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**Brenda V. Smith**

Watching You, Watching Me

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# Watching You, Watching Me

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*Shortly after the death of my grandfather, I was fondled for the first time by a friend of the family. I had known Mr. Willie all of my life. He made it clear that I better not tell anyone what he had done. If I did, he would tell my parents that I was lying, and because of my lies, he would no longer take my father to and from work. If my father lost his job, it would all be my fault. I believed him and I never said a word. I remember feeling completely helpless in the situation.*

*When I was 15 years old, I was on my way to my sister's house to babysit. As I was turning the corner, a car pulled up with two men inside. One got out and asked for directions. As I was giving him directions, he suddenly grabbed my arm and pulled me into the car, forcing my face onto the floorboard. The two drove to a construction site. They told me to get in the backseat and take off my clothes. They wanted sex. As I crawled to the backseat of the car, I noticed one door was unlocked. I quickly turned the doorknob and escaped. I never told my parents. I was so scared and frightened I would not be believed.*

*At 18 I was violently raped and badly beaten by Harold Yarbrough. He threatened to kill me if I told anyone or pressed charges against him. Because we had mutual friends, I was always coming into contact with him. He continued his threats. Harold terrified me—terrorized me for more than a year after the rape. His control over me ended with his death in a car accident. I was relieved. But, once again, I never told anyone of the rape.*

*The impact of my brutal rape and threats of retaliation shaped the way I interact with men.*

*The showers at Western Wayne [correctional facility] are too small to dress in without getting my clothes wet, so after my shower I dress near the*

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<sup>†</sup> Associate Professor, Washington College of Law. I would like to thank the many Dean's Fellows who worked on this project over the years: Stephanie Joseph, Sheila Bedi, Erika Rivera, Maggie Byrne, Lisa Cox, Ivy Lange, Christine Rose, Pamala Micheaux, Rebecca Goldfrank, Ramona Cotca, Loren Ponds, Shannon Hall, Sundeep Patel, Marisa Ritchey, and David Rak. I am also grateful for the assistance of my colleagues, Binny Miller, Angela Davis, Susan Carle, Elizabeth Bruch, and David Chavkin, who at various times listened to my ideas about this project, read drafts of the paper and encouraged me to complete it. I also thank Washington College of Law as an institution for providing important support for this project through the junior faculty scholarship meetings, clinical faculty scholarship lunch series, and the Mid-Atlantic Clinical Legal Theory workshop. This paper has been presented in some version in each of those venues and benefited greatly from those critiques.

*sinks, in the bathroom near the sinks. There is no door from the hallway to the bathroom so anyone walking down the hallway can see me in a state of undress. When I dress in my room, I have a fear of men peeping over the door cover. As I age in prison, one of the only things I have left is my body. Having men look at me naked is such degradation.*

*Women prisoners are referred to as bitches and whores by officers. Male staff at Western Wayne commonly refer to female prisoners as bitches and "hos" and/or respond to women by saying fuck you.*

*Most complaints of sexual misconduct, inappropriate behavior, and retaliation are not false. However, it is normal for only those involved in the activity or cover-up to know the circumstances surrounding the crime. In cases where there are no witnesses and it is a "he said, she said" situation, the credibility of staff is always given more weight than that of the prisoner. If the allegation is deemed false, the prisoner can expect to be further victimized and punished by receiving an interference with administration major misconduct ticket, which results in losing good time, disciplinary credits, and the possibility of delaying parole.*

*Given the chilling consequences of reporting, many women are reluctant or unwilling to report sexual misconduct, sexual harassment and/or privacy violations.*

*Incarceration is a devastating experience, but if it is coupled with sexual abuse and assault by correctional staff, it far exceeds the punishment imposed by judges, lawmakers, and society.*

*Yes, I am a convicted felon, but my sentence does not require me to be exposed to or at risk of sexual assault anywhere, especially by the individuals hired to protect me.<sup>1</sup>*

## INTRODUCTION

From 1988 to 1998, I directed a legal and educational program for women prisoners incarcerated at the Minimum Security Annex by the District of Columbia Department of Corrections. In that role, I taught a curriculum that included issues the women identified as priorities: housing, drug treatment, child custody, employment, and health.<sup>2</sup> I also did legal intake and helped women inmates resolve problems they were having obtaining services from their lawyers, the courts, social service agencies, and the prison. In 1992, the composition of the cases I was receiving in the legal program changed. Increasingly, I was providing legal assistance to address the problems women

1. Deposition of Gladys Wilson at 206, lines 1-25; 207, lines 1-8; 208, lines 14-22; 209, lines 9-12, 18-15; 210, lines 1-25; 211, lines 1-4, 8-11, *Everson v. Mich. Dep't of Corr.*, No. 00-73133 (E.D. Mich. Feb. 23, 2001).

2. See BRENDA V. SMITH, *A VISION BEYOND SURVIVAL: A RESOURCE GUIDE FOR INCARCERATED WOMEN* (National Women's Law Center 1995).

faced because they had conceived while incarcerated.<sup>3</sup> The many challenges these women faced when they conceived in prison,<sup>4</sup> and my often unsuccessful attempts to assist them in hiding, terminating, or managing their pregnancies, forced me to examine how they had become pregnant in a system that specifically prohibits any sexual activity by prisoners.<sup>5</sup> While there are serious consequences for sex with male inmates, including possible loss of good time credits or denial of parole for becoming pregnant while incarcerated,<sup>6</sup> female inmates were much more concerned with identifying prison staff as the fathers of their children because they feared retaliation and violence from other inmates and staff. Not surprisingly, the action or inaction of the institution and its staff bore the primary responsibility for inmate pregnancy.<sup>7</sup> Female inmates

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3. The District of Columbia Department of Corrections, like most jurisdictions, did not keep reliable statistics on the number of women inmates who conceived while incarcerated. Also, women often did not report their pregnancies for fear they would be punished by the prison or by the paroling agency. See U.S. GOVERNMENT ACCOUNTING OFFICE, *WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF*, A Report to the Honorable Eleanor Holmes Norton, House of Representatives, GAO/GGD-99-104, 7-8 (1999) [hereinafter GAO REPORT ON SEXUAL MISCONDUCT].

4. Women prisoners who give birth experience problems arranging for custody of their children. In the absence of an already identified custodian, most women leave their infants at public hospitals and return to prison 24-48 hours after delivery. These infants may become "boarder babies" and eventually wards of the state. Women who decide to terminate their pregnancies experience problems obtaining abortions. In the District of Columbia and most other states, officials may not use federal funds to pay for abortions for low-income women except in cases of rape or incest. The District of Columbia's situation is even more restrictive because the District may use neither federal funds nor its own revenues to fund abortions for low-income women. Consequently, in order to obtain abortions, District of Columbia women prisoners must find private funding or use their own, often meager, resources to pay for an abortion. They must also arrange with the Department of Corrections to be transported, in shackles, to private facilities like Planned Parenthood to obtain abortions. Finally, women who carry their pregnancies to term experience many problems obtaining appropriate prenatal care and nutrition. They often experience high-risk pregnancies complicated by their poor health status, which includes risk of violence, drug addiction, HIV infection and the presence of other sexually transmitted diseases, and mental illness. See generally Ellen M. Barry, CRIM. J. *Bad Medicine: Health Care Inadequacies in Women's Prisons* 39, 39-43 (2001) [hereinafter Barry, *Bad Medicine*]; Ellen M. Barry et al., *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 147, 155 (Katherine Gabel & Denise Johnston eds., 1995).

5. See generally HUMAN RIGHTS WATCH WOMEN'S RIGHT PROJECT, *ALL TOO FAMILAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 2* (1996) [hereinafter ALL TOO FAMILAR] ("One of the clear contributing factors to sexual misconduct in U.S. prisons for women is that the United States, despite authoritative rules to the contrary, allows male correctional employees to hold contact positions over prisoners, that is, positions in which they serve in constant physical proximity to the prisoners of the opposite sex"); Christine E. Rasche, *Cross-Sex Supervision of Incarcerated Women and the Dynamics of Staff Sexual Misconduct*, in GENDERED JUSTICE: ADDRESSING THE FEMALE OFFENDER (Barbara Bloom ed., 2003) ("The problems associated with cross-sex supervision of female inmates are numerous and reflect not only the management challenges posed by incarcerated female offenders in particular, but also the traditional difficulties of gender relations in our society in general").

6. See Mary Zahn, *Inmate Punished for Sex with Guard; Case Exposes Gap in Law; Man Fired Not Prosecuted*, MILWAUKEE J. SENTINEL, Jan. 22, 2003, at A1 (reporting that a mentally ill inmate who was impregnated by prison guard received one year of solitary confinement while the prison guard was only fired).

7. This article does not deny women's agency. Nor does it address the complicated personal and strategic reasons why women may have sex in prison, like the need for intimacy, the desire to express their sexuality, the desire to bear a child. See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (cautioning that exclusively conceptualizing women's sexuality as a site of danger obscures the complex and affirmative reasons women may want to have sex); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988

conceived because inadequate staffing or lack of supervision enabled them to find opportunities to have sexual relations with staff or other inmates;<sup>8</sup> because staff actively arranged for women to have sex with male inmates and other staff;<sup>9</sup> or because staff compelled sex from women inmates by use of force, threats or inducements.<sup>10</sup>

After my attempts to resolve these systemic issues informally through demands failed, I<sup>11</sup> filed suit on behalf of a class of women prisoners<sup>12</sup> alleging violations of their civil rights under 42 U.S.C. § 1983.<sup>13</sup> The litigation, *Women Prisoners v. District of Columbia*,<sup>14</sup> established that a pattern of sexual abuse and harassment of women inmates violates the Eighth Amendment of the U.S. Constitution. The litigation raised the issue of sexual misconduct in prisons as a national concern<sup>15</sup> and a subject for scholarly critique.<sup>16</sup> It was also the first class action by women inmates challenging sexual abuse by correctional staff.<sup>17</sup>

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Wis. L. REV. 187, 225 (1988) ("People have a strong affirmative interest in sexual expression and relationships"). See, e.g., Susan Rosenberg, *Lee's Time*, in *DONG TIME: 25 YEARS OF PRISON WRITING* 206-07 (1999) (giving a fictional short account of one woman inmate's motivation for having sex with a male guard). However, sexual contact between inmates and prison staff must be judged in light of the special responsibility correctional institutions bear toward inmates. The Supreme Court has recognized custodial settings as the foremost example of situations where a special relationship exists. See *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 197-200 (1989) (noting that when the state takes a person into custody and holds him or her there, the Constitution imposes upon the state a "corresponding duty to assume some responsibility for his safety and well-being." This special relationship in the prison setting rests on the total lack of control inmates have over the most basic aspects of their lives and the complete control correctional institutions and staff have over inmates); *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1371 (3d Cir. 1992) (recognizing the dependence of institutionalized persons). Courts have found that the corresponding Constitutional obligation, coupled with statutes prohibiting sexual contact with prison staff, negates an inmate's ability to voluntarily consent to sexual contact with prison staff members. See *Carrigan v. Davis*, 70 F. Supp. 2d 448, 459-461 (D. Del. 1999) (discussing inmates' inherent lack of meaningful capacity to consent to sexual contact with correctional institution staff).

8. See Appendix A for Trial Transcript at 1-76 to 1-78, *Women Prisoners v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994) (No. 93-2052(JLG)).

9. See, e.g., *Lucas v. White*, 63 F. Supp. 2d 1046, 1050 (N.D. Cal. 1999) (alleging male officer repeatedly gave male inmates access to female inmates for sex); *Downey v. Denton County* 119 F.3d 381 (5th Cir. 1997) (complaining that female officer arranged for male officer to have sex with female inmate); *Ware v. Jackson*, 150 F.3d 873 (8th Cir.1998) (complaining that male officer arranged for himself and three other male inmates to have sex with female inmates).

10. *Women Prisoners*, 877 F. Supp. at 634.

11. The author was Senior Counsel for Economic Security and Director of the Women in Prison Project at the National Women's Law Center at the time she filed suit against the D.C. Department of Corrections with Peter Nickles, counsel from the law firm of Covington & Burling.

12. See Complaint for Declaratory and Injunctive Relief and Order Certifying Class, *Women Prisoners v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994) (3-2052(JLG)).

13. See Complaint for Declaratory and Injunctive Relief, at ¶¶ 1-46, 69-76, *Women v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994) (No. 93-2052(JLG)).

14. See generally *Women Prisoners v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994) [hereinafter *Women Prisoners I*]; *stay denied and motion to modify granted in part*, *Women Prisoners v. District of Columbia*, 899 F. Supp. 659 (D.D.C. 1995) [hereinafter *Women Prisoners II*]; *Women Prisoners v. District of Columbia, vacated in part, remanded*, 93 F.3d 910 (D.C. Cir. 1996) [hereinafter *Women Prisoners III*]; *Women Prisoners v. District of Columbia*, 520 U.S. 1196 (1997) *cert. denied* [hereinafter *Women Prisoners IV*].

15. See generally GAO REPORT ON SEXUAL MISCONDUCT, *supra* note 3; WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS, A Report to the Honorable Eleanor Holmes Norton, United States House of Representatives, GAO/GGD-00-22 (Dec. 1999).

A natural outgrowth of the *Women Prisoners* litigation has been the search for policy and practice recommendations to prevent sexual misconduct. One of the most often called for remedies for sexual misconduct has been to end the cross-gender supervision of female inmates.<sup>18</sup> Cross-gender supervision is the supervision of inmates by staff of the opposite gender<sup>19</sup> and encompasses a range of practices including escorting prisoners, searching prisoners, and observing prisoners while they work, sleep, eat or perform intensely private functions, such as bathing and toileting.<sup>20</sup> The theory contends that if female staff supervised women inmates, then a primary vector for sexual misconduct would be eradicated. This rationale, of course, is subject to four significant criticisms. First, eliminating cross-gender supervision still ignores the sexual misconduct female inmates experience at the hands of female staff.<sup>21</sup> Second,

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16. See generally Martin R. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law— A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 73 (2000) (noting increased international and domestic scrutiny of the human rights crisis in U.S. prisons and the need for U.S. courts to incorporate international human rights laws through domestic civil rights laws); Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1 (1998-1999) (arguing that greater employment rights for women were achieved at the expense of the privacy rights of male prisoners by adopting gender stereotypes for both genders within the correctional system); Delisa Springfield, *Sisters in Misery: Utilizing International Law to Protect United States Female Prisoners from Sexual Abuse*, 10 IND. INT'L & COMP. L. REV. 457 (2000) (discussing the need for the U.S. to fully ratify the International Covenant on Civil and Political Rights and recognize that the abuse, rape and torture of female prisoners are serious human rights violations); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195 (1999) (criticizing the inflexibility of the courts' adherence to deliberate indifference and qualified immunity standards for prison officials as found in *Farmer v. Brennan*, 511 U.S. 825 (1994)).

17. But see *Barney v. Pulsipher*, 143 F.3d 1299, 1312 & n.14 (10th Cir. 1998) (distinguishing *Women Prisoners I* on grounds of pervasiveness: "*Women Prisoners* involved repeated reports and incidents of prison guards sexually assaulting and harassing women inmates. Despite prison officials' knowledge of this longstanding abuse, the officials ignored the reports and took no reasonable measures to alleviate these conditions").

18. See generally ALL TOO FAMILIAR, *supra* note 5; Radhika Coomaraswamy *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, E.S.C. Res. 1997/44, U.N. ESCOR, 55th Sess., at ¶¶ # 55-56, U.N. Doc. E/CN.4/1999/68/Add.2 (1999) [hereinafter *Report of the Special Rapporteur*]; HUMAN RIGHTS WATCH, ABUSES IN THE STATE OF GEORGIA 197 (1996); AMNESTY INTERNATIONAL, BREAKING THE CHAIN: THE HUMAN RIGHTS OF WOMEN PRISONERS 5 (2000).

19. This, of course, assumes that gender is the appropriate comparison. See Teresa A. Miller, *Sex and Surveillance: Gender, Privacy and the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L. J. 291, 299 (2000) [hereinafter Miller, *Sex and Surveillance*] ("Prisons are sites of sexual and gender complexity that require a far more nuanced understanding of the relationship between gender, nudity, sex and violence than that implicit in the doctrinal analysis of cross-gender search cases").

20. These searches range from "pat searches," where staff run their hands over clothed inmates, to "strip searches," where inmates are asked to remove clothing, to "cavity searches," where staff or medical personnel use their hands to search the orifices (mouth, anus, vagina, ears, nose) of an inmate.

21. Compare Miller, *Sex and Surveillance supra* note 19, at n.33 ("Prisoner family groupings appear to be the source of power through which women who distrust each other guard against being cheated or hurt by other women. These attachments are often reinforced through sexual intimacy rather than through sexual violence") with *Newby v. District of Columbia*, 59 F. Supp. 2d 35 (D.D.C., 1999) (involving female inmate striptease at jail organized by female staff) and *Daskalea v. District of Columbia*, 227 F.3d 433 (D.D.C., 2000) (involving female inmate striptease at jail organized by female staff).

same-sex supervision of women inmates by female staff ignores sexual misconduct by male and female staff against male inmates.<sup>22</sup> Third, the call to end cross-gender supervision may run counter to significant Title VII jurisprudence ensuring equal opportunity to men and women in employment.<sup>23</sup> Finally, this proposal turns a blind eye to the egregious instances of sexual misconduct that took place in settings where same-sex supervision policies were already in place.<sup>24</sup>

This article addresses these arguments and ultimately concludes that same-sex supervision should be adopted in U.S. prisons in supervising both male and female prisoners. First, while same-sex supervision may not prevent sexual misconduct, it may reduce it by cutting off a primary vector of sexual misconduct—cross-gender interactions between staff and inmates. Second, same-sex supervision may increase prisoner well-being by giving prisoners a greater sense of control over their bodies, thereby reducing their sense of vulnerability to abuse.<sup>25</sup> Finally, adopting same-sex supervision policies would make the United States' position more congruent with international standards for the treatment of prisoners.<sup>26</sup> Currently, the United States is the one of the few developed countries that permits cross-gender supervision of male or female inmates in sensitive areas such as living areas, showers and bathrooms.<sup>27</sup>

22. See generally HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001). Several states report that the majority of their staff sexual misconduct complaints involve male inmates and female staff. Several factors may account for this. First, the fact that the vast majority of prisoners are male naturally leads to more complaints made by men. Second, female staff have relatively low status in correctional settings, and are therefore less likely to receive protection in correctional environments. Third, female staff may experience such harassment and lack of support from their male counterparts that they form alliances with male inmates for protection and support.

23. See generally Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1964). For a more in-depth discussion of Title VII employment issues attendant to cross-gender supervision, see *infra* Part IV.

24. Women staff may even have acceded to the conduct in order to gain favor or identify with more powerful male staff; women staff, themselves subject to the same conduct, may have had little power to remedy the situation for women inmates. See Women Prisoners I, *supra* note 14, at 639 (finding the existence of a "sexualized environment" where "boundaries and expectations of behavior are not clear"); Neal v. District of Columbia, No. 93-2420, 1995 WL 517248 (D.D.C. Aug. 9, 1995) (finding that the Department of Corrections engaged in a pattern and practice of sexual harassment by creating a sexually hostile working environment for female staff).

25. See Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. L. & PSYCHIATRY 301, 319 (1999) ("Time spent in an incarcerated setting provides an opportunity for targeted interventions that could markedly improve the potential for adjustment within the incarcerated setting and successful reintegration when women return to the community"). This may be particularly true for women prisoners whose significant histories of physical and sexual abuse may leave them more vulnerable to sexual abuse in institutional settings.

26. U.N. Standard Minimum Rules for Treatment of Prisoners, Rule 53(B)(2), U.N. Doc/A/CONF/6/1annex I A (1956), amended by E.S.C. Res. 2076, 62 U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977). International standards call for, among other things, close supervision of female inmates by female staff.

27. See, e.g., *Raghubans v. State*, 1972 A.I.R. (P&H) 17 (1971) (concluding that women, given their "peculiarities," were not fit to supervise male prisoners, and citing an American case, *Meuller v. Oregon State Corr. Inst.*, 690 P.2d 532 (Or. Ct. App. 1984), to bolster the proposition that women are the "weaker sex"). In the spirit of parity, however, the Tihar Prisons of India also require that no men

Part II of this article describes the context of sexual misconduct against prisoners in the United States, highlighting important cases and discourse. It also reviews and critiques the response of states and the federal government to sexual misconduct in prison. Part III examines important differences in the legal decisions that address claims challenging cross-gender supervision raised by or concerning male and female inmates. Part IV addresses the disconnect between the jurisprudence involving cross-gender supervision of men and women, and examines the explicit and implicit assumptions about race and gender that account for the difference in treatment.

Part V concludes with a recommendation that the U.S. establish a zone of privacy for both male and female inmates that exists regardless of the inmate's gender. It further concludes that while same-sex supervision of male and female inmates is an imperfect solution, it remains the best response presently available. The article also provides recommendations for implementing same-sex supervision consistent with Title VII, thereby recognizing both the importance of equal employment opportunities and the right to privacy and basic human dignity of both male and female inmates.

## I. THE CONTEXT OF THE PROBLEM

Over the past ten years, staff sexual misconduct has become a major prison management and policy issue for states and the federal government. While the problem first presented itself in major litigation against state corrections agencies, it soon became a major source of critique for the U.S. by both domestic and international organizations. Several early cases, *Cason v. Seckinger*,<sup>28</sup> *Women Prisoners v. D.C.*,<sup>29</sup> and two cases brought by the Special Litigation Section of the U.S. Department of Justice under the Civil Rights of Institutionalized Persons Act<sup>30</sup> illustrate the different approaches that the government and advocates have utilized to address sexual abuse of women in custody.

### A. Early Litigation

Sexual misconduct often arises as part of other unconstitutional abuses and conditions in a corrections system. Often, the issue of sexual misconduct may not be an initial complaint, but instead may arise in the course of investigating

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supervise the women prisoners. See Tihar Prisons, available at <http://www.tiharprisons.nic.in/vstiharprisons/html/infra.htm> (noting that the women have their own ward, which is supervised solely by women).

27. 231 F.3d 777 (11th Cir. 2000).

28. 877 F.Supp. 634 (D.D.C. 1994).

30. PUB. L. NO. 96-247, § 2, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997) (authorizing the Special Litigation Division of United States Department of Justice to investigate and litigate allegations of abuse against individuals held in institutions, including correctional facilities).



other claims. *Cason v. Seckinger*, one of the first contemporary cases to address widespread sexual misconduct against women, exemplifies this pattern.<sup>31</sup> *Cason* was originally filed in 1984 and sought to remedy numerous alleged constitutional violations related to conditions of confinement.<sup>32</sup> In 1990, however, allegations of widespread sexual abuse of women in Georgia's Milledgeville State Prison emerged in enforcement proceedings related to the existing litigation.<sup>33</sup> Allegations included claims that women were forced to have sex with staff, routinely exchanged sex for favors, and experienced verbal harassment.<sup>34</sup> Women also alleged that their complaints about the abuse went unheeded and uninvestigated;<sup>35</sup> that they suffered emotional and psychological harm as a result of the abuse and did not receive appropriate counseling to deal with the trauma,<sup>36</sup> and that they were placed in physical restraints and seclusion for days at a time.<sup>37</sup> They claimed that during seclusion, male officers often stripped them naked and observed them on camera.<sup>38</sup> On March 7, 1984, the court ruled in favor of the plaintiff, entering an order permanently enjoining sexual contact, sexual harassment, and staff sexual abuse of female inmates.<sup>39</sup>

In 1993, I litigated *Women Prisoners I*.<sup>40</sup> As in *Cason*, allegations of widespread sexual abuse of women emerged during the fact investigation for the underlying claims.<sup>41</sup> In *Women Prisoners I*, women incarcerated in the District of Columbia correctional system alleged that they were denied equal access to educational, vocational, work, apprenticeship, and religious opportunity.<sup>42</sup> In the course of conducting fact investigations on claims of unequal access to education, recreation, and work and industry assignment, female inmates revealed widespread sexual relations between male staff and female inmates and between male inmates and female inmates, at each of the

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31. 231 F.3d 777 (11th Cir. 2000).

32. *See id.* at 779.

33. *See id.* at 779 n.4 (detailing several consent decrees entered between 1992 and 1994 pertaining to the sexual abuse of inmates, as well as the final order for permanent injunctive relief in reference to all forms of sexual misconduct, entered on March 7, 1994).

34. *Id.* at n.2; *see also Report of the Special Rapporteur, supra* note 18, ¶¶ 60-63 (discussing the factual allegations made in *Cason*, including that women were forced to have involuntary abortions as a result of sexual abuse suffered during incarceration).

35. *See id.*, 231 F.3d at 779, n.2.

36. *Id.* at n. 2, ¶¶ 23-24.

37. *See id.*

38. *See id.*

39. *Id.* at n.4. This was the court's final order. From 1992 until 1995, the court also entered a series of consent decrees. *Id.* The decrees provided, *inter alia*, confidential reporting guidelines for women inmates who were victims of sexual abuse and harassment in violation of the Fifth and Eighth Amendments, Title IX of the Education Amendments Act, and the Fourteenth Amendment. *See generally Women Prisoners II*, 899 F. Supp. 659 (D.D.C. 1995).

40. 877 F. Supp. 634 (D.D.C. 1994).

41. Pursuant to the discovery of these facts, the women alleged that they were subjected to a widespread pattern of sexual abuse and harassment in violation of the Fifth and Eighth Amendments, Title IX of the Education Amendments Act, and the Fourteenth Amendment. *See generally Women Prisoners II*, 899 F. Supp. 659 (D.D.C. 1995).

42. *Id.*

three facilities that were the subject of the litigation.<sup>43</sup> What surfaced was evidence of abuse including: inappropriate comments of a sexual nature; touching of women's breasts, buttocks and vaginal area; sex in exchange for food, cigarettes, and privileges; and sexual assault.<sup>44</sup> While *Cason* involved the complaints of individual women, the allegations of sexual abuse, denial of equal access to programming, poor medical care, and unsafe living conditions were so pervasive and consistent that the plaintiff-female inmates were certified as a class.<sup>45</sup> The female prisoners sought to hold the defendants liable pursuant to 42 U.S.C. § 1983<sup>46</sup> and D.C. Code §§ 22-425 and 22-442.<sup>47</sup>

In December 1994, the United States District Court for the District of Columbia found that within the District of Columbia Department of Corrections, there existed a "sexualized environment" where "boundaries and expectations of behavior are not clear,"<sup>48</sup> and that such an environment was sufficiently severe and pervasive to constitute an Eighth Amendment violation.<sup>49</sup> Specifically, the court found that "[t]he physical assaults endured by women prisoners at the Annex, CTF and the Jail unquestionably violate the Eighth Amendment . . . . In combination, vulgar sexual remarks of prison officers, the lack of privacy within CTF cells and the refusal of some male corrections officers to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment."<sup>50</sup> The district court found that "many incidents of sexual misconduct between prison employees and female prisoners in all three of the women's facilities in this case" had occurred.<sup>51</sup> The court concluded that while the D.C. Department of Corrections had anti-sexual misconduct policies in place, those policies were of little value because of the lack of staff training, inconsistent reporting practices, inadequate investigation, and timid sanctions.<sup>52</sup>

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43. The three facilities that were the subject of the litigation were the District of Columbia Central Detention Facility (Jail), the Correctional Treatment Facility (CTF) and the Lorton Minimum Security Annex (Annex). Both male and female inmates were housed at each of the three facilities.

44. See *Women Prisoners I*, 877 F. Supp. at 639-40.

45. See *id.* at 638-39. The class was defined as "all women prisoners who are incarcerated in the District of Columbia correctional system as of October 1, 1993, and all women prisoners who will be hereafter incarcerated in the D. C. correctional system."

46. 42 U.S.C. § 1983 (1994). The statute provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

47. D.C. CODE ANN. § 24-425 (1981); D.C. CODE ANN. § 24-442 (1989) (providing, in pertinent part, that "[the] Department of Corrections . . . shall . . . be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to [facilities under its jurisdiction].")

48. *Women Prisoners I*, 877 F.Supp. at 639.

49. See *id.* at 665; see also *Neal v. District of Columbia*, No. 93-2420, 1995 WL 517244 (D.D.C. 1995) (alleging similar pattern and practice of sexual harassment of female staff).

50. *Women Prisoners I*, 877 F.Supp. at 655 (emphasis added).

51. *Id.* at 639.

52. See *id.* at 640.

Subsequent litigation by the U.S. Department of Justice Special Litigation Section sought to remedy sexual misconduct by holding states accountable for violations of CRIPA, a statute only enforceable by the U.S. Department of Justice (DOJ). In 1997, the Special Litigation Section of the DOJ filed suit against Arizona and Michigan for widespread patterns of sexual abuse of women inmates under CRIPA,<sup>53</sup> and eventually obtained settlements in each case in 1999.<sup>54</sup> The Department of Justice entered both cases in response to allegations of state failure to protect inmates from staff sexual misconduct. As a result, Michigan's settlement agreement required, among other things, the institution of a six-month moratorium on cross-gender pat searches of female inmates. The settlement agreement also prohibited male staff from being alone with female inmates and required male staff to announce their presence anywhere female inmates might be in a state of undress.<sup>55</sup> Arizona's settlement agreement required better applicant screening, the use of contract employees, improved training and investigations, meaningful sanctions, and prohibitions against rehiring any employee who resigns in lieu of dismissal after an allegation of sexual misconduct.<sup>56</sup>

*Cason, Women Prisoners* and the Department of Justice's CRIPA litigation represent a timeline of the efforts to address sexual abuse of women in custody. The sexual abuse claims in *Cason* arose from individual women's allegations of sexual abuse in the context of a larger piece of litigation, even though the ultimate remedy affected all female prisoners in the Georgia Department of Corrections. *Women Prisoners* addressed the pervasive and institutionalized character of sexual abuse of women in custody by recognizing that women could experience sexual abuse in custody as a class of women and that sexual abuse could be "cruel and unusual punishment"<sup>57</sup> as envisioned in the U.S.

53. PUB. L. NO. 96-247, 94 Stat. 349 (1980).

54. *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. 1999); *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. 1999). *But see* Letter from Regan Ralph, Executive Director of the Women's Rights Division of Human Rights Watch, to Janet Reno, United States Attorney General (June 11, 1999), at <http://www.hrw.org/press/1999/jun/reno611.htm> ("condemning" settlement of the Michigan case by the Department of Justice as "grossly inadequate" and "leav[ing] the women vulnerable to sexual harassment and abuse by corrections staff").

55. *See United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. 1999). When the Michigan Department of Corrections responded to the underlying problem by taking steps to make female gender a bona fide occupational qualification for the positions of Correctional Officer and Resident Unit Officer in female housing units, male and female corrections officers challenged the move on grounds that gender-specific assignments violate § 703 of Title VII of the Civil Rights Act of 1964; *see also* *Everson v. Michigan Dep't of Corrections*, 222 F. Supp. 2d 864 (E.D. Mich. 2002) (holding gender-based assignments in Corrections Officer and Resident Unity Office positions constitute gender-based discrimination).

56. *See United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. 1999)

57. A series of cases address whether all sex, even where prisoners "consent" to the sexual contact is actionable under the Eighth Amendment of the Constitution. The courts have been split on this issue, with several of them taking the position that the authority of correctional officers renders any form of inmate consent ineffective. *See, e.g.*, *D.R.*, 972 F.2d at (recognizing dependence of institutionalized persons). Furthermore, courts have found that the corresponding Constitutional obligation, coupled with statutes prohibiting sexual contact with prison staff, precludes an inmate's ability to voluntarily consent

Constitution. Moreover, the Department of Justice litigation situated protection from sexual abuse of women in custody as a civil right, which the government was obligated to protect. Subsequent litigation<sup>58</sup> has proceeded under one of the three models discussed above, often addressing questions left unanswered by this first generation of litigation.<sup>59</sup>

While subsequent litigation has received widespread media attention, it is fair to say that claims of sexual abuse of women in custody have garnered only mixed results in the courts.<sup>60</sup> On the one hand, the litigation has established that sexual abuse of women in custody is a violation of the Eighth Amendment of the Constitution.<sup>61</sup> At the same time, however, the doctrine of qualified immunity,<sup>62</sup> which shields government officials from civil liability in performing discretionary functions as long as their conduct does not violate clearly established constitutional rights, of which a reasonable person should have known, has often meant that prisons, prison officials, and municipalities are held blameless, while individual corrections officers are held liable.<sup>63</sup> While

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to the sexual contact with prison staff members. *See, e.g.*, *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997) (noting that if a state legislature's treatment of the injury is *de minimis* – in that sanctions for crimes are relatively lax – it will result in *de minimis* review at trial when a violation of the law is alleged); *Fisher v. Goord*, 981 F. Supp. 140 (W.D.N.Y. 1997) (ruling that consensual sex engaged in before the enactment of New York's law characterizing such activity as statutory rape was legal, while acknowledging that the concept of "consensual" sex in prisons was a sham, due to the particular situation of prisons); *see also Carrigan v. Davis*, 70 F. Supp. 2d 448, 459-461 (D. Del. 1999). Other courts have found that the inmate's willingness to engage in sexual activity obviates any claim for damages for sexual abuse.

58. *See Lucas v. White*, 63 F. Supp. 2d 1046 (N.D. Cal. 1999). In *Lucas*, three female inmates housed at the federal prison in Dublin, California, sued the Federal Bureau of Prisons seeking monetary damages, changes in prison procedures, and staff training. Robin Lucas, Valerie Mercadel, and Raquel Douthit alleged that they were placed in a men's security unit and sold as sex slaves by male staff to male inmates. The women prevailed and were jointly awarded \$500,000 in damages. Significantly, as part of the settlement, the Federal Bureau of Prisons undertook a national training program on staff sexual misconduct with inmates and developed a confidential reporting system to protect women from retaliation. *See also Amador v. New York State Dep't of Corr. Serv.*, (S.D.N.Y. 03 Civ. 0650 filed on Feb. 2003) (suit filed on behalf of individual current and released women inmates for injunctive and declaratory relief and monetary damages for sexual abuse in New York state prisons); *Neal v. Dep't of Corr.*, 592 N.W.2d 370 (Mich. 1998) (seeking injunctive and declaratory relief and monetary damages for sexual harassment and retaliation on behalf of female correctional staff).

59. *See generally* Kristine Mullendore & Laurie Beever, *Sexually Abused Female Inmates in State and Local Correctional Facilities*, 1 WOMEN, GIRLS & CRIM. JUST. 81-96 (Oct./Nov. 2000) (providing thorough case summaries of litigation involving sexual abuse of women prisoners, and providing background information on seminal cases, such as *Women Prisoners*).

60. *See id.*

61. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994); *Boddie v. Schneider*, 105 F.3d 857 (2d Cir. 1997); *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993); *Newby v. District of Columbia*, 227 F.3d 433 (D.D.C. 1999).

62. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *But see Farmer*, 511 U.S. 825 (articulating a new standard of "deliberate indifference," which is a lower standard than a knowing violation of an inmate's rights).

63. *See, e.g.*, *Carrigan v. Delaware*, 957 F. Supp. at 1376 (finding individual correctional officer liable, while the state correctional officials and state department of corrections were dismissed from suit under the doctrine of qualified immunity); *see also Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997); *Fisher v. Goord*, 981 F. Supp. 140 (W.D.N.Y. 1997).

finding individual actors liable<sup>64</sup> provides some measure of vindication for the victims, it does little to address the complicity of systems and officials in the sexual abuse of women in custody.<sup>65</sup>

While these setbacks are disheartening, early litigation like *Cason and Women Prisoners* nevertheless played an important part in establishing that staff sexual misconduct occurred within inmates' institutional settings.<sup>66</sup> In particular, *Women Prisoners* established that unremediated sexual misconduct violated the constitutional ban on cruel and unusual punishment. As a result of *Women Prisoners* and cases like it, the public was much more willing to believe that such abuses could occur, particularly when confronted with instances of abuse of power in other institutions including foster care,<sup>67</sup> the juvenile system,<sup>68</sup> the church,<sup>69</sup> the military,<sup>70</sup> and government.<sup>71</sup> Moreover, the emergence of dialogue on the pervasive climate of violence and harassment that exists against women not only in this country but also in other countries has increased the public's willingness to hear and credit that such abuses could occur.<sup>72</sup> Specifically, the public discourse on partner violence, rape, and sexual

64. Findings of liability are helpful, but little happens to the offending officers themselves; they are often allowed to resign only to be re-employed in other systems. They also usually face only misdemeanor penalties or probation. See *Former INS Guard Gets Probation for Sex Act*, MIAMI HERALD, Dec. 21, 2001, at 1B (reporting on a former immigration guard who engaged in a sexual act with a female detainee sex offender; noting that he was sentenced to three years of probation and ordered to resign immediately from his job at a detention facility for juvenile sex offenders); *How Felony Rape Became a Misdemeanor*, MIAMI HERALD, Aug. 2, 2001 (criticizing the Department of Justice's "deal" with guards to accept misdemeanor consensual sex charges); John Gunning, *Jailer Pleads Guilty to Having Female Inmate Do Striptease*, USA TODAY, Dec. 13, 2000 (reporting on the fourth correctional officer in a year to be convicted of sexual misconduct; convicted of a class A misdemeanor and sentenced to one year of misdemeanor probation and the permanent revocation of his peace officer and jailer license). See generally BRENDA V. SMITH AND LOREN C. PONDS, FIFTY STATE SURVEY OF STATE CRIMINAL LAWS PROHIBITING THE SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (2004) [hereinafter 50 STATE SURVEY 2004] (detailing state and federal penalties for violations of sexual misconduct laws).

65. *But see generally*, Riley v. Olk-Long, 282 F.3d 592, 594-95 (8th Cir. 2002) (holding personally liable officials of Iowa Corrections Institute for Women, who repeatedly gave offending corrections officer access to inmates, after several complaints had been made and disciplinary action taken); GAO REPORT ON SEXUAL MISCONDUCT, *supra* note 3; *Report of the Special Rapporteur*, *supra* note 18.

66. See, e.g., Toni Locy, *Study: Sex Abuse Rife in Women's Prisons*, USA TODAY, Mar. 6, 2001, at A13 (citing an Amnesty International study finding widespread misconduct and lack of legal sanction of sexual abuse in U.S. prisons).

67. See, e.g., Kendra Hurley, *Heed Lessons of Church Scandal*, USA TODAY, Jul. 25, 2002, at A13 (seizing opportunity to discuss pervasiveness of sexual abuse against children in foster care system amid highly publicized Catholic Church sexual abuse controversy).

68. See, e.g., Rick Brundrett, *11 Youths Sue South Carolina Juvenile Prison System*, THE STATE (Columbia, S.C.), Jun. 19, 2002, at 1 (reporting on a \$27 million suit alleging that prison officials failed to protect juvenile detainees from sexual and physical abuse by other youths or staff members).

69. See, e.g., William Lobdell, *Turmoil in the Church, Dioceses' Policies Reflect Settlement*, L.A. TIMES, Apr. 28, 2002, at B1 (discussing overhaul of church's policies in light of recent settlement with sexual abuse victim).

70. See, e.g., *Army Calls Sex Bias Widespread*, DALLAS MORNING NEWS, Sept. 12, 1997, at 1A ("sexual harassment exists throughout the Army crossing gender, rank, and racial lines").

71. See, e.g., Jackie Calmes, *White House Tries to Stick to Business Amid Scandal*, WALL ST. J., Mar. 30, 1998, at A20 (discussing sexual harassment lawsuit brought against former President Clinton).

72. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001 (Feb. 2002).

harassment has educated and informed the public and policymakers about sexual abuse against women prisoners. Consequently, enacting legislation to protect prisoners from sexual abuse became politically feasible.

*B. The Enactment of Legislation Prohibiting Sexual Abuse of Prisoners*

In response to the increased attention on staff sexual misconduct with inmates, states enacted laws specifically prohibiting sexual contact between correctional staff and inmates.<sup>73</sup> In the early 1990s, few states had laws specifically prohibiting sexual contact between correctional staff and inmates.<sup>74</sup> In the absence of such statutes, many incidents of sexual misconduct could not be prosecuted under existing general sexual assault statutes where consent is a defense to the conduct. Often, staff involved claimed that the inmate had either enticed them<sup>75</sup> or had consented to the conduct.<sup>76</sup> As a result, states enacted laws, often in the wake of visible incidents, prohibiting any sexual contact between prisoners and staff.<sup>77</sup> These laws differ in their coverage — some apply only to prisons,<sup>78</sup> while others cover prisons, parole, probation, and work release programs.<sup>79</sup> Still others cover juvenile facilities.<sup>80</sup> Some states take the approach of broadly covering anyone under “custody” or authority of law.<sup>81</sup>

Three states, Arizona, Nevada, and Delaware, have passed legislation providing for the prosecution of inmates who willingly engage in sexual misconduct with staff.<sup>82</sup> These states have also codified inmate consent into

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73. See generally 50 STATE SURVEY 2004, *supra* note 64.

74. At present, only three states (Alabama, Oregon, and Vermont) have not enacted legislation specifically prohibiting sexual contact between staff and inmates. See 50 STATE SURVEY 2004, *supra* note 64, at 1, 29, 33. Legislation in Wisconsin was enacted in August 2003 after a highly publicized incident in which a male correctional officer impregnated a mentally ill inmate. *Id.* at 35. See Zahn, *supra* note 6, at A1 (detailing Republican legislator’s intent to “introduce legislation to make sexual contact between prison employees and inmates a felony”).

75. See, e.g., Carrigan v. Davis, 70 F. Supp. 2d 448, 451 (D. Del. 1999) (alleging plaintiff enticed defendant by opening her bathrobe, baring her breasts, and inviting defendant into her room to look at some pictures).

76. See, e.g., Long v. McGinnis, 1999 U.S. App. LEXIS 2556 (alleging plaintiff’s consent to sex with male corrections officer).

77. See 50 STATE SURVEY 2004, *supra* note 64, at 4-6 (noting that COLO. REV. STAT. § 18-3-404 (West 2000) provides that any actor subjecting any person in custody to any sexual contact is guilty of unlawful sexual conduct).

78. See *id.* Idaho, Louisiana, Massachusetts, and Mississippi have enacted legislation prohibiting sexual contact with inmates only in prison settings.

79. See *id.* Georgia, Kansas, and Illinois are among states that have enacted legislation covering prisons, parole, probation, and work release programs.

80. See *id.* Iowa, Kansas, Arizona, Maryland, Montana, and California are among states that have enacted legislation expressly prohibiting sexual contact with persons in juvenile facilities.

81. See *id.* The District of Columbia, Florida, and Connecticut are among states that have enacted legislation covering anyone in custody or under authority of law.

82. See ARIZ. REV. STAT. § 13-419(B) (1989 and Supp. 1999) (“A prisoner who is in the custody of the state department of corrections or an offender who is on release status and who is under the supervision of the state department of corrections commits unlawful sexual conduct by engaging in oral sexual contact, sexual contact or sexual intercourse with a person who is employed by the state department of corrections or a private prison facility or who contracts to provide services with the state

their statutes. This approach is in the minority – twenty-one states specifically provide that the consent of the inmate is not a defense available to staff accused of prohibited conduct.<sup>83</sup> The large majority of states define these offenses as felonies.<sup>84</sup>

Even though the enactment of legislation has been a critical element in responding to staff sexual misconduct with inmates, it has not had the broad prophylactic effect that policymakers, advocates, and corrections officials anticipated. Unfortunately, sexual abuse in institutional settings remains even less likely to be reported and prosecuted than sexual assault in the larger community.<sup>85</sup> All of the barriers to the prosecution of sexual assault in general, such as issues related to credibility, the shifting nature of consent, and problems of proof, are intensified when the complainant is a prisoner.<sup>86</sup>

### C. Domestic Scrutiny of Staff Sexual Misconduct with Inmates

In 1996, the National Institute of Corrections (NIC) began a process of examining the scope of the problem of sexual misconduct and the responses of correctional agencies to those problems. NIC published a study in November 1996<sup>87</sup> that made several important findings. First, the report found “significant

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department of corrections or a private prison facility”); NEV. REV. STAT. § 212-187 (NRS 1999) (effective until July 2003); DEL. CODE ANN. tit. 11, §§ 1259, 4205 (Michie 1995 and Supp. 2000).

83. See ARK. CODE ANN. § 5-14-126 (Michie 2002); CAL. PENAL CODE § 289.6 (West 2001); DEL. CODE ANN. tit. 11 § 1259 (2000); D.C. CODE ANN. § 22-411(a) (1999); FLA. STAT. ANN. § 944.35(3)(b)(3) (2000); GA. CODE ANN. § 16-6-5.1(c)(3) (1999); § 11-9.2(e) ILL. COMP. STAT. (2000); IND. CODE ANN. § 35-44-1-5(c) (West 2000); KAN. STAT. ANN. § 21-3520(a) (2001); MASS. GEN. LAWS ANN. ch. 268, § 21A (West 2000); MINN. STAT. § 344(1)(m) (2001); MISS. CODE ANN. § 97-3-104 (1999); MONT. CODE ANN. § 45-5-502 (2001); NEB. REV. STAT. § 28-322.01 (1999); N.H. REV. STAT. ANN. § 632-A: (2), (3) (1999); N.Y. PENAL LAW § 130.05(3)(e) (McKinney 2000); N.C. GEN. STAT. § 14-27.7 (1999); S.C. CODE ANN. § 44-23-1150: (A)(2) (Law Co-op. 1999); UTAH CODE ANN. § 76-5-412(7)(b) (2001); WASH. REV. CODE ANN. §§ 9A.44.160(2), 9A.44.170(2) (West 2000); WIS. STAT. ANN. § 940.225(4) (West 2003).

84. See 50 STATE SURVEY 2004, *supra* note 64.

85. See, e.g., Anthea Dinos, Note, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. Sch. L.R. 281, 284-85 (2000-2001) (citing several decisive factors that keep female inmates from reporting sexual abuse: the inmates' own lack of credibility, the specter of “protective segregation” from the rest of the prison population, fear of the accused's retaliation and the unlikelihood of a favorable outcome in litigation). See generally AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 15 (2001).

86. See GAO REPORT ON SEXUAL MISCONDUCT, *supra* note 3, at 8 (finding that despite increasing legislation, inmates in the jurisdictions studied made at least 506 allegations of staff-on-inmate sexual misconduct between 1995 and 1998, of which only eighteen percent resulted in administrative sanctions). Many cases involving prisoners do not fit the construct of a “typical” rape complaint because the sexual interactions appear to be “consensual” and outside the scope of many state sexual assault statutes, particularly where no physical force was used and the sex occurred as an exchange for highly valued items such as food, better work assignments, telephone access, clothing, or drugs.

87. See generally U.S. DEP'T OF JUSTICE NAT'L INST. OF CORR., SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE, AND PREVENTION (Nov. 1999) [Hereinafter LAW, AGENCY RESPONSE, AND PREVENTION].

activity” among state departments of corrections on the issue of staff/inmate sexual misconduct, spurred by “recent legislative action, litigation, and ongoing concern for improving agency policy and practice.”<sup>88</sup> Second, the report found that of the fifty-three jurisdictions responding to the NIC survey,<sup>89</sup> twenty-four had been involved in litigation in the preceding five years related to sexual misconduct allegations involving staff and inmates.<sup>90</sup> At the time of the report, nineteen of the reporting states were in the midst of litigation.<sup>91</sup> Third, the report found that many state corrections agencies had no internal policies specifically prohibiting sexual contact between staff and inmates.<sup>92</sup> When policies were in place, they were often vague and confusing.<sup>93</sup> The report also found that while states reported training staff specifically on sexual misconduct with inmates, the majority only provided one to four hours of training that focused on successfully avoiding encounters and refraining from activity that might lead to prohibited sexual or sexualized contact with inmates.<sup>94</sup> Only eight states specifically provided training to inmates.<sup>95</sup> Finally, the survey revealed varying levels of inter-agency cooperation in addressing staff/inmate sexual misconduct. Some state departments of corrections (DOCs) may call on other agencies for help in investigating allegations of staff sexual misconduct with inmates, and some may not. Furthermore, only some DOCs had established relationships with either state police or prosecutors to assure that cases were vigorously investigated and prosecuted.<sup>96</sup>

NIC updated its earlier study in May 2000 to determine the progress corrections agencies had made since the 1996 report.<sup>97</sup> The study found that corrections agencies were continuing to address staff sexual misconduct with inmates. In 2000, all but eight states had specific statutes, which prohibited

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88. *Id.* at 10.

89. *See id.* at 4. Participating jurisdictions included forty-seven states, the District of Columbia, the Federal Bureau of Prisons, the Correctional Services of Canada, Puerto Rico, the Northern Mariana Islands, and Guam.

90. *See id.*

91. *See id.*

92. *See id.*

93. *See* LAW, AGENCY RESPONSE, AND PREVENTION *supra* note 86, at 4. One DOC policy document provided, “Personnel shall not . . . become unduly familiar in any manner with inmates, parolees, and probationers.” *Id.* at 4. Another provided that “Social relationships are prohibited, including but not limited to emotional or romantic attachments with inmates in an institution, or on parole or probation.” *Id.* at 5. Still another provided that “[a]ny act or conduct which establishes, maintains, or promotes a member’s relationship with an offender . . . which is outside the color of employment for personal benefit or gain which compromises a member’s professional role is prohibited.” *Id.* at 5.

94. *See id.* at 8 (incorrectly paginated in original as page 6).

95. *See id.* at 10 Those eight states were Arizona, District of Columbia, New Hampshire, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia.

96. *See id.* at 6.

97. *See generally* U.S. DEP’T OF JUSTICE NAT’L INST. OF CORR., SEXUAL MISCONDUCT IN PRISONS: LAW, REMEDIES, AND INCIDENCE (May 2000) [hereinafter LAW, REMEDIES, AND INCIDENCE].



staff sexual misconduct with inmates.<sup>98</sup> The report found that 15 states either had enacted or amended statutes prohibiting staff sexual misconduct with inmates since 1996.<sup>99</sup> The May 2000 report found that slightly more states were involved in litigation related to staff sexual misconduct. The 2000 report indicated that in 1999, 22 state DOCs were involved in litigation based on sexual misconduct with staff or inmates, whereas in 1996, 24 states indicated involvement in similar litigation over the previous five years.<sup>100</sup> As in 1996, the majority of these cases were individual damage suits against the corrections agencies and the state.<sup>101</sup> Since 1996, states had written and implemented specific internal policies prohibiting staff sexual misconduct with inmates, increased staff training, and increased communication with inmates about staff sexual misconduct.<sup>102</sup>

The General Accounting Office (GAO), at the request of Delegate Eleanor Holmes Norton, initiated its own study of the incidence of sexual misconduct by correctional staff in June 1999.<sup>103</sup> The GAO report found that most correctional jurisdictions generally recognize staff-on-inmate sexual misconduct as a problem and that forty-one states had passed laws criminalizing sexual misconduct in prisons.<sup>104</sup> It also noted that most correctional systems had participated in training programs to develop policies and implement procedures to address sexual misconduct.<sup>105</sup> The GAO found that, while laws and policies could help reduce staff sexual misconduct, they had not helped as much as expected.<sup>106</sup> The GAO found that staff-on-inmate sexual misconduct still occurs and is underreported.<sup>107</sup>

Specifically, the GAO report noted that “[t]he systemic absence of such data or reports makes it difficult for lawmakers, correctional system managers, relevant federal and state officials, inmate advocacy groups, academicians, and others to effectively address staff sexual misconduct issues.”<sup>108</sup> GAO found that the absence of such information impeded efforts in four key areas: (1) monitoring the incidence of the sexual misconduct; (2) keeping track of employees accused and found to be involved in staff sexual misconduct; (3) monitoring the enforcement of state law and corrections policies and

98. *See id.* at 2. The states that had not enacted statutes prohibiting staff sexual misconduct with inmates were Alabama, Kentucky, Minnesota, Montana, Oregon, Utah, Vermont, and West Virginia. At present, only three states – Oregon, Alabama, and Vermont – lack laws prohibiting sexual contact between staff and inmates.

99. *See id.* at 3.

100. *See id.* at 4.

101. *See id.* at 4.

102. *See id.* at 5-7.

103. *See generally* GAO REPORT ON SEXUAL MISCONDUCT, *supra* note 3.

104. *See id.* at 2.

105. *See id.*

106. *See id.* at 8, 13-15.

107. *See id.* at 1-2; *see also* Dinos, *supra* note 85 and accompanying text (discussing reasons why inmates are unlikely to report custodial sexual abuse).

108. GAO REPORT ON SEXUAL MISCONDUCT, *supra* note 3, at 16.

procedures; and (4) identifying corrective actions to address misconduct.<sup>109</sup> As a result, the GAO recommended the development of systems and procedures for monitoring, analyzing, and reporting allegations of staff sexual misconduct.<sup>110</sup>

The GAO report examined correctional systems in four jurisdictions: Texas, the Federal Bureau of Prisons (BOP), California, and the District of Columbia. The report found that the full extent of sexual misconduct in prisons is unknown because many female inmates may be reluctant or unwilling to report staff sexual misconduct.<sup>111</sup> Importantly, the GAO found that the lack of systemic data collection and analysis hampered efforts to discover the full extent of staff-on-inmate sexual misconduct.<sup>112</sup> For example, from 1995 to 1998, the three largest jurisdictions studied (California, BOP and Texas) reported five-hundred and six allegations of sexual misconduct. Of that number, ninety-two (eighteen percent) were sustained.<sup>113</sup> Staff resignations or terminations followed the majority of the sustained allegations.<sup>114</sup> Two of the three largest jurisdictions studied (BOP and Texas) provided no data on the types of allegations involved (i.e., sexual contact, inappropriate touching, invasion of privacy, etc.), thus the full extent of staff sexual misconduct in those jurisdictions remains unknown.<sup>115</sup> Data from the District of Columbia indicated that eleven percent of allegations by female inmates were sustained and resulted in disciplinary action against staff members.<sup>116</sup> District of Columbia officials cited lack of evidence as the reason why more allegations were not sustained.

The GAO Report's call for increased and better reporting is welcome, but it does not address a more pernicious problem- the paucity of sustained allegations. The lack of sustained allegations can be attributed to several factors present in prison culture. First, there is an issue of inmate credibility. Generally, if there is a dispute between an inmate and a staff member, the staff member's version of events will be believed. This notion that inmates live to lie and manipulate staff and the corrections system means that inmates' complaints about sexual misconduct and other matters are at best ignored, and at worst, generate punishment and retaliation.<sup>117</sup> Second, recent research shows

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109. *See id.* at 2.

110. *See id.*

111. *See id.* at 15.

112. *See id.* at 16.

113. *See id.* at 2.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See* BUD ALLEN & DIANA BOSTA, GAMES CRIMINALS PLAY: HOW YOU CAN PROFIT BY KNOWING THEM 7-10, 33-77 (1981) (discussing essential conflict between the "keeper" and the "kept" and identifying inmate techniques for setting up professionals who deal with them); GARY CORNELIUS, THE ART OF THE CON: AVOIDING OFFENDER MANIPULATION 13-18, 25-30, 43-69 (2001) (describing sociopathic personalities in general and inmate personalities in particular, and arguing that inmates cope with incarceration through a process of "prisonization," including the adoption of techniques to

that the code of silence in prisons is extremely powerful.<sup>118</sup> A study by the National Institute of Ethics found that 46 percent of responding officers had witnessed misconduct, but had concealed it. Eight percent of those responding were "upper administrators."<sup>119</sup> Finally, fearing that they will not be believed and will be retaliated against by staff and other inmates, many inmates do not report staff sexual misconduct or will only report it long after the event has occurred.<sup>120</sup> This reluctance and fear often means that crucial, corroborating evidence is no longer available.

#### D. *International Scrutiny of Staff Sexual Misconduct with Inmates*

In addition to developments in case law and legislation, sexual abuse of women in the custody of the United States has generated intense scrutiny by human rights organizations, domestically and abroad.<sup>121</sup> In 1996, Human Rights Watch released a report, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*,<sup>122</sup> analyzing the United States' response to the problem of sexual abuse of female prisoners. The report examined prison systems in the District of Columbia, California, Georgia, Illinois, Michigan, and New York. The report sharply criticized practices in each of these jurisdictions and recommended changes in training, legislation, and policy. Due in large part to visible litigation on the issue and the Human Rights Watch report, the Special Rapporteur for Violence Against Women, Radhika Coomaraswamy, issued a stinging report on the treatment of women in U.S. prisons, focusing most particularly on sexual misconduct and cross-gender supervision.<sup>123</sup>

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manipulate officers); BILL ELLIOT & VICKI VERDEYEN, *GAME OVER! STRATEGIES FOR REDIRECTING INMATE DECEPTION* (2003).

118. See generally *Baron v. Hickey*, 242 F. Supp. 2d 66 (D. Mass. 2003) (correctional officer complained that he was forced to resign because he broke the "code of silence" and reported inappropriate conduct between staff and inmates); Neil E. Trautman, *The Code of Silence . . . Now We Know the Truth*, SHERIFF 16-18 (Mar./Apr. 2001) (finding that the code of silence permeates law enforcement agency culture and affects professionalism at every level).

119. GAO REPORT ON SEXUAL MISCONDUCT, *supra* note 3, at 16.

120. See *Colman v. Vasquez*, 142 F. Supp. 2d 226, 229 (D. Conn. 2001) (plaintiff's reports not investigated, and plaintiff subject to retaliation for making complaints); *Riley v. Olk-Long*, 282 F.3d 592, 593 (8th Cir. 2002) (plaintiff "did not report these incidents to prison officials because she doubted that she would be believed and feared the resulting discipline"); *Morris v. Eversley*, 205 F. Supp. 2d 234, 237 (S.D.N.Y. 2002) (plaintiff initially did not report assault due to fears of retaliation); *Corona v. Lunn*, 2002 WL 550963, at \*2 (S.D.N.Y. Apr. 11, 2002) (inmate denied assault due to fears of retaliation), *aff'd* 56 Fed. Appx. 20 (2d Cir. 2003).

121. Reports about the sexual abuse of men and women in prison have been a routine part of the country reports for human rights organizations in the years prior to 1996. However, in 1996, human rights organizations that had previously scrutinized the human rights practices of other countries undertook a deliberate campaign to hold the United States to the same standards they applied to other countries. See, e.g., HUMAN RIGHTS WATCH, *ABUSES IN THE STATE OF GEORGIA*, *supra* note 18 and accompanying text; ALL TOO FAMILIAR, *supra* note 5 and accompanying text.

122. See generally ALL TOO FAMILIAR, *supra* note 5.

123. See *Report of the Special Rapporteur*, *supra* note 18.

This report was followed by a report from Amnesty International, “*Not Part of My Sentence: Violations of the Human Rights of Women in Custody*,” which focused on a number of issues affecting women in custody – including sexual abuse. The Amnesty report reached essentially the same conclusions as the Human Rights Watch report and called for: (1) same-sex supervision of female inmates; (2) more explicit policies and laws prohibiting sexual abuse of inmates; (3) stronger mechanisms for investigating and prosecuting sexual abuse of prisoners; (4) appropriate supportive services and redress for sexual abuse; and (5) greater protection from retaliation for inmates who reported sexual misconduct.<sup>124</sup> The report explicitly addressed sexual abuse of female inmates, tersely disparaging the United States’ practice of permitting male staff to guard female inmates as contrary to international human rights standards enunciated in Article 10 of the International Covenant on Civil and Political Rights.<sup>125</sup> The Amnesty International report cited a moving letter that investigators received from the general population of women at Valley State Prison in California as an example of female inmates’ response to cross-gender supervision:

There’s no voice telling taxpayers that their money is being wasted, that we are in need of adequate medical care, that we don’t like being pawed on by male correctional officers under the pretence of being pat searched. No, we don’t have a voice that will speak about how we are treated by the male officers, as if we were their private harem to sexually abuse and harass. Not to mention the emotional and verbal abuses when being addressed as bitches, niggers, wet backs, or any other of the racial or sexual slurs that the abusive officer’s tiny mind can conjure.<sup>126</sup>

Despite the increased visibility of the issue, enactment of legislation, and critique by both domestic and international organizations, policy and practice remain disconnected. Few changes have been made to address sexual misconduct in prison—it remains underreported and underprosecuted.<sup>127</sup> Even

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124. See generally HUMAN RIGHTS WATCH, WOMENS’ RIGHTS PROJECT, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998).

125. See AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE:” VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 38 (1999) (criticizing the U.S. for not following international standards requiring same-sex supervision of female inmates). Article 10 provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” *Id.* (citing the International Covenant on Civil and Political Rights).

126. *Id.* at 40.

127. This is certainly not indicative of the prevalence of misconduct in prison, because female staff may be more likely to be disciplined than their male counterparts. This increased likelihood of discipline may be due to their lack of connections, their vulnerability in the institution, or even the perception that such conduct is worse coming from women than from men. As Rasche points out, “[G]ender can be seen to mediate the peculiar context of prison where female correctional employees are also in a position of dominance over female offenders but are apparently at less risk of sexually assaulting them.” Rasche, *supra* note 5.

more hidden are the instances of sexual misconduct involving male and female staff and male inmates.<sup>128</sup> Even when the complaints are eventually substantiated, corrections decision-makers are less willing to hold female staff liable for sexual misconduct with male inmates on the theory that male inmates are more predatory and that female staff are the victims in those interactions. Thus, while many experts agree that a single remedy—same-sex supervision—would ameliorate a large percentage of staff sexual misconduct with inmates, the practice remains mired in controversy about whether it is appropriate for both men and women, and whether it violates the employment rights of male and female staff.

## II. COURT DECISION-MAKING ON CROSS-GENDER SUPERVISION

The issue of same sex supervision is not new. The first prisons in this country held men and women together,<sup>129</sup> and women were supervised by male guards. Not surprisingly, there were many accounts of children conceived during their mother's imprisonment.<sup>130</sup> This abuse of women in custody led to public outcry and criticism from religious groups, particularly the Quakers,<sup>131</sup> and spurred the creation of all female facilities. Same sex supervision was the norm until the early 1970s, when women sought entry into the corrections field after years of being excluded or being allowed only to work in female institutions.<sup>132</sup> In the 1970s, women began to assert their rights under Title VII to work in male correctional facilities.<sup>133</sup> Then, beginning in the 1980s with the

128. See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) (finding that complaints by male inmates are viewed less seriously).

129. See Sheryl Pimlott & Rosemary C. Sarri, *The Forgotten Group: Women in Prisons and Jails*, in *WOMEN AT THE MARGINS: NEGLECT, PUNISHMENT AND RESISTANCE* (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) (citing an incident of sexual and physical abuse of a female inmate by a male inmate at the Auburn, New York State Prison in 1865, which led to the opening of a separate women's facility, the Mount Pleasant Female Prison).

130. See NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800-1935* 97-98 (1985). Rafter gives a first-person account of the especially poor situation of women prisoners in the South. Detailing their living conditions, she emphasizes the constant supervision of female inmates by male corrections officers. She also narrates an account of Molly Forsha, who was convicted of murder in the mid-1870s, and gave birth to twins while incarcerated—allegedly as a result of sexual activity with a prison warden.

131. See Carole D. Spencer, *Evangelism, Feminism and Social Reform: The Quaker Woman Minister and the Holiness Revival*, at <http://www.messiah.edu/whwc/Articles/article6a.htm> [hereinafter *Evangelism, Feminism and Social Reform*] (remarking that a prominent Quaker woman, Rhoda Coffin, championed for her trailblazing efforts on behalf of women prisoners, is credited with founding the first state prison for women, the Women's Prison and Girls' Reformatory in Indianapolis, Indiana).

132. Prior to 1972, Virginia and Idaho were the only states to hire women to work in men's prisons. Corrections work was considered a non-traditional field for women, and there was considerable opposition to their presence by administrators, fellow staff, and inmates. See Rita J. Simon & Judith D. Simon, *Female Guards in Men's Prisons*, in *IT'S A CRIME: WOMEN AND JUSTICE* 226-41 (Roslyn Muraskin & Ted Alleman eds., 1993) (citing LYNN E. ZIMMER, *WOMEN GUARDING MEN* 50 (1986)). See also CLARICE FEINMAN, *WOMEN IN CRIMINAL JUSTICE SYSTEM*, 172 (3d ed. 1994).

133. See *infra* notes 285-319 and accompanying text. For a discussion of a National Institute of Corrections sponsored study and other studies that indicate actual employment practices in women's

increase in female employees in male correctional facilities, states began to receive challenges from male inmates complaining about the presence of women staff in sensitive supervision area, such as showers, living quarters, and search posts.<sup>134</sup> Male prisoners<sup>135</sup> and male-dominated staff and administrations<sup>136</sup> contested women's employment in male correctional facilities with the former citing privacy and other constitutional concerns,<sup>137</sup> and the latter challenging women's fitness for these "high risk" positions.<sup>138</sup> With one notable exception,<sup>139</sup> courts settled those early claims in favor of female employees.

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facilities, see *infra* note 357 and accompanying text. See also Linda Zupan et al., *Men Guarding Women: An Analysis of the Employment of Male Correction Officers in Prisons for Women* (Mar. 1990) (unpublished manuscript, presented at the Annual Meeting of the Academy of Criminal Justice Sciences in Denver, Colorado).

134. See, e.g., *Cornwell v. Dahlberg*, 963 F.2d 912, 913 (6th Cir. 1992) (arguing cross-gender supervision is a violation of Fourth Amendment privacy rights); *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990) (arguing that cross-gender clothed pat searches are unconstitutional); *Madyun v. Franzen*, 704 F.2d 954, 955 (7th Cir. 1983) (raising First Amendment argument as to constitutionality of cross-gender search); *Cumby v. Meachum*, 684 F.2d 712, 713 (10th Cir. 1982) (alleging that cross-gender supervision where female staff can view male inmates showering, undressing, and using the toilet is violation of privacy).

135. See, e.g., *Kent v. Johnson*, 821 F.2d 1220, 1221 (6th Cir. 1987) (alleging that cross-gender supervision violated their privacy interests); *Avery v. Perrin*, 473 F. Supp. 90, 91 (D.N.H. 1979) (alleging female staff's presence constituted a violation of privacy rights).

136. See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("appellants [Department of Safety] argue that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a prima facie case" of gender discrimination).

137. See, e.g., *Timm v. Gunter*, 917 F.2d 1093, 1097 (8th Cir. 1990); *Kent* 821 F.2d at 1221 ("[plaintiff] alleged that he finds this policy and practice humiliating and degrading and that it violates several of his constitutional rights: . . . his limited fourth amendment right to privacy"); *Avery* 473 F. Supp. at 91.

138. See, e.g., *Dothard*, 433 U.S. at 335 ("In a prison system where violence is the order of the day, . . . there are few visible deterrents to inmate assaults on women custodians"); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1368 n.10 (11th Cir. 1982) (indicating that defendant did not believe that "protecting" women from work in male correctional facility constituted discrimination); *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952, 955 (N.D. Iowa 1979) ("Defendant has repeatedly asserted that placing women in contact positions within the institution would . . . put the guards, both male and female, in increased danger"); *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769, 775 (S.D. Ohio 1981), *aff'd*, 779 F.2d 50 (6th Cir. 1985) (reviewing the holding of the lower court, and remarking that "[d]efendants had failed to demonstrate . . . that they had a factual basis for believing that substantially all women would be unable to safely and efficiently perform the duties involved"); *Griffin v. Michigan Dep't of Corr.*, 654 F. Supp. 690, 698 (E.D. Mich. 1982) (asserting that the "primary concern [associated with] keeping women out of housing units at [high security housing] institutions was for their own safety, as opposed to the privacy rights of the inmates").

139. See, e.g., *Dothard*, 433 U.S. at 336 ("We conclude that the District Court was in error in ruling that being male is not a bona fide occupational qualification for the job of correctional counselor in a 'contact' position in an Alabama male maximum security penitentiary"). But see, e.g., *Rucker v. City of Kettering*, 84 F. Supp. 2d 917 (S. D. Ohio 2000) (holding that gender was not a BFOQ to work in male jail facility, but noting that the Ohio State Constitution required same sex supervision); *Gunther*, 462 F. Supp. at 958 ("Defendants have patently failed to bear their burden of proving that a BFOQ was reasonably necessary to the normal operation of the [facility]"); *Griffin*, 654 F. Supp. at 703 ("[A]ny contention by Defendants that they are entitled to the Title VII BFOQ exception on the basis of the inmates' right to privacy argument is without merit"); *Hardin*, 691 F.2d at 1374 ("Failure of proof concerning . . . the assignment policy . . . would be sufficient grounds for this court's decision to reverse the district court's opinion holding that sex is a BFOQ for the position of Deputy Sheriff"); *Harden*, 520

In the early 1990s, as a response to highly publicized cases of sexual misconduct between male staff and female inmates, the issue of same-sex supervision again emerged at the forefront of corrections policy.<sup>140</sup> These cases<sup>141</sup> were framed in much the same way as they had been framed in the late 19th century,<sup>142</sup> when scandals involving female inmates created the impetus for single-sex reformatories.

Contemporary challenges to cross-gender supervision have been raised in four separate contexts, with male inmates initiating the large majority of those challenges: (1) male prisoners challenging supervision by female staff,<sup>143</sup> (2) female prisoners challenging their supervision by male staff,<sup>144</sup> (3) male staff challenging their exclusion from positions in female correctional institutions,<sup>145</sup> and (4) female staff challenging policies that limit their placement in men's institutions.<sup>146</sup>

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F. Supp. at 774 (determining that "the BFOQ [being a female in a female institution] . . . for the female quarters of the Rehabilitation Center constituted a violation of . . . the Ohio Civil Rights law").

140. See, e.g., *Lucas*, 63 F. Supp. 2d at 1046; *Women Prisoners I*, 877 F. Supp. 634 (D.D.C. 1994); *Women Prisoners II*, 899 F. Supp. 659 (D.D.C. 1995); *Women Prisoners III*, 93 F.3d 910 (D.C. Cir. 1996). These and other cases of sexual misconduct by prison staff and officials have been highlighted in the press and their insights have been incorporated into prison policy. See generally *BOP Strengthens Sexual Abuse Policies, Training Following Settlement*, CORRECTIONS PROF., Apr. 17, 1998 (addressing *White* and the subsequent policy and training impositions); Steven A. Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes Greater Concern*, N.Y. TIMES, Dec. 27, 1996 at A18 (discussing sexual abuse of female inmates especially in California, Georgia, Illinois, Michigan, New York, and the District of Columbia).

141. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (challenging the constitutionality of cross-gender clothed body searches of female inmates); *Colman v. Vasquez*, 142 F. Supp. 2d 226, 229 (D. Conn. 2001) (challenging the constitutionality of cross-gender pat searches of female inmates in sexual trauma unit); *Carlin v. Manu*, 72 F. Supp. 2d 1177, 1178 (D. Or. 1999) (concluding that female inmates do not yet have a right to be free from the presence of male guards); *Cain v. Rock*, 67 F. Supp. 2d 544, 549 (D. Md. 1999) (alleging that corrections policy of cross-gender supervision leads to sexual assault against women prisoners).

142. See *Spencer*, *supra* note 131 and accompanying text (discussing conditions leading to creation of separate women's incarceration facilities).

143. See, e.g., *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995); *Timm*, 917 F.2d at 1093; *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981).

144. See, e.g., *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980); *Jordan*, 986 F.2d at 1523; *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1980).

145. See, e.g., *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 224-225 (8th Cir. 1995) (concluding that the plaintiffs were not harmed by the minimal restrictions of the staffing policy); *Torres v. Wisconsin Dep't of Health and Soc. Serv.*, 859 F.2d 1523, 1524, 1532 (7th Cir. 1988) (deciding that the rehabilitative needs of all female inmates created a situation where being female *could* be a bona fide occupational requirement); *Carl v. Angelone*, 883 F. Supp. 1433, 1436 (D. Nev. 1995) (alleging that the director of the Nevada Department of Prisons intentionally discriminated against both male and female employees on the basis of gender when, absent a valid BFOQ, he instituted a plan removing all male correctional officers from a female prison and replaced them with female correctional officers from other facilities); *Edwards v. Dep't of Corrections*, 615 F. Supp. 804, 805-06 (M.D. Ala. 1985) (holding that being female was not a BFOQ for a permanent position in a women's correctional facility).

146. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (alleging Title VII sex discrimination when female applicant to a position in a men's facility was rejected); *Reidt v. County of Trempealeua*, 975 F.2d 1336, 1337 (7th Cir. 1992) (alleging Title VII sex discrimination, when female plaintiff was denied a position as a half-time "jailer"/ half-time traffic officer because the position had traditionally been filled by male employees); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1366 (11th Cir. 1982) (alleging Title VII employment discrimination claim after female plaintiff was denied an interview for a position as Deputy Sheriff I in the male section of a jail).

Typically, inmates have raised challenges pursuant to 42 U.S.C. § 1983,<sup>147</sup> which prohibits deprivation of a right secured by either the Constitution or Laws of the United States by a person acting under color of state law. The majority of these claims have been raised under the Fourth and Eighth Amendments.<sup>148</sup> Both male and female inmates have argued that supervision or searches by staff of the opposite gender violate important privacy rights protected by the Fourth Amendment.<sup>149</sup> Inmates have also challenged cross-gender supervision as a violation of their right to be free from cruel and unusual punishment pursuant to the Eighth Amendment of the Constitution.<sup>150</sup> The courts have had difficulty determining the rights of prisoners in situations involving cross-gender supervision. The outcome of these challenges has

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147. This section provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen or the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983 (1994 & Supp. 1996).

148. While rare, First Amendment challenges to cross-gender supervision have been raised by both male and female inmates. *See, e.g.*, *Canedy v. Boardman*, 16 F.3d 183, 186 n.2 (7th Cir. 1994) (noting that, while the court did not address the legal validity of plaintiff's assertion of a First Amendment violation, plaintiff's brief did indicate that exposing his naked body to female staff was especially onerous because of his Muslim religious beliefs); *Jordan*, 986 F.2d 1521 (declining to address a female prisoner's assertion that male staff supervision violated her First Amendment rights); *Madyun v. Franzen*, 704 F.2d 954, 958 (7th Cir. 1983) (arguing that a Muslim male inmate's First Amendment rights were violated because his religious beliefs prohibited him from being unclothed in the presence of a woman who is not his wife, and female correctional officers' supervision of him constituted a violation of a central religious tenet); *Canell v. Oregon Dep't of Corr.*, 840 F. Supp. 1378, 1379-80 (D. Or. 1993) (alleging a violation of "constitutional" rights because of the manner in which visual body cavity searches were conducted: his Muslim faith forbade him from appearing naked before others); *Thompson v. Stansberry*, 2002 WL 1362453 (Tex. App. Jun. 21, 2002) (finding that cross-gender strip search did not violate male inmate's First Amendment rights).

149. *See, e.g.*, *Carlin v. Manu*, 72 F. Supp. 2d 1177, 1179 (D. Or. 1999) (discussing whether female inmates have Fourth Amendment privacy right to not be observed by male corrections staff during strip searches). Male inmates have also argued that situations where they are supervised by female staff, but male staff do not supervise women inmates, violates the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Timm*, 917 F.2d at 1098 (alleging that the Nebraska State Penitentiary violated male inmates' Equal Protection rights, because similarly-situated female inmates were afforded more privacy protections). Specifically, the male plaintiffs asserted that female inmates benefited from such "luxuries" as not having male corrections officers routinely assigned to monitor their showers and perform pat searches on them. *Id.*

150. *See, e.g.*, *Jordan v. Gardner*, 986 F.2d 1521, 1530-31 (9th Cir. 1993) ("The inmates have established a violation of their Eighth Amendment right to be free from 'cruel and unusual punishments.' The record more than adequately supports the district court's finding of psychological harm, and the harm is sufficient to meet the constitutional minimum"); *Colman v. Vasquez*, 142 F. Supp. 2d 226, 230-38 (D. Conn. 2001) (discussing Fourth Amendment and Eighth Amendment violations as they relate to cross-gender searches); *see also Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997) (questioning whether a Fourth Amendment privacy right for prisoners to be free from cross-gender body-cavity searches and supervision even exists, and concluding that a male prisoner may not be awarded monetary damages as a result of alleged privacy rights violations when he was body-cavity searched and supervised in the shower by female corrections officers); *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996) (declining to find that male prisoners' Fourth Amendment privacy rights were violated when they were observed during various activities by female corrections officers, and noting that since prison violence is a real threat, constant surveillance is necessary, and prisoners could not legitimately expect the same privacy rights they enjoyed when not incarcerated).



depended in large part on three factors: (1) the gender of the inmate; (2) the gender of the staff person; and (3) the nature of the intrusion challenged.

*A. Inmate Challenges to Cross-Gender Supervision under the Fourth Amendment*

Both male and female inmates have challenged cross-gender supervision as a violation of the Fourth Amendment of the United States Constitution.<sup>151</sup> Inmates have raised these challenges under the Fourth Amendment's prohibition against unreasonable searches and the more general guarantee of the right to privacy found variously under the Fourth, Fourteenth and Fifth Amendments.<sup>152</sup> While all courts clearly state that inmates cannot expect the same degree of privacy they enjoyed in free society,<sup>153</sup> most have found that prisoners retain some right to bodily privacy under the Fourth Amendment.<sup>154</sup> As in all Fourth Amendment cases, the court must answer the threshold question of whether the individual has a reasonable expectation of privacy that

151. See U.S. CONST., Amend. IV (stating "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated"). See also *Cookish v. Powell*, 945 F. 2d 441 (1st Cir. 1991) (considering cross-gender supervision a violation of the Fourth Amendment only); *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990) (considering the severity of intrusion on the right of privacy); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (appeal from hearing on violations of First, Fourth, Eighth, Ninth, and Fourteenth Amendments where the court heard arguments only on the Fourth and Fourteenth Amendment issues); *Johnson v. City of Kalamazoo*, 123 F. Supp. 2d 1099 (W.D. Mich. 2000) (considering the Fourth Amendment right to privacy and Eighth Amendment right to be free from cruel and unusual punishment); *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855 (W.D. Mich. 2000) (considering the Fourth Amendment right to privacy and the Eighth Amendment right to be free from cruel and unusual punishment); *Ashann-Ra v. Commonwealth of Virginia*, 112 F. Supp. 2d 559 (W.D. Va. 2000) (raising a Fourth Amendment and a Fourteenth Amendment Equal Protection claim); *Canell v. Oregon Dept. of Corrections*, 840 F. Supp. 1378 (D. Or. 1993) (summary judgment motion on the inmates' right to be free from cross-gender searches under the Fourth Amendment); *Canell v. Armenifikis*, 840 F. Supp. 783 (D. Or. 1993) (raising Fourth Amendment privacy issue with regard to female staff observing male inmates); *Bowling v. Enomoto*, 514 F. Supp. 201 (N.D. Cal. 1981) (balancing the privacy rights of inmates that the Fourth Amendment requires against the state's interest in security).

152. Although most courts proceed under the Fourth Amendment, some courts have attempted to identify where the right to privacy for prisoners exists in the Constitution. In *Sterling v. Cupp*, the Oregon State Supreme Court relied on the Oregon State Constitution. 625 P.2d 123 (Or. 1981). The court recognized that privacy, as it was understood in *Griswold v. Connecticut*, is one of the only ways to address penal principles at the federal level. *Id.*; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

153. Generally, courts have found that all prisoners, regardless of gender, have no reasonable expectation of privacy as to their cells or belongings due to the nature of prison itself. *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that inmates do not retain a legitimate privacy interest in their prison cells, but leaving open the question of inmates' bodily privacy rights under the Fourth Amendment).

154. Over the years, the privacy rights of inmates have been diminished. For an in depth discussion of the gradual chipping away of privacy rights, see Miller, *Sex and Surveillance*, *supra* note 19, at 311; *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (stating that even though inmates retain constitutional rights, these rights are subject to limitation); *Wolf v. McDonnell*, 418 U.S. 539, 555 (1974) ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a retraction justified by the considerations underlying our penal system." But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country").

society is willing to recognize.<sup>155</sup> Additionally, in the prison context, the court must consider whether the prison has a legitimate penological reason for limiting inmates' constitutional rights.<sup>156</sup>

The bulk of cross-gender jurisprudence involves male inmates' challenges to female supervision. Generally, male inmates have argued that supervision or intrusive searches by female staff violate important privacy rights protected by the Fourth Amendment<sup>157</sup> and the more general right to privacy under the Fourteenth Amendment.<sup>158</sup> Female inmates, on the other hand, have not only argued that supervision by male staff violates their Fourth Amendment right to privacy<sup>159</sup> and their right to be free from unreasonable searches,<sup>160</sup> but also that it exacerbates past traumatic experiences and constitutes cruel and unusual punishment under the Eighth Amendment.<sup>161</sup> The majority of male inmates'

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155. *Katz v. United States*, 389 U.S. 347, 353 (1967) (acknowledging that it was reasonable for a person to expect privacy while talking in a telephone booth, thereby finding the related search unreasonable).

156. *Turner v. Safley*, 482 U.S. 78, 87-91 (1987) (establishing a list of criteria to be used by the courts when evaluating Fourth Amendment violations of prison inmates).

157. For Fourth Amendment claims made by male inmates, see *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002); *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991); *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Johnson v. City of Kalamazoo*, 124 F. Supp. 2d 1099 (W.D. Mich. 2000); *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855 (W.D. Mich. 2000); *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559 (W.D. Va. 2000); *Canell v. Oregon Dept. of Corr.*, 840 F. Supp. 1378 (D. Or. 1993); *Canell v. Armenifkis*, 840 F. Supp. 783 (D. Or. 1993); *Bowling v. Enomoto*, 514 F. Supp. 201 (N.D. Cal. 1981).

158. Even though some types of personal privacy are part of fundamental liberties guaranteed by the Fourteenth Amendment, for the most part, cross-gender supervision cases that expressly rely on a "right of privacy" have used a Fourth Amendment analysis. See, e.g., *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997) *cert. denied*, 522 U.S. 852 (1997); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995) *cert. denied*, 519 U.S. 1006 (1996); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985).

159. See e.g., *Jordan*, 986 F.2d at 1524-25 (arguing violations of the Fourth and Eighth Amendments); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1414 (9th Cir. 1992) (arguing that cross-gender viewing of a parolee during the administration of a urine drug test violated her privacy rights); *Forts v. Ward*, 621 F.2d 1210, 1213 (2d Cir. 1980) (alleging that the assignment of male guards to areas where they viewed female inmates in various stages of undress violated female inmates privacy rights); *Colman*, 142 F. Supp. 2d at 230-38 (discussing Fourth Amendment and Eighth Amendment violations as they relate to cross-gender searches); *Carlin*, 72 F. Supp. 2d at 1179 (discussing whether female inmates have Fourth Amendment privacy right in not being observed by male corrections staff during strip searches).

160. See, e.g., *Jordan*, 986 F.2d at 1524 (discussing female inmates' claim that cross-gender pat searches violated their Fourth Amendment right to be free from unreasonable searches); *Colman*, 142 F. Supp. 2d at 230 (finding that a female inmate had a Fourth Amendment claim she was subject to cross-gender pat searches).

161. In *Jordan*, male guards searched several female inmates, and one inmate had a particularly traumatic reaction to a clothed body search, which included pushing inward and upward on the inmate's crotch and flattening her breasts. The inmate had to be pried from the bars of her cell and vomited after returning to her cell block. The incident was the basis of the claim against cross-gender searches, and the holding relied on the fact that the inmates were known to be victims of sexual assault or abuse. *Jordan*, 986 F.2d at 1523-24. See also *Colman*, 142 F. Supp. 2d at 234-35 (female inmates in Danbury, Connecticut facility were housed in unit for sexual violence victims, and court held that subjecting them to cross-gender pat searches was a violation of Fourth Amendment privacy and Eighth Amendment protection against cruel and unusual punishment). But see *Carlin*, 72 F. Supp. 2d at 1179 (distinguishing *Jordan* because 1) *Jordan* plaintiffs were subject to sustained invasive searches of breasts, buttocks, and genital areas by male guards; 2) the searches were random and suspicionless; and 3) the plaintiffs had

claims have been resolved under the Fourth Amendment, while courts have been reluctant to address the Fourth Amendment claims raised by female inmates, preferring to resolve the claims under the Eighth Amendment.<sup>162</sup>

In *Bell v. Wolfish*,<sup>163</sup> the preeminent prison search case, the court ruled that any expectation of privacy that detainees retained while in jail is diminished due to their presence in the facility.<sup>164</sup> Consequently, jail staff conducting visual body cavity searches<sup>165</sup> on detainees of the same gender did not violate detainees' constitutional right against unreasonable searches.<sup>166</sup> *Bell* outlines four factors that courts must weigh when judging the reasonableness of a search: (1) the scope of the intrusion; (2) the manner in which it was conducted; (3) the justification for the intrusion; and (4) the place in which it was conducted.<sup>167</sup> Ruling for the jail, the Court found that the intrusion occasioned

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been previously sexually traumatized). Note, however, that in *Jordan* the court points out that what the Carlin court calls "sustained" searches only happened one time. *Jordan*, 986 F.2d at 1523.

162. See *infra* discussion of Eighth Amendment constitutional claims of inmates due to cross-gender supervision.

163. 441 U.S. 520 (1979). The challenged search addressed by the Supreme Court in *Bell* was a visual body cavity search sometimes called a "strip search." The record is silent as to the gender composition of those conducting the searches. However, given the fact these were strip searches that required prisoners to disrobe and show their genitals, it is fair to infer that the searches were conducted by staff of the same as gender as the inmates they searched. Also, in *Bell*, male and female pre-trial detainees challenged numerous conditions of confinement in a newly opened federal prison. See United States *ex rel. Wolfish v. Levi*, 439 F. Supp. 114 (S.D.N.Y. 1977), cited in *Bell v. Wolfish*, 441 U.S. at 529 n.10. Although the Supreme Court ruled on the question of inmate privacy in strip searches, it is interesting to note what the Court *did not* rule on. Citing their privacy interests, the inmates had alleged that "a 'sex blind' policy of staff assignments improperly results in male staff on the women's unit, and vice versa." 439 F. Supp. at 158. After touching upon the difficult problems involved in cross-gender supervision, the district court concluded that it would not "order the segregation of correctional personnel to match the sexes of the inmates." *Id.* at 160. It did, however, "forbid entry into rooms or bathroom facilities by officers of the opposite sex" in the absence of notice or emergency. *Id.* This ruling was left undisturbed by the appellate court. *Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978). It was thus untouched by the Supreme Court in *Bell v. Wolfish*.

164. See *Bell*, 441 U.S. at 557 (stating that "given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of administrative scope").

165. In *Bell*, the Court describes the visual cavity search for both male and female inmates. "If the inmate is a male. He must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates are also visually inspected. The inmate is not touched by security personnel at any time during the visual search procedure." *Id.* at 558 n.39. Additionally, in his dissent, Justice Marshall notes that:

In my view, the body cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency. After every contact visit with someone from outside the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates. *Id.* at 576 (J. Marshall, dissenting).

166. See *id.* at 560 (explaining that the necessity for visual cavity searches in order to maintain security outweighed the detainee's right to privacy).

167. See *id.* at 559 (identifying criteria, later known as the *Bell* factors, to be used when balancing detainee's privacy rights with a facility's security interest).

by the strip search was minimal compared to the jail's justification for the search.<sup>168</sup> Consequently, the court found that the search was reasonable.<sup>169</sup>

In addition to the *Bell* factors, courts rely on four criteria established in *Turner v. Safley*.<sup>170</sup> In *Turner*, a class of inmates challenged state prison regulations, which restricted inmate to inmate correspondence between different penal institutions, with exceptions for correspondence between immediate family members and correspondence by inmates on "legal matters." The challenged regulations also prohibited inmate marriage unless the prison superintendent determined that there were "compelling reasons" for the marriage.<sup>171</sup> Ultimately, the correspondence regulations were upheld, but the marriage restrictions were declared unconstitutional.<sup>172</sup>

In deciding the constitutionality of the prison regulations, the Court enunciated a four-part analysis for determining the constitutionality of prison regulations: 1) the existence of a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, 2) the existence of alternative means of exercising the right that remain open to prison inmates, 3) the impact that accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally, and 4) the absence of ready alternatives as the evidence of the reasonableness of the regulation.<sup>173</sup> The courts have used *Turner* to determine whether prison policies that expose male inmates in various states of nudity to female corrections staff are legitimate and of penological necessity.

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168. *See id.* at 558 (explaining the factual circumstances surrounding the visual cavity searches). The prison proffered that it visually inspected inmates' bodily cavities to ensure that prisoners did not bring illegal objects into the detention facility in their anal or vaginal orifices. *Id.* Yet, even *Bell* has been limited based on the reasonableness—or lack thereof—of searches. For example, courts have found that a policy where male inmates are subjected to strip searches violates the Fourth Amendment. *See, e.g., Farmer v. Perill*, 288 F.3d 1254, 1260 (10th Cir. 2002) (stating that strip searches of male inmates cannot be conducted in an open area visible to other inmates and staff without regard for privacy without a justification); *Foote v. Spiegel*, 118 F.3d 1416, 1426 (10th Cir. 1997) (holding that a same sex strip search of a motorist stopped for a traffic violation and later believed to be under the influence of marijuana was not reasonable since the motorist had no opportunity to hide a personal stash of drugs). *But see Oliver v. Scott*, 276 F.3d 736, 741-43 (5th Cir. 2002) (finding that cross-gender strip searches were not unreasonable searches for male inmates, even if the policy on cross-gender searches differed for female inmates).

169. *See Bell*, 441 U.S. at 561 (explaining that the prison staff had a legitimate interest in maintaining security and the searches were not performed with an intent to punish the detainees).

170. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (applying a four part reasonableness test to prison regulations that infringed on inmates' rights to send mail amongst themselves—a First Amendment right—and to marry without the prison superintendent's permission—a fundamental privacy right argument).

171. *Id.* at 82. While "compelling" was not identified in the regulations, prison officials testified in the lower court proceedings that "only a pregnancy or the birth of an illegitimate child would be considering a compelling reason." *Id.*

172. *Id.*

173. *Id.* at 89-90.

The governmental interests that the courts in those cases have found persuasive are prison safety and equal employment rights of female correctional staff.<sup>174</sup>

Reconciling *Turner* and *Bell*, courts have also relied on a number of tangible and intangible indicators: the frequency and intensity of the female correctional officer's supervision of male inmates,<sup>175</sup> the professionalism of female correctional staff,<sup>176</sup> and the circumstances of the intrusion (e.g. routine or emergency).<sup>177</sup> Given the court's deference to prison administrators, this has meant that most male inmate Fourth Amendment challenges to cross-gender supervision have failed.<sup>178</sup> Yet, as noted above, the courts are hesitant to *totally* disregard inmates' claims to privacy—particularly for female inmates, and

174. For the most part, cases that use the *Turner* analysis rely on a female staff person's right to equal employment and the security of the facility. *See, e.g., Cookish v. Powell*, 945 F.2d 441, 447 (1st Cir. 1991) (discussing circumstances where in an emergency situation, it is rational for a female staff member to conduct a visual strip search on a male inmate); *Somers v. Thurman*, 109 F.3d 614, 619 (9th Cir. 1997) (discussing cases where security and equal employment were sufficient to meet the rational relation test); *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (finding that surveillance of prisoners is necessary, and Title VII of the Civil Rights Act of 1964 opens prison employment to female staff); *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002) (finding that prison security interests outweigh the right to same gender staff observation); *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990) (“[W]hen balanced against the legitimate equal employment rights of male and female guards, and against the internal security needs of the prison, [inmates’ privacy rights] must give way to the use of pat searches on a sex-neutral basis as performed at [the facility]”); *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (“We recognize as legitimate both the interest in providing equal employment opportunities and the security interest in deploying available staff effectively”). *See also Miller, Sex and Surveillance*, *supra* note 19, at 329 (“The general trend has shifted from mutual accommodation of privacy and employment rights consistent with the interest-balancing approach in *Bell*, to only partially accommodating prisoner privacy or overriding privacy claims entirely when the basis for the underlying policy is internal security or equal opportunity employment”). However, some cases have held female staff's equal employment and institutional security can be overcome for otherwise unreasonable circumstances in cross-gender supervision situations. *See Canedy v. Boardman*, 16 F.3d 183, 188 (7th Cir. 1994) (finding that a male prisoner is entitled to accommodations, such as changing female officers' shifts or constructing privacy barriers); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980) (“[T]he Court must find that the plaintiff's rights were violated by the assignment of female guards to posts where they could view him while he was completely or entirely unclothed”).

175. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988) (noting that strip searches conducted when an inmate leaves or returns to the housing unit are not unreasonable); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (discussing how frequency and regularity of viewing are taken into account when holding that viewing inmates in their cells, showers and from “play yards” is not unreasonable under the Fourth Amendment); *Canell v. Oregon Dep't of Corrections*, 840 F. Supp. 1378, 1381 (D. Or. 1993) (stating that a single viewing of an inmate that is intentional and not motivated by penological interests can be illegal, as well as repeated viewing where prison officials fail to take steps to limit such viewing).

176. *See, e.g., Somers v. Thurman*, 109 F.3d 614, 621 (9th Cir. 1997) (“So long as there is sufficient justification for a guard to view an unclothed male inmate, and the guard behaves in a professional manner, the gender of the guard is irrelevant.”); *Grummett*, 779 F.2d at 495 (“[F]emale guards have conducted themselves in a professional manner”). *See also* John D. Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity Versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 24 (2000) (discussing professionalism within the corrections profession).

177. *See, e.g., Cookish*, 945 F.2d at 447-48 (declining to do a Fourth Amendment analysis, yet discussing whether a visual body cavity search conducted by a correctional officer of the opposite sex in an emergency situation would be a violation of an inmate's Fourth Amendment rights).

178. *See Id.*; *Somers v. Thurman*, 109 F.3d 614, 621 (9th Cir. 1997); *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988); *Forts v. Ward*, 621 F.2d 1210 (2nd Cir. 1980); *Grummett*, 779 F.2d at 495; *Johnson v. City of Kalamazoo*, 124 F. Supp. 2d 1099 (W.D. Mich. 2000).

circumstances where inmates are nude and the staff may have a prolonged view of prisoners' genitalia.<sup>179</sup>

### 1. *Cross-Gender Viewing – Infrequent and Irregular*

Although the courts have ruled that cross-gender clothed pat searches of male inmates do not generally violate the Fourth Amendment,<sup>180</sup> there is considerable disagreement among the circuits about the constitutionality of staff of the opposite gender *viewing* inmates in various states of undress<sup>181</sup> and prolonged viewing of genitalia.<sup>182</sup> Both male and female inmates have complained that staff's observing opposite sex inmates while nude or undressing violates their Fourth Amendment rights.<sup>183</sup>

In *Grummett v. Rushen*, the Ninth Circuit held that cross-gender observation of male inmates by female correctional officers was reasonable.<sup>184</sup> In *Grummett*, female correctional officers observed male inmates during various stages of undress while they showered, used the toilet, or were strip-

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179. *See, e.g.*, *Colman v. Vasquez*, 142 F. Supp. 2d 226, 231 (D. Conn. 2001) (“Ms. Colman does retain some limited Fourth Amendment right to bodily privacy.”); *Jordan v. Gardner*, 986 F.2d 1521, 1524 (9th Cir. 1993) (“Whether such right exists—whether the inmates possess privacy interests that could be infringed by the cross-gender aspect of otherwise constitutional searches—is a difficult and novel question, and one that cannot be dismissed lightly”).

180. *See, e.g.*, *Rice v. King County*, 243 F.3d 549 (9th Cir. 2000) (unpublished disposition), (finding that clothed pat downs by female staff of male inmates is generally permissible); *Timm*, 917 F.2d at 1100 (holding that cross-gender clothed pat searches are reasonable when considered in relation to security purposes and equal employment considerations); *Madyun v. Franzen*, 704 F.2d 954, 955 (7th Cir. 1983) (allowing clothed pat searches because they do not violate inmate's right to freedom of religion when balanced with security and female officer's equal employment rights); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (concluding that limited frisk searches by female staff violate no constitutional right).

181. *See, e.g.*, *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (holding that inmate did make a cognizable claim that his privacy right was violated by a “certain amount of viewing” by female guards and implying that an excessive amount of viewing would be a violation of the inmate's rights); *Canell v. Armenikis*, 840 F. Supp. 783, 783 (D. Or. 1993) (holding that the gender of the correctional officer is irrelevant if the viewing would be proper by a same sex staff member). *But see Hudson v. Goodlander*, 494 F. Supp. 890, 891 (D. Md. 1980) (prohibiting female staff from work posts that would require them to see men showering, or in the wards where male inmates might be undressed or attending to personal bodily functions, except in emergencies).

182. *See, e.g.*, *Michenfelder v. Sumner*, 860 F.2d 328, 330 (9th Cir. 1988) (noting that female officers filled all prison positions, but did not do strip searches except in severe emergencies); *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855, (W.D. Mich. 2000) (stating that Fourth Amendment privacy rights were violated where plaintiffs were “denied any and all means of shielding their private body parts from the viewing of others . . . for at least six hours”); *Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (specifying that prisoner's right to privacy includes right to be free from “unrestricted observation of [inmate's] genitals and bodily functions”).

183. *See, e.g.*, *Grummett*, 779 F.2d at 492 (alleging that prison policies allowed female staff to view male inmates while showering, undressing, being strip-searched and using the toilet); *Forts v. Ward*, 621 F.2d 1210, 1213 (2d Cir. 1980) (alleging that constitutional right to privacy was violated since male guards were able to view the female inmates while undressing and using the toilet).

184. *See Grummett*, 779 F.2d at 496 (considering the reasonableness of the searches under the *Bell* test).

searched.<sup>185</sup> Male inmates argued that although these activities were reasonable searches when performed by male staff, they became unreasonable when female correctional officers observed them.<sup>186</sup> Relying on the "infrequent and irregular" nature of the visual intrusions and the administrative burden of rescheduling female employees so that contact would not occur, the Ninth Circuit held that the cross-gender viewing was not so offensive as to be considered unreasonable.<sup>187</sup> The deciding factor in *Grummett* appeared to be the infrequency of the incidents and the perceived professionalism of the female staff.<sup>188</sup>

When male staff observe female inmates undressing, courts have avoided finding Fourth Amendment violations by resolving female inmate complaints under the Eighth Amendment. However, the Second Circuit has held that such viewing should be avoided if at all possible.<sup>189</sup> In *Forts*, a class of female inmates asserted that their involuntary exposure to male guards during various stages of undress violated their constitutional right of privacy.<sup>190</sup> The women

185. *Id.* at 492. In *Grummett*, the search involved female guards supervising male inmates while disrobing, showering and using the toilet. Female guards were assigned to the gunrail and not the main floor. Additionally, female guards were not allowed to conduct unclothed searches of male inmates. However, female guards occasionally observed unclothed searches of male inmates in emergency situations. Furthermore, female guards could conduct pat searches, which did include the groin area. *Id.* *But see* *Bowling v. Enomoto*, 514 F. Supp. 201 (N.D. Cal. 1981) (imposing an order that prison administrators develop a plan to minimize female officers viewing male inmates nude while showering, sleeping and using the toilet). In *Bowling*, male prisoners objected to the assignment of women staff that allowed for unrestricted *observation* of their genitals and bodily functions. *Id.* at 202. The court noted that they were following the recent trend among the courts in recognizing that prisoners limited right to privacy includes the right to be free from "unrestricted observation of their genitals and bodily functions by prison officials of the opposite sex under normal prison conditions." *Id.* at 204. *See also* *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (holding that the male inmate's Fourth Amendment claim was not frivolous since it was necessary to balance the need for the search with the rights of the prisoner). In *Moore*, a male inmate challenged whether a cross-gender strip search was unreasonable since male correctional officers were around and available to perform the search. *Id.* at 235. Since male officers were an available alternative and the strip search lacked a certain exigency, the court allowed the claim to be litigated. *Id.*

186. *Grummett*, 779 F.2d at 495.

187. *Id.* at 496 (holding also that limited pat searches were reasonable and observation of body cavity searches were reasonable in emergency situations, due to the limited intrusion on the male inmates). The court believed that even when balancing the privacy rights of the male inmates, the employment rights of the female correctional officers, and the realities of prison security maintenance, the cross-gender supervision of the male inmates remained a reasonable search since the cross-gender supervision was casual and irregular. *Id.*

188. The *Grummett* court notes that:

[T]he pat down searches conducted by the female guards are not so offensive as to be unreasonable under the Fourth Amendment. These searches are done briefly and while the inmates are fully clothed, and thus do not involve *intimate* contact with the inmates' bodies. The record indicates that the searches are performed by the female guards in a *professional* manner and with respect for the inmates.

*Id.* at 496.

The use of "professionalism" seems to be code for the female officer's display of a lack of sexual interest in the male inmate. The cases discussed *infra* involving male staff seem to adopt the view that when viewing female inmates in a similar state of undress, male staff are "unprofessional"—again code for displaying sexual interest. Women are positioned as being above desire, while men are slaves to it.

189. *See Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980).

190. *Id.* at 1213 (noting that male guards would often view female inmates through the glass window on their cell doors).

claimed that male guards often viewed them unclothed when their doors simultaneously opened each morning.<sup>191</sup> They also alleged that male officers saw them unclothed while they slept.<sup>192</sup> To resolve this issue, the district court judge ordered officers to give a five-minute warning each morning before entering the female living area.<sup>193</sup> The court also granted female inmates' request for an injunction against male guards working night shifts.<sup>194</sup> On appeal, the Second Circuit extended the five-minute privacy warning and allowed female inmates to cover their cell windows for fifteen minutes while undressing or going to the bathroom.<sup>195</sup> Additionally, the court reasoned that female inmates were interested in protecting their private parts from the viewing of male correctional officers during the evening hours while they slept.<sup>196</sup> The court held that the use of nightgowns could provide such protection without precluding male staff from working evening shifts. The court found the administrator's interest in ensuring the availability of equal employment opportunities for men and women, and the available ameliorative option—five minute warnings, the ability to cover cells for fifteen minutes, and the use of nightgowns—provided appropriate justification for a cross-gender supervision policy.<sup>197</sup> Thus the court reasoned, under *Bell* and *Turner*, that while the female inmates had privacy concerns, these concerns could be met with the modifications,<sup>198</sup> and therefore, the prison's cross-gender supervision policy could remain in place.

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191. *Id.* at 1214 (explaining that each morning, female inmates were not warned that their cell doors were opening, which left them vulnerable to inspection without clothing, going to the toilet, or cleaning up an unexpected menstrual flow).

192. *See id.*

193. *See id.*

194. *See id.* at 1213-14 (finding that a female inmate's constitutional right to privacy was violated by male staff in the corridors during the nighttime hours).

195. *See id.* at 1216 (maintaining that the five minute privacy rule appeared to be a compromise that met the approval of both female inmates and male prison guards ). *But see* Joanne Wasserman, *Prison Rapes "Routine,"* N.Y. DAILY NEWS, Jan. 28, 2003 (detailing recent litigation filed in federal court alleging a pattern of rape of female inmates in New York state prisons).

196. *See Forts*, 621 F.2d at 1217.

197. *Id.* The court was concerned with limiting the employment options of male and female prison employees and took careful steps to assure that no individual rights would be sacrificed by the new policy revisions. While the court did not rule out the option of banning cross-gender supervision at night entirely, the Second Circuit held that under the circumstances and facts of this case, such a sacrifice of rights was not necessary. The court also recognized that balancing the conflicting privacy interests of inmates with employment rights of correctional officers is a challenge that the courts have not been able to completely resolve. *Id.*

198. Prior to the litigation, New York had promulgated additional provisions to protect inmate privacy, including prohibiting assignments that required correctional officers "to conduct strip frisks of inmates of the opposite sex," prohibiting permanent assignment of staff to posts where they could routinely view staff of the opposite sex showering, and requiring that at least one staff member of the same sex as the inmate population be assigned to each housing unit. *Id.* at 1213 n.3.



## 2. *Cross-Gender Viewing – Frequent and Direct*

When the situation involves more frequent and direct contact with correctional officers—including the unimpeded view of genitalia—courts have held that cross-gender supervision constitutes a violation of privacy rights. Two recent cases illustrate this point. In *Johnson v. City of Kalamazoo*,<sup>199</sup> four male detainees were kept overnight in only their underwear when they refused to answer whether they were suicidal during an intake interview. Female officers were present throughout their detention. In addressing the inmates' Fourth Amendment claim, the court found that even if the state had infringed the inmates' rights, the infringement would still be valid if it were "reasonably related to legitimate penological interests."<sup>200</sup> Relying on the fact that the men were detained in their undergarments, the court held that "society is not prepared to recognize as legitimate any subjective expectation by a prisoner that he might not be confined even for a short period of time clad only in his underwear."<sup>201</sup> The court did not conduct a *Turner* analysis because it found no Fourth Amendment violation.

On similar facts, in an opinion released only days later, the same court reached a different conclusion in *Wilson v. City of Kalamazoo*.<sup>202</sup> The only distinction between the plaintiffs in *Johnson* and the plaintiffs in *Wilson* was that the *Wilson* male plaintiffs were detained while wearing no clothing at all. The factual distinction is somewhat significant because the court uses *identical* language to describe the tests that must be met to establish a Fourth Amendment violation. Relying on *Bell v. Wolfish*,<sup>203</sup> the court found that "the City's alleged practice of removing all of a new detainee's clothing does impinge on his Fourth Amendment privacy rights."<sup>204</sup> The court found that Kalamazoo's justification for not allowing the men to wear their underwear failed the "readily apparent and available alternative" prong of the *Turner* test.<sup>205</sup> In direct contrast to the *Johnson* result, the court wrote:

[T]he Court remains *unpersuaded* that society is not, as a matter of law, prepared to recognize as legitimate an inmate's subjective expectation that he may not be stripped of all clothing and covering,

199. *Johnson v. City of Kalamazoo*, 124 F. Supp. 2d 1099, 1101 (W.D. Mich. 2000).

200. *Id.* at 1103 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

201. *Id.* at 1104.

202. 127 F. Supp. 2d 855, 861 (W.D. Mich. 2000).

203. 441 U.S. 520 (1979).

204. *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855, 861 (W.D. Mich. 2000).

205. *Id.* ("[P]laintiffs were denied any and all means of shielding their private body parts from viewing by others, at least by video surveillance, for at least six, and as many as 18 hours. Yet the City's justification for this greater intrusion is no different than its justification for its removal only of the plaintiffs' outer clothing in [*Johnson*]. Thus, comparison of the pleadings in these two sets of cases demonstrates that . . . the City had at least one readily apparent, and available, alternative means of minimizing the risk of suicide and securing inmate safety that would have also, at least minimally, observed plaintiffs' interests in bodily privacy and modesty").

even for a short period of time, simply because he refuses to answer a question as to whether he is suicidal.<sup>206</sup>

*Johnson* and *Wilson* read together bolster the notion that female staff surveillance of male nudity for an extended period of time violates male inmates' Fourth Amendment right to bodily privacy.<sup>207</sup> Moreover, the court drew a clear distinction between the *Johnson* and *Wilson* incidents, recognizing a modesty interest as well as a privacy interest in not being subjected to visual cross-gender searches for an extended period of time while nude.<sup>208</sup>

The courts have also recognized that prolonged and direct viewing of female inmates by male staff is a violation of privacy. Two cases involving women, *Lee v. Downs*<sup>209</sup> and *Sepulveda v. Ramirez*,<sup>210</sup> are instructive. In *Lee*, a female inmate was removed from her cell after being found in her undergarments with a noose around her neck made from her prison clothes.<sup>211</sup> Upon finding her, prison staff took her to the prison's clinic, where doctors ordered a nurse to remove Lee's undergarments. Lee offered to remove her undergarments if the male guards left the area. However, Lee claimed that the male guards restrained her while the female nurse removed her garments.<sup>212</sup> The Fourth Circuit found that Lee's privacy rights were violated since the male guards were present while she was forced to disrobe completely.<sup>213</sup> This is just one example of courts' willingness to find a violation when male guards observe female inmates being strip-searched. Additionally, in *Sepulveda v. Ramirez*, a female plaintiff was required to submit to drug testing as a condition of parole.<sup>214</sup> In September 1988, Officer Ludwig, a male who was not Ms. Sepulveda's regular parole officer, entered the restroom while she was urinating. Ms. Sepulveda asked Officer Ludwig to leave, but he laughed, mocking her request while remaining in the bathroom. In distinguishing *Sepulveda* from *Grummett*, its earlier case sanctioning cross-gender viewing of male inmates while nude, the Ninth Circuit found that the circumstances differed, since this violation included a plain view of the parolee's genitals,

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206. *Id.* at 862 (emphasis added).

207. Note that the plaintiffs in *Johnson* and *Wilson* were all pre-trial detainees. Some question remains as to what role the level of security and the stage of custody an inmate is in play in relation to the outcome of privacy determinations. However, the court did not choose to make a distinction between convicted inmates and pre-trial detainees in its holdings in *Johnson* and *Wilson*, referring to "inmates' rights" to a subjective expectation of privacy. See *Johnson*, 124 F. Supp. 2d at 1104; *Wilson*, 127 F. Supp. at 860.

208. See *Johnson*, 124 F. Supp. 2d at 1104; *Wilson*, 127 F. Supp. 2d at 860 (attempting to effectively reconcile the *Bell* and *Turner* tests).

209. 641 F.2d 1117 (4th Cir. 1980).

210. 467 F.2d 1413 (9th Cir. 1992).

211. 641 F. 2d at 1118.

212. *Id.*

213. *Id.* at 1120 (noting "it was wholly unnecessary for the male guards to remain in the room and to restrain the plaintiff while her underclothing was forcefully removed").

214. *Sepulveda v. Ramirez*, 467 F.2d 1413, 1415 (9th Cir. 1992). *Sepulveda* was paroled from state prison in July of 1988. *Id.*

which was "neither obscured nor distant."<sup>215</sup> The court, in acknowledging an individual's right to bodily privacy, held that the right to be free from cross-gender viewing when submitting to a drug test was clearly established and found Ludwig's presence in the bathroom to be an unreasonable intrusion under the Fourth Amendment.<sup>216</sup>

In addition to *Sepulveda*, the U.S. District Court in Oregon found that female inmates' privacy rights may have been violated by male guards who directly but casually observed female inmates being strip-searched. In *Carlin v. Manu*, female inmates brought a Fourth Amendment action against male guards since the male guards observed the inmates being strip-searched while processing papers in the room and walking in and out of the room.<sup>217</sup> The male guards were immune from suit under the doctrine of qualified immunity because the illegality or unconstitutionality of their conduct was not clearly established at the time of the incident in February of 1996.<sup>218</sup> Nevertheless, the court noted that the guards might have violated the inmates' privacy interests. The court distinguished this case from other case law, namely *Grummett* and

215. See *Sepulveda*, 967 F.2d at 1416 (noting that the circumstances involved in *Sepulveda* were more degrading than the circumstances in *Grummett* since the cross-gender viewing in *Sepulveda* was both closer in distance and more direct). However, the actions in *Grummett* occurred during an extended period of time, while *Sepulveda* was subject to such supervision on only one occasion. Compare *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985), with *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Cir. 1992).

216. *Sepulveda*, 967 F.2d at 1416. While *Sepulveda* uses the analysis of Ninth Circuit cross-gender cases and is helpful, it is also distinguishable. First, *Sepulveda* involved drug testing for which a separate body of case law has evolved. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (holding that where a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement, such as public safety, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether individualized suspicion is required); *Nat'l Treasury Employees Union v. Yeutter*, 918 F.2d 968, 973 (D.C. Cir. 1990) (holding that where a drug test is not for law enforcement purposes, government must offer another legitimate purpose that outweighs the individual's privacy interests); *Hansen v. Cal. Dept. of Corr.*, 920 F. Supp. 1480 (N.D. Cal. 1996) (holding that it was not clearly established at the time of the challenged urination drug testing that direct observation under the circumstances presented violated constitutional norms); *Am. Fed'n of Gov't Employees, Council 33 v. Thornburgh*, 720 F. Supp. 154 (N.D. Cal. 1989) (disallowing Bureau of Prisons' plan for mandatory, random testing of all employees where special need or particularized focus not demonstrated).

Second, Ms. *Sepulveda* was a parolee and therefore entitled to greater constitutional protection of her privacy rights than inmates. *Sepulveda*, 967 F.2d at 1416. See also *United States v. Crawford*, 323 F.3d 700, 709 (9th Cir. 2003) (claiming that, for Fourth Amendment purposes, parolee's expectation of privacy is not defeated by virtue of his parole status; however, parole status reduced the expectation of privacy that society was prepared to recognize as reasonable); *United States v. Scott*, 678 F.2d 32 (5th Cir. 1982) (holding that parolees, as prisoners serving out their terms of punishment under conditions of partial relief, enjoy constitutional rights commensurate with that status).

217. 72 F. Supp. 2d 1177, 1180-81 (D. Or. 1999). In *Carlin*, the search included male guards walking in and out of the room and doing paperwork while the female inmates were being strip-searched. Although testimony "differs as to how many male guards and staff were present during the searches, however, it is not disputed that male guards and staff were present in the area for at least some portions of plaintiff's skin searches." *Id.* at 1181 at n.1.

218. *Id.* at 1180 ("Because observation by male guards during strip searches of female inmates was not clearly identified as unlawful conduct under existing law, I conclude that the defendants are entitled to qualified immunity").

*Sepulveda*, on the basis that the guards in *Carlin* were passing casually in and out of the room for purposes unrelated to the strip searches.<sup>219</sup>

More recent Eighth Circuit cases involving female arrestees have broadened the holding in *Carlin* and retained the possibility that cross-gender viewing of female inmates by male guards can violate the Fourth Amendment.<sup>220</sup> Thus, courts are willing to recognize that both genders have a limited interest in not being viewed naked for long periods, or up close by correctional staff of the opposite sex. Frequent and direct viewing is the only area where courts appear to treat male and female inmates equally. This outcome differs from the case law on infrequent or irregular cross-gender viewing discussed *supra*, and from the judicial standards on cross-gender pat searches discussed *infra*. In both of those situations, female inmates receive greater protection of their bodily privacy rights than male inmates.

### 3. Cross-Gender Pat Searches

Male inmates' challenges to cross-gender pat searches have suffered the same fate as their challenges to cross-gender viewing. Courts have been amazingly consistent in finding that clothed pat searches of male inmates by female staff do not violate the Fourth Amendment.<sup>221</sup> Similar to cross-gender viewing cases, these body searches become more problematic under the Fourth Amendment as they get increasingly intrusive and involve the genital area. For example, in *Sterling v. Cupp*, male inmates sought relief from clothed body

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219. *Id.* at 1179 (comparing *Jordan*, *Grummett*, *Somers*, and *Sepulveda* to the circumstances surrounding the search in *Carlin*). The court did note that the Ninth Circuit has "acknowledged that taken together, *Grummett*, *Michenfelder*, and *Sepulveda* might be read to suggest that up close, frequent and intentional viewings by guards of the opposite sex could violate a prisoner's privacy rights." *Id.* (internal citations omitted).

220. *See, e.g.*, *Hill v. McKinney*, 311 F.3d 899 (8th Cir. 2002) (holding that a female arrestee's Fourth Amendment rights were violated when she was kept naked and exposed to the view of male guards for a substantial period after the threat to safety and security posed by the inmate had passed); *Spencer v. Moreno*, 2003 WL 1043318 (D. Neb. 2003) (unsuccessfully challenging male officer's presence in the examining room during vaginal, anal, pelvic, and breast exams). While pretrial detainees are entitled to a greater degree of constitutional protection than prisoners—*see, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979)—these cases signal the court's willingness to accord even sentenced inmates protection from observation of their naked bodies.

221. *See Madyun v. Franzen*, 704 F.2d 954, 956 (7th Cir. 1983). In *Madyun* the court found a search performed on a male inmate by a female guard constitutional. The guard described the search in an affidavit in the following way:

The resident is asked to raise his arms. I then run my thumbs under his collar, take my hands and rub the top of his arms, come back under his arms to his armpits and down the sides of his waist. I run my finger around his waistband. I run my hand down the outside of his legs and back up to mid thigh. I then reach around and pat his chest area and his back.

*See also Grummett v. Rushen*, 779 F.2d 491, 492 (9th Cir. 1985) (finding that female guards did not violate male inmates' privacy rights when observing them showering, going to the toilet, and disrobing). Additionally, the female guards were allowed to perform clothed pat searches on male inmates, which included the area of the groin since the searches were brief, did not involve "intimate contact with the inmate," and were performed "in a professional manner." *Id.* at 496.

frisk searches that included the genital and anal areas when performed by female guards.<sup>222</sup> The court found that female staffs' examinations of these areas violated inmates' privacy rights since genital and anal areas are considered to be the "final bastion of privacy."<sup>223</sup> However, rather than excluding female guards from all frisk searches of male inmates, the court instead prohibited female guards from performing body cavity searches and searching genital and anal areas of male inmates when performing clothed body frisk searches.<sup>224</sup>

Cross-gender pat searches involving female inmates have often skirted the Fourth Amendment shoals that stranded male inmates.<sup>225</sup> In *Jordan v. Gardner*,<sup>226</sup> the court quickly dismissed the female inmate's Fourth Amendment claim regarding a cross-gender pat search,<sup>227</sup> finding instead that the search violated the Eighth Amendment. The court noted that had it conducted a Fourth Amendment analysis, it would have been uncertain how to find that female inmates' Fourth Amendment rights were violated by the pat search.<sup>228</sup> Unwilling to find cross-gender searches of women *per se* unconstitutional, the court stated, "we cannot assume from the fact that the searches cause immense anguish that they therefore violate protected Fourth Amendment interests."<sup>229</sup> Judge Reinhardt, concurring in the judgment, found that the cross-gender searches of the female inmates violated the Fourth Amendment, as well as the Eighth Amendment.<sup>230</sup> Stating that the searches

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222. 625 P.2d 123 (1981).

223. *Id.* at 132.

224. *Id.* at 137. *See cf.* Smith v. Fairman, 678 F.2d 52, 53 (7th Cir. 1982) (finding that frisk searches of female guards on male inmates which include "placing her hands on his neck, back, chest, stomach, waist, buttocks, and the outside of his thighs and legs" did not violate male inmates' privacy rights since the searches were limited and did not include the genital and anal areas). The court found that the prison accommodated both female employees' interest in equal employment opportunities and male inmates' interest in privacy rights by limiting the scope of the frisks. *Id.* at 55. *But see* Rice v. King County, 243 F.3d 549 (9th Cir. 2000) (holding that female guard did not violate male inmate's privacy rights by "shov[ing] her hand very hard into Mr. Rice's testicles" since she did not have reason to know that Mr. Rice was a victim of sexual abuse as a child). The court also noted that Mr. Rice's allegations of such conduct were not supported by evidence and were raised for the first time on appeal. *Id.*

225. *See infra* discussion of Eighth Amendment claims.

226. 986 F.2d 1521 (9th Cir. 1993).

227. In *Jordan*, the court describes the searches as such:

"[T]he male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet. According to the prison training material, a guard is to use a flat hand and pushing motion across the inmate's crotch area. The guard must push inward and upward when searching the crotch and upper thighs of the inmate. All seams in the leg and the crotch area are to be squeezed and kneaded. Using the back of the hand, the guard also is to search the breast area in a sweeping motion so that the breast will be flattened." *Id.* at 1523 (internal citations omitted).

228. *Jordan*, 986 F.2d at 1524.

229. *Id.*

230. *Id.* at 1532 (Reinhardt, J., concurring).

“are intimate and deeply invasive,” Judge Reinhardt opined that inmates do not surrender their constitutional rights when they enter prison doors.<sup>231</sup>

Although the majority in *Jordan* dodged the female inmates’ claim that cross-gender pat searches violate the Fourth Amendment, a more recent court denied the defendant Federal Bureau of Prisons’ motion to dismiss in a similar case, finding instead that the cross-gender searches in this instance may have been unreasonable.<sup>232</sup> In *Colman v. Vasquez*,<sup>233</sup> Rosanna Colman was enrolled in the “Bridge Program,” a program for survivors of sexual abuse, at a federal prison. Despite her participation in the program and her well-known history of past trauma, Colman was subjected to random pat searches by male correctional officers.<sup>234</sup> Vasquez, a male correctional officer, searched Colman often, and such searches often led to unwanted sexual advances and touching by Vasquez. Colman reported Vasquez’s conduct to a psychiatrist in the Bridge Program, who informed Vasquez’s supervisor, Lieutenant Meredith. Vasquez’s harassment of Colman continued for two years, culminating in a sexual assault in March 1997. Colman reported Vasquez’s assault to Lieutenant Meredith and subsequently brought an action against prison officials for failure to investigate the harassment allegations. In her suit, Colman also challenged the

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231. *See id.* at 1534 (Reinhardt, J., concurring). Specifically disagreeing with the majority’s contention that these searches did not violate the Fourth Amendment, Reinhardt proffered that female inmates had a right to be “secure in their persons” and “free from unreasonable searches.” *Id.* at 1534 n.7. He argued that the Fourth Amendment not only applied to the women’s privacy interests, but also protected their right to bodily integrity and personal dignity. *Id.* at 1534. Reinhardt also found the cross-gender searches and policy were unreasonable because the offensive and intimidating nature of the search resulted in a constitutional injury that could not be justified by any legitimate penological necessity under *Turner*. *Id.* at 1537. *See also* *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (plurality opinion).

232. *Colman v. Vasquez*, 142 F. Supp. 2d 226, 234 (D. Conn. 2001).

233. 142 F. Supp. 2d 226.

234. The prison had been on notice since at least 1999 that female inmates believed that random searches conducted by male correctional officers were extremely intrusive. *See* *Holder v. Harding*, No. 3-98-CV-656 (D. Conn. Dec. 16, 1999) (denying a writ for habeas corpus). In *Holder*, two female inmates claimed that their Fourth Amendment rights were violated by a cross-gender clothed body search. The court’s description of the intrusiveness of the searches in question follows:

A clothed-body search is intrusive; it is a search of an inmate’s entire person. Pursuant to the Bureau of Prison’s policy, at the beginning of the clothed body search, the officer orders an inmate to turn around, extend her arms and spread her feet apart. During the pat search, the officer first feels the inmate’s collar, back and shoulders and arms. The officer then moves to the side and then to the front of the inmate, passing his hands over the inmate’s arms, torso, chest, waist, lower abdomen, hips, buttocks, legs and crotch area. During a search of the lower body, the correctional staff is to search each leg of the inmate separately, from the waist to the feet, with the inmate’s feet spread. Staff is directed to pay special attention to the inmate’s lower abdomen and crotch. The proper practice calls for the officer to use the back of his hand when touching the inmate’s breast and crotch area. However, the record reflects many different methods used at FCI Danbury and evidence that the palm of the hand is often passed over the nipples and contrary to proper practice. In a proper, clothed body search that would achieve its purpose of uncovering contraband, the officer must use a ‘squeeze’ and ‘feel’ technique.

*Id.* at 5-6. *See also* *Peddle v. Sawyer*, 64 F. Supp. 2d 12, 19 (D. Conn. 1999) (finding that a female inmate had raised a claim under the Violence Against Women Act since she was sexually assaulted on numerous occasions during cross-gender searches).

constitutionality of the cross-gender pat search policy as it applied to women in the Bridge Program. The court specifically rejected the defendants' contention that Colman's only constitutional protection was the Eighth Amendment.<sup>235</sup> Additionally, the court distinguished the impermissible searches of the female inmates from searches found permissible for male inmates, noting that it is socially recognized that women experience unwanted touching differently than men.<sup>236</sup>

The court rejected the defendant's *per se* argument that cross-gender pat searches do not violate the Fourth Amendment.<sup>237</sup> The court refused to find at the pretrial stage that cross-gender searches did *not* violate the Fourth Amendment. Distinguishing *Colman* from the male inmate jurisprudence holding cross-gender pat searches to be constitutional, the court reasoned that allowing such case law to control its decision would require the court to hold that all pat searches are lawful.<sup>238</sup> Instead, the court acknowledged that, in keeping with *Turner*, it also must look at the specific facts and circumstances of the inmate and the search, the general nature of the search, and the prison's reasons for the specific policy being considered.<sup>239</sup> Further distinguishing *Colman* from previous jurisprudence concerning male inmates, the court noted that the circumstances surrounding the search were unique since the searches involved female inmates who were also residents of the sexual trauma unit.<sup>240</sup> The court held open the possibility that the plaintiff could litigate the question *Jordan* left unanswered—whether cross-gender pat searches of inmates with a history of sexual abuse are unconstitutional under the Fourth as well as the Eighth Amendment.<sup>241</sup>

While courts have afforded male inmates only limited protections against pat searches by female officers, they have extended broader protections to female prisoners. This greater recognition of female inmates' privacy has been grounded in Eighth Amendment jurisprudence rather than established Fourth Amendment precedent. Thus, female inmates' privacy is, at least in the court's reasoning, closely tied to their sexual vulnerability.

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235. *See id.* at 231 (stating that “[a]s Ms. Colman does retain some limited Fourth Amendment right to bodily privacy, the court rejects defendant’s legal contention that the only source of constitutional protections is the Eighth Amendment”).

236. *See id.* at 232.

237. *See id.* at 232.

238. *See Colman*, 142 F. Supp. 2d at 230 (distinguishing this case from *Turner*, *Covino*, *Timm*, *Grummett*, and *Madyun*).

239. *See id.* at 232 (finding that the searches could violate the Fourth Amendment since the inmates still maintain a certain amount of privacy while in prison).

240. *See id.* at 233.

241. *See id.* at 234 (noting that the search could have no “rational connection to a legitimate penological objective”). The court also notes that if less intrusive and restrictive alternatives were available then the defendants would be unable to claim qualified immunity. *Id.*

*B. Cross-Gender Supervision Challenges Under the Eighth Amendment*

The Eighth Amendment prohibits “unnecessary and wanton infliction of pain.”<sup>242</sup> While the Constitution “does not command comfortable prisons,”<sup>243</sup> “neither does it permit inhumane ones.”<sup>244</sup> Conditions of confinement are serious enough to establish an Eighth Amendment violation when they result in the denial of “the minimal civilized measure of life’s necessities.”<sup>245</sup> Thus, an Eighth Amendment conditions-of-confinement claim requires an objective inquiry into the seriousness of the alleged deprivation.<sup>246</sup> If the alleged conditions are sufficiently serious, then the complaining party must also satisfy a second, subjective, inquiry.<sup>247</sup> That is, the plaintiff must show that the defendant acted with a sufficiently culpable state of mind—with “deliberate indifference to inmate health or safety.”<sup>248</sup>

In cases addressing cross-gender supervision of male inmates by female correctional officers, the courts conduct the traditional Eighth Amendment objective seriousness and subjective state of mind inquiries.<sup>249</sup> Under the objective seriousness prong of this dual analysis, events that occur once,<sup>250</sup> or events viewed as less serious, even though they occur repeatedly,<sup>251</sup> remain outside the Eighth Amendment’s prohibition on cruel and unusual punishment.

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242. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); *Talley-Bey v. Knebl*, 168 F.3d 884, 886 (6th Cir. 1999).

243. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

244. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). *See also* *Hutto v. Finney*, 437 U.S. 678, 681-82 (1978) (affirming imposition of remedial orders on state penal system to correct egregious Eighth Amendment violations).

245. *Farmer*, 511 U.S. at 834; *Talley-Bey*, 168 F.3d at 886; *Rodgers v. Jabe*, 43 F.3d 1082, 1086 (6th Cir. 1995).

246. *Farmer*, 511 U.S. at 834.

247. *Id.*

248. *Id.*

249. *Id.* (analyzing whether the alleged action was “objectively, sufficiently serious” to be a violation of the Eighth Amendment and whether the prison official involved had a “sufficiently culpable state of mind”).

250. *See Cornwell v. Dalhberg*, 693 F.2d 912, 914 (6th Cir. 1992) (holding that a strip search of a male inmate in an outdoor courtyard with female staff present on a winter day did not violate the Fourth and Eighth Amendments; failing to address directly the fact that the staff members involved were women); *Rice v. King County*, 234 F.3d 549 (9th Cir. 2000) (decision printed in table only), 2000 WL 1716272 (finding that a search in which a female corrections officer allegedly shoved her hand into a male inmate’s testicles did not violate the Eighth Amendment); *Johnson v. City of Kalamazoo*, 124 F. Supp. 2d 1099, 1106 (W.D. Mich. 2000) (holding pre-trial detainees under one-time suicide prevention surveillance while clad only in their undergarments did not violate the cruel and unusual punishment standard). *But see* *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855, 863 (W.D. Mich. 2000) (holding pre-trial detainees under one-time suicide prevention surveillance with no clothing constitutes cruel and unusual punishment).

251. *See Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997), *cert. denied*, 522 U.S. 852 (1997) (holding that Eighth Amendment claim met neither the subjective nor objective tests where the inmate alleged cruel and unusual punishment based on repeated visual body cavity searches during which female officers “pointed at” him and “joked among themselves” at his expense, and where female staff joked and pointed at Somers while he showered); *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (finding no Eighth Amendment violation in female correctional officer’s comments to a male inmate regarding the nudity of male inmates).



Under the subjective state of mind prong of the inquiry, courts look to whether the actor knew the act would harm the inmate, and to the willful nature of the act.<sup>252</sup>

On the whole, courts have been less sympathetic to male inmates' Eighth Amendment challenges to cross-gender supervision than to similar challenges raised by women inmates. In most instances, courts find that male inmates' claims challenging cross-gender supervision do not even meet the objective seriousness prong of the Eighth Amendment.

The Seventh Circuit's jurisprudence exemplifies many of the problems male inmates face when they raise privacy claims under the Eighth Amendment. In *Smith v. Fairman*, for example, Mr. Smith argued on appeal that having female corrections officers conduct frisk searches violated his Eighth Amendment right to be free from cruel and unusual punishment because "such searches [were] totally unnecessary and [were] intended to degrade and humiliate male inmates."<sup>253</sup> The Seventh Circuit, ruling for the prison, reasoned that requiring male inmates to submit to limited, fully clothed pat searches by female guards, where those searches do not invade the genital area, fell short of the kind of deplorable treatment prohibited by the Eighth Amendment.<sup>254</sup>

Like most courts, the Seventh Circuit has recognized that prisoners enjoy limited protection under the Fourth Amendment against unreasonable searches and seizures,<sup>255</sup> but has not outlined the parameters of inmates' limited remaining privacy rights. Instead, it simply noted that "regardless of how one views the Fourth Amendment in this context, it is the Eighth Amendment that is more properly posed to protect inmates from unconstitutional strip searches."<sup>256</sup> Thus, for example, in *Johnson v. Phelan*, the Seventh Circuit cast the plaintiff's claim as little more than whining.<sup>257</sup> Mr. Johnson filed a § 1983 action seeking damages because female guards observed him while he was naked in the Cook County Jail's showers and while he was using the toilet. According to the court, "what Johnson wants to show is not that the defendants adopted their policy to cause injury, but that they [deliberately] ignored his sensibilities."<sup>258</sup> Examining "deliberate," the court found that Johnson's claim failed to satisfy the requisite standard of criminal recklessness, of *wanting* to injure an inmate or knowingly disregarding a *substantial* risk.<sup>259</sup> For the *Johnson* court, deliberate acts without foreknowledge of serious consequences, did not establish "intent" within the meaning of the Eighth Amendment.<sup>260</sup>

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252. *Id.*

253. *Smith v. Fairman*, 678 F.2d 52, 53 (7th Cir. 1982).

254. *Id.* at 54.

255. *Peckham v. Wisc. Dep't of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998).

256. *Id.*

257. 69 F.3d 144, 149 (7th Cir. 1995).

258. *Id.* at 149.

259. *See Farmer v. Brennan*, 511 U.S. 825 (1994).

260. *Johnson*, 69 F.3d at 149.

Furthermore, the court found that cross-gender monitoring of inmates, regardless of their state of undress, served a function beyond the infliction of pain. First, it “makes good use of the staff” to have all prison guards serve all functions.<sup>261</sup> Second, cross-gender monitoring of inmates, regardless of their state of undress, comports well with Title VII and the Equal Protection clause by reducing the need for prisons to make gender a bona fide occupational qualification. While the decision in *Johnson* specifically addressed a male inmate’s challenge to visual monitoring by female staff, the language of the decision was quite broad and implied that its reasoning could even apply to cross-gender viewing of female inmates by male staff.<sup>262</sup>

In his dissent, Judge Posner not only acknowledged a deep societal taboo against nudity in the presence of people who are not one’s intimates, but also criticized his colleagues for confusing the central issues of the case and for using a Title VII interest in advancing women’s career opportunities as a defense to cruel and unusual psychological punishments.<sup>263</sup> “My colleagues toy with the idea that unless the *intentions* of the prison officials are in some sense punitive, there can be no liability under the cruel and unusual punishments clause, whatever the psychological impact of the prison’s actions. . . . The motives of prison officials and guards [to sort custodial tasks by gender] are in fact irrelevant.”<sup>264</sup> Thus, Posner argued that Title VII cannot be used in this instance to justify inhumane treatment of male prisoners.<sup>265</sup> Three years later, in *Peckham v. Wisconsin Department of Corrections*,<sup>266</sup> the Seventh Circuit vindicated Judge Posner by specifically limiting the *Johnson* holding and clarifying that, contrary to *Johnson*, prisoners do retain some expectation of bodily privacy under the Fourth Amendment.<sup>267</sup> Nonetheless, the *Peckham* court agreed with *Phelan*’s ruling that the Eighth Amendment “is more properly posed to protect inmates from unconstitutional strip searches, notably when their aim is punishment, not legitimate institutional concerns.”<sup>268</sup>

Also restricting Eighth Amendment safeguards was *Johnson v. City of Kalamazoo*,<sup>269</sup> discussed *infra*. The court held that the pre-trial detention of male arrestees, who were stripped to their undergarments and held in the presence of female police officers for an extended period of time, did not satisfy the objective seriousness prong of the Eighth Amendment inquiry. The court indicated that being detained in one’s underwear for brief, or relatively brief, periods of time in the presence of members of the opposite sex did not

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261. *Id.* at 147; see also *Everson v. Mich. Dep’t of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002).

262. *Johnson*, 69 F.3d at 147.

263. See *id.* at 152, 154 (Posner, J., dissenting).

264. *Id.* at 155.

265. *Id.*

266. 141 F.3d 694, 697 (7th Cir. 1998).

267. *Id.*

268. *Id.*

269. 124 F. Supp. 2d 1099 (W.D. Mich. 2000).

constitute the kind of “denial of ‘the minimal civilized measure of life’s necessities’ needed to support an Eighth Amendment conditions-of-confinement claim or any other federally recognized right.”<sup>270</sup>

Perhaps because men’s cross-gender complaints rarely succeed on Fourth Amendment reasonable expectation of privacy grounds, courts also tend not to find the requisite harm necessary to establish an Eighth Amendment violation—regardless of whether the complaint involves actors of the same or opposite sexes.<sup>271</sup> For example, in *LaRocco v. New York City Dept. of Corrections*,<sup>272</sup> a same-sex supervision case, LaRocco alleged sexual abuse perpetrated by a male prison guard. The complaint alleged that on three separate occasions after contact visits, “‘Officer Pitt’ sexual[ly] harassed me, assaulted me by throwing me up against the wall and ripping my jumpsuit halfway off of me, held his body up against me calling me a bitch and threatening me, and threatened to sexually assault me the next time if I ever told anyone.”<sup>273</sup> In addition, the officer allegedly forced LaRocco to lift his penis and spread his buttocks about three times after each contact visit.<sup>274</sup> The District Court dismissed LaRocco’s complaint, finding that the incidents alleged did not satisfy the objective seriousness prong of the Eighth Amendment evaluation because the officer did not actually *touch* LaRocco in an explicitly *sexual* manner.<sup>275</sup>

*LaRocco* is troubling because the misconduct alleged was arguably more egregious than cross-gender pat searches or cross-gender visual surveillance. This finding of fact fails to acknowledge a whole range of psychological harms that occur far short of actual unwanted touching by another. Here, the ruling plots only explicitly sexual and unwanted touching by another on an Eighth Amendment trajectory, and ignores the harm that comes from being forced to touch oneself in a degraded and degrading manner as LaRocco was when he was repeatedly forced to lift his penis and spread his buttocks. Moreover, this case, when juxtaposed with similar facts alleged by female inmates, suggests an unwillingness by courts to recognize how sexually charged encounters with corrections staff can affect the psyche and emotions of male inmates. Given courts’ hostility to these claims, it is not surprising that male inmates have not raised Eighth Amendment claims as often as female inmates. Even in those cross-gender cases where male inmates raised Eighth Amendment claims, they

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270. *Id.* at 1105.

271. *See, e.g.,* *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (stating that a clothed pat search is best analyzed under Fourth Amendment, and does not rise to the level of “shocking, barbarous treatment proscribed by the Eighth Amendment”).

272. 2001 WL 1029044 (S.D.N.Y. 2001) (discussing Eighth Amendment sexual abuse/harassment claim).

273. *Id.* at \*1.

274. *Id.*

275. *Id.* at \*5 (“LaRocco does not allege that [officer] Pitt fondled him or touched him in a sexual manner. These incidents are not severe enough to be considered ‘objectively, sufficiently serious.’ While ‘despicable,’ if true, they do not ‘involve a harm of federal constitutional proportions’”) (quoting *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997)).

did so by way of challenging some other practice—no doubt hedging their chances of success.<sup>276</sup>

Conversely, female inmates have successfully argued that cross-gender pat searches and viewing by male guards can rise to the level of an Eighth Amendment violation. As previously mentioned, in *Jordan v. Gardner*, the Ninth Circuit upheld female inmates' allegation that non-emergency, cross-gender, clothed body searches were a violation of Eighth Amendment.<sup>277</sup> The court reasoned that, due to psychological differences, "women experience unwanted touching by men differently from men subject to comparable touching by women."<sup>278</sup> *Jordan* distinguished *Grummet v. Rushen*<sup>279</sup> on the grounds that the psychological trauma suffered by the *Jordan* petitioners was different from the momentary discomfort male inmates experience when viewed in states of partial or total nudity by female corrections officers.

Qualified immunity has been raised with mixed success as a defense to Eighth Amendment claims. For example, the district court in *Carlin v. Manu*,<sup>280</sup> discussed *infra*, carefully avoided an expansion of *Jordan* by granting defendants qualified immunity on the grounds that prison officials "are not required to anticipate subsequent legal developments, and cannot be fairly said to know the law unless it is sufficiently unmistakable from authoritative sources."<sup>281</sup>

In *Colman v. Vasquez*,<sup>282</sup> however, the Second Circuit declined to give qualified immunity to prison administrators, finding that they should have known searches by male staff of female inmates housed in a unit specifically for women with prior histories of sexual abuse involved unnecessary and wanton infliction of pain. The searches involved squeezing and kneading of the breast, groin, and thigh areas. Failure to take reasonable steps to abate established the deliberate indifference needed to succeed under a § 1983 claim.<sup>283</sup> In direct contrast to *Johnson v. Phelan*, the *Colman* court rejected the defendants' arguments regarding efficient use of staff in all job functions and

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276. See, e.g., *Cornwell v. Dalhberg*, 963 F.2d 912, 917 (6th Cir. 1992) (arguing an Eighth Amendment violation for excessive force in which male inmate was strip-searched in the presence of female staff in the outdoor courtyard, but not including it as part of cross-gender argument); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (alleging a violation of the Eighth Amendment as a result of the use of taser guns, but allegation was wholly unrelated to the cross-gender search argument); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (holding that a fully-clothed frisk search does not violate Eighth Amendment); *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (challenging female correctional officer's verbal comments as Eighth Amendment claim rather than as a cross-gender supervision claim).

277. See *Jordan v. Gardner*, 986 F.2d 1521, 1530-31 (9th Cir. 1993). But see *Rice v. King County*, 243 F.3d 549 (9th Cir. 2000).

278. *Id.* at 1526.

279. 779 F.2d 491 (9th Cir. 1985).

280. 72 F. Supp. 2d at 1177.

281. *Id.* at 1180 (citing *Somers v. Thurman*, 109 F.3d 614, 621 (9th Cir. 1997)).

282. 142 F. Supp. 2d 226 (D. Conn. 2001).

283. See *Colman*, 142 F. Supp. 2d at 235.

the potential for conflict with Title VII without some showing that the cross-gender supervision policy was reasonably connected to those concerns.<sup>284</sup>

On balance, it appears that women inmates have navigated the shoals of the Eighth Amendment more successfully than male inmates. Apparently, courts are more willing to acknowledge actual deprivation along with deliberate indifference. To the extent women inmates are able to establish Eighth Amendment claims, however, they often become bogged down in issues of qualified immunity, supervisory liability, and sufficient nexus.

### *C. Inmate Challenges to Cross-Gender Supervision and Title VII*

Inmates' challenges to cross-gender supervision are sometimes entangled with the employment rights that staff are guaranteed by Title VII. The Civil Rights Act of 1964 (Title VII) was enacted to eradicate employment discrimination and compensate victims of discrimination.<sup>285</sup> Title VII makes it unlawful for an employer to discriminate in hiring, firing, compensation, and conditions of employment because of one's color, race, sex, national origin, or religion. However, gender discrimination is permitted when "reasonably necessary to the normal operation of that particular business or enterprise."<sup>286</sup> This exemption is known as the bona fide occupational qualification (BFOQ). To maintain a BFOQ, the employer must establish by a preponderance of evidence: (1) that there is a basis for its belief that all or substantially all members of the excluded sex will be unable to perform job safely and efficiently,<sup>287</sup> (2) that the job qualifications which members of the excluded sex are unable to perform relate to the essence or central purpose of operating the business at hand,<sup>288</sup> and (3) that there is no reasonable alternative to excluding all members of one sex from the position for which the BFOQ is sought.<sup>289</sup> Accommodating inmate privacy rights raises direct conflicts with Title VII in the prison context, because of the employment patterns and promotion structures in prisons.<sup>290</sup>

284. *See id.* at 237.

285. Civil Rights Act of 1964 (Pub. L. No 88-352), 42 U.S.C. § 2000e-2000e-17.

286. 42 U.S.C. § 2000e-2(e)(1) (2003).

287. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321 (1977).

288. Torres v. Wisc. Dep't of Health and Human Services, 859 F.2d 1523 (7th Cir. 1988) (en banc); Diaz v. Pan American World Airways, Inc. 346 F. Supp. 1301 (S.D. Fl. 1992). For a good discussion of Torres, see Bonnie Belson Edwards, *Rehabilitation as the Essence of a BFOQ Defense*, 31 B.C. L. REV. 213 (1990).

289. *See, e.g.,* Sterling, 625 P.2d at 123; Percy v. Allen, 31 Fair Empl. Prac. Cas. (BNA) 1021 (Me. 1982) (female guards allowed at male prison if job tasks separated to ensure some inmate privacy); *In re Long*, 127 Cal. Rptr. 732 (Cal. App. 1976) (requiring separate job tasks for female guards observing male wards at state youth facility); Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980) (bestowing privacy upon female inmates while using the toilet and engaging in activities that would risk the exposure of the nude body to male guards).

290. *See generally* Mary Ann Farkas & Kathryn R.L. Rand, *Female Corrections Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995, 996 (1997) (identifying the tension between women corrections officers' right to employment and promotions under Title VII, and prisoners' "limited

Before examining Title VII in the prison setting, it is useful to examine its deployment in another setting where employment rights conflict with privacy rights or "customer preference." For example, several Title VII challenges have been raised where a qualified male nurse is prevented from intimate contact with female patients.<sup>291</sup> In each case, the male nurse's employment rights gave way to the female patient's privacy rights.<sup>292</sup> In non-prison settings, the solution appears straightforward: privacy trumps employment rights.<sup>293</sup>

The application of Title VII to prisons is more complex. Unlike hospital patients, inmates have diminished privacy rights due to their imprisonment. This diminished privacy must also be viewed against the backdrop of female entry into the corrections field. Corrections, like police, fire departments, and the military, was an institution that was most hostile to women's entry into the workforce.<sup>294</sup> Women were considered too weak, too emotional, and too feminine for these hyper-male environments. Consequently, courts in the early years of implementing Title VII had to be strong and unequivocal in their support for women's entry into these institutions, particularly corrections. Thus, inmate demands for greater privacy and more humane treatment collided with courts' desires to remedy past and present discrimination by opening these closed, hostile environments to women. Female staff are a far more

right[s] to same-sex searches"); John Dwight Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity Versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 4 (2000) (noting the courts' inability to reconcile these two important issues when faced with specific types of searches, including pat-down, strip, and body cavity varieties); Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1, 6 (1999) (arguing that corrections officers' employment should be based on "equal qualifications," and that qualifications with a "normalizing effect" should be taught to all corrections officers, because of their benefit to the prison culture).

291. See Elsa Shartsis, *Privacy as Rationale for the Sex-Based BFOQ*, 1985 Det. C.L. Rev. 865, 876-87 (1985) (discussing *Wilson v. Sibley Memorial Hospital*, 340 F. Supp. 686 (D.D.C. 1972), *rev'd on other grounds and remanded*, 488 F.2d 1338 (D.C. Cir. 1973)); *Fessel v. Masonic Home of Del.*, 447 F. Supp. 1346 (D.Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982); *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D.Okla. 1982).

292. See Shartsis, *supra* note 291, at 876-77.

293. See *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187, 206 at fn. 4 (1991) ("We have never addressed privacy based sex discrimination and should not do so here . . . Nothing in our discussion of the essence of the business test, however suggests that sex could not constitute a BFOQ when privacy interests are implicated . . .").

294. See generally Sonja A. Soehnel, *Sex Discrimination in Law Enforcement and Corrections Employment*, 53 A. L. R. FED. 31 (1981). See, e.g., *Officers for Justice v. Civil Service Comm'n*, 395 F. Supp. 378 (N.D. Cal. 1975) (concluding that the police department's physical agility test had an almost total adverse impact on female applicants for positions as patrol officers, which established a prima facie case of employment discrimination under Title VII. The government defendants' efforts at validating this test were not sufficient to sustain its use.); *Maine Human Rights Comm'n v. Auburn*, 408 A.2d 1253 (Me 1979) (deciding that the police department's reliance on physical strength had disproportionate impact on women); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986) (involving a female city fire department dispatcher's claim against employer for sexual harassment and assault); *Bartley v. U.S. Dept. of Army*, 221 F. Supp. 2d 934 (C.D. Ill. 2002) (alleging continuing harassment of and retaliation against eight female staff members, including rape, sodomy, unwelcome sexual advances and touching, requests for sexual favors, sexual innuendo, harassing phone calls, threats of physical harm, non-consensual sex, and duress).

sympathetic population and equal employment of women a far more laudable goal than protecting the privacy rights of male inmates, who are perceived as violent, irredeemable, and unworthy of concern.<sup>295</sup> In this climate, women's ability to supervise male inmates has become the touchstone for equal employment in prisons.

Courts have struggled to define the limits of inmate privacy in the post-Title VII era of cross-gender supervision. These cases can be generally characterized as: (a) those that treat gender as a BFOQ;<sup>296</sup> (b) those that do not treat gender as a BFOQ;<sup>297</sup> and (c) those that acknowledge that gender could be a BFOQ, but find alternatives, such as limiting contact between the genders.<sup>298</sup> Not surprisingly, because courts treat male and female inmates' privacy claims differently, they have reached seemingly inconsistent outcomes when reconciling Title VII and cross-gender supervision claims raised by male and female inmates.

The first and only Supreme Court case on the topic of cross-gender supervision in prison, *Dothard v. Rawlinson*, upheld a prison's refusal to hire women in contact positions in the Alabama Maximum Security Men's Prison.<sup>299</sup> The Court's decision was based not on prisoners' privacy, but on the vulnerability of female corrections staff in a maximum-security prison with "jungle-like" conditions, that had previously been declared unconstitutional.<sup>300</sup> Subsequent courts have limited *Dothard's* holding that gender is a legitimate

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295. *Johnson v. Phelan*, 69 F.3d 144, 151 ("There are different ways to look upon the inmates of prisons and jails . . . One way is to look upon them as member of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue regarding the degrading or brutalizing treatment of prisoners would arise. In particular . . . [t]he parading of naked male inmates in front of male guards, or of naked female inmates in front of male guards, would be no more problematic than "cross sex surveillance" in a kennel. . . . I do not myself consider the 1.5 million inmates of American prisons in that light") (Posner, J., dissenting).

296. *Torres v. Wisconsin Dep't of Health & Human Serv.*, 859 F.2d 1523 (7th Cir. 1988) (en banc) (holding that gender can be a BFOQ for guards in women's units); *Rider v. Pennsylvania*, 850 F.2d 982, 987 (3d Cir. 1988), *cert. denied*, 488 U.S. 993 (1988) ("Implicit in the Commonwealth Court's holding . . . was a finding that female gender . . . is a BFOQ [for supervising female inmates]"); *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223 (8th Cir. 1995) (refusing to assign males to female unit was BFOQ); *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998) (holding that gender is a BFOQ where inmates retain privacy interest in not being viewed unclothed by person of opposite sex); *Philadelphia v. Penn. Human Relations Comm'n*, 300 A.2d 97 (1973) (holding that gender is a legitimate BFOQ at youth facility).

297. *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952 (N.D. Iowa 1979) (finding that a BFOQ was not established to prevent women from contact positions, although some privacy protections for male inmates were allowed); *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769 (S.D. Ohio 1981), *aff'd*, 779 F.2d 50 (6th Cir. 1985) (finding no BFOQ based on male privacy); *Carl v. Angelone*, 883 F. Supp. 1433 (D. Nev. 1995) (transferring of males out of female prison not BFOQ absent showing of harm to women by male supervision); *Everson v. Mich. Dept. of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002) (finding that gender was not a BFOQ for guards at female prison where an insufficient amount of study had been done to justify prison action).

298. See *supra* note 288 and accompanying text.

299. 433 U.S. 321 (1977).

300. Shartsis, *supra* note 291, at 891.

BFOQ for supervising male inmates to situations where extreme and unconstitutional prison conditions exist.<sup>301</sup>

At the same time that the Supreme Court upheld the BFOQ in contact positions in the Alabama Maximum Security Prison, it used *Dothard* to hold unconstitutional, height, weight, and strength requirements for corrections officers in Alabama. Thus, *Dothard* became the wedge that helped women to gain entry into corrections, particularly in supervision in male prisons.<sup>302</sup> In opening corrections to women, courts have relied on the second prong of the BFOQ test; the gendered job qualification must be centrally related to the business.<sup>303</sup> Protecting male inmates' privacy is not central to incarceration and may indeed be antithetical. Therefore, male inmates' privacy interests generally give way to women's employment rights.<sup>304</sup> Courts either deny male inmates' privacy altogether,<sup>305</sup> or maintain only its vestiges.<sup>306</sup>

Title VII challenges to same sex supervision in women's prisons and youth facilities have resulted in different outcomes. As discussed above, courts have been quite willing to exclude male correctional officers from women's prisons and to limit cross-gender supervision by both male and female staff at youth facilities, no doubt because of their view of women and children as particularly vulnerable. Female inmates, unlike males, "retain a privacy interest in not being viewed unclothed by a person of the opposite sex."<sup>307</sup>

Decisions recognizing gender as a BFOQ are also based on the second prong of the BFOQ test. Where a prison administrator documents the psychological harm experienced by women inmates when exposed to male guards, courts will exclude males from supervisory positions in the facility.<sup>308</sup>

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301. See, e.g., *Reynolds v. New York State Dept. of Corr. Serv.*, 568 F. Supp. 747, 749 (D.C.N.Y. 1983) (*Dothard* limited to the facts of the "peculiarly inhospitable' environment of the Alabama penitentiaries characterized by 'rampant violence' and 'a jungle atmosphere'"); *Csizmadia v. Fauver*, 746 F. Supp. 483, 492 at n. 14 (D.N.J. 1990).

302. See *supra* note 301.

303. See, e.g., *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769 (S.D. Ohio 1981), *aff'd*, 779 F.2d 50 (6th Cir. 1985); *Griffin v. Michigan Dep't of Corr.*, 654 F. Supp. 690, 703 (E.D. Mich. 1982).

304. In *Griffin v. Michigan Dep't of Corrections*, the court disposed of male inmate privacy noting that "[a]ny contention by Defendants that they are entitled to the Title VII BFOQ exception on the basis of the inmates' right to privacy argument is without merit. Inmates do not possess any protected right under the Constitution against being viewed while naked by correctional officers of the opposite sex."

305. *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769, 774 (S.D. Ohio 1981) (concluding that female plaintiff had right to work as Rehabilitation Specialist in all male corrections institutions).

306. *Percy v. Allen*, 31 Fair Empl. Prac. Cas. (BNA) 1021 (Me. 1982) (female guards allowed at male prison if job tasks separated to ensure some inmate privacy); *Timm v. Gunther*, 917 F.2d 1093, 1103 (8th Cir.1990).

307. *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998). See also *Everson v. Mich. Dept. of Corr.*, 222 F. Supp. 2d 864, 893 (E.D. Mich. 2002) ("Female inmates retain the right to be protected against unwarranted intrusion by male corrections officers").

308. See *Torres*, 859 F.2d at 1524, 1532 (7th Cir. 1988) (en banc) (allowed gender as a BFOQ for guards in women's units, using a totality of the circumstances test). See *Everson*, 222 F. Supp. 2d at 892 ("What is important to the decisions in *Torres* and in *Robino* is that the prison officials, before making the change, conducted extensive studies of the prison environment and came to reasoned conclusions



This is because rehabilitation and safety for both staff and inmates are recognized goals of incarceration, and psychological harm may diminish the prospect of meeting those goals, in particular the goal of rehabilitation.<sup>309</sup>

While some courts will permit generalized findings of a need for exclusion of staff of one sex from employment, to justify a BFOQ, others require more.<sup>310</sup> In *Everson v. Michigan Department of Corrections*, for example, the court took it for granted that corrections officers' tasks in female prisons would be different based on their gender.<sup>311</sup> Nonetheless, it refused to grant the Michigan Department of Corrections (MDOC) a BFOQ for positions in female housing units because the MDOC failed to seek less restrictive means to limit contact between male corrections officers and female inmates.<sup>312</sup>

Courts have also been inclined to protect youth from cross-gender supervision. This logic mirrors the courts' analyses of claims involving female inmates. For example, the court in *Philadelphia v. Pennsylvania Human Relations Commission* excluded women from supervising males at a youth detention home.<sup>313</sup> Here, gender was considered a BFOQ because supervisors would have to gain the confidence of children in order to advise and treat them. The court reasoned that, "[t]o expect a female or a male supervisor to gain the confidence of troubled youths of the opposite sex in order to be able to alleviate emotional and sexual problems is to expect the impossible."<sup>314</sup>

Challenges to cross-gender supervision are often framed by courts as pitting inmate privacy against employment rights. However, the problem is not discrete, nor is its solution. A range of acceptable alternatives exist, and it is apparent that some states have found ways to accommodate staff employment rights while providing a modicum of dignity, privacy, and protection for inmates. States have created shifts with same gender staff<sup>315</sup> at times when

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that for particular penological reasons the female BFOQ was appropriate"). *But see* *Carl v. Angelone*, 883 F. Supp. 1433 (D. Nev. 1995) (transferring males out of female prison is not a BFOQ absent showing of harm to women by male supervision).

309. *See Torres*, 859 F.2d at 1524, 1532.

310. *See Everson*, 222 F. Supp. 2d at 893.

311. *Id.* at 893-94 (observing that "there are limitations on the scope of the tasks male corrections officers can perform," and noting problems "associated with abuses in female prisons occasioned by lax control of male corrections officers and particularly poor correctional practice such as pat-down searches by them").

312. *Id.* at 895 (covering vacancies with females, increasing female coverage where necessary with overtime, redeployment of female officers in supervisory positions).

313. 300 A.2d 97 (Pa. Cmwealth. 1973). *But see* Equal Employment Opportunity Commission, 1982 WL 21177, \*4+, 28 Fair Empl. Prac. Cas. (BNA) 1845 (E.E.O.C. Jan 19, 1982) (No. 82-4) (allowing female supervisor at group home for male youths where shifts and search policy were adjusted to accord privacy to youths).

314. *Philadelphia v. Penn. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Cmwlth. 1973).

315. *See, e.g.,* *Tharp v. Iowa Dep't. of Corr.*, 68 F. 3d 223 (8th Cir. 1995). Two male correctional officers challenged a policy that required female-only staff on certain preferred shifts. The plaintiffs would have been eligible for the positions otherwise, given their seniority. They filed suit, seeking damages for discrimination on the basis of sex in violation of Title VII and the Iowa Civil Rights Act. The court concluded that same-sex assignments "constituted minimal restriction on [male] plaintiff's employment," given their access to opportunities across the system. *Id.* at 226.

inmates are showering or dressing. They have required prisons to provide appropriate clothing, or privacy protections like screens. They have required that opposite gender staff announce their presence when entering a housing unit. States have also teamed male and female staff so they perform intrusive activities on inmates of the same gender. These are all measures that have been taken in women's prisons, and only in limited part in male prisons. The success of such programs in women's institutions suggests that they should be implemented in men's institutions.

In short, courts have privileged the privacy needs of women and children over those of men. By treating women and children as vulnerable and worthy of rehabilitation, while rejecting these notions for men, the courts reinforce the very stereotypes and inequities that Title VII was designed to eliminate. The vast majority of inmates are eventually released from prison, and all are worthy of rehabilitation, regardless of age or gender. The limited BFOQ applied to female or youth prisons can and should therefore be extended to all inmates.

#### *D. Equal Protection and Male and Female Inmate Privacy Protections*

Courts' application of the Fourteenth Amendment's Equal Protection Clause to cross-gender supervision challenges raised by male and female inmates is equally tortured and internally inconsistent. To date, there has been an invariably disappointing result for male inmates—no protection of their basic privacy interest.

Under Equal Protection analysis, courts review the constitutionality of government action under one of three standards: rational basis, heightened scrutiny, or strict scrutiny. Under rational basis analysis; the government must pursue a legitimate government objective and there must be a rational relationship between the classification and that objective.<sup>316</sup> Many government classifications are held constitutional under this test because the government's objective only needs to be plausible, not actual.

Classifications based on gender are usually reviewed under a heightened scrutiny standard.<sup>317</sup> Using a heightened scrutiny analysis, government actions must have an "exceedingly persuasive justification" to be sustained. Actions deemed "exceedingly persuasive" are based on proven data rather than stereotypes about traditional gender roles.<sup>318</sup> Government action must also be substantially related to important government interests.<sup>319</sup> Finally, strict scrutiny analysis applies where the disputed government action affects fundamental rights, such as the right to procreate and the right to family, or

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316. *Romer v. Evans*, 517 U.S. 620 (1996).

317. *United States v. Virginia*, 518 U.S. 515, 556 (1996).

318. *Id.*

319. *See United States v. Virginia*, 518 U.S. 515 (1996).

when the government makes classifications based on race or national origin.<sup>320</sup> Strict scrutiny requires the government to show that the challenged action uses narrowly tailored means to achieve compelling government interests.<sup>321</sup>

If courts employed a heightened scrutiny standard to analyze male inmates' claims that cross-gender supervision violates equal protection, it is likely they would prevail.<sup>322</sup> The government's justification for permitting cross-gender supervision of male inmates is based on the rationale that men do not experience trauma, threat, or embarrassment from routine viewing or touching of their bodies by female staff in the same way women inmates would experience that same conduct by male staff.<sup>323</sup> In other words, the government would be unlikely to meet its burden because the sole basis for female prisoners' greater "privacy protection lies in stereotypes of women that are consistent with women's traditional sex roles."<sup>324</sup> However, several courts have explicitly rejected equal protection claims in analyzing the differential treatment of male and female inmates with respect to cross-gender supervision.<sup>325</sup>

In *Colman v. Vasquez*, the District Court distinguished the jurisprudence cited by the Federal Bureau of Prisons in defense of its cross-gender pat search policy for female inmates on the ground that all of the cases cited by the government involved male inmates.<sup>326</sup> Citing a long line of cases recognizing that female inmates' privacy rights are "qualitatively different than the same rights asserted by male inmates vis-à-vis female prison guards," the court found that the female inmates in general and specifically those in *Colman* (who were participants in a sexual trauma recovery program) had greater privacy rights than male inmates.<sup>327</sup> Similarly, in *Oliver v. Scott*,<sup>328</sup> the 5th Circuit found no Equal Protection violation in permitting women inmates to have partitions and privacy screens for showering and dressing while not making similar accommodations for male inmates.<sup>329</sup> The court also found no Equal Protection violation in permitting cross-gender supervision of men, but not of women.<sup>330</sup> The *Oliver* court went even further than the *Colman* court, finding that men's

320. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

321. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

322. See generally Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Females Inmates*, 32 COLUM. HUMAN RIGHTS L. REV. 251 (2000); Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women's Prisons*, 5 TEMPLE POL. & CIV. RTS. L. REV. 1 (1995).

323. Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches* [hereinafter Miller, *Keeping the Government's Hands Off Our Bodies*], 4 BUFF. CRIM. L. REV. 861, 865 (2001).

324. *United States v. Virginia*, 518 U.S. 515, 553 (1996).

325. See *infra* note 336 and accompanying text.

326. 142 F. Supp. 2d at 230.

327. *Id.* at 230 (distinguishing this case from *Turner, Covino, Timm, Grummett, and Madyun*).

328. 276 F.3d 736 (5th Cir. 2002).

329. *Oliver*, 276 F.3d at 746.

330. *Id.* (citing varying "security concerns" as justification for cross-gender supervision).

larger population, their history of violence within and outside of the institution, and the history of finding weapons doomed any Equal Protection challenge they might raise.<sup>331</sup> These outcomes are permissible because Equal Protection analysis has been steadily eroded in the prison context. The crux of an Equal Protection claim is that similarly situated individuals are being treated differently.<sup>332</sup> In the prison context, this has meant that courts compare male and female inmates to determine if they are “similarly situated” with regard to a particular claim and then analyze whether the differential treatment can withstand the appropriate level of scrutiny.<sup>333</sup>

Because of courts’ deeply entrenched notions of maleness and femaleness, which is then grafted on to the profile of men and women in custody, male and female inmates rarely are considered “similarly situated.” For example, in *Timm v. Gunter*, male inmates asserted an equal protection violation because female inmates were afforded more privacy than males.<sup>334</sup> The court found that males were not similarly situated. Males required more security and thus less privacy than females because: (1) there were more male than female inmates; (2) males committed more severe crimes; and (3) male prisons are prone to higher rates of violence.<sup>335</sup> Although these propositions are true, the analysis tends toward circular logic because different population sizes are used to avoid comparing the sexes. Thus in the United States prison context, because of their differing populations and crime trajectories, male and female inmates will almost never be similarly situated.<sup>336</sup>

The *Timm* court failed to analyze the disparate treatment meted out to male and female inmates of the same security classification. The appropriate inquiry would find that male and female inmates “are similarly situated . . . because both groups of inmates are confined . . . as a result of criminal conviction. . . . [They] are similarly situated because the State of Nebraska and the Department of Corrections view the purpose of incarceration to be the same for all inmates

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331. *Id.* at 747.

332. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996).

333. *See, e.g.*, *Klinger v. Nebraska Dep’t of Corr.*, 107 F.3d 609 (8th Cir. 1997); *Canterino v. Wilson*, 875 F.2d 862 (6th Cir. 1989); *Women Prisoners III*.

334. 917 F.2d 1093, 1103 (8th Cir. 1990).

335. *See id.*; *see also supra* note 331 and accompanying text.

336. *See, e.g.*, *Timm* at 1103 (rejecting equal protection claim for failing to require cross-sex monitoring of women prisoners because treating the sexes differently was justified by different numbers of inmates, the severity of crimes, and frequency of inmate violence). *See also* *Klinger v. Nebraska Dep’t. of Corr.*, 107 F.3d 609 (8th Cir. 1997) (holding that female inmates in one Nebraska prison were not similarly situated to male inmates in another Nebraska prison for purposes of receiving prison programs and services); *Pargo v. Elliott*, 894 F. Supp. 1239 (S.D. Iowa 1994) (holding Iowa male and female inmates were not similarly situated for the purpose of equal protection analysis); *Women Prisoners III*, 93 F.3d 910 (D.C. Cir. 1996) (holding in part that Title IX and equal protection principles were inapplicable because male and female prisoners were not similarly situated); Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 Colum. Hum. Rts. L. R. 251, 258 (2000) (discussing doctrinal confusion arising from refusal to hear prisoner equal protection claims since *Turner*).

regardless of gender.”<sup>337</sup> Moreover, changing patterns of violence indicate that gender-based assumptions about violence are mutable. Women are being incarcerated at higher rates<sup>338</sup> and they are arrested for increasingly violent offenses.<sup>339</sup>

Post *Turner v. Safley*, courts have consistently refused to apply heightened scrutiny to prison regulations that affect constitutional and fundamental rights. The *Turner* court ruled that the appropriate judicial inquiry to determine “whether a prison regulation that burdens fundamental rights, [such as the right to privacy], is [whether the regulation is] reasonably related to legitimate penological interests.”<sup>340</sup> For example, in *Yates v. Stadler*<sup>341</sup> the court acknowledged that if there are legitimate penological interests in treating male and female prisoners differently, then they could not be similarly situated for equal protection purposes.<sup>342</sup> As a result, courts routinely permit differential treatment of men and women in prison. While this reading of the Equal Protection clause has meant that men receive less protection than women from harms associated with cross-gender supervision, it has also meant that in other instances men receive greater access to prison programming and educational and vocational opportunities.<sup>343</sup>

### III. DIGNITY AND SHAME – COURTS’ CONTRASTING VIEWS OF THE CLAIMS RAISED BY MALE AND FEMALE INMATES

Several important themes emerge from the cases addressing cross-gender supervision of male and female inmates. First, courts fundamentally see women

337. See *Klinger*, 31 F.3d at 734 (McMillan, J., dissenting).

338. The rate of incarcerated female prisoners increased from 11 in 1980 to 32 in 1990, the year *Timm* was decided. By 2000, the incarceration rate for women was 59. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2001*, at 495 (2002).

339. The number of women arrested for violent crime increased by 37 percent between 1990 and 1999. Federal Bureau of Investigation, *Crime in the United States 1999*, 217 (2000). At the same time, the number of males arrested for violent crimes during that period dropped by 15 percent. *Id.* These statistics are also deeply gendered. For example, between 1990 and 1999, the number of women arrested for crimes against family and children increased by 124 percent. *Id.* This may not reflect an increase in such crime, only an increase in police officers’ willingness to arrest women.

340. *Turner v. Safley*, 107 S. Ct. 2254, 2260 (U.S. Mo. 1987); see also *Washington v. Harper*, 494 U.S. 210, 233 (1990) (standard of reasonableness applies to fundamental rights); *Overton v. Bazzetta*, 123 S. Ct. 2162, 2167 (2003) (because the regulations bear a rational relation to legitimate penological interests, this suffices to sustain them regardless of whether respondents have a constitutional right of association that has survived incarceration).

341. 217 F.3d 332 (5th Cir. 2000).

342. *Id.* (acknowledging that if there are legitimate penological interests for treating male and female prisoners differently, then they cannot be similarly situated for equal protection purposes, but declining to assume that the conditions of confinement male prisoners complained of were legitimately imposed, and remanding for more fact-gathering).

343. While in *Timm* the failure to recognize men’s privacy rights inured to the benefit of women, the same jaundiced view of Equal Protection harmed Nebraska women in 1994. In *Klinger v. Nebraska*, the 8th Circuit found that male and female inmates were not similarly situated and denied women inmates’ challenge to Nebraska’s failure to provide equal vocational and educational programming for both sexes. 31 F.3d at 339.

and men, not just male and female inmates, as having different privacy interests.<sup>344</sup> This difference in privacy interests shapes courts' analyses and decisions on the constitutional protections due to imprisoned men and women. What men and women are due depends on their sex.

Using a language of victimization and sexual vulnerability, the courts have decided that female inmates deserve more privacy than male inmates. As discussed above, these different approaches have a ripple effect on privacy claims raised by male and female inmates under the Fourth and Eighth Amendments, the Equal Protection Clause of the Fourteenth Amendment, as well as Title VII challenges raised by male and female staff.

Courts obviously do not credit the view that men can experience trauma, threat, or embarrassment from the routine viewing and touching of their bodies by female staff in the same way that women inmates would experience that same conduct by male staff. What is not clear is whether this belief is based on notions that men do not experience the vulnerability that most people experience about nakedness solely because they are men,<sup>345</sup> or on some notion of the particular powerfulness or dangerousness of these men: that these men who are powerful or dangerous enough to violate the law cannot experience any shrinking from the mere exposure of their nudity or touching of their bodies.<sup>346</sup> It may be that courts believe that even in the prison context, where female staff wear the superficial vestiges of power and control, they are still less powerful than men, even imprisoned men.<sup>347</sup> Furthermore, the court's limited protection of male nudity could be designed to protect male inmates—and their last vestige of male power and control<sup>348</sup>—or it could be an attempt to protect female staff from the power and potency of male sexuality.<sup>349</sup> What is clear is that courts are unwilling to acknowledge the dignity claims being raised

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344. See *supra* notes 132, 135-136 and accompanying text.

345. But see *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (finding that “[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity”); see also *Iowa Dep’t of Soc. Serv. v. Iowa Merit Employment Dep’t.*, 261 N.W.2d 161 (Iowa 1977) (holding that “[i]n general, prisoners possess sensibilities to the exposure of the body and its functions approximating those of people in the free world”).

346. See *Johnson*, 69 F.3d at 149 (dismissing plaintiff’s argument that prison staff “ignored his sensibilities”).

347. See *Miller, Sex and Surveillance*, *supra* note 19, at 296, 308, 322-325 (criticizing the Supreme Court’s inconsistent guidance on surveillance and searches by opposite sex guards); see also Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, in *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 490-95 (Katharine T. Bartlett & Angela P. Harris eds., 1998) (proposing an alternative interpretation of gender difference—or sameness—by suggesting that equality between men and women be analyzed in terms of how power is distributed between them).

348. See *Miller, Sex and Surveillance*, *supra* note 19.

349. *Id.*

by male inmates in almost any context unless it relates to the privacy of their genitals—prolonged viewing and touching.<sup>350</sup>

While courts have struggled with what is due to male inmates under the Fourth Amendment's right to privacy, there has been little analysis of constitutional protections for women challenging cross-gender supervision. Courts have skirted the Fourth Amendment when women have challenged cross-gender supervision practices. Rather, the courts have chosen to frame women's complaints as violations of the Eighth Amendment's prohibition against cruel and unusual punishment. The courts have reasoned that women experience cross-gender supervision very differently than men. Acts permitted when female staff supervise male inmates are not permitted when male staff supervise female inmates. Viewing of female inmates by male staff for even brief periods of nudity is not permitted, absent appropriate clothing, privacy screens, and knock-and-announce policies. Cross-gender clothed pat searches of women inmates by male staff can violate the Eighth Amendment. To date, there has been no case outlining any circumstance, except dire emergency, where male staff would be permitted to either conduct or visually observe a strip or cavity search of female inmates.

While the courts have clearly put inmates into a box in terms of analyzing their challenges to cross-gender supervision, that box may have been of inmates' and their advocates' own making. There is a qualitative difference in the kinds of claims men and women have made challenging cross-gender supervision. Men have raised claims challenging cross-gender supervision as a violation of their privacy and dignity. They have spoken of supervision by women as humiliating and embarrassing, apparently finding it less acceptable to be under the control of a woman rather than a man. On the other hand, women inmates challenge cross-gender supervision as a practice that is damaging and destructive, exacerbating existing and past trauma experienced as children and adults. Is it that men do not have those experiences, or that in our culture and the culture of prison it is less acceptable or safe for men to express vulnerability?

Not surprisingly, advocates frame their appeals and tell their clients' stories in ways that courts can recognize and hear.<sup>351</sup> The appeals target a predominantly male and male-identified population of judges. In the process,

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350. See *supra* notes 151 & 180-181 and accompanying text (discussing cases, including *Smith*, *Hudson*, *Wilson* and *Bowling*, where the court declined to grant male plaintiffs relief for brief viewings and non-intrusive pat searches of their genitalia by female staff).

351. See Binny A. Miller, *Telling Stories About Cases and Clients: The Ethics of a Narrative*, 14 GEO. J. LEGAL ETHICS 1, 1-2 (2000) (differentiating between narratives and stories, and remarking that the several varieties of critical legal theory employ client stories to elicit sympathy and indignation at the mistreatment of a marginalized group).

court decisions directly and indirectly reaffirm constructions of harm that are not likely to challenge dominant constructions of masculinity or femininity.<sup>352</sup>

I posit that male inmates have raised these claims as dignity claims because that is the vernacular that is acceptable and available to men in the free world and in prison. The large majority of prison staff is male. The model of supervision, which depends on confinement and a high need for control, is male. Men have been socialized to detach from vulnerability, while women have been socialized to embrace and identify it. Thus, in the prison setting, male inmates will not articulate vulnerability, which is essential to the success of an Eighth Amendment claim. To do so could mean that they would become more vulnerable to abuse and retaliation from staff and other male inmates. Rape of male inmates is well documented in both popular culture<sup>353</sup> and in empirical studies.<sup>354</sup> It is well documented that staff may use inmate rape as a method of punishing and rewarding behavior in prison.<sup>355</sup> By placing the harm that male and female inmates experience into narrow constitutional boxes where men can only articulate the harm to them under the rubric of dignity, and women can only proceed from the rubric of vulnerability and shame, the courts have denied agency to both men and women to name the harm and petition the court for appropriate relief.<sup>356</sup>

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352. Interview with Meda Chesney Lind, Professor of Women's Studies at the University of Hawaii, in Maui, Haw. (Sept. 10, 2002).

353. One popular HBO television show is "Oz" (HBO television broadcast, 1997-2003). In addition to serial programs, there are several box office features centered on prison culture, notably THE SHAWSHANK REDEMPTION (Castle Rock Entertainment, 1994) and THE GREEN MILE (Castle Rock Entertainment, 1999). Both are based on short stories written by Stephen King. See [http://www.stephenking.com/past\\_movies1.html](http://www.stephenking.com/past_movies1.html).

354. See, e.g., Helen Eisenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415 (2000); Cindy Struckman-Johnson et al., *A Survey of Inmate and Staff Perspectives on Prison Sexual Assault*, presented at Midwestern Psychological Association Meeting, May 4, 1995, Chicago, Illinois; Robert W. Dumond, *The Impact and Recovery of Prisoner Rape*, presented at National Conference: "Not Part of My Penalty: Ending Prisoner Rape," Oct. 19, 2001, Washington, D.C.

355. See *supra* note 22 and accompanying text (discussing the prevalence of male rape in U.S. prisons, and the varied circumstances under which it may occur). In fact, Congress has responded to prison rape by enacting the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 117 Stat. 972 (2003). This legislation authorizes \$60 million for training and technical assistance and provides enhanced sanctions for those convicted of prison rape. The speed of passage and bi-partisan support for this legislation, when compared to the lack of support for the Custodial Sexual Abuse Act of 1998, which sought to address staff sexual abuse against primarily women inmates, supports and reinforces gendered notions of the acceptability of violence against women.

356. See generally LAW, *supra* note 7, at 187, 225. See also Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies*, at 871 ("When judges employ gendered stereotypes of men as sexually aggressive, and therefore limit the assignment of male guards within the housing units of women's prisons, they are accepting as a given that male guards are unable to respect the human dignity of women when observing them nude in the act of toileting, showering, and undressing. In accepting this duality of aggression and vulnerability, judges are not just rationalizing outcomes they can feel comfortable with on the basis of presumed traits. They are actually constructing a reality within prisons. They are ultimately writing rules around the fact that 'boys will be boys' rather than facilitating a culture change within prisons that requires male guards to conduct themselves professionally").



Similar assumptions regarding vulnerability and sexuality arise as a consequence of race. Given the disproportionate number of non-white inmates in the United States prison system,<sup>357</sup> racial bias and stereotypes create an overlay or transparency of sorts for the discourse of sexual, physical, and emotional vulnerability in penal institutions. This discourse lies at the heart of cross-gender supervision challenges. These racial transparencies color courts' views of male and female inmates' claims of the harm occasioned by cross-gender supervision. This is not surprising given the disproportionate confinement of minorities—primarily Black and Latino in United States prisons.

For example, in male prisons, studies report that sexual abuse and rape occur at higher rates between individuals of different races.<sup>358</sup> In a study of Philadelphia jails, 56% of prison rapes involved black aggressors and white victims, while no identifiable case found involving a white aggressor with a black victim.<sup>359</sup> The stereotype of men of color in institutional settings is one of sexual predation, dangerousness, and manipulation. Certainly, these men could not be raising credible claims related to the modesty and dignity interests that are damaged by cross-gender supervision.

Similarly, Black and Hispanic women face racial stereotypes of promiscuity,<sup>360</sup> untrustworthiness,<sup>361</sup> and toughness.<sup>362</sup> In fact, studies have shown that when non-white females raise claims of sexual abuse, they are not only less likely to be believed, but are also less likely to be successful in having their perpetrators punished.<sup>363</sup> These attitudes affect non-white female inmates'

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357. Dept. of Justice, Bureau of Justice Statistics: Criminal Offender Statistics, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>, last updated April 2003 (finding that the prison and jail population is 44% Black, 19% Hispanic, and 34% White).

358. See John D. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference*, 92 J. CRIM. L. & CRIMINOLOGY 127, 158-160 (2002) (explaining that race is the most polarizing force in prison populations and is the central explanation for rape and sexual abuse in prisons).

359. *Id.* at 162 n.3.

360. See Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 884-886 (1996) (developing a theory that places black women in a position of assumed promiscuity as a means of enforcing the white male's supremacy, and using white supremacy as a way of explaining why the black female is viewed as promiscuous).

361. See Meri Triades, 8 WASH. & LEE RACE & ETHNIC ANC. L. J. 35 (2002) (stating that there is a historical connection between veracity and chastity that has caused the public to question the truthfulness of black women).

362. See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 U.M.K.C. L. REV. 251, 266 (2002) (opining that race affects assumptions of vulnerability and makes the non-white female victim less likely to appear vulnerable).

363. See, e.g., Kimberle Crenshaw, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1467, 1468 (1992) (stating that juries often assume black women exaggerate the truth, and noting that assailants who attack black women are less likely to receive jail time than those who assault white women).

success in raising vulnerability claims, such as those related to harm caused by cross-gender supervision and sexual abuse.<sup>364</sup>

Hence, race operates in ways that are similar to gender with regard to vulnerability assumptions. For men of color, the difficulty lies in overcoming the stereotype of being sexual victimizers as opposed to victims; for women of color the challenge is to overcome the stereotype of promiscuity and untrustworthiness.

Both men and women have a right to expect some degree of privacy in their bodies, regardless of their penal status. While that expectation of privacy may be diminished in recognition of a prison's concern for safety and security, the state is not free to totally eviscerate the right. Some intensely private activities, such as bathing, dressing and disrobing, and using the toilet ought to be afforded some privacy rights. There is no legitimate penological reason that inmates should be observed by staff of the opposite gender during these activities. While same gender supervision does not entirely resolve these privacy concerns either, same gender supervision does begin to address many of these privacy concerns.<sup>365</sup>

There is some acknowledgement of this principle in both domestic and international law. In a recent case, *Rucker v. City of Kettering*,<sup>366</sup> a female staff member challenged her exclusion from employment in a five-day city jail facility. The court found that while gender was not a bona fide occupational qualification for performing the tasks in the jail, Ohio law nonetheless prevented Ms. Rucker from holding the position. The Ohio statute provided that same-gender staff had to perform certain duties. Similar statutes exist in other states and cover cross-gender supervision of both men and women.<sup>367</sup>

While states may vigorously contest these cases in the courts, what they do out of court as routine practice differs.<sup>368</sup> Male corrections officers express deep discomfort with cross-gender searches of women:

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364. See Devon Carbado, *Race to the Bottom*, 49 U.C.L.A. L. REV. 1283, 1301 (2002) (explaining the assumptions in the white community that unchaste black women cannot refuse the sexual advances of black men).

365. See Miller, *Sex and Surveillance*, *supra* note 19, and accompanying text (critiquing the gender-based classification as a starting point for the analysis of sexual misconduct in prison settings, and describing as myopic the current cross-gender analysis' assumption that gender is an appropriate way to measure whether certain behaviors are violative of prisoners' rights).

366. 84 F. Supp. 2d 917 (S.D. Ohio 2000).

367. See, e.g., Alaska Admin. Code tit. 22, § 05.010(b) § 05.067(c) ("a staff member of the same sex shall conduct a search" of newly admitted jail inmates; "a prisoner is subject to a strip search, by a staff member who, except under exigent circumstances, must be the same sex as the prisoner being searched"); Cal. Code Regs. tit. 15, § 1360(e) ("cross-gender supervision shall distinguish between visual supervision, pat-down searches, and more intrusive searches"); Md. Regs Code tit. 12, § 02.03.07(B)(12) ("staff members of one sex may not conduct body searches of persons of the opposite sex").

368. See *Cross-Gender Pat Search Practices: Findings From NIC Telephone Research*, NIC Prisons Division & Research Center (Jan. 1999) (detailing broad diversity in policies for pat-down searches employed at men's and women's facilities among the fifty states); Mark Matus, *September 2000 Survey of Housing Unit Staffing at Female Correctional*, Survey Prepared Pursuant to the Request

Q. And you start at the genital area; is that correct?

A. Right. You come down and you start with the crotch area here then you work your way down.

Q. And in going up into the crotch and genital area, you need to touch it to make sure there's no contraband there, correct?

A. Exactly.

Q. Did it make you feel uncomfortable because you were touching the most private areas of a woman's body?

A. I think so, I think so; at least I did. I felt very uncomfortable.

Q. But some women, you – some women felt uncomfortable?

A. I think so. I think they did. I think they felt degraded. I think they felt degraded to a certain point. I know I would. When we come into the institution, they search us coming through the gate. We feel a little degraded at that point.<sup>369</sup>

The explicit or unwritten policies of most states reflect that discomfort.<sup>370</sup> Male corrections officers offer that, more often than not, they do not thoroughly search women inmates and try not to observe women when they are undressed. Likewise, female staff report feeling embarrassed and threatened by their contact with male inmates. Yet, because they often receive little support from male corrections staff in the environment, they may overcompensate in order to hide their discomfort.<sup>371</sup> While the Standard Rules are not legally binding, they have enormous persuasive authority due to their relevance and usefulness as basic standards for humane treatment of individuals in custody. Consequently, they may gaze longer, taunt and threaten, and conduct searches that are more intrusive than they need to be in order to demonstrate their power and control over imprisoned men in order to ally themselves with their male colleagues or intimidate male inmates whom they fear.<sup>372</sup>

International law recognizes the inherent threat to the human rights and dignity of inmates in cross-gender interactions by providing the "Standard

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of the Honorable Avern Cohn, Judge of the U.S. District Court, Eastern District of Michigan, Re: *Everson v. Michigan Dept. of Corrections* (Oct. 3, 2000) [hereinafter *September 2000 Survey*] (apprising the judge of the fact that only four states—Hawaii, Nevada, South Carolina and Georgia—responded affirmatively when asked whether housing units at women's facilities were limited to female corrections officers only). The study does note, however, that thirty-one states have at least *some* gender-specific assignments in women's facilities, including urine analysis collection, doctor appointments, and positions requiring strip searches and transportation runs. *Id.*

369. Deposition of Officer Kenneth Heard, in *Nunn v. Michigan Dept. of Corrections*, 1997 U.S. Dist. LEXIS 22970 (No. 96-CV-71416).

370. See *September 2000 Survey*, *infra* note 368 and accompanying text.

371. See Miller, *Sex and Surveillance*, *supra* note 19, at 296, 300-309 (examining hierarchies of dominance and submission through words and conduct); see also MacKinnon at 490-95 (proposing an alternative interpretation of gender difference—or sameness—by suggesting that equality between men and women be analyzed in terms of how power is distributed between them).

372. See e.g., MELISSA S. HEBERT, *Amazons and Butterflies*, in CAMOUFLAGE ISN'T ONLY FOR COMBAT: GENDER, SEXUALITY AND WOMEN IN THE MILITARY 26-54 (1998).

Rules for the Minimum Treatment of Prisoners.”<sup>373</sup> Both Article 1 of the Declaration against Torture and Article 1 of the U.N. Convention against Torture exclude from the definition of torture “lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners”<sup>374</sup> The U.S. is a signatory to the Torture Convention and bound by the Standard Rules to the extent that they are referenced in the Convention. In addition to the prohibition against torture or other ill-treatment [of prisoners], the International Covenant on Civil and Political Rights [provides] that prisoners are to be ‘treated with humanity and respect for the inherent dignity of the human person.’”<sup>375</sup> The Standard Rules, which are by their definition minimal standards that the world’s nations should be expected to meet regardless of material resources,<sup>376</sup> directly address cross-gender supervision and provide that men and women shall be supervised in sensitive settings like showers, toilets, housing units, and transportation for medical visits by staff of the same gender.<sup>377</sup> The United States has received harsh international criticism in recent years for its failure to follow the Standard Rules for the Minimum Treatment of Prisoners.<sup>378</sup> Many human rights organizations believe cross-gender supervision increases the vulnerability of inmates to sexual abuse by staff.<sup>379</sup> The fact that many nations, poor or rich, more developed or less developed, more progressive or more conservative than the United States follow the Standard Minimum Rules with regard to cross-gender supervision is persuasive evidence that following these Rules is both possible and preferable.<sup>380</sup>

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373. E.S.C. Res. 663(c), U.N. ESCOR (1957), available at [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm).

374. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 278 (2d. ed. 1999).

375. *Id.* The American Convention on Human Rights has the same language except that it omits “humanity.”

376. *Id.* at 279-281.

377. *See* G.A. Res. 663(c), U.N. ESCOR. at paras. 53(1) – 53(3).

378. *See supra* notes 120-27 and accompanying text.

379. *Id.*

380. *See also* Lei de Execução Penal, Art. 77 § 2 (Brazil) (providing that female prisoners must be supervised by women); C.C.R.A., § 49(3) (Can.) (requiring same gender searches), cited in LOUISE ARBOUR, COMMISSION OF INQUIRY INTO CERTAIN EVENTS AT THE PRISON FOR WOMEN IN KINGSTON 58 (1996), but see *Weatherall v. Canada*, (1990) 1 F.C. 85 (importance of allowing women in corrections field outweighs male inmates’ privacy interest). *See also* Minister of Justice, Decree on Regulations of the Imprisonment, Art. 4 § 1 (Dec. 21, 1999) (Czech Republic) (searches shall be performed by person of same sex as the inmate); *see also* Council of Europe, Recommendation of the Committee of Ministers to Member States on the European Prison Rules, No. R (87) 3, at III § 62 (Feb. 12, 1987) (“appointment of staff in institutions or parts of institutions housing prisoners of the opposite sex is to be encouraged”), available at <http://cm.coe.int/ta/rec/1987/word/87r3.doc>, and David Ramsbotham, *Women in Prison: A Thematic Review* by the HM Chief Inspector (July 2000), available at <http://www.homeofficer.gov.uk/hmipris/wippref.htm> (reporting that male staff in UK prisons are not permitted to search female prisoners or observe them in residential situations); HUMAN RIGHTS WATCH, *THE WOMEN’S RIGHTS PROJECT*, 5 (1998) (noting that Venezuelan law prohibits cross-gender supervision); HUMAN RIGHTS WATCH, *PUNISHMENT BEFORE TRIAL: PRISON CONDITIONS IN VENEZUELA*, 5 (1997) (observing that searches of female visitors are conducted by female guards); *But see* HUMAN RIGHTS WATCH, *CUBA’S REPRESSIVE MACHINERY* n.40 (1999) (documenting Cuba’s

## IV. CONCLUSION

How do we extricate ourselves from the bonds of culture, habit, history, and socialization? How can we acknowledge the history of violence against women, both inside and outside prisons, and at the same time recognize the basic human need to strive for dignity, regardless of our physical or social circumstances? How do we clearly see male and female inmates' experience through the multiple transparencies of gender, race, and class? Finally how do we enhance women's opportunities as workers without subjecting inmates to further dehumanization and degradation as a result?

The answer to these questions is found most clearly in the language of human rights. International human rights principles can provide an analytical framework and supply concrete solutions to the problem of cross-gender supervision. Conversely, as described above, domestic courts have narrowly applied available Equal Protection, Fourth Amendment and Eighth Amendment jurisprudence to constrict the rights of both male and female inmates. Moreover, the domestic trend of narrowing privacy rights in the prison context while expanding them in the public sphere<sup>381</sup> is simply inconsistent, particularly under a dignity based approach to the construction of rights. An acknowledgment of the innate dignity of each person, regardless of gender would assist in this project. These notions are at the root of international human rights law<sup>382</sup> and have been acknowledged, albeit in dissent, by courts that have considered the issue of cross-gender supervision.

In *Jordan v. Gardner*, arguing that the Fourth Amendment prohibited the cross-gender searches of female inmates, Judge Reinhardt opined that "while privacy is the primary interest underlying the Fourth Amendment, that amendment also protects persons against infringements of bodily integrity, and personal *dignity* (emphasis added). The court refers to these interests together as 'dignitary interests.'"<sup>383</sup> Likewise, arguing that male inmates privacy rights should not automatically yield to the employment rights of female staff, Judge Posner argued, "[w]e must not exaggerate the distance between 'us' the lawful one, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration."<sup>384</sup>

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problems with cross-gender supervision and attendant abuse). See also COMMISSION ON HUMAN RIGHTS, SITUATION OF HUMAN RIGHTS IN HAITI, §§ 44-45, 52nd Sess. E/CN.4/1996/94 (1996) (documenting Haiti's problems with cross-gender supervision).

381. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 123 S. Ct. 2742. But see *Gerber v. Hickman*, 537 U.S. 1039 (2002); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990).

382. See Art. 1, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (providing "[a]ll human beings are born free and equal in dignity and rights").

383. See *Jordan v. Gardner*, 966 F.2d 1521, 1534 at n.7 (9th Cir. 1993) (Reinhardt, J. dissenting).

384. *Johnson v. Phelan*, 69 F.3d at 152.

While our constitutional jurisprudence is impoverished and conflicted in this respect, there is a rich body of law in international human rights jurisprudence that could assist us. In particular, international human rights law focuses on the dignity of each person.<sup>385</sup> Such an approach would allow for either same or different treatment based on need rather than the relatively immutable characteristic of sex. Under this construct, women could receive greater privacy because of need or because of a history of victimization and men could receive privacy because of their basic humanity without resorting to the constitutional contortions currently necessary. Thus, the Standard Rules for the Minimum Treatment of Prisoners, which provides for supervision of inmates by staff of the same gender, recognize the need of both men and women to be protected from the viewing of their naked or unclothed bodies by correctional staff of the opposite gender. These rules, based on human rights principles, focus not on vulnerability but on the right to dignity.

Yet, a critique of adopting the approach of the Standard Rules for the Minimum Treatment of Prisoners in this country is that our history is different and that our existing laws narrow the scope and application of international law in this context. The most obvious statutory impediment to same sex supervision of inmates is Title VII. In the early days of women's entry into corrections, the only way that women could move up the ladder was through work in maximum security male facilities which were seen as the "proving ground" for advancement to higher level positions. This reason sounds very similar to the arguments made about the advancement of women in the military and the stalled advancement of women because they had not served in combat positions. In reality women in corrections, like women in the military, have the necessary skills to advance without serving in all male facilities. The privacy rights of inmates should not be abridged in order to accommodate discriminatory employment practices in correctional settings.

At the same time, both male and female corrections staff should have the right to work in any facility they choose and for which they are qualified. My argument is not that they should be totally precluded, but that they should be limited to positions that do not abridge the basic privacy rights of inmates. If the basic premise is that each person, regardless of their penal status, is entitled to a basic modicum of dignity including the ability to control the view of their body and their performance of basic bodily functions, then the rights of inmates as persons, albeit with more limited privacy rights, is reconcilable with the employment rights of correctional staff. This is a modest concession and would place same sex staff in housing units, in situations where searches occur, and on medical visits and transportation of prisoners. That leaves a range of other

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385. See generally, *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) (1976) (entered into force Mar. 23, 1976); U.N. Convention against Torture, G.A. Res. 39/46 (1984).

jobs and positions in correctional institutions for both male and female staff and provides flexibility for corrections administrators to meet these goals in creative ways, including the pairing of male and female staff in sensitive areas, enforcement of knock and announce policies, appropriate clothing, privacy screens, and schedule changes that permit same gender supervision of sensitive area on particular shifts.

I propose these solutions not because they are perfect, but because they are the best and most humane solutions in an explicitly coercive and dehumanizing environment.<sup>386</sup>

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386. *See generally* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977) (1975) (exploring the historical birth and rise of the penitentiary); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971) (exploring the nature and creation of penitentiaries for criminals, asylums for the mentally ill, almshouses for the poor, orphanages for homeless children and reformatories for delinquent youth post 1820 in the United States).

## APPENDIX A

A: They came up for rounds and Lieutenant Brinson stayed, but Lieutenant Alexander left and Lieutenant Brinson and Officer Rivers was talking. So then he came back there and got the key –

Q: Slow down a little bit. You say he came back and got the key, who do you mean?

A: Lieutenant Brinson got the key and unlocked our gate where the girls was housed at . . . .

Q: And what did he do when he came to the area where you were?

A: He locked Trina Brown and Angel down and left me out.

Q: And what happened next?

A: Then Angela Collins' tray came for breakfast and the detail gave her her tray but then she refused it and Lieutenant Brinson said if she don't want to eat, then she don't have to. Then he told – ordered Officer Rivers to go call down to the kitchen.

Q: Did Officer Rivers do that?

A: Yeah.

Q: Did he leave the unit?

A: He left the post of the infirmary.

Q: And was the post of the infirmary where you were at, at that time?

A: Yes.

Q: What happened after Officer Rivers left the unit?

A: Lieutenant Brinson asked me to come here and I came to see what he wanted. He was by the door, by the gate on the wall.

Q: And what happened next?

A: He started feeling me through my jumpsuit.

Q: Did he say anything prior to doing that?

A: No.[sic] He just started feeling me through my jumpsuit and –

Q: Excuse me. Go on.

A: And then he pulled his – he unzipping his pants. Then –

Q: Hold on. I'm going to slow this down a little bit. He was feeling you through your jumpsuit. Could you describe for the court what you were wearing at that time?

A: I was wearing a nice shirt that the infirmary gave me and a jumpsuit that was tied around my waist.

Q: And you stated that he touched you in between your legs. Did he touch you anywhere else?



A: And on my breasts. He was just feeling on them. He was feeling on my private area.

Q: Now, did he say anything as he touched you?

A: No.

Q: Were there any other staff around?

A: No.

Q: Were there any other inmates around?

A: No.

Q: Now, what happened after that?

A: Then he took his penis out of his pants.

Q: And what did he say?

A: And he told me that if I tell anybody watch what happens.

Trial Transcript at 1-76 to 1-78, *Women Prisoners v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994) (No. 93-2052(JLG)).

