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JUST PUNISHMENT: *RICKS V. SHOVER* AND THE NEED FOR A
CONSTITUTIONAL RESPONSE TO GUARD-ON-INMATE PRISON
SEXUAL ABUSE

JONATHAN T. RUTTER*

“[T]he sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment.”¹

I. INTRODUCTION: HOW GUARD-ON-INMATE SEXUAL ABUSE INCAPACITATES
PRISONS

The lock on a cell door went “click.”² It had been remotely activated, as a warning, by a prison guard keeping watch as a lookout.³ Inside the cell, a second prison guard knew exactly what his accomplice was telling him: someone was about to discover him sexually assaulting a prisoner inside her cell, and he needed to escape to avoid detection.⁴ According to reports, at least one prison guard used this method to cover up his sexual abuses of female prisoners while working at the Lackawanna County Prison in Scranton, Pennsylvania.⁵

Just this year, seven prison officials were charged with sexually abusing prisoners at the Lackawanna County Prison.⁶ The allegations of misconduct go back decades and involve prison officials systematically abusing female inmates at the prison, not only in the darkness of utility closets, but openly in cells.⁷ The abuse was “common and widely known” and facilitated by the complicity of other guards.⁸

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1. Crawford v. Cuomo, 796 F.3d 252, 260 (2d Cir. 2015).

2. Matthew Haag, *7 Prison Guards in Pennsylvania Charged with Sexually Abusing Inmates*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/pennsylvania-prison-guards-sexual-abuse.html> (reporting on criminal investigation into sexual abuse allegedly committed by multiple corrections officers at Lackawanna County Prison in Scranton, Pennsylvania).

3. *See id.* (describing plot by prison guard to avoid detection of sexual abuse of inmate in cell).

4. *See id.* (describing method used by prison guard to warn other guard that he was going to be caught sexually abusing prisoner).

5. *See id.* (reporting that correctional officer who allegedly devised plot worked at Lackawanna County Prison for over a decade and used this method during that time).

6. *See id.* (noting that victims of alleged abuse filed lawsuit against some guards at Lackawanna County Prison).

7. *See id.* (reporting on fact that some prison officials abused inmates in their own cells).

8. *Id.* (describing fact that allegations were reportedly common knowledge among prison staff). In a civil action arising from these abuses, one of the victim inmates claimed that guards

Unfortunately, the Lackawanna County Prison is not unique.⁹ The number of allegations of sexual abuse in American correctional facilities has risen dramatically over the past decade.¹⁰ Even more troubling, almost half of all sexual abuse allegations in American prisons involve correctional staff as the perpetrators.¹¹

Sexual abuse in prisons has incurred significant attention in recent decades.¹² Several commentators have noted the negative cultural and social implications of prison sexual abuse.¹³ The federal government and most states have enacted

destroyed her complaints when she reported her allegations to an assistant warden at the prison. *See id.*; *see also* Terrie Morgan-Besecker, *Lackawanna County Prison Guard Says He Was Fired for Reporting Sexual Abuse*, SCRANTON TIMES-TRIBUNE (Aug. 21, 2018), <https://www.thetimes-tribune.com/news/lackawanna-county-prison-guard-says-he-was-fired-for-reporting-sexual-abuse-1.2376309> (reporting allegations of prison guard who claimed he was fired from Lackawanna County Prison for reporting guards who were sexually abusing inmates).

9. *See, e.g.*, Julie K. Brown, *You Do It “To Survive.” Ex-Inmate at Florida Women’s Prison Tells How Staff Extorted Sex*, MIAMI HERALD (Aug. 16, 2018), <https://www.miamiherald.com/news/special-reports/florida-prisons/article216807755.html> (discussing criminal investigation of assistant warden who allegedly extorted sex from female inmate by threatening detention and loss of gain time at Lowell Correctional Institution in Marion County, Florida); *Ex-Federal Jail Guard Convicted of Sexually Abusing Inmates*, ASSOCIATED PRESS (May 14, 2018), <https://www.apnews.com/085a8bd9aedc4aadb2d8d74a5f472881> (discussing convictions of three prison officials who abused female inmates at Metropolitan Detention Center in Brooklyn, New York); Carol Marbin Miller & Audra D.S. Burch, *They Were Stalkers, Sexters and Rapists – and Worked Safeguarding Florida Delinquents*, MIAMI HERALD (Oct. 10, 2017), <https://www.miamiherald.com/news/special-reports/florida-prisons/article177887586.html> (reporting prison guards’ abuse of inmates across Florida juvenile detention centers, including one guard who sexually abused at least nine young girls at Milton Girls Juvenile Residential Facility).

10. *See* Ramona Rantala, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-2015*, BUREAU OF JUST. STAT. (July 25, 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6326> (describing rise in allegations of both inmate-on-inmate and staff-on-inmate sexual victimization in American correctional facilities, as well as increase in number of substantiated allegations).

11. *See id.* (noting that 42% of substantiated inmate allegations of sexual abuse were perpetrated by staff members); *see also* Liz Fields, *Half of Sexual Abuse Claims in American Prisons Involve Guards, Study Says*, ABC NEWS (Jan. 26, 2014), <https://abcnews.go.com/US/half-sexual-abuse-claims-american-prisons-involve-guards/story?id=21892170> (detailing research into guard-on-inmate sexual abuse demonstrating that just under half of allegations involve correctional officials).

12. *See generally* Megan Coker, *Common Sense About Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 VA. L. REV. 437, 440 (2014) (arguing that courts placing emphasis on injury in sexual abuse claims has “disparate impact on inmates”, including contributing to harmful gender disparity); Haag, *supra* note 2 (reporting on sexual abuse at Pennsylvania prison). For a discussion of how sexual abuse in prisons has gained recent attention, *see infra* notes 37-47 and accompanying text.

13. *See, e.g.*, Heidi Lee Cain, *Women Confined by Prison Bars and Male Images*, 18 TEX. J. WOMEN & L. 103, 104-105 (2008) (describing cultural implications of how prisons treat female inmates and arguing that women behind bars are seen as inherently sexual objects); Coker, *supra* note 12 (arguing that courts placing emphasis on injury in sexual abuse claims has “disparate impact on inmates”, including contributing to harmful gender disparity). *See generally* Alice Ristorph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006) (arguing

legislation proscribing guard-on-inmate sexual contact.¹⁴ Additionally, several United States appellate courts have ruled that guard-on-inmate sexual contact may violate the Constitution's prohibition of cruel and unusual punishment under the Eighth Amendment.¹⁵

Similarly, in *Ricks v. Shover*,¹⁶ the Third Circuit Court of Appeals considered whether guard-on-inmate sexual abuse violates the Eighth Amendment's prohibition of cruel and unusual punishment.¹⁷ In holding that it can, the Third Circuit Court of Appeals joined several other circuits in providing a potential remedy for inmates who have been deprived of their Eighth Amendment rights by being sexually assaulted by correctional staff.¹⁸ Employing the reasoning from the Supreme Court's excessive force jurisprudence, the *Ricks* court qualified

that incarceration is inherently "sexual punishment" because sexual coercion is endemic to the experience of imprisonments). *See also* Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 562-65 (2006) (discussing purposes of punishment and arguing that no legitimate penological purpose supports sexual assault in prison as a legitimate incident of incarceration).

14. *See generally* *Prison Rape Elimination Act*, 34 U.S.C. § 30302 (establishing federal response to increasing rates of prison sexual assault); 18 PA. CONS. STAT. AND STAT. ANN. § 3124.2(a) (West 2012) (providing criminal penalty for correctional officers who commit "indecent contact" with an inmate); N.J. STAT. ANN. § 2C:14-3(b) (West 2018) (providing criminal penalty for correctional officers who commit "an act of sexual contact" with an inmate). For further citations to and descriptions of federal and state legislation that provides criminal sanctions for prison officials who engage in sexual contact with victims, see *infra* note 38 and accompanying text.

15. *See, e.g.*, *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015) (holding "intentional contact with an inmate's genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or humiliate the inmate, violates the Eighth Amendment"); *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding "severe or repetitive sexual abuse" of inmate by prison official can violate Eighth Amendment's prohibition on cruel and unusual punishment); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that sexual abuse of inmate violates Eighth Amendment and that officers engaging in such conduct are not entitled to qualified immunity); *Giron v. Corrs Corp. of Am.*, 191 F.3d 1281, 1290 (10th Cir. 2000) (holding inmate claims for sexual abuse may arise under Supreme Court excessive force jurisprudence); *Freitas v. Ault*, 109 F.3d 1335, 1138 (8th Cir. 1997) (holding inmates may have cause of action under Eighth Amendment for sexual abuse by prison officials when such abuse caused injury); *Boddie v. Schnieder*, 105 F.3d 857, 859 (2d Cir. 1997) (concluding inmates may make Eighth Amendment claim for sexual abuse by corrections officer, but holding no such deprivation occurred in that case).

16. 891 F.3d 468 (3d Cir. 2018).

17. *See id.* at 479 (holding sexual abuse of prisoner by prison official may violate the Eighth Amendment, but single act of prison official rubbing his clothed erect penis against inmate's buttocks during pat-down search is not sufficiently serious to support claim under Eighth Amendment). Specifically, the plaintiff brought a claim pursuant to 42 U.S.C. § 1983 for deprivation of his Eighth Amendment right to be free from cruel and unusual punishment. *See id.* at 472 (describing *Ricks*'s complaint and procedural history of present case). *See generally* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted.*") (emphasis added); 42 U.S.C. § 1983 (1996) (providing private cause of action for people deprived of their constitutional rights by those acting "under color of" state law).

18. *See Ricks*, 891 F.3d at 473 ("Today, we join numerous sister Circuits in holding that prison sexual abuse can violate the Constitution.").

its holding, stating that “even if sexualized touching lacks a penological purpose, it may still fall below the threshold of constitutional cognizability based on a lack of objective seriousness.”¹⁹

This Note analyzes the Third Circuit’s reasoning in *Ricks*, as well as the test the court employed to evaluate whether a guard’s conduct violates the Eighth Amendment.²⁰ Given society’s evolving standards of decency and the categorical difference between sexual abuse and excessive force, this Note argues that the Third Circuit erred in concluding that guard-on-inmate sexual contact is constitutionally permissible if such conduct is not objectively serious.²¹ Part II of this Note provides a background on sexual abuse in prisons, as well as judicial and legislative responses to this pervasive problem.²² Part III examines the factual and procedural background of *Ricks*.²³ Part IV discusses the reasoning the *Ricks* court employed in reaching its decision.²⁴ Part V provides a critical analysis of the court’s reasoning and advocates for an alternative test in cases of alleged sexual abuse of prisoners.²⁵ Finally, Part VI considers the impact of the *Ricks* court’s decision in establishing barriers to the vindication of inmates’ constitutional rights.²⁶

II. BACKGROUND: THE LEGAL SYSTEM’S ATTEMPT TO DETER PRISON SEXUAL ABUSE

The rate of sexual abuse of inmates has risen dramatically in recent decades.²⁷ The legal system has confronted this problem in a number of different ways, including criminal prosecutions and civil lawsuits for the vindication of inmates’ Eighth Amendment rights.²⁸ However, the Supreme Court has never

19. *Id.* at 475-76 (reasoning that sexual abuse claims under Eighth Amendment must satisfy objective and subjective prongs). The court concluded that *Ricks*’s complaint did not clearly allege abuse rising to a level prohibited by the Constitution, appearing instead to be “isolated” and “momentary.” *Id.* at 479.

20. *See id.* at 474 (describing two-part test comprised of objective and subjective prong analyzing seriousness of actor’s conduct and mental state, respectively).

21. For a complete argument that proof of objective seriousness should not be required to establish an Eighth Amendment sexual abuse claim, see *infra* notes 135–181 and accompanying text.

22. For a description of the factual and legal background of Eighth Amendment claims alleging sexual abuse, see *infra* notes 27–105 and accompanying text.

23. For a recounting of the underlying facts and procedural posture of *Ricks*, see *infra* notes 106–122 and accompanying text.

24. For a narrative analysis of the court’s reasoning in *Ricks*, see *infra* notes 123–134 and accompanying text.

25. For a critical analysis of the *Ricks* court’s decision, as well as a proposed alternative test in cases of guard-on-inmate sexual abuse, see *infra* notes 135–181 and accompanying text.

26. For a discussion of the impact of the *Ricks* decision on future Eighth Amendment sexual abuse claims, see *infra* notes 182–187 and accompanying text.

27. *See Rantala, supra* note 10 (detailing rise in sexual abuse allegations in American prisons). For a discussion of the rise in sexual abuse allegations in American correctional facilities, see *infra* notes 30–36 and accompanying text.

28. *See, e.g., Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (holding inmate

articulated a definite rule for judging civil claims for prison sexual abuse, and the circuit courts have employed subtly different tests in such cases.²⁹

A. The Incidence of Sexual Abuse in Prisons

According to a 2018 Justice Department study, there has been a significant rise in inmate allegations of sexual assault in American correctional facilities between 2011-2015.³⁰ The study found that there were 24,661 allegations of sexual abuse in American correctional facilities in 2015.³¹ This number was up nearly 300% from the 8,768 allegations recorded in 2011.³² Significantly, just under half of the substantiated allegations involved abuse by correctional officials.³³

These statistics are reflected in a spate of high-profile prosecutions of correctional officers alleged to have sexually abused inmates at their prisons.³⁴ For example, six correctional officers at the Edna Mahan Correctional Facility in New Jersey were recently indicted for sexually abusing prisoners.³⁵ Additionally,

stated cause of action under Eighth Amendment by alleging correctional officer fondled inmate's genitals for personal gratification). For further discussion of the legal response to sexual abuse in prisons, see *infra* notes 37-105 and accompanying text.

29. Compare *Ricks v. Shover*, 891 F.3d 468, 476 (3d Cir. 2018) (“[E]ven if sexualized touching lacks a penological purpose, it may still fall below the threshold of constitutional cognizability based on a lack of objective seriousness.”), with *Crawford*, 796 F.3d at 254 (“A corrections officer’s intentional contact with an inmate’s genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer’s sexual desire or humiliate the inmate, violates the Eighth Amendment.”).

30. See *Rantala*, *supra* note 10 (describing rise in allegations of both inmate-on-inmate and staff-on-inmate sexual victimization in American correctional facilities, as well as increase in number of substantiated allegations). In the Prison Rape Elimination Act, Congress mandated that the Bureau of Justice Statistics of the Department of Justice compile this information. See 34 U.S.C. § 30303(a) (2017) (requiring the Bureau of Justice Statistics to annually complete “comprehensive statistical review and analysis of the incidence and effects of prison rape”).

31. See *Rantala*, *supra* note 10 (reporting that there were 1,473 substantiated allegations in 2015, which reflected a 63% increase from 902 substantiated allegations in 2011).

32. See *id.* (“The number of allegations in prisons increased from 6,660 in 2011 to 18,666 in 2015 (up 180%).”).

33. See *id.* (stating that 42% of substantiated allegations were perpetrated by staff members at correctional facilities).

34. See, e.g., Casey Quinlan, *Sexual Assault of Inmates by Staff Is Prevalent and Often Goes Unpunished: Six Officers at the Same New Jersey Facility Have Been Indicted for Sexual Abuse of Female Inmates*, THINKPROGRESS (Feb. 5, 2018), <https://thinkprogress.org/prison-guard-sexual-assault-e824a2d7006a/> (describing investigation and charges brought against six corrections officials at a prison, including one who had worked as corrections officer since 2000).

35. See *id.* (discussing story of abuse by corrections officers at New Jersey’s Edna Mahan Correctional Facility). Two guards have already been convicted of sexually abusing inmates at Edna Mahan Correctional Facility. See David Foster, *Corrections Officer Found Guilty of Raping Inmate at Edna Mahan Women’s Prison*, THE TRENTONIAN (May 10, 2018), https://www.trentonian.com/news/corrections-officer-found-guilty-of-raping-inmate-at-edna-mahan/article_9c8f1a62-17bf-595a-8d4c-6418ed7884f3.html (recounting conviction of one

as discussed above, seven correctional officials at the Lackawanna County Prison were indicted for sexually abusing inmates.³⁶

B. Legal Responses

The legal system has responded to the epidemic of sexual abuse in American correctional institutions through both legislation and judicial interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment.³⁷ State and federal governments have passed laws to address the sexual abuse of prisoners.³⁸ Furthermore, courts have increasingly recognized that sexual abuse may implicate a prisoner's Eighth-Amendment right to be free from cruel and unusual

former guard for raping inmate, as well as previous conviction of another guard in 2017).

36. For a discussion of the abuse allegations at the Lackawanna County Prison, see *supra* notes 2–8 and accompanying text.

37. See, e.g., Prison Rape Elimination Act, 34 U.S.C. §§ 30301–30309 (2018) (providing federal response to rape in prisons in United States); *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (holding inmate stated cause of action under Eighth Amendment by alleging correctional officer fondled inmate's genitals for personal gratification). For further discussion on legal responses to sexual abuse in prisons, see *infra* notes 37–105 and accompanying text.

38. The federal government addressed sexual contact in the Prison Rape Elimination Act. See 34 U.S.C. § 30302 (2017) (identifying purpose of Act to “establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States”). Every state forbids at least some form of sexual contact between guards and inmates. See ALA. CODE § 14-11-31(a) (2018); ALASKA STAT. § 11.41.427(a) (2018); ARIZ. REV. STAT. ANN. § 13-1419(A) (2018); ARK. CODE ANN. § 5-14-217(a)(2) (2009); CAL. PENAL CODE § 289.6(a)(2) (West 2015); COLO. REV. STAT. § 18-7-701(1) (2010); CONN. GEN. STAT. § 53a-73a(a) (2013); D.C. CODE § 22-3014 (2013); FLA. STAT. ANN. § 794.011(2) (West 2017); GA. CODE ANN. § 16-6-5.1(b)(5) (West 2016); HAW. REV. STAT. § 707-732(1)(e) (2018); IDAHO CODE ANN. § 18-6110(1) (West 2018); 720 ILL. COMP. STAT. § 5/11-9.2(a) (West 2018); IND. CODE ANN. § 33-44.1-3-10(c)(2) (West 2014); IOWA CODE ANN. § 709.16(1) (West 2015); KAN. STAT. ANN. § 21-5512(a) (West 2018); KY. REV. STAT. ANN. § 510.120(1) (West 2018); LA. STAT. ANN. § 14:134.1(A) (2010); ME. STAT. tit. 17-A, § 255-A(1) (2016); MD. CODE ANN. CRIM. LAW § 3-314(b)(2) (West 2018); MASS GEN. LAWS ANN. ch. 268 § 21A (West 2018); MICH. COMP. LAWS ANN. § 750.520c(1) (West 2013) (criminalizing generally sexual contact when actor had authority over victim); MINN. STAT. ANN. § 609.345 (West 2010); MISS. CODE ANN. § 97-3-104(1) (West 2018); MO. ANN. STAT. § 566.145(1) (West 2017); MONT. CODE ANN. § 45-5-502 (West 2017); NEB. REV. STAT. ANN. § 28-322.01 (West 2018); NEV. REV. STAT. ANN. § 212.187(2) (West 2015); N.H. REV. STAT. ANN. §§ 632-A:3 (2018); N.J. STAT. ANN. §§ 2C:14-2, 2C:14-3 (West 2018); N.Y. PENAL LAW § 130.05(3) (McKinney 2018); N.C. GEN. STAT. ANN. § 14-27.31(b) (West 2015) (criminalizing generally sexual contact where actor had “custody” over victim); N.D. CENT. CODE ANN. § 12.1-20-07(1)(d) (West 2018); OHIO REV. CODE ANN. § 2907.03(A) (West 2009); OR. REV. STAT. ANN. § 163.454(1) (West 2018); 18 PA. CONS. STAT. AND STAT. ANN. § 3124.2(a) (West 2012); S.C. CODE ANN. § 44-23-1150(B) (2018); S.D. CODIFIED LAWS § 22-22-7.6 (2018); TENN. CODE ANN. § 39-16-408(b) (West 2018); TEX. PENAL CODE ANN. § 39.04(a) (West 2017); UTAH CODE ANN. §§ 76-5-412(4)(a), 76-5-412(5) (West 2018); VT. STAT. ANN. tit. 13, § 3257(a) (West 2018); VA. CODE ANN. § 18.2-67.4(A) (2018); WASH. REV. CODE ANN. § 9A.44.170(1) (West 2014); W. VA. CODE ANN. § 61-8B-10(a) (West 2012); WIS. STAT. ANN. § 940.225(2)(h) (West 2018); WYO. STAT. ANN. § 6-2-304(a) (West 2018). Four states only criminalize sexual penetration, rather than sexual contact between guards and inmates generally. See DEL. CODE ANN. tit. 11, § 780A (2018); N.M. STAT. ANN. § 30-9-11(E) (West 2009); OKLA. STAT. tit. 21, § 1111(A)(7) (West 2018); R.I. GEN. LAWS ANN. § 11-25-24 (West 2018).

punishment.³⁹

1. Legislation

Congress has taken an active role in describing the contours of a valid prison sentence, including defining the lawful purposes for sentencing and proscribing certain unlawful incidents to a prisoner's sentence.⁴⁰ For example, in the Sentencing Reform Act, Congress provided sentencing judges with a description of valid purposes for criminal punishment that a judge should consider in imposing a sentence, including retribution to promote respect for the law and to provide just punishment, deterrence of future crimes, incapacitation of the offender, and rehabilitation of the defendant.⁴¹ Moreover, through the Prison Rape Elimination Act, Congress sought to prevent rape in United States prisons.⁴² Notably, the Prison Rape Elimination Act adopts an expansive definition of "rape" that includes the sexualized touching of an inmate's "genitalia, anus, groin, breast, inner thigh, or buttocks."⁴³ Finally, under 42 U.S.C. § 1983,

39. See, e.g., Crawford, 796 F.3d at 254 (2d Cir. 2015) (holding guard-on-inmate sexualized contact violates Eighth Amendment when no penological purpose and guard had wrongful intent); Boxer X v. Harris, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding "severe or repetitive sexual abuse" of inmate by prison official can violate Eighth Amendment); Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding sexual abuse of inmate violates Eighth Amendment); Giron v. Corr. Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 2000) (holding inmate claims for sexual abuse may arise under Supreme Court excessive force jurisprudence); Freitas v. Ault, 109 F.3d 1335, 1138 (8th Cir. 1997) (holding inmates may have cause of action under Eighth Amendment for sexual abuse by prison officials when such abuse caused injury); Boddie v. Schnieder, 105 F.3d 857, 859 (2d Cir. 1997) (concluding inmates may make Eighth Amendment claim for sexual abuse by corrections officer, but holding no such deprivation occurred here). See generally U.S. CONST. amend. VIII (proscribing infliction of "cruel and unusual punishments").

40. See Prison Rape Elimination Act, 34 U.S.C. §§ 30301–30309 (2018) (providing federal response to rape in prisons in United States); Sentencing Reform Act, 18 U.S.C. § 3553 (2018) (describing factors judges must weigh in imposing criminal sentence).

41. See Sentencing Reform Act, 18 U.S.C. § 3553(a)(2)(A)-(D) (2018) (describing justifications for criminal punishment, including "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; (D) and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

42. See Prison Rape Elimination Act, 34 U.S.C. § 30302 (2018) (stating that purposes of Act are to "(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; (2) make the prevention of prison rape a top priority in each prison system; [and] . . . (7) protect the Eighth Amendment rights of Federal, State, and local prisoners . . ."). The Prison Rape Elimination Act also mandates the gathering of information relating to prison sexual abuse. See *id.* § 30303(a)(1) (requiring Department of Justice to prepare "a comprehensive statistical review and analysis of the incidence and effects of prison rape"). The Act also provides funds to be made available to the states to achieve the Act's purposes. See *id.* § 30305(a) (providing grants for "personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prison rape").

43. See *id.* § 30309(9), (11) (defining "rape" to include "sexual fondling," which is defined as "the touching of the private body parts of another person (including the genitalia, anus, groin, breast, inner thigh, or buttocks) for the purpose of sexual gratification").

inmates may bring private civil actions against any person who, under color of state law, has subjected them to a deprivation of their Eighth Amendment rights.⁴⁴

States have similarly promulgated legislation to combat prison sexual abuse.⁴⁵ Every state (and the District of Columbia) has enacted statutes imposing criminal penalties for correctional officers who engage in sex acts with prisoners.⁴⁶ Of these, all but four states broadly prohibit sexual contact between correctional officers and inmates; those four other states opt instead to narrowly criminalize sexual penetration.⁴⁷

2. *The Supreme Court's Eighth Amendment Jurisprudence*

The Supreme Court has never expressly ruled on whether guard-on-inmate sexual contact deprives prisoners of their Eighth Amendment rights.⁴⁸ Nevertheless, in *Farmer v. Brennan*,⁴⁹ the Supreme Court held that a correctional officer's failure to prevent one inmate from sexually abusing another could violate the Eighth Amendment.⁵⁰ In *Farmer*, a transsexual inmate was raped by fellow prisoners.⁵¹ In holding that correctional officers may be liable for inmate-on-inmate sexual abuse, the Court reasoned that the relevant inquiry in assessing liability is whether the correctional officers were aware of a risk of harm to the inmate, yet disregarded that risk by failing to take reasonable measures to mitigate it.⁵² Although the opinion did not address whether guard-on-inmate

44. See 42 U.S.C. § 1983 (providing private cause of action against any “person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

45. For citations to relevant state statutes, see *supra* note 38.

46. See *Crawford v. Cuomo*, 796 F.3d 252, 259 (2d Cir. 2015) (recognizing that all but two states criminalize guard-on-inmate sexual contact). The District of Columbia also criminalizes this conduct. See *id.* For citations to state laws criminalizing sexual contact between inmates and corrections officers, see *supra* note 38.

47. See DEL. CODE ANN. tit. 11, § 780A (2018); N.M. STAT. ANN. § 30-9-11(E) (West 2009); OKLA. STAT. tit. 21, § 1111(A)(7) (West 2018); R.I. GEN. LAWS ANN. § 11-25-24 (West 2018).

48. *Ricks v. Shover*, 891 F.3d 468, 473-74 (3d Cir. 2018) (noting that Supreme Court has never addressed question of whether sexual abuse of prisoner by prison official may rise to the level of constitutional violation).

49. 511 U.S. 825 (1970).

50. See *id.* at 828 (stating corrections officers may be liable under Eighth Amendment for inmate-on-inmate sexual abuse when officers were aware of substantial risk to abused inmate).

51. See *id.* at 829-30 (describing that incident occurred soon after inmate was transferred from one prison to another and subsequently moved from administrative segregation into general population).

52. See *id.* at 847 (“Accordingly, we reject petitioner’s arguments and hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”). The Court adopted a subjective, rather than objective, standard for “deliberate indifference” under the Eighth Amendment because a subjective standard best aligns with the text of the Cruel and Unusual Punishments Clause. See *id.* at 837-838 (“[A]n official’s failure to alleviate a significant risk that he should

sexual contact could violate the Eighth Amendment, *Farmer* nevertheless established the principle that sexual abuse could—under certain circumstances—deprive prisoners of their Eighth Amendment rights.⁵³

In the absence of more specific guidance regarding guard-on-inmate sexual abuse, it is important to consider the Supreme Court’s Eighth Amendment jurisprudence in general.⁵⁴ The Eighth Amendment is often implicated in capital punishment cases, and the Supreme Court has long interpreted the Eighth Amendment to categorically forbid imposing the death penalty when its application would be disproportionate to the crime.⁵⁵ For example, in *Atkins v. Virginia*,⁵⁶ the Court found the death penalty unconstitutional when imposed on mentally disabled defendants.⁵⁷ However, the Supreme Court has not restricted its Eighth Amendment jurisprudence merely to analysis of the death penalty; the Court has also recognized that the Cruel and Unusual Punishments Clause prohibits certain conditions of a prisoner’s confinement that are “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”⁵⁸

In 1976, in *Estelle v. Gamble*,⁵⁹ the Court first recognized that an inmate’s treatment in prison—unrelated to the sentence itself—could violate the Cruel and

have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment.”).

53. *See id.* at 847 (delineating circumstances where sexual abuse gives rise to potential Eighth Amendment claim). Numerous federal appellate cases cite *Farmer* when applying the Eighth Amendment to instances of guard-on-inmate sexual abuse. *See, e.g., Ricks*, 891 F.3d at 473-74; *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1285 (10th Cir. 1999); *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).

54. For an overview of the Supreme Court’s Eighth Amendment jurisprudence, *see infra* notes 55–76 and accompanying text.

55. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 412-13 (2008) (holding that death penalty is unconstitutional when applied in cases of child rape in which crime did not result, and was not intended to result, in victim’s death); *Roper v. Simmons*, 543 U.S. 551, 579 (2005) (holding that death penalty is unconstitutional when imposed on offenders under eighteen years old); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that imposition of death penalty on “mentally retarded” offenders is unconstitutional); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (concluding that imposing death penalty on mentally insane defendant is unconstitutional); *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion) (holding that imposition of death penalty for rape of adult woman, when victim was not killed, is unconstitutionally disproportionate). *But see Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that imposition of death penalty on offenders convicted of felony murder, who were major participants in felony and exhibited reckless indifference to human life, is constitutional).

56. 536 U.S. 304 (2002).

57. *See id.* at 321 (holding that imposing death penalty on “mentally retarded” offenders is unconstitutional).

58. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)) (finding that Eighth Amendment forbids “more than physically barbarous punishments”). Additionally, the Court reasoned that punishments violate the Eighth Amendment when they “involve the unnecessary and wanton infliction of pain.” *Id.* at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)).

59. 429 U.S. 97 (1976).

Unusual Punishments Clause.⁶⁰ In *Estelle*, the Court held that denial of medical treatment to prisoners by correctional staff may deprive prisoners of their Eighth Amendment rights.⁶¹ In doing so, the Court emphasized that the unnecessary infliction of suffering, which can happen through failure to attend to medical needs, “is inconsistent with contemporary standards of decency.”⁶²

In *Rhodes v. Chapman*,⁶³ the Court applied *Estelle*’s “contemporary standards of decency” test to a factual scenario where inmates were double bunked in one cell.⁶⁴ In holding that housing two inmates in one cell is constitutional, the *Rhodes* court reasoned that conditions of confinement that are not contrary to contemporary standards of decency are within constitutional bounds.⁶⁵ Moreover, the Court asserted that, in the absence of a violation of contemporary standards of decency, the mere fact that conditions of confinement may inflict pain does not run afoul of the Constitution because “the Constitution does not mandate comfortable prisons.”⁶⁶

In addition to conditions of confinement in prison, the Supreme Court has applied the Eighth Amendment to affirmative acts of prison staff in exerting excessive force against inmates.⁶⁷ In *Whitley v. Albers*,⁶⁸ the Court considered an inmate’s Eighth Amendment claim of excessive force during a prison riot.⁶⁹ In

60. *See id.* at 104 (holding that deliberate indifference to prisoner’s serious medical needs constitutes “unnecessary and wanton infliction of pain,” which is prohibited by Eighth Amendment); *see also* *Hudson v. McMillian*, 503 U.S. 1, 10 (1992) (“*Estelle*, we noted, first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of the prisoner’s sentence.”).

61. *See Estelle*, 429 U.S. at 104 (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ . . . proscribed by the Eighth Amendment.” (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion))).

62. *Id.* at 103-04 (arguing that such “standards of decency [are] manifested in modern legislation” that requires public to care for prisoners who cannot care for themselves).

63. 452 U.S. 337 (1981).

64. *See id.* at 339 (“The question presented is whether the housing of two inmates in a single cell at the Southern Ohio Correctional Facility is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.”); *id.* at 347 (applying *Estelle*).

65. *See id.* at 347 (“Conditions other than those in *Gamble* . . . alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble* But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional.” (citing *Estelle*, 429 U.S. at 103-04)). The Court went on to note that, even though conditions may be harsh, if such conditions do not violate contemporary standards of decency, then “they are part of the penalty that criminal offenders pay for their offenses against society.” *Id.*

66. *Id.* at 349 (asserting that, because conditions are not unconstitutional, they are best decided by legislative or executive authority).

67. *See Whitley v. Albers*, 475 U.S. 312, 326-27 (1986) (holding that excessive force may violate Eighth Amendment, but that no violation occurred in that case because officer acted in “good-faith effort to restore prison security”).

68. 475 U.S. 312 (1986).

69. *See id.* at 314 (“This case requires us to decide what standard governs a prison inmate’s claim that prison officials subjected him to cruel and unusual punishment by shooting

contrast to *Estelle's* required mental standard of deliberate indifference in a conditions of confinement claim, the *Whitley* court ruled that the proper question in excessive force cases is “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”⁷⁰

In *Hudson v. McMillian*,⁷¹ the Court extended the *Whitley* rule to all cases of excessive force under the Eighth Amendment.⁷² In so doing, the Court clarified that the analysis for an excessive force claim under the Eighth Amendment includes both an objective and subjective prong.⁷³ For the subjective prong, the relevant question is whether “the officials act[ed] with a sufficiently culpable state of mind.”⁷⁴ As for the objective prong, the court must determine whether the alleged wrongdoing was “harmful enough” for constitutional cognizability.⁷⁵ Whether conduct satisfies the objective prong is necessarily contextual because the Eighth Amendment’s prohibition of “cruel and unusual punishments” is given meaning “from the evolving standards of decency that mark the progress of a maturing society.”⁷⁶

3. Circuit Court Precedent on Prison Sexual Abuse

Although the Supreme Court has not considered the issue, the circuit courts have employed the Supreme Court’s Eighth Amendment jurisprudence in cases of guard-on-inmate sexual abuse.⁷⁷ In 1997, the Second Circuit Court of Appeals confronted this issue in *Boddie v. Schnieder*.⁷⁸ There, the defendant, a

him during the course of their attempt to quell a prison riot.”).

70. *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (reasoning this standard is necessary because of “significant risks to the safety of inmates and prison staff” that are inherent in attempts by prison staff to resolve disturbance).

71. 503 U.S. 1 (1992).

72. *See id.* at 6-7 (“[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”).

73. *See id.* at 8 (“[C]ourts considering a prisoner’s claim must ask both if ‘the officials act[ed] with a sufficiently culpable state of mind’ and if the alleged wrongdoing was objectively ‘harmful enough’ to establish a constitutional violation.” (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991))).

74. *Id.* at 8 (quoting *Wilson*, 501 U.S. at 298). This standard may vary depending on context. Compare *Whitley*, 475 U.S. at 313 (holding standard in excessive force context is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for the purpose of causing harm”), with *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding standard in conditions of confinement context is “deliberate indifference”).

75. *See Hudson*, 503 U.S. at 8 (quoting *Wilson*, 501 U.S. at 298) (discussing elements of an Eighth Amendment claim).

76. *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).

77. For descriptions of and citations to relevant circuit court decisions, see *infra* notes 78–105 and accompanying text.

78. *See* 105 F.3d 857 (2d Cir. 1997) (framing issue as whether inmates may make Eighth

correctional officer, sexually harassed the plaintiff, an inmate.⁷⁹ The plaintiff alleged that the defendant touched his penis, stating, “[Y]ou know your [sic] sexy black devil, I like you”; that on another occasion the defendant pressed her breasts into his chest “so hard [he] could feel the points of her nipples against [his] chest”; and that she again pressed up against him, “vagina against penis pinning [him] to the door.”⁸⁰

In holding that sexual abuse may violate the Eighth Amendment, the *Boddie* court asserted that such conduct can satisfy both prongs of the Supreme Court’s test for Eighth Amendment violations.⁸¹ On the objective prong, sexual abuse can be “objectively, sufficiently serious,” because it may cause “severe physical and psychological harm,” may be contrary to contemporary standards of decency, and serves no legitimate penological purposes.⁸² Sexual abuse can also satisfy the subjective prong of an Eighth Amendment claim because a prison official may have a sufficiently culpable state of mind to meet the requirement.⁸³ However, the *Boddie* court held the facts of that case did not objectively rise to an Eighth Amendment deprivation because the alleged conduct was merely “isolated episodes of harassment and touching” and thus did not amount to “a harm of federal constitutional proportions as defined by the Supreme Court.”⁸⁴

Following *Boddie*, a number of other federal appellate courts recognized that sexual abuse may violate the Eighth Amendment, but read the objective prong as

Amendment claims for sexual abuse by correctional officers).

79. *See id.* at 859-60 (noting that plaintiff believed that prison official mistreated him, and specifically detailing allegations of sexual misconduct plaintiff experienced at hand of prison official).

80. *Id.* Apparently, the second incident occurred after Schnieder stopped Boddie and accused the inmate of wearing an orange (rather than red) sweatshirt because only prison employees were permitted to wear orange. *See id.* at 860 & n.1. When Boddie refused to take off the sweatshirt, Schnieder pressed herself against him. *See id.* at 860.

81. *See id.* at 860-861 (noting that only in “some circumstances” will sexual abuse of a prisoner violate the prisoner’s rights).

82. *See id.* (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)) (discussing objective element of Eighth Amendment claim).

83. *See id.* at 861-62 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)) (discussing subjective element of Eighth Amendment claim).

84. *Id.* at 862 (citing *Farmer*, 511 U.S. at 833-34; *Rhodes v. Chapman*, 452 U.S. 337, 348-49 & 348 n.13 (1981)) (noting that “not every deviation from an ‘aspiration toward an ideal environment for long-term confinement’ amounts to a constitutional violation”). However, the *Boddie* court conceded that isolated episodes of harassment and touching could give rise to a state tort claim. *See id.* at 861.

requiring that the inmate suffer “harm.”⁸⁵ For example, in *Freitas v. Ault*,⁸⁶ the Eighth Circuit Court of Appeals held that sexual abuse of an inmate could violate the Constitution; however, the court found that there was no constitutional deprivation because the guard and inmate engaged in a consensual sexual relationship, and therefore the inmate failed to allege the requisite harm as a result of the officer’s conduct.⁸⁷ In *Boxer X v. Harris*,⁸⁸ the Eleventh Circuit Court of Appeals reached a similar conclusion.⁸⁹ Although the *Boxer X* court recognized that sexual abuse of an inmate may violate the Eighth Amendment, the court held that no such violation occurred when a prison guard solicited an inmate to masturbate on threat of reprisal.⁹⁰ Relying on *Boddie* and Eleventh Circuit precedent, the court reasoned that the objective element of an Eighth Amendment claim requires “more than *de minimis* injury.”⁹¹

Although the aforementioned cases required proof of harm to satisfy the objective prong, others have foregone the harm inquiry in favor of an emphasis on the evolving standards of decency.⁹² The Ninth Circuit Court of Appeals

85. See, e.g. *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997); *Boxer X v. Harris*, 437 F.3d 1107 (11th Cir. 2006). See *Coker*, *supra* note 12 at 440 (arguing that placing emphasis on injury in sexual abuse claims has disparate impact on inmates, including contributing to harmful gender disparity). *Coker* criticizes the requirement that a plaintiff suffer an injury to state an Eighth Amendment sexual abuse claim. See *id.* Notably, *Ricks* expressly held that injury is not dispositive of the issue and that the objective prong is better analyzed with reference to “evolving standards of decency.” *Ricks v. Shover*, 891 F.3d 468, 477 (3d Cir. 2018) (quoting *Graham v. Florida*, 560 U.S. 48, 58 (2010)) (holding that “the absence of force or injury will not doom a sexual abuse claim outright” and even though “physical injury will certainly signal severity, it is not the touchstone for objective seriousness”).

86. 109 F.3d 1335 (8th Cir. 1997).

87. See *id.* at 1339 (“[W]e hold that, at the very least, welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute ‘pain’ as contemplated by the Eighth Amendment.”). One commentator has criticized the notion that prisoners can consent to sex acts with prison officials. See Hannah Belitz, Note, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R.-C.L.L. REV. 291, 297-98 (2018) (arguing inmates cannot give consent to sex with guards because power imbalance may cause inmates to feel incapable of rejecting guards’ sexual advances).

88. 437 F.3d 1107 (11th Cir. 2006).

89. See *id.* at 1111 (“In this case, we join other circuits recognizing that severe or repetitive sexual abuse of a prisoner by a prison official can violate the Eighth Amendment.”).

90. See *id.* (reasoning that even though exposure of one’s genitals could be “especially demeaning and humiliating,” forcing inmate to expose self was only a *de minimis* injury).

91. *Id.* (“We conclude 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.”). The court relied explicitly on Eleventh Circuit precedent in holding that the objective element of an Eighth Amendment claim requires more than *de minimis* injury. See *id.* (citing *Johnson v. Breeden*, 280 F.3d 1308, 1321 (11th Cir. 2002)).

92. See, e.g., *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015) (“[W]e recognize that sexual abuse of prisoners, once passively accepted by society, deeply offends today’s standards of decency.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (“In such cases, no lasting physical injury is necessary to state a cause of action. Rather, the only requirement is that the officer’s actions be ‘offensive to human dignity.’” (quoting *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991))).

articulated this standard in *Schwenk v. Hartford*.⁹³ In holding that a pattern of sexual abuse of an inmate may implicate the Constitution's prohibition on cruel and unusual punishment, the *Schwenk* court reasoned that cruel and unusual punishment is gauged against "the evolving standards of decency that mark the progress of a maturing society."⁹⁴ The court asserted that an Eighth Amendment claim does not require a lasting physical injury, but rather that the conduct be "offensive to human dignity."⁹⁵ Because a guard-on-inmate sexual assault is "deeply 'offensive to human dignity,'" the court held that the plaintiff had adequately stated a claim of deprivation of Eighth Amendment rights.⁹⁶

In *Crawford v. Cuomo*,⁹⁷ the United States Court of Appeals for the Second Circuit clarified its previous stance in *Boddie* by holding that, because of evolving standards of decency, the facts of *Boddie* would not withstand its own test today.⁹⁸ The court heavily based its analysis on the notion that "the Eighth Amendment requires courts to 'look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.'"⁹⁹ In assessing contemporary standards of decency, the court must review "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."¹⁰⁰ Noting that a significant number of states enacted laws prohibiting guard-on-inmate sexual contact after *Boddie*, the *Crawford* court found that these legislative enactments demonstrate how society's beliefs have evolved on sexual abuse in prisons and that society now considers such abuse to offend "our most basic principles of just punishment."¹⁰¹

In an unpublished decision, *Obiegbu v. Werlinger*,¹⁰² the Third Circuit addressed an Eighth Amendment claim of sexual abuse in which an inmate alleged that a prison guard grabbed the inmate's genitals through clothing during a pat-down search.¹⁰³ Relying on *Boddie*, the court paid special attention to the

93. 204 F.3d 1187 (9th Cir. 2000).

94. *Id.* at 1196 (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)).

95. *Id.* (quoting *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991)). In addition, the court noted that "physical injury" is not required under Eighth Amendment as long as an "officer's actions be 'offensive to human dignity'". *Id.*

96. *Id.* at 1197 (quoting *Felix*, 939 F.2d at 702 (9th Cir. 1991)); *see also id.* at 1205 (holding inmate stated a claim for relief under Eighth Amendment).

97. 796 F.3d 252 (2d Cir. 2015).

98. *See id.* at 260 ("In light of this evolution [of contemporary standards of decency], while the standard articulated in *Boddie* remains the same, 'its applicability must change as the basic mores of society change.'" (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008))).

99. *Id.* at 259 (quoting *Graham v. Florida*, 560 U.S. 48, 58 (2010)) (noting that even though conduct may not have risen to Eighth Amendment violation historically, changing standards of decency may dictate different outcome today).

100. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 564 (2005)).

101. *See id.* at 260 (noting state and federal laws against officer-inmate sexual contact "make it clear that the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment").

102. 581 F. App'x 119, 121 (3d Cir. 2014).

103. *See id.* at 121 (holding inmate did not state valid Eighth Amendment claim for sexual abuse when corrections officer touched genitals during pat-down search because "a small

limited number of instances of sexual abuse alleged here, arguing that a “small number of incidents in which a prisoner is verbally harassed, touched, and pressed against without his consent do not amount to [an Eighth Amendment] violation.”¹⁰⁴ Thus, the federal appellate courts have adopted two different schools of thought regarding Eighth Amendment sexual abuse claims: (1) requiring proof of objective “harm” that goes beyond a *de minimis* injury, and (2) recognizing, based on evolving societal standards of decency, that guard-on-inmate sexual abuse may violate the Eighth Amendment without physical injury.¹⁰⁵

III. SEEKING RESTITUTION: THE FACTS OF *RICKS V. SHOVER*

Against this background of Eighth Amendment jurisprudence, the Third Circuit was faced with *Ricks v. Shover*.¹⁰⁶ The incident giving rise to this case occurred on September 17, 2014.¹⁰⁷ At that time, Gregory Ricks was an inmate at Pennsylvania State Corrections facility SCI-Graterford.¹⁰⁸ On that morning, Corrections Officer Paul Keil ordered Ricks to undergo a pat-down search while walking through a public hallway.¹⁰⁹ Lieutenant Shover was also allegedly

number of incidents in which a prisoner is verbally harassed, touched, and pressed against without his consent do not amount to such a violation”). Other district court opinions have similarly relied on *Obiegbu* for the proposition that a prisoner suffering only “isolated” incidents of inappropriate behavior do not amount to an Eighth Amendment violation. *See, e.g.*, *Kokinda v. Pa. Dep’t of Corr.*, No. 2:16-CV-1580-MRH-CRE, 2017 WL 3897378, at *5-6 (W.D. Pa. Aug. 9, 2017) (holding inmate did not state valid Eighth Amendment claim when alleging that corrections officer displayed “latent sexual interest” for inmate and, on numerous occasions, stared at inmate’s groin area “for an uncomfortable duration” while inmate wore only underwear in cell), *report and recommendation adopted as modified*, No. 2:16-CV-1580-MRH-CRE, 2017 WL 3912350 (W.D. Pa. Sept. 5, 2017); *Hann v. Southwoods State Prison*, No. CV-14-3752-RBK-AMD, 2016 WL 3638107, at *4 (D.N.J. July 6, 2016) (holding prisoner did not state valid Eighth Amendment claim when alleging corrections officer touched inmate on shoulder and told inmate that officer liked inmate); *Burch v. Thomas*, No. 7:14-cv-01812-CLS-JEO, 2015 WL 10911325, at *2-3 (N.D. Ala. Aug. 19, 2015) (holding inmate did not state claim under Eighth Amendment when alleging corrections officer groped inmate’s genitals and ran hand between inmate’s buttocks during pat-down search), *report and recommendation adopted*, No. 7:14-CV-01812-CLS-JEO, 2016 WL 2865802 (N.D. Ala. May 17, 2016).

104. *Obiegbu*, 581 F. App’x at 121 (citing *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997)).

105. *Compare Boxer X*, 437 F.3d at 1111 (requiring more than *de minimis* injury to prevail on Eighth Amendment sexual abuse claim) with *Schwenk*, 204 F.3d at 1196 (requiring only that alleged conduct be “offensive to human dignity”).

106. 891 F.3d 468 (3d Cir. 2018).

107. *See id.* at 472 (describing facts of case).

108. *See id.* (noting Ricks’s confinement at SCI-Graterford); *see also id.* at 472 n.1 (noting that after events at issue, Ricks was released on parole and is no longer incarcerated).

109. *See id.* at 472 (stating that events occurred during morning line movements while Ricks was on his way to law library); *see also id.* at 472 n.2 (noting in original complaint, Ricks identified defendant as “C/O Kile,” but thereafter Commonwealth of Pennsylvania identified defendant as “Corrections Officer Paul Keil”).

present and observed the pat-down.¹¹⁰

While being patted-down from behind, Ricks felt Keil's erect penis "rubbing up against" his buttocks.¹¹¹ Ricks stepped away from Keil, protesting the sexual contact.¹¹² Ricks then informed Shover that Keil had touched him inappropriately.¹¹³ After Ricks explained further, Shover approached him and "slammed [him] in the . . . wall."¹¹⁴ Shover then led Ricks back to his cell in handcuffs.¹¹⁵ Shover also allegedly directed several racial slurs at Ricks in the process.¹¹⁶

Ricks subsequently brought a civil action under 18 U.S.C. § 1983 against Keil and Shover in the United States District Court for the Eastern District of Pennsylvania.¹¹⁷ In his complaint, Ricks sought monetary and injunctive relief for racial discrimination, harassment, sexual abuse, and excessive force.¹¹⁸

The district court dismissed Ricks's complaint for failure to state a claim.¹¹⁹ The court based its decision on the Third Circuit's non-precedential opinion in *Obiegbu*, citing it for the proposition that a small number of incidents of sexual abuse do not amount to an Eighth Amendment violation.¹²⁰ Ricks appealed the trial court's order.¹²¹ However, on appeal, Ricks only pursued his claims for sexual abuse and excessive force.¹²²

IV. CRIME AND PUNISHMENT: THE THIRD CIRCUIT'S JUDGMENT ON PRISON

110. *See id.* at 472 (explaining that Lt. Shover was overseeing line movement and that entire series of events was allegedly captured on video camera).

111. *Id.* (providing that Ricks was clothed at time of alleged sexual contact).

112. *See id.* (noting Ricks's statement that Keil was "on [his] (ASS)").

113. *See id.* (describing Ricks's statement to Lt. Shover that Keil was "[r]ubbing [u]p against my [b]ehind with his genitals").

114. *Id.* (noting that Ricks alleged injuries as result of this force including "[b]usted" nose and lip, as well as injuries to his head, neck, and back).

115. *See id.* (describing aftermath of Ricks's statement to Shover).

116. *See id.* (recounting that Ricks alleged prior instances of harassment by Shover).

117. *See id.* at 472-73 (describing procedure of case); *see also* 18 U.S.C. § 1983 (1996) (providing private cause of action for deprivations of constitutional rights carried out "under color of" state law).

118. *See Ricks*, 891 F.3d at 472 (describing Ricks's complaint).

119. *See id.* at 472-73 (noting that district court initially granted Ricks leave to amend complaint, but that Ricks did not amend his complaint within allotted time period). Thus, the district court accordingly dismissed Ricks's complaint with prejudice. *See id.* at 473 (noting that district court dismissed complaint).

120. *See id.* at 472-73 (stating that district court relied on *Obiegbu* to dismiss Ricks's Eighth Amendment claim). For a discussion of *Obiegbu*, see *supra* notes 102-104 and accompanying text.

121. *See Ricks*, 891 F.3d at 473 (explaining that Ricks filed his appeal after lower court dismissed case with prejudice).

122. *See id.* at 472 n.4 (noting Ricks did not pursue claims for racial discrimination or harassment on appeal).

SEXUAL ABUSE

In reaching its decision, the *Ricks* court acknowledged that there is no Supreme Court precedent on the issue.¹²³ However, the court stated that it was guided by both the Supreme Court's holding in *Farmer* that inmate-on-inmate sexual assault can implicate the Eighth Amendment's prohibition on cruel and unusual punishment and the Supreme Court's excessive force jurisprudence.¹²⁴ Additionally, the *Ricks* court considered other circuits' approaches that applied excessive force principles to sexual abuse claims.¹²⁵

Citing the Second Circuit's decision in *Boddie*, the *Ricks* court employed the Supreme Court's two-prong excessive force test.¹²⁶ The *Ricks* court noted that the objective prong of an Eighth Amendment claim requires that sexual abuse be "objectively, sufficiently serious," which can be satisfied by "severe or repetitive sexual abuse of an inmate by a prison officer."¹²⁷ The court described the subjective prong of an Eighth Amendment claim as satisfied in cases "[w]here no legitimate law enforcement or penological purposes can be inferred from the defendant's alleged conduct."¹²⁸

Ricks argued that, based on *Crawford*, the objective and subjective elements of an Eighth Amendment claim should be consolidated such that the finding of a lack of penological purpose for sexualized contact would be dispositive; however, the Third Circuit disagreed.¹²⁹ In doing so, the court distinguished *Crawford* by noting that the conduct at issue there was a body-cavity search, which the court found to be "objectively intrusive."¹³⁰ Additionally, the court

123. *See id.* at 473-74 (noting Supreme Court has not addressed issue of guard-on-inmate sexual abuse).

124. *See id.* ("Though the Supreme Court has not addressed sexual abuse of inmates by prison officials, courts grappling with this issue have drawn from the Supreme Court's excessive force precedents and its holding in *Farmer v. Brennan* that sexual assaults of inmates by inmates can implicate the right to be free from cruel and unusual punishment.").

125. *See id.* (providing citations to other federal appellate decisions holding sexual abuse can violate Eighth Amendment). The *Ricks* court particularly relied on *Boddie*, citing it repeatedly when analyzing the objective and subjective elements of an Eighth Amendment claim. *See id.* at 474 ("In particular, the United States Court of Appeals for the Second Circuit's reasoning in its two landmark Eighth Amendment sexual abuse cases informs our analysis.").

126. *See id.* at 474 (citing *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997)) (noting two-prong test used in *Boddie*).

127. *Id.* (quoting *Boddie*, 105 F.3d at 861).

128. *Id.* (citing *Boddie*, 105 F.3d at 861).

129. *See id.* at 476 ("Ricks has urged us to adopt a standard that would collapse the subjective and objective inquiries, so that a finding of a lack of penological purpose would be determinative. He draws this standard from *Crawford* We do not take issue with the focus of the analysis by other courts on whether the official performing the search had a penological purpose That is, when a search involves intrusive, intimate touching to ensure that contraband and weapons are not present, an inquiry into its purpose is legitimate.").

130. *Id.* ("Absent a legitimate penological purpose, the type of touching involved in, for instance, a body-cavity search, would be undoubtedly cruel and unusual. And a desire to humiliate the inmate or gratify the officer—inferred through the officer's conduct—is a reasonable way to distinguish between invasive touching that is permitted by law to ensure safety and that which is not. An analysis focused on intent of the officer is therefore appropriate

concluded that contemporary standards of decency had not evolved to provide for a zero-tolerance policy towards all sexual abuse in prisons because federal law only proscribes “severe misconduct” and because state law only criminalizes “inmate rape, sexual assault, and ‘indecent contact.’”¹³¹

In its analysis, the *Ricks* court noted that the cases decided by the other circuits did not necessarily establish a floor level for the objective standard.¹³² However, the court ultimately concluded that, although Keil’s conduct was “inappropriate and unprofessional,” it did not, as alleged in *Ricks*’s complaint, rise to the level of objective seriousness because there is no way to determine whether the alleged conduct was part of a “legitimate pat-down” absent more specific pleading and because “the episode as alleged appeared to be isolated” and “momentary.”¹³³ However, because *Ricks* was not initially represented by counsel in filing this lawsuit, the court granted *Ricks* the opportunity to amend his complaint to allege facts that would meet the legal requirements of an Eighth Amendment claim.¹³⁴

when evaluating whether an objectively intrusive search is constitutional.”); *accord id.* (“[In a previous decision,] [w]e found a focus on intent necessary to demarcate permissible from *ultra vires* invasiveness. Accordingly, the inquiry to define culpable state of mind versus legitimate penological purpose is a necessary, but not sufficient, inquiry. Fusing the subjective and objective inquiries, as *Ricks* urges we must, would constitutionalize any alleged touch, if the corrections officer lacked a penological purpose. We decline to entirely eliminate the objective prong of the analysis by collapsing it with the subjective prong. That is to say, even if sexualized touching lacks a penological purpose, it may still fall below the threshold of constitutional cognizability based on a lack of objective seriousness.”).

131. *Id.* at 477-78 (“In recent years, both the federal government and all but two of the states have passed legislation outlawing sexual activity between guards and inmates. . . . [T]hese enactments reflect a societal standard that conduct falling outside the definition for ‘rape’ nonetheless is taken seriously and compensable by damages at law. They do not, however, compel a finding that all inappropriate touching is *per se* unconstitutional. The Prison Rape Elimination Act . . . explicitly seeks to ‘establish a zero tolerance standard for the incidence of prison rape in the prisons of the United States.’ . . . But the statute defines ‘rape’ so as to overtly encompass severe misconduct. . . . Similarly, the Prison Litigation Reform Act . . . limits recovery for mental and emotional injuries unless a litigant can show ‘physical injury or the commission of a sexual act.’ . . . We therefore do not read the PREA and the PLRA as evincing Congressional intent to create a zero-tolerance standard for minor sexual touching.”).

132. *See id.* at 479 (“Nevertheless, a situation falling below the level of objective seriousness present in those cases is not *per se* excluded from constitutional cognizance. This is a fact-specific inquiry.”).

133. *Id.* at 478-79 (“Nevertheless, a situation falling below the level of objective seriousness present in those cases is not *per se* excluded from constitutional cognizance. This is a fact-specific inquiry. Because we cannot definitively say that, consistent with his complaint, *Ricks* could not plead other facts relevant to objective seriousness under the standard we have articulated, he should be afforded a reasonable opportunity to cure his complaint by amendment. To be sure, Officer Keil’s alleged behavior was, by any standard, inappropriate and unprofessional. It is not clear from the face of *Ricks*’ complaint whether the touching was incidental to a legitimate pat-down search. Yet, the episode as alleged appeared to be isolated, momentary, and avoided by *Ricks*’ ability to step away from the offending touch.”).

134. *See id.* at 479 (emphasizing that *pro se* litigants often lack ability to meet the requirements of modern litigation). This holding allows *Ricks* to attempt to allege more facts

V. “JUST” DESSERTS? A CRITICAL ANALYSIS OF *RICKS V. SHOVER*

The Third Circuit’s decision in *Ricks v. Shover* is a step in the right direction toward fully vindicating the rights of prisoners to be free from cruel and unusual punishment.¹³⁵ However, the court’s decision has its problems.¹³⁶ By requiring that sexualized touching rise to an objectively serious level before a violation of the Constitution occurs, the court tacitly accepted that a prison official may escape liability for sexual abuse if the abuse is not “serious” enough.¹³⁷ The *Ricks* court should not have held that Eighth Amendment claims for guard-on-inmate sexualized touching may be dismissed for lack of objective seriousness.¹³⁸ This is for two critical reasons: (1) because our community’s standards of decency have evolved to the point of requiring a zero-tolerance policy for the unjustified sexualized touching of inmates and (2) because sexual abuse cases are categorically distinguishable from excessive force claims, rendering it

relating to the incident, which may be able to meet the standard for Eighth Amendment claims that the Third Circuit now articulates.

135. *Cf. id.* at 479 (“Absent more specific allegations as to the severity of Keil’s conduct or the surrounding context, including the need for the search, we cannot conclude that he plausibly violated Ricks’ right to be free from ‘cruel and unusual punishments.’ By this, we do not intend to trivialize Ricks’ allegations, nor suggest that he did not suffer harm. Rather, the Constitution may require more detail in his pleadings before a federal court recognizes his claim. We have maintained that imprisoned *pro se* litigants ‘often lack the resources and freedom necessary to comply with the technical rules of modern litigation.’ . . . Now that Ricks is represented ably by *pro bono* counsel, he should be given another chance to amend his complaint to allege facts specifying the incident’s seriousness or severity, as well as its purpose, and any other facts that would provide context. Whether his complaint as amended will be sufficient is a matter yet to be determined. In particular, the controlling legal principles we announce today must be applied to the facts alleged. But Ricks should have the opportunity to present allegations with due consideration to the law which controls his case. We will therefore vacate the District Court’s dismissal of his sexual abuse claim against Keil and remand so that he can re-plead his claim.”).

136. *Cf. id.* at 477 (“Whether conduct is objectively cruel and unusual is better considered with sensitivity to ‘evolving standards of decency.’ . . . Ricks posits that the current standard vis-à-vis sexualized touching in prison contexts is ‘zero tolerance.’ . . . We are aware that societal norms surrounding unwanted sexual attention are changing rapidly, and we are mindful that behavior that may not have warranted damages in the past may so warrant today. We nonetheless are not persuaded that the current standard is zero tolerance for all minor sexualized touching in prison, such that all such claims are objectively serious to a constitutional degree.” (quoting *Graham v. Florida*, 560 U.S. 48, 58 (2010); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976))).

137. *Cf. id.* at 476 (“That is to say, even if sexualized touching lacks a penological purpose, it may still fall below the threshold of constitutional cognizability based on a lack of objective seriousness.”).

138. *Contra id.* at 477 (“Whether conduct is objectively cruel and unusual is better considered with sensitivity to ‘evolving standards of decency.’ . . . Ricks posits that the current standard vis-à-vis sexualized touching in prison contexts is ‘zero tolerance.’ . . . We are aware that societal norms surrounding unwanted sexual attention are changing rapidly, and we are mindful that behavior that may not have warranted damages in the past may so warrant today. We nonetheless are not persuaded that the current standard is zero tolerance for all minor sexualized touching in prison, such that all such claims are objectively serious to a constitutional degree.” (citations omitted)).

inappropriate to apply the excessive force standard to cases of sexual abuse in prison.¹³⁹

A. Evolving Standards of Decency and Legislative Responses to Prison Sexual Abuse

In interpreting the meaning of “cruel and unusual punishments,” the Supreme Court has repeatedly “affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society.’”¹⁴⁰ According to the Court, the touchstone for identifying society’s standards of decency is “a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”¹⁴¹ After considering the judgment of the legislatures, the Court may bring its own reasoning to bear, asking “whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”¹⁴²

The Supreme Court’s jurisprudence on the death penalty provides a case study in changing societal standards of decency.¹⁴³ In 1989, the Supreme Court held that the Cruel and Unusual Punishments Clause did not prohibit the use of

139. For a discussion of evolving standards of decency with respect to Eighth Amendment jurisprudence, see *infra* notes 140–60 and accompanying text. See also Crawford v. Cuomo, 796 F.3d 252, 259–60 (2d Cir. 2015) (finding that “objective indicia of consensus” primarily seen through recent state and federal legislative enactments, make clear that “the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment”). For a discussion of the differences between sexual abuse and excessive force cases in connection to Eighth Amendment rights, and why those differences render it inappropriate to apply the excessive force standard in sexual abuse cases, see *infra* notes 161–81 and accompanying text.

140. Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)) (holding that imposition of death penalty on juveniles violates Eighth Amendment).

141. *Id.* at 564 (explaining starting point for court to determine standards of decency).

142. Atkins v. Virginia, 536 U.S. 304, 313 (2002) (describing approach). The *Atkins* court went on to find that, in addition to the consensus on execution of the mentally disabled, the Court’s own jurisprudence on the death penalty provides additional reasons to prevent such executions. See *id.* at 317–18. For example, the Court noted, “there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders.” *Id.* at 318–19. In regard to retribution—the first purpose for the death penalty—the Court noted that “the severity of the appropriate punishment necessarily depends on the culpability of the offender,” and the “mentally retarded” are less morally culpable than the average criminal offender. *Id.* at 319. On deterrence—the second purpose for the death penalty—the Court stated that “it is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.” *Id.* at 320. In addition, the Court further noted that the reduced mental capacity of such defendants may frustrate procedural protections in death penalty cases, such as the ability to give meaningful assistance to counsel. *Id.* at 320–21.

143. Compare Penry v. Lynaugh, 492 U.S. 302, 338–39 (1989) (holding death penalty constitutional when imposed on inmates with “mental retardation”), with Atkins, 536 U.S. at 321 (holding death penalty unconstitutional when imposed on “mentally retarded” inmates).

the death penalty on mentally disabled defendants.¹⁴⁴ The Court largely based its decision on the fact that, at that time, only one State had enacted a statute prohibiting the execution of mentally disabled persons.¹⁴⁵ Because of the paucity of state legislative enactments, the Court reasoned that “there is insufficient evidence of a national consensus against executing mentally retarded people”¹⁴⁶

However, in 2002, the Supreme Court changed course in *Atkins v. Virginia*.¹⁴⁷ There the Court found that, in the intervening time, no less than sixteen states had passed laws prohibiting the execution of the mentally disabled.¹⁴⁸ The Court additionally noted that the “consistency of the direction of change” strongly suggested that societal standards of decency had evolved on the issue.¹⁴⁹

Applying this rationale in the sexual abuse context is telling.¹⁵⁰ As noted above, every state legislature and the District of Columbia impose criminal sanctions on correctional staff who engage in sex acts with prisoners.¹⁵¹ Of these, thirty-five states and the District of Columbia broadly prohibit “sexual conduct”

144. *See Penry*, 492 U.S. at 340 (holding death penalty constitutional when imposed on inmates with “mental retardation”).

145. *See id.* at 333-34 (noting that only Georgia provided such a statute and that Maryland had recently enacted similar legislation, which had not yet taken effect).

146. *Id.* at 335 (“The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.”); *accord id.* at 334 (“In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”). The Court had previously held that the Eighth Amendment prohibited the execution of the mentally insane, finding evidence of a national consensus where no state specifically authorized execution of the insane and where twenty-six states expressly forbade it. *See Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986) (holding that Eighth Amendment’s Cruel and Unusual Punishments Clause prohibits execution of mentally insane).

147. *See Atkins*, 536 U.S. at 321 (holding execution of “mentally retarded” inmates violative of Eighth Amendment).

148. *See id.* at 314-15 (noting various states came to prevent execution of mentally disabled persons). Specifically, the Court found that between 1990 and 2001, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina had all passed statutes prohibiting the execution of the mentally disabled. *See id.* (describing state statutes). Additionally, the Texas legislature had unanimously passed a similar statute, but the governor of Texas vetoed it. *See id.* at 315.

149. *Id.* at 315-16 (“[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal.”).

150. *Cf. Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (determining objective indicia of consensus as to sexual abuse in prisons by examining relevant laws and policies).

151. For citations to state statutes addressing sexual guard-on-inmate contact, see *supra* note 38.

or “sexual contact” between guards and inmates.¹⁵² Similarly, eleven other states

152. See ALA. CODE § 14-11-31(a) (2018) (“It shall be unlawful for any employee to engage in sexual conduct with a person who is in the custody of the Department of Corrections”); ALASKA STAT. § 11.41.427(a) (2018) (“An offender commits the crime of sexual assault in the fourth degree if (1) while employed in a state correctional facility . . . the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment”); ARK. CODE ANN. § 5-14-127(a)(2) (2009) (prohibiting sexual contact); COLO. REV. STAT. § 18-7-701(1) (2010) (prohibiting sexual conduct); CONN. GEN. STAT. § 53a-73a(a)(1)(F) (2013) (prohibiting sexual contact); D.C. CODE § 22-3014 (2013) (prohibiting sexual contact); GA. CODE ANN. § 16-6-5.1(b)(5) (West 2016) (“A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person: . . . [i]s an employee or agent of a correctional facility . . . who engages in sexual contact with such other individual who the actor knew or should have known is in the custody of such facility.”); HAW. REV. STAT. § 707-732(1)(e)(i) (2018) (prohibiting sexual contact); IDAHO CODE ANN. § 18-6110(1) (West 2018) (prohibiting sexual contact); ILL. COMP. STAT. § 5/11-9.2(a)(1) (West 2018) (“A person commits custodial sexual misconduct when . . . he or she is an employee of a penal system and engages in sexual conduct or sexual penetration with a person who is in the custody of that penal system”); IND. CODE ANN. § 33-44.1-3-10(c)(2) (West 2014) (prohibiting sexual conduct); KY. REV. STAT. ANN. § 510.120(1)(b) (West 2018) (prohibiting to sexual contact); LA. STAT. ANN. § 14:134.1(A)(2) (2010) (prohibiting “intercourse or any other sexual conduct”); ME. STAT. tit. 17-A, § 255-A(1)(I) (2016) (“A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and . . . [t]he other person . . . is detained in . . . prison or other institution and the actor has supervisory or disciplinary authority over the other person.”); MD. CODE ANN. CRIM. LAW § 3-314(b)(2) (West 2018) (prohibiting “sexual contact, vaginal intercourse, or a sexual act with an inmate”); MASS. GEN. LAWS ANN. ch. 268 § 21A (West 2018) (“prohibiting “intentional, inappropriate contact of a sexual nature”); MICH. COMP. LAWS ANN. § 750.520c(1)(i) (West 2013) (prohibiting sexual contact); MINN. STAT. ANN. § 609.345(1)(m) (West 2010) (prohibiting sexual conduct); MO. ANN. STAT. § 566.145(1) (West 2017) (prohibiting sexual conduct); MONT. CODE ANN. § 45-5-502(1), (5)(a)(i) (West 2017) (prohibiting sexual contact without consent, and providing that inmates may not consent to sexual contact “unless the act is part of a lawful search”); NEB. REV. STAT. ANN. § 28-322.01 (West 2018) (prohibiting “sexual penetration or sexual contact”); NEV. REV. STAT. ANN. § 212.187(2) (West 2015) (prohibiting sexual conduct); N.H. REV. STAT. ANN. § 632-A:3(IV)(a)(1) (2018) (prohibiting sexual contact); N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2018) (prohibiting “sexual penetration”); N.J. STAT. ANN. § 2C:14-3(b) (West 2018) (prohibiting sexual contact); N.Y. PENAL LAW § 130.05(3)(e) (McKinney 2018) (providing that an inmate is incapable of consent to sexual acts with employees of inmate’s prison); N.Y. PENAL LAW § 130.60 (McKinney 2010) (criminalizing sexual contact with person incapable of consent); N.D. CENT. CODE ANN. § 12.1-20-07(1)(d) (West 2018) (prohibiting sexual contact); OHIO REV. CODE ANN. § 2907.03(A) (West 2009) (prohibiting sexual contact); OR. REV. STAT. ANN. § 163.454(1)(a)(B) (West 2018) (prohibiting sexual contact); S.C. CODE ANN. § 44-23-1150(B) (2018) (prohibiting sexual contact); S.D. CODIFIED LAWS § 22-22-7.6 (2018) (prohibiting “sexual contact or sexual penetration”); TENN. CODE ANN. § 39-16-408(b) (West 2018) (prohibiting “sexual contact or sexual penetration”); TEX. PENAL CODE ANN. § 39.04(a)(2) (West 2017) (prohibiting “sexual contact, sexual intercourse, or deviate sexual intercourse”); WASH. REV. CODE ANN. § 9A.44.170(1)(a)(i)-(ii) (West 2018) (prohibiting sexual contact); W. VA. CODE ANN. § 61-8B-10(a) (West 2012) (prohibiting “sexual intercourse, sexual intrusion or sexual contact”); WIS. STAT. ANN. § 940.225(2)(h) (West 2018) (prohibiting “sexual contact or sexual intercourse”); WYO. STAT. ANN. § 6-2-304(a)(iii) (West 2018) (prohibiting sexual contact under the circumstances of subsection (vii)); WYO. STAT. ANN. § 6-2-303(a)(vii) (West 2018) (prohibiting “sexual intrusion” where the “actor is an employee, independent contractor or volunteer of a state, county, city or town, or privately operated adult or juvenile correctional

broadly prohibit sexual conduct under various other terms.¹⁵³ The overwhelming majority of states broadly define “sexual conduct” as intentional contact with a person’s clothed or unclothed genitals or “intimate parts” with intent to elicit sexual gratification or to abuse the victim.¹⁵⁴ In contrast, only four states

system . . . and the victim is known or should be known by the actor to be a resident of such facility or under supervision of the correctional system . . .”).

153. See ARIZ. REV. STAT. ANN. § 13-1419(A)(1) (2011) (emphasis added) (“A person commits unlawful sexual conduct by intentionally or knowingly engaging in *any act of a sexual nature* with an offender who is in the custody of the state department of corrections For the purposes of this subsection, ‘person’ means a person who . . . [i]s employed by the state department of corrections”); CAL. PENAL CODE § 289.6(a)(2) (West 2015) (emphasis added) (“An employee or officer of a public entity detention facility . . . who engages in *sexual activity* with a consenting adult who is confined in a detention facility is guilty of a public offense.”); FLA. STAT. ANN. §§ 794.011(4)(b), (e)(7) (West 2017) (prohibiting “sexual battery”); IOWA CODE ANN. § 709.16(1) (West 2015) (prohibiting “a sex act”); KAN. STAT. ANN. § 21-5512(a)(1) (West 2018) (prohibiting “sexual intercourse, lewd fondling or touching, or sodomy”); MISS. CODE ANN. § 97-3-104(1) (West 2018) (prohibiting “any sexual penetration . . . or other sexual act”); N.C. GEN. STAT. ANN. § 14-27.31(b) (West 2015) (prohibiting “vaginal intercourse or a sexual act”); 18 PA. CONS. STAT. AND STAT. ANN. § 3124.2(a) (West 2012) (emphasis added) (“[A] person who is an employee or agent of the Department of Corrections or a county correctional authority . . . commits a felony of the third degree when that person engages in sexual intercourse, deviate sexual intercourse or *indecent contact* with an inmate”); UTAH CODE ANN. § 76-5-412(4)(a) (West 2018) (emphasis added) (“An actor commits custodial sexual misconduct if the actor commits any of the acts under Subsection (5) . . . and the actor knows that the individual is a person in custody.”); UTAH CODE ANN. § 76-5-412(5)(a)-(c) (West 2018) (“Acts referred to in subsection 4(a) are the following acts when committed with the intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual regardless of the sex of any participant: (a) touching the anus, buttocks, pubic area, or any part of the genitals of a person in custody; (b) touching the breast of a female person in custody; or (c) *otherwise taking indecent liberties* with a person in custody.”); VT. STAT. ANN. tit. 13, § 3257(a)(1) (West 2018) (prohibiting “a sexual act”); VA. CODE ANN. § 18.2-67.4(A)(iii) (West 2014) (providing criminal sanctions for correctional staff who “sexually abuse[]” an inmate).

154. This includes at least thirty-six states and the District of Columbia. See ALA. CODE § 14-1-30(3)(b)(1)-(3) (2018) (“Sexual contact [means] [a]ny known touching for the purpose of sexual arousal, gratification, or abuse of the following: (1) The sexual or other intimate parts of the victim by the actor. (2) The sexual or other intimate parts of the actor by the victim. (3) The clothing covering the immediate area of the sexual or other intimate parts of the victim or actor.”); ALASKA STAT. ANN. § 11.81.900(b)(60)(A)(i)-(ii) (West 2018) (defining “sexual contact”); ARIZ. REV. STAT. ANN. § 13-1419(D)(1)(a) (defining “act of a sexual nature”); ARK. CODE ANN. § 5-14-101(11) (2017) (defining “sexual contact”); CAL. PENAL CODE § 289.6(d)(5) (West 2015) (“As used in this section, ‘sexual activity’ means . . . [t]he rubbing or touching of the breasts or sexual organs of another, or of oneself in the presence of and with knowledge of another, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of oneself or another.”); COLO. REV. STAT. ANN. § 18-3-401(2) (West 2013) (“‘Intimate parts’ means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.”); COLO. REV. STAT. ANN. § 18-3-401(4) (West 2013) (“‘Sexual contact’ means the knowing touching of the victim’s intimate parts . . . for the purposes of sexual arousal, gratification, or abuse.”); CONN. GEN. STAT. ANN. § 53a-65(3) (West 2018) (defining “sexual contact” as contact with victim’s “intimate parts”); CONN. GEN. STAT. ANN. § 53a-65(8) (West 2018) (“‘Intimate parts’ means the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts.”); D.C. CODE ANN. §§ 22-3011(9), 3014 (West 2009) (defining “sexual contact”); GA. CODE ANN. § 16-6-5.1(a)(2) (West 2016) (defining “intimate parts”); GA. CODE ANN. § 16-6-

expressly limit the statutorily prohibited conduct to “penetration.”¹⁵⁵

Thus, the overwhelming trend among state legislatures is not only to prohibit the rape of prisoners by prison officials but also to establish a zero-tolerance

5.1(a)(4) (West 2016) (defining “sexual contact” as contact “involving the intimate parts of either person for the purpose of sexual gratification of the actor”); HAW. REV. STAT. ANN. § 707-700 (West 2018) (defining “sexual contact”); 720 ILL. COMP. STAT. ANN. § 5/11-0.1 (West 2011) (defining “sexual conduct”); 720 ILL. COMP. STAT. ANN. § 5/11-9.2(g)(4) (West 2018) (defining “sexual conduct”); KY. REV. STAT. ANN. § 510.010(7) (West 2018) (defining “sexual contact”); ME. REV. STAT. ANN. tit. 17-a, § 251(1)(D) (2018) (defining “sexual contact”); MD. CODE ANN. CRIM. LAW § 3-301(e)(1) (West 2016) (defining “sexual contact”); MICH. COMP. LAWS ANN. § 750.520a(f) (West 2014) (defining “intimate parts”); MICH. COMP. LAWS ANN. § 750.520a(q)(iii) (West 2014) (defining “sexual contact”); MINN. STAT. ANN. § 609.341(11)(a)(i), (iii) (West 2013) (defining “sexual contact”); MO. ANN. STAT. § 566.010(6) (West 2017) (defining “sexual contact”); MONT. CODE ANN. §§ 45-2-101(67)(a)-(b) (West 2018) (defining “sexual contact”); NEB. REV. STAT. ANN. § 28-318(5) (West 2018) (defining “sexual contact”); NEV. REV. STAT. ANN. § 212.187(3)(a) (West 2015) (defining “sexual conduct”); N.H. REV. STAT. ANN. § 632-A:3(IV)(c) (2018) (defining “sexual contact”); N.J. STAT. ANN. § 2C:14-1(d) (West 2012) (defining “sexual contact”); N.J. STAT. ANN. § 2C:14-1(e) (West 2012) (defining “intimate parts”); N.Y. PENAL LAW § 130.00(3) (McKinney 2010) (“‘Sexual contact’ means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.”); N.D. CENT. CODE § 12.1-20-02(5) (West 2018) (defining “sexual contact”); OR. REV. STAT. ANN. § 163.305(6) (West 2018) (defining “sexual contact”); 18 PA. STAT. AND CONS. STAT. ANN. § 3101 (West 2014) (“‘Indecent contact’ [means] [a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.”); S.C. CODE ANN. § 16-3-651(d) (2018) (defining “intimate parts”); S.C. CODE ANN. § 44-23-1150(C)(2) (2018) (defining “sexual contact”); S.D. CODIFIED LAWS § 22-22-7.1 (2018) (defining “sexual contact”); TENN. CODE ANN. § 39-13-501(2) (West 2013) (defining “intimate parts”); TENN. CODE ANN. § 39-13-501(6) (West 2013) (defining “sexual contact”); TEX. PENAL CODE ANN. § 21.01(2) (West 2005) (defining “sexual contact”); UTAH CODE ANN. § 76-5-412(5)(a)-(c) (West 2018) (defining prohibited sexual contact); VA. CODE ANN. § 18.2-67.10(2) (West 2018) (defining “intimate parts”); VA. CODE ANN. § 18.2-67.10(6)(a) (West 2018) (defining “sexual abuse”); WASH. REV. CODE ANN. § 9A.44.010(2) (West 2007) (defining “sexual contact”); W. VA. CODE ANN. § 61-8B-1(6) (West 2007) (defining “sexual contact”); WIS. STAT. ANN. § 940.225(5)(b)(1)(a) (West 2018) (defining “sexual contact”); WYO. STAT. ANN. § 6-2-301(a)(ii) (West 2018) (defining “intimate parts”); WYO. STAT. ANN. § 6-2-301(a)(vi) (West 2018) (defining “sexual contact”); *see also* State v. Hart, 687 So. 2d 94, 96 (La. 1997) (“Because of the nature of the relationship between prisoners and those who exercise direct authority over them while they are incarcerated, we think the legislature intended to make the statute as broad as possible to prohibit any and all conduct which might be interpreted as sexual.”).

155. *See* DEL. CODE ANN. tit. 11, § 780A(a) (2018) (prohibiting “sexual intercourse or sexual penetration with a person who is in custody . . .”); N.M. STAT. ANN. § 30-9-11(E)(2) (West 2009) (prohibiting “criminal sexual penetration”); OKLA. STAT. ANN. tit. 21, § 1111(A)(7) (West 2018) (prohibiting “sexual intercourse involving vaginal or anal penetration”); 11 R.I. GEN. LAWS ANN. § 11-25-24 (West 2018) (prohibiting “sexual penetration”); 11 R.I. GEN. LAWS ANN. § 11-37-1 (West 2018) (defining “sexual penetration” as “sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person’s body or by any object into the genital or anal openings of another person’s body, or the victim’s own body upon the accused’s instruction, but emission of semen is not required”).

policy for sexual contact in general.¹⁵⁶ Notably, the state legislatures have responded swiftly and consistently to the rise in sexual abuse in prisons.¹⁵⁷ As recently as 1997, only eighteen states and the District of Columbia had statutory provisions criminalizing guard-on-inmate sexual contact.¹⁵⁸ Since 1997, however, the remaining thirty-two states have all prohibited such conduct.¹⁵⁹ A consensus of sixteen state statutes enacted over the course of thirteen years was strong enough to show that evolving standards of decency prohibit the execution of the mentally disabled.¹⁶⁰ By that same reasoning, a similar consensus of thirty-two state statutes passed over twenty-two years should be considered sufficient to demonstrate that evolving standards of decency in our society establish a zero-tolerance policy toward sexual abuse of inmates.

B. Sexual Punishments: The Dissimilarity Between Sexual Abuse and Excessive Force

Under the Supreme Court's Eighth Amendment analysis, reviewing contemporary standards of decency is only the starting point in determining whether there was a constitutional deprivation, and a court may go on to "determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."¹⁶¹ In doing so, the court's "own judgment is 'brought to bear,'" and the court must ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."¹⁶² Although the *Ricks* court did not expressly state that sexual abuse is a legitimate punishment, its holding troublingly implies that otherwise unjustified sexual abuse of inmates may be a legitimate incident to a prisoner's

156. See *Crawford v. Cuomo*, 796 F.3d 252, 259-60 (2d Cir. 2015) (recognizing trend among state legislatures to prohibit sexual conduct between guards and prisoners).

157. See *id.* at 260 (recognizing that consistent direction of these state statutes "reflect[s] the deep moral indignation that has replaced what had been society's passive acceptance of the problem of sexual abuse in prison").

158. See *id.* at 259 ("At the time *Boddie* was written, 18 states and the District of Columbia expressly criminalized corrections officers' sexual contact with inmates."). These states were Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Michigan, New Jersey, New Mexico, New York, North Dakota, Rhode Island, South Dakota, Texas, and Wisconsin. See *id.* at 259 n.5 (providing citations to relevant state statutes).

159. See *id.* at 259 ("Today, all but two states criminalize sexual contact between inmates and corrections officers."); *id.* at 259 n.6 (noting that thirty states have criminalized guard-on-inmate sexual contact after 1997 since *Boddie* and providing citations to relevant state statutes).

160. Cf. *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002) (describing state statutes prohibiting execution of mentally disabled and offering helpful comparison as to how state-wide consensus demonstrates evolving standards of decency mandate zero-tolerance policy).

161. *Graham v. Florida*, 560 U.S. 48, 61 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)) (describing Supreme Court's analysis in Eighth Amendment cases).

162. *Atkins*, 536 U.S. at 313 (2002) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1997) (plurality opinion)).

sentence under the Constitution.¹⁶³ Because sexual abuse is readily distinguishable from physical force and because the recognized purposes of criminal punishment cannot support sexual abuse, sexual abuse cases should be analyzed independently of excessive force cases under the Eighth Amendment.¹⁶⁴ Specifically, courts should not require an objective element for sexual abuse claims.

1. Sexual Abuse as Distinguishable from Excessive Force

In *Hudson*, the Supreme Court stated that “not . . . every malevolent touch by a prison guard gives rise to a federal cause of action.”¹⁶⁵ Circuit courts of appeal, including the Third Circuit in *Ricks*, have utilized this statement to conclude that only “objectively, sufficiently serious” conduct may violate the Eighth Amendment.¹⁶⁶ Importantly, however, the Supreme Court made this statement in the context of excessive force, recognizing in *Hudson* that some force is to be expected and accepted in prisons because of the need to maintain and restore discipline.¹⁶⁷

Sexual abuse is another story. In discussing the potential liability of prison officials for inmate-on-inmate sexual abuse, the Supreme Court asserted that being sexually assaulted “is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”¹⁶⁸ Unlike the use of force, then, the Supreme Court does not consider sexual assault to be an acceptable part of a prisoner’s sentence.¹⁶⁹ Accordingly, a standard meant to weed out less serious uses of force that are needed to maintain and restore discipline—when the Supreme Court has accepted force itself as necessary in prisons—should not be applied in cases of sexual abuse because the Supreme Court has never considered

163. See *Ricks v. Shover*, 891 F.3d 468, 477 (2018) (noting conduct must be “objectively cruel and unusual” according to “evolving standards of decency” in order to amount to constitutional violation).

164. See Sigler, *supra* note 13 (describing different philosophical justifications for sentencing and punishment and arguing that no justification supports prison rape as valid form of punishment).

165. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (discussing Eighth Amendment in context of excessive force).

166. *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)) (requiring punishment to be “objectively, sufficiently serious”); accord *Ricks*, 891 F.3d at 475 (requiring that “the incident be objectively, sufficiently intolerable and cruel”). United States district courts have similarly cited *Farmer* in the sexual abuse context. See, e.g., *Fenlon v. Peters*, No. 6:16-cv-397-SI, 2016 WL 4487855, at *1 (D. Or. 2016) (requiring conduct to be “objectively unreasonable”); *De’lonta v. Clarke*, No. 7:11-cv-00483, 2013 WL 209489, at *4 (W.D. Va. 2013) (quoting *Farmer*, 511 U.S. at 834) (requiring punishment to be “objectively, sufficiently serious”).

167. See *Hudson*, 503 U.S. at 6 (holding that, in excessive force context, officer’s mental state in applying excessive force is essential to analysis).

168. *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

169. See *id.* (noting that being sexually assaulted in prison is not part of sentence imposed on prisoners).

sexual abuse to be a legitimate part of a prisoner's punishment.¹⁷⁰ In contrast to the use of force, it is not "excessive" sexual abuse that runs afoul of the Constitution, but sexual abuse generally, and therefore an objective requirement should not be required in cases of guard-on-inmate sexual abuse.¹⁷¹

2. *The Absence of Justification for Prison Sexual Abuse*

The Supreme Court has held that the purposes of punishment are relevant to the interpretation of the Eighth Amendment, such that a punishment "lacking any legitimate penological justification is by its nature disproportionate to the offense."¹⁷² The Sentencing Reform Act identifies the purposes of punishment that a court should consider in imposing a sentence.¹⁷³ Congress includes several justifications for punishment in the act, such as deterrence of future criminal conduct; incapacitation of the offender to protect the public from future crimes; rehabilitation of the offender; and retribution, which includes the purpose "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."¹⁷⁴

One commentator notes that none of the traditional justifications for punishment support prison rape as a valid form of punishment.¹⁷⁵ Under utilitarian purposes of punishment—including deterrence, incapacitation, and rehabilitation—the negative societal consequences of imposing prison sexual abuse as a punishment outweigh the positive.¹⁷⁶ This is due not only to the "unhappy consequences associated with the offender's experience of the sanction" but also to the fact that "punitive rape could be expected to brutalize and corrupt our own humanity . . . and also to foster sadism and cruelty among those who administer criminal punishment and society more generally."¹⁷⁷ Additionally, the notion that offenders should receive a punishment they morally deserve cannot be the basis for prison rape as a punishment for a rapist because "such treatment is inconsistent with the principle of respect for humanity that the

170. *Cf. id.* ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'").

171. *But see id.* (noting that prison officials violate Eighth Amendment only when both objective and subjective requirements are met).

172. *Graham v. Florida*, 560 U.S. 48, 71 (2010) (holding no traditional purpose for punishment justifies sentence of life without parole for juvenile offenders).

173. *See* Sentencing Reform Act, 18 U.S.C. § 3553(a)(1)-(7) (2010) (describing factors to be considered by sentencing court in imposing sentence, including nature of offense, history of defendant, and purposes of punishment).

174. *Id.* § 3553(a)(2)(A); *accord id.* § 3553(a)(1), (3)-(7) (describing penological purposes of retributivism, deterrence, incapacitation, and rehabilitation).

175. *See Sigler, supra* note 13, at 562-65 (describing different philosophical justifications for sentencing and punishment and arguing that no justification supports prison rape as valid form of punishment).

176. *See id.* at 564 (arguing prison rape does not satisfy utilitarian purposes of punishment).

177. *Id.* (arguing that "rape as a form of punishment is likely to be disutilitarian").

retributive account of punishment presupposes.”¹⁷⁸

Like the use of excessive force, there may be legitimate reasons for a prison guard to touch an inmate’s intimate parts, such as searching for contraband.¹⁷⁹ But, such reasons implicate the subjective—not objective—element of an Eighth Amendment claim because they evoke the question of whether there was a penological justification for the touching or whether the guard acted with intent to elicit sexual gratification or to abuse the inmate.¹⁸⁰ These considerations require that the subjective prong of an Eighth Amendment claim be the locus for assessing the constitutional permissibility of guard-on-inmate sexual contact.¹⁸¹

VI. REHABILITATING PRISON: THE FUTURE OF SEXUAL ABUSE CLAIMS AFTER *RICKS V. SHOVER*

Although the Third Circuit’s recognition that a correctional officer’s sexual abuse of an inmate may violate the Eighth Amendment is a welcome step, it does not go far enough to adequately vindicate the constitutional rights of prisoners.¹⁸² The decision is particularly problematic in that it tacitly allows prison officials to engage in minor sexual contact with prisoners—even with wrongful intent—without running afoul of the Constitution.¹⁸³ Effectively, *Ricks v. Shover* provides a loophole to allow prison officials to sexually abuse prisoners in a way that does not amount to “objective seriousness” and fails to provide prisoners a remedy for the deprivation of their Eighth Amendment rights.¹⁸⁴

In order to secure a more meaningful remedy for prisoners, courts should

178. *Id.* (relying heavily on retributivist philosopher Immanuel Kant for argument that rapists do not morally deserve rape as punishment).

179. *See Crawford v. Cuomo*, 796 F.3d 252, 257–58 (2d Cir. 2015) (“In determining whether an Eighth Amendment violation has occurred, the principal inquiry is whether the contact is incidental to legitimate official duties, such as a justifiable pat frisk or strip search, or by contrast whether it is undertaken to arouse or gratify the officer or humiliate the inmate.”). Indeed, many states specifically provide that sexual contact that occurs during the course of a legitimate search or during other acts with a penological justification do not fall within the statutory prohibition of sexualized guard-on-inmate touching. *See, e.g.*, COLO. REV. STAT. ANN. § 18-7-701(2)(b) (West 2010) (“‘Sexual conduct’ does not include acts of an employee of a correctional institution . . . that are performed to carry out the necessary duties of the employee or the person with custody.”); *accord Crawford*, 796 F.3d at 258 (noting prison security and safety may necessitate highly personal searches).

180. *See Ricks v. Shover*, 891 F.3d 468, 474 (3d Cir. 2018) (describing issue in subjective prong as question of whether “no legitimate law enforcement or penological purpose can be inferred from the defendant’s alleged conduct”).

181. *Cf. Crawford*, 796 F.3d at 257 (“A corrections officer’s intentional contact with an inmate’s genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer’s sexual desire or humiliate the inmate, violates the Eighth Amendment.”).

182. For a complete argument of this position and a description of an alternate test, see *supra* notes 135–81 and accompanying text.

183. *See Ricks*, 891 F.3d at 476 (“[E]ven if sexualized touching lacks a penological purpose, it may still fall below the threshold of constitutional cognizability based on a lack of objective seriousness.”).

184. *See id.* (requiring objective prong for Eighth Amendment sexual abuse claim).

recognize that the applicability of any test for prison sexual abuse “‘must change as the basic mores of society change.’”¹⁸⁵ Contemporary standards of decency now mandate a zero-tolerance policy for guard-on-inmate sexual abuse.¹⁸⁶ Therefore, all instances of sexualized touching of an inmate committed without penological justification and with the intent to elicit sexual gratification or to abuse or humiliate the inmate should give rise to a claim under the Eighth Amendment.¹⁸⁷

185. *Crawford*, 796 F.3d at 260 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)) (noting importance of assessing contemporary standards of decency when conducting Eighth Amendment analysis).

186. For an argument that contemporary standards now require a zero-tolerance policy to sexual abuse in prisons, see *supra* notes 135–81 and accompanying text.

187. See *Crawford*, 796 F.3d at 257 (“[I]ntentional contact with an inmate’s genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer’s sexual desire or humiliate the inmate, violates the Eighth Amendment.”).