

ARTICLES

WHAT DIGNITY DEMANDS: THE CHALLENGES OF CREATING SEXUAL HARASSMENT PROTECTIONS FOR PRISONS AND OTHER NONWORKPLACE SETTINGS

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ABSTRACT

In the more than twenty years since the Supreme Court created Title VII's workplace sexual harassment protections, judges and feminist legal scholars have struggled to create a clear, conceptual account of the harm sexual harassment inflicts. For years, many courts and scholars were content to justify sexual harassment law by arguing that harassment should be prohibited because it interferes with women's interest in workplace gender equality; however, by the late 1990s, several feminist legal scholars had revealed the inadequacy of this account, suggesting instead that harassment law should be understood as protecting women from dignitary harm. The failure to reach a broad-based consensus about the injury sexual harassment inflicts, and relatedly about sexual harassment law's purpose, appeared without significant consequence until federal courts

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began using understandings developed in the context of workplace sexual harassment law to develop new sexual harassment doctrine for nonworkplace settings. Operating without clear conceptual moorings, many federal courts created narrow, cabined sexual harassment protections governing nonworkplace settings, often without principled justifications for doing so. To demonstrate the serious nature of this problem, this Article explores the Eighth Amendment sexual harassment doctrine courts have created to govern prisoners' sexual harassment claims against guards, demonstrating the myriad ways in which workplace sexual harassment doctrine has distorted the development of prisoners' sexual harassment protections. Yet the prison cases discussed here are offered as an example of a potentially far broader phenomenon. To address the larger issue—the distorting effects workplace sexual harassment law has had on other areas of sexual harassment doctrine—this Article argues that we should return to the dignitary account of sexual harassment law that was introduced by feminist workplace sexual harassment scholars in the late 1990s. However, in order to use this dignity analysis for settings other than the workplace, the dignitary framework these scholars introduced must be expanded and particularized to account for the different dignity expectations a person may reasonably hold in different institutional contexts. To that end, this Article offers a nuanced, context-specific analysis that will allow federal courts to determine “what dignity demands” in each institutional setting. The Article demonstrates that this dignitary framework will allow federal courts to identify the key considerations that should be weighed when creating sexual harassment doctrine for locations other than the workplace.

I. INTRODUCTION

“What[’s] . . . wrong with sexual harassment?”¹ Twenty years after the Supreme Court created Title VII’s sexual harassment protections in the *Meritor* decision,² the question remains. Most practitioners see the issue as fairly settled. It is generally understood that sexual harassment is wrong because it denies its victims the right to workplace gender equality.³ This

1. Katherine Franke posed this question more than ten years ago, spurring a firestorm of controversy among feminist legal theorists and workplace discrimination scholars. See Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 691 (1997).

2. The claim for hostile environment sexual harassment was first recognized by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986).

3. This understanding is based on Catharine MacKinnon’s seminal work, CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 116–18 (1979). For an updated version of the equality argument MacKinnon makes, see Franke, *supra* note 1,

definitional account has proven sufficient to adjudicate most workplace sexual harassment claims. However, some feminist legal scholars have cautioned that despite the cultural currency of the workplace gender equality account, this explanatory framework inadequately captures the fundamental nature of the wrong inflicted by sexual harassment.⁴ They further argue that our failure to think more deeply about the nature of the wrong that sexual harassment inflicts has rendered sexual harassment law fundamentally unstable. The rising tide of nonworkplace sexual harassment cases has brought a new urgency to these scholars' concerns, as federal courts that are forced to adjudicate nonworkplace cases seem to be deeply unsure about how to characterize the injury inflicted by sexual harassment when the harassment occurs outside of the employment setting.⁵ Simply put, because federal courts are unsure about the primary wrong sexual harassment inflicts, they are unsure about the proper substance and scope of nonworkplace sexual harassment protections, as well as the reasons justifying their creation.

Invariably, federal courts adjudicating the nonworkplace sexual harassment cases turn to Title VII doctrine for direction; however, Title VII

at 762–72 (arguing that 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).

4. Instead, these scholars have argued that sexual harassment should be understood as inflicting a kind of dignitary injury. *See, e.g.*, Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (arguing that the judicial definition of harassment would be improved if it focused on vindicating a worker's right to dignity rather than the right to workplace equality); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999) (same); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001) (arguing for a broader understanding of all workplace harassment protections, including sexual harassment law, as based on dignity concerns). *See also* Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 582, 591 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (arguing in favor of an equality approach informed by dignity concerns); Orit Kamir, *Dignity, Respect, and Equality in Israel's Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra*, at 561, 564. Baer has also noted, however, that a definition of harassment that stresses dignity considerations runs the risk of decreasing the special status that harassment claims enjoy by virtue of being connected to the larger project of racial and gender equality. Baer, *supra*, at 593 (applying this analysis in the context of German law). *See also* Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Sexual Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003) (discussing the costs and benefits of shifting from an equality-based sexual harassment framework to one that stresses dignity concerns).

5. The most frequently litigated nonworkplace 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 ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632 (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 72–73.

doctrinal tools were not designed to analyze anything other than sexual harassment's workplace effects. In order to properly adjudicate these nonworkplace cases, federal courts—as well as legal scholars—will once again have to face the basic foundational question that has troubled supporters of sexual harassment law: What is the nature of the wrong inflicted by sexual harassment?⁶ Now that the universe of cases is larger and more diverse, the stakes are even higher. In order to provide a sure, clear footing for federal courts working on sexual harassment cases outside of the workplace context, the definition of harm used to understand sexual harassment must be of a broader, more generalizable nature.

Federal 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.⁷ However, the nonworkplace cases make the need for a foundational definition of the injury clear. Without this foundation, federal courts cannot make consistent, principled assessments when claimants petition for sexual harassment protections in different institutional settings. Also, federal 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 harassment doctrines proliferates, the judiciary runs the risk of creating inconsistent and unjustifiable distinctions among the sexual harassment protections provided in various institutional settings.

6. 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, regardless of whether one believes that equality or dignity should be central in workplace sexual harassment cases, the dignitary framework is the superior framework for understanding harassment disputes *once one steps outside of the employment setting*. Indeed, in some nonworkplace cases, one finds bad actors using harassment (either sexual harassment or expression of negative sex-based animus) for troubling instrumental reasons, but ones that are not primarily motivated by or intended to promote gender inequality. More specifically, these actors are not, first and foremost, interested in denying a given gender equal access to social resources or sending symbolic social messages about the devalued status of a given gender. Rather, they are focused on inflicting humiliation by whatever means are at their disposal, and they choose gender-based strategies because they know them to be powerful and effective. In these nonworkplace cases, it is more accurate to treat harassment as causing a dignitary harm, a form of indignity that uses sex-based or sexual subordination to achieve its ends.

7. Feminist legal scholars have tended to confine their analyses to discussions of the workplace. For examples, see *supra* notes 3–4.

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 primarily as a way of vindicating gender equality interests and instead adopt an approach that justifies workplace sexual harassment law as a means of preventing individuals from suffering dignitary harm.⁸ This Article makes new use of this body of scholarship, showing that the idea of a dignitary injury is central to understanding the role sexual harassment protections play in *nonworkplace* 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 the workplace, federal 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 federal courts selectively borrow language and constructs from Title VII sexual harassment cases, is sufficient to resolve the nonworkplace 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—prisoners' Eighth Amendment sexual harassment claims against guards.⁹

Unsurprisingly, the Eighth Amendment sexual harassment cases illustrate that the current "Title VII-borrowing" approach used to develop nonworkplace sexual harassment doctrine yields troubling, unprincipled

8. The most prominent scholars making this argument are Bernstein, Ehrenreich, and Fisk. *See supra* note 4. The accounts they have offered, however, have focused solely on workplace harassment concerns.

9. This Article concentrates solely on inmates' Eighth Amendment claims raised against prison guards or staff members. It does not consider prisoners' sexual harassment claims concerning sexual abuse by other prisoners. For a discussion of inmate-perpetrated sexual abuse, see Alice Ristorph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 146–62 (2006) (discussing the naturalization of male inmates' sexual abuse of other male inmates), and Kim S. Buchanan, *Gendered Law, Racial Stories* (Univ. of S. Cal. Legal Studies Working Paper Series, Paper No. 53, 2009), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1143&context=usclwps> (discussing how certain racial and sexual tropes in Eighth Amendment doctrine naturalize sexual harassment and assault between male inmates).

results. The Title VII–modeled standards used in Eighth Amendment analysis, the “severe or repetitive” standard¹⁰ and the “unwelcomeness” standard,¹¹ provide far weaker sexual harassment protections for prisoners than their Title VII analogues make available to workers.¹² Prisoners are afforded only narrow protection from the vast majority of sexual harassment perpetrated by guards, including voyeurism, verbal abuse,¹³ unwanted touching,¹⁴ and even coerced sexual activity.¹⁵ This result is

10. The Title VII “severe or pervasive” standard first appeared in the Eighth Amendment prisoner sexual harassment cases, in modified form, as the “severe or repetitive” standard in *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).

11. The Title VII “unwelcomeness” standard, as modified for Eighth Amendment prisoner sexual harassment cases, first appeared in *Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997).

12. Thus far, no one has published an article that analyzes the effect that Title VII sexual harassment doctrine has had on the Eighth Amendment analysis used to assess prisoners’ sexual harassment claims against guards. Some authors have criticized existing Eighth Amendment sexual harassment standards but have not drawn the connection between this particular form of sexual harassment law and harassment law governing other contexts. See, e.g., Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195 (1999) (criticizing the deliberate indifference standard and suggesting policy changes that might assist vulnerable inmates). Other scholars have focused on Fourth Amendment harassment claims, in particular those challenging cross-gender prison searches and surveillance policies and their effect on women prisoners. See, e.g., Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751 (2001) (discussing how some conceptions of Fourth Amendment privacy claims advanced by female prisoners reinscribe sexist notions of feminine privacy); Teresa A. Miller, *Sex and 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).

13. Several courts have held that verbal harassment by prison guards is insufficient to state a claim under § 1983, even in circumstances where the sexual overtures are implicitly threatening. See, e.g., *Howard v. Everett*, 208 F.3d 218 (8th Cir. 2000) (unpublished disposition) (finding that mere sexual language and gestures of a custodial officer did not amount to constitutional violations); *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995) (affirming the dismissal of a female inmate’s sexual harassment claim, which alleged that a male officer made sexual comments to her and sneaked into her cell one night to watch her sleep and to tell her that she had “nice breasts”). In contrast, implicitly threatening sexual language is sufficient to state a hostile environment claim under Title VII. See, e.g., *DeJesus v. K-Mart Corp.*, 9 F. App’x 629, 630 (9th Cir. 2001) (ruling that a plaintiff could establish her Title VII sexual harassment claim with evidence showing that her male 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”); *Penry v. Fed. Home Loan Bank of Topeka*, 970 F. Supp. 833, 840 (D. Kan. 1997) (recognizing that a plaintiff stated a claim for sexual harassment when she alleged that her supervisor had asked female employees whether women have “wet dreams” and inquired about what the plaintiff “was wearing under her dress”).

14. Compare *Boddie*, 105 F.3d 857 (affirming the dismissal of a prisoner’s Eighth Amendment sexual harassment claim, which alleged that a female officer touched his penis and pressed her genitals and breasts against him), with *Stewart v. Cartessa Corp.*, 771 F. Supp. 876 (S.D. Ohio 1990) (recognizing that a female employee stated a valid Title VII sexual harassment claim based on her coworker’s unwanted touching, staring, and habit of following her around the office), and *Pease v.*

disturbing as prisoners face a greater risk of sexual harassment than workers given guards' broad discretionary authority to intimately touch prisoners and guards' immense retaliatory power.¹⁶ Federal 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, federal courts have not identified the changes they have made to the original Title VII standards that have produced the extremely narrow Eighth Amendment sexual harassment protections.

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. Federal courts, in many cases, have apparently cherry-picked from the workplace sexual harassment doctrine, borrowing some questionable portions of the Title VII analysis to support restrictions on sexual harassment claims while ignoring more easily generalized, helpful principles that counsel in favor of recognizing broader protections. In some cases, courts have even revived discredited principles from the early Title VII cases and made them part of the Eighth Amendment doctrine. On review of the Eighth Amendment cases, one cannot identify any clear principles that federal courts are using to select which aspects of Title VII doctrine should be borrowed and employed in prisoner sexual harassment cases.

Alford Photo Indus., Inc., 667 F. Supp. 1188, 1202 (W.D. Tenn. 1987) (holding that a plaintiff's evidence establishing that a supervisor touched, rubbed, fondled, and stroked his female employees' hair, neck, shoulders, breasts, and buttocks, and grabbed his female employees' bodies, had established a hostile environment claim and that no reasonable person could find otherwise).

15. *Compare* Fisher v. Goord, 981 F. Supp. 140, 145, 174 (W.D.N.Y. 1997) (rejecting an inmate's Eighth Amendment sexual harassment claim against her guards on the ground that she consented to the sex, despite the plaintiff's testimony that she was warned to play along with the guards or they would retaliate against her), *with* Huffman v. City of Prairie Vill., 980 F. Supp. 1192, 1193, 1200 (D. Kan. 1997) (holding that a female police department employee alleged facts sufficient to state a Title VII sexual harassment claim, despite her admitted "consensual" performance of oral sex on a 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").

16. Ironically, under the current Title VII and Eighth Amendment standards, the female prisoner has less protection from guard sexual harassment than the harassing guard's own coworkers. If a guard sexually harasses his female coworker by using verbal epithets and touching her in a sexually inappropriate manner, the worker has a Title VII claim. An inmate making identical allegations against the guard would more than likely have her claim dismissed under Eighth Amendment sexual harassment standards.

By cataloguing the problems that stem from this Title VII–borrowing approach¹⁷ in the Eighth Amendment cases, 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.¹⁸ I argue that scholars cannot expect federal 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 Catharine MacKinnon’s attempt to articulate a coherent theory of workplace sexual harassment in the 1970s, as her work unquestionably shaped federal courts’ understanding of sexual harassment as a social problem.¹⁹ Now, scholars must provide a more expansive and comprehensive theoretical account of why sexual harassment is wrong and how it inflicts injury if we are to assist federal courts in crafting and justifying sexual harassment doctrine for the multiple disparate social contexts and institutional settings in which this problem arises. This Article uses the Eighth Amendment prisoner sexual harassment

17. To be clear, I am not arguing that Title VII has no relevance for federal courts creating nonworkplace sexual harassment doctrine. Certainly federal courts should 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 questions that inform all harassment cases, as these questions allow us to better recognize and understand the substantive interests invaded when harassment occurs in different, disparate institutional locations.

18. Although this discussion concentrates primarily on “sexual” harassment (harassment expressed through the idiom of sexual desire, actual attraction, or commodification), some of the harassment of women in prisons is simply “sex-based” harassment that is communicated through a more general attitude of hostility. The high degree of focus on sexual harassment cases, to the exclusion of inquiries into other kinds of sex-based hostility, replicates a pattern seen in workplace discrimination cases and scholarship. For a discussion of this problem, see generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (discussing the distinction between harassment articulated as an attack on female competence and harassment articulated through the idiom of desire and noting the prevalence of the desire-based account in discussions of workplace sexual harassment). In the prison context, however, there is more reason to focus on the sexual, as opposed to sex-based, harassment cases. I suspect there are institution-specific reasons for guards to express gender-based animus through the use of a sexualized idiom in the prison environment, as their ability to touch and view women’s bodies may cause them to engage in behavior associated with the commodification of women’s bodies. In contrast, harassers in the workplace might more often be motivated to express hostility toward women by denigrating them because of their alleged ineptitude at performing particular nonsexual functions or tasks.

19. See Reva B. Siegel, *A Short History of Sexual Harassment, Introduction* to DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 4, at 1, 9 (describing MacKinnon’s work as “a stunningly brilliant synthesis of lawyering and legal theory [that] played a crucial role” in getting courts to recognize sexual harassment claims). Lin Farley also played a key role in this process. *Id.* at 9–11.

cases as an opportunity to reflect on the institution-specific distinctions between the workplace and prison environments and to understand how these distinctions shape institutional players' expectations of respect and experiences of harassment. The Article explains that, given these understandings, institution-specific distinctions should also play a role in shaping the concept of dignity mobilized in different areas of sexual harassment law.

Skeptics may worry that my dignitary framework encourages judges to stray too far afield from existing sexual harassment law. They may argue that most judges are unlikely to reconsider existing judicially construed sexual harassment doctrines or that the principles of *stare decisis* prevent them from doing so and, consequently, that they will not subject new categories of sexual harassment cases to the cross-institutional analysis I propose. Yet in the two most apparent areas of the law where Title VII workplace sexual harassment standards have shaped nonworkplace sexual harassment doctrine, the law is far from settled, and courts have substantial negotiating room to reject or amend existing sexual harassment doctrine. These two areas of law, the Title IX school sexual harassment cases and the Eighth Amendment prisoner sexual harassment cases, have either no governing Supreme Court precedent on major questions or have only been discussed in limited fashion in a few Supreme Court cases, leaving open important unresolved questions.²⁰ Thus, there is more opportunity for intervention than it might initially seem.

Additionally, the dignity analysis I propose may win over skeptics once it is placed in the proper context. For my dignity approach merely refocuses federal courts' attention on a 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.²¹ This analytic consideration, when understood more broadly, counsels that we should similarly adopt a context-based inquiry when thinking about what respect conditions are required in institutional locations other than the workplace. Indeed, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court reiterated

20. Thus far, the Supreme Court has offered no guidance on the proper constitutional analysis to be used for prisoners' sexual harassment claims against guards. The Supreme Court has offered some insight about peer sexual harassment law, but important aspects of the doctrine turn on narrowly decided, hotly contested points that may be revisited in subsequent decisions. See *Davis ex rel. Lashonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 647 (1999) (recognizing tension in current judicially constructed harassment standards and the potential need for legislative intervention).

21. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (explaining that the Title VII sexual harassment analysis is a context-specific inquiry).

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.²² These social norms can and do affect the cultural intelligibility, and therefore viability, of a plaintiff's claim of sexual harassment. While the *Oncale* Court never explicitly referred to dignitary norms in its decision, the social norms and expectations it was concerned with were the respect conditions that structure each institutional setting. At bottom, the Supreme Court in *Oncale* and in other Title VII workplace harassment cases has directed federal 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 functions both as an exposé and an opportunity. It exposes the regrettable developments the Title VII-borrowing approach has led to in Eighth Amendment cases, but it uses these developments as an opportunity to talk about larger concerns that threaten the future development of sexual harassment law governing a range of contexts. It offers the reader the chance to see how the Title VII constructs used in the Eighth Amendment cases have compromised our ability to fairly adjudicate prisoners' claims. It then shows how federal courts could develop better insights regarding prisoner sexual harassment cases if they used the kind of context-specific, dignity-based analysis I propose. Specifically, the dignitary framework I offer in my analysis directs federal courts to focus on prisoners' context-specific dignity interests, as well as on the scope of prison officials' alleged responsibility for ensuring the protection of these dignity concerns.

Part II of my Article begins this conversation by laying the groundwork for understanding the analytic errors caused by the use of the current 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, the federal courts have provided no guidance

22. *Id.* at 81.

regarding what relationship, if any, exists between the two. The federal courts have failed 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.²³

Part III begins by showing that some federal courts are effectively using the Title VII–styled tools they have created in Eighth Amendment sexual harassment cases as a cover to limit claimants’ rights, as the new tools have allowed them to uniformly institute heightened pleading and proof standards for prisoners’ sexual harassment claims far beyond what is required of Title VII workplace sexual harassment plaintiffs. Even more disturbing, the heightened burdens imposed on prisoners’ claims fundamentally contradict what little general guidance the Supreme Court has offered in Title VII cases about the considerations that should structure sexual harassment protections. After demonstrating that the heavier burdens that federal courts have imposed are not required by the Eighth Amendment’s doctrinal norms, Part III notes that readers of Eighth Amendment sexual harassment cases are left to speculate about the federal courts’ true justification for creating these standards, as *no* tenable explanation is offered in these cases for any of the changes they make to the Title VII sexual 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. This is a crucial insight, as this problem is not unique to Eighth Amendment sexual harassment law, but rather has complicated the development of other kinds of sexual harassment doctrine. In this Article, I argue that feminist scholars should be more mindful of this sleight of hand, as the deployment of Title VII–modeled tools in other contexts has similarly provided cover for the development of sexual harassment standards that are less protective than the Title VII workplace constructs.²⁴

23. 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 the “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. 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.

24. This issue will be discussed in more detail in a future article discussing the effects workplace sexual harassment doctrine has had on Title IX peer sexual harassment standards.

Part IV explores another set of problems that stems from the deployment of Title VII–styled tools in Eighth Amendment prisoner sexual harassment cases. This part highlights a discursive side effect of the workplace constructs, one that most likely escaped even those courts that believed themselves to be more careful about their modification of the workplace sexual harassment standards for prison cases. Part IV.A shows that courts that simply believed that they were creating free-standing Eighth Amendment constructs that coincidentally sounded like workplace sexual harassment standards were mistaken, as the interpretation of these constructs reveals that they are based on workplace-specific assumptions about harassment that do not hold true in prison cases. As a consequence, the Title VII–modeled constructs in the Eighth Amendment cases lead federal courts to ask the wrong questions in prisoner sexual harassment cases, to ignore relevant facts, and to produce analyses that leave a broad range of inappropriate officer conduct inactionable and without remedy. Also, Part IV.B shows that the interjection of the Title VII–modeled standards into the prisoner sexual harassment cases has also 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.C briefly presents the consequences of this conflation.

Part V lays out my proposed dignitary framework, showing that it can guide federal courts in creating a more principled sexual harassment doctrine. Part V.A begins with a discussion of the basic propositions that inform the concept of dignity that should be employed in sexual harassment cases. Part V.B then introduces the idea of a context-specific dignity inquiry, explaining that when conducting a sexual harassment analysis, the federal courts 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 those interests. By addressing these questions, the federal courts will be able to develop a better understanding of what plaintiffs in sexual harassment cases should be able to demand of an institution in the form of dignity protections as a consequence of the plaintiffs’ involvement in the institution’s enterprise. Part V.C applies this context-specific dignitary framework to the prison cases, showing how it focuses our attention on the primary institution-specific considerations that should be weighed in sexual harassment cases in new institutional contexts.

This section also uses the dignitary 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 V.D uses the dignitary framework to evaluate the constructs currently used in the prison context and to suggest alternative approaches.

II. TITLE VII STANDARDS IN EIGHTH AMENDMENT ANALYSIS

A. THE TITLE VII HOSTILE ENVIRONMENT STANDARDS

The groundwork for the Title VII sexual harassment claim and for 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 issued its decision in *Meritor Savings Bank, FSB v. Vinson*. In that case, the Supreme Court established that two forms of sexual harassment—quid pro quo²⁵ and hostile environment sexual harassment—would be recognized as sex discrimination under Title VII.²⁶ In the same year, the Court also decided *Whitley v. Albers*, the case in which it recognized a prisoner's right to a remedy under the Eighth Amendment for injuries suffered as a consequence of officers' use of excessive force.²⁷ This excessive force claim eventually evolved into the right to recompense for injuries from sexual abuse and harassment perpetrated by guards and staff members. To better understand the relationship between these two areas of doctrine, however, our analysis must begin with *Meritor*, the case that laid the foundation for contemporary 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,

25. FRANCIS ACHAMPONG, *WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPALS, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT* 17–18 (1999) (defining quid pro quo sexual harassment as a circumstance in which an employee is forced to submit to unwelcome sexual demands in exchange for a job benefit).

26. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

27. See *Whitley v. Albers*, 475 U.S. 312 (1986). The precise contours of the claim were later clarified in *Hudson v. McMillian*, 503 U.S. 1 (1992).

exposed himself in the workplace, and eventually raped her several times.²⁸ In addition to bringing a claim based on the employer's actual demands for sex—which the *Meritor* Court agreed was an actionable quid pro quo claim under Title VII—the teller sought relief under the theory that the supervisor's actions created a sexually harassing hostile environment. The *Meritor* Court agreed that a second cause of action was warranted, recognizing her second set of allegations as providing a basis for a sexual harassment “hostile environment” claim. The *Meritor* Court explained that its decision to recognize both a quid pro quo and a hostile environment claim was consistent with Congress's intention to make Title VII a statutory regime that addresses a variety of discriminatory actions that compromise the sexes' equal enjoyment of the “terms, conditions, [and] privileges of employment.”²⁹ Therefore, the *Meritor* Court held that Title VII should be interpreted to include a prohibition on explicit demands for sex, as well as of the “practice of creating a working environment heavily charged with [sex-based] discrimination.”³⁰ Analogizing to the barriers to equal employment opportunity posed by racial harassment, the *Meritor* Court explained that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit [an] arbitrary barrier to . . . equality at the workplace.”³¹ The *Meritor* Court, however, also recognized the need for some limits on the hostile environment claim and stressed that sexually harassing conduct must meet a certain standard of seriousness before it is treated as a factor compromising an employee's right to workplace equality.

To help courts determine whether a Title VII plaintiff has met the appropriate standard for a hostile environment claim, the *Meritor* Court laid out two concepts designed to test whether the sexual harassment alleged is sufficient to pollute the workplace.³² The first, the “severe or pervasive” standard, provides that the harassment complained of “must be sufficiently

28. *Meritor*, 477 U.S. at 60.

29. *Id.* at 64 (internal quotation marks omitted).

30. *Id.* at 60 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *superseded on other grounds by statute as recognized in EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 n.11 (1984)).

31. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

32. *See id.* at 67–69. These basic standards are now part of a five-part test that courts use to review a sexual harassment hostile environment claim. In order to make out a prima facie case of hostile environment sexual harassment, plaintiffs must show that (1) they are members of a protected class, (2) they were 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 their employment and create an abusive working environment, and (5) their employers should be held liable for the harassment. *See ACHAMPONG, supra* note 25, at 41–51 (describing the elements of a prima facie hostile environment claim).

severe or pervasive ‘to alter the conditions of . . . employment and create an abusive working environment.’”³³ The Supreme Court further clarified the standard several years later in its decision in *Harris v. Forklift Systems, Inc.*³⁴ In *Harris*, the Court explained 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 particular showing of emotional or psychological injury in order for the plaintiff to establish a claim.³⁵ Rather, the Court explained, sexual harassment is actionable under the statute when it has reached a level sufficient to impact the plaintiff’s ability to perform her job or enjoy her position, or when it otherwise offends our understanding of workplace gender equality.³⁶

The severe or pervasive standard was revisited some years later in *Oncale v. Sundowner Offshore Services, Inc.*,³⁷ a decision in which the Supreme Court emphasized that the severe or pervasive standard must be interpreted in a context-specific manner and therefore does not allow the development of absolute and static descriptions of prohibited behavior. Consequently, the *Oncale* Court explained that the weight given to a set of sexual harassment allegations depends on the circumstances in which the allegedly harmful conduct occurred.³⁸ Specifically, the *Oncale* Court explained that harassment’s “objective severity . . . should be judged from

33. See *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

34. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

35. *Id.* at 21–22.

36. See *id.* 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’ psychological 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.” *Id.* 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. *Id.* at 23.

37. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

38. *Id.* at 82. In his rather colorful discussion of this principle, Justice Scalia explained:

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. at 81. 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, revisiting Justice Scalia’s football example, I argue that if the coach has engaged in this “butt-smacking” practice over the years, similarly to his peer coaches and predecessors, as a way of humiliating or subordinating gender-nonconforming or otherwise disfavored players, 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.

the perspective of a reasonable person in the plaintiff's position" considering "all the circumstances," including "the social context in which a particular behavior occur[ed] and [the manner in which it] is experienced by the target."³⁹

2. The Title VII Unwelcomeness Standard

The second construct the *Meritor* Court created to identify actionable harassment, the "unwelcomeness" standard,⁴⁰ is informed by the doctrine of excuse; it inquires whether a harasser had a reasonable basis to believe that his sexual advances were welcome. A plaintiff, in kind, must demonstrate that she made it clear to the alleged harasser that his attentions were "unwelcome."⁴¹ 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 that this socially valued activity should not be altogether prohibited.⁴² However, the Court also recognized that this interest in preserving a certain sociable atmosphere at work 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, helps protect employers from being 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.⁴³

Importantly, when the Supreme Court introduced the unwelcomeness

39. *Id.* at 81.

40. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68–69 (1986).

41. This evidentiary requirement has been the subject of a great deal of criticism, in particular because it has been used in cases concerning general sex-based hostility as opposed to the paradigmatic sexual harassment cases—cases in which the question of desire is prominent. *See Schultz, supra* note 18, at 1729–32. *See also infra* note 48.

42. The Court reminded litigants that Title VII may not be "expand[ed] into a general civility code." *Oncale*, 523 U.S. at 81. 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.* Rather, "it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Id.*

43. *See id.* (stating that "neither asexuality nor androgyny" are required in the workplace and that "intersexual flirtation" as part of "ordinary socializing" is not necessarily discriminatory). A plaintiff is required to present proof of the other elements of a hostile environment claim before the plaintiff's employer will be held liable. Additionally, the plaintiff may have to offer proof of timely reporting of the harassment if alleging harassment by a coworker. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808–09 (1998) (outlining an employer's affirmative defense based upon an employee's failure to use the employer's complaint procedure for reporting coworker harassment).

standard, it explained that the inquiry conducted under this test should not be confused with an inquiry into “consent” or “voluntariness.” The *Meritor* Court made clear that in a Title VII case, the “correct inquiry is whether the [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in the sexual intercourse was voluntary.”⁴⁴ “[V]oluntariness in the sense of consent is not a defense,”⁴⁵ the *Meritor* Court explained, because in some cases the voluntary nature of the target’s submission is a direct result of a prior campaign of intimidation and harassment. Federal 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. And while feminists were quick to celebrate the Court’s recognition of causes of action for sexual harassment, they were highly critical of these conceptual hurdles that plaintiffs were forced to clear to bring their claims. Specifically, feminist legal scholars raised the concern that the unwelcomeness inquiry unreasonably burdens women by forcing them to rebut the presumption that sexual overtures are unwelcome in the workplace.⁴⁶ Similar complaints have been raised regarding the severe or pervasive standard.⁴⁷ Other scholars have raised the concern that the *Meritor* constructs have tended to direct courts’ attention toward sexualized harassment rather than toward the broad array of hostile behaviors directed at women.⁴⁸

44. *Meritor*, 477 U.S. at 68.

45. *Id.* at 69 (internal quotation marks omitted).

46. See, e.g., Louise F. Fitzgerald, *Who Says?: Legal and Psychological Constructions of Women’s Resistance to Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 4, at 94 (discussing and critiquing the burden placed on women to demonstrate that sexual conduct was unwelcome).

47. See, e.g., e. christi cunningham, *Preserving Normal Heterosexual Male Fantasy: The “Severe or Pervasive” Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 217–28 (arguing that courts’ failure to problematize normal or “ordinary” intersexual flirtation makes the severe or pervasive standard function in a manner that preserves space for male fantasy and gender-based sexual harassment); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 843–44 (1991) (noting courts’ tendency to uncritically treat sexually charged nonwork situations as an appropriate baseline for determining whether conduct meets the severe or pervasive test).

48. For example, Vicki Schultz distinguishes sexualized, desire-driven harassment and sex-based (but nonsexualized) harassment that is often economically motivated and seeks to undermine female competence and preserve the workplace as a realm of male superiority. Along with other feminist

Regardless of their flaws, the Title VII sexual harassment constructs ultimately played a key role in shaping the Eighth Amendment sexual harassment standards. Yet almost immediately, a pattern of selective borrowing was clear, as the Title VII hostile environment standards were embraced by courts creating Eighth Amendment standards, and the arguably more relevant claim—the quid pro quo doctrine—was wholly absent from the seminal Eighth Amendment sexual harassment cases.

B. THE EIGHTH AMENDMENT SEXUAL HARASSMENT STANDARDS

In the same year it decided *Meritor*, the Supreme Court held in *Whitley v. Albers* that prisoners could sue under the Eighth Amendment for injuries caused by officers' use of excessive force in the performance of their duties, a cause of action that ultimately became the primary vehicle for prisoners' sexual abuse and harassment claims.⁴⁹ 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 is now required to show that the pain suffered in the forcible encounter was "objectively . . . sufficient[ly] [serious]" to be worthy of constitutional concern⁵⁰ and that the defendant officer subjectively acted with "a sufficiently culpable state of mind"—namely, with "malicious[]

scholars, Schultz criticizes the predominance of the former model in workplace sexual harassment jurisprudence. See Schultz, *supra* note 18. Some scholars have suggested, however, that it is better to understand both sets of conduct as part of a continuum of sexist harassing behaviors. See, e.g., Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 4, at 457, 467–70 (making this argument based on the multivectoral experience of gender-based harassment faced by African American female slaves).

As the next section shows, similar criticisms can be lodged regarding Eighth Amendment sexual harassment law, in part because of the doctrinal similarities between the two sets of cases. Indeed, in particular, the doctrine has almost exclusively focused on cases involving sexualized behavior, despite the threat that female inmates will also be subject to more general nonsexual sex-based harassment as well.

49. *Whitley v. Albers*, 475 U.S. 312 (1986).

50. *Hudson v. McMillian*, 503 U.S. 1, 7–8 (1992). This standard has been consistently applied in Eighth Amendment sexual harassment cases. See, e.g., *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997). This Article does not consider the physical injury requirement under the Prison Litigation Reform Act of 1995, which bars prisoners from bringing a federal claim for any mental or emotional injury suffered while in prison without a showing of physical injury. 42 U.S.C. § 1997e(e) (2006). This standard imposes a second hurdle for prisoners' sexual harassment claims and has been widely criticized for its potential to prevent prisoners from having their sexual harassment claims heard in federal court.

and sadistic[.]” intent rather than in “a good faith effort to maintain or restore discipline.”⁵¹

Some may question why the Eighth Amendment excessive force claim became the primary vehicle for prisoners’ sexual harassment claims against guards.⁵² No single reason can be cited for this development; however, at least two factors played a role. First, federal 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.⁵³ 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.⁵⁴ This second rationale proved particularly persuasive for the early sexual harassment cases, which were primarily based on more clearly violent conduct, such as rape.⁵⁵

However, the justifications for analyzing prisoners’ sexual harassment claims under the Eighth Amendment became more questionable as the years passed, particularly those based on excessive force analysis, as federal courts were presented with sexual harassment cases concerning more diverse allegations, including violations 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 attempted to provide guidance on this issue by introducing Title VII–modeled doctrinal constructs into the Eighth Amendment analysis.⁵⁶

51. *Hudson*, 503 U.S. at 6–7 (quoting *Whitley*, 475 U.S. at 320).

52. Litigants still attempt to bring sexual harassment claims as Fourth Amendment invasion of privacy claims and Fourteenth Amendment antidiscrimination claims, but these claims are primarily disregarded in favor of the Eighth Amendment analysis. *See, e.g.*, *Jordan v. Gardner*, 986 F.2d 1521, 1524–31 (9th Cir. 1993) (en banc) (refusing to reach a Fourth Amendment challenge to a prison’s search policy and analyzing the claim as an Eighth Amendment violation). *See also supra* note 12.

53. *See, e.g.*, *Jordan*, 986 F.2d at 1524–25 (identifying the Eighth Amendment as the primary textual source of protection in the Constitution for prisoners).

54. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (“[T]he 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.”).

55. *E.g.*, *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281 (10th Cir. 1999).

56. The discussion of constitutionally significant injury is distinct from the physical “significant injury” requirement that was used in Eighth Amendment excessive force cases.

1. *Boddie v. Schnieder* and the Eighth Amendment Severe or Repetitive Standard

In the first case, *Boddie v. Schnieder*, the Second Circuit created the “severe or repetitive” test, which is used to determine whether an allegedly sexually harassed prisoner has suffered sufficient “pain” to trigger the protection of the Eighth Amendment.⁵⁷ 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.⁵⁸ The *Boddie* court began its analysis by recognizing that the Eighth Amendment does provide a remedy for inmates who are subject to this kind of harassing behavior. The court held that “[s]exual abuse *may* violate contemporary standards of decency and *can* cause severe physical and psychological harm.”⁵⁹ “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.”⁶⁰ 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.”⁶¹ Consequently, the Second Circuit ruled that Boddie’s claim “[did] not involve a harm of federal constitutional proportions as defined by the Supreme Court.”⁶²

Although the Second Circuit made no mention of the *Meritor* Court’s

57. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997). Similarly to the *Boddie* court, other federal courts often describe harassment in the prison cases as sexual abuse rather than sexual harassment. Because the conduct alleged in the prison cases is very similar to behavior characterized as sexual harassment in workplace cases, I have used harassment interchangeably with abuse throughout this piece.

58. *Id.* at 860.

59. *Id.* at 861 (emphases added).

60. *Id.* (emphasis added). 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 conduct random searches of female inmates and other conduct that was held to violate the Eighth Amendment. See *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc); *Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994), *modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part*, 93 F.3d 910 (D.C. Cir. 1996).

61. *Boddie*, 105 F.3d at 861.

62. *Id.*

severe or pervasive test in *Boddie*, the Eighth Amendment analysis it produced was clearly influenced by this Title VII standard. Both standards weigh 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. Federal courts in Title VII cases routinely conclude that a plaintiff has stated an actionable claim under the severe or pervasive standard when it is alleged that a coworker fondled the plaintiff's genitals or rubbed against the plaintiff in a sexual manner.⁶³ In Eighth Amendment cases, however, the federal courts routinely reject prisoners' claims under the severe or repetitive standard based on the same behavior.⁶⁴ The distinction is stark even in the *Boddie* decision, as one cannot imagine the Second Circuit dismissing as inconsequential a Title VII plaintiff's claim that a supervisor rubbed the plaintiff's genitals while uttering a racially coded innuendo, particularly when combined with the claim that the supervisor retaliated against the plaintiff for failing to respond to the unwanted sexual advances. Yet this is precisely what the plaintiff in *Boddie* alleged, and the *Boddie* court concluded that he had 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*.⁶⁵ 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.⁶⁶ In *Freitas*, a male inmate alleged that he had been sexually abused by a female civilian worker employed at the prison where he was incarcerated. The inmate did not claim he had sexual relations with the worker but described other sexual interactions, explaining that he and the worker would "kiss and hug" for long periods of time. *Freitas* alleged that the worker told him that they

63. For examples, see *supra* note 14.

64. 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 72–73. Additionally, several other circuits have explicitly adopted the standard or quietly relied on its analysis in unpublished cases. See, e.g., *Boxer X v. 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 F. App'x 656 (6th Cir. 2005).

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

66. The *Freitas* court also introduced a more amorphous standard that courts occasionally use to substitute for the *Boddie* severe or repetitive standard.

might live together after his release from prison. When he discovered that the worker had a “real” relationship outside the prison, he reported his previous sexual interactions with the worker to prison officials. When making his report, he acknowledged that he was partly “at fault” for what occurred.⁶⁷ However, he noted that the worker had initiated the sexual interactions. 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 the worker had made that convinced him to submit to her advances.⁶⁸

On review of the inmate’s 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 one to suffer “pain.”⁶⁹ The *Freitas* court then offered some general guidance on the limits of the sexual harassment standard. “Without deciding at what point unwelcome sexual advances become serious enough to constitute ‘pain,’” the *Freitas* 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’ as contemplated by the Eighth Amendment.”⁷⁰ Thereafter, the *Freitas* court made it clear that the plaintiff in that case could not prevail because he had not offered clear evidence of coercion. On review of Freitas’s testimony, the Eighth Circuit did not credit Freitas’s assertion that he did not report the overtures because he feared the worker would retaliate against him, and instead pointed to the evidence showing his obvious consensual participation over the course of the relationship. Based on this determination, the Eighth Circuit concluded that the evidence on the whole established that Freitas was a disaffected, spurned lover, that his relationship with the worker was “consensual,” and that he had “welcomed” the worker’s attentions.⁷¹ Importantly, the *Freitas* analysis proceeded under a sexual harassment construct used in hostile environment analysis, even though the allegations of coercion in the case bore a striking similarity to those raised in Title VII quid pro quo cases.

Taken together, *Boddie* and *Freitas* are the gatekeepers of relief and have served as the basis for dismissing a large number of prisoners’ Eighth Amendment sexual harassment claims. *Boddie* has had the larger impact of

67. *Freitas*, 109 F.3d at 1336.

68. *Id.* at 1339.

69. *Id.* at 1338.

70. *Id.* at 1339.

71. *Id.*

the two cases. Invoking the severe or repetitive standard, district courts have dismissed a number of prisoners' Eighth Amendment sexual harassment claims involving inappropriate acts that would easily be regarded as actionable if alleged by a worker as part of a Title VII claim.⁷² Federal 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.⁷³ Even more disturbing, the Eighth Amendment cases do not include a version of the quid pro quo doctrine available under Title VII, a concerning development given that this area of doctrine is specifically designed to address explicit and implicit demands for sex, a kind of threat one might expect to arise in the prison environment.

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

72. See, e.g., *Joseph v. U.S. Fed. Bureau of Prisons*, No. 00-1208, 2000 WL 1532783, at *2 (10th Cir. Oct. 16, 2000) (finding that a corrections officer's exposure of her breasts to an inmate was not "objectively, sufficiently serious" to demonstrate a use of force of a constitutional magnitude"); *Anderson v. Nassau County*, No. 99-CV-5838, 2004 WL 1753262 (E.D.N.Y. May 13, 2004) (dismissing an inmate's claim alleging that a corrections officer called him a "retard," cursed at him, and exposed his penis to the inmate while making lewd suggestions); *Smith v. Chief Executive Officer*, No. 00 CIV. 2521(DC), 2001 WL 1035136, at *1 (S.D.N.Y. Sept. 7, 2001) (dismissing a claim where the plaintiff alleged that a corrections officer "entered [the] plaintiff's protective custody unit . . . , grabbed plaintiff's buttocks, and [called the plaintiff obscene names] in front of other inmates"); *Young v. Coughlin*, No. 93 Civ. 262 DLC, 1998 WL 32518, at *7 (S.D.N.Y. Jan. 29, 1998) (dismissing a claim alleging that a "preacher at [the] prison chapel placed [the plaintiff's] hand on the preacher's buttocks," that a fellow inmate "attempt[ed] to place his penis on [the plaintiff's] leg," and that "a corrections officer 'hunched his pelvis out as if he wanted [the plaintiff] to play with his penis'"); *Holton v. Moore*, No. CIV.A.96CV0077, 1997 WL 642530 (N.D.N.Y. Oct. 15, 1997) (dismissing a claim where the plaintiff alleged that a guard sexually violated the plaintiff during a search). See also *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004) (dismissing an inmate's claim alleging that a corrections officer exposed his penis to the inmate for thirty to forty seconds because the act was not sufficiently serious to constitute an Eighth Amendment violation given that the corrections officer never physically touched the inmate); *Collins v. Graham*, 377 F. Supp. 2d 241 (D. Me. 2005) (dismissing an 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).

73. See, e.g., *White v. Ottinger*, 442 F. Supp. 2d 236, 245-48 (E.D. Pa. 2006) (interpreting *Freitas* to find that where there was some evidence in the record that the plaintiff acted as a result of coercion, there was a genuine issue of material fact regarding whether the plaintiff's participation in sexual interactions with a guard was "consensual"); *Fisher v. Goord*, 981 F. Supp. 140, 174-75 (W.D.N.Y. 1997) (applying *Freitas* and dismissing several Eighth Amendment claims because of an inmate's failure to establish her "lack of consent" to sexual interactions with guards).

doctrinal norms.⁷⁴ This concern about the distinct doctrinal norms that inform Eighth Amendment and Title VII case law is wholly appropriate; however, it is also the reason the comparison between these two areas of law is required in this analysis. My concern is that we must do all we can to ensure that the distinct normative commands of each area of the law are recognized and observed, yet we cannot be sure that they have been heeded until we make these comparisons. Stated simply, if one believes comparisons between the Eighth Amendment and Title VII sexual harassment doctrines are inappropriate, then one should be particularly interested in this analysis, as its primary goal is to ferret out both the ill-conceived and the unintended connections the federal courts have created between these two areas of sexual harassment doctrine. Parties wary of making these connections must recognize that the linguistic similarity between the Eighth Amendment and Title VII sexual harassment standards, as well as their similar functions, invites comparisons. Instead of turning a blind eye to the potential relationship between these two kinds of sexual harassment law, we should proceed with a full understanding of how they may have influenced each another.

Also, my focus in this discussion is on recognizing when the normative commands of different areas of the law can be aligned instead of certain comparisons being shortsightedly resisted. In an effort to facilitate this kind of close, careful analysis, this Article draws attention to the ways in which federal courts quietly have been making inappropriate comparisons and linkages between the Title VII and Eighth Amendment standards, as well as highlights areas where productive and principled connections might otherwise be drawn.

Some may still be loath to make these more complicated comparisons, arguing that this inquiry is unnecessary because the current Eighth Amendment sexual harassment standards can be defended solely by reference to the Eighth Amendment's doctrinal norms. Part III, however, reveals that this proposition is simply untrue. The Eighth Amendment's norms, which are based on a historically contingent and evolving concept of dignity, simply did not compel the federal courts to adopt the extremely restrictive standards currently in use in the Eighth Amendment prisoner sexual harassment cases. When one fully understands the substance of the Eighth Amendment's norms, one realizes that current Eighth Amendment sexual harassment standards are based in large part on decisions that are the

74. I provide a more detailed discussion of the potential conflict between the Eighth Amendment's and Title VII's interpretational norms in a later section of Part III.

product of judicial discretion. In light of the substantial role that judicial discretion has played in these cases, it is important to consider the ways in which the federal courts' understanding of Title VII may have influenced their exercise of discretion in the Eighth Amendment sexual harassment cases.

Lastly, some may have reservations about my analysis, arguing that it seems skeptical about the Eighth Amendment standards merely because they seem more restrictive than those used in Title VII workplace sexual harassment cases. These persons may believe that because the Eighth Amendment inquiry is focused on identifying injuries of a constitutional dimension, it should logically cover fewer injuries than Title VII's statutory protections. Alternatively, they may argue that because the Eighth Amendment standards are protections for prisoners—persons who must surrender certain rights because of their imprisonment—we should expect they would receive narrower sexual harassment protections than the average civilian worker. Even if there is some validity to these claims, we should still scrutinize the Eighth Amendment standards, as concerns about judicial process and fairness require that the litigants in the Eighth Amendment cases be given a clear explanation regarding how federal courts have reconciled 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 constructs to analyze their Eighth Amendment sexual harassment claims.⁷⁵ Rather, the appellate panels reviewing these cases, on their own initiative, decided to borrow constructs from the Title VII doctrine. Fairness demands that if the federal courts are going to borrow from Title VII doctrine when constructing prisoner sexual harassment doctrine, that they be required to explain why Title VII figures into their decisions at all, as well as to justify and explain the modifications they have made to the Title VII standards as they are tailored for an Eighth Amendment analysis. The *Boddie* and *Freitas* courts declined to make these disclosures in the seminal Eighth Amendment cases, 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.

Finally, one of the most compelling reasons for inquiring into the

75. See, e.g., Plaintiff-Appellant's Brief, *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997) (No. 96-2417) (on file with author).

relationship between Eighth Amendment sexual harassment doctrine and the protections provided under Title VII is to *highlight the dangers brought about by our failure to carefully monitor the multiple trajectories that sexual harassment doctrine has taken now that harassment protections have been formulated under different statutory and constitutional provisions*. The failure to monitor these different trajectories has made us less mindful of the substantive differences between the sexual harassment protections recognized in different areas of the law. Even more concerning, our inattention has made us less proactive about articulating the reasons we might want courts faced with a choice regarding where they should locate new sexual harassment doctrine to choose one area of law over another.

For example, federal courts have experimented with recognizing prisoners' sexual harassment protections under the Fourth, Fourteenth, and Eighth Amendments, with most settling on the Eighth Amendment after the early seminal cases.⁷⁶ However, if there are parallels to be drawn between prisoners' and workers' experiences of harassment, one could argue that the most logical constitutional reference point for protecting prisoners from sexual harassment should be the Fourteenth Amendment. There are several reasons to take this position. First, Title VII was passed to give effect to the equal protection guaranties of the Fourteenth Amendment.⁷⁷ Additionally, Fourteenth Amendment doctrine provides for very similar sexual harassment protections to those available under Title VII and historically has protected government workers in circumstances where statutory protections are unavailable or when a plaintiff seeks an alternate constitutional source of protection.⁷⁸ However, there is some dispute about whether state employees should be able to bring both Fourteenth Amendment and Title VII employment discrimination claims simultaneously. Also, prisoners, while they are incarcerated, still enjoy robust Fourteenth Amendment rights.⁷⁹ Even if courts chose to scale back these Fourteenth Amendment rights because of prisoners' incarceration, we would have a better means for comparing the scope of prisoners' sexual

76. See *supra* notes 52–54.

77. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 367 (1978) (Brennan, J., concurring in part, dissenting in part) (recognizing the Fourteenth Amendment and the Commerce Clause as bases for powers exercised and protections granted under Title VII); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (finding support in the Fourteenth Amendment for Congress's extension of Title VII in the 1972 amendments).

78. See Jana Howard Carey, *Sexual Harassment*, in *AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 2000*, at 125 (PLI Litig. & Admin. Practice, Course Handbook Series No. H0-006Y, 2000).

79. These rights include the right to be free from race discrimination perpetrated by prison officials. See *Johnson v. California*, 543 U.S. 499 (2005).

harassment protections if they were simply one of several constituencies that enjoys sexual harassment protections under the Fourteenth Amendment.

The question then is, Why did the federal courts choose to recognize prisoners' sexual harassment protections under the Eighth Amendment instead of the Fourteenth Amendment? Why would they subject prisoners' sexual harassment claims to the arguably more restrictive normative commands of the Eighth Amendment instead of looking to the Fourteenth Amendment to create these protections? Importantly, prison litigants, whose primary interest is in prevailing on their claims, do not have the luxury of pressing this issue about the proper constitutional provision that should cover their claims. However, even more surprisingly, prisoner rights scholars and feminist legal scholars have never explored this consideration. Instead, scholars have either celebrated the creation of Eighth Amendment sexual harassment doctrine or critiqued the doctrine at the margins for offering relatively anemic protections. The key point here is that the federal courts, whether by accident or by design, have effectively subordinated inmates' Fourteenth Amendment right to protection against sexual harassment, forcing inmates to articulate this interest within the more restrictive confines of the doctrinal norms of the Eighth Amendment. The federal courts did so without ever explaining the repercussions of their decisions. The fact that courts achieved this result with no discernable sound of complaint from public interest groups or feminist legal scholars is sobering. If we do not learn to pay closer attention to these kinds of discretionary decisions about where to locate judicially constructed sexual harassment doctrine, then we should not be surprised to see more anemic versions of sexual harassment doctrine created in the future.

III. THE USE OF TITLE VII-STYLED TOOLS

This part 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 that federal courts have 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 the federal courts should weigh when creating sexual harassment doctrine. Yet the federal courts have failed to explain why doctrinal features of sexual harassment law that the Supreme Court explicitly rejected in early Title VII cases are now being revived and

used to analyze prisoners' Eighth Amendment sexual harassment claims, and Section B demonstrates that these troubling features are not justified by Eighth Amendment doctrine. Indeed, feminist legal scholars critical of the evolution of workplace sexual harassment doctrine will be given pause when they review the Eighth Amendment cases. For if we understand the Eighth Amendment cases to be in dialogue with the Title VII cases, Eighth Amendment sexual harassment doctrine appears to be giving judges frustrated with the expansive reach of the Title VII protections a "second bite at the apple," allowing them to reimagine sexual harassment law in a more conservative fashion in a different domain.

A. BACK TO THE FUTURE: THE REVIVAL OF DISCREDITED PROPOSITIONS
FROM TITLE VII SEXUAL HARASSMENT ANALYSIS IN EIGHTH
AMENDMENT SEXUAL HARASSMENT CASES

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 proclaimed that "welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute 'pain' [under] the Eighth Amendment."⁸⁰ This reading of the unwelcomeness standard is fundamentally different from 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 actual participation in the sexual intercourse was voluntary*."⁸¹ The Supreme Court explained that a standard that provided otherwise would only reward harassers for the success of their inappropriate advances once their targets ultimately relented and succumbed.

The Eighth Circuit's decision to treat voluntariness as central to the

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

81. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (emphasis added).

analysis of prisoners' sexual harassment claims is particularly disturbing given the Supreme Court's recognition that this 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 offered no explanation for discounting this concern.⁸² Also, in reshaping the unwelcomeness standard, the *Freitas* court invited other federal courts and juries to engage in a detailed review of the inmate's entire "relationship" with an officer in order to identify evidence of voluntariness and dismiss a plaintiff's claim.⁸³ 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 herself as having a choice or agency at the time when the alleged harasser initiated the sexual overtures.⁸⁴

2. The Eighth Amendment Severe or Repetitive Standard

a. The Severe Physical or Psychological Harm Requirement

Similarly to the *Freitas* case, *Boddie v. Schnieder* offers no guidance about the relationship between the Eighth Amendment severe or repetitive standard and its Title VII analogue, the severe or pervasive standard. Indeed, in many ways, the *Boddie* decision appears purposely vague; it generally provides that prisoners may only bring claims based on sexual abuse or harassment *capable of inflicting* severe emotional and

82. The *Freitas* court mentioned the Eighth Amendment pain standard in a manner that suggested that this constitutional standard required it to create a tougher unwelcomeness standard in Eighth Amendment cases than prevails in Title VII cases. This justification for modifying the standard proves untenable when one examines the Supreme Court's Eighth Amendment jurisprudence. *See infra* Part IV. *See also Freitas*, 109 F.3d at 1338–39. Additionally, the *Freitas* court never explicitly made this claim. If it had clearly articulated a 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 nonworkplace sexual harassment doctrine.

83. *See Freitas*, 109 F.3d at 1338–39.

84. *See generally id.* 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's claim that he had feared the consequences if he rejected the worker or reported her behavior. *Id.* at 1338–39. 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. *Id.* These facts went to Freitas's perceptions of agency and his emotional feelings during the course of the relationship, not when the relationship was initiated. Because no detailed discussion was offered regarding the proof Freitas provided regarding his initial feelings of compulsion, we cannot know whether the court's conclusion about Freitas's claim was correct.

psychological harm.⁸⁵ Therefore, while the plaintiff is not actually required to make a showing of physical or emotional injury to establish a claim, the plaintiff 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. The standard, however, severely limits the kinds of inappropriate guard behavior prisoners may challenge. Specifically, the standard provides no relief to prisoners who want to challenge guard actions intended to temporarily 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 federal courts to ignore prisoners’ basic dignity interests and to focus solely on the potential for serious emotional and physical injury.

This description of the *Boddie* standard reveals the sharp break the standard made with 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 and by seriously compromising a plaintiff’s working environment.⁸⁶ Consequently, while allegations establishing an emotional injury are helpful, Title VII’s protections are triggered regardless of whether harassment of this magnitude occurs. The Supreme Court’s insights about the limits of an emotional harm standard should have pushed federal courts reviewing prison sexual harassment cases to ask whether the protections of the Eighth Amendment encompass more than harassment capable of inflicting severe physical and/or psychological injury. The *Boddie* court, however, failed to acknowledge

85. See *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (stating that “[s]exual abuse may violate contemporary standards of decency and can cause severe physical and psychological harm,” implicating the objective component of the Eighth Amendment standard). Although the court in *Boddie* never explicitly required 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 relied solely on cases in which evidence of severe psychological harm was presented and proved pivotal to establishing the plaintiffs’ sexual harassment claims. Also, the *Boddie* court’s own analysis suggests that its focus was on the actual harm the *Boddie* plaintiff suffered, as it found that none of the acts the plaintiff alleged was “severe enough” to do damage, nor were the acts “cumulatively egregious in the harm they inflicted.” *Id.* (emphasis added).

86. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

this concern.⁸⁷

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 federal 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 Eighth Circuit imagine we should refer to a “reasonable inmate standard”? Second, even if we assume this standard exists, federal courts are given no guidance about how to determine what the reasonable expectations of prisoners are. What kinds of conduct does an inmate reasonably believe are sufficient to inflict severe psychological harm? Consider that many prisoners are already severely traumatized by cross-gender invasive touching by guards in the prison context, touching that feels sexual in nature. They routinely experience severe psychological harm because of the ways that they are touched under what I call “authorized intimacy-violating prison procedures,” but they are expected to submit to this touching for security purposes.⁸⁸ The *Boddie* court inquiry is simply ill equipped to deal with the range of problems these institutional realities present for courts reviewing prisoners’ sexual harassment claims.

For example, what happens when a male guard uses an authorized intimacy-violating procedure⁸⁹ as a cover to gratify a sexual impulse or merely to humiliate the prisoner as an expression of gender-based hostility?

87. The *Boddie* court’s decision to institute a standard effectively requiring a showing of severe emotional or physical harm 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. Federal courts will focus on identifying actions that cause severe emotional or (worse) physical harm. They will ignore harassment that is more generally demeaning and that might otherwise raise Eighth Amendment concerns.

88. For example, how should a court treat a plaintiff’s Eighth Amendment sexual harassment claim alleging that a guard invited other officers to watch the plaintiff while she was held naked 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 to strip inmates as a calmative measure. Consequently, the court would likely conclude that the prisoner had not suffered any severe emotional injury other than the injury always suffered when subject to 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.

89. The term “authorized intimacy-violating prison procedure” is being used to refer to prison policies that allow male guards to touch female prisoners’ breasts or private parts or to conduct surveillance of inmates when the inmates are nude or only partially clothed.

The prisoner is humiliated by the procedure even in the absence of the officer's ill intent, making it difficult for her to show that she suffers some severe injury *because of* the officer's inappropriate actions. Yet the prisoner's inability to show the potential for some other separate or discrete psychological injury (as technically required under the Eighth Amendment analysis) seems irrelevant to considerations of justice. 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 potential for a discrete "severe" injury in this hypothetical case.

Third, as a practical matter, federal courts will end up requiring proof of serious physical and/or psychological harm in cases in which they are skeptical about whether the behavior complained of could actually inflict severe harm. For example, what should a court do in a case in which a prisoner alleges she was not allowed out to smoke until she flashed her breasts at an officer?⁹⁰ 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 officer's demand could (and in fact did) cause injury. Even if the showing is made, the plaintiff's claim will be complicated by the fact that the prisoner "consented" to the sexual exchange. Looking at this harassment scenario, a court might just as easily conclude that the prisoner's severe injury resulted from the prisoner's own bad choices as opposed to the officer's. Yet all of this seems beside the point. Although it may be difficult to show that the officer's solicitation caused the prisoner to suffer psychological injury, it is clearly a dignitary assault. The inmate has been encouraged to trade sexual favors for a pittance; this is certainly a humiliating circumstance.

b. Implications

Taken together, the *Boddie* and *Freitas* cases provide us with compelling evidence of the ways in which federal courts can borrow from Title VII sexual harassment doctrine in prisoner cases (and other nonworkplace cases) in selective and deeply problematic ways. These two cases, and subsequent prison cases relying on them as authority, force us to ask questions about the ways in which judges have used Title VII doctrine in attempting to understand the stakes in prison sexual harassment cases

90. *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1282 (N.D. Ga. 2002) (denying an inmate's Eighth Amendment sexual harassment claim based on a guard's requirement that she flash her breasts in order to get cigarettes). *See also infra* notes 109–12.

and other nonworkplace sexual harassment cases. I argue that, if federal 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 federal courts in creating sexual harassment protections. As this section shows, the *Boddie* and *Freitas* courts failed to heed the Supreme Court's guidance and instead incorporated extremely stringent standards in Eighth Amendment sexual harassment cases, some of which are drawn from options explicitly rejected in Title VII workplace sexual harassment doctrine. The federal courts' failure to acknowledge the guidance the Supreme Court has offered in Title VII cases would be of less concern if it were shown that this guidance is inapplicable to prison sexual harassment claims because of the Eighth Amendment's doctrinal norms.⁹¹ The remainder of this part, however, demonstrates that Eighth Amendment doctrine neither requires nor supports the use of the Eighth Amendment's more restrictive 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.⁹² This may come as a surprise given the central role pain has played in contemporary Eighth Amendment prisoner sexual harassment cases, a development stemming from its relationship to the Eighth Amendment excessive force doctrine.⁹³ 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 interpreted the Eighth Amendment to provide protection only against pain stemming from sexual abuse when the nature of the abuse is extreme enough to potentially

91. Importantly, *Harris* indicated 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. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting the congressional intent behind Title VII in defining the standard for a hostile work environment claim). 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?

92. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (explaining that the Eighth Amendment requires that any penalty imposed be in "accord with the 'dignity of man'"); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

93. *See supra* notes 49–55 and accompanying text.

cause “severe harm.”⁹⁴ The *Freitas* decision also relied on the pain standard as a justification for its stringent version of the unwelcomeness standard. It explained that interactions that appear “welcome and voluntary” cannot cause “pain” and therefore cannot serve as the basis for an Eighth Amendment sexual harassment claim.⁹⁵ One might challenge a federal 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 sexual harassment protections that provide protection against the humiliation and subordination issues covered under the more generous workplace sexual harassment standards.

As explained in Part II, the excessive force inquiry is based on the Eighth Amendment’s prohibition of the “unnecessary and wanton infliction of pain.”⁹⁶ 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: Does the Eighth Amendment wanton infliction of pain standard require these categorical conclusions about the nature of the harm required in prisoner sexual harassment cases? 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. McMillian*,

94. See *Boddie v. Schnieder*, 105 F.3d 857, 861–62 (2d Cir. 1997).

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

96. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)). This standard is also used in confinement cases to ascertain whether the conditions complained of compromise a constitutionally significant interest in a meaningful manner.

the Supreme Court decision that established that prisoners need not suffer a physically “significant injury” before bringing an Eighth Amendment excessive force claim.⁹⁷ 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 minimis harm.⁹⁸ The Supreme Court not only rejected the significant harm standard for excessive force claims, but the Court also held that no litmus test like the de minimis standard should be proposed to take its place. Instead, it held that the Eighth Amendment pain standard must be interpreted in a context-specific manner and admits of no absolute limitations.⁹⁹ The Supreme Court explained that determinations regarding the constitutional significance of the harm alleged in a given case should be assessed based on “evolving standards of decency that mark the progress of a maturing society,” as well as on the core value of human dignity.¹⁰⁰

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 emphasized that federal 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.¹⁰¹ With this in mind, the Court created a dynamic proof standard for these claims, explaining that the show of proof will “var[y] according to the nature of the alleged constitutional violation.”¹⁰² By recognizing that

97. See *Hudson v. McMillian*, 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. See, e.g., *id.* at 7. Once the Court permitted Eighth Amendment excessive force claims, it opened the door to other claims challenging guards’ ultra vires actions and abuses of their discretionary authority, including guards’ sexual harassment of prisoners.

98. See *id.* at 7 (“[T]he absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it.”); *id.* at 9–10.

99. *Id.* at 8–9.

100. See, e.g., *id.* at 8 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)) (explaining that the Eighth Amendment requires that any penalty imposed be in “accord with the ‘dignity of man’”).

101. *Hudson*, 503 U.S. at 8 (quoting *Whitley*, 475 U.S. at 320).

102. *Id.* at 5.

the pain standard is variable and context specific, the Supreme Court opened the door to legal challenges based on a broad array of officer actions, including those that 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.”¹⁰³ One is forced to conclude that the federal 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.¹⁰⁴

IV. IMPLICATIONS OF USING TITLE VII–STYLED TOOLS

This part explores additional problems that stem from courts’ use of the Title VII–modeled standards in Eighth Amendment cases. Section A shows that despite the modifications that have been made, these standards still carry the residue of their workplace origins and, consequently, cause federal courts to import entirely inappropriate workplace-specific assumptions about sexual harassment into the prison cases. Section B shows that, because of the Eighth Amendment sexual harassment standards’ linguistic similarity to their Title VII progenitors, the standards enjoy a certain undeserved legitimacy and discourage questions about the baseline level of protection afforded under the Eighth Amendment analysis. Section C describes how these workplace-inspired Eighth Amendment standards have caused courts to miss important opportunities to address the institutional factors specific to prison sexual harassment cases. Indeed, as we will see, these constructs have served as an effective cover for serious inconsistencies and holes in the Eighth Amendment analysis.

103. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997). 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. It does establish that the Eighth Amendment standards *permit* sexual harassment claims based on the infliction of dignitary harm.

104. 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 federal courts’ analysis of whether sexual harassment violates the Eighth Amendment’s dignity guaranty are explored in Part V. 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, a court would likely conclude that sexual harassment by prison guards violates prisoners’ Eighth Amendment interests.

A. PROBLEMS CAUSED BY WORKPLACE-SPECIFIC ASSUMPTIONS IN
EIGHTH AMENDMENT SEXUAL HARASSMENT DOCTRINE

1. The Eighth Amendment 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 explained in Part II, the Title VII unwelcomeness standard creates a safe harbor for an employer when his or her employees engage in invited or solicited flirtation and sexual interaction. 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 such conduct.¹⁰⁵ Its purpose is to ensure that employers will not be held liable for small-scale expressions of sexual interest or attraction between coworkers who appear to encourage and enjoy such behavior, even when these employees occasionally make mistakes about the sexual interest of their intended partner.

Armed with this understanding of the unwelcomeness standard's purposes, one immediately realizes that the unwelcomeness standard seems wholly inappropriate in prison cases. First, we must recognize that the workplace-specific assumption about the value of voluntary sexual relationships that informs the standard does not hold when we think about guards' sexual relationships with prisoners. Inmate codes of conduct and officer disciplinary rules prohibit guard-inmate sexual relationships.¹⁰⁶ Additionally, virtually all of the states have passed laws making guards criminally liable for engaging in sex with prisoners.¹⁰⁷ These statutes are

105. This proposition is often explicitly discussed in sexual harassment opinions. *See, e.g.*, *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994) (explaining that "courts are understandably reluctant to chill the incidence of legitimate [workplace] romance[s]"). The *Nichols* court explained that "[p]eople 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.*

106. *See, e.g.*, OHIO ADMIN. CODE § 5120-9-06 (2009) (inmate rules of conduct); INMATE RULES AND REGULATIONS 1 (John E. Polk Corr. Facility 2009), available at http://webbond.seminolesheriff.org/inmate_rules_and_regulations.pdf; Fla. Dep't of Law Enforcement, Correctional Officer Ethical Standards of Conduct Rule 4.4, <http://www.fdle.state.fl.us/Content/CJST/Officer-Requirements/CO-Ethical-Standards-of-Conduct.aspx> (last visited Nov. 1, 2009).

107. *See* AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 9 tbl.1 (2001), available at http://www.amnestyusa.org/women/custody/custody_all.pdf [hereinafter AMNESTY INT'L, ABUSE OF WOMEN]. At the time of the report,

based on the understanding that the power imbalance between a guard and a prisoner makes a prisoner incapable of voluntarily engaging in or consenting to a sexual relationship. These laws reflect the fact that a prisoner in a so-called relationship with a guard is dealing with a person who possesses the discretionary power to use violence to compel the prisoner to comply with demands for intimate conduct or sexual behavior. Because of their unequal power, a guard's solicitation of an inmate for sex or for some other form of intimate contact 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.¹⁰⁸

Ironically, rather than modifying the Title VII unwelcomeness standard to reflect the specific institutional conditions in prisons (including an inmate's diminished capacity to resist or consent to sexual interactions), in *Freitas*, the Eighth Circuit created an even broader safe harbor for officers who initiate these so-called consensual relationships with prisoners. The *Freitas* standard gave guards additional leeway to demonstrate that the inmate willingly participated in a sexual relationship by presenting evidence of the inmate's consent or voluntariness. However, this consent or voluntariness inquiry simply does not account for the subtle, coercive power harassing guards use to control prisoners. As currently constructed, the *Freitas* voluntariness inquiry fails to take into account the background atmosphere of coercion in which guard and inmate interactions occur.

The power dynamics in prison sexual harassment cases are well illustrated in *Fisher v. Goord*,¹⁰⁹ a Western District of New York case decided under the *Freitas* standard. In that case, the plaintiff, Amy Fisher, offered detailed testimony, outlining the ways in which guards can make inmates acutely aware of their dependency on the guards for basic needs and physical protection. Specifically, Fisher testified that upon admission to prison, one guard lectured her at length that she needed to "play along" with the guards and not oppose them because if she resisted, the guards

only Alabama, Minnesota, Oregon, Utah, Vermont, and Wisconsin did not have criminal laws prohibiting guards from engaging in this misconduct. *Id.* at 5, 9 tbl.1. Forty-three states have made voluntary sex with inmates a felony; the remainder treats it as a misdemeanor. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES I (2005).

108. See *supra* note 84 and accompanying text.

109. 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 (W.D.N.Y. 1997). See also Corey Kilgannon, *Lolita's Chapter 2: Motherhood and Memoirs*, N.Y. TIMES, Sept. 29, 2004, at B3.

would not protect her from other inmates. He also claimed that if she resisted, the guards would write false disciplinary reports about her that could affect her eligibility for parole.¹¹⁰ The guard explained that she needed all of the guards to be her “friends.”¹¹¹ Ultimately, two guards, including the one who had made the speech, made sexual advances toward Fisher, and she submitted to their advances. When she brought Eighth Amendment sexual harassment claims against the two guards, the district court ruled that since Fisher never said no or actually resisted the guards, the sexual interactions she had had with the two men were welcome and voluntary.¹¹²

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 district court to minimize the evidence of subtle coercion Fisher presented. As a consequence, the court ended up recasting sexual behavior spurred by the implicit threat of force and retaliation as voluntary sexual behavior. The unwelcomeness standard used in the *Fisher* case 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. Unfortunately, the *Fisher* court (just like the *Freitas* court) failed to provide any explanation for why the analysis in Eighth Amendment prison sexual harassment cases does not make allowances for this dynamic. The background presence of coercion should be factored into any inquiry into an inmate’s alleged voluntary consent to sexual interaction.

b. Assumptions About Resistance

The Eighth Amendment unwelcomeness standard is also based on certain workplace-related assumptions about the harassment target’s agency. The standard is less problematic in the Title VII context, as 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, federal courts conclude that it is reasonable to require the alleged target in a Title VII case to affirmatively demonstrate resistance and/or report harassing activity to a supervisor. Courts also recognize that employers are incentivized to create reasonable complaint regimes, if only to protect themselves from Title VII

110. *Fisher*, 981 F. Supp. at 145–46.

111. *Id.* at 145.

112. *Id.* at 173–74.

liability. Unfortunately, however, these same assumptions about victims' agency do not hold in the prison cases, rendering the unwelcomeness standard deeply problematic in the Eighth Amendment context. For one, the reporting mechanisms currently in use in prisons tend to discourage disclosure or complaint, as prison reporting regimes are often transparent and can lead to retaliation from guards.¹¹³ Consequently, one of the major categories of resistance the federal courts look for—evidence of reporting—is often not present in prison sexual harassment cases.

Additionally, federal 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 and openly reject a guard's sexual overture.¹¹⁴ The threat of retaliation that inmates face is far more serious than anything faced by workers in workplace cases: the harasser often exercises control over nearly all of the inmate harassment target's basic life necessities.¹¹⁵ In a context where a guard may beat a noncompliant prisoner, file false disciplinary charges against her that can reduce her eligibility for parole, 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 female prisoners confirm that fear is widespread, explaining that many prisoners believe that their very physical safety is at risk if they rebuff a guard's advances.¹¹⁶ Furthermore, 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

113. See, e.g., Class Action First Amended Complaint ¶¶ 26–39, *Amador v. Andrews*, 2009 U.S. Dist. LEXIS 108727 (S.D.N.Y. Nov. 19, 2009) (No. 03 Civ. 0650 (KTD) (GWG)) (describing the transparency of prison administrative complaint procedures, which resulted in retaliation against the complaining inmates by guards); HUMAN RIGHTS WATCH, NO WHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS 6–7 (1998) (discussing female inmates' complaints about receiving false disciplinary reports after reporting sexual abuse).

114. Avery J. Calhoun & Heather D. Coleman, *Female Inmates' Perspectives on Sexual Abuse by Correctional Personnel: An Exploratory Study*, WOMEN & CRIM. JUST., Nos. 2/3 2002, at 101, 114 (discussing inmate interviews in which the inmates indicated that part of the "survival" strategy in a women's prison is avoiding having to ever say "no" to a guard).

115. HUMAN RIGHTS WATCH, *supra* note 113, at 7 (noting that the "guards wield near-absolute power over the women, [and] retaliation can be devastating to the women's security, health and psychological well-being"); Calhoun & Coleman, *supra* note 114, at 104–05 (noting that inmates are constantly aware that a "staff person's authority can ultimately be backed by state sanctioned use of physical force" and that the officers' uniforms and access to weapons reinforces inmates' understanding of their subordination).

116. Calhoun & Coleman, *supra* note 114, at 114–15. 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.

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 guards who engage in harassment or by appearing passive, as these strategies often minimize the potential for retaliation. Unfortunately, claimants who adopt these more prudent strategies typically find they cannot survive the Eighth Amendment unwelcomeness inquiry, and their sexual harassment claims fail.¹¹⁷ The Eighth Amendment unwelcomeness standard is simply too wedded to workplace-specific assumptions about harassment victims' agency to support prisoners' claims.

2. The Eighth Amendment Severe or Repetitive Standard and Workplace Sexual Harassment Assumptions

Similarly to the unwelcomeness standard, the severe or repetitive standard invites the federal courts to adopt workplace-specific assumptions about prisoners' sexual harassment claims and, consequently, radically mischaracterizes parties' relative power in prison cases. As explained in Part II, in Title VII cases, in order to establish hostile environment sexual harassment claims, plaintiffs must show that they were subjected to severe or pervasive sexual harassment. This Title VII standard attempts to establish a fair baseline at which an employer may be held liable for his or her employees' sexually inappropriate conduct. Consequently, courts applying the severe or pervasive standard are preoccupied with a particular kind of sorting—namely, sorting out minor sexual flirtation or stray inappropriate remarks from more serious 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 to develop, given their arguable social value. The problem,

117. 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. Prison work details often give civilian workers, like the defendant in *Freitas*, the power to hire, fire, reassign, or demote prisoner-workers. See Job Description for Cook/Foreman, <http://federalgovernmentjobs.us/jobs/Cook-Foreman-1708383.html> (last visited Oct. 20, 2009). 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, affecting his eligibility for parole. Given the range of sanctions available to the worker 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.

however, is that the severe or repetitive standard, as used in prisoner sexual harassment cases, naturalizes the idea that we should also tolerate guards' intermittent sexual "flirtation" with and propositioning of prisoners—a far more controversial position for several reasons explored below.

First, unlike in workplace cases, there is no consensus that "minor" sexual harassment in prison cases 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 of engaging in criminal activity. In spite of these facts, the severe or repetitive standard effectively creates a safe harbor for "low-level" sexual harassment.

Indeed, because of the dramatic power inequality between guards and prisoners, prisoners know that a guard's flirtation is always backed up with the implicit threat of sanctions if the prisoner does not respond.¹¹⁸ Consequently, a prisoner is likely to experience a guard's "flirtation" as far more threatening than flirtation by a coworker or supervisor 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. Specifically, 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.¹¹⁹

Second, prison cases as a group tend to feature degrading sexual behavior that often bears little relationship to the activities one might regard as minor workplace sexual flirtation. Instead, this conduct is better described as low-level sexualized touching that, although not physically harmful, is degrading and increases the anxiety of prisoners subject to this treatment. Often the officer engaged in such behavior attempts to use his valid authority to invasively touch the prisoner in order to engage in illicit conduct. The officer's actions are more easily recognizable as displays of power and domination than the de minimus workplace flirtation the severe or pervasive standard was intended to protect. Under the severe or repetitive standard, however, courts lump these officer incidents of clearly humiliating touching into the category of flirtation and conclude that they do not inflict serious harm.

Indeed, the severe or repetitive standard is particularly disturbing

118. See Calhoun & Coleman, *supra* note 114, at 104–05.

119. *Fisher v. Goord*, 981 F. Supp. 140, 144–48 (W.D.N.Y. 1997).

because it distracts federal 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.¹²⁰ 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.¹²¹ These facts make the inquiry into illicit conduct complicated. The primary challenge for federal courts is to remain sensitive to the offensive nature of ultra vires acts, despite guards’ discretion to engage in authorized invasive touching.¹²²

The second special challenge in prison sexual harassment cases is identifying a way of sorting through sexual harassment claims that involve officers gratifying sexual impulses under the cover of authorized cross-gender search procedures.¹²³ Federal 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 the guard’s 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 the federal courts should conclude that an officer’s episodic use of authorized search procedures for sexual harassment purposes is not serious enough to inflict an injury of constitutional concern. Even worse, the severe or repetitive standard suggests that 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 the federal courts into a false sense of security when analyzing harassing conduct in prison cases.

120. 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.

121. See Calhoun & Coleman, *supra* note 114, at 109–11 (describing inmates’ assessments of power dynamics in searches).

122. Indeed, the federal courts’ desensitization to prisoners’ injuries was key in *Boddie*, as the court discounted the plaintiff’s experience of violation because it recognized that guards constantly touch inmates in an offensive manner. See *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).

123. See, e.g., *Holton v. Moore*, No. CIV.A.96CV0077, 1997 WL 642530 (N.D.N.Y. Oct. 15, 1997) (rejecting a 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).

The construct distracts the federal courts from what should be the core inquiry in prison sexual 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: Reexamining the Severe or Repetitive Standard

The problems I have identified as stemming from the Title VII–modeled standards counsel against the current borrowing strategy that federal courts use when developing Eighth Amendment sexual harassment doctrine. 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 II, in Title VII cases, the severe or pervasive inquiry is conducted with an eye toward vindicating a specific baseline right or guaranteed interest—the plaintiff’s right to workplace gender equality. The *Meritor* Court specifically explained that Title VII is fundamentally concerned with conditions that are severe or pervasive enough to compromise a person’s ability to work because of gender. To this end, the *Meritor* Court directed courts conducting the Title VII inquiry to look for harassment severe or pervasive enough to “affect[] a term, condition, or privilege of employment.”¹²⁴ Consequently, the proof a Title VII plaintiff offers in support of a sexual harassment claim tends to show that the harassment compromised the plaintiff’s work performance or motivation to participate in the workplace. Alternatively, the plaintiff may attempt to show that the harassment was sufficient to discourage the victim from remaining at his or her job or to keep him or her from attempting to advance in his or her career.¹²⁵ 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 the severe or repetitive standard? Federal 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.

124. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (emphasis added) (internal quotation marks omitted).

125. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

Some may argue that the Second Circuit did identify the baseline interest vindicated by Eighth Amendment sexual harassment doctrine in *Boddie*—the standard *Boddie* created requires a court to look for harassment severe or repetitive enough to cause pain cognizable under the Eighth Amendment. But the superficiality of the *Boddie* court’s analysis becomes clear when we consider that the court provided no guidance about how to determine when sexual harassment inflicts “severe” pain sufficient to trigger Eighth Amendment concerns. In the absence of further guidance, the court’s reference to the Eighth Amendment pain standard merely raises more questions. Specifically, 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.¹²⁶ Without some basic guiding principle, or some understanding of the interests the *Boddie* court recognized as meriting constitutional protection, the resort to the classic Eighth Amendment inquiry is simply an empty rhetorical strategy that provides no real answers. Of course, the *Boddie* court, acting in compliance with the doctrinal norms of the Eighth Amendment, could have identified dignity as the core concern that determines when prison sexual harassment triggers the Eighth Amendment pain standard. However, the *Boddie* court failed to do so. The court offered no guidance on how to identify inconsequential sexual harassment that does not constitute pain under the Eighth Amendment or 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.¹²⁷ 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

126. Indeed, this analysis is even more suspect when we recognize that the *Hudson* Court established that severe pain is not necessarily required to establish an Eighth Amendment claim. See *supra* notes 97–104 and accompanying text.

127. *Harris*, 510 U.S. at 22.

motivation- or participation-based 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 a 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, there is no question that the showering incident has caused her to be injured. As the above example shows, the injury prisoners suffer in sexual harassment cases cannot be 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, and it wisely chose not to make this part of its analysis. However, the *Boddie* court provided no affirmative value in place of this participatory account and therefore offered courts no assistance in determining what is actually being protected by the severe or repetitive test. Instead, it left federal courts wondering what interest is protected by Eighth Amendment sexual harassment protections.

The conceptual defect I have identified in the severe or repetitive standard is much more than an academic problem; it has had clear and troubling repercussions for federal courts ruling on prisoner sexual harassment claims. Because federal 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 for 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*, then the court dismisses the plaintiff's claim. In effect, this interpretation of the *Boddie* decision transforms the analysis under the severe or repetitive standard into a purely mechanical inquiry.¹²⁸

This mechanical interpretation of *Boddie* is particularly disturbing as it contradicts the basic interpretive guidelines that inform the severe or

128. See *Holton*, 1997 WL 642530, at *2 (holding that the 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 that no claim was stated).

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.¹²⁹ It would reject the analyses other federal courts have produced under *Boddie* or any analysis that proposed to test sexual harassment allegations against some preexisting litmus test or standard. However, federal courts applying the Eighth Amendment severe or repetitive test have no choice. Because the standard as currently stated is not based on the vindication of any particular interest, federal courts must resort to a mechanical comparison of a given plaintiff's allegations to the facts of other cases 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. Because it has not been challenged, the use of the severe or repetitive standard has allowed federal 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 permits 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 preestablished, but undisclosed, standard of seriousness that the federal 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's Role in Establishing Individual *and* Institutional Liability

The severe or repetitive standard is undertheorized in a second, related manner. In Eighth Amendment analysis, it functions as a standard for

129. See *supra* notes 37–39 and accompanying text.

establishing both individual liability and institutional liability. As explained in Part II, 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 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 Eighth Amendment cases against individual guards.

The concerns I have raised about the use of the severe or repetitive standard to review claims against individual harassing officers are never even recognized, much less addressed, in the *Boddie* decision. However, by using the standard in this manner, the *Boddie* court is effectively giving officers a free pass for sexually harassing conduct unless the conduct meets the severe or repetitive standard. However, we must ask, Why are individual officers 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 its counterpart does under the Title VII inquiry: the severe or repetitive test 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 federal courts will have to establish some baseline to identify harassment sufficient to state an actionable Eighth Amendment claim. Certainly judges will need to establish a set of principles that can be used to effectively sort through the prisoner sexual harassment cases to identify offensive behavior that does not inflict

constitutionally significant harm for Eighth Amendment purposes. My goal in this analysis is simply to make it clear that the current Eighth Amendment standard, the severe or repetitive test, does not set up the analysis in a fair and principled way.

C. CONSEQUENCES

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

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 judicial justification for the standard, we can explore one reasonable reading—namely, that the *Boddie* court believed that prisoners' individual damages claims should be governed by a higher standard than that which informs the employer liability standard in Title VII cases because guards typically are indemnified by the state for tortious acts committed in the normal course of their duties. Since these prisoner

claims against individual guards actually require a draw on the public fisc (that is, they require payment by the state), using a Title VII-modeled standard to assess their claims 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, as 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 *Boddie* court concluded that courts should only be concerned with the most serious sexual violations. On its face, this analysis seems reasonable. On closer examination, however, this line of reasoning reveals its flaws. For one, this argument fails to acknowledge prison officials' role in creating a prison environment that gives birth to a large number of claims of sexual harassment. 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.¹³⁰ 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 a federal court's interest in avoiding the administrative challenge of dealing with the

130. See *Jordan v. Gardner*, 986 F.2d 1521, 1540 (9th Cir. 1993) ("A common-sense understanding of the different experiences of men and women in this society leads to the inescapable conclusion that invasive searches of the bodies of female prisoners by male guards . . . constitute and reinforce gender subordination . . ." (citation omitted)).

potentially high number of prison sexual harassment cases should figure into its analysis at all. 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 (“PLRA”).¹³¹ The PLRA regime raises its own set of concerns; however, under our current laws, it is the regime that has been created for dealing with concerns about the administrative challenges of managing the allegedly high volume of prisoner litigation. It is improper to allow courts to arbitrarily cabin prisoners’ Eighth Amendment rights based on this concern.¹³²

Moreover, to the extent that the heightened standard is justified by concerns about the volume and interpretational challenges of prisoner sexual harassment suits, the federal courts’ analysis is based on a distorted understanding of these problems. Claims based on discretionary touching are likely to be numerous, 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 courts using these standards have not been required to engage in a thorough review of the issues at stake in the prisoner sexual harassment cases. In this way, the *Boddie* decision illustrates the risk that federal courts operating without a clear conceptual framework, and instead using these borrowed

131. See 42 U.S.C. § 1997e(a) (2006). This observation does not mean that the PLRA 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 prisoners 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 *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 3–5 (2008) (testimony of Lisa Freeman and Dori Lewis of the Legal Aid Society of New York).

132. 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 v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring).

Title VII doctrinal tools, will allow unspoken and unexamined assumptions about prisons to shape their analyses.

V. A NEW APPROACH

Parts III and IV highlighted the costs of selectively borrowing from Title VII sexual harassment doctrine to create nonworkplace sexual harassment protections. This part offers a new approach for federal courts creating nonworkplace sexual harassment doctrine, laying out a three-part context-specific inquiry that will help federal courts incorporate into their analyses an understanding of how an individual's dignity interests are framed by institutional circumstances, whether the claim arises in prison or some other nonworkplace context. The framework is intended to help federal courts identify the institution-specific facts that should play a role in their analyses, 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 antidiscrimination regime based on dignity is the broad, undefined nature of this value. Despite the central role it plays in international law, appearing in various antidiscrimination covenants and conventions,¹³³ dignity has no one shared, universal definition.¹³⁴ Rather, dignity interests are necessarily context specific, as

133. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) (stating 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"); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Annex, pmb., U.N. Doc. A/6316 (Dec. 16, 1966) (arguing that basic civil rights "derive from the inherent dignity of the human person"); Universal Declaration of Human Rights, G.A. Res. 217A (III), pmb., U.N. Doc. A/810 (Dec. 10, 1948) (calling for the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"); U.N. Charter pmb. (affirming the commitment of the United Nations to protect "fundamental human rights . . . [and] the dignity and worth of the human person").

134. Oscar Schachter, Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 849 (1983) ("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."). Schachter explains that "[i]ts intrinsic meaning has been left to intuitive understanding." *Id.* See also R. George Wright, Essay, *Consenting Adults: The Problem of Enhancing Human 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 agree fully with a contemporary human rights activist." *Id.* See also Gloria Zuniga, *Eine Ontologie der Würde [An Ontology of Dignity]*, in MENSCHEDWÜRDE: ANNÄHERUNG AN EINEN BEGRIFF 175 (Ralf Stoecker ed., 2003) (F.R.G.) (reprint of English translation on file with author) (explaining that the "meaning of dignity is just assumed to be

they are defined by shared cultural assumptions, religious concerns, politics, and the history of the specific community in which the claim is made.¹³⁵ The continually shifting, evolving nature of the concept is apparent, particularly in litigation,¹³⁶ as parties characterize a broad array of concerns as implicating dignity interests, in circumstances as varied as criminal cases,¹³⁷ right-to-life cases,¹³⁸ right-to-die cases,¹³⁹ prisoners' rights cases,¹⁴⁰ and antidiscrimination cases.¹⁴¹ 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—Anita Bernstein in particular—have offered insights about dignity's meaning in sexual harassment law, relying primarily on political philosophy.¹⁴² In my view, however, the proper

understood or too obvious to require an explanation").

135. Baer, *supra* note 4, at 589 (explaining that the role dignity plays in the German constitution is a response to the Holocaust); Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 971 (same). Dignity is also a similarly culturally specific notion as embodied in Israeli law. See 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.").

136. See, e.g., Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 757 (2006) (noting that the Supreme Court's considerations of dignity have evolved with public opinion rather than dignity being treated as an "invariant"). For example, dignity claims may be used to challenge the material conditions of one's existence if one is challenging arguably degrading poverty conditions. They may also 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, they may be cited as part of the rationale for why we should provide a remedy for status-based assaults, a consideration I explore in more detail in the next section.

137. *Id.* (cataloguing the various constitutional claims—including Fifth Amendment claims—that have used dignity as a basis for their arguments); Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 546–50 (2004) (arguing that dignity should be a fundamental constitutional limit on substantive criminal law). See generally Lois Shepherd, Essay, *Dignity and Autonomy After Washington v. Glucksberg: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL'Y 431 (1998) (undertaking a critical analysis of the concepts of dignity and autonomy and proposing new understandings).

138. Shepherd, *supra* note 137, at 438 (arguing that dignity in abortion cases means nothing more than "respecting the autonomous actions of rational persons").

139. *Id.*

140. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (explaining that the Eighth Amendment requires that any penalty imposed be in "accord with the 'dignity of man'"); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than 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.

141. See, e.g., *infra* Part V.A.1.

142. See, e.g., DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND*

starting point is to consider how dignity is understood across Title VII and Fourteenth Amendment antidiscrimination cases regarding race and sex—the legal foundation for the creation of sexual harassment hostile environment doctrine. This decision to focus on the doctrine to develop my fundamental concept of dignity is based on two reasons, one conceptual and one pragmatic. By understanding the core concept of dignity mobilized in antidiscrimination cases, we learn something fundamental about our shared cultural understanding of why sex 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.¹⁴³ This section of the discussion attempts to develop a richer understanding of dignity based on antidiscrimination doctrine. I then use this understanding to expand on and add further depth to Bernstein’s model of dignity, which was formulated to consider workplace sexual harassment concerns. These resources, taken together, form the basis of my dialogic model of dignity, which emphasizes the continual interplay between institutional conditions and social conventions that must be considered when creating sexual harassment doctrine.

1. Reading the Cases: Dignity’s Role in Antidiscrimination Doctrine

Courts primarily have been preoccupied with questions of equality in antidiscrimination cases; however, faint echoes regarding dignity concerns can be heard when one listens closely. In Fourteenth Amendment and Title VII cases, dignity occasionally appears as a secondary justification for why race and gender discrimination inflicts injury, typically after federal courts justify their decisions using an equality paradigm.¹⁴⁴ Dignity, then, can be characterized as equality’s “poor cousin” in antidiscrimination doctrine—the two values are undeniably related, although equality gets the lion’s share of attention.

SEXUAL HARASSMENT 171–90 (1995) (describing harassment using a Rawlsian framework of the “primary good of self respect”); Bernstein, *supra* note 4.

143. Some scholars have argued that the discussion of dignity in legal decisions is typically underdeveloped and undertheorized. *See* Goodman, *supra* note 136, at 747 (describing the concern that “the role of human dignity in our constitutional jurisprudence [is] episodic and underdeveloped” (internal quotation marks omitted)); Wright, *supra* note 134, at 1399 (“In spite of its implicit prominence in our jurisprudence, human dignity as a legal principle has not received the degree of careful attention it deserves.”).

144. Goodman, *supra* note 136, at 762–64 (explaining that in Fourteenth Amendment claims for equal access to education and accommodations, the Court often finds that plaintiffs’ dignity interests are compromised when they are denied equal treatment on the grounds of racism and/or sexism).

The two concepts, however, are also sometimes conflated in judges' minds.¹⁴⁵ Laying out the equality justifications for sexual harassment protections, Guido Calabresi asks, "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'?"¹⁴⁶ The swift move from equality to respect elides a certain basic question that is at the heart of Calabresi's view: What does it mean to "have respect" for another person? How much respect, and what kind, is necessary as a baseline proposition when examining antidiscrimination challenges? Calabresi's words suggest that judges' and legal scholars' understandings of equality are fundamentally shaped by certain baseline dignity standards that are part and parcel of our views regarding fair and decent treatment in discrimination disputes. Therefore, as a first step in grounding our understanding of dignitary harm, we should look to dignity's definition in the early antidiscrimination cases, tracing how the understanding of this value gets crafted over time.¹⁴⁷

Review of the Fourteenth Amendment cases shows that two kinds of dignity have been recognized as significant under the Fourteenth 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 witness the dignitary slight except the target and the harasser.¹⁴⁸ Both dignity concerns are raised in Supreme Court antidiscrimination cases. For example, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court noted that antidiscrimination law reflects Americans' shared understanding that our common humanity requires that all Americans be accorded equal respect in public life. The specific example calling for comment in that case was the

145. See Guido Calabresi, *Perspective on Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 4, at 47, 49.

146. *Id.*

147. Baer, *supra* note 4, at 589, 591 (noting that in the United States dignity is not part of equality jurisprudence and contrasting German sexual harassment doctrine—which is based on dignity—with the U.S. doctrine); Kamir, *supra* note 4, at 564 (explaining that U.S. sexual harassment law was "legally formulated in the context of the right to equality").

148. For a further discussion of this public/private split, see Eberle, *supra* note 135, at 980 (discussing notions of outward-focused dignity and inward-focused dignity in German and American constitutional jurisprudence).

public accommodations provisions of the Civil Rights Act of 1964. The Court explained that “the fundamental object of [antidiscrimination law is] to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments,’” describing these denials as a form of public insult.¹⁴⁹ The Court’s comments provide insight into the two kinds of dignity concerns that have motivated courts interpreting civil rights measures: 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 “personal dignity” is compromised in such interactions, a reality even when no third party is present).

The two types of dignity concerns also appear in *J.E.B. v. Alabama ex rel. T.B.* Rejecting the practice of making gender-based preemptory challenges, the Court commented on the effect gender stereotyping has had on women. It explained that the “assumption that [jurors] 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, [it] reinvokes a history of exclusion from political participation.”¹⁵⁰ Here, the Court’s concern about “branding” sounds in the nature of a public dignity concern. In contrast, the concern about women being reminded of their history of subordination sounds like a private experience of dignitary harm, a factor that compounds the experience of indignity.

When one focuses on the discussions in Title VII cases, one sees the two faces of dignity again, although they appear in the understudy’s role and equality takes centerstage. In several cases, after discussing equality concerns, the Court has recognized that Title VII race discrimination claims can be characterized as a means to address a kind of “dignitary tort” because discriminatory acts are intended to “den[y] another’s right to equal dignity.”¹⁵¹ Also, although the Supreme Court focused on equality

149. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872 (1964)), *abrogated on other grounds by* *United States v. Lopez*, 514 U.S. 49 (1995). In a concurring opinion, Justice Goldberg explored the nature of this dignity question further. Quoting from the *Senate Report on the Civil Rights Act*, the opinion notes that “[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.” *Id.* at 292 (Goldberg, J., concurring).

150. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (citation omitted) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

151. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 677 & n.9 (1987) (citing *Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974)), *superseded by statute on other grounds*, 28 U.S.C. § 1658(a) (2006), *as*

considerations when it defined behavior constituting sexual harassment, it included actions that are “threatening or humiliating,”¹⁵² a characterization that reminds us of one’s dignity interests in avoiding coercion or public degradation. The two faces of dignity are also present in appellate courts’ decisions, with such courts recognizing that “[s]exual harassment strips the victim of [public] dignity and self-respect.”¹⁵³ Federal 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.”¹⁵⁴

2. Insights from Feminist Legal Theory

The insights from the antidiscrimination cases give one clear insight regarding the nature of the respect-based injuries that must be avoided; however, my project is to translate these understandings about dignitary injury into more certain guideposts that can help courts identify and assess wrongful as well as actionable conduct. Feminist legal theory provides more assistance in this regard. In *Treating Sexual Harassment with Respect*, Anita Bernstein offers a definition of dignity or respect that focuses on negative duties, providing specific guidance regarding how one discharges one’s obligation to avoid inflicting public or private forms of dignitary harms on others.¹⁵⁵ Bernstein explains that sexual harassment is a

recognized in Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004). *See also* *United States v. Burke*, 504 U.S. 229, 245 (1992) (finding that a personal, psychological injury resulting from discrimination was not necessary for a plaintiff to recover backpay under Title VII), *superseded by statute on other grounds*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, sec. 1605, § 104, 110 Stat. 1755, 1838–39. The *Goodman* Court stated, “Any act of racism doubtless inflicts personal injury.” *Goodman*, 482 U.S. at 677.

152. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). In *Meritor*, another seminal decision, the Court characterized sexual harassment as including comments that constitute “ridicule” or “insult,” more specifically connecting harassment to a concept of dignity-based assault. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

153. *Weeks v. Baker & McKenzie*, No. 943043, 1994 WL 774633, at *1 (Cal. Super. Ct. Nov. 28, 1994), *aff’d*, 74 Cal. Rptr. 2d 510 (Ct. App. 1998).

154. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1174 (9th Cir. 2003). *See also* *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994) (“Nothing is more destructive of human dignity than being forced to perform sexual acts against one’s will.”); *Andrews v. City of Phila.*, 895 F.2d 1469, 1485–86 (3d Cir. 1990) (explaining that an environment filled with obscene comments and materials “could be regarded as 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” (internal quotation marks omitted)), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). 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.

155. Specifically, Bernstein argues in favor of shifting from a reasonable person standard to a respectful person standard. Bernstein, *supra* note 4, at 507.

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.”¹⁵⁶ In defining this right to recognition respect, she identifies three duties that social actors in the workplace owe one another in order to maintain certain respect conditions.¹⁵⁷ These duties require that the agent (1) “not treat another person only as a means of achieving the ends of the agent,” (2) “refrain from humiliating another,” and (3) “not engage in conduct that rejects or denies the personhood or self-conception of another.”¹⁵⁸ These general principles can be applied outside the workplace if supplemented by our understanding of the dynamic context-specific nature of dignity concerns.

Specifically, the insights we developed from our reading of the Fourteenth Amendment antidiscrimination cases add an additional dimension to Bernstein’s concept of recognition respect, one that emphasizes the importance of social conventions. The cases 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 treated with respect.¹⁵⁹ In addition to a personal or private sense of respect, one wants to feel as though other actors in the world, persons who witness one’s treatment, realize that one is being treated in a respectful manner. These respect considerations are the result of more explicit, shared understandings of the relevant bases for determining when one has been accorded respectful treatment. While antidiscrimination law takes note of both private and public dignity concerns, it is primarily concerned with the second group of concerns—those respect expectations that stem from shared, explicitly recognized social conventions. It is not concerned with a person’s individual claim of being disrespected unless that experience matches an existing or emergent social convention we understand to govern

156. *Id.* at 484.

157. 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 imposes on others. William Nelson, *Varieties of Rights: How They Work, How They Are Justified*, 31 *SOC. THEORY & PRAC.* 359, 373–75 (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. In my view, these negative duties must be broadly defined, as the potential scope of a protective right becomes most clear when the right is threatened with being compromised or invaded.

158. Bernstein, *supra* note 4, at 487. 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 1, at 763.

159. Of course, this personal, private sense of assurance is not entirely idiosyncratically generated; it is typically based on respect expectations cultivated as a result of interactions in a social world.

a particular space. Consequently, we must develop an analysis that allows us to map these social conventions and identity-shifting dynamics in respect expectations.

To identify the social expectations that make up the respect conventions the law is prepared to recognize in a given institutional location, we should focus on three basic considerations: (1) the role of the harassment target in the institution, (2) the role of the alleged harasser, and (3) the needs of the given institution in which the parties in conflict find themselves. These considerations must be weighed in an analysis that gives full consideration to the interrelation of these three actors and the ways in which their instrumental roles shape the scope of the dignity expectations they are understood to validly maintain. Stated alternatively, my dignity-based sexual harassment framework relies 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 federal courts a method for identifying the institution-specific factors, as well as the value assumptions, that shape respect demands in different institutional settings.¹⁶⁰

B. THE DIGNITARY MODEL

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

1. The Reasonable Dignity Expectations of the Target

How do we go about identifying the reasonable dignity expectations of the target?¹⁶¹ Federal courts can identify the scope of these expectations

160. This understanding is related to the concept 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 4, at 484.

161. The ambiguous and potentially confusing nature of this inquiry becomes clearer when we attempt to define the institution-specific dignitary 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 dignity 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

by examining three issues: (1) the harassment target's assigned role within the institution, (2) the extent to which the harassment interferes with this defined role—and how it achieves that end, and (3) whether the conduct complained of plays some role in the institution's functioning.

a. The Target's Role in the Institution

The first consideration federal courts should weigh in assessing the individual's role in the institution is to examine the respect expectations the institution cultivates. If the institution's rules or customary practices appear to recognize the dignity interest the complainant is attempting to protect, this fact should be considered as part of the federal 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 to partake of the benefits the institution offers.¹⁶² 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, federal 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 dignity interests cultivated by the institution and of any preexisting dignitary rights that are not inconsistent with the institution's functioning.

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 dignity interests despite their incarceration and that harassment protections are merely an attempt to inquire whether the alleged harassing actions 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 dignity interests as well as the reasons the law might be prepared to recognize those interests, it is likely that 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 his or her own thinking, some additional guidance is required.

162. For example, Title VII workplace sexual harassment doctrine allows claims based on voyeurism, recognizing the right to be free from unwanted sexual attention. Claims based on harassing voyeurism, however, would be more complicated in prison cases, given that guards are required to watch prisoners. Claims based on voyeurism would be equally as complicated in school peer sexual harassment cases, in which 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 and social conventions that change the nature of the claim.

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. Federal courts must question whether these dignitary compromises are truly necessary. Second, the assessment a federal 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 in which the individual's role is voluntary, he or she may have made a decision that the benefits offered by the institution counter the dignitary limitations he or she must endure. In circumstances in which 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 the sacrifice. Therefore, while it will be helpful to know the respect expectations the institution cultivates and the specific concerns it believes should be brought to bear, federal courts creating sexual harassment doctrine should initially be skeptical about the dignitary 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 when 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 may 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 dignity expectations. For example, even if some prison administrators currently ignore guards' use of gender-based epithets to chastise prisoners, we should not use this administrative practice as a basis for arguing that inmates have no right to expect more respectful treatment. Federal courts should be mindful that the general goal under this first prong of the analysis is to develop a better understanding of what the harassment target's function is within a particular institution and what the target may reasonably expect as a baseline level of respectful conduct given the target's 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, may initially 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. Federal 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 an unfortunate but necessary 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. Additionally, they may argue that prison disputes can get heated and officers may accidentally use these epithets when they are upset or are responding to an insulting comment made by an inmate. Officers must be permitted to occasionally use these terms without triggering legal sanctions, administrators will argue, or the officers will be unduly hampered in the performance of their duties. A federal court presented with these arguments should ask, Is it appropriate to honor these justifications, or does allowing guards to use these epithets as a disciplinary tool seem inconsistent with our larger antidiscrimination goals?

Different instrumental arguments might be raised in cases concerning military officers' complaints regarding gender-based verbal harassment.¹⁶³ 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 a recruit's subjectivity as part of the process of making the recruit 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 the individual's sensitivity about such issues and encourage the recruits more generally to see themselves as officers rather than in gender-based terms. In considering this claim, the reviewing court must determine whether gender-based

163. A framework that permits a more principled analysis of sexual harassment is also needed for military cases. See Douglas R. Kay, Comment, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307, 336-37 (1992) (criticizing military courts' failure to use a clear and consistent definition of actionable sexual harassment when interpreting military justice provisions). Problems concerning the proper scope of disciplinary and military code protections are likely to arise as military courts attempt to use these provisions to address sexual harassment. Importantly, soldiers must seek relief in military courts, as they are not able to secure damages in civilian courts for sexual harassment incident to service. See Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 170-73 (2007).

insults should be permitted as part of the training arsenal available to officers to accomplish their goals. Even if the reviewing 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.¹⁶⁴

The harassment scenarios I have outlined above only briefly explore the ways in which this focus on institutional position can help federal courts highlight the key disputes in nonworkplace 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 federal courts focus on the parties' dignity expectations as opposed to analogies drawn 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 there is any relationship of trust or a fiduciary duty between the individual and the institution. In conducting this assessment, federal 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, a federal court should consider whether the target's institutional position has required the target to give up certain rights or freedoms that might otherwise allow the target to protect him or herself from harassing conduct, another consideration that would counsel in favor of providing the target with broader protections.

An additional, critically important inquiry is a federal court's examination of the doctrinal norms that inform the constitutional or statutory provision used as a basis for extending sexual harassment

164. For example, if a woman's coworker in a Title VII case leaned into her cubicle and told her that she was "driving him crazy," implying that he sexually desired her, the threat register would be different from other institutional circumstances. Indeed, under the severe or pervasive standard, it might be entirely disregarded. 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, these actions would register differently. The same comment, again, would have a different threat register if a teacher made 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.

protections in a particular setting. For example, in school cases, the limits of Title IX have been cited as the reason why federal courts should not adopt an agency theory to assess a school's liability when a teacher sexually harasses a student.¹⁶⁵ Parties may argue that the doctrinal imperatives of the Eighth Amendment counsel in favor of limiting or expanding prison officials' responsibility to protect inmates from officer harassment. Typically, however, there is substantial negotiating room in interpreting the legal authority used to support sexual harassment protections. 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 federal court develops.

Additionally, federal courts should be aware of the institution-specific reasons officials raise regarding their inability to exercise control over a particular harassment problem. For example, prison officials may argue that, because prisons are stressful places, officials should not be held liable for every ill-advised comment an officer makes in anger. Specifically, prison officials may argue that officers may make regrettable comments because in some cases they are goaded by inmates who make similarly 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 sex-based or sexual epithets. Given these arguments, a court might still hold an institution responsible for verbal, gender-based harassment; however, it could consider creating a narrow "heat of passion" defense to protect officers who inadvertently engage in such conduct. However, a court should not rely solely on prison officials' claims. Instead, a federal court's analysis must consider the training the prison provides to officers regarding how prisoners should be treated, the rules and disciplinary procedures the institution has (or has not) created to ensure officers treat prisoners properly, and the attention the institution has devoted to gender-based verbal harassment as compared to other similar problems.

Similarly, 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

165. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996) (collecting Title IX cases alleging teacher sexual harassment and discussing the actual notice standard used to hold a school district liable for its failure to protect a student from a teacher's sexual harassment).

epithets and that the problem is so rampant that it is unfair to hold them responsible for this conduct. Judges also should interrogate the horseplay argument, recognizing that what *is* is not necessarily what *should be*. Military courts must also weigh the fact that the law shapes institutional culture and consider 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 the dysfunctional behavior that children learn from people outside of school given that school officials have little ability to prevent this kind of influence. In weighing school officials' arguments about schools' limited control over students, federal courts should consider the disciplinary regimes that already exist in schools, whether schools have measures in place to address other forms of harassment, and whether students and school officials actually rely on these measures to attend to students' dignity concerns. Parties may additionally need to present courts with information about child psychology and mental development to establish whether there is a sufficient basis to believe that students could be disciplined sufficiently to prevent school officials and students 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 should be formulated for a given institutional context or situation. At present, however, the unstructured inquiry federal courts use does not signal when they need additional information. Instead, the inquiry allows federal courts to simply elaborate on established 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 dialogic dignity analysis requires us to ask, What agency or power does the target have? Two aspects of agency should be considered: (1) whether the harassment target is capable of consenting to certain sexualized treatment¹⁶⁶ and (2) what kind of power is available to a

166. Bernstein explains that "[r]ecognition respect . . . is implicit in the legal and extralegal concept of consent, especially informed consent." Bernstein, *supra* note 4, at 485. See also Wright, *supra* note 134, at 1397 ("We can hardly imagine the law of contracts, of property, or of crimes and

target attempting to rebuff a harasser.

a. Consent

When determining whether the target is capable of consenting to certain treatment, federal courts must carefully consider the nature of the allegedly harassing conduct. In some cases, the federal courts may be unprepared to allow the target to consent to certain kinds of harassing treatment.¹⁶⁷ For example, if a prison guard promises an inmate cigarettes in exchange for allowing the guard to step on the inmate's penis, the potential for harm (among other considerations) counsels against recognizing the inmate's right to consent to this kind of treatment.¹⁶⁸ 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.¹⁶⁹ Consider, for example, a fourteen-year-old teenager who consents to a sexual relationship with a fifty-year-old teacher. Because the teenager most likely has little or no experience with other sexual relationships and, therefore, has insufficient experience to determine whether the relationship is exploitative, most people are unlikely to accept the teenager's "consent" to enter into this relationship. Finally, we may be prepared to declare consent ineffective when the relative power imbalance between the target and the harasser makes it impossible for the target to "volunteer" to do anything. When a superior officer promises a soldier in Iraq that the soldier will be exempt from dangerous assignments as long as the soldier has a sexual relationship with the officer, the relative power imbalance between the soldier and the superior officer, as well as the threat of harm the soldier faces, should be sufficient to declare any consent given null and void.

torts—including battery, trespass, assumption of the risk, and informed medical consent—apart from the idea of consent.”).

167. While this discussion has primarily focused on sexual harassment, it must be emphasized that much of prison gender-related harassment is effected through nonsexual behavior expressing gender-specific hostility. Schultz has noted that workplace sexual harassment doctrine has become overly focused on cases involving sexualized treatment. *See supra* notes 41, 48. The prison cases show a great range of nonsexualized, but gender-specific, hostility as well. *See Calhoun & Coleman, supra* note 114, 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.

168. *See United States v. Walsh*, 27 F. Supp. 2d 186, 191–93 (W.D.N.Y. 1998) (recognizing a male inmate's Eighth Amendment excessive force claim based on a "trading" relationship in which he allowed a guard to step on the inmate's penis in exchange for cigarettes).

169. *See Wright, supra* note 134, at 1401.

b. Resistance

The second agency-related question regarding the harassment target's power to resist also requires federal 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 a harasser, federal courts should consider whether the institution has made reasonable complaint procedures available to the target, whether the target is in a position to use the procedures without risk of retaliation, and whether the target is intellectually sophisticated enough to negotiate these complaint mechanisms. Federal courts should also consider what kinds of retaliation the target is likely to suffer as a consequence of resistance and whether it is fair to force the target to face this retaliation as part of the cost of protecting him or herself. Taken together, these facts should help federal courts determine what kind of evidence they will require of plaintiffs to establish that they were not interested in the sexual advances being made.

The inquiry into these questions promises to provide federal 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 the regimes 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. Part IV provided a detailed assessment of the factors that suggest prisoners' agency is sufficiently compromised to recommend against using the unwelcomeness doctrine to analyze their claims. These questions about agency would also help federal courts sort through the questions that should be asked when developing doctrine in school sexual harassment cases. For the agency inquiry in 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 dignitary framework or to fully resolve the issues already described.

Skeptics may say that the questions I have identified would likely arise even without this dignitary framework. However, as demonstrated in

Part IV, many of these questions do not appear in the Eighth Amendment cases, and to the extent that they may have been factored into the analysis, they have not been considered in an orderly fashion. By focusing attention on the dignity 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, federal courts will have a reasonable basis upon which to frame sexual harassment protections. If they rely on this framework, federal courts are more likely to generate principled sexual harassment protections that take into account the major areas of concern that should be weighed when creating doctrine governing novel institutional conditions and circumstances.

C. THE DIGNITARY MODEL AND PRISONERS' EIGHTH AMENDMENT PROTECTIONS

With the questions described above in mind, one can develop a better sense of an inmate's reasonable dignity 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 as part of the cost of incarceration. However, as I explained in Part III, 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.¹⁷⁰ 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 preexisting Fourteenth Amendment protections that she enjoyed prior to incarceration.¹⁷¹ Indeed, the prison sexual harassment cases present a unique opportunity to think about the interplay between the Fourteenth Amendment and the 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,

170. This is the analysis conducted under *Turner v. Safley*, 482 U.S. 78, 87-91 (1987). The Court examined the extent of prisoners' rights when the prisoners alleged that a prison *policy* interfered with the exercise of their constitutional rights.

171. To the extent one claims that the dignity interests in this area should be interpreted based on Eighth Amendment concerns, the analysis in Part III demonstrated that there is nothing in the doctrinal norms of the Eighth Amendment that prohibits the recognition of a broad range of sexual harassment protections.

the answer appears to be no. The scope of inmates' Fourteenth Amendment equal protection rights was considered by the Supreme Court in 2005 in *Johnson v. California*.¹⁷² 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 prison 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 "threaten[ed] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."¹⁷³ The Court's concern in *Johnson* was the deleterious symbolic effect the segregation policy had to the extent it affirmed this country's prior ignoble practice of using policies based on race-based differentiation to systematically subordinate certain groups. 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 would be similarly 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 prisoner sexual harassment in many cases 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 dignitary framework to the prison sexual harassment cases with some confidence. Both of the constitutional provisions provide federal courts with a fair degree of latitude to correct the sexual harassment doctrine already created as well as to craft new sexual harassment doctrine offering prisoners more generous protections. This, however, is only the beginning of our analysis. The dignitary framework also provides the federal courts with reasons why prisoners' rights in this area should not be cabined given the institutional realities that 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

172. *Johnson v. California*, 543 U.S. 499 (2005).

173. *Id.* at 507 (emphasis omitted).

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 sexual harassment, at least when it takes some physical form. The statutes tend to focus on unwanted touching and penetration.¹⁷⁴ Prison rules, however, tend to be broader, prohibiting inappropriate and overly familiar relationships between guards and prisoners, and sometimes prohibiting verbal abuse.¹⁷⁵ While these rules and regulations are helpful, we should expect that federal courts will have difficulty making determinations about prisoners' respect expectations with regard to behavior that seems to have less clear impact, such as verbal harassment. Consequently, we would expect to see more divergence in federal courts' 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 necessary and essential to the security of prisons, on first gloss, this understanding might compel one to conclude that inmates' dignity protections with regard to this treatment should be fairly low. The issue in most Eighth Amendment harassment cases, however, is not the physical searches themselves but the manner in which they are conducted.¹⁷⁶ Understanding the protocol and component parts of the cross-gender search policies is essential to our determination. We must ask, Are these cross-gender searches, and other practices that create a sexualized environment in prisons, necessary for the prison's functioning? Even if we assume that some touching must occur, we know that the circumstances that require this kind of intimate touching must be limited. Consequently, whatever limits we impose on prisoners' dignity claims as a result of the fact that prison security requires some search procedures, we should bear in mind that these justifications do *not* affect prisoners' dignity interests in being free from wholly ultra vires touching. In summary, the dignity inquiry requires

174. These statutes are reviewed in detail in AMNESTY INT'L, ABUSE OF WOMEN, *supra* note 107, at 9 tbl.1. At the time of the report, only Alabama, Minnesota, Oregon, Utah, Vermont, and Wisconsin did not have criminal laws prohibiting guards from engaging in this misconduct. *Id.*

175. *Id.*

176. See Calhoun & Coleman, *supra* note 114, at 110 (reporting a consensus among some female inmates who stated that the "attitude" of the officer conducting the search had the greatest impact on how they experienced the search).

us to clearly acknowledge that prisoners' dignity expectations, fairly viewed, do not include protection against a certain amount of intimacy-violating touching, as prisoners 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 prison security procedures. Additionally, it highlights that we need a new analysis that can accurately assess search activities to identify those guards that engage in gratuitous and ultra vires searching that harms prisoners.

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 better citizens—to teach them how to relate to themselves and to others. Prisoners are committed to the state's care, custody, and control. Given that their options for escape and resistance are fairly limited, prisoners quite reasonably would develop the expectation that prison officials will protect them from sexual harassment by 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.

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,¹⁷⁷ assisting with or witnessing strip searches,¹⁷⁸ or conducting pat-frisks that require prison

177. See AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 39–40 (1999), available at <http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/7588269a-e33d-11dd-808b-bfd8d459a3de/amr510191999en.pdf> [hereinafter AMNESTY INT'L, "NOT PART OF MY SENTENCE"].

178. *Id.* 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, while screaming abuse, roused the female prisoners from their beds. The officers then forced the women to submit to strip searches in front of male and female staff, as well as provide urine samples. *Id.* at 42–43. Improper visual surveillance, while not actionable alone, can cause serious emotional injury. For example, Florida inmate Florence Krell committed suicide in 1998 after she wrote letters to her sentencing judge and her mother complaining of abuse by guards, specifically about being left naked in her cell and being observed by male officers. *Id.* at 41–42.

guards of the opposite sex to touch intimate parts of prisoners' bodies.¹⁷⁹ Because prison officials give guards broad discretion to engage in cross-gender touching and surveillance, the officials have created an environment in which there is a high risk of abuse of discretion.¹⁸⁰ 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, they encourage gender-specific exploitative impulses in male officers who might not otherwise have them. Additionally, one worries that certain men may be attracted to the profession precisely because they are interested in exploiting this authority.¹⁸¹ These facts counsel in favor of providing the inmate with a clear remedy for officers' abusive use of these policies.¹⁸² Overall, these factors indicate that prison officials have a heightened responsibility to address sexual harassment perpetrated by guards.¹⁸³

179. *Id.* 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 Amnesty International report also discusses the complaints of several female prisoners in Arizona jails that guards "without good reason, [engage in] frequent, prolonged, close-up and prurient viewing [of inmates] during dressing, showering and use of toilet facilities." *Id.* Even if such conduct is viewed as ultra vires, a larger portion of male guards' authorized and "appropriate" actions is still experienced as harassing. For example, one woman described standard prison "eyeball [procedure]," which allowed a guard to leave her naked in her cell during observation, explaining that when the inmate attempted to stop the guard from watching her, she was tied to the floor, naked, in four-point restraints for the remainder of the observation period. *See id.* at 43.

180. 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 honor the wishes of those officers who want to be staffed in cross-gender assignments. These concerns are unrelated to the legitimate penological obligations the officials owe prisoners and do not mitigate their responsibility to address the dangers attendant on these policies.

181. Similar exploitative urges may be developed by female guards in cross-gender settings as well as same-gender settings.

182. Sociological literature bears out the concern that these cross-gender search policies in fact aggravate the abuse problem, and it raises 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. *See, e.g.,* Calhoun & Coleman, *supra* note 114; Ristroph, *supra* note 9. 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 that these miscues are likely to be acted on given the guards' generally wide discretion to intimately touch inmates. These concerns counsel that prisons have a special obligation to intervene in cases in which guards have arguably abused their discretion and used prison search policies to harass prisoners.

183. Calhoun & Coleman, *supra* note 114, 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).

3. Prisoners' Agency

The last part of the dignity analysis, which deals with questions of agency, has already been covered in large part by the discussions in Part IV. 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.¹⁸⁴ 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 even more likely to be passive in the face of abuse.¹⁸⁵ These features, coupled with the requirement that they constantly submit to authorized but unwanted touching, will cause some inmates to feel that they have no real power to object to the treatment of their bodies.¹⁸⁶ Consequently, the presence of more accessible prison complaint regimes may have less effect on reporting rates than one might hope.

D. THE CURRENT EIGHTH AMENDMENT SEXUAL HARASSMENT CONSTRUCTS

In this 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.

184. See AMNESTY INT'L, “NOT PART OF MY SENTENCE,” *supra* note 177. See also Calhoun & Coleman, *supra* note 114, at 115.

185. Persons with a history of physical and sexual abuse are less likely to complain about sexual harassment when they are incarcerated. See Faye E. Sultan & Gary T. Long, *Treatment of the Sexually/Physically Abused Female Inmate: Evaluation of an Intensive Short-Term Intervention Program*, J. OFFENDER COUNSELING, SERVICES & REHABILITATION, Spring 1988, at 131, 132 (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 percent of the female prisoner population in some areas are victims of prior physical and/or sexual abuse. *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*, WOMEN & CRIM. JUST., No. 3 1997, at 61, 69.

186. Calhoun & Coleman, *supra* note 114, at 113–15.

1. Institutional Responsibility and the Severe or Repetitive Standard

Part III explained that the severe or repetitive test is being used as a standard for determining when an individual tortfeasor will be held liable in Eighth Amendment prison sexual harassment cases; the test 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 is not capable of causing “severe physical and psychological harm”¹⁸⁷ would be treated as low-level, inconsequential behavior for purposes of 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?

In my view, the factors outlined in the dignity analysis in the previous section clearly counsel against maintaining the safe harbor. At a bare minimum, guards should be individually liable 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 will likely 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 how to negotiate inmates’ psychological vulnerability, a guard’s decisions to engage in sexual harassment should be viewed as morally and ethically culpable behavior.¹⁸⁸ 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 “nonthreatening” sexual overtures.

Having established this standard as a baseline, we must then consider some of the competing factors weighing against the lower standard, namely

187. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997). Again, the severe physical and psychological harm 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 of the “significant injury” requirement in *Hudson*.

188. These factors also might cause courts to develop a reasonable prisoner standard that could be used to determine whether flirtation or sexual overtures would appear threatening to the average prisoner.

concerns about chilling officers in the performance of their duties and creating negative incentives for prisoners. This concern about the chilling effect, 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, or 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 in 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 indicates that inmates who are subject to ultra vires conduct should not be required to negotiate this safe harbor in order to bring claims against individual guards.

Concerns about chilling effects are more validly raised when we discuss how a lowered standard might affect what I call the “abuse of discretion” cases—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, monitoring prisoners’ intimate activities including showering or using the toilet, to observe or conduct strip searches, and to conduct invasive pat-frisks.¹⁸⁹ Because prison officials give guards broad authority to engage in what inmates perceive to be sexually violative behavior, it is very likely that there will be a high number of complaints concerning abuse of discretion. Recognizing that these abuse of discretion cases are difficult to resolve, guards 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 prompt an otherwise disgruntled prisoner to bring a false claim and attempt to secure some cash benefit.

Importantly, rather than confront this issue, the *Boddie* court, when it created the severe or repetitive standard, only further compromised courts’ ability to sort out these issues. Specifically, the *Boddie* court summarily concluded that sexual abuse has “no legitimate penological purpose”¹⁹⁰

189. See *supra* notes 177–80 and accompanying text.

190. *Boddie*, 105 F.3d at 861 (emphasis added).

and, therefore, when it is sufficiently “serious,” it constitutes a violation of the Eighth Amendment. It could not imagine a circumstance in which an officer attempting to discharge his duties would engage in actions that constitute sexually abusive behavior. Yet our discussion of the institutional realities in prisons reveals that the *Boddie* court’s failure of imagination resulted in the court making a statement that is just patently untrue. There is a legitimate penological purpose behind a variety of actions inmates find sexually harassing: cross-gender pat-frisks, strip searches, and surveillance.¹⁹¹ Furthermore, a large number of prisoner sexual abuse complaints contain allegations that guards have used legitimate prison search procedures to sexually harass prisoners.¹⁹² Sorting out these abuse of discretion cases is one of the major challenges for courts reviewing Eighth Amendment sexual harassment cases, yet the *Boddie* court seems to deny rather than address the scope of this challenge.

One solution to this problem involving offensive search procedures 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 should 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. Additionally, it may be reasonable to ask inmates to establish evidence of some pattern or practice to demonstrate that a guard has been using discretionary authority to sexually harass the inmate.

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 class of cases, 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

191. *Id.*

192. *See supra* note 123 and accompanying text.

for federal courts to identify claims where there is simply an insufficient basis for a claim of illicit intent. Also, to the extent that 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 III explained, the Eighth Amendment unwelcomeness doctrine is an inquiry that examines the harassment target's powers of resistance and agency.¹⁹³ At present, the analysis encourages the federal courts to consider whether the inmate appears to have voluntarily or consensually participated in the sexual interactions complained of or whether the inmate clearly resisted the harasser. The question we must ask 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 the 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 guard intimidation and manipulation that causes inmates to "consent" to "voluntary" sexual interactions. Also, as Part III explained, inmates' powers of resistance are quite limited. Prisoners most often will not respond to harassment with outright resistance because the cost is too high.¹⁹⁴ Therefore, when prisoners do resist, they tend to do so in a subtle manner that minimizes the potential for retaliation.¹⁹⁵ Also, prisoners are often reluctant to file formal complaints about guards because the

193. Additional scholarship is required that focuses on an inmate's sexual harassment rights, as feminist legal scholars working on employment discrimination are much more committed to a standard that preserves a worker's sexual agency. See, e.g., Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 4, at 111, 117–20 (arguing for an unwelcomeness standard that would preserve the workplace as a site for female agency, even if a woman is either gender or sexually nonconforming, without making her subject to offensive male behavior); Vicki Schultz, *Talking About Harassment*, 9 *J.L. & POL'Y* 417, 431–32 (2001) (arguing that employer sexual harassment codes are being used to police sexuality and drive expressions of sexual interest and attraction out of the workplace).

194. See *supra* notes 114–17 and accompanying text. See also AMNESTY INT'L, "NOT PART OF MY SENTENCE," *supra* note 177, at 39.

195. See *supra* note 114 and accompanying text.

complaint regimes available to the prisoners are relatively transparent, and the complaints often trigger retaliation by the accused guards.¹⁹⁶ Prisoners 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.¹⁹⁷ Taken together, these factors counsel that the current Eighth Amendment unwelcomeness standard should be retired.¹⁹⁸

Federal 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.¹⁹⁹ 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

196. See *supra* notes 113, 116 and accompanying text.

197. See AMNESTY INT'L, "NOT PART OF MY SENTENCE," *supra* note 177, at 39. Cf. Calhoun & Coleman, *supra* note 114, at 114 (reporting officers' ability to get around "officially sanctioned compliance procedures").

198. Calhoun & Coleman, *supra* note 114, at 117. Even valid officer behavior, because of its often sexually intrusive nature, can lead to "institutional reinforcement of compliant behavior" and result in fewer inmates communicating their complaints about sexual harassment when it involves wholly ultra vires actions by guards. Specifically, 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 contribute to the sexualized atmosphere in the prison, as well as to inmates' feelings of powerlessness. *Id.* at 109–11, 117–18. 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 the individual react to improper touching, and how willing would the individual 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 the inmates' exposure and submission to sexual harassment in the outside world. Sultan & Long, *supra* note 185, at 132–33. Perhaps most important, inmates often decline to report because they fear retaliation from guards. See Calhoun & Coleman, *supra* note 114, at 104–05, 114–15.

199. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 221, 224 tbl.4 (2002) (noting that officers used both bribery and intimidation to secure sexual favors). See also Calhoun & Coleman, *supra* note 114, at 104–05 (connecting the power-differential aspect of sexual violence and the inherent power differential of officer-inmate relations). 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 the inmate, or what the inmate reasonably believed to be the scope of the guard's power, as a way of explaining why the inmate submitted to the 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 an inmate access to services.

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 the guard with sexual favors, the inmate may “voluntarily” initiate the quid pro quo arrangement, but the inmate is undoubtedly being exploited.²⁰⁰

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 that the guards’ attentions were unwelcome. 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 the federal courts may decide to find their own doctrinal solutions to the prison cases. My goal in this Article is simply to show how the dignity-based framework reorients our thinking, allowing us to concentrate on the characteristics of the institution and the target and on the target’s dignity needs. In this way, the framework 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 federal courts to explore the same set of considerations across a number of kinds of institution-specific cases, to objectively measure the kinds of protections they provide in one context against another, and to provide rationales for their decisions. While there will likely continue to be disputes about the decisions federal courts make, the dignitary framework I have provided, at

200. Calhoun & Coleman, *supra* note 114, at 117–18 (discussing “non-consenting sexual action,” in which voluntary sexual activity cannot be considered consensual given the circumstances or the characteristics of the participants). These “trading” relationships are actually based on extortion, as guards 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, 1286–88 (N.D. Ga. 2002) (recognizing an Eighth Amendment sexual harassment claim that was based in part on a trading relationship in which a male guard withheld feminine hygiene products from a female prisoner until she performed a striptease for him and other officers). *Cf.* United States v. Walsh, 27 F. Supp. 2d 186, 191–93 (W.D.N.Y. 1998) (recognizing a male inmate’s Eighth Amendment claim based on a trading relationship in which he allowed a guard to step on the inmate’s penis in exchange for cigarettes).

the very least, provides a clear basis for scholarly critique and discussion. More importantly, the framework has the potential to assist courts in building a consensus in support of their decisions by ensuring that they provide principled justifications for the sexual harassment protections they create in the future.

VI. CONCLUSION

This Article highlights the potential problems that can result when federal courts incorporate Title VII-modeled constructs in nonworkplace 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 for reflection on and reconciliation of 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 nonworkplace 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 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.