

NOTE

COMMON SENSE ABOUT COMMON DECENCY: PROMOTING A NEW STANDARD FOR GUARD-ON-INMATE SEXUAL ABUSE UNDER THE EIGHTH AMENDMENT

Megan Coker*

Although Washington alleges that he was subjected to an offensive and unwanted touching [by a male guard who snuck up behind him and groped his genitals, kissed him on the mouth despite resistance, and threatened oral sex], he alleges only momentary pain, “psychological injury,” embarrassment, humiliation, and fear. These de minimis injuries do not rise to the level of constitutional harms, and [the guard’s] conduct, while inappropriate and vulgar, is not repugnant to humanity’s conscience.

Washington v. Harris¹

INTRODUCTION

A sexual assault perpetrated “on an inmate by a guard—regardless of the gender of the guard or of the [inmate]—is deeply offensive to human dignity,” and is not part of the punishment we impose on criminal offenders for their offenses against society.² In fact, sexual abuse perpetrated on an inmate by a guard should be characterized as cruel and unusual punishment. It harms an inmate, psychologically and sometimes

* J.D. 2013, University of Virginia School of Law; B.A. 2010, University of Texas at Dallas. I would like to thank Professor Anne Coughlin for her inspiring mentorship and steadfast guidance in writing this Note. I am also grateful to Professors Kerry Abrams and Jim Ryan for helpful feedback that challenged my conceptions at crucial moments in the writing process. I am indebted to the hardworking members of the *Virginia Law Review*, who have invaluable improved this Note through their insightful critique and diligent editing. Finally, thanks to my family for their endless support and for helping me form and hone the inklings that became this Note. My mother, Kathy Black, father, Robert Newman, grandmother, Rose Black, sister, Lisa Newman, and husband, Jonathan Coker, have always quietly acted out the innate respect and tolerance at the core of decency. I owe my notion of decency to them, along with my ever-present desire to learn, explore, and describe.

¹ 186 F. App’x 865, 866 (11th Cir. 2006) (per curiam).

² See *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (internal quotation marks omitted).

physically, to face sexual contact, fondling, solicitations, threats, offers for quid pro quo exchanges, and attendant harassment from an official who controls every aspect of the inmate's life. In the prison environment, an inmate can neither avoid this official, nor, in reality, seek much help from others to protect against this abuse. As a society, we are repulsed by the idea of guards committing sexual abuse against those in their charge. After all, guards are agents of the government, tasked with the health and safety of inmates while in custody to which we have confined them. We talk, as a society, of our expectation that inmates will emerge from confinement ready to reenter society and assume productive citizenship. Yet, the trauma of sexual abuse may compromise their ability to do so.

All the assertions above seem uncontroversial. They fit within the bounds of common sense. Nevertheless, a large and dominant body of Eighth Amendment case law tells a different story. It examines guard-on-inmate sexual abuse claims under the Eighth Amendment and interprets that amendment as requiring inmates to allege objectively serious injury to claim the infliction of cruel and unusual punishment. It often holds that guard-on-inmate sexual abuse does not inflict objectively serious injury. Unfortunately, this case law also promotes a harmful gender stereotype. Time and time again courts using this standard find that women and transgender persons *can* suffer serious psychological injury from sexual abuse by guards. But courts reject the same sorts of claims by similarly situated male inmates as *de minimis* or insufficiently serious. In coming to disparate conclusions, the case law not only denies male inmates relief from sexual abuse. Through the language and conclusions of these cases, the law also promotes an image of women and persons of non-male gender as more naturally vulnerable to psychological harm from sexual abuse.

As this Note will describe in Part I, this body of law comes to the wrong conclusion because it focuses on the wrong question. The law asks whether a guard's conduct imposes a threshold level of harm on inmates, which is a requirement the U.S. Supreme Court has explicitly rejected in a closely analogous context. Instead, Eighth Amendment case law should simply ask whether a guard's conduct can be justified by any prison-management purpose, whether the conduct is illegal under state or federal law, and whether it violates contemporary standards of decency.

Part I will describe the effects of the misdirected focus of Eighth Amendment law. It will show this focus results in male inmates receiving less recognition than female or transgender inmates for psychological injuries suffered from sexual abuse because courts are less likely to find male inmates meet the injury threshold. Part I will also theorize that this disparate treatment promotes a harmful discourse about women and transgender persons.

Part II of this Note will attempt to offer a simple solution to redirect the focus of the Eighth Amendment. First, it will describe a few cases which have successfully inquired about guards' legitimate prison-management interests and contemporary standards of decency, discarding the injury threshold requirement. It will explain how this approach more faithfully tracks Supreme Court precedent and the core purpose of the Eighth Amendment. Finally, Part II will enumerate specific standards that advocates and courts can use to properly refocus the Eighth Amendment inquiry onto whether contemporary standards of decency have been violated by conduct between guards and inmates.

These new standards helpfully distinguish between, on the one hand, abusive sexual conduct between guards and inmates, and on the other hand, conduct not exceeding a legitimate prison-management purpose. Properly performed and legitimate pat-down or body-cavity searches, for example, would not violate contemporary standards of decency, though they include intimate touching between guards and inmates. Conversely, "sexual abuse" inflicted on an inmate by a guard would always violate contemporary standards of decency because, by definition, it is illegal and not justified by a prison-management purpose. Using the proposed standards, courts could more efficiently target conduct that violates the Eighth Amendment.

Other articles and notes have discussed the struggle inmates face in bringing claims of sexual abuse against their prison guards. These pieces have attempted to expose the problem,³ theorize about how gender operates in the coercive prison environment,⁴ and suggest solutions that would create comprehensive sexual harassment regulation through the

³ Lauren A. Teichner, Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons, 14 Mich. J. Gender & L. 259, 261 (2008).

⁴ See generally Brenda V. Smith, Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery, 33 Fordham Urb. L.J. 571 (2006).

Eighth Amendment.⁵ This Note suggests a solution for a different element of the same problem. It uniquely recognizes, theorizes, and explains how Eighth Amendment sexual abuse standards have a disparate impact on inmates of different genders because of the erroneous focus on injury. And this Note is the first to highlight an emerging body of case law that suggests a simple solution. Namely, courts should focus on the contemporary standards of decency that drive the Eighth Amendment's definition of cruel and unusual punishment, rather than on a threshold of injury requirement. Hopefully, this solution will enable courts to correct and streamline the course of an Eighth Amendment inquiry gone astray, while simultaneously eliminating a harmful gender disparity in the doctrine.

I. EIGHTH AMENDMENT JURISPRUDENCE SURROUNDING SEXUAL ABUSE OF INMATES BY THEIR GUARDS

Inmates who face sexual abuse at the hands of their guards can seek relief in the federal courts by claiming violations of their Eighth Amendment rights. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments,"⁶ and courts have held that sexual abuse by prison guards or other inmates can constitute a form of cruel and unusual punishment.⁷ Inmates most often file either *Bivens* or Section 1983 actions to pursue these claims. Section 1983 creates a cause of action for the violation of federal statutory or constitutional rights by state officials "acting under color of law."⁸ State employees, including prison guards, act under color of law while acting pursuant to their duties—even when their actions violate state law.⁹ Inmates in federal prisons can sue in a similar fashion under *Bivens v. Six Unknown Federal*

⁵ Camille Gear Rich, What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings, 83 S. Cal. L. Rev. 1, 2, 19, 52–73 (2009).

⁶ U.S. Const. amend. VIII.

⁷ See Teichner, *supra* note 3, at 274 (reviewing decisions).

⁸ 42 U.S.C. § 1983 (2006) (noting persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" who deprive a citizen of "rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"); see also Teichner, *supra* note 3, at 274–76.

⁹ See *Hudson v. McMillian*, 503 U.S. 1, 4–5 (1992) (noting inmate brought suit in federal court alleging Eighth Amendment violation under § 1983 and upholding judgment against state corrections officers for inflicting cruel and unusual punishment); *Monroe v. Pape*, 365 U.S. 167, 173–80, 183–85 (1961).

*Narcotics Agents*¹⁰ for violations of their federal constitutional rights by federal government employees.¹¹

Once in court, remedies available to these inmates range from declaratory or injunctive relief to damages. Courts can declare that a guard has violated an inmate's Eighth Amendment rights, enjoin further abuse by a guard, and require certain actions to prevent future abuse.¹² Inmates can also receive damages meant to compensate them for injuries caused by sexual abuse, or to sanction guards and penal institutions. However, courts may refuse to impose various forms of relief or even allow certain causes of action when an inmate alleges only "mental or emotional injury," based on the much-litigated dictates of the Prison Litigation Reform Act ("PLRA").¹³

Until March 7, 2013, the PLRA declared: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."¹⁴ Courts struggled over what to do when a suit alleged sexual abuse but no physical injury: whether to preclude the action altogether, allow only suits seeking declaratory and injunctive relief, award only nominal or punitive damages for emotional injuries, or broadly define physical injury.¹⁵

On March 7, 2013, Congress changed the landscape. Congress amended the PLRA to add that no suit for mental or emotional injury may be brought without a prior showing of physical injury "*or the commission of a sexual act* (as defined in section 2246 of title 18)."¹⁶ Section 2246 defines a "sexual act" to include any penetration of the anal or gen-

¹⁰ 403 U.S. 388 (1971).

¹¹ *Id.* at 389; see, e.g., *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

¹² See generally Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 *Harv. C.R.-C.L. L. Rev.* 45, 70-75 (2007); *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 666, 679-81 (D.D.C. 1994), vacated in part and modified in part on other grounds, 899 F. Supp. 659 (D.D.C. 1995).

¹³ 42 U.S.C. § 1997e(e) (2006); see John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 *Brook. L. Rev.* 429, 434-43 (2001). Such a large body of jurisprudence surrounds the PLRA and this specific requirement that this Note will only generalize about its effects.

¹⁴ 42 U.S.C. § 1997e(e).

¹⁵ See generally Boston, *supra* note 13 (explaining different interpretations of the PLRA's "emotional or mental injury" provision); Buchanan, *supra* note 12, at 71-75 (discussing courts' different reactions to the PLRA restriction).

¹⁶ *Violence Against Women Reauthorization Act of 2013*, Pub. L. No. 113-4, § 1101, 127 Stat. 54, 134 (emphasis added).

ital openings, contact between the mouth and sexual organs or anus, and intentional touching of the genitalia of someone less than sixteen years-old with specific intent to humiliate, abuse, harass, degrade, or arouse or gratify the sexual desire of any person.¹⁷

Before this amendment, many courts rested their interpretations of the PLRA on its ambiguity, declaring that Congress could not have meant to exclude *all* actions alleging only emotional injury for sexual abuse, or even all types of damages for those injuries.¹⁸ With this new clarification, courts may further limit inmates' causes of action or damages for sexual abuse. If those actions allege purely emotional injury and conduct that falls short of penetration, oral sexual activity, or fondling of underage inmates, courts may dismiss the suits or restrict remedies to injunctive and declaratory relief.

Much of the sexual conduct discussed in this Note falls below the narrow threshold recently set by the PLRA amendment, as Section I.A will discuss in more detail. This Note will nevertheless argue this conduct lacks a legitimate penological purpose and violates contemporary standards of decency, as shown by a large body of law condemning, criminalizing, and seeking to prevent broadly-defined sexual abuse. This body of law hails from multiple branches of both state and federal governments, including Congress itself. Furthermore, courts will not likely close their doors altogether to claims of sexual abuse, even if they do not include the sexual penetration or contact the PLRA requires. This Note discusses many cases that find conduct below the "sexual contact" threshold sufficient to allege cognizable Eighth Amendment harm. As with the prior version of the PLRA, courts will likely interpret the PLRA's limitations narrowly when those limitations would otherwise preclude inmates from pursuing cognizable allegations of Eighth Amendment violations.

A. Defining Sexual Abuse

Defining what this Note means by "sexual abuse" will prove crucial to understanding its claims. This Note borrows a definition already used by the Department of Justice in its regulations implementing the Prison Rape Elimination Act ("PREA").¹⁹ In seeking to prevent, detect, and respond to sexual abuse in prisons, the PREA regulations define "sexual

¹⁷ 18 U.S.C. § 2246(2) (2006).

¹⁸ Buchanan, *supra* note 12, at 73–74.

¹⁹ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2006).

abuse” in different ways, depending on the perpetrator.²⁰ For staff perpetrators, including staff members, contractors, and volunteers, the regulations define sexual abuse to include “the following acts, *with or without consent of the inmate, detainee, or resident*”: (1) all types of penetration of the anal or genital openings, which is “unrelated to official duties *or*” involving an “intent to abuse, arouse, or gratify sexual desire”; (2) “contact between the mouth and penis, vulva, or anus,” or any other body part “where the staff member . . . has the intent to abuse, arouse, or gratify sexual desire”; (3) intentional contact with genitalia, buttocks, anus, groin, breasts, and inner thighs, through clothing or not, again unrelated to official duties *or* with the intent to abuse, arouse, or gratify sexual desire; (4) attempts, threats, or requests that inmates engage in these activities; (5) “any display” of a guard’s uncovered genitals, buttocks, or breasts in the presence of inmates; and (6) voyeurism.²¹

This definition contains some crucial elements. First, it defines conduct as sexual abuse regardless of whether the inmate supposedly consented to it. Consent’s role in Eighth Amendment doctrine is a voluminous topic outside the scope of this Note. But in short, the coercive environment of imprisonment and the position of power guards enjoy over inmates suggest inmates cannot really consent to sexual contact with their guards. At the very least, this factor should be removed from the calculus of whether a guard has violated contemporary standards of decency. Courts should focus instead on the guard’s conduct and whether it rests on prohibited intent or a legitimate penological interest.

Second, this definition of sexual abuse appropriately includes far more conduct than traditional definitions of violent sexual assault or rape. Courts *should* find that our contemporary standards of decency condemn and protect against fondling of genitals and private parts, forced kissing or sexual activities, voyeurism, and displays of a guard’s private parts to inmates. The definition acknowledges the harmful undercurrent of force and coercion underlying these acts, preventing attempts, threats, and requests for these activities alike. Section I.E will

²⁰ 28 C.F.R. § 115.6 (2012). Definitions of inmate-on-inmate sexual abuse are narrower than those of guard-on-inmate sexual abuse. *Id.* As a result, institutions are required to expend less effort prohibiting, preventing, and sanctioning inmate-on-inmate sexual contact.

²¹ *Id.* (emphasis added). The regulations define this conduct as “sexual abuse” if engaged in by a staff member, contractor, or volunteer, with an inmate, detainee, or resident. *Id.* For the purposes of this Note, I am focusing primarily on guards, who are either staff members or contractors.

reveal that this definition encompasses just the sort of quid pro quo exchanges, forced masturbation, and sexual touching courts have found to fall short of a de minimis harm threshold.

B. The Dominant Eighth Amendment Standard: Objectively Serious Injury

Hudson v. McMillian,²² *Farmer v. Brennan*,²³ and *Wilkins v. Gaddy*²⁴ explain the standard most relevant to sexual abuse cases for determining whether the Eighth Amendment prohibits a given act as cruel and unusual punishment. In these cases the U.S. Supreme Court asked whether an inmate faced an “unnecessary and wanton infliction of pain,”²⁵ or whether “prison officials maliciously and sadistically use[d] force to cause harm.”²⁶ The Court focused on pain and force in *Farmer*, *Hudson*, and *Wilkins* because these cases have been decided under Eighth Amendment frameworks designed either for claims that guards used excessive force in maintaining prison order, or for claims that inmates have endured impermissibly harsh prison conditions.²⁷

In *Farmer*, the Supreme Court adjudicated claims against officials for failure to prevent inmate-on-inmate sexual abuse.²⁸ It has never decided a case directly involving an inmate’s Eighth Amendment claims against a sexually abusive prison guard, but courts have adapted *Farmer*’s standard as the closest analogue. This standard has two components. First, courts look to “contemporary standards of decency”²⁹ and determine whether an inmate faced a cognizable level of injury by asking

²² 503 U.S. 1, 8 (1992).

²³ 511 U.S. 825, 834 (1994).

²⁴ 559 U.S. 34, 36–40 (2010) (per curiam).

²⁵ *Farmer*, 511 U.S. at 834; see also *Hudson*, 503 U.S. at 8. The Court has at times asked whether someone inflicts “pain” on inmates because it originally developed this standard from cases involving excessive force under the Eighth Amendment. See Rich, *supra* note 5, at 19 (noting the Eighth Amendment has become the vehicle for inmates’ sexual harassment lawsuits within the excessive force framework).

²⁶ *Hudson*, 503 U.S. at 9.

²⁷ See Rich, *supra* note 5, at 18–19 (noting it is not entirely clear why excessive force claims became the primary vehicle for prisoners’ sexual abuse and harassment suits against guards).

²⁸ See, e.g., *Farmer*, 511 U.S. at 849 (remanding for determination of whether prison officials acted in deliberate indifference to danger that transsexual inmate would be sexually assaulted by other inmates).

²⁹ *Hudson*, 503 U.S. at 8.

whether the harm involved was “objectively, sufficiently serious.”³⁰ Second, subjectively, courts ask whether the prison officials involved acted or failed to act with a “sufficiently culpable state of mind.”³¹ When inmate victims bring claims that prison-guard perpetrators abused them without a legitimate penological purpose for their actions, proof that the abuse occurred generally establishes a culpable state of mind.³² Courts also employ a subjective component in Eighth Amendment cases when non-perpetrating officials are sued for failing to foresee or prevent abuse by other inmates or guards.³³ Those cases are beyond the scope of this Note, which examines only how courts have dealt with the objective prong of the Eighth Amendment inquiry when inmates claim guards abused them directly.

Within that prong, courts have established levels of injury which qualify as sufficiently serious under the Eighth Amendment. Courts usually find physical injury is sufficient.³⁴ In general, so is psychological injury from rape, violence, or the overt threat of rape or violence.³⁵ Courts diverge when considering psychological injury from the other forms of sexual abuse Section I.A identifies. This divergence has affected male, female, and transgender inmates differently. In these cases, many courts find men suffer only de minimis, non-cognizable psychological injury, while women and transgender persons suffer serious, cognizable psychological injury.³⁶

The Supreme Court in *Hudson v. McMillian* explained that de minimis uses of physical force are not recognized as cruel and unusual punishment by the Eighth Amendment.³⁷ Yet it qualified that statement, noting that even the de minimis use of force must not be the sort that is

³⁰ *Farmer*, 511 U.S. at 834 (internal quotation marks omitted).

³¹ *Id.* at 834.

³² *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).

³³ If an inmate claims prison authorities or officials other than the perpetrator should have foreseen or prevented abuse, an inmate must show officials acted with “deliberate indifference” to an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 837. Furthermore, the official must have been “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [must have drawn] the inference.” *Id.*

³⁴ See *infra* Section I.D.

³⁵ See *infra* Section I.D.

³⁶ I did not conduct a formal, statistical survey of all cases on this subject. But my research overwhelmingly revealed general trends in district courts, along with leading cases setting those trends in various federal appellate courts.

³⁷ *Hudson*, 503 U.S. at 8.

“repugnant to the conscience of mankind.”³⁸ Eight years later, the Court clarified that the inquiry should not focus exclusively on the force or injury involved. The U.S. Court of Appeals for the Fourth Circuit had required that inmates suffer a certain amount of injury in excessive force cases, excluding from Eighth Amendment consideration even illegitimate and arbitrary uses of force by prison officials when they did not cause enough injury.³⁹ The Court rejected that standard in *Wilkins*, noting that the proper approach was to consider injury as just *one* component of the Eighth Amendment inquiry. The “‘core judicial inquiry’ . . . was not whether a certain quantum of injury was sustained, but rather ‘whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.’”⁴⁰

This Note argues that, in deciding sexual abuse cases, most courts have made the same mistake that the Supreme Court corrected in *Wilkins* for excessive force cases. Courts have focused on whether an inmate suffered a certain quantum of injury, rather than asking whether guards acted maliciously and sadistically, or without a legitimate penological purpose, in a way that violates contemporary standards of decency. Furthermore, focus on a quantum of injury has led to a body of cases that largely rejects male inmates’ claims of purely psychological harm, while accepting claims of similarly situated female or transgender inmates.

C. Theory: How Courts Have Expressed a Gender Bias in Eighth Amendment Doctrine

The misguided doctrinal focus in Eighth Amendment sexual abuse cases also has a harmful discursive effect. As institutions of law and the state, courts hold great power to influence social norms and discourse. Yet, through the language and results of these Eighth Amendment cases, courts have expressed a gender bias. This bias suggests, through the cases’ disproportionate results, that males are harmed less by unwanted sexual advances because they cannot experience that harm in a significant psychological way. The language of some of these cases suggests a

³⁸ *Id.* at 9–10.

³⁹ See *Taylor v. McDuffie*, 155 F.3d 479, 483–84 (4th Cir. 1998).

⁴⁰ *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 7). The Court speaks of force again in *Wilkins* because the inmate there made an excessive force claim. But the same focus on maliciously and sadistically causing harm without a proper penological purpose can be adapted to the sexual abuse context.

rationale for this lower level of harm: Males may simply possess more social or natural immunity to psychological harm from unwanted sexual advances. This rationale also has implications for women and other persons of non-male gender. It suggests women and others are uniquely vulnerable to psychological harm from sexual abuse. Scholars would doubtless disagree about whether this potential immunity or vulnerability exists, and about whether either stems from characteristics instilled innately, or socially, or both. Courts should avoid expressing a postulate that wades into that debate and treats people differently based on gender.

One example of a court expressing this gender bias through explicit language arises in *Jordan v. Gardner*.⁴¹ In that case, the Ninth Circuit used expansive language to describe why women suffer cognizable Eighth Amendment harm from clothed cross-gender pat-downs, while men do not.⁴² Although the court only faced claims by female inmates that cross-gender pat-downs violated their Eighth Amendment rights, the court speculated on how the searches would affect male and female inmates differently while reconciling *Jordan* with precedent involving male inmates.⁴³ Citing *Grummett v. Rushen*, a case about cross-gender pat-down searches of male inmates, the court said that nothing in *Grummett* “indicate[d] that the [male inmates] had particular vulnerabilities that would cause the cross-gender clothed body searches to exacerbate symptoms of pre-existing mental conditions . . . or would be likely to experience any psychological trauma as a result of the searches.”⁴⁴ Although this finding could have been based on differing case records, and the court cited “the record in this [female inmate’s] case,” it framed women’s vulnerabilities in absolute terms and found that while female inmates suffered cognizable Eighth Amendment psychological harm, men were unlikely to suffer that same harm.⁴⁵ This conclusion was based on a “postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women,” based on “differences in gender socialization [that] would lead to differences in the experiences of men and women with regard to sexuality.”⁴⁶ Courts also express a gender bias through results in cases where inmates

⁴¹ 986 F.2d 1521, 1526 (9th Cir. 1993) (en banc); see also *infra* Subsection I.F.2.

⁴² *Jordan*, 986 F.2d at 1526.

⁴³ *Id.*

⁴⁴ *Id.* (citing *Grummett v. Rushen*, 779 F.2d 491, 492 (9th Cir. 1985)).

⁴⁵ *Id.* at 1526, 1531.

⁴⁶ *Id.*

allege mostly psychological injury. In those cases, courts have consistently found men do not allege objectively serious harm under the Eighth Amendment, while other courts find women have alleged such harm on similar facts. The cases follow logic like that in *Boxer X v. Harris*, where the court found “that 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.”⁴⁷ The court found non-cognizable injury despite actual reprisal, quid pro quo offers of favors for masturbation, and the fact that the male inmate performed for the female guard on multiple occasions against his will.⁴⁸

When courts rely on general differences between the mental conditions and socialization of women and men to reject male inmates’ claims of abuse, women, men, and transgender persons are harmed. First, courts turn a blind eye to legitimate injuries suffered by male inmates in prisons and thereby tacitly allow continued abuse. Labeling men’s serious psychological injuries as de minimis tells men that even if they feel this injury, the courts (and likely society) will not account for it. Indeed, in many cases cited in this Note, prison guards defended sexually abusive conduct using courts’ injury threshold standards, proclaiming the inmate could allege no Eighth Amendment violation because any harm the guard inflicted on the inmate was only de minimis.⁴⁹ This marginalizes male inmates who suffer injury from abuse and later learn courts will neither recognize nor protect against that abuse.

Second, courts’ pronouncements that men do not suffer serious injury in these situations may also hinder society from discovering and addressing harm. Men may be less likely to talk about injuries that supposedly do not exist, including how any sexual abuse they suffered before prison may magnify the harm caused by sexual abuse in prison. Scholars may be less likely to study, gather empirical evidence, and theorize about the sexual abuse of men both before and during their time in prison. Yet, contrary to what courts may believe, many studies suggest men also suffer high rates of sexual abuse.⁵⁰

⁴⁷ *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006).

⁴⁸ *Id.* at 1109, 1111; see also *infra* Subsection I.E.3.

⁴⁹ See *infra* Sections I.D and I.E.

⁵⁰ Studies suggest about one in six men are sexually abused before the age of eighteen. See generally *The 1 in 6 Statistic*, 1in6, Inc., <http://1in6.org/the-1-in-6-statistic/> (last visited Dec. 22, 2013) (citing resources proving this statistic and discussing the effects of sexual abuse on men).

A review of psychiatric research about the sexual abuse of men conducted in 2011 reveals a widespread bias against viewing men as vulnerable to harm from unwanted sexual advancements.⁵¹ It found commentary in nearly all the studies it reviewed about “the lack of recognition accorded to male victims of sexual assault.”⁵² In the past, psychology scholars and their literature left out the study of sexual assaults against men because it was assumed men could not be victims of assault, assault against men was rare, or men somehow wanted to be assaulted.⁵³

One study found this same bias among law enforcement agencies, hospitals, and community crisis or rape crisis centers in the late 1990s. Crisis centers that did not treat men or had never seen male assault victims responded they did not do so because “so few [men] get raped.”⁵⁴ One law enforcement representative simply said: “Men can’t be raped.”⁵⁵ Another explained: “We don’t have too many [males] that are unwontedly sodomized. If they are, they don’t come to us to report it. . . . [T]hat leads me to believe that there is just not a problem.”⁵⁶ Many scholars have recognized these sentiments as misperceptions. Other studies have acknowledged that men are sexually abused, and that abuse has long been a tool used by some men to “assert[] power” over other men.⁵⁷ Men sexually abuse other men to humiliate or torture them, or as a form of gay bashing against men perceived to be homosexuals.⁵⁸

The way courts afford different treatment to male and female inmates claiming Eighth Amendment violations suggests they may share the un-

⁵¹ Clayton M. Bullock & Mace Beckson, *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, 39 *J. Am. Acad. Psychiatry & L.* 197, 200 (2011).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* (citing D.A. Donnelly & S. Kenyon, “Honey, We Don’t Do Men”: Gender Stereotypes and the Provision of Services to Sexually Assaulted Males, 11 *J. Interpersonal Violence* 441, 445 (1996) [hereinafter *Gender Stereotypes*]).

⁵⁵ *Id.* (quoting *Gender Stereotypes*, supra note 54, at 444) (internal quotation marks omitted).

⁵⁶ *Gender Stereotypes*, supra note 54, at 445.

⁵⁷ Bullock & Beckson, supra note 52, at 201 (citing A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 *Am. J. Psychiatry* 806, 806–10 (1980); A. Nicholas Groth & Ann Wolbert Burgess, *Rape: A Sexual Deviation*, 47 *Am. J. Orthopsychiatry* 400, 400–06 (1977); A. Nicholas Groth, Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape: Power, Anger, and Sexuality*, 134 *Am. J. Psychiatry* 1239, 1239–43 (1977)).

⁵⁸ *Id.* (citing Michael B. King, *Male Rape: Victims Need Sensitive Management*, 301 *Brit. Med. J.* 1345, 1345 (1990)).

derlying, unconscious bias against recognizing that men can be sexually abused—or harmed by that abuse as the perpetrators doubtless intend. And the level of injury threshold courts have imposed looks strikingly similar to requirements courts once imposed on female victims of rape. Professor Anne Coughlin has argued force requirements that formed the very elements of rape arose in the context of women being prosecuted for sex outside of marriage.⁵⁹ Women used rape as a *legal defense* to a charge of criminal fornication, and thus had to prove they lacked criminal intent to engage in sex, or that they “submitted to the unlawful intercourse under duress,” among other things.⁶⁰ In short, courts originally criminally sanctioned women for sex outside of marriage unless they could show, often through physical injury, that they were forced to engage in it. Rape’s elements remained the same even after laws criminalizing sex outside of marriage were eliminated.⁶¹ Courts operating under these laws continued to require, functionally, that victims prove themselves innocent of consensual sex through stringent force requirements.⁶²

Although we no longer criminalize fornication, social norms and stereotypes continue to affect sexual abuse and rape law. This can translate into elements and interpretations of rape law that make it difficult for a victim to prove the crime occurred. The debate continues over how to define the crime of rape in a sensible and workable fashion, while avoiding essentially making rape victims prove their innocence. Yet courts applying Eighth Amendment law seem to be imposing a similarly strict threshold for male inmates claiming psychological harm from sexual abuse. Unfortunately, several studies suggest our society blames men more than women for being victims of sexual assault.⁶³ Perhaps courts impose heightened injury thresholds on male inmates more often than on female or transgender inmates because they share this bias or do not fully believe men have been victimized. Or maybe courts are more willing to recognize that sexually-abused female and transgender inmates meet the injury threshold because it has become more socially accepted that

⁵⁹ Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1, 28–30 (1998).

⁶⁰ *Id.* at 30–40.

⁶¹ *Id.* at 45.

⁶² *Id.*

⁶³ Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services*, 7 *Aggression & Violent Behav.* 203, 209–10 (2002) (citing several studies that have shown “less sympathy was attributed to male victims compared with females,” and that “gay male victims (of male perpetrators) are blamed more for sexual assault . . . than in cases of asexual assault towards heterosexual victims”).

sexual abuse is used to threaten, humiliate, and harm women and persons whose gender does not conform to social norms. Courts fail to see that powerful male and female guards are also using sexual abuse to threaten, humiliate, dominate, and harm less powerful *male* inmates.

Courts should avoid espousing this gender bias. They can do so with a new doctrinal focus that avoids telling women and transgender persons, through either language or disparate outcomes, that persons of non-male gender are uniquely vulnerable to being harmed by sexual abuse. At the same time, courts should avoid telling men that they are invulnerable, and that men will simply have to show courts more injury inflicted by their alleged sexual abuse before courts or society will countenance those injuries. Otherwise, powerful institutions convey the message that women and transgender persons are unavoidably weaker than men because they alone must guard against and overcome trauma from the harmful experience of sexual abuse. Without speaking about the assumptions underlying these seemingly unavoidable realities, courts create a false impression and entrench a gender bias in discourse that is unnecessary and harmful.

D. Sexual Abuse Cases Involving Physical Injury

Many courts are reluctant to recognize that male inmates suffer psychological harm when sexually abused by their guards. But when those male inmates claim to have suffered actual or overtly threatened physical injury, courts have found that more than *de minimis* harm results.⁶⁴ In both *Marrie v. Nickels*⁶⁵ and *Styles v. McGinnis*,⁶⁶ courts analyzed whether male inmates could prove more than *de minimis* injury under the Eighth Amendment standard in order to determine whether the inmates sustained the required physical injury or could request emotional damages under the PLRA.⁶⁷

Two inmates' claims that they were sexually assaulted and fondled during pat frisks survived a motion to dismiss in *Marrie*, as the court found these allegations sufficed to show more than *de minimis* physical

⁶⁴ I do not examine any cases where female inmates allege physical injury to show Eighth Amendment harm. Many such cases exist. To focus on this Note's central claims, I examine cases involving male inmates claiming physical injury to compare courts' responses in these cases with their responses in cases arguably involving only psychological injuries.

⁶⁵ 70 F. Supp. 2d 1252, 1257, 1264 (D. Kan. 1999).

⁶⁶ 28 F. App'x 362, 364–65 (6th Cir. 2001).

⁶⁷ See 42 U.S.C. § 1997e(e) (2006).

injury under the Eighth Amendment.⁶⁸ The inmates alleged that a guard placed his hands inside one inmate's pants, "caressed his buttocks, and stroked his genitalia," before another guard later "caressed [the inmate's] lower stomach . . . [and] buttocks, and struck him in the genitals with sufficient force to cause him several hours of pain."⁶⁹

A forcible digital penetration of the rectum inflicted sufficient physical injury in *Styles*.⁷⁰ The inmate claimed two guards held him down and a doctor sexually assaulted him "by performing a digital rectal exam on [him] with severe force and without consent."⁷¹ The Sixth Circuit reversed a dismissal of the inmate's claims where the rectal examination, according to the record, "resulted in increased blood pressure, chest pain, tachycardia, and numerous premature ventricular contractions" in an inmate with a history of serious cardiac problems.⁷²

Courts have also been willing to find objectively serious harm when sexual abuse or harassment is accompanied by overt threats of physical injury. In *Thomas v. District of Columbia*, a male inmate alleged that a male guard tried to coerce sexual relations by "forcibly touch[ing] or attempt[ing] to touch plaintiff's penis on at least two occasions, sexually harass[ing] and intimidat[ing] plaintiff, threaten[ing] [and actually] spread[ing] rumors" that the inmate was a homosexual and a snitch, and thus directly prompting confrontations and threats from other inmates of "bodily harm and further unwanted sexual contact."⁷³ The court examined contemporary standards of decency and found such sexual assault, harassment, and coercion, the physical harm with which the inmate was threatened, and the resulting "psychic injuries" were "sufficiently harmful to make out an Eighth Amendment excessive force claim."⁷⁴

All of these cases included some amount of forcible sexual assault, as well as actual or overtly threatened physical injury. The courts had little difficulty finding either male or female inmates faced objective, serious

⁶⁸ *Marrie*, 70 F. Supp. 2d at 1257, 1264.

⁶⁹ *Id.* at 1257. The court only describes one inmate's allegations in detail. *Id.* He alleged sexual assault involving physical contact and injury, and the court seemed to rely mostly on his claims in its Eighth Amendment harm analysis. *Id.* at 1257, 1264.

⁷⁰ *Styles*, 28 F. App'x at 363–65.

⁷¹ *Id.* at 363–64.

⁷² *Id.* at 364–65.

⁷³ 887 F. Supp. 1, 3 (D.D.C. 1995).

⁷⁴ *Id.* at 4. Although the court included "psychic injuries" in its list of harms, it focused more on the forcible touching and rumors, which the court found were highly likely to provoke violence from fellow inmates in the prison environment. *Id.*

harm in those circumstances. As the following Sections will show, many courts react differently to male and female inmates when the inmates claim psychological injury from sexual abuse more broadly defined to include physical touching, coercion, or quid pro quo exchanges. Courts recognize that psychological injury can cause objectively serious Eighth Amendment harm for female inmates, but react with more skepticism to the same claims by male inmates.⁷⁵

E. Sexual Abuse Cases Involving Psychological Injuries

1. Courts Deny Relief to Male Inmates

In contrast to *Styles*, where the inmate could show physical manifestations of his psychological distress after a forcible rectal exam, in *Berryhill v. Schriro* the Eighth Circuit found a male inmate could show no objectively serious injury sufficient to survive summary judgment.⁷⁶ He claimed sexual harassment made him “humiliated and paranoid” and caused several asthma attacks, but he had never sought medical help and did not present medical evidence linking his asthma attacks to the harassment.⁷⁷ His allegations involved less physical force than in *Styles*—he claimed four prison maintenance workers approached him, grabbed and held him by the shoulders, and two of them grabbed his buttocks before leaving about a minute later.⁷⁸ But the court emphasized repeatedly that the inmate failed to prove *any* injury,⁷⁹ despite his testimony about psychological harm and asthma. The court also found that since the jail classified the incident as “horseplay,” the inmate did not claim sexual comments were involved, and the inmate “did not assert that he feared

⁷⁵ Courts have consistently rejected Eighth Amendment claims involving verbal sexual harassment brought by both male and female inmates. See, e.g., *Bowie v. Cal. Dep’t of Corr.*, 99 F.3d 1145, 1996 WL 593182, at *2 (9th Cir. Oct. 15, 1996) (unpublished table decision) (noting the court had never held verbal sexual harassment violated the Eighth Amendment without physical touching and denying a male inmate’s claim that a male guard sexually harassed him); *Adkins v. Rodriguez*, 59 F.3d 1034, 1035–37 (10th Cir. 1995) (finding no cognizable Eighth Amendment harm where a male guard commented about his sexual prowess and a female inmate’s body, asked if she still loved him over her cell intercom, and stood over her bed staring at her as she slept, commenting that she had “nice breasts” after she awoke).

⁷⁶ 137 F.3d 1073, 1076–77 (8th Cir. 1998).

⁷⁷ *Id.* at 1076.

⁷⁸ *Id.* at 1074–75.

⁷⁹ See *id.* at 1076–77 (noting “there is no evidence that [the inmate] suffered anything more than a brief unwanted touch on his buttocks” and finding that “[the inmate] has shown no injury”).

sexual abuse during the incident,” it could not even qualify as a sexual assault.⁸⁰

Comparing *Berryhill* with *Styles* suggests some courts treat male inmates’ claims of sexual abuse much as they have treated female claims of rape in the outside world—they look for injury from force as a proxy for lack of consent and harm. This tendency has been exacerbated in the past when courts have used the excessive force framework to determine whether an inmate suffers cognizable Eighth Amendment harm, thus imposing an implicit quantum of injury requirement.⁸¹ Absent physical injury or violence, these courts do not easily find male inmates are seriously harmed by sexual abuse under the Eighth Amendment.

Common sense suggests physical injuries like heart problems or asthma may merely serve as outward manifestations of psychological harm. Nevertheless, some courts are reticent to acknowledge that male inmates can suffer psychological harm from sexual abuse and assault. In *Berryhill*, the court went so far as to deny that an inmate even experienced sexual assault when approached by a group of prison workers,

⁸⁰ Id. at 1076 (“It would be a distortion, however, to characterize the conduct in this case as a sexual assault . . .”). In an amicus brief in *Oncale v. Sundowner Offshore Services*, Catharine MacKinnon argues courts have used terms like “horseplay” to trivialize sexual abuse of men by men in Title VII sexual harassment cases. She suggests this is one way society ignores that men also seek to control and harm other men through gender, and that women are not the only ones subject to this abuse. Brief of Nat’l Org. on Male Sexual Victimization, Inc. et al. as Amici Curiae in Support of Petitioner at 11–12, *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 471814, at *11–12.

⁸¹ In *Wilkins v. Gaddy*, the Supreme Court adjusted the excessive force inquiry from a focus on whether an inmate suffered de minimis injury to whether nontrivial force was applied maliciously and sadistically to cause harm. 559 U.S. at 36–38. This shift in the inquiry has resulted in courts recognizing cognizable claims involving what could be seen as only de minimis injury or force, but alleging the requisite malicious intent by prison officials, or violation of contemporary standards of decency. See, e.g., *Hogan v. Fischer*, 738 F.3d 509, 514–17 (2d Cir. 2013) (excessive force); *Washington v. Hively*, 695 F.3d 641, 642–44 (7th Cir. 2012) (Posner, J.) (finding in a Fourteenth Amendment case, based on the same standards that apply under Eighth Amendment, that “[a]n unwanted touching of a person’s private parts, intended to humiliate the victim or gratify the assailant’s sexual desires, can violate a prisoner’s constitutional rights whether or not the force exerted by the assailant is significant” and whether or not the injury claimed is de minimis); *Evans v. Martin*, No. 2:12-cv-03838, 2013 WL 4805729, at *6–7 (S.D.W. Va. Sept. 9, 2013) (excessive force). But the prior standard continues to shield guards who acted before *Wilkins*, through qualified immunity, even as the Fourth Circuit has acknowledged its new excessive force framework will focus less on the quantum of injury and more on the nature and intent of force applied by guards. See, e.g., *Hill v. Crum*, 727 F.3d 312, 320–25 (4th Cir. 2013); *Williams v. Carlton*, No. 12-6882, 2013 WL 6905932, at *1–2 (4th Cir. Dec. 19, 2013).

held immobile, and intimately touched twice.⁸² This intimate touching, clearly performed without a legitimate penological justification and with the intent to abuse, arouse, or gratify sexual desire, qualifies as “sexual abuse,” as defined in Section I.A, and violates contemporary standards of decency.

Perhaps courts have simply had more experience with women claiming that the psychological coercion and duress they experience from sexual abuse and harassment harms them psychologically and problematically subordinates them to their harassers. For example, in *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, the court acknowledged that female prisoners can be psychologically harmed by sexual harassment in circumstances where there is a total lack of privacy and inability to escape the harassment through relocation or avoidance.⁸³ By contrast, the Sixth Circuit seemed to barely countenance that a male inmate could face cognizable sexual harassment in *Johnson v. Ward*.⁸⁴ Instead of discussing coercive sexual touching as abuse outside any legitimate penological justification, the court in *Johnson* focused on how a male inmate did not even really “claim that he suffered serious pain” when a male guard “(1) placed his hand on [the inmate’s] buttocks; (2) told [the inmate] that he had put sperm in his food; and (3) made an offensive sexual remark to him.”⁸⁵ As discussed in Section II.A, when courts focus more on guards’ conduct and contemporary standards of decency, they find Eighth Amendment violations for male inmates on similar facts.

2. The “Severe or Repetitive” Standard: A Quantum of Injury Requirement

The Second Circuit has made matters worse by heightening the standard of proof for inmates in sexual abuse cases, narrowing the definition of cognizable sexual abuse to that which is “severe or repetitive.”⁸⁶ The court created this heightened threshold while adjudicating a male inmate’s claim that he faced unwanted touching of his private parts and

⁸² *Berryhill*, 137 F.3d at 1074, 1076.

⁸³ 877 F. Supp. 634, 665. (D.D.C. 1994).

⁸⁴ 215 F.3d 1326, 2000 WL 659354, at *1 (6th Cir. May 11, 2000) (unpublished table decision).

⁸⁵ *Id.*

⁸⁶ *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).

sexually harassing remarks from a female guard.⁸⁷ The court labeled injuries as insufficiently serious unless an inmate could show “severe or repetitive sexual abuse . . . by a prison officer.”⁸⁸ This test technically applies to forcible sexual abuse, sexual harassment involving minimal force, and women and men alike, excluding from recognition much conduct this Note would define as sexual abuse. At least one court has cited this standard to deny Eighth Amendment relief to a female inmate alleging sexual abuse by a male officer.⁸⁹ But overall, the rule has operated to squelch claims involving sexual harassment and psychological harm,⁹⁰ and it operates overwhelmingly on male inmate claimants.⁹¹

Sexual abuse by a female guard was neither severe nor repetitive, the Second Circuit found in *Boddie v. Schnieder*, when a female guard first appeared to make “a pass” at a male inmate, and the next day “squeezed his hand, touched his penis,” and said “sexy black devil, I like you.”⁹² Later, she stopped the inmate, accused him of wearing an orange sweatshirt contrary to prison regulations (he claimed the sweatshirt was red), and demanded he take it off.⁹³ The inmate asked to take it off in his cell, as he had a heart condition and the hallway was cold.⁹⁴ As he attempted to pass, the guard twice “stopped him, bumping into [his] chest with both her breast [sic] so hard [he] could feel the points of her nipples against [his] chest,” pinning him to a door.⁹⁵ He tried to pass by again, and the guard bumped into him again, pinning him to the door “with her

⁸⁷ Id. at 859–60.

⁸⁸ Id. at 861.

⁸⁹ *Harris v. Zappan*, No. CIV A 97-4957, 1999 WL 360203, at *4–5 (E.D. Pa. May 28, 1999) (finding insufficiently serious harm under “severe and repetitive” standard where a male officer “made sexually explicit comments to [a female inmate], fondled her, and rubbed her thighs and breasts” during transport to jail). *Boddie* was not binding on the *Harris* court.

⁹⁰ See Rich, *supra* note 5, at 20–23. Although the court does not define severe or repetitive harm, the requirement clearly targets claims of subtle coercion and sexual harassment. It is difficult to imagine a court denying that harm was severe for a forcible sexual assault.

⁹¹ My research only uncovered one case in which the rule applied to deny a female inmate’s claim, see *Harris*, 1999 WL 360203, at *4–5, one case where a female inmate’s consent negated her claim, see *Fisher v. Goord*, 981 F. Supp. 140, 174 (W.D.N.Y. 1997), and countless cases applying the rule to deny claims by male inmates. Yet so many district court cases since 1997 have cited *Boddie* for various propositions that it is difficult to quantify how often this rule operates on male versus female inmates. Disparities in male and female prison populations also might negate any inference drawn from that quantification.

⁹² 105 F.3d 857, 859–61 (2d Cir. 1997).

⁹³ Id. at 860.

⁹⁴ Id.

⁹⁵ Id. (alterations in original) (internal quotation marks omitted).

whole body[,] vagina against penis.”⁹⁶ The court found the female guard inflicted no “objectively, sufficiently serious,” nor “cumulatively egregious” harm on the inmate.⁹⁷ It upheld dismissal of his claims.⁹⁸

The Supreme Court disapproved of this focus on a threshold of injury for excessive force claims in *Hudson*⁹⁹ and *Wilkins*.¹⁰⁰ These cases suggest that, for inmate sexual abuse claims, courts should look at whether guards’ conduct is without penological purpose or has a specific intent to abuse or arouse, instead of imposing a threshold level of injury. The cases that follow show the harm in *Boddie*’s erroneous focus. Setting up a threshold of injury that must be suffered has led courts to restrict recovery and deny that male inmates suffer psychological harm from sexual abuse, in effect narrowing the definition of cognizable sexual abuse only for men. And courts that follow *Boddie* merely must find the abuse was not “severe” or “repetitive” enough to constitute serious harm.¹⁰¹

Professor Camille Gear Rich has criticized the use of the severe or repetitive standard in Eighth Amendment sexual abuse and harassment cases as ill-fitted for this context.¹⁰² She notes the Supreme Court originally created the “severe and pervasive” standard for Title VII hostile environment cases to help determine whether alleged harassment sufficiently “alter[ed] the conditions of . . . employment and create[d] an abusive working environment.”¹⁰³ Rich demonstrates that *Boddie* conducts much the same analysis, but in the prison context.¹⁰⁴

Unfortunately, under this standard, inmates get less protection than workers—in the workplace, courts “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.”¹⁰⁵ Yet *Boddie* and the

⁹⁶ *Id.*

⁹⁷ *Id.* at 861.

⁹⁸ *Id.* at 861–62.

⁹⁹ 503 U.S. at 7–9 (holding that even in the absence of serious injury, excessive force against a prisoner may be cruel and unusual punishment).

¹⁰⁰ 559 U.S. at 37 (stating that when a prisoner alleges excessive force, the judicial inquiry should focus on whether the force was used in a good faith effort to maintain order or deliberately to cause harm).

¹⁰¹ See *Boddie*, 105 F.3d at 861.

¹⁰² Rich, *supra* note 5, at 6–7.

¹⁰³ *Id.* at 14–15 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)) (internal quotation marks omitted).

¹⁰⁴ *Id.* at 20–21.

¹⁰⁵ *Id.* at 21.

many cases that follow it often find no cognizable harm when inmates, especially male inmates, make the same claims.¹⁰⁶ Less protection for inmates makes no sense, Rich argues.¹⁰⁷ The Court created the severe and pervasive standard to distinguish serious harassment from permissible and potentially valuable sexual relationships between workers, or to distinguish harmless flirtation from offensive remarks.¹⁰⁸ In prison, there are no potentially valuable sexual relationships between prisoners and guards. The realities of abuse in coercive prison environments have led states and the federal government to broadly condemn and prohibit sexual activity between guards and prisoners.¹⁰⁹ Rich notes *Boddie*'s standard misdirects a court's focus, which should be on the dignity interests of inmates and the duties of guards.¹¹⁰

This misdirected focus, and courts' resulting disparate treatment of different inmates by gender, appears clearly in cases where male inmates explicitly claim emotional injury from forced kissing, fondling, and threats or attempted assaults. In *Washington v. Harris*¹¹¹ and *Parker v. Department of Corrections*,¹¹² courts acknowledged that inmates alleged psychological and emotional injuries from sexual assaults, but labeled those injuries nonexistent or de minimis under the Eighth Amendment. In *Washington*, a male guard surprised a male inmate at his work station by grabbing his genitals, kissing his mouth despite resistance, and threatening oral sex.¹¹³ The Eleventh Circuit affirmed dismissal of the inmate's claims.¹¹⁴ The court in *Parker* noted allegations that a male guard pulled down a male inmate's gym shorts and attempted to assault him with oral sex, but found the inmate "fail[ed] to describe *any* injury he incurred . . . other than emotional impact."¹¹⁵ It granted the guard's motion for summary judgment on the sexual assault claim.¹¹⁶

¹⁰⁶ Id.

¹⁰⁷ Id. at 68–69.

¹⁰⁸ Id. at 41–42.

¹⁰⁹ See also Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2006); Rodriguez v. McClenning, 399 F. Supp. 2d 228, 237–38 & nn.84–85 (S.D.N.Y. 2005) (citing various state codes and Amnesty Int'l, "Not Part of My Sentence": Violations of the Human Rights of Women in Custody 18–19 (1999)); 28 C.F.R. § 115 (2012).

¹¹⁰ Rich, supra note 5, at 42–43.

¹¹¹ 186 F. App'x 865, 866 (11th Cir. 2006) (per curiam).

¹¹² No. 1:09-cv-00029-MP-GRJ, 2011 WL 721307, at *1 (N.D. Fla. Feb. 22, 2011).

¹¹³ *Washington*, 186 F. App'x at 865.

¹¹⁴ Id. at 866.

¹¹⁵ *Parker*, 2011 WL 721307, at *1.

¹¹⁶ Id. at *1–2.

This focus on injury leads courts to define cognizable sexual abuse more narrowly for male than for female inmates. In *Williams v. Prudden*, a guard “ground his pelvis against” a female inmate, fondled her breast, “verbally demanded sexual favors, . . . and attempted to force himself upon her.”¹¹⁷ The court found this conduct alleged objectively serious injury, although it relied on both the physical and emotional injuries involved.¹¹⁸ Contrast courts’ reactions to genital fondling, forced kissing, and attempts and threats of oral sex for the male inmates. The conduct is the same. The differences are the gender of the inmates and the courts’ willingness to recognize that men can also suffer cognizable psychological harm from this conduct.

3. *Boddie’s “Severe or Repetitive” Threshold as Precedent*

In cases where inmates claim they were forced to engage in sexual activity for guards, courts applying *Boddie’s* standard find these inmates faced insufficient harm. *Morales v. Mackalm* cited *Boddie* and summarily dismissed a male inmate’s claim that a female guard repeatedly “asked him to have sex with her and to masturbate in front of her and other female staffers” while he participated with them in a mental health group.¹¹⁹ The Second Circuit found these allegations did “not even rise to the level of those made by the plaintiff in *Boddie*” and thus did “not state a claim for sexual harassment in violation of the Eighth Amendment.”¹²⁰

An inmate in *Boxer X v. Harris* actually performed “sexual acts of self-gratification” for a female guard on at least six occasions over the course of several months, but suffered only de minimis injury.¹²¹ He acquiesced after a long campaign of harassment. First, the guard demanded that he “strip naked and [masturbate],” then she promised a special favor if he would “show her [his] penis’ while she watched through the flap in the prison door,” threatening him when he refused.¹²² Finally, she filed disciplinary reports against him when he later gave in, offering not

¹¹⁷ 67 F. App’x 976, 977 (8th Cir. 2003).

¹¹⁸ *Id.* at 977–78.

¹¹⁹ 278 F.3d 126, 129, 132 (2d Cir. 2002) (per curiam), abrogated on other grounds by *Porter v. Nussle*, 534 U.S. 516, 532 (2002), as recognized in *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir. 2004).

¹²⁰ *Id.* at 132.

¹²¹ 437 F.3d at 1109, 1111.

¹²² *Id.* at 1109.

to file any more if he would masturbate for her in the future without question.¹²³ The court noted that “severe or repetitive sexual abuse of a prisoner by a prison official can violate the Eighth Amendment,” but that injuries would only prove objectively, sufficiently serious in the Eleventh Circuit “if there is more than de minimis injury.”¹²⁴

The court affirmed dismissal of the claim, ignoring the voyeurism, threats, reprisal, and lack of any penological justification for the guard’s activities.¹²⁵ It “conclude[d] that 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.”¹²⁶ The conclusion is simply astounding. The female guard did more than solicit masturbation and threaten reprisal. She *took* reprisal, and the prisoner felt coerced enough to perform for her, *multiple times*, after months of quid pro quo offers, threats, and harassment.¹²⁷ Given the way courts discuss the psychological harm of sexual harassment and abuse for women,¹²⁸ it is difficult to imagine a court reacting similarly to a female complainant.

Ultimately, *Boxer X* vividly shows courts’ improper focus on a quantum of injury, and its disparate effect on male inmates. The court in *Boxer X* seemed unable to grasp the psychological harms present when a male inmate participated in sexual activity not directly physically forced upon him. Its focus should be redirected to the fact that this guard’s conduct violates a definition of sexual abuse that comports with our contemporary standards of decency, and violates the Eighth Amendment due either to the guard’s negative intent or the lack of a legitimate justification for her acts.

Boddie’s heightened “severe and repetitive” standard enjoys widespread acceptance by other federal courts at all levels and in different circuits, with a correspondingly large effect in jurisprudence and discourse. A magistrate judge in *Green v. Brown*, for example, reacted in lock-step with the Eleventh Circuit to a forced masturbation claim by a male inmate against a female guard.¹²⁹ It cited *Boxer X*, *Morales*, and

¹²³ *Id.*

¹²⁴ *Id.* at 1111.

¹²⁵ *Id.* at 1112.

¹²⁶ *Id.* at 1111 (emphasis added).

¹²⁷ *Id.* at 1109.

¹²⁸ See *infra* Section I.F.

¹²⁹ No. 10-cv-02669-WYD-MEH, 2011 WL 3799049, at *8–9 (D. Colo. July 8, 2011), report and recommendation adopted, No. 10-cv-02669-WYD-MEH, 2011 WL 3799047, at *7 (D. Colo. Aug. 29, 2011).

Boddie, and found the female guard's "conduct was crude and unprofessional, but ultimately de minimus [sic]."¹³⁰ Precedent so clearly established that no objectively serious harm arose from the guard's actions that the court granted her qualified immunity and dismissed the claim against her.¹³¹ The court distinguished, in part, between conduct posing "a substantial risk of serious bodily harm," as in *Thomas*, and sexual harassment involving no physical conduct or threat of physical force.¹³² A magistrate court in *Arrington v. Wickstrom* likewise relied heavily on the lack of physical contact between a female guard and male inmate forced to masturbate in front of her, and found no cognizable Eighth Amendment harm.¹³³ Both courts' conclusions were adopted in their respective district courts, where *Boddie* is not binding.¹³⁴

F. A Lower Injury Threshold for Female Inmates

Where female inmates allege guards sexually abused them, courts still focus on whether the women have suffered sufficiently serious injury. But when a guard fondles a female prisoner or harasses her with a combination of words and actions without direct force, courts usually neither ignore the psychological harms which result, nor label them as de minimis.

¹³⁰ *Id.*

¹³¹ *Id.* Courts may only grant qualified immunity to officials when their actions do not violate the Constitution, as clearly established at that time by case law. *Somers v. Thurman*, 109 F.3d 614, 616–17 (9th Cir. 1997). The court in *Somers* noted:

To determine whether an official is entitled to qualified immunity, we conduct a two-part analysis: (1) We consider whether the law governing the official's conduct was clearly established. If it was not clearly established, the official is entitled to immunity from suit. (2) If the law was clearly established, we proceed to ask if under that law, a reasonable official could have believed the conduct was lawful.

Id. at 617.

¹³² *Green*, 2011 WL 3799049, at *9.

¹³³ No. 2:10-cv-177, 2012 WL 1032701, at *5–6 (W.D. Mich. Feb. 21, 2012) (collecting cases which found that verbal sexual harassment does not unnecessarily and wantonly inflict pain), report and recommendation adopted, No. 2:10-CV-177, 2012 WL 1029957, at *2 (W.D. Mich. Mar. 27, 2012); accord *Petty v. Venus Corr. Unit*, No. 3:00-CV-1753-M, 2001 WL 360868 (N.D. Tex. Apr. 10, 2001) (recommending the district court find insufficient Eighth Amendment harm from "consensual" masturbation by a male inmate, when requested by female guards, because of a lack of forced touching or breach of bodily integrity, but expressing no opinion on whether forced masturbation would violate the Eighth Amendment), findings, conclusions, and recommendations adopted, No. 3:00-CV-1753-M, 2001 WL 492396, at *1 (N.D. Tex. May 3, 2001).

¹³⁴ *Arrington*, 2012 WL 1029957, at *2; *Green*, 2011 WL 3799047, at *7.

1. Careful Identification of Injury in Women Prisoners

Women Prisoners worked within the threshold of injury framework but, by using a broad and comprehensive definition of sexual abuse, found female inmates suffered an “objectively cruel” and “wanton and unnecessary infliction of pain.”¹³⁵ *Women Prisoners*’s facts displayed an amount and breadth of sexual abuse which many other courts do not encounter because the case involved women in three prisons who formed a class action against their jailors.¹³⁶ But the court carefully specified the different types of sexual abuse that occurred and how they harmed inmates.¹³⁷

According to the court, several categories of sexual misconduct occurred at the prisons: “forceful sexual activity” from rape to fellatio, “unsolicited sexual touching” including kissing and fondling of women’s buttocks, genitals, legs, and breasts, “exposure of body parts or genitals” through lack of privacy for female inmates, “and sexual comments,” including derogatory comments and solicitation.¹³⁸ It found that forcible sexual assaults upon female inmates—including “[r]ape, coerced sodomy, [and] unsolicited touching of women prisoners’ vaginas, breasts and buttocks”—“unquestionably violate[d] the Eighth Amendment.”¹³⁹ As Section I.E demonstrates, courts often classify such unsolicited touching and coerced masturbation for male inmates as causing, at most, de minimis harm.

Beyond using an appropriately broad definition of sexual abuse, the court in *Women Prisoners* also carefully examined context and avoided implying that women are uniquely or naturally vulnerable to sexual abuse. It concluded that in a prison environment, where women are not free to relocate, avoid sexual harassment, or seek help and support from law enforcement, friends, and family, sexual harassment inflicts heightened injuries.¹⁴⁰ Viewing the environment as a whole, the court found that sexually harassing comments and a total lack of privacy for female inmates cumulatively violated the Eighth Amendment, “since they mu-

¹³⁵ 877 F. Supp. at 663–66. The court referred to an objective standard, but did not use the “objectively serious harm” standard, which was not always applied by courts in the early 1990s.

¹³⁶ Id. at 638–39. The female inmates also made many other health, disparate education and opportunity, and safety claims. Id. at 643–44, 651–52, 654, 656.

¹³⁷ Id. at 664–66.

¹³⁸ Id. at 639–40.

¹³⁹ Id. at 665.

¹⁴⁰ Id.

tually heighten the psychological injury of women prisoners.”¹⁴¹ The substantial risk of injury arising from sexual remarks could have uniquely arisen from that particular environment, “where sexual assaults of women prisoners by officers are well known and inadequately addressed.”¹⁴² But one could make a similar argument about many prisons, or at least prisons with miserable records of sexual abuse and harassment.

The court’s description of what harm results from sexual abuse and harassment is worth quoting at length, for it arguably applies to male, female, and transgender inmates alike:

The effect of sexual harassment on women prisoners is profound. The abuse has a significant impact on a woman’s concentration, and it lowers confidence and self-esteem. It leads to irritability, anxiety and nervousness. Women may be angry that the incident is happening and fearful that they will be continually exposed to it. Women prisoners who experience sexual harassment report significant depression, nausea, frequent headaches, insomnia and feelings of fatigue. Those who report the harassment often experience increased stress and may end up becoming isolated from other women in the institution. Women can feel self-doubt, and disillusionment at the failure of the organization to protect them. Women prisoners lose confidence in the system and may decide not to complain about additional incidents.

For women who have a history of sexual abuse the harassment often brings back memories of the prior abuse. This can lead to severe depression, reinforcement of a “victim” self-image and a belief that, as in childhood, they have no control over their lives.¹⁴³

Some of the psychological harm women experience from sexual harassment results from multiple victimizations, and the court cited the women’s expert witness to show that seventy to eighty percent of the female inmate population had been previously sexually abused.¹⁴⁴ But the court also carefully noted harms experienced by inmates never before abused. This careful delineation provides one useful template for how courts can recognize harm unique to previously abused inmates, as

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id. at 642–43 (internal citations omitted).

¹⁴⁴ Id. at 643 & n.8.

the court attempted to do in *Jordan v. Gardner*,¹⁴⁵ while avoiding a negative discursive implication that women are somehow uniquely more susceptible to this harm.

Women Prisoners's analysis has led other courts to use a broad definition of sexual abuse and find cognizable Eighth Amendment harm for female inmates. In *Chao v. Ballista*, for example, the court followed *Women Prisoners*'s logic to find that arguably consensual sex between a male guard and female inmate involved sufficient Eighth Amendment harm to survive summary judgment.¹⁴⁶ As in *Women Prisoners*, the court found "sex within the prison is simply not the same as sex outside—particularly between a female inmate and her captor."¹⁴⁷ The court took account of prison policies and federal law negating consent for sexual relations between guards and inmates, and noted consent may be illusory where a guard holds power over many details of an inmate's daily life.¹⁴⁸ Focusing on the environment and lack of penological justification for this activity allowed the court to recognize quid pro quo exchanges between the guard and inmate as coercive and harmful acts that sufficiently constituted violations of contemporary standards of decency to survive summary judgment.¹⁴⁹

The Eighth Circuit in *Williams v. Prudden* also found a female inmate alleged objectively serious harm on facts similar to those other courts have rejected as not cognizable.¹⁵⁰ A female inmate claimed a male guard "forcibly ground his pelvis against her, grabbed her breast, verbally demanded sexual favors, made physical sexual advances, and attempted to force himself upon her."¹⁵¹ The court cited cases affirming that physical and emotional harm results from sexual assaults.¹⁵² Still working within the injury threshold framework, the court noted a female inmate suffered both "bodily and emotional harm," and affirmed she alleged sufficient, objectively serious injury to meet the Eighth Amendment's threshold.¹⁵³ On very similar facts, in *Washington v. Harris*, the

¹⁴⁵ See supra Section I.C.

¹⁴⁶ *Chao v. Ballista*, 772 F. Supp. 2d 337, 342 (D. Mass. 2011).

¹⁴⁷ *Id.* at 350 (denying defendant male guard summary judgment on Eighth Amendment sexual abuse claim).

¹⁴⁸ *Id.* at 348.

¹⁴⁹ *Id.* at 350.

¹⁵⁰ See *Williams*, 67 F. App'x at 977–78.

¹⁵¹ *Id.* at 977.

¹⁵² *Id.* at 977–78.

¹⁵³ See *id.*

Eleventh Circuit found the harm a male inmate suffered from sexual abuse was not cognizable.¹⁵⁴ Courts' focus on injury thus produces disparate treatment that has a negative discursive effect.

2. *Incautious Stereotyping Language in Jordan v. Gardner*

The courts in *Women Prisoners* and *Chao* comprehensively described the harm suffered by sexually-abused female inmates. Yet they were careful to separate general harm, suffered by any sexually-abused female inmate, from the specific harm women inmates suffer if they have been previously sexually abused.¹⁵⁵ These analyses can also be applied to male prisoners who do not claim past abuse, or when evidence is lacking to prove male prisoners' past victimizations.

In a cross-gender search case, the Ninth Circuit faced slightly different circumstances, where the unwanted intimate touching might have occurred pursuant to a legitimate penological purpose.¹⁵⁶ Yet the Ninth Circuit's rationale in *Jordan v. Gardner* for granting female inmates relief under the Eighth Amendment reveals a bias that underlies many of these cases. Namely, while courts will recognize harm from forcible sexual assault for male and female inmates, courts assume sexual abuse harms women's psyches more.

The court's bias reveals itself in how broadly it attributed the harm women suffer from unwanted intimate touching to women's general psyches and social upbringings.¹⁵⁷ In *Jordan*, the Ninth Circuit faced claims that when male guards conducted "random, non-emergency, suspicionless clothed body searches on female inmates," even for a legitimate penological purpose, these searches caused serious Eighth Amendment harm.¹⁵⁸ The court first minutely detailed what cross-gender searches entail, including squeezing and kneading of the legs, crotch, and breast areas, and pushing inward and upward into the crotch area.¹⁵⁹ It examined the evidence introduced in the district court about how the policy would cause psychological harm to women in general, but espe-

¹⁵⁴ See *Washington*, 186 F. App'x at 865–66 (finding no cognizable harm where a guard grabbed a male inmate's genitals, overcame his resistance, kissed him on the mouth, and threatened to forcibly perform oral sex on him).

¹⁵⁵ *Chao*, 772 F. Supp. 2d at 351; *Women Prisoners*, 877 F. Supp. at 643.

¹⁵⁶ *Jordan*, 986 F.2d at 1527.

¹⁵⁷ *Id.* at 1526.

¹⁵⁸ *Id.* at 1522.

¹⁵⁹ *Id.* at 1523.

cially to previously victimized women.¹⁶⁰ Multiple psychological experts testified about “the psychological fragility of and disorders found in abused women,” including re-victimization and post-traumatic stress disorder symptoms.¹⁶¹ Relying on this evidence, the court found the female inmates had established that random, cross-gender searches caused cognizable Eighth Amendment “pain.”¹⁶²

The court explicitly recognized that female inmates suffered “psychological harm, and [that] the harm is sufficient to meet the constitutional minima.”¹⁶³ Importantly, the Ninth Circuit noted men were unlikely to experience this same harm, due to “the differences in gender socialization” and women’s “pre-existing mental conditions.”¹⁶⁴ Men implicitly did not share these conditions, the court found, and men “would be [un]likely to experience *any* psychological trauma as a result of the [cross-gender] searches.”¹⁶⁵

In arguing that courts should avoid stereotyping women as uniquely vulnerable, this Note does not mean that the *Jordan* court and others have been wrong to recognize and remedy the harms of sexual abuse for female inmates—quite the contrary. All inmates should receive relief and protection from abusive prison guards. And if an inmate suffers aggravated psychological harm due to past abuse, a court should acknowledge that heightened harm on an individual basis, perhaps in damages calculations. In *Jordan*, for example, it would have been appropriate to consider that a particular female inmate suffered added trauma from the cross-gender search due to sexual abuse she had suffered in the past. After she submitted to the search at issue in *Jordan*, her fingers had to be “pried loose from bars she had grabbed during the search, and she vomited after returning to her cell block.”¹⁶⁶ On those facts, the court should certainly recognize the serious harm she suffered.

¹⁶⁰ Id. at 1525–26.

¹⁶¹ Id. The court also described several female inmates’ graphic histories of past abuse in detail, and noted that one woman was unwillingly searched on the only day of the policy’s implementation, only to turn pale and shaky, and vomit. Id. at 1523.

¹⁶² Id. *Jordan* does not mention objectively serious harm, but tests for unnecessary and wanton infliction of pain. Thus, the court examined whether this policy was necessary for security at the prison, as well as whether officials had culpable, or “wanton,” intent. Id. at 1526–28.

¹⁶³ Id. at 1531.

¹⁶⁴ Id. at 1526.

¹⁶⁵ Id. (emphasis added).

¹⁶⁶ Id. at 1523.

But courts should also recognize that guards violate a baseline of contemporary standards of decency when they sexually abuse inmates, outside the context of legitimate searches, without speculating about how gender affects harm inflicted above that baseline. Nothing suggests that male inmates are less likely to feel this basic harm. Furthermore, male inmates may be less able or likely to show that they have suffered sexual abuse in the past, despite the fact that many men have suffered such abuse.¹⁶⁷

As this Note has shown, courts focusing on a quantum of injury requirement often tell male inmates they face little or no harm from sexual abuse or coercion. These same courts recognize that female or transgender inmates suffer cognizable harm when they experience similar conduct. Courts intercede to remedy violations for those inmates they see as vulnerable—but men do not fall in this category, labeled instead as implicitly immune from such vulnerability.

These gender biases should be excised from Eighth Amendment harm determinations. Women and transgender persons should not be told that they suffer from a unique weakness that they must alternately guard against or experience and overcome. Men should not be told that the harm that courts remedy for women cannot be felt, protected against, or remedied for them because they possess an illusory immunity to psychological injury from sexual abuse. Part II describes how some courts have excised this bias in the process of redirecting the focus of the Eighth Amendment inquiry.

II. A SOLUTION: GUARD-ON-INMATE SEXUAL ABUSE VIOLATES CONTEMPORARY STANDARDS OF DECENCY

This Note has attempted to show that courts have the potential to create, entrench, or promote gender bias by withholding relief from male inmates for the psychological injuries that sexual abuse inflicts. *Boddie v. Schnieder*'s focus on a quantum of injury does so and has been followed by the vast majority of courts considering inmates' sexual abuse claims. However, a few circuit courts have implemented a better inquiry for Eighth Amendment sexual abuse cases in the last ten years, and district courts have begun to follow their lead.

¹⁶⁷ See generally The 1 in 6 Statistic, *supra* note 50 (noting that one in six men have experienced abusive sexual experiences before age eighteen, citing resources proving this statistic, and discussing the effects of sexual abuse on men); see also *supra* Section I.C.

A. *The Beginnings of a New Approach*: *Schwenk v. Hartford*, *Calhoun v. DeTella*, and *Wood v. Beauclair*

The Ninth Circuit first de-emphasized the Eighth Amendment's objective injury requirement, although it did so in a case involving forcible sexual assault. In *Schwenk v. Hartford*, the court found that a male guard could not claim qualified immunity for same-sex sexual abuse and harassment of a male-to-female transsexual, including propositioning, demands for sex, threats of reprisal, and a forcible assault where the guard ground his naked penis into the inmate's bare buttocks.¹⁶⁸ *Schwenk* cannot stand for the proposition that non-forcible sexual abuse is an outright violation of contemporary standards of decency. Yet the *Schwenk* court stated broadly that "[i]n the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault."¹⁶⁹ And it carefully noted "no lasting physical injury is necessary to state a cause of action" when "prison officials maliciously and sadistically use force to cause harm," because in those cases "contemporary standards of decency are *always* violated."¹⁷⁰

Schwenk set an example that courts need not focus so heavily on the objective injury requirement in sexual abuse cases involving conduct with no legitimate penological purpose. *Schwenk* involved the kind of forcible assault that courts often recognize as violating the Eighth Amendment. But other cases in *Schwenk*'s wake have found contemporary standards of decency are violated by non-forcible coercion, quid pro quo activity, touching, and verbal harassment. These cases have focused less on the harm imposed by this conduct than on the fact that it presumably violates human dignity and contemporary standards of decency in a way the Eighth Amendment forbids.

The Seventh Circuit focused on this basic violation in *Calhoun v. DeTella*, in which a male inmate alleged he was strip-searched in an open area where several female guards watched, laughed, "made 'sexual ribald comments,' forced him to perform 'provocative acts,' and 'pointed their sticks towards his anal area' while he bent over and spread his buttocks to permit visual inspection for contraband."¹⁷¹ The district court

¹⁶⁸ 204 F.3d 1187, 1193–94, 1198 (9th Cir. 2000).

¹⁶⁹ *Id.* at 1197.

¹⁷⁰ *Id.* at 1196 (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)).

¹⁷¹ 319 F.3d 936, 938 (7th Cir. 2003).

had dismissed the suit for failure to state a cognizable claim under the Eighth Amendment because it contained insufficient allegations of injury.¹⁷² In other words, it followed *Boddie*'s approach and found the psychological harm caused by sexual harassment insufficiently serious under the Eighth Amendment.

The *Calhoun* court re-oriented the inquiry to whether the search was conducted for a legitimate penological purpose. It firmly held that the strip search alleged, if true, would be “punishment that is so totally without penological justification that it results in the gratuitous infliction of suffering” and would constitute the “unnecessary and wanton infliction of pain” that the Eighth Amendment prohibits.¹⁷³ Simply put, the Seventh Circuit found that “[s]uch gratuitous infliction of pain always violates contemporary standards of decency and need not produce serious injury in order to violate the Eighth Amendment.”¹⁷⁴ To state an Eighth Amendment claim for such a strip search, the court said, an inmate must only show it “was not merely a legitimate search conducted in the presence of female correctional officers, but instead a search conducted in a harassing manner intended to humiliate and inflict psychological pain.”¹⁷⁵ The court thus used a broad definition of sexual abuse, incorporating penological justification and the guard's intent to find a violation of the Eighth Amendment.¹⁷⁶

Recently, *Wood v. Beauclair* similarly upheld a sexual abuse claim with the simple rationale that sexual abuse violates “the basic concept of human dignity” that the core of the Eighth Amendment protects.¹⁷⁷ Echoing *Calhoun*, the Ninth Circuit found that conduct “so totally without penological justification that it results in the gratuitous infliction of suffering” violates the Eighth Amendment, regardless of whether the plaintiff “produce[d] evidence of injury.”¹⁷⁸

The Ninth Circuit also addressed the deeper rationales for finding that non-forcible sexual abuse harms inmates in the prison environment. The male inmate in *Wood* claimed that a female guard, over his protests,

¹⁷² Id. at 938–39.

¹⁷³ Id. at 939 (internal quotation marks omitted) (citing *Gregg v. Georgia*, 428 U.S. 153, 173, 183 (1976)).

¹⁷⁴ Id. (citing *Hudson*, 503 U.S. at 9).

¹⁷⁵ Id.

¹⁷⁶ Id. at 940.

¹⁷⁷ 692 F.3d 1041, 1050–51 (9th Cir. 2012) (quoting *Gregg*, 428 U.S. at 182) (internal quotation marks omitted).

¹⁷⁸ Id. at 1050 (quoting *Gregg*, 428 U.S. at 183) (internal quotation marks omitted).

fondled his genitals on two separate occasions.¹⁷⁹ A district court had dismissed his claims, finding he was in a consensual relationship with the guard and could suffer no Eighth Amendment harm.¹⁸⁰ The *Wood* court disputed whether he ever consented to sexual activity, but also discussed the problematic relationship of guards and inmates in a context where guards control everything and coercion poses a serious risk that inmates can never consent.¹⁸¹ To “recognize[] the coercive nature of sexual relations in the prison environment,” *Wood* created a presumption that guard-on-inmate sexual abuse is not consensual.¹⁸² The court acknowledged that sexual abuse takes many forms in the prison context, and that coercion is revealed in force and threats, but also in “favors, privileges, or any type of exchange for sex”—quid pro quo exchanges.¹⁸³ As Section II.B will detail, this presumption of coercion and harm is the same type of presumption courts should apply for *all* sexual abuse claims under the Eighth Amendment.

Several district court cases have followed *Calhoun*, *Schwenk*, and *Wood*'s approach when inmates allege that they have been improperly fondled and harassed during pat-down searches. One of the first such cases, *Rodriguez v. McClennig*, acknowledged and rejected *Boddie*'s “severe or repetitive” injury threshold, formulated in 1997, as out of sync with contemporary standards of decency in 2005.¹⁸⁴

The *Rodriguez* court presented a novel rationale to support its conclusion. First, the *Rodriguez* court found that cruel and unusual punishment has increasingly been defined by what violates “contemporary standards of decency” or proves “repugnant to the conscience of mankind.”¹⁸⁵ To avoid imposing judgments simply based on the “subjective views of judges,” courts must examine objective sources to find contemporary standards and societal expectations concerning punishment.¹⁸⁶ Trends in state laws provide such objective indicators of public attitudes. The *Rodriguez* court relied on the consistent trend in state laws between 1998

¹⁷⁹ Id. at 1044–45.

¹⁸⁰ Id. at 1046.

¹⁸¹ Id. at 1047–49.

¹⁸² Id. at 1048–49.

¹⁸³ Id. at 1049.

¹⁸⁴ 399 F. Supp. 2d 228, 237–38 (S.D.N.Y. 2005).

¹⁸⁵ Id. at 235 (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (internal citations omitted)).

¹⁸⁶ Id. (quoting *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) (internal citations and quotation marks omitted)).

and 2005 toward outlawing sexual contact with inmates, along with “the overwhelming number of states” that had prohibited sexual contact with inmates by 2005, to find “a national consensus that any sexual assault of a prisoner by a prison employee constitutes cruel and unusual punishment.”¹⁸⁷ The court found the guard’s alleged groping of the inmate’s genitals and buttocks while making threatening comments during a pat-frisk search violated the inmate’s Eighth Amendment rights.¹⁸⁸

The *Rodriguez* court’s approach directly addresses several problems with the *Boddie* quantum of injury requirement and has the potential to eliminate those problems. The court was concerned about the appearance or reality of judges subjectively deciding what contemporary standards of decency require. If judges impose erroneous views of societal norms through cases, that can limit the protections of the Eighth Amendment and hinder the positive development of the law. The *Boddie* standard appears to do just that, and as Part I shows, it has instilled a subtle gender bias against recognizing male psychological injury from sexual abuse. Looking to outside sources like state law could potentially solve that problem, if *Rodriguez* is any indication. The *Rodriguez* court implicitly validated male inmates’ psychological injuries from sexual abuse by recognizing that society condemns that abuse. Its result starkly contrasts with *Berryhill v. Schriro*, which found similar groping and sexual harassment by four prison workers upon a male inmate alleged *no* injury and did not even constitute sexual assault.¹⁸⁹

In 2006, a district court in *Bromell v. Idaho Department of Corrections* wove together *Rodriguez*’s analysis of state law and *Calhoun* and *Schwenk*’s interpretation of Supreme Court precedent into a more refined standard prohibiting guard-on-inmate sexual abuse.¹⁹⁰ The court acknowledged *Boddie*’s severe and repetitive requirement but relied on *Rodriguez*’s analysis of state law to find the *Calhoun* and *Schwenk* approaches more consistent with contemporary standards of decency.¹⁹¹ Consequently, it found simply that “where uninvited sexual contact is totally without penological justification, even though it does not produce serious injury, it results in the gratuitous infliction of suffering, which

¹⁸⁷ Id. at 237–38 (citing *Roper v. Simmons*, 543 U.S. 551, 566 (2005)).

¹⁸⁸ Id. at 231–32, 238.

¹⁸⁹ 137 F.3d 1073, 1076–77 (8th Cir. 1998).

¹⁹⁰ No. CV05-419-N-LMB, 2006 WL 3197157, at *2–4 (D. Idaho Oct. 31, 2006).

¹⁹¹ Id. at *1–4.

always violates contemporary standards of decency.”¹⁹² Therefore, the *Bromell* court found that a male inmate stated an Eighth Amendment claim where he alleged a male guard grabbed him from behind, placed his penis against the inmate’s buttocks, squeezed his pectoral muscles, fondled and squeezed his genitals, and made sexually harassing remarks while doing so.¹⁹³ Earlier in 2006, another district court in *Turner v. Huibregtse* followed this same logic in finding that a male inmate stated an Eighth Amendment claim when male guards sexually harassed him while fondling his genitals and buttocks during a pat-down search.¹⁹⁴

Courts in the cases discussed above present an encouraging new approach to defining sexual abuse and cognizable harm in guard-on-inmate sexual abuse cases. This coherent standard has the potential to eliminate gender bias and recognize the violations male inmates suffer at the hands of sexually abusive guards. Unfortunately, although the standard has been developing for ten years, it remains somewhat obscure and has not been widely adopted. Many cases that use, note, or cite the standard continue to justify their results under *Boddie*’s standard, too.¹⁹⁵ Many other courts continue to follow *Boddie*.¹⁹⁶

¹⁹² *Id.* at *4. The court also suggested two other ways to phrase this rule:

[A]n Eighth Amendment violation occurs when a bodily search is performed in a harassing manner intended to humiliate and inflict psychological pain. Stated another way, uninvited sexual contact that is done maliciously and sadistically to cause harm and that does not advance any legitimate security interest is the type of conduct that is “inconsistent with contemporary standards of decency” and that is “repugnant to the conscience of mankind,” and therefore violates the Eighth Amendment.

Id. (internal citations omitted).

¹⁹³ *Id.* at *1, *4.

¹⁹⁴ 421 F. Supp. 2d 1149, 1151 (W.D. Wis. 2006).

¹⁹⁵ See, e.g., *De’lonta v. Clarke*, No. 7:11-cv-00483, 2013 WL 209489, at *4 nn.9 & 11 (W.D. Va. Jan. 14, 2013) (noting an “emerging division” in guard-on-inmate sexual abuse cases between cases like *Wood* and *Boddie*, but proving the factual allegations satisfied the *Boddie* standard and not addressing the split); *Longshore v. Russell*, No. C11-5278 RBL/KLS, 2012 WL 2892197, at *4–6 (W.D. Wash. June 15, 2012) (quoting *Schwenk*’s standard and noting no significant physical injury must be alleged, but also discussing sufficiency of the severity and duration of sexual assault), report and recommendation adopted, No. C11-5278 RBL/KLS, 2012 WL 2903085, at *1 (W.D. Wash. July 16, 2012); *Jacobs v. Durko*, No. 04-1941, 2007 WL 2769436, at *1–4 (W.D. Pa. Sept. 17, 2007) (discussing alleged sexual abuse under *Rodriguez* and *Bromell* standards, but also factually distinguishing from *Boddie*).

¹⁹⁶ See, e.g., *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006); *Green v. Brown*, No. 10-cv-02669-WYD-MEH, 2011 WL 3799049, at *7–9 (D. Colo. July 8, 2011), report and recommendation adopted, No. 10-cv-02669-WYD-MEH, 2011 WL 3799047, at *1 (D. Colo. Aug. 29, 2011); *Parker v. Dep’t of Corr.*, No. 1:09-cv-00029-MP-GRJ, 2011 WL

B. A New Standard

The Supreme Court should clarify the law in this area and adopt the approach innovated by *Calhoun*, *Rodriguez*, and *Bromell*. Below, I enumerate three possibilities for a specific standard that could be applied to prohibit and remedy guard-on-inmate sexual abuse under the Eighth Amendment. Until the Court takes up this issue, advocates should encourage circuit and district courts to adopt the standards below as most congruent with the Court's precedents in *Wilkins*, *Hudson*, and *Farmer*, and with contemporary standards of decency in the United States.

Courts can employ the new standard in several different ways. The simplest formulation comes from *Bromell*, slightly altered here: *Guard-on-inmate sexual contact that is totally without penological justification per se results in the gratuitous infliction of suffering and violates contemporary standards of decency.*

I omit the *Bromell* court's references to "uninvited" sexual contact and its qualification that suffering is inflicted "even though it does not produce serious injury."¹⁹⁷ Guards' complete power over inmates in the prison environment leads me to agree with *Wood* and *Chao* that courts should presume inmates are unable to consent to sexual activity with guards. I would not require inmates to prove the contact was uninvited. The qualification about serious injury may prove useful in explicitly rejecting *Boddie*, but it suggests something I find inaccurate—that sexual abuse and harassment does not inflict serious psychological injury on inmates. The Eighth Amendment should move away from examining serious injury because of its irrational restrictions, ill-fitted standards adopted from Title VII, and gender biases. Yet, one basis for assuming that sexual abuse violates contemporary standards of decency may be that we assume it is harmful.

Another possible standard would allow courts to infer from certain actions a malicious and sadistic intent to cause psychological harm.¹⁹⁸ *A good baseline presumption would establish that guards sexually abuse inmates maliciously and sadistically to cause inmates psychological harm. Within this presumption, sexual abuse includes, at the very least,*

721307, at *1 (N.D. Fla. Feb. 22, 2011); *Lewis v. Fischer*, No. 08-CV-3027 (JG)(LB), 2009 WL 689803, at *4–6 (E.D.N.Y. Mar. 12, 2009).

¹⁹⁷ *Bromell*, 2006 WL 3197157, at *4.

¹⁹⁸ I refer here to psychological harm because courts seem to readily recognize physical harm and overt threats of physical harm by guards as violating contemporary standards of decency in the sexual abuse context.

fondling, sexual touching, coerced sexual activity, combinations of sexual harassment and abuse, and quid pro quo exchanges of sexual activity to avoid discipline or gain favors. Maliciously and sadistically acting to cause psychological harm in these presumed circumstances violates contemporary standards of decency and the Eighth Amendment.

Alternatively, using different language from the excessive force framework, courts could hold that *the sexual abuse conduct listed above, when imposed without legitimate penological purpose,¹⁹⁹ unnecessarily and wantonly inflicts psychological pain on inmates and thus violates contemporary standards of decency.* No inquiry into whether an inmate was individually, psychologically harmed would be necessary, as *Wood* demonstrates.

These standards and presumptions assume one of two things, either of which creates a cognizable claim under the Eighth Amendment. Either: 1) all inmates suffer the kind of serious injury from these abuses that contemporary standards of decency condemn and prohibit; or 2) sexual abuse of inmates by their guards, in situations void of any legitimate penological purpose, violates our societal conception of the punishment that we seek to impose on inmates and therefore constitutes cruel and unusual punishment.

Supreme Court and lower court case law bear out these two assumptions about what violates contemporary standards of decency. Federal statutes and regulations, state laws, and penal institutions' own policies also support these assumptions. States almost uniformly condemn sexual contact between prison workers and inmates. As of 2005, *Rodriguez* reported that only four states had not yet passed laws criminally proscribing all sexual contact between inmates and guards, and eleven states had moved to criminalize such contact from 1998 to 2005.²⁰⁰

Federal law and regulations also condemn and seek to prevent all sexual contact between guards and inmates. Although Congress recently imposed more stringent requirements on inmates pursuing litigation under the PLRA, those restrictions have not yet been interpreted. Like the

¹⁹⁹ I do not mean to suggest here that there is ever a legitimate penological justification for sexual abuse. This term simply clarifies that courts can find that no Eighth Amendment violation has occurred in situations where inmates have endured unwanted touching and psychological discomfort from intrusive searches that were conducted properly and for legitimate penological purposes.

²⁰⁰ *Rodriguez*, 399 F. Supp. 2d at 237–38 (citing various state codes and Amnesty Int'l, "Not Part of My Sentence": Violations of the Human Rights of Women in Custody 18, 19 (1999)).

PLRA's prior restrictions, this new amendment may simply restrict certain forms of damages to conduct like rape or violent sexual assault, but may allow injunctive relief for other violations of contemporary standards of decency. Even if courts require inmates to show either physical injury or the commission of a sexual act to initiate litigation, those terms may be interpreted broadly by courts, as has occurred in the past. If courts come to define a wider range of sexual abuse as violating contemporary standards of decency, they may prove reluctant to read the PLRA in a way that would preclude relief for those constitutional violations.²⁰¹

Regardless, other forms of federal legislation have condemned sexual abuse in no uncertain terms. In 2003, Congress passed the Prison Rape Elimination Act to prevent, detect, and respond to sexual violence in prisons.²⁰² It directed the Department of Justice to study the problem and implement national standards to prevent, reduce, and punish sexual abuse in confinement facilities, including state facilities that receive federal funding.²⁰³ The Department of Justice issued federal regulations in 2012 which define prohibited sexual abuse and harassment and specify procedures by which confinement facilities must be audited and certified as compliant.²⁰⁴ If state facilities are not certified as compliant with PREA, they can lose five percent of their federal funding.²⁰⁵ In Section I.A, I described the regulations' definition of "sexual abuse." Throughout this Note, I have shown that this definition identifies exactly the type of conduct that courts often deal with differently depending on an inmate's gender. I have argued that the standards I suggest above would remedy this situation by redirecting the focus of the Eighth Amendment and broadening the law's conception of conduct that is unacceptable between prison guards and inmates. The PREA regulations already find that this conduct is unacceptable between those two groups—for every type of prison, jail, or confinement facility, the regulations specify that

²⁰¹ See *supra* Part I for a discussion of the PLRA's new amendment.

²⁰² Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601–15609 (2006)).

²⁰³ National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,107–10 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

²⁰⁴ 28 C.F.R. §§ 115.5–115.6 (2012); see also National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37,107.

²⁰⁵ National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37,107.

“[t]ermination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.”²⁰⁶

Clearly, federal and state governments, across all branches, specifically condemn the very guard-on-inmate sexual abuse targeted by this Note. Supreme Court and circuit court decisions demand that courts account for contemporary standards of decency in defining cruel and unusual punishment under the Eighth Amendment, without imposing a significant injury requirement.²⁰⁷ *Rodriguez* followed the *Roper v. Simmons* approach and found that society so disapproves of all sexual contact between guards and inmates that state laws have trended toward criminalizing it.²⁰⁸ Disapproval of this kind of sexual contact is supported by such broad consensus that Congress *unanimously* passed PREA in 2003.²⁰⁹ The *Rodriguez*, *Bromell*, and other courts rightly recognize that our contemporary social norms absolutely proscribe sexual abuse of inmates by their guards. As this conduct violates contemporary standards of decency, other courts should follow suit and find the Eighth Amendment protects all inmates—male, female, and transgender—from sexual abuse.

CONCLUSION

This Note has attempted to highlight a body of case law that problematically interprets a threshold of injury requirement into the Eighth Amendment’s ban on cruel and unusual punishment. Led by *Boddie v. Schnieder*, courts have disproportionately denied male inmates’ claims of psychological injury, promoted a harmful gender stereotype, and grafted incompatible standards onto the Eighth Amendment from Title VII. Fortunately, a few courts in the last ten years have begun to formulate a better Eighth Amendment standard with the potential to solve these problems.

The standards that this Note refines from *Schwenk*, *Calhoun*, *Bromell*, and *Rodriguez* could eliminate the gender bias effect while simultaneously protecting inmates from sexual abuse that our society views as

²⁰⁶ 28 C.F.R. § 115.76(b) (2012).

²⁰⁷ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Hudson*, 503 U.S. at 7–8; *Calhoun*, 319 F.3d at 938–39; *Schwenk*, 204 F.3d at 1196–98.

²⁰⁸ *Rodriguez*, 399 F. Supp. 2d at 237–38 (citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

²⁰⁹ See Bobby Scott & Frank Wolf, Op-Ed., Ending Prisoner Rape Is a Bipartisan Cause, *Richmond Times-Dispatch* (Aug. 4, 2012), http://www.timesdispatch.com/news/ending-prisoner-rape-is-a-bipartisan-cause/article_4d579a68-42d3-517a-b35f-3e2be8c9223e.html.

2014]

Common Sense About Common Decency

477

harmful and reprehensible. “Contemporary standards of decency” well describes that consensus, and remains flexible to changing norms which affect our society’s conception of cruel and unusual punishment. Yet this standard also comes with pre-defined limits from long lines of precedent and from my suggested definitions of sexual abuse. Thus, it can keep unwarranted litigiousness from overwhelming the courts. Appropriately re-orienting the Eighth Amendment focus to guards’ legitimate penological justifications and contemporary standards of decency would also ensure the Eighth Amendment accurately reflects our society’s consensus on cruel and unusual punishment, based on legislation and litigation at every level of government.

Guard-on-inmate sexual abuse inflicts harm that is “not part of the punishment” we impose on offenders. In fact, it is cruel and unusual. Through this Note, I hope to have proven that point. And I hope that advocates and courts can use this analysis and my suggested standards to refocus the Eighth Amendment on its core function: namely, protecting the basic human dignity of inmates by ensuring that their punishment does not violate our common sense of common decency.

