholars, in particular, Anita Bernstein, have offered insights about dignity's meaning, relying primarily on political philosophy.<sup>118</sup> In my view, however, the proper starting point, however, is to consider how dignity is understood across Title VII and Fourteenth Amendment anti-discrimination cases regarding race and sex – the legal foundation for the creation of hostile environment doctrine. This decision to focus on the doctrine to develop my fundamental concept of dignity, is based on two reasons – one conceptual, one pragmatic. By understanding the core concept of dignity mobilized in anti-discrimination cases, we learn something fundamental about our shared cultural understanding of why discrimination is a dignity concern. Also, by resorting to what *is* as a starting point in developing *what should be*, we provide judges with a more solid foundation should they decide to emphasize dignity concerns in sexual harassment doctrine.<sup>119</sup> This section of the discussion attempts to develop a richer understanding of dignity based on antidiscrimination doctrine. I then use this understanding to supplement Bernstein's model, which is derived from Kant's views on respect conditions. These resources, taken together, form the basis of my model, which emphasizes the dialogic nature of the issues that must be considered when creating sexual harassment doctrine.

#### 1. Reading the Cases: Dignity's Role in Anti-Discrimination Doctrine

Courts primarily have been preoccupied with questions of equality in anti-discrimination cases; however, faint echoes regarding dignity concerns can also be heard when one listens closely.

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<sup>114</sup> Shepard, *supra* note 113 at 435 (arguing that dignity in the abortion or right to life cases means nothing more than “respecting the autonomous actions of rational persons”).

<sup>115</sup> *Id.*

<sup>116</sup> See, e.g., *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *Gregg v. Georgia* 428 U.S. at 173(explaining that any penalty imposed must be in accord with the “dignity of man.”). As I explain later in more detail, this definition of dignity has something to do with the manner in which one is punished, the right to the recognition of one's humanity when considering injuries caused by punishing behavior.

<sup>117</sup> See *supra* at 40-42.

<sup>118</sup> See, e.g., Drucilla Cornell, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT 168 (1995) (describing harassment using a Rawlsian framework); Bernstein, *supra* note \_\_\_\_ **Error! Bookmark not defined.** (relying on Kant's work on dignity)

<sup>119</sup> Some scholars have argued that the discussion of dignity in legal decisions is typically underdeveloped and undertheorized. See R. George Wright, *supra* note 104 at 1397. Goodman, *supra* note 106 at 747 (describing the concern that “the role of human dignity in our constitutional jurisprudence is episodic and underdeveloped.”).

In Fourteenth Amendment and Title VII cases dignity occasionally appears as a secondary justification for why race and gender discrimination inflicts injury, typically after courts justify their decisions using an equality paradigm.<sup>120</sup> Dignity then can be characterized as equality doctrine’s “poor cousin” in anti-discrimination doctrine: the two values are undeniably related, although equality gets the lion’s share of attention.

The two concepts, however, also are sometimes conflated in judges’ minds.<sup>121</sup> Laying out the equality justifications for sexual harassment protections, Guido Calabresi explains, “Do we want a workplace in which men and women are equally free to talk like swine and demand sex from those who are below them? Or do we want equality of a different sort that says: “I have respect. You must respect me for what I am.” The swift move from equality to respect elides a certain basic question that is at the heart of Calabresi’s view. We must ask what does it mean to “have respect” for another person? How much respect, and what kind is necessary as a baseline proposition when examining anti-discrimination challenges? As a first step in grounding our understanding of dignitary harm, we should look to dignity’s definition in early anti-discrimination cases, tracing how the understanding of this value gets crafted over time.<sup>122</sup>

Review of the Fourteenth Amendment cases shows that two kinds of dignity have been recognized as significant under the 14<sup>th</sup> Amendment – public dignity and private dignity. By public dignity, I am referring to the Court’s concern about public humiliation, losing standing in the eyes of one’s peers when one is subject to discrimination. In contrast, private dignity refers to the personal shame one experiences when one is made to feel inferior because of one’s race or sex. This kind of injury occurs even when there is no one else present to experience the dignitary slight except the target and the harasser.<sup>123</sup> Both concerns are raised in Supreme Court anti-discrimination cases. For example, in *Heart of Atlanta Motel, Inc. v. United States*, the court explains that “[t]he dignity that all human beings share requires that they be accorded equal respect. Denying equal access to public establishments results in the deprivation of ‘personal dignity.’”<sup>124</sup> This comment may be read to concern both public dignity — to the extent the concern is the public humiliation one experiences when being denied accommodations, and private dignity — to the extent the concern is that

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<sup>120</sup> Goodman, *supra*, note 106 at 758 (explaining that plaintiffs raising Fourteenth Amendment claims for equal access to education and accommodations often argue that their dignitary interests are compromised when they are denied equal treatment on the grounds because of racism and/or sexism).

<sup>121</sup> See Guido Calabresi, *Perspective on Sexual Harassment Law* in NEW DIRECTIONS IN SEXUAL HARASSMENT LAW at 49.

<sup>122</sup> Orit Kamar, *Israel’s Sexual Harassment Law* at 564 (explaining that sexual harassment law was “legally formulated in the context of the right to equality”); Baer, *supra* note \_\_\_ at 591.

<sup>123</sup> For a further discussion of this split, see Edward J. Eberle, *Human Dignity, Privacy and Personality In German and American Constitutional Law*, 1997 UTAH L. REV. 963, 971 (discussing the notion of outward focused dignity and inward focused dignity in German and American constitutional jurisprudence).

<sup>124</sup> *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 250 (1964)

“personal” dignity is compromised in such interactions, a reality even when no third party is present. The two types of injury also appear in *J. E. B. v. Alabama, ex rel.* Writing for the majority, Justice Blackmun explains, the “assumption that [women] hold particular views simply because of their gender is practically a brand upon them, affixed by law, an assertion of their inferiority. It denigrates the dignity of the excluded juror, and, for a woman, re-invokes a history of exclusion from political participation.”<sup>125</sup> Here, the Court’s concern about “branding,” sounds in the nature of a public dignity concern, the effect of being excluded from a jury based on one’s gender. In contrast, the concern about women being reminded of their history of subordination sounds like a private experience of dignitary harm, no less significant for its failure to have immediate social implications.

When one focuses on discussions in Title VII cases, dignity again appears in the understudy’s role. In *United States v. Burke*, for example, the Court notes that Title VII can be treated as a dignitary tort, and that Congress recognized that it was intended to protect workers’ “self respect” and “dignity.”<sup>126</sup> Although the Supreme Court focuses on equality considerations when it defines behavior constituting sexual harassment, it includes actions that are “threatening or humiliating,”<sup>127</sup> a characterization that reminds us of one’s dignitary interests in avoiding coercion or public degradation. The two faces of dignity are also present in appeals courts’ decisions, with courts recognizing that “sexual harassment strips the victim of dignity and self respect.”<sup>128</sup> Courts adopting this view recognize that it “is [the judiciary’s] role to enjoin and remedy predatory workplace conduct so that all workers may earn a living with dignity, free from sexual harassment.”<sup>129</sup>

## 2. Insights from Feminist Legal Theory

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<sup>125</sup> *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

<sup>126</sup> *United States v. Burke*, 504 U.S. 229, 246 (1992).

<sup>127</sup> *Harris*, 510 U.S. at 21-23. In *Meritor*, another seminal decision, the Court characterizes sexual harassment as including comments that constitute “ridicule” or “insult,” more specifically connecting harassment to a concept of dignity based assault. See *Meritor*, *supra* note 3 at 60.

<sup>128</sup> *Weeks v. Baker & McKenzie*, 66 FEP Cases (BNA) 582, 582 (Cal. Sup. Ct. 1994).

<sup>129</sup> *Holly D. v. California Institute of Technology*, 339 F.3d 1158 (9<sup>th</sup> Cir. 2003). See also *Andrews*, 895 F.2d at 1485-86 (explaining that an environment filled with obscene comments and materials is “highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.”); *Nicholas v. Frank*, 42 F.3d 503, 510 (9<sup>th</sup> Cir. 1994) (“Nothing is more destructive of human dignity than being forced to perform sexual acts against one’s will.”) More broadly stated, this form of indignity would extend equally to being used randomly and commonly as an object for sexual titillation, or being reduced solely to that role.

In *Treating Sexual Harassment with Respect*, Alice Bernstein also offers a definition of dignity or respect that focuses on negative duties.<sup>130</sup> She explains that sexual harassment is a violation of Title VII because it denies its targets “recognition respect,” the esteem each individual is entitled to as a “separate, unique, and independent human being.”<sup>131</sup> In defining this right to “recognition respect,” she identifies three duties that social actors in the workplace owe to one another to maintain certain respect conditions.<sup>132</sup> These duties require that 1) the “agent not treat another person as only a means of achieving the ends of the agent”; 2) that the agent has “a duty to refrain from humiliating another” and 3) that the agent “must not engage in conduct that rejects or denies the personhood or self conception of another.”<sup>133</sup> However, it is not clear how we would interpret these abstract principles to apply outside of the workplace.

The insights we developed from the Fourteenth Amendment antidiscrimination cases add additional dimension to Bernstein’s concept of recognition respect, one that emphasizes the importance of social conventions. Specifically, they suggest that recognition respect has personal symbolic value as well as public symbolic value. One wants to have a personal, private sense of assurance that one has been respected. However, one also wants to feel as though other social actors in the world, persons who witness our treatment, realize that we are being treated in a respectful manner. Antidiscrimination law is primarily concerned with those respect expectations that stem from recognized social conventions. It is not concerned with a person’s claim that he interpreted an action as being disrespectful unless it matches an existing or emergent social convention we understand to govern a particular space. These respect conventions will be based on three different considerations, specifically, our understanding of : the role of the target, the role of the alleged harasser, and the needs of the given institution in which they find themselves. These considerations must be weighed in an analysis that gives full consideration to the dialogic relationship between these three actors. Stated alternatively, my dignity based sexual harassment framework is based on the understanding that respect expectations are based on complex, potentially still evolving but carefully negotiated social understandings about the social conventions that govern a particular space. I build upon this insight in the next section, and offer courts a method for identifying the

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<sup>130</sup> Specifically, Bernstein argues in favor of shifting from a reasonable person standard to a respectful person standard. Bernstein, *supra* note 7.

<sup>131</sup> Bernstein, *supra* note 7 at 487, 491.

<sup>132</sup> Bernstein’s definition of dignity is consistent with scholars who describe dignity as a protective right - a right that is defined by the negative duties it impose on others. William Nelson, *Varieties of Rights: How They Work, How They Are Justified*, 13 SOCIAL THEORY AND PRACTICE 360, 374-375 (July 2005). Nelson explains that protective rights concern one’s interest in avoiding ill-treatment and therefore are distinguishable from more concretely defined affirmative rights, which must be more detailed as they define the scope of the *right holder’s* permissible actions. Even these negative duties must be broadly defined, as the potential scope of a protective right become most clear when the right is threatened with being compromised or invaded.

<sup>133</sup> Bernstein, *supra* note 7 at 489. These forms of instrumentalization can include treating the target as a means of sexual gratification or, as Katherine Franke explains, as a means to perform one’s gender or police the boundaries of gender. See Franke, *supra* note 7 at 171.

institution specific facts, as well as the value assumptions that shape respect demands in different institutional settings.<sup>134</sup>

## **B. The Dignity Model**

Courts using my dignity model to formulate non workplace sexual harassment doctrine should weigh three considerations: 1) the fair or reasonable dignitary expectations of the target as a consequence of her position in a particular institutional setting; 2) the institution's responsibility to protect the target from invasion of these interests; 3) and the target's actual agency. Each prong of the analysis is considered in turn.

### **1. The Reasonable Dignitary Expectations of The Target**

How do we go about identifying the reasonable dignity expectations of the target?<sup>135</sup> Courts can identify the scope of these expectations by examining three issues: the harassment target's assigned role within the institution; the extent to which harassment interferes with this defined role — and how it achieves that end; and an inquiry into whether the conduct complained of plays some role in institution's functioning.

#### *a. The Target's Role In The Institution*

The first consideration courts should weigh in assessing the individual's role in an institution is to examine the respect expectations the institution cultivates. If the institution's rules or customary practices appear to recognize the dignitary interest the complainant is attempting to protect, this fact should be considered as part of the court's analysis of whether the target has suffered a dignitary harm. These institutional rules may outline the minimum respect conditions the institution has identified as necessary to execute one's responsibilities in the institutional environment or partake of

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<sup>134</sup> This understanding is related to the conception of recognition respect because that principle requires one to "look at the object [or agent in this case] with the intent of determining how to act vis-à-vis that object." Bernstein, *supra* note 7 at 483.

<sup>135</sup> The ambiguous and potentially confusing nature of this inquiry becomes clearer when we attempt to define the institution-specific dignity rights of prisoners. Reasonable people (and not so reasonable people) may disagree about the dignitary rights a prisoner should be afforded. Some people will assume that the dignitary interests at stake in prison cases are fundamentally the same as in workplace cases. Others will be inclined to conclude that inmates have no dignitary rights, based on the proposition that indignity is a necessary and constitutive aspect of the penalty paid by those who are incarcerated. Still others will recognize that prisoners have some dignitary interests despite their incarceration, and that harassment protections are merely an attempt to inquire whether the harassing actions alleged interfere with these remaining dignitary rights, and do so in an impermissible fashion. Indeed, unless the discussants are provided with a framework that helps them identify prisoners' potential dignitary interests as well as the reasons the law might be prepared to recognize these interests, it is likely their analyses will incorporate stereotyped and naturalized assumptions about the subordinate status of prisoners and the demeaning conditions in prisons. Indeed, in order for individuals to engage in dialogue with one another, in order for each person to sort out her own thinking, some additional guidance is required.

the benefits the institution offers.<sup>136</sup> Alternatively, these rules may refer to the ideal respect conditions institution officials believe should be maintained. Regardless of their intended purpose, these rules contain important insights into how the institution assumes those participating in its operation should relate to one another. Also, courts should look to the specific justifications or claims the institution makes about the need to limit certain dignitary rights in order to accomplish the institution's goals. Under my analysis, the individual is therefore entitled to the preservation of dignitary interests cultivated by the institution, and any pre-existing dignitary rights that are not inconsistent with the institution's functioning.

Some general caveats must be offered about this portion of the analysis. First, an institution's claims about the need to compromise the complainant's dignitary rights cannot always be accepted at face value. Courts must question whether these dignitary compromises are truly necessary. Second, the assessment the court conducts when weighing the alleged need to cabin an institutional actor's dignity interests will depend on whether the actor's participation in the institution is voluntary or involuntary. In circumstances where the individual's role is voluntary, she may have made a decision that the benefits offered by the institution counter the dignitary limitations she must endure. In circumstances where the individual being asked to make dignitary compromises is forced to participate in the institution, these compromises must be additionally scrutinized, as the compromises required are not being met with a reciprocal agreement to provide some benefit to the individual forced to make this sacrifice. Therefore, while the respect expectations the institution cultivates and the specific concerns it presents will be helpful in this inquiry, courts should initially be skeptical about the compromises the institution claims are necessary to achieve its goals.

Also, judges should bear in mind that the inquiry conducted under this analysis is an attempt to identify something close to the *ideal* respect conditions that an individual is entitled to by her functioning within an institution, not the less than ideal circumstances that may currently exist in a given case. Judges also must be mindful that in some cases cultural biases about certain institutions or the facts of a particular case will slant their views. Also, they will encounter cases where the institution's normal operations are infected with sex-based bias and consequently should not serve as the ideal baseline used to formulate the litigant's reasonable dignitary expectations. For example, the fact that prisons currently allow guards to use gender-based epithets is not a basis for arguing that inmates have no basis for expecting more respectful treatment.<sup>137</sup> Courts should be mindful that the general goal under this first prong of the analysis is to develop a better understanding of what the

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<sup>136</sup> For example, Title VII workplace sexual harassment doctrine allows claims based on voyeurism, recognizing the right to be free from unwanted sexual attention. Claims about harassing voyeurism, however, would be more complicated in prison cases, given that guards are required to watch prisoners. Claims about voyeurism would equally be different in school peer sexual harassment cases, where children, unfamiliar with the decorum and norms of adult interactions, may stare at one another for prolonged periods, not recognizing the offensive nature of their actions. The claim of injury from voyeurism cannot be understood without considering the specific institutional factors that change the nature of the claim.

<sup>137</sup> See, e.g., *Howard v. Everett, et al.*, 208 F.3d 218 (8th Cir. 2000) (“Mere threatening language and gestures of a custodial officer do not amount to constitutional violations.”).

harassment target's function is within a particular institution, and what she may reasonably expect as a baseline level of respectful conduct given her role in that institution.

b. *The Harassment's Role In Effecting Or Compromising The Institution's Functioning*

The second and third considerations — regarding the role harassment may play in an institution's functioning, initially may seem strange. Indeed, it is difficult to imagine a scenario in which an employer would argue that it is necessary to allow its employees to make gender-based harassing comments in order to conduct its business. Courts should be prepared however to deal with these arguments when confronting harassment claims in different institutions. For example, in prison harassment cases, prison officials might argue that verbal harassment is unfortunately part of the disciplinary arsenal officers have at their disposal. While this approach to disciplining prisoners is far from ideal, it is certainly preferable to violence. Officials may argue that comments that express gender hostility are quite effective at shocking and intimidating inmates who act out, and ensuring that they comply with orders. The court should ask, is it appropriate to honor this justification, or does allowing guards to use these epithets as a disciplinary tool seem inconsistent with our larger anti-discrimination goals?

Different arguments would be raised in cases concerning military officers' complaints regarding gender-based verbal harassment.<sup>138</sup> Military officials may claim that boot camps and other training regimes sometimes require officers to use gender based insults, as a way of breaking down the recruit's subjectivity and make her over into a proper soldier. The whole idea behind exposing the recruit to this kind of abuse, it would be argued, is to break down her sensitivity about such issues, and encourage her instead to see herself not in gender based terms, but as an officer. In considering this claim, the court must determine whether gender based insults should be permitted as part of the training arsenal available to officers to accomplish their goals. Even if the court created an exception to accommodate this specific training interest, the exception would only apply in a narrow band of cases and, certainly, would allow claims based on verbal harassment in other circumstances.<sup>139</sup>

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<sup>138</sup> A framework that permits a more principled analysis is also needed for military cases. See Douglas R. Kay, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Navy Personnel In the United States Navy*, 29 CAL. W. L. REV. 307 (1992) (criticizing military courts' failure to use a clear and consistent definition of actionable sexual harassment when interpreting military justice provisions).

<sup>139</sup> For example, if a woman's co-worker in a Title VII case leaned into her cubicle and told her she was "driving him crazy," implying that he sexually desired her, the threat register would be different than in other institutional circumstances. Indeed, under the severe or pervasive standard, it might be entirely disregarded. However, if a prison guard made the same comment to a prisoner while she was naked in the shower, or while blocking her path and holding a taser, would have a different register. The same comment, again, would have a different register if a teacher makes the comment to a student during detention. In all three circumstances, the relative power of the target as compared to the harasser, as well as the institutional resources at the harasser's disposal change the intensity or threatening nature of the comment made.

The harassment scenarios I have outlined above only briefly explore the ways in which this focus on institutional position can help courts highlight the key disputes in non-workplace sexual harassment cases. These scenarios show that the need for particular exceptions or the need to create subcategories of harassment (which would be analyzed under different standards) becomes clearer when courts focus on the parties' dignity expectations, as opposed to analogies from the Title VII standards.

## 2. The Institution's Responsibility to Protect the Target From Harassment

The second prong of the dignity inquiry, the one focusing on the institution's responsibility, is at its heart an inquiry into whether any relationship of trust or fiduciary duty that binds the individual and the institution. In conducting this assessment, courts should inquire into whether the harasser is using institutional power to coerce the target in some manner. In cases where an institutional agent appears to have engaged in coercion, the institution's responsibility to protect the target should of course include a responsibility to protect the target from its agent's abuse. Also the court should consider whether the target's institutional position has required her to give up certain rights or freedoms that might otherwise allow her to protect herself from harassing conduct, another consideration that would counsel in favor of providing the target with broader protections.

An additional, critically important inquiry, is the court's examination of the doctrinal norms that inform the constitutional or statutory provision used as a basis for extending sexual harassment protections in a particular setting. For example in school cases, the limits of Title IX have been cited as the reason why courts should not adopt an agency theory to assess a school's liability when a teacher sexually harasses a student.<sup>140</sup> Parties variously may argue that the doctrinal imperatives of the Eighth Amendment counsel in favor of limiting or expanding prison officials' responsibility to protect inmate harassment targets. Typically, however, there is substantial negotiation room in interpreting the legal authority used to support sexual harassment protections. Indeed, the existence of this negotiating room emphasizes the need for a structured inquiry that allows one to consider the institution specific facts that counsel as to how the fiduciary relationship – if one exists – between the institution and the target, should be factored into the sexual harassment doctrine the court develops.

Additionally, the court should be aware of the institution specific reasons officials raise regarding their inability to exercise control over the particular harassment problem. For example, prison officials may argue that prisons are stressful places and officials should not be held liable for every ill-advised comment an officer makes in anger. Also, prison officials may argue that officers may make regrettable comments because in some cases they are goaded by inmates who make similar offensive comments. Officials will argue that, because these kinds of problems are unavoidable, the State should not be held liable for officers' intermittent use of gender-based sexual epithets. Given these arguments, a court might still hold an institution responsible for verbal gender

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<sup>140</sup> *Canutillo Independent School District v. Leija*, 101 F.3d 393 (collecting Title IX cases alleging teacher sexual harassment and discussing actual notice standard used to hold a school liable for its failure to protect a student from teacher sexual harassment).

based harassment; however, it could consider creating a narrow “heat of passion” defense to protect officers who inadvertently engage in such conduct. However, the court should not solely rely on prison officials claims. Instead, the court’s analysis must consider the training the prison provides to officers regarding how prisoners should be treated, the rules and disciplinary procedures it has (or has not created) to ensure officers treat prisoners properly, and the attention it has devoted to gender based verbal harassment as compared to other similar problems.

In the military, individual officers may offer institution based reasons to excuse their conduct, arguing that the routine “horseplay” that occurs in military environments invariably includes gender based epithets, and the problem is so rampant that it is unfair to hold them responsible for this conduct. Courts also should interrogate the horseplay argument, recognizing that what *is* is not what necessarily *should be*. They must also weigh the fact that law shapes institutional culture and whether the risk of liability would cause officers to change how they relate to one another in potentially positive ways. Notably, school officials could make similar arguments about uncontrollable horseplay in schools, citing children’s immaturity as a reason for why schools should not be held liable for peer sexual harassment claims under Title IX. School officials could argue that it is unfair to ask a school to take on liability stemming from dysfunctional behavior children learn from people outside of school since they have little ability to prevent this kind of influence. In weighing school officials’ arguments about schools’ limited control over students, courts should take notice of the disciplinary regimes that already exist in schools, and whether schools have measures in place to address other forms of harassment and whether they actually rely these measures to attend to students’ dignity concerns. The court could also decide to review information about child psychology and mental development to establish whether there is sufficient basis to believe schools that students could be disciplined sufficiently to prevent them from engaging in sexual harassment. As one thinks more specifically about the dignity analysis, one realizes that there is a wide range of materials that might be relevant to determining what kind of doctrinal standards that should be formulated for a given institutional context or situation. At present, however, the unstructured inquiry courts use does not signal when they need additional information, and allows them instead to simply elaborate on establish doctrinal tools based on their assumptions about the needs of parties in a given institution or location.

### 3. The Target’s Actual Agency

The last prong of the analysis requires us to ask, what agency or power does the target have? Two kinds of agency should be considered: whether the harassment target is capable of consenting to certain sexualized treatment;<sup>141</sup> whether and what kinds of power are available to a target attempting to rebuff her harasser.

#### a. *Consent*

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<sup>141</sup> Bernstein explains that “recognition respect is implicit in the legal and extralegal concept of consent, especially informed consent.” Bernstein, *supra* note 7 at 485. See also, Wright, *supra* note 104 at 1397 (discussing the range of circumstances in which we might decide that consent is ineffective)

When determining whether the target is capable of consenting to certain treatment, courts must carefully consider the nature of the allegedly harassing conduct. In some cases we may be unprepared to allow the target to consent to certain kinds of harassing treatment.<sup>142</sup> For example, if a guard promises an inmate cigarettes in exchange for allowing him to step on the inmate's penis, the potential for harm (among other considerations) counsel against recognizing the inmate's right to consent to this kind of treatment.<sup>143</sup> Alternatively, we may want to declare the consent given ineffective if a target has insufficient information to make an informed decision about the treatment in question.<sup>144</sup> Consider, for example, the teenager who consents to a degrading sexual relationship with a teacher because she has no experience with other sexual relationships and therefore has insufficient experience to determine whether she is being exploited. Finally, we may be prepared to declare consent ineffective when the relative power imbalance between the target and the harasser make it impossible for the target to "volunteer" to anything. When a superior officer promises a soldier in Iraq that she will be exempt from dangerous assignments, as long as she has a sexual relationship with him, the relative power imbalance between the soldier and her superior officer, as well as the threat of harm she faces, should be sufficient to declare any consent given null and void.

#### b. *Resistance*

The second agency-related question, regarding the harassment target's power to resist, also requires courts to take account of the institution specific facts that bear on the power available to the harassment victim. When considering whether the target has the power to rebuff her harasser, courts should first consider whether the institution has made reasonable complaint procedures available to the target; whether the target is in a position to use them without risk of retaliation, and whether the target is intellectually sophisticated enough to negotiate these complaint mechanisms. Courts should also consider what kinds of retaliation the target is likely to suffer as a consequence of her resistance, and whether it is fair to force her to face this retaliation as part of the cost of protecting herself. This inquiry will also require an understanding of the harasser's relative institutional power, which bears on the target's powers of resistance. Taken together, these facts should help courts determine what kind of evidence they will require of plaintiffs to establish that they were not interested in the sexual advances being made.

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<sup>142</sup> While this discussion has primarily focused on sexual harassment, it must be emphasized that much of prison gender related harassment is effected through non-sexual behavior expressing gender specific hostility. Vicky Schultz has noted that workplace sexual harassment doctrine has become overly focused on cases involving sexualized treatment. *See generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683 (1998). The prison cases show a great range of non-sexualized but gender specific hostility as well. *See* Coleman & Calhoun, *supra* note 83 at 110. When one analyzes these cases under a dignity paradigm, questions of unwelcomeness and consent become even more important as, even if an individual would consent to disrespectful treatment, there are larger social consequences to other members of that individual's gender or racial group that should be considered in analyzing harassment in such cases.

<sup>143</sup> *See U.S. v. Walsh* 27 F. Supp. 2d (WDNY 1998) (recognizing male inmate's Eighth Amendment excessive force claim based on "trading" relationship in which he allowed guard to step on his penis in exchange for cigarettes).

<sup>144</sup> Wright, *supra*, note 104 at 1401.

The inquiry into these questions promises to provide courts with a more developed understanding of the doctrine required in particular institutional circumstances. For example, one would need an understanding of the complaint regimes available to military officers who complain of harassment, whether they are used, and the types of retaliation these officers might suffer if they complain of harassment. These factors might counsel against the development of an unwelcomeness doctrine in some military cases. In Part III, I provide a detailed assessment of the factors that suggest prisoners' agency is sufficiently compromised that the unwelcomeness doctrine should not be used to analyze their claims. These questions about agency would also help courts sort through the questions that should be asked when developing doctrine in the school sexual harassment cases. The agency inquiry in the school cases highlights the fact that school sexual harassment doctrine should be structured in a manner that accounts for the different levels of sophistication that students have at different points in their educational careers.

Again, this brief review merely attempts to identify some of the insights that a dignity or respect based framework produces in analyzing institution specific harassment claims. No attempt has been made to comprehensively identify all of the considerations that should be raised under the dignity framework, or to fully resolve the issues already described. Skeptics may say that the questions I've identified would likely arise even without this dignity framework. However, as Part III demonstrates, many of them do not appear in the Eighth Amendment cases and, to the extent they may have been factored into the analysis, they have not been considered in an orderly fashion. By focusing attention on the dignitary interests held by each target in each institutional circumstance, and the institutional factors bearing on the institution's responsibility (or practical ability) to address harassment issues, courts will have a reasonable basis upon which to frame sexual harassment protections. If they rely on this framework, courts more likely will generate principled sexual harassment protections that take account of the major areas of concern that should be weighed in new cases.

## **B. The Dignity Model & Prisoners' Eighth Amendment Protections**

With the abovedescribed structuring questions in mind, one can develop a better sense of an inmate's reasonable dignitary expectations, as well as a critique of the existing Eighth Amendment doctrine. Normally, my analysis could easily proceed from the assumption that the harassment target enjoys the same dignitary rights as the average citizen. With prisoners, however, there is an assumption that inmates have fewer dignitary rights, because this is part of the cost of incarceration. However, as I explained in Part II prisoners do not lose all of their rights when they are imprisoned; they merely lose rights that are inconsistent with the experience of being a prisoner or rights that would interfere with prison functions.<sup>145</sup> Therefore, the question that must be considered is whether there is something about the status of being a prisoner that would justify limiting a prisoner's

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<sup>145</sup> This is the analysis conducted under *Turner v. Safley*, 476 U.S. 1139 (1986), is the inquiry when prisoners allege that a prison policy interferes with the exercise of their constitutional rights.

Fourteenth Amendment protections from sexual harassment.<sup>146</sup> Indeed, the prison sexual harassment cases present a unique opportunity to think about the interplay between the Fourteenth Amendment and Eighth Amendment protections prisoners enjoy. They force us to ask, does the Eighth Amendment require that inmates be afforded less protection from sex discrimination than average citizens?

Although the Supreme Court has not directly addressed this question, the answer appears to be no. The scope of inmates Fourteenth Amendment equal protection rights was recently considered by the Supreme Court in *Johnson v California*.<sup>147</sup> In *Johnson*, the Court reviewed an inmate's claim that the California Department of Corrections had violated his Fourteenth Amendment equal protection rights by using a racial segregation policy in housing new prisoners. All new transfers to the prisoner were placed in double cells with an inmate of the same race; prison officials argued that this was necessary to avoid racial violence in the prison. The Court did not rule on the constitutionality of the racial segregation policy, but clarified that this policy must be subject to "strict scrutiny" as it "threatened to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." The Court's concern in *Johnson* was the deleterious symbolic effect the segregation policy had, to the extent it affirmed the policy of race-based differentiation and exclusion. Yet similar stigmatic harms are at issue in cases involving sexual harassment. Sexual harassment raises the same public humiliation and private shame concerns that animated the decision in *Johnson*. Consequently, it is reasonable to believe that the court similarly would be wary of cabining prisoners' sexual harassment rights based on the special needs of prison officials or out of some deference to the punishments they create, as this harassment is expressive of and encourages further sex-based hostility.

In light of the Fourteenth Amendment rights prisoners enjoy, as well as their right to dignity under the Eighth Amendment, we can apply the dignity framework to the prison sexual harassment cases with some confidence. Both of the constitutional provisions provide courts with a fair degree of latitude to correct the sexual harassment doctrine already created, as well as craft new sexual harassment doctrine offering prisoners more generous protections. This, however, is only the beginning of our analysis. The dignity framework still may provide courts with reasons prisoners' rights in this area should be cabined given the institutional realities the actors involved face.

### 1. The Dignity Expectations of Prisoners

Under my dignity analysis, the first question to be considered is, what are the fair and reasonable dignity expectations of prisoners? When one looks to the prison rules and criminal sanctions concerning guard sexual harassment that are in place in most states, one sees that prison officials and legislators have recognized that prisoners do have an interest in being protected from

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<sup>146</sup> To the extent one claims that the dignity interests in this area should be interpreted based on Eighth Amendment concerns, the analysis in Part II demonstrates that there is nothing in the doctrinal norms of the Eighth Amendment that prohibits the recognition of a broad range of sexual harassment protections.

<sup>147</sup> 125 S.Ct. 1141 (2005).

sexual harassment, at least when it takes some physical form. The statutes tend to focus on unwanted touching and penetration.<sup>148</sup> Prison rules, however, tend to be broader, prohibiting inappropriate and overly familiar relationships between inmates and prisoners.<sup>149</sup> While these rules and regulations are helpful, courts will have difficulty making determinations about prisoners' respect expectations with regard to verbal harassment. Consequently, we would expect to see more divergence in court analyses as to whether and when these verbal harassment complaints should be considered actionable under prisoner sexual harassment doctrine.

The next question that should be considered in examining a prisoner's dignity expectations is, how does harassment interfere with or potentially facilitate the goals of the institution? This factor requires us to consider both the scope and kind of touching that will occur in the course of the institution's normal functioning. Because physical searches are a necessary and essential to the security of prisons, on first gloss, this understanding might compel one to conclude that inmates' dignitary protections with regard to this treatment should be fairly low. The issue, however, is not the physical searches themselves, but the manner in which they are conducted. The cross-gender search policies shape are essential to our determination. The question is, are these cross gender searches and other practices that create a sexualized environment in prisons necessary for the prison's functioning? If we assume that some touching must occur, we know that the circumstances that require this kind of intimate touching are limited. Consequently, whatever limits we impose on prisoners' dignity claims because prison security requires some search procedures, we should bear in mind that these justifications do *not* affect prisoners dignity interest in being free from wholly *ultra vires* touching. Therefore, the dignity inquiry requires us to clearly acknowledge that prisoners dignity expectations, fairly viewed, do not include protection against a certain amount of intimacy violating touching, as they must be searched to ensure institutional security. Consequently, we may need a safe harbor for officers who inflict injury on prisoners in the course of following normal prisoner security procedures.

## 2. Institutional Responsibility

This second part of the dignity analysis requires us to consider questions of institutional responsibility. When we turn to the institution specific considerations that bear on this question, we see that the state also makes an affirmative representation to prisoners' that creates new rights and expectations. Prisoners are told that their detention is intended to make them into better citizens, to teach them how to relate to themselves and to others. They are committed to the state's care, custody and control. Given that their options for escape and resistance are fairly limited, they quite reasonably would develop the expectation that prison officials will protect them sexual harassment from guards and staff. In this context, it is reasonable to characterize the prison's reform project as creating a reciprocal obligation on the institution's part to provide protection for the prisoner.

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<sup>148</sup> These statutes are reviewed in detail in the Amnesty International report *Abuse of Women In Custody: Sexual Misconduct and Shackling of Pregnant Women* at 9. At the time of the report only Minnesota, Oregon, Utah, Vermont and Wisconsin did not have criminal laws prohibiting guards from engaging in this misconduct.

<sup>149</sup> *Id.* The report also discusses the role of prison rules in setting forth standards for inappropriate behavior.

Also, I would argue that prisons' institutional responsibility obligations are fairly broad, because of the cross gender search and surveillance policies prisons use. Male guards are permitted in the course of the performance of their duties to watch female inmates in various states of undress, including monitoring prisoners in showers<sup>150</sup>, assisting with or witnessing strip searches,<sup>151</sup> or conducting pat frisks that require members of the opposite sex to touch intimate parts of prisoners' bodies.<sup>152</sup> Because prison officials give guards broad discretion to engage in cross gender touching and surveillance, they have created an environment in which there is a high risk of abuse of discretion.<sup>153</sup> Even worse, these policies may have created a moral hazard for guards. Specifically, some would argue that because prison rules are based on the proposition that members of the opposite sex must submit to cross gender touching, it encourages gender specific exploitative impulses in male officers whom might otherwise not have them. Additionally, one worries that certain men may be attracted to the profession precisely because they are interested in exploiting this authority. These facts counsel in favor of providing the inmate with a clear remedy for officers' abusive use of these policies.<sup>154</sup> Overall, these factors indicate that prison officials have a heightened responsibility to address sexual harassment perpetrated by guards.<sup>155</sup>

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<sup>150</sup> See Amnesty International, *Not Part of My Sentence* at 40.

<sup>151</sup> Amnesty International, *Not Part of My Sentence* at 43. The report describes a series of incidents in 1995 in a Massachusetts state prison during which male guards, as part of a training exercise donned masks and, screaming abuse, roused the female prisoners in their custody from their beds. The officers then forced the women to submit to strip search in front of male and female staff, as well as provide urine samples. Improper visual surveillance, while not actionable alone, can cause serious emotional injury. Amnesty International, *Not Part of My Sentence* at 41 (describing suicide of Florence Krell in 1998 after she wrote letters to sentencing judge and her mother complaining of abuse by guards, specifically about being left naked in her cell and observed by male officers).

<sup>152</sup> Amnesty International, *Not Part of My Sentence* at 39 (explaining that "much of the touching and viewing of their bodies by staff that women experience a shocking and humiliating is permitted by law.") The report also discusses complaints of female prisoners in Arizona jails that guards. Even if such conduct is viewed as *ultra vires*, a larger portion of male guards' authorized and "appropriate" actions are still experienced as harassing. See Amnesty International, *Not Part of My Sentence* at. at 43 (describing woman's complaints about standard prison "eyeball procedure" which allowed guard to leave her naked in her cell during observation). When the inmate attempted to stop the guard from watching her, she was naked tied to the floor in four point restraints for the remainder of the observation period.

<sup>153</sup> Prison officials typically argue that these cross gender policies are required because it would be too expensive to staff women's prisons with only female guards, or because they are required by union contracts and antidiscrimination law to allow officers who want to be staffed in cross gender assignments. However, these concerns are unrelated to the legitimate penological obligations they owe to prisoners, and do not mitigate their responsibility to address the dangers attendant to these policies.

<sup>154</sup> Sociological literature bears out the concern that these cross gender search policies in fact aggravate the abuse problem, and raise questions about the way the administrative structure in prisons may aggravate exploitative impulses in guards. Numerous scholars have commented on the sexualized nature of the prison environment. When viewed against the backdrop of sociological data indicating that men often read women's neutral behavior to contain sexual overtures, one realizes that guards' discretion to watch nude or partially nude inmates increases opportunities and motivation for miscues, and these miscues are likely to be acted upon given guard's general wide discretion to intimately touch inmates. These concerns counsel that prisons have a special obligation to intervene in

### 3. Prisoners' Agency

The last part of the analysis, which deals with questions of agency, has already been covered in large part by the discussions in Part III. Here I will simply say that many factors counsel that inmates have insufficient information as well as insufficient power to “voluntarily” consent to sexual interactions with guards. Additionally, they have limited power to resist, given the complaint regimes available to them and the great risk that they will face serious retaliation from guards.<sup>156</sup> Rather than reviewing these concerns again here, I merely note that scholars have also identified special features of the prison population, including high rates of physical and sexual abuse that suggest that this constituency is more likely to be passive in the face of abuse.<sup>157</sup> These features, coupled with the constant requirement that they submit to authorized but unwanted touching, will cause some inmates to feel they have no real power to object to the treatment of their bodies.<sup>158</sup> Consequently, the presence of more accessible prison complaint regimes may have less effect on reporting rates than one might hope.

#### **B. The Current Eighth Amendment Sexual harassment Constructs**

In the next section I use the insights from Section A to examine the existing Eighth Amendment doctrinal constructs. I question whether they adequately address the dignity interests of prisoners. I also suggest alternative doctrinal constructs that might take better account of institutional conditions.

##### I. Institutional Responsibility & the Severe or Repetitive Standard

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cases where guards have arguably abused their discretion and used prison search policies to harass prisoners, given the risks they have created.

<sup>155</sup> Coleman & Calhoun, *supra* note 94 at 109 (noting that inmates describe this as “in the line of duty” harassment, as they have no ability to avoid sexually harassing conduct that occurs under cover of an authorized cross gender pat frisk).

<sup>156</sup> Cindy Struckman Johnson, et. al., *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 THE JOURNAL OF SEX RESEARCH 217-227 (2002).

<sup>157</sup> Persons with a history of physical and sexual abuse are also less likely to complain about sexual harassment when they are incarcerated. See Faye Sultan & Gary Long, *Treatment of the Sexually/Physically Abused Female Inmate: Evaluation of an Intensive Short Term Intervention Program*, 12 JOURNAL OF OFFENDER COUNSELING, SERVICES AND REHABILITATION 131, 132 (1988) (surveying literature reporting that adult sexual abuse victims have low self esteem, low assertiveness, difficulty trusting others and routine feelings of powerlessness in controlling their own destinies. Some studies indicate that as much as 75% of the female prisoner population are victims of prior physical and or sexual abuse. See *id.* at 133. A high number also have a history of drug abuse, a factor that tends to make women less likely to complain about sexual abuse and more likely to fall prey to exploitation. 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 & CRIMINAL JUSTICE 61, 69 (1997).

<sup>158</sup> Coleman & Calhoun, *supra* note 94 at 104-105, 109-110, and 115.

Part II explains that the severe or repetitive test is being used as a standard for determining when an individual tortfeasor will be held liable in the prison cases; it provides that guards must engage in severe or repetitive sexual harassment before they may be individually sued for damages. The standard, consequently, creates a fairly large safe harbor for any activity that gets characterized as low-level or intermittent sexual misconduct. Indeed, under the *Boddie* decision, any activity that does not cause “serious physical or psychological pain”<sup>159</sup> would be treated as low-level inconsequential behavior under the Eighth Amendment analysis. The question to be decided is, does the broad safe harbor created by the severe or repetitive standard seem consistent with the institutional considerations that bear on this issue in the prison cases?

The factors outlined in the above dignity analysis clearly counsel against maintaining the safe harbor. Guards should be held responsible because they are dealing with an extremely vulnerable population. Prisoners are quite literally physically and psychologically captive during their incarceration. Consequently, guards should expect that the inmates likely will be intimidated by an officer’s sexual advances. Prison procedures are also structured to discipline the prisoner both physically and psychologically. Prisoners are encouraged not to question much less challenge a guard’s authority. Under these circumstances, prisoners are more vulnerable to coercion and sexual exploitation. Also because guards are typically trained about inmates’ psychological vulnerability, their decision to engage in sexual harassment should be viewed as morally and ethically culpable behavior.<sup>160</sup> Collectively, when one carefully weighs the special institutional considerations that should shape prison sexual harassment doctrine, one finds there is no reason to provide guards with a safe harbor for what *they* perceive to be “non-threatening” sexual overtures.

Having established this standard as a baseline, we must then consider some the competing factors weighing against the lower standard, namely concerns about chilling officers in the performance of their duties, and creating negative incentives for prisoners. This chilling concern however has limited relevance, for cases involving wholly *ultra vires* conduct. To be clear, we are not worried about chilling officers from making sexual propositions, raping prisoners and engaging in wholly unnecessary and unauthorized touching. Therefore, the prosecution of claims involving *ultra vires* behavior should have very limited chilling effects on officers engaged authorized conduct, as the line between these two kinds of activities is clear. Finally, while it is unclear what the ultimate effect will be, I believe that eliminating this safe harbor will not substantially incentivize prisoners to bring claims about *ultra vires* conduct. The same psychological factors and institutional conditions that make it difficult for women to come forward will continue to exist, even after the creation of a more forgiving standard. On the whole, the balance of equities indicate that inmates who are subject *ultra vires* conduct should not be required to negotiate this safe harbor in order to bring claims against individual guards.

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<sup>159</sup> Again, the “serious physical and psychological pain” standard cannot be justified purely on doctrinal grounds. The standard created by the *Boddie* court is not actually required under the Eighth Amendment in light of the Supreme Court’s rejection in *Hudson* of the “significant injury” requirement.

<sup>160</sup> These factors also counsel that a “reasonable prisoner” standard could be used to determine whether flirtation or sexual overtures would appear threatening to a prisoner.

Concerns about chilling effects are more validly raised when we discuss how a lowered standard might affect what I call the “abuse of discretion case— cases in which officers are accused of abusing their search and surveillance power for personal, prurient purposes. In the course of the performance of their duties, male guards are often required to watch female inmates in various states of undress, including monitoring prisoners in showers, assisting with or witnessing strip searches,<sup>161</sup> or conducting pat frisks that require members of the opposite sex to touch intimate parts of prisoners’ bodies.<sup>162</sup> Because prison officials give guards broad authority to engage in what inmates perceive to be sexually violative behavior, it is very likely there will be a high number of complaints concerning abuse of discretion. Recognizing that these abuse of discretion cases are difficult to resolve, officers might be hesitant to conduct cross gender searches because of fear of liability. Also, using a lower standard in the abuse of discretion cases arguably might incentive an otherwise disgruntled prisoner to bring a false claim and attempt to secure some cash benefit.

Importantly, rather than confront this issue, the *Boddie* decision muddies the analysis when it created the severe or repetitive standard. The *Boddie* court summarily asserts that sexual abuse can “*never serve a legitimate penological purpose*” and, therefore, when it is sufficiently “serious” it constitutes a violation of the Eighth Amendment. Our discussion of the institutional realities in prisons, however, reveals that this statement simply is not true. There is a legitimate penological purpose behind a variety of actions inmates find sexually harassing: cross gender pat frisks, strip searches, and surveillance. Furthermore, a large number of prisoner sexual abuse complaints contain allegations that guards have used legitimate prison search procedures to sexual harass prisoners.<sup>163</sup> Sorting out these abuse of discretion cases is one of the major challenges for the Eighth Amendment abuse cases.

One solution to this problem is to separate out cases involving primarily *ultra vires* acts from claims involving primarily authorized but intimacy violating procedures. Prisoner claims involving these intimacy violating procedures certainly should be permitted; however, some acknowledgment must be made of the more limited dignitary rights prisoners have with regard to surveillance and physical touching. Therefore these cases would require greater proof of intent, which could be satisfied with circumstantial evidence, such as inappropriate comments during a search, searches at inappropriate times, or searches conducted in ways that clearly violate established procedures.

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<sup>161</sup> Amnesty International, *Not Part of My Sentence* at 43.

<sup>162</sup> Amnesty International, *Not Part of My Sentence* at 39 (explaining that “much of the touching and viewing of their bodies by staff that women experience as shocking and humiliating is permitted by law.”) The report also discusses the complaints of several female prisoners in Arizona jails that guards “[w]ithout good reason, engage in frequent prolonged close-up and prurient viewing of inmates during dressing, showering and use of toilet facilities.” Even if such conduct is viewed as *ultra vires*, inmates experience other authorized and “appropriate” guard actions as harassing. *See id.* at 43 (describing woman’s complaint about being left naked in cell under surveillance while hemorrhaging as part of standard “eyeball status” prison procedure). The inmate was placed in four-point restraints naked, and tied to the floor when she attempted to prevent officers from viewing her inside her cell.

<sup>163</sup> *See supra* note 94.

Additionally, it may be reasonable to ask inmates to establish some pattern or practice evidence to demonstrate that a guard is using his discretionary authority to sexually harass her.

With regard to concerns about the negative incentives for prisoners, it is important to remember that whenever one recognizes a category of claims that provides inmates with the right to collect damages there is the potential for bad faith claims. There is also the potential to chill officers in the performance of their duties. In this case, however, the risks are minimal. First, officers will be indemnified for claims based on searches and other actions that are truly authorized and required as part of their duties. Consequently, there will be no risk of chilling officers, or decreasing their willingness to be staffed in cross-gender assignments. Also, the proof of intent requirement for these abuse of discretion cases will make it easier for courts to identify claims where there is simply insufficient basis for a claim of illicit intent. Also, to the extent there are a high number of claims involving cross gender searches and surveillance, it may encourage prison officials to change the staffing arrangements that cause problems, as part of the normal cost benefit analysis made in the administration of prisons.

## 2. The Unwelcomeness Standard: The Institutional Position of the Prisoner and the Question of Agency

As Part II explains, the Eighth Amendment unwelcomeness doctrine is an inquiry that examines the harassment target's powers of resistance and agency.<sup>164</sup> At present, the analysis encourages the court to consider whether the inmate appears to have voluntarily or consensually participated in the sexual interactions complained of, and whether she clearly resisted her harasser. The question is, does this standard appear reasonable given prisoners' institutional position, the powers they have, and the risks posed by other institutional actors?

In my view, again, the answer is no. Questions of voluntariness and consent are very difficult in an environment where there is an extreme imbalance in power between the harasser and his target. Guards may be able to compel behavior using implicit threats of force or deprivation. The current unwelcomeness inquiry is simply insufficient to capture the subtle intimidation and manipulation that causes inmates to "consent" to "voluntary" sexual interactions. Also, as Part II explains, inmates' powers of resistance are quite limited. Prisoners most often will not respond to harassment with outright resistance because the cost is too high.<sup>165</sup> Therefore, when they do resist, they do so in a subtle manner that minimizes the potential for retaliation.<sup>166</sup> Also, prisoners are

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<sup>164</sup> Additional scholarship is required that focuses on inmate's sexual harassment rights, as scholars working on employment discrimination are much more invested in preserving worker's agency. See, e.g., Katharine Abrams, *Subordination and Agency In Sexual Harassment Law* in NEW DIRECTIONS IN SEXUAL HARASSMENT LAW at 117-120 (arguing for a standard that would preserve the workplace as a site of female sexual agency, without making her subject to offensive male behavior); Vicki Schultz, *Talking About Harassment*, 2001 Harvard Law School Public Law and Legal Theory Working Paper Series at 15 (arguing employer sexual harassment codes are being used to police sexuality and drive expressions of sexual interest and attraction out of the workplace).

<sup>165</sup> See *supra* note 80. See also, Amnesty International, *Not Part of My Sentence* at 39.

<sup>166</sup> See sources *supra* note 94.

often reluctant to file formal complaints about officers because the complaint regimes available to them are relatively transparent, and their complaints often trigger retaliation by the accused guards. Prisoner may also decline to file a complaint when the only evidence they have of misconduct is their own testimony, as prison administrators tend to credit the guard's account when the only evidence of misconduct is an inmate's word.<sup>167</sup> Taken together, these factors counsel that the current Eighth Amendment unwelcomeness standard should be retired.<sup>168</sup>

Courts are likely to have reservations about an analysis that suggests prisoners have no power to resist guards' sexual overtures. Therefore, alternatively, the unwelcomeness standard could continue to be used, but it should be balanced against a rich and expansive quid pro quo doctrine that would allow prisoners to show how guards subtly and not so subtly use oblique threats or promises of benefits to coerce inmates into sexual activity.<sup>169</sup> To be truly helpful, however, this quid pro quo framework would have to acknowledge that inmates may recognize that a guard provides special benefits to inmates who provide sexual favors, and may feel compelled to make the same offer. For example, if an inmate with a heroin addiction notices that a guard provides drugs to inmates who provide him with sexual favors, she may "voluntarily" initiate the quid pro quo arrangement, but she is undoubtedly being exploited.<sup>170</sup>

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<sup>167</sup> See Amnesty International, *Not Part of My Sentence* at 39.

<sup>168</sup> Coleman and Calhoun identify a number of reasons why women prisoners fail to clearly communicate their resistance to guards' sexual overtures. These reasons include a tendency to disassociate when they experience trauma. Also, many inmates already experience the routine cross gender searches they submit to as sexual assaults, and sometimes fail to react to further invasive behavior by guards. Many inmates complain that these cross gender search policies contributed to the sexualized atmosphere in the prison as well as to inmates' feelings of powerlessness. Coleman & Calhoun, *supra* note 94 at 104-05, 109-110. Given these facts we should ask, what would proof of unwelcomeness look like from an individual who has been forced to endure constant sexual violation stemming from authorized touching? How quickly would she react to improper touching, and how willing would she be to come forward with a complaint. Other reasons inmates may fail to report include inmates' failure to actually identify improper guard behavior as harassment given their exposure and submission to sexual harassment in the outside world. Perhaps most important, inmates often decline to report because they fear retaliation from guards. See generally, Coleman & Calhoun, *supra* note 94.

<sup>169</sup> Cindy Struckman Johnson & David Struckman Johnson, *Sexual Coercion of Women Reported in Three Midwestern Prisons*, 39 THE JOURNAL OF SEX RESEARCH 217, 226-67 (2002) (noting that officers are using a combination of bribery and intimidation to secure sexual favors). A variety of evidence could be used to assess the degree of potential intimidation at play in a particular case. An inmate could be permitted to present evidence of the guard's actual control over her, or what she reasonably believed to be the scope of his power, as a way of explaining why she submitted to a guard's advances. Evidence of intimidation could include a range of different showings, including proof of intimidating comments made, evidence of threats of discipline or punishment, or a showing that a guard without justification refused to allow her to access to services for services. See also, sources collected at *supra* note 94.

<sup>170</sup> Calhoun & Coleman, *supra* note 94 at 107-108, 116. Coleman and argue these "trading" relationships are actually based on extortion, as officers have substantial resources to create inmate "debt," including the power to deprive inmates of basic privileges to which they are otherwise entitled. See e.g., *Hammond v. Gordon County*, 316 F. Supp. 2d 1262 (N.D. Ga. 2002) (recognizing Eighth Amendment sexual harassment claim based on "trading" relationship in which guard withheld feminine hygiene products from prisoners until she performed striptease for

Another solution that would better accord with prisoners' limited ability to explicitly resist guards' advances would be to shift the burden to the defendant in these cases to show that the inmate solicited the sexual relationship. The current regime puts the burden on the prisoner to show the guards' attentions were unwelcome. However, since guards are prohibited from making these advances, it would make more sense if they were required to explain why they disregarded their professional obligations. Again, however, this solicitation standard will only work if there is an expansive *quid pro quo* claim available to prisoners, as this will explain that some inmates who "solicited" attention did so because of their realistic assessment that they would suffer detriment if they failed to provide sexual favors.

I recognize that courts may decide to find their own doctrinal solutions to the prison cases. My goal in this Article is to simply show how the dignity-based framework reorients our thinking, allowing us to concentrate on the characteristics of the institution and the target, and the target's dignitary needs. In this way it is superior to an equality analysis, or any analysis that posits that harassment interferes with the target's expressed interest in some affirmative right or goal. Additionally, the dignity-based framework will allow courts to explore the same set of considerations across a number of institution specific kinds of cases, and objectively measure the kinds of protections they provide in one context against another, and the reasons provided for their decisions. While there will likely continue to be disputes about the decisions courts make, the dignity framework I have provided at the very least provides a clear basis for critique and discussion and, more importantly, the potential to build consensus by providing principled justifications for the sexual harassment protections created.

## CONCLUSION

This Article highlights the potential problems that can result when courts incorporate Title VII modeled constructs in non-workplace sexual harassment cases. It explains that each time a harassment claim is raised in a new institutional environment, we must insist on a rigorous analysis of the doctrine used to review the claim, to ensure that it captures the salient institution-specific features of the new environment. The prison sexual abuse cases this Article discusses expose some of the dangers of a less mindful approach. As the Article shows, these cases include Title VII assumptions that should only apply to workplace cases. Additionally, the analyses performed are subtly affected by judges' unexamined stereotypes about prison conditions.

The larger project, however, is charting a way forward, and building support among judges and scholars to reflect on and reconcile the decisions made in crafting discrete kinds of sexual harassment doctrine. This Article is intended to initiate a much needed discussion about the relationship between the various legal doctrines being created to address non-workplace sexual harassment claims. My analysis counsels that when judicial decisions in these new cases indicate that the right to be free from sexual abuse is being abridged, scholars and, indeed, litigants must

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him and other officers). The Court however denied her Eighth Amendment claim based on trades requiring her to expose her breasts to get cigarettes. *Cf. Walsh, infra* note 139 (upholding judgment for prisoner on Eighth Amendment claim based on trading relationship in which inmate allowed guard to step on his penis in exchange for cigarettes).

remain attentive to the limits imposed and the justifications offered for these limits. Additionally, we must be mindful of how Title VII doctrinal concepts are modified when they are imported to analyze claims in new institutional contexts. As this Article shows, if we are not careful, these constructs may become blinders that compromise the analysis of sexual harassment claims, rather than being the liberating tools they were intended to be when originally crafted.