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## Cross-Gender Supervision in Prison and the Constitutional Right of Prisoners to Remain Free from Rape

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# CROSS-GENDER SUPERVISION IN PRISONS AND THE CONSTITUTIONAL RIGHT OF PRISONERS TO REMAIN FREE FROM RAPE

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## ABSTRACT

A variety of state, federal, and international laws theoretically prohibit sexual abuse of prisoners by the guards hired by the state to oversee them. Nevertheless, sexual abuse of female prisoners by male prison guards is a rampant phenomenon that the law has thus far failed to remedy. Cross-gender supervision policies exacerbate the problem by placing women in situations in which they have no escape from their attackers. These policies, which are as dangerous for some prisoners as they are humiliating to all prisoners, have generally withstood scrutiny in courts.

This note attempts to reframe the arguments challenging cross-gender supervision policies and proposes a more narrowly tailored constitutional claim against them. Clearly establishing the causal link between cross-gender supervision policies and custodial sexual abuse could convince courts to enjoin prisons from hiring male guards to oversee female prisoners in contact positions. Such a result would hopefully both stem the tide of sexual abuse in prisons while simultaneously improving conditions of confinement for female prisoners by restricting prisons from adopting these degrading policies.

## INTRODUCTION

*The sadistic abuse and sexual humiliation by American soldiers at Abu Ghraib prison has shocked most Americans — but not those of us familiar with U.S. jails and prisons. In American prisons today, wanton staff brutality and degrading treatment of inmates occur across the country with distressing frequency. . . . Both men and women prisoners — but especially women — face staff rape and sexual abuse.*<sup>1</sup>

*[P]ermitting male correctional employees to pat down women contributes to the problem of sexual degradation of women in prison and heightens the risk of staff sexual abuse.*<sup>2</sup>

Multiple international laws and treaties prohibit cross-gender supervision. For example, Article 17 of the International Covenant of Civil and Political Rights provides that all people have a right to privacy,<sup>3</sup> a provision that some people interpret as prohibiting cross-gender pat-frisk searches in prisons.<sup>4</sup> The United Nations has encouraged all member nations to implement its Standard Minimum Rules for the Treatment of Prisoners.<sup>5</sup> Rule 53(3) of the Standard Minimum Rules states that “[w]omen prisoners shall be attended and supervised only by women officers.”<sup>6</sup> Strangely, in the same year that

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1. Jamie Fellner, Esq., Commentary, *Prisoner Abuse: How Different are U.S. Prisons?*, HUMAN RIGHTS WATCH, May 14, 2004, <http://hrw.org/english/docs/2004/05/14/usdom8583.htm>.

2. Letter from Jamie Fellner, Director, U.S. Program Human Rights Watch, to Jeanne Woodford, Director, California Department of Corrections (Dec. 9, 2004), available at <http://hrw.org/english/docs/2004/12/16/usdom9906.htm>.

3. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171, 177.

4. Letter from Jamie Feller, Director, U.S. Program Human Rights Watch, to Jeanne Woodford, Director, California Department of Corrections, *supra* note 2.

5. G.A. Res. 3144, U.N. GAOR, 28th Sess., Supp. No. 30, at 85, U.N. Doc. A/9425 (Dec. 14, 1973).

6. United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) [hereinafter *UN Standard Minimum Rules*]. The United Nations has also stated that prison guards should only perform body searches on prisoners of the same sex. *Compilation of General Comment and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/Rev. 3, gen'l cmt. 18 (Aug. 15, 1997).

the United Nations expanded the scope of these policies,<sup>7</sup> the prevalence of cross-gender supervision<sup>8</sup> in both male and female prisons in the United States began to increase.<sup>9</sup> Today, all federal and state prisons allow prison guards to supervise prison inmates of the opposite sex.<sup>10</sup> According to Amnesty International, seventy percent of federal prison guards are men<sup>11</sup> and forty-one percent of guards in the average state correctional center who work with female inmates are men.<sup>12</sup>

The extent to which prison guards may observe or search opposite-sex inmates varies from prison to prison throughout the United States.<sup>13</sup> Some prisons limit observation of opposite-sex inmates to “infrequent and casual observation, or observation at a distance,”<sup>14</sup> while others allow observation of inmates while dressing, showering, and using the toilet.<sup>15</sup> Some prisons have allowed prison

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7. E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) (extending Standard Minimum Rules to “persons arrested or imprisoned without charge”).

8. For the purposes of this note, the phrase *cross-gender supervision* refers generally to any prison policy that allows prison guards to observe or search prison inmates of the opposite sex, whereas the phrase *cross-gender surveillance* specifically refers to prison policies that allow prison guards to observe inmates while sleeping, dressing, showering, using the toilet, and in any other state of undress. Unless stated otherwise, the latter phrase refers to those policies that allow cross-gender surveillance without requiring a second guard of the opposite sex to be present.

9. Martin A. Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 MARGINS 175, 177-78 (2002); James B. Jacobs, *The Sexual Integration of the Prison Guard's Force: A Few Comments on Dothard v. Rawlinson*, 10 U. TOL. L. REV. 389, 389 (1979).

10. CORRECTIONAL SERVICE OF CANADA, FEDERALLY SENTENCED WOMEN INITIATIVE: CROSS-GENDER STAFFING IN FSW FACILITIES (Mar. 11, 2005), [http://www.csc-scc.gc.ca/text/prgrm/fsw/fsw30/fsw30e05\\_e.shtml](http://www.csc-scc.gc.ca/text/prgrm/fsw/fsw30/fsw30e05_e.shtml).

11. Amnesty International, *Women's Human Rights: Women in Prison*, <http://www.amnestyusa.org/women/womeninprison.html> (last visited Apr. 20, 2007).

12. AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 51-52 (1999), available at <http://web.amnesty.org/library/Index/engAMR510011999>. Kansas, California, and Idaho had the highest percentage of male guards working with female prisoners at seventy-two percent in Kansas and sixty-six percent in California and Idaho. *Id.*

13. See Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 49, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999).

14. *Grummet v. Rushen*, 779 F.2d 491, 494-95 (9th Cir. 1985).

15. Coomaraswamy, *supra* note 13, ¶¶ 63, 97; see also *Hill v. McKinley*, 311 F.3d 899, 902-04 (8th Cir. 2002) (holding that male guards who transferred a naked female pre-trial detainee down a hallway and “strapped her to [a] restrainer board face-down, naked, and in a spread-eagle position” did not violate prisoner’s Fourth Amendment rights); *Johnson v. Phelan*, 69 F.3d 144, 150-51 (7th Cir. 1995) (holding a female guard’s observation of a nude male inmate to be constitutional); *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990) (holding a female guard’s observation of nude male inmates to be constitutional).

guards to conduct pat-frisks of clothed inmates of the opposite sex,<sup>16</sup> while others have allowed guards to observe and to conduct strip searches<sup>17</sup> and body-cavity searches<sup>18</sup> of opposite-sex inmates.

Although these policies are often humiliating to prison inmates of both sexes, cross-gender supervision can have particularly traumatizing effects on female prisoners. Various studies estimate that forty to eighty-eight percent of female prisoners have histories of sexual or physical abuse.<sup>19</sup> Female prisoners with a history of sexual abuse are often more fearful of male guards,<sup>20</sup> are more traumatized by cross-gender supervision and searches,<sup>21</sup> and become more vulnerable to sexual assaults while incarcerated.<sup>22</sup> In addition to being degrading, cross-gender supervision in women's prisons greatly increases the frequency of sexual abuse against female prisoners.<sup>23</sup>

Sexual assault is virtually a part of everyday life in women's prisons.<sup>24</sup> Although women comprise only seven percent of the state prison population, forty-six percent of sexual abuse victims in state prisons are women.<sup>25</sup> Because women constitute the fastest-growing

16. *Jordan v. Gardner*, 986 F.2d 1521, 1522 (9th Cir. 1993) (holding random pat-frisks of female inmates by male guards unconstitutional); see also *Gunter*, 917 F.2d at 1099-1100 (holding pat-frisk of male inmates by female guards to be constitutional); *Madyun v. Franzen*, 704 F.2d 954, 957 (7th Cir. 1983) (holding that a pat-frisk of a male inmate by a female guard did not violate prisoner's First Amendment rights).

17. *Canedy v. Boardman*, 16 F.3d 183, 184, 189 (7th Cir. 1994) (reversing dismissal of a male inmate's constitutional challenges to strip search conducted by a female guard); *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (addressing a male inmate's Fourth and Eighth Amendment challenges to an outdoor strip search observed by several female guards).

18. *Elliott v. Morgan*, 111 Fed. Appx. 345, 346 (5th Cir. 2004) (holding that male prisoner had no clearly established Fourth Amendment right to remain free from routine cross-gender body-cavity searches); *Somers v. Thurman*, 109 F.3d 614, 616, 620 (9th Cir. 1997) (holding that male inmate had no constitutional right to privacy that prohibited female guards from subjecting him to regular body-cavity searches); *Bonitz v. Fair*, 804 F.2d 164, 169, 173 (1st Cir. 1986) (holding that female inmates had a Fourth Amendment right to remain free from unhygienic body-cavity searches conducted by female officers in the presence of male guards).

19. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 753 (2005).

20. See *id.* at 754.

21. Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338-39 (1998).

22. *Id.*

23. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1 (1996), available at <http://hrw.org/reports/1996/Us1.htm>.

24. See AMNESTY INTERNATIONAL, *supra* note 12; Coomaraswamy, *supra* note 13 at ¶ 59; HUMAN RIGHTS WATCH, *supra* note 23; see also *infra* Part II.

25. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 210333, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 8 (2005), available at <http://www.ojp>

segment of the United States prison population,<sup>26</sup> one can only expect the frequency of sexual abuse against female prisoners to rise. Nevertheless, the unfortunate truth is that in most circumstances female inmates will never have the opportunity to make their voices heard in court. In some situations victims will not report abuse for fear of retaliation.<sup>27</sup> In other situations local politics may prevent bringing attackers to justice.<sup>28</sup> Furthermore, prison inmates often face legal barriers to gaining access to the courts, such as the Prison Litigation Reform Act, which restricts the kinds of cases that inmates can litigate.<sup>29</sup> Lack of resources and ignorance of their rights may also prevent some inmates from accusing their attackers or from seeking relief in the courts.

Even in those circumstances when an inmate does have the opportunity to bring her case before a court, few inmates prevail on constitutional challenges to any kind of condition of confinement. Both male and female prison inmates have challenged sexual assault and cross-gender supervision policies on Fourth, Eighth, and Fourteenth Amendment grounds with little success.<sup>30</sup> Female inmates challenging custodial sexual abuse in prisons often face the additional and often insurmountable challenge of proving their claims in court.<sup>31</sup> Part III addresses challenges that prison inmates have made under the Fourth, Eighth, and Fourteenth Amendments and the obstacles that prisoners face when litigating them. Because prison inmates are

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.usdoj.gov/bjs/pub/pdf/svrca04.pdf (collecting data on prison rape pursuant to the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15603 (Supp. IV 2005)).

26. JOHN IRWIN, VINCENT SCHIRALDI & JASON ZIEDENBERG, AMERICA'S ONE MILLION NONVIOLENT PRISONERS 7(1999), available at <http://www.justicepolicy.org/downloads/onemillionnonviolentoffenders.pdf>; see also U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 175688, WOMEN OFFENDERS 6 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> (finding that the population of women involved in corrections had grown forty-eight percent between 1990 and 1998, as opposed to twenty-seven percent for the male population).

27. See Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 227 (2003).

28. Although *U.S. v. Lanier* did not deal with sexual abuse in the prison context, it is a good example of local politics standing in the way of justice for victims of sexual abuse. In *Lanier*, federal prosecutors had to bring charges of sexual assault against a state judge because the state district attorney who had jurisdiction over the case was the defendant's brother. *U.S. v. Lanier*, 33 F.3d 639, 646 (6th Cir. 1994); Joy Ward, *The Judge Who Got Off*, ON THE ISSUES: THE PROGRESSIVE WOMEN'S Q., Fall 1996, <http://www.ontheissuesmagazine.com/f96judge.html> ("Nothing happened in Dyer County that the Laniers could not control.").

29. 42 U.S.C. § 1997(e) (Supp. IV 2005).

30. See Buchanan, *supra* note 19, at 759; see also *infra* Part II.

31. See Laderberg, *supra* note 21, at 326-29 (arguing that a single female prisoner often cannot satisfy the evidentiary requirements of an Eighth Amendment suit without testimony from other inmates regarding custodial sexual abuse).

a politically unpopular group with limited access to the courts and limited success there, new proposals for legal challenges to conditions of confinement are important to remedy the inhumane treatment of prisoners.

Female prisoners have had marginally better success than male prisoners in challenging cross-gender supervision and searches in prisons.<sup>32</sup> Strangely, female prisoners have had much *less* success challenging repeated sexual abuse perpetrated by prison guards.<sup>33</sup> The limited successes of female prisoners in court thus far have unfortunately done little to end the practice of cross-gender supervision nationwide.<sup>34</sup> Because cross-gender supervision policies lead to an increase in the frequency of sexual abuse against female prisoners,<sup>35</sup> challenging these specific policies may indirectly lead to a corresponding decrease in sexual abuse of prisoners.

Some prisons, recognizing that cross-gender supervision violates prisoners' rights and poses a danger to those prisoners' mental and physical health, have unilaterally decided to restrict access of prison guards to opposite sex prisoners.<sup>36</sup> Other prisons have reached the same result but out of concern for the safety of female guards and not out of concern for the rights of prisoners.<sup>37</sup> Both situations have generated much litigation from prison guards under Title VII of the Civil Rights Act of 1964.<sup>38</sup> The Supreme Court decided such a case in *Dothard v. Rawlinson*, the only Supreme Court case to recognize a bona fide occupational qualification (BFOQ) to Title VII.<sup>39</sup> Although the Supreme Court allowed the prison in *Dothard* to discriminate against female prison guards, the stream of litigation continued, encouraging prison systems to implement cross-gender supervision policies.<sup>40</sup>

32. See *infra* Part III.

33. See *infra* Part III.

34. CORRECTIONAL SERVICE OF CANADA, *supra* note 10.

35. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1 (1996), available at <http://hrw.org/reports/1996/Us1.htm>.

36. E.g., *Everson v. Michigan Dep't. of Corr.*, 391 F.3d 737, 739-40, 753 (6th Cir. 2004) (finding a female bona fide occupational qualification for a women's prison notorious for "rampant" sexual abuse).

37. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 335-37 (1977).

38. 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, 12 (2000).

39. *Dothard*, 433 U.S. at 335-37 (allowing a male prison system to discriminate against women in hiring practices).

40. The topic of discriminatory employment practices in the prison setting lies beyond the scope of this note, but it is worth mentioning because much Title VII litigation in this area touches upon prisoners' privacy rights. More importantly, as the legal system addresses the civil rights of prisoners, it must also consider the employment rights of female

This note proposes a theory of the law that would help to reduce both custodial sexual abuse and cross-gender supervision policies. Recognition of a constitutional right to remain free from sexual abuse from one's prison guards opens the door to new challenges to the constitutionality of cross-gender supervision of female prison inmates. Part I discusses the problem of custodial sexual abuse in women's prisons and how it relates to cross-gender supervision. Part II analyzes the constitutional challenges to cross-gender supervision that prisoners have raised over the past thirty years. Part III explains how the Eighth and Fourteenth Amendments give rise to the right of prison inmates to remain free from rape by prison guards. Part IV argues that female prisoners can challenge not only sexual abuse but also cross-gender surveillance in prisons as violating these rights. This part further discusses the changes in prison policies that would result if female prisoners were able to successfully litigate these constitutional claims.<sup>41</sup> Holding prisons and prison administrators liable whenever prison guards sexually abuse prisoners would pressure prisons and legislatures to abandon cross-gender surveillance policies, thereby preventing future instances of sexual abuse before they occur. Successful litigation of such claims would reduce the frequency of sexual assaults in women's prisons and would lead to restrictions on the degrading practice of cross-gender supervision.

### I. SEXUAL ASSAULT IN WOMEN'S PRISONS

Multiple factors increase the frequency of rape in women's prisons. Poor training of prison guards and abandonment of rehabilitation goals also increase the frequency of prison rape,<sup>42</sup> as do failures to investigate and prosecute prison rape.<sup>43</sup> Overcrowding of prisons and an inability to sufficiently staff prisons to oversee large

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prison guards and find some way to accommodate those rights without degrading inmates or putting inmates in harm's way. For a discussion of the clash that cross-gender supervision creates between two different feminist values (support of equal employment versus protecting women from sexual abuse), see Ashlie E. Case, Case Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309 (2005). See also Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327 (1985); Mary Ann Farkas & Kathryn R.L. Rand, *Female Correctional Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995 (1997); Ingram, *supra* note 38.

41. See *infra* Part IV.B.

42. See Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 427 (2005).

43. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 471-72 (2003).



populations serve to exacerbate the problem.<sup>44</sup> Professor of Correctional Law James Robertson has noted that "the very layout of many prisons renders their architecture an accessory to rape" by making detection of sexual attacks difficult.<sup>45</sup>

The increased implementation of cross-gender supervision policies has also led to an increase in sexual assaults.<sup>46</sup> Pursuant to the Prison Rape Elimination Act of 2003, the Bureau of Justice Statistics compiled data on prison rape for 2004; although these statistics do not report the percentage of custodial sexual abuse cases in which male guards abuse female prisoners, they do imply a high percentage of cross-gender sexual abuse incidents.<sup>47</sup> In local jails throughout the United States, seventy percent of victims of custodial sexual misconduct were women, whereas sixty-five percent of the perpetrators were male guards.<sup>48</sup> State prisons present a different situation, in which thirty-one percent of such victims were female and thirty-three percent of the perpetrators were male.<sup>49</sup> This lower percentage makes more sense when one considers that local jails have almost double the percentage of female inmates as state prisons.<sup>50</sup>

Sexual abuse of female prisoners by male guards has long been a problem in the United States. As early as 1869, prison reformers were campaigning for remedies to this problem.<sup>51</sup> Indiana established the first separate women's prison in 1874, and by 1940 almost half of the United States had separate prison facilities for women.<sup>52</sup> In these separate facilities, all the guards were female.<sup>53</sup> After the 1972 Congress amended the Civil Rights Act of 1964, prisons again began hiring prison guards to supervise opposite-sex inmates.<sup>54</sup> This sudden onset of cross-gender supervision prompted many male prisoners to file lawsuits, but the "less litigious and outspoken" population

44. Barrett, *supra* note 42, at 427.

45. Robertson, *supra* note 43, at 472-73.

46. See HUMAN RIGHTS WATCH, *supra* note 23, at 20-22.

47. BUREAU OF JUST. STAT., *supra* note 25, at 8.

48. *Id.*

49. *Id.*

50. U.S. DEPT OF JUST., BUREAU OF JUST. STAT., NCJ 208801, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 5, 8 (2005), available at <http://www.ojp.usdoj.gov/bjs/abstract/pjim04.htm> (reporting that women constituted 12.3% of the local jail population but only 6.9% of the state and federal prison population in 2004; figures for 2003 were 11.9% and 6.9%).

51. Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281, 282 (2000).

52. *Id.*

53. *Id.*

54. 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, 21 (1999).

of female prisoners created less litigation.<sup>55</sup> The next section addresses some of these challenges.

## II. CONSTITUTIONAL CHALLENGES TO CROSS-GENDER SUPERVISION

United States case law makes challenges to both cross-gender supervision policies and custodial sexual abuse extremely difficult for prisoners to litigate successfully. Although the Supreme Court has never addressed whether cross-gender supervision violates the constitutional rights of prisoners,<sup>56</sup> almost every federal court of appeals has heard at least one case in this area. Male prisoners have initiated the majority of litigation challenging the constitutionality of cross-gender supervision.<sup>57</sup> This section analyzes the Fourth, Eighth, and Fourteenth Amendment claims that inmates have raised against cross-gender supervision and sexual assault.

### A. Fourth Amendment Claims

Although courts normally decide Fourth Amendment<sup>58</sup> claims according to a strict scrutiny standard,<sup>59</sup> the Supreme Court has created a less strenuous test in the prison context.<sup>60</sup> Outside the prison context, courts follow a two-part test to determine the constitutionality of a search.<sup>61</sup> Courts ask (1) whether the defendant had a subjective expectation of privacy and (2) whether that expectation of privacy is one that society is reasonably willing to recognize.<sup>62</sup> In the prison context, courts follow the same test but afford great deference to prison officials and will find a violation of a prisoner's Fourth Amendment rights only if the infringement is not "reasonably related to legitimate penological interests."<sup>63</sup> Applying this test involves consideration of four factors:

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55. HUMAN RIGHTS WATCH, *supra* note 23, at 21.

56. The Court has refused to hear four such cases. Jennifer Weiser, *The Fourth Amendment Rights of Female Inmates to be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31, 41 n.67 (2002).

57. Smith, *supra* note 27, at 246.

58. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

59. *Katz v. United States*, 389 U.S. 347, 354-55 (1967).

60. *Turner v. Safley*, 482 U.S. 78, 87 (1986).

61. *Katz*, 389 U.S. at 351-52.

62. *Id.*

63. *Turner*, 482 U.S. at 89.

- (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest asserted to justify it;
- (2) the existence of alternative means for inmates to exercise their constitutional rights;
- (3) the impact that accommodation of these constitutional rights may have on other guards and inmates, and on the allocation of prison resources; and
- (4) the absence of ready alternatives as evidence of the reasonableness of the regulation.<sup>64</sup>

Although the Supreme Court has recognized that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison,"<sup>65</sup> prisoners have had little success in challenging cross-gender supervision under this more deferential standard. This section categorizes these challenges based on the apparent severity of the intrusion imposed on prisoners.

### 1. Cross-Gender Pat Frisks

The Seventh Circuit heard one of the first Fourth Amendment challenges to any kind of cross-gender supervision of prisoners in *Madyun v. Franzen* in 1983.<sup>66</sup> In *Madyun*, the complainant, a male prisoner, refused to allow a female prison guard to pat-frisk him because his Islamic faith prohibited such a search.<sup>67</sup> The Seventh Circuit Court of Appeals held that such a search was reasonably related to the substantial state interests of ensuring security within the prison and of providing equal employment rights to female prison guards.<sup>68</sup>

The Eighth Circuit reached a similar result in *Timm v. Gunter*.<sup>69</sup> Although the court did not specifically cite the Fourth Amendment, it held that neither cross-gender pat-frisks<sup>70</sup> nor cross-gender surveillance<sup>71</sup> violated prisoners' rights to privacy. The Ninth Circuit held

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64. *Cornwell v. Dahlberg*, 963 F.2d 912, 917 (6th Cir. 1992) (summarizing the test established by the Supreme Court in *Turner*, 482 U.S. at 89-91).

65. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (holding that body-cavity searches do not violate prisoners' Fourth Amendment rights).

66. 704 F.2d 954 (7th Cir. 1983).

67. *Id.* at 956.

68. *Id.* at 960. In so deciding, the Court referenced *dicta* from a similar case in which a male inmate from the same prison challenged the constitutionality of cross-gender pat-frisks under the Eighth Amendment. See *Smith v. Fairman*, 678 F.2d 52, 53-54 (7th Cir. 1982).

69. 917 F.2d 1093 (8th Cir. 1990).

70. *Id.* at 1099-1101.

71. *Id.* at 1101-02.

cross-gender pat-frisks to be unconstitutional in *Jordan v. Gardner*, but it did so regarding an especially broad pat-frisk regulation and based its decision on the Eighth Amendment rather than the Fourth Amendment.<sup>72</sup> The Fourth Amendment therefore appears to be of no avail to prisoners challenging cross-gender pat-frisk searches.

## 2. Cross-Gender Surveillance and Strip-Searches

Most federal Courts of Appeals have addressed the constitutionality of cross-gender surveillance and strip searches. Two of the first federal cases challenging cross-gender surveillance of naked inmates came before the Fourth Circuit Court of Appeals in the early 1980s.<sup>73</sup> Both involved situations in which prison medical staff deprived the plaintiff of clothes following a suicide attempt.<sup>74</sup> In *Lee v. Downs*, male prison guards restrained the plaintiff while a female nurse removed her clothing.<sup>75</sup> The plaintiff in *Downs* also raised Fourth and Fourteenth Amendment claims against the prison for a vaginal search conducted by a female nurse while male guards physically restrained her.<sup>76</sup> In *Fisher v. Washington Metropolitan Area Transit Authority*, prison officials placed a pre-trial detainee, naked, in an isolation cell for fifteen hours, during which time she heard male prison guards making derogatory comments about her appearance.<sup>77</sup> In both cases, the Court of Appeals acknowledged that prisoners should not have to expose their genitals involuntarily to members of the opposite sex but qualified that acknowledgement with the words “[w]hen not reasonably necessary.”<sup>78</sup> In *Lee*, the court held that the first violation of privacy was unnecessary<sup>79</sup> but that the second, the vaginal search in the presence of male guards, was reasonably necessary because male guards were stronger and therefore could more easily restrain the “big and strong” inmate.<sup>80</sup> Furthermore, the nurse conducted the search after the inmate had removed and burned the paper gown provided her by the prison, and the Court therefore callously reasoned that “[s]ince her genital area was already in full view

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72. See *infra* text accompanying notes 130-31.

73. *Fisher v. Wash. Metro. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981).

74. *Fisher*, 690 F.2d at 1136; *Lee*, 641 F.2d at 1118-19.

75. *Lee*, 641 F.2d at 1119.

76. *Id.*

77. *Fisher*, 690 F.2d at 1136.

78. *Id.* at 1142 (holding that “involuntary exposure in a state of nakedness to members of the opposite sex [is constitutionally prohibited] unless that exposure was reasonably necessary in maintaining . . . legal detention”); *Lee*, 641 F.2d at 1119.

79. *Lee*, 641 F.2d at 1119-20.

80. *Id.* at 1120-21.

of the two male guards, it was not an horrendous additional invasion of her right of privacy that they restrained her limbs while the female nurse conducted the search.”<sup>81</sup> In essence, conducting the vaginal search in front of male guards was reasonable because the prisoner had removed her own clothes, reasoning that appears disturbingly similar to blaming the victim.

The Fifth Circuit Court of Appeals has held multiple times that cross-gender surveillance is constitutional.<sup>82</sup> In at least two cases, the Sixth Circuit has held that female prison guards do not violate male prisoners’ Fourth Amendment rights by observing strip searches.<sup>83</sup> The Seventh Circuit has held in favor of male prisoners regarding cross-gender strip searches but not regarding cross-gender surveillance.<sup>84</sup> As noted above, the Eighth Circuit held in *Timm v. Gunter* that female prison guards did not violate the Fourth Amendment rights of male prisoners by supervising them from a distance in various states of undress.<sup>85</sup> The Eight Circuit also held in favor of prison guards in *Hill v. McKinley*, in which male guards who transferred a naked female pre-trial detainee down a hallway and “strapped her to [a] restrainer board face-down, naked, and in a spread-eagle position.”<sup>86</sup>

The Ninth Circuit has addressed cross-gender supervision of naked inmates on numerous occasions. That court first recognized the privacy right of individuals “to shield one’s unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex” in *York v. Story*.<sup>87</sup> In *Grummet v. Rushen*, the court of appeals found that allowing female guards to watch male inmates while dressing, showering, and using the toilet was not a constitutional violation

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81. *Id.* at 1121.

82. *Tasby v. Lynaugh*, 123 Fed.Appx. 614 (5th Cir. 2005) (holding that a strip search of a male prisoner in front of female guards was not a constitutional violation); *Sinclair v. Stalder*, 78 Fed.Appx. 987 (5th Cir. 2003) (holding that female supervision of male inmates is constitutional); *Oliver v. Scott*, 276 F.3d 736, 744-45 (5th Cir. 2002) (holding that prisoners’ rights to bodily privacy were minimal and that cross-gender surveillance of naked prisoners is constitutional); *Barnett v. Collins*, 940 F.2d 1530 (5th Cir. 1991) (holding cross-gender surveillance of showering prisoners to be constitutional).

83. *Cornwell v. Dahlberg*, 963 F.2d 912, 916-17 (6th Cir. 1992) (reversing jury verdict in favor of a prisoner whom prison guards had strip-searched in front of several female correctional officers); *Roden v. Sowders*, 84 Fed. Appx. 611 (6th Cir. 2003) (affirming summary judgment in favor of a female prison guard who had observed and allegedly laughed at the strip search of a prisoner).

84. See *infra* notes 147-51 and accompanying text.

85. 917 F.2d 1093, 1101-02 (8th Cir. 1990).

86. *Hill v. McKinley*, 311 F.3d 899, 901-02 (8th Cir. 2002).

87. 324 F.2d 450, 455 (9th Cir. 1963) (holding that a police officer violated a woman’s constitutional rights by photographing her nude and distributing the pictures to other police personnel).

because this viewing was restricted to “infrequent and casual observation, or observation at a distance.”<sup>88</sup> In *Michenfelder v. Sumner* the Ninth Circuit Court of Appeals ruled against a male prison inmate because the presence of a female guard at one of his routine strip searches was an isolated incident and because all other female supervision was limited.<sup>89</sup> Conversely, in *Sepulveda v. Ramirez* the Court of Appeals ruled in favor of a female parolee who filed a civil rights suit after a male parole officer entered the bathroom stall where the parolee was producing a urine sample.<sup>90</sup> That case is of little use to prison inmates because, as the court stated, “the constitutional rights of parolees are . . . more extensive than those of inmates.”<sup>91</sup> Also, at least one federal district court has called even these limited holdings into question, claiming that the Court acknowledged the right to bodily privacy in those cases because it felt obligated to condemn such “obviously offensive” searches.<sup>92</sup>

The Eleventh Circuit acknowledged the existence of a limited bodily privacy right in prisons in *Fortner v. Thomas* but refused to address whether prison regulations that violated that right were constitutional under *Turner*.<sup>93</sup> The Eleventh Circuit Court of Appeals recently reaffirmed that prisoners possess a limited bodily privacy right in *Boxer X v. Harris* but again refused to address the merits of the prisoner’s Fourth Amendment claim.<sup>94</sup> At least one Eleventh Circuit district court has held that cross-gender surveillance of nude prisoners does not violate the Fourth Amendment.<sup>95</sup>

### 3. Cross-Gender Body Cavity Searches

The Supreme Court upheld the constitutionality of body-cavity searches generally in *Bell v. Wolfish*,<sup>96</sup> but it has never addressed cross-gender body cavity searches. At least four federal courts of appeal have addressed prisoners’ challenges to prison policy allowing guards to conduct body-cavity searches of opposite sex inmates. The

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88. 779 F.2d 491, 494-95 (9th Cir. 1985).

89. 860 F.2d 328 (9th Cir. 1988).

90. 967 F.2d 1413, 1415-16 (9th Cir. 1992) (deciding case under Fourteenth Amendment protections of bodily privacy); *see also infra* Part III.C.

91. *Sepulveda*, 967 F.2d at 1416.

92. *Hansen v. Cal. Dep’t. of Corr.*, 920 F.Supp. 1480, 1496-99 (N.D. Cal. 1996).

93. *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993).

94. 437 F.3d 1107, 1110-11 (11th Cir. 2006).

95. *Sinkfield v. Culliver*, No. Civ.A. 03-0432-WS-M, 2005 WL 2665348, at \*6-8 (S.D. Ala. Sept. 28, 2005), *adopted*, 2005 WL 2665354 (holding that female guards’ viewing male prisoners in shower did not violate Fourth Amendment).

96. 441 U.S. 520, 558 (1979).

Fifth<sup>97</sup> and Ninth<sup>98</sup> Circuits have upheld these policies regarding male prisoners, and the Fourth Circuit held in *Lee v. Downs* that having male guards restrain a female inmate during a body-cavity search can be reasonable and therefore constitutional.<sup>99</sup> The First Circuit Court of Appeals reached a different result in *Bonitz v. Fair*, in which nine female prisoners challenged a series of body-cavity searches performed in the presence of male prison guards.<sup>100</sup> However, the circumstances of the searches in *Bonitz* were particularly heinous in that they were disturbingly unhygienic, were performed by guards instead of medical staff, involved repeated groping instead of mere visual inspection, and did not make special provisions for one plaintiff who was menstruating at the time.<sup>101</sup> In upholding the lower court's denial of the defendants' motion for summary judgment, the Court of Appeals based its decision almost entirely on the unreasonably intrusive and unhygienic nature of the search involved, mentioning the presence of male guards only in passing.<sup>102</sup> In short, there appears to be no case law indicating that cross-gender body-cavity searches are *per se* unconstitutional under the Fourth Amendment.

### *B. Eighth Amendment Claims*

The Eighth Amendment's prohibition of "cruel and unusual punishments"<sup>103</sup> has been "even less effective" than the Fourth Amendment for prisoners challenging cross-gender supervision policies.<sup>104</sup> Under the Supreme Court's current conditions-of-confinement jurisprudence, a condition of confinement violates an inmate's Eighth Amendment rights if (1) it inflicts an injury that is "sufficiently serious"<sup>105</sup> and (2) the injury to the prisoner is "unnecessary and wanton"<sup>106</sup> and committed with "deliberate indifference" to inmate health or safety.<sup>107</sup> Deliberate indifference is behavior beyond "mere negligence" but requires a mental state less than knowledge or purpose that harm will result.<sup>108</sup>

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97. *Elliott v. Morgan*, 111 Fed. Appx. 345 (5th Cir. 2004).

98. *Somers v. Thurman*, 109 F.3d 614, 620 (9th Cir. 1997).

99. *Lee v. Downs*, 641 F.2d 1117, 1120-21 (4th Cir. 1981).

100. 804 F.2d 164, 165, 173 (1st Cir. 1986).

101. *Id.* at 169.

102. *Id.* at 172-73.

103. U.S. CONST. amend. VIII.

104. *Jurado*, *supra* note 54, at 35.

105. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

106. *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

107. *Id.* (quoting *Seiter*, 501 U.S. at 302-03).

108. *Id.* at 835.

The most startling failure of Eighth Amendment jurisprudence is its failure to protect prisoners from conditions of confinement that result in sexual assault. Although courts may enter a verdict in favor of sexual abuse victims against a specific guard,<sup>109</sup> they typically will not do so against prisons, prison administrators, or communities that adopt policies that lead to sexual abuse.<sup>110</sup> In *Farmer v. Brennan* the Supreme Court addressed a situation in which a prison policy created a substantial risk of sexual assault.<sup>111</sup> The plaintiff in *Farmer* was a male-to-female transgender person incarcerated in the United States Penitentiary in Terre Haute, Indiana, an all-male prison, where another inmate beat and raped her within two weeks of her transfer to the general population.<sup>112</sup> The plaintiff challenged the conditions of her confinement, claiming that her placement in the general population of a prison with a history of inmate assaults constituted deliberate indifference to her safety.<sup>113</sup> In holding for the defendants, the Court adopted a subjective test of deliberate indifference under which a prison official violates a prisoner's constitutional rights only if the official actually knows that the inmate is at significant risk and nevertheless disregards that risk<sup>114</sup> "by failing to take reasonable measures to abate it."<sup>115</sup> Although the Court did recognize in *Farmer* "that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment,"<sup>116</sup> this standard makes Eighth Amendment challenges to sexual abuse in prisons almost impossible to litigate successfully.<sup>117</sup> The Third,<sup>118</sup> Fifth,<sup>119</sup> Sixth,<sup>120</sup> Ninth,<sup>121</sup> and Tenth<sup>122</sup> Circuits have all denied such

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109. See, e.g., *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (holding that "severe or repetitive sexual abuse of an inmate by a prison officer can be 'objectively, sufficiently serious' enough to constitute an Eighth Amendment violation").

110. Compare *Carrigan v. Davis*, 70 F. Supp. 2d 448, 452-53 (D. Del. 1999) (holding that prison guard's sexual intercourse with plaintiff was a *per se* violation of the Eighth Amendment) with *Carrigan v. Delaware*, 957 F. Supp. 1376 (D. Del. 1997) (holding that the same plaintiff did not establish deliberate indifference of prison officials).

111. 511 U.S. 825, 829 (1994).

112. *Id.* at 829-30.

113. *Id.* at 831.

114. *Id.* at 837-39.

115. *Id.* at 847.

116. Prison Rape Elimination Act, 42 U.S.C.A. § 15601 (West 2005) (citing *Farmer*).

117. Laderberg, *supra* note 21, at 330; see also Dinos, *supra* note 51, at 282-85 (analyzing the difficulties women face in litigating Eighth Amendment claims).

118. *Beers-Capitol v. Whetzel*, 256 F.3d 120, 125 (3d Cir. 2001).

119. *Downey v. Denton County, Tex.*, 119 F.3d 381, 383 (5th Cir. 1997).

120. *Long v. McGinnis*, 97 F.3d 1452 (6th Cir. 1996).

121. *Fernandez v. San Francisco*, 124 Fed.Appx. 581 (9th Cir. 2005).

122. *Barney v. Pulsipher*, 143 F.3d 1299, 1303 (10th Cir. 1998); *Hovater v. Robinson*, 1 F.3d 1063, 1064 (10th Cir. 1993). But see *Gonzales v. Martinez*, 403 F.3d 1179, 1180-81



claims by female litigants. Some courts also refuse to recognize sexual harassment as an Eighth Amendment violation.<sup>123</sup>

The Tenth Circuit's treatment of sexual assault in *Hovater v. Robinson* is particularly relevant to this note. The plaintiff in *Hovater* sued the county and the county sheriff for violations of her Eighth and Fourteenth Amendment rights after a male prison guard raped her.<sup>124</sup> The plaintiff argued that the sheriff had actual knowledge of the risk inherent in leaving male guards alone with female inmates because the prison had a policy against such supervision.<sup>125</sup> Although the Court recognized that the prison guard had violated the plaintiff's constitutional rights, it rejected her argument that the sheriff had knowledge of the risk and therefore ruled against her.<sup>126</sup> The court held that the policy against cross-gender supervision was in place for the protection of *prison guards* from fraudulent complaints and not for the protection of inmates against actual harms.<sup>127</sup> The Court further held that a decision in the inmate's favor would "require the conclusion that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone."<sup>128</sup>

In *Farmer*, the Court stressed that the Eighth Amendment only applies to "punishments" and not to "conditions,"<sup>129</sup> and the Eighth Amendment has indeed proven virtually impotent to protect prisoners subjected to cross-gender supervision conditions. One of the

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(10th Cir. 2005) (holding that plaintiff inmate raised a genuine issue of material fact regarding county sheriff's knowledge of a substantial risk of sexual assault).

123. See, e.g., *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding that female prison guards did not violate the Eighth Amendment by coercing male prisoners to undress and masturbate for the guards' entertainment); *Freitas v. Ault*, 109 F.3d 1335, 1338-39 (8th Cir. 1997) (holding that sexual harassment could constitute an Eighth Amendment claim but ruling against the prisoner because he had "tacitly admitted that he bore some responsibility for" their sexual relationship); *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997) (recognizing that sexual abuse can constitute an Eighth Amendment violation but rejecting plaintiff's claims because the alleged verbal harassment and sexual touching were not "objectively, sufficiently serious"); *Adkins v. Rodriguez*, 59 F.3d 1034, 1035-36 (10th Cir. 1995) (ruling in favor of defendant prison guard who had made sexual comments to plaintiff inmate and had entered her cell while she was sleeping); *Ornelas v. Giurbino*, 358 F. Supp. 2d 955, 963 (S.D. Cal. 2005) ("Plaintiff cannot state an Eight[h] Amendment claim on alleged verbal sexual harassment."); *Minifield v. Butikofer*, 298 F. Supp. 2d 900, 903 (N.D. Cal. 2004) (holding that a "prisoner may state an Eighth Amendment claim under § 1983 for sexual harassment only if the alleged harassment was sufficiently harmful, that is, a departure from the 'evolving standards of decency that mark the progress of a maturing society,' and the defendant acted with intent to harm the prisoner").

124. *Hovater*, 1 F.3d at 1064-66.

125. *Id.* at 1068.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

few successes in this area occurred in *Jordan v. Gardner*, in which female prison inmates challenged the Washington Correction Center for Women's policy requiring male prison guards to conduct random, non-emergency clothed pat-frisks of female inmates.<sup>130</sup> The Ninth Circuit held that this policy violated the inmates' Eighth Amendment rights because it created "unnecessary and wanton infliction of pain."<sup>131</sup>

### C. Fourteenth Amendment Claims

The Fourth and Eighth Amendments have proven ineffective at protecting prisoners from sexual assault and from degrading and often dangerous cross-gender supervision policies. Prisoners have met with equal failure when claiming protection under the Fourteenth Amendment, but this section argues that these suits result in failure only because prisoners claim a general right to privacy under the Fourteenth Amendment instead of a more specific right to remain free from bodily intrusions.

The Supreme Court has interpreted the Fourteenth Amendment to include an implicit right to privacy. The Supreme Court first explicitly recognized this general right to privacy in *Griswold v. Connecticut*,<sup>132</sup> although tacit recognition of such a right by the Court arguably extends as far back as 1891.<sup>133</sup> In *Griswold* the Court held that the right to privacy arose from penumbras of the Bill of Rights and not from the due process clause of the Fourteenth Amendment.<sup>134</sup> Less than a decade later, the Court again recognized the right to privacy in *Roe v. Wade* but held that the source of that right was the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action."<sup>135</sup> The right to privacy protects interests in "avoiding disclosure of personal matters" and "independence in making certain kinds of important decisions."<sup>136</sup> Although the Court has not defined the full reach of the substantive due process right to privacy,<sup>137</sup> it stated in *Roe*<sup>138</sup> that the right protects decisions

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130. 986 F.2d 1521, 1522-23 (9th Cir. 1993).

131. *Id.* at 1524. However, the district court narrowly tailored its injunction to prohibit only "routine or random clothed body searches of female inmates which include touching of and around breasts and genital areas[] by male corrections officers." *Id.* at 1531.

132. 381 U.S. 479, 484 (1965) (holding that the general right to privacy exists in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments).

133. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

134. *Griswold*, 381 U.S. at 484.

135. 410 U.S. 113, 153 (1973).

136. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

137. *Carey v. Population Services, Int'l.*, 431 U.S. 678, 685 (1977).

138. *Roe*, 410 U.S. at 152-53 (citations omitted).

regarding "marriage,<sup>139</sup> procreation,<sup>140</sup> contraception,<sup>141</sup> family relationships,<sup>142</sup> and child rearing and education."<sup>143</sup> The Court has also recognized in recent years that the right extends to the right to refuse medical treatment<sup>144</sup> and the right to engage in certain intimate sexual conduct.<sup>145</sup> Against this backdrop of privacy rights, prison inmates have achieved little success when challenging cross-gender supervision policies as violating their Fourteenth Amendment rights. Most appellate courts address prisoners' privacy rights with respect to the Fourth Amendment,<sup>146</sup> but the Seventh Circuit has specifically addressed prisoners' rights to bodily integrity under the Supreme Court's substantive due process jurisprudence.

In 1994, the Seventh Circuit addressed a male inmate's constitutional challenge to cross-gender strip searches in *Canedy v. Boardman*.<sup>147</sup> The plaintiff, Canedy, alleged that two female prison guards strip-searched him, violating his right to privacy.<sup>148</sup> The Court held that Canedy had rights to privacy and bodily integrity under the Supreme Court's substantive due process jurisprudence, rights that specifically protected him against unreasonable and unwanted exposure of his naked body to members of the opposite sex.<sup>149</sup>

One year later, the Seventh Circuit distinguished cross-gender strip-searches from cross-gender surveillance in *Johnson v. Phelan*.<sup>150</sup> In *Phelan*, the court held that the plaintiff's substantive due process right to privacy did not prohibit female guards from monitoring him while showering and using the toilet.<sup>151</sup>

The Ninth Circuit has also recognized a right to privacy in one's body. In *York v. Story* the Court of Appeals held that police officers violated the plaintiff's Fourteenth Amendment right to privacy when they photographed her in indecent positions against her objections

139. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

140. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

141. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

142. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

143. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

144. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).

145. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

146. *See supra* Part II.A.

147. 16 F.3d 183, 184 (7th Cir. 1994).

148. *Id.* Canedy also challenged the prison's policy of allowing female guards to monitor prisoners in various states of undress and while showering and defecating. *Id.*

149. *Id.* at 185-86.

150. 69 F.3d 144, 145 (7th Cir. 1995).

151. *Id.* at 145-47.

and distributed the photographs throughout the office.<sup>152</sup> The Court refused to extend that protection to prisoners in *Grummet v. Rushen*.<sup>153</sup>

In these cases and in cases addressing prisoners' Fourth Amendment rights to privacy, prisoners have alleged only a general right to privacy. Focusing a court's attention on the right to remain free from rape makes prisoners' claims appear more reasonable and makes prison practices appear less reasonable. The following sections address the existence of such a constitutional right and how prisoners can apply that right to obtain injunctive relief from cross-gender supervision.

### III. THE CONSTITUTIONAL RIGHT OF PRISONERS TO REMAIN FREE FROM RAPE

Many state legislatures have passed laws explicitly giving inmates a statutory right to remain free from rape by prison guards,<sup>154</sup> but plaintiffs can also challenge cross-gender supervision policies under 42 U.S.C. § 1983 by claiming a constitutionally protected right to remain free from rape. The Eighth Amendment's prohibition of cruel and unusual punishments and the Fourteenth Amendment's guarantee of bodily integrity both support the notion that female prisoners have a constitutionally protected right to remain free from rape at the hands of prison guards.

First, a number of courts have reached the somewhat obvious conclusion that prison guards violate the Eighth Amendment when they sexually assault prison inmates.<sup>155</sup> These decisions fall in line with the even broader right recognized by the Supreme Court in *Farmer v. Brennan* that prison guards can be held liable for deliberate indifference to rapes perpetrated by other inmates.<sup>156</sup> Furthermore,

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152. 324 F.2d 450, 455 (9th Cir. 1963).

153. 779 F.2d 491, 494 (9th Cir. 1985); *see also supra* Part II.A.

154. GENERAL ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF 3 (1999).

155. *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (holding that "the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault, and no reasonable prison guard could possibly have believed otherwise"); *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (holding that sufficiently serious sexual abuse by prison guards can constitute an Eighth Amendment violation); *Women Prisoners of the Dist. of Columbia Dep't of Corr. v. Dist. of Columbia*, 877 F.Supp. 634, 665 (D.D.C. 1994) ("Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1970)), *aff'd in part and modified in part*, 899 F.Supp. 659 (D.D.C. 1995).

156. *Farmer*, 511 U.S. at 833 (holding that "gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objectiv[e]") (internal

the Supreme Court held in *Hudson v. McMillian* that a guard's use of excessive physical force against a prison inmate can be a violation of the Eighth Amendment even if the use of such force leaves minimal physical injuries.<sup>157</sup> These cases make clear that female prison inmates have an Eighth Amendment right to remain free from sexual assault while in prison.<sup>158</sup>

The Fourteenth Amendment also provides support for the notion that all United States citizens, including prisoners, have a right to remain free from rape at the hands of government officials. In *Ingraham v. Wright*, the Supreme Court held that the Fourteenth Amendment protected the right to remain free from "unjustified intrusions on personal security," including "freedom from bodily restraint and punishment."<sup>159</sup> The Supreme Court has not explicitly held whether this Fourteenth Amendment guarantee of bodily integrity includes a right to remain free from rape by public officials,<sup>160</sup> although it decided a case concerning such facts in 1997 in *U.S. v. Lanier*.<sup>161</sup>

In *Lanier*, the Court considered the conviction of a state judge under 18 U.S.C. § 242 for "criminally violating the constitutional rights of five women by assaulting them sexually while [he] served as a state judge."<sup>162</sup> The Sixth Circuit Court of Appeals initially upheld the conviction,<sup>163</sup> but upon rehearing *en banc*, the Court reversed that decision.<sup>164</sup> In so reversing, the Court held that sexual assault could not be a constitutional violation because the Supreme Court had not yet held as such.<sup>165</sup> The Supreme Court reversed, holding that a specific constitutional right could exist absent a Supreme Court ruling recognizing such a right under fundamentally similar facts.<sup>166</sup> In effect, the Court gave lower courts considerably more discretion in recognizing constitutional rights. Since the Court passed down that decision, at least three Courts of Appeals have held that

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quotations omitted).

157. *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

158. Nevertheless, as stated above, female prisoners rarely are able to litigate such claims successfully. See *supra* Part III.C.

159. 430 U.S. 651, 673-74 (1977).

160. *Rogers v. City of Little Rock*, 152 F.3d 790, 795 (8th Cir. 1998).

161. 520 U.S. 259, 262 (1997).

162. *Id.*

163. *U.S. v. Lanier*, 33 F.3d 639, 645 (6th Cir. 1994).

164. *U.S. v. Lanier*, 73 F.3d 1380, 1394 (6th Cir. 1996).

165. *Id.* at 1388.

166. *Lanier*, 520 U.S. at 268-70.

the Fourteenth Amendment includes a right to remain free from sexual assault by public officials.<sup>167</sup>

Even before *Lanier*, some courts addressed the question of whether such a right exists in specific contexts. In *Doe v. Taylor Independent School District*, the Fifth Circuit held that the right of students to remain free from sexual assault by their teachers existed and was clearly established as early as 1987.<sup>168</sup> The Third Circuit also had held that students have a right to remain free from sexual assault by public officials prior to the Supreme Court's holding in *Lanier*.<sup>169</sup> In summary, ample precedent supports the notion that all citizens have a right to remain free from sexual assault, a right that female prisoners can raise in civil rights actions against the prison officials incarcerating them.

#### IV. ELIMINATING CROSS-GENDER SUPERVISION IN PRISONS

Shifting the focus of cross-gender supervision challenges to the right to remain free from rape by public officials has two benefits. The first benefit is that this shift necessitates analyzing prisoners' claims under a standard that is less deferential to prison administrators. The second benefit is that prisoners can use this theory to challenge cross-gender supervision policies because these policies create substantially higher rates of sexual assault.<sup>170</sup>

##### A. *The Standard of Review*

One of the difficulties that inmates face when raising any constitutional challenge is the overwhelming deference granted to prison

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167. *Alexander v. DeAngelo*, 329 F.3d 912, 916 (7th Cir. 2003) (holding that "rape committed under color of state law" violates the right to bodily integrity and "is therefore actionable under 42 U.S.C. § 1983 as a deprivation of liberty without due process of law"); *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795-96 (8th Cir. 1998) (collecting cases in support of their recognition of the "the due process right to be free of unwelcome 'sexual fondling and touching or other egregious sexual contact' by a police officer acting under color of law"); *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir. 1997) (holding that rape by a police officer violated the victim's substantive due process right "not to be subjected by anyone acting under color of state law to the wanton infliction of physical harm").

168. 15 F.3d 443, 455 (5th Cir. 1994) (recognizing a student's "substantive due process right to be free from sexual abuse and violations of her bodily integrity").

169. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989).

170. If female prisoners were able to successfully litigate such claims, male prisoners might be able to challenge cross-gender supervision in male correctional facilities under the theory that such policies violate the Equal Protection clause. Analysis of such an argument lies beyond the scope of this note.

administrators under *Turner v. Safley*<sup>171</sup> and *Farmer v. Brennan*.<sup>172</sup> Challenging male supervision of female prisoners as creating an atmosphere tolerant to the deprivation of these women's right to remain free from rape would either invoke a stricter standard of review or would increase the inmate's chances of success under the *Turner v. Safley* framework.

One should first note that the *Turner v. Safley* framework may be inapplicable when the deprived right is narrowly defined as the right to remain free from rape by public officials. In *Johnson v. California*, an equal protection case, the Supreme Court chose to forego the *Turner* framework and subjected the prison practice at issue to strict scrutiny review.<sup>173</sup> The court stated that the *Turner* framework was only applicable to those rights that are "inconsistent with proper incarceration."<sup>174</sup> Cases in which courts have applied the *Turner* framework in the past are distinguishable because in those cases the prisoners alleged a violation of a general right to privacy rather than a specific, narrow privacy right that is not inconsistent with incarceration.<sup>175</sup> Asserting that prisoners lose their right to remain free from rape by public officials upon entering a prison or that this right is "inconsistent with proper incarceration" are difficult arguments to make.

Even if a court were to apply the *Turner* test to cross-gender supervision practices, the prisoners' claims would withstand such scrutiny.<sup>176</sup> The first factor considered by courts under the *Turner* test is whether the policy is "'reasonably related' to legitimate penological objectives."<sup>177</sup> Cross-gender supervision policies appear to serve only one legitimate penological purpose, that of assuring equal employment in prisons.<sup>178</sup> However, because the Court held in *Dothard* that prisons have no obligation to provide jobs for opposite-sex prison guards,<sup>179</sup> courts must question the strength and validity of this interest.

171. 482 U.S. 78, 89-91 (1987).

172. 511 U.S. 825, 834 (1994).

173. *Johnson v. California*, 543 U.S. 499, 502, 515 (2005).

174. *Id.* at 510 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)) (internal quotation marks omitted).

175. *See supra* Part III.

176. The four factors courts consider when applying the *Turner* test are listed *supra* text accompanying note 64.

177. *Turner v. Safley*, 482 U.S. 78, 87 (1987).

178. *See, e.g., Sinclair v. Stalder*, 78 Fed. Appx. 987, 989 (5th Cir. 2003); *Somers v. Thurman*, 109 F.3d 614, 619 (9th Cir. 1997); *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995); *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990).

179. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

Second, female prisoners have no alternative means by which to exercise their right to remain free from rape.<sup>180</sup> In fact, because the right to remain free from rape is a negative freedom rather than a positive right, one cannot truly *exercise* it at all. The right to remain free from rape is by its very nature a binary right, one that a prisoner either has or does not have.

Ending or limiting cross-gender supervision policies would assuredly have a “ripple effect” on prison populations,<sup>181</sup> but that effect would be a highly positive one. Such elimination or limitation would allow female prisoners to live free from fears of sexual violence at the hands of male guards. The only negative effect of ending or limiting cross-gender supervision policies is that it could lead to a drop in the number of jobs available to women in the prison system if legislatures chose to abandon such policies in both female and male prison facilities.<sup>182</sup> Nevertheless, the government’s duty to protect prisoners’ Eighth Amendment rights surely outweighs any obligation it may have to preserve jobs for female prison guards.

Finally, easy, obvious alternatives exist to cross-gender supervision policies that accommodate female prisoners’ rights to remain free from rape.<sup>183</sup> For example, prisons could accommodate these rights and still satisfy security concerns by instituting policies that substantially limit the access of male prison guards to female prisoners to include only distant supervision.<sup>184</sup> Prisons could also choose only to hire guards of the same sex as the prisoners.<sup>185</sup> The fact that some prisons have adopted such policies in the past serves as evidence that these policies are both obvious and relatively easy to implement.

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180. See *Turner*, 482 U.S. at 90 (“A second factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates.”).

181. See *id.* (“When accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”).

182. Because men constitute a disproportionate percentage of the prison population, women would have fewer employment opportunities in prison administration if the government excluded them from working in male facilities. See BUREAU OF JUST. STAT., *supra* note 50, at 5, 8.

183. See *Turner*, 482 U.S. at 90 (“Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.”).

184. See, e.g., *Grummet v. Rushen*, 779 F.2d 491, 494-95 (9th Cir. 1985).

185. See, e.g., *Everson v. Michigan Dep’t of Corr.*, 391 F.3d 737, 739-40 (6th Cir. 2004); *UN Standard Minimum Rules*, *supra* note 6 (“Women prisoners shall be attended and supervised only by women officers.”).



*B. Ending Cross-Gender Supervision in Women's Prisons*

In *Helling v. McKinney*, the Supreme Court held that a prisoner could sue for an injunction under the Eighth Amendment to prevent injuries before they happened.<sup>186</sup> The Court refused to distinguish between current harms suffered by prisoners and harms that prisoners would suffer in the future if they did not receive relief.<sup>187</sup>

Before granting injunctive relief to a prisoner, he must show not only that his present conditions of confinement create a risk but that the risk is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate."<sup>188</sup> Plaintiffs can easily satisfy this part of the analysis since rape is without question an unspeakable crime of violence that society does not tolerate.<sup>189</sup>

The primary hurdle for a female inmate requesting such an injunction would be proving the causal link between cross-gender supervision policies and the risk of rape at the hands of male prison guards. The Tenth Circuit in *Hovater v. Robinson* expressed a fear that holding prison administrators responsible for harms resulting from cross-gender supervision would imply that all male guards pose a danger to the bodily integrity of all female inmates.<sup>190</sup> While the proposition that *all* men would inevitably sexually assault female inmates if given the chance is clearly false, leaving male guards alone with female inmates is sufficiently dangerous to warrant an injunction against such practices.

Some studies from the 1990s address this causal link and reach the conclusion that the risk is severe, but they fail to provide rigorous statistical evidence supporting this conclusion.<sup>191</sup> In at least one class action suit, the plaintiffs showed the risks of psychological and other harms inherent in cross-gender supervision through expert testimony.<sup>192</sup> Similar expert testimony could prove fruitful for plaintiffs attempting to show the risk of rape inherent in such supervision. In

186. 509 U.S. 25, 33 (1993).

187. *Id.*

188. *Id.* at 36.

189. See, e.g., *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting) ("Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity."); see also *Farmer v. Brennan*, 511 U.S. 825, 853 (1994) (Blackmun, J., dissenting).

190. *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993).

191. See AMNESTY INTERNATIONAL, *supra* note 12; Coomaraswamy, *supra* note 13, at 15; HUMAN RIGHTS WATCH, *supra* note 23.

192. *Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993).

some class action suits, plaintiffs have met their burden of proof through the testimony of numerous prison inmates regarding rapes at the hands of guards.<sup>193</sup> Such testimony would also bolster plaintiffs' claims when seeking an injunction against cross-gender supervision policies.

Finally, statistical evidence bolsters the claims of female inmates seeking injunctions against cross-gender supervision. First, although it is by no means dispositive, one should note that ninety-nine percent of those arrested or convicted of rape are male,<sup>194</sup> and male staff are reportedly the perpetrators of "the overwhelming majority of complaints of sexual abuse by female inmates against staff."<sup>195</sup> These statistics at the very least imply that same-sex supervision policies pose a lesser risk than cross-gender supervision policies. Second, pursuant to the Prison Rape Elimination Act of 2003, the Bureau of Justice Statistics of the United States Department of Justice must provide a "comprehensive statistical review and analysis of the incidence and effects of prison rape."<sup>196</sup> Although the first report under this statute sheds little light on the causes of prison rape,<sup>197</sup> future reports may provide more information that plaintiffs could use to show the effects of cross-gender supervision on the frequency of prison rape.

Assuming that a plaintiff or class of plaintiffs meets the burden of proving that cross-gender supervision policies lead inevitably (or at least are a substantial factor that leads to) the rape of female inmates, correct application of current federal law necessitates granting relief to plaintiffs. Upon making such a finding, courts must reach the conclusion that cross-gender supervision policies either are a violation of prisoners' rights to remain free from rape by public officials or are policies that create an atmosphere tolerant of such violations. If so, then the plaintiff has a cognizable civil claim under 42 U.S.C. § 1983, under which she can request an injunction.<sup>198</sup> When

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193. See Laderberg, *supra* note 21, at 327.

194. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT at v (1997) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf> ("Federal statistical series obtaining data on arrested or convicted persons — Uniform Crime Reports, National Judicial Reporting Program, and National Corrections Reporting Program — show a remarkable similarity in the characteristics of those categorized as rapists: 99 in 100 are male . . .").

195. AMNESTY INTERNATIONAL, *supra* note 12, at 38-39.

196. 42 U.S.C. § 15603 (Supp. IV 2005).

197. See BUREAU OF JUST. STAT., *supra* note 25.

198. 42 U.S.C. § 1983 provides in relevant part that:

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 of the United States or other person

addressing the plaintiff's § 1983 claim, the court must subject the policies either to strict scrutiny or to the *Turner* standard of review. As stated in the previous section, such policies cannot withstand either level of scrutiny.

### CONCLUSION

A society that allows female prisoners to live each day in constant fear of being sexually abused is guilty of the most heinous form of barbarism. Nevertheless, sexual abuse of female prisoners by prison guards is a rampant phenomenon that the law has thus far proved impotent to stop. Cross-gender supervision policies exacerbate the problem by placing women in situations in which they have no escape from their attackers. Clearly establishing that prisoners have a right to remain free from rape by public officials promises to stem the tide of sexual abuse while simultaneously improving conditions of confinement for female prisoners by restricting prisons from adopting cross-gender supervision policies.

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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 . . . .

42 U.S.C. § 1983 (Supp. IV 2005).

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