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## COMMENT

### **JORDAN v. GARDNER: FEMALE PRISONERS' RIGHTS TO BE FREE FROM RANDOM, CROSS-GENDER CLOTHED BODY SEARCHES**

DAVID J. STOLLMAN

#### INTRODUCTION

On July 5, 1989, a male guard at the Washington Corrections Center for Women ("WCCW") randomly stopped a female prisoner and performed a clothed body search.<sup>1</sup> The guard ran his hands over her entire body, from neck to feet.<sup>2</sup> He squeezed and kneaded her breasts and probed her crotch by pushing inward and upward with the flat of his hand.<sup>3</sup> Moreover, the guard squeezed and kneaded any seams in her crotch area.<sup>4</sup> During the search, the female inmate, distressed and shocked, grabbed hold of some nearby cell bars.<sup>5</sup> After the search, her fingers had to be pried loose from the bars.<sup>6</sup> Soon after, she returned to her cell and vomited.<sup>7</sup>

That day, the WCCW inmates filed a complaint in federal district court and obtained a preliminary injunction prohibiting male guards from performing random, clothed body searches on female prisoners.<sup>8</sup> The court concluded that the cross-gender clothed body search policy constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>9</sup>

The district court's decision was unique in two respects. First, in almost all previous cross-gender prison search cases, courts had applied a Fourth Amendment analysis.<sup>10</sup> Second, the court was the first to con-

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1. *See* *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (en banc).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See* *Jordan v. Gardner*, No. C89-339TB (W.D. Wash. Feb. 28, 1990).

10. *See, e.g.,* *Covino v. Patrissi*, 967 F.2d 73, 77-78 (2d Cir. 1992) (employing a Fourth Amendment analysis); *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (determining that a Fourth Amendment analysis should be considered); *Cookish v. Powell*, 945 F.2d 441, 446 (1st Cir. 1991) (reaching a conclusion based on a Fourth Amendment analysis); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (recognizing that incarcerated prisoners retain a limited right of bodily privacy); *Smith v. Chrans*, 629 F. Supp. 606, 610 (C.D. Ill. 1986) (employing a Fourth Amendment analysis).

Inmates also bring First Amendment claims in prison search cases when the inmate has a religious objection to intimate contact by a guard of another sex. *See generally* *Sam'I v. Mintzes*, 554 F. Supp. 416, 417 (E.D. Mich. 1983) (analyzing a muslim pris-

clude that random, cross-gender clothed body prison searches violate the Eighth Amendment.

Prison officials appealed to the United States Court of Appeals for the Ninth Circuit, where a three-judge panel reversed the district court's decision.<sup>11</sup> Subsequently, the Ninth Circuit granted an *en banc* rehearing of the case and vacated the previous appellate decision.<sup>12</sup>

In deciding the *en banc* hearing, the majority in this case, *Jordan v. Gardner*, concluded that the district court had decided correctly that the prison's policy violated the Eighth Amendment.<sup>13</sup> Two judges concurred that the prison policy violated the Eighth Amendment, but they supported deciding the case on Fourth Amendment grounds.<sup>14</sup> Two judges filed dissenting opinions, both maintaining that the WCCW search policy did not violate either the Fourth or Eighth Amendment.<sup>15</sup>

This Note addresses two issues raised in *Gardner*: first, whether the cross-gender clothed body search in *Gardner* violated the Eighth Amendment;<sup>16</sup> and second, whether the cross-gender clothed body search in *Gardner* violated the Fourth Amendment.<sup>17</sup>

This discussion proceeds in five parts. Part I outlines the Eighth Amendment and Fourth Amendment law applicable to *Gardner*.<sup>18</sup> Part II presents the facts of *Gardner*.<sup>19</sup> Part III explains the reasoning behind the *Gardner* decision's five opinions.<sup>20</sup> Part IV criticizes the majority's Eighth Amendment analysis.<sup>21</sup> Part V proposes an alternative way to

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oner's allegation that submitting to a pat-down search by a female guard was a violation of his constitutional right to free exercise of religion).

One court has concluded that a cross-gender search violated an inmate's Eighth Amendment rights. *See Lee v. Downs*, 470 F. Supp. 188, 193 (E.D. Va. 1979) (determining that a female prisoner's Eighth Amendment rights had been violated), *aff'd*, 641 F.2d 1117 (4th Cir. 1981) (upholding the lower court's holding but referring only to an invasion of privacy, not an Eighth Amendment violation). Unlike the searches in *Gardner*, *Downs* entailed a forcible removal of a female inmate's clothes by male guards. *See id.*

Another court has concluded that cross-gender body cavity searches violate the Eighth Amendment. *See Frazier v. Ward*, 426 F. Supp. 1354, 1366 (N.D.N.Y. 1977).

11. *See Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992).

12. *See Jordan v. Gardner*, 968 F.2d 984 (9th Cir. 1992) (granting rehearing *en banc*).

13. *See Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993) (*en banc*). Circuit Judges Poole, Hall, and Leavy joined in the majority opinion. *See id.* at 1521-22. Both Judge Reinhardt's opinion, which Judge Canby joined, and Judge Noonan's opinion are concurrences in result. Thus, the majority mustered seven votes.

14. *See id.* at 1532 (Reinhardt, J. and Noonan, J., concurring). Judge Noonan's concurrence agreed with the majority's reasoning and discussed how indecent and cruel cross-gender searches are. *See id.* at 1543 (Noonan, J., concurring).

15. *See id.* at 1545-66 (Trott, J., dissenting) & 1566-67 (Wallace, J., dissenting). Judge Trott was joined in full by Kleinfeld and Wiggins and joined in part by Chief Judge Wallace. *See id.* at 1545.

16. *See infra* text accompanying notes 223-65.

17. *See infra* text accompanying notes 266-95.

18. *See infra* text accompanying notes 23-96.

19. *See infra* text accompanying notes 97-122.

20. *See infra* text accompanying notes 123-222.

21. *See infra* text accompanying notes 223-65.

analyze *Gardner*.<sup>22</sup> This Note concludes that courts should apply a Fourth Amendment analysis, instead of an Eighth Amendment analysis, to cases similar to *Gardner*.

## I. THE EIGHTH AMENDMENT AND FOURTH AMENDMENT LAW RELEVANT TO *GARDNER*

Unlike free citizens, prisoners are not entitled to the Constitution's full protection.<sup>23</sup> The Supreme Court has declared that "imprisonment carries with it the circumscription or loss of many significant rights."<sup>24</sup> The Supreme Court has also made clear, however, that prisons are "not beyond the reach of the Constitution."<sup>25</sup> Thus, prisoners are accorded "those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."<sup>26</sup>

### A. Prisoner's Constitutional Rights

The Supreme Court has recognized that prisoners retain limited First Amendment,<sup>27</sup> Equal Protection,<sup>28</sup> and Due Process rights.<sup>29</sup> The Supreme Court has not addressed the issue of whether a prisoner has any Fourth Amendment rights to be free from unreasonable searches of his person.<sup>30</sup> The Supreme Court has, however, recently determined that prisoners have no Fourth Amendment protection from searches of their property within their prison cells. This conclusion indicates that if prisoners have any Fourth Amendment rights whatsoever, they are extremely limited.<sup>31</sup> In addition to these limited rights, upon imprisonment, individuals gain the protection of the Eighth

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22. See *infra* text accompanying notes 266-305.

23. See *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984).

24. *Id.* at 524 (citing *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)).

25. *Id.* at 523.

26. *Id.* Further, the Supreme Court has stated that "[l]oss of freedom of choice and privacy are inherent incidents of confinement . . ." *Bell*, 441 U.S. at 537.

27. See *Pelf v. Procunier*, 417 U.S. 817, 822 (1974); see also *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (determining that prisoners must be provided reasonable opportunities to exercise their religious freedom).

28. See *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam).

29. See *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Haines v. Kerner*, 404 U.S. 519 (1972).

30. The Court in *Bell v. Wolfish* assumed, but did not decide, that inmates retain some Fourth Amendment rights; nonetheless, it concluded that, in any event, the challenged searches were reasonable. See *Bell*, 441 U.S. at 558.

31. See *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). There, the Supreme Court held that prisoners have no legitimate expectation of privacy within their prison cells. Thus, a prisoner's private property in his cell is not protected from random searches under the Fourth Amendment. See *id.* at 529-30. Further, while the Supreme Court did not directly address the issue of whether a prisoner has any Fourth Amendment rights to privacy, the Court did conclude that body-cavity searches are not unreasonable; they do not violate the Fourth Amendment. See *Wolfish*, 441 U.S. at 558. This decision hints at the extremely limited Fourth Amendment protection the Supreme Court would provide.

The Court in *Palmer* cautioned, however, "that prison attendants can[not] ride roughshod over inmates' property rights with impunity." *Palmer*, 468 U.S. at 530. The Court

Amendment.<sup>32</sup>

### B. *The Eighth Amendment*

The Eighth Amendment protects incarcerated persons from cruel and unusual punishment. The amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>33</sup> The Supreme Court has determined that "[a]fter incarceration, only the 'unnecessary and wanton infliction of pain,' constitutes cruel and unusual punishment forbidden by the Eighth Amendment."<sup>34</sup> In analyzing an Eighth Amendment claim, a court must examine two factors.<sup>35</sup> First, it must consider whether there is a sufficient "infliction of pain" to constitute a violation.<sup>36</sup> Second, it must determine whether the infliction is "unnecessary and wanton."<sup>37</sup>

In addressing the first factor, the Supreme Court has stated that no single test can determine whether conditions of confinement are cruel and unusual.<sup>38</sup> Rather, in determining whether an infliction of pain was overly severe, a court must consider "the evolving standards of decency that mark the progress of a maturing society."<sup>39</sup>

Although the Supreme Court did not create a specific test for determining what degree of pain the Eighth Amendment prohibits, the Court provided one specific guideline—courts should analyze Eighth Amendment claims by examining objective factors.<sup>40</sup> Thus, courts must objectively determine whether an infliction of pain is cruel and unusual under society's contemporary standards of decency.<sup>41</sup>

To evaluate the second factor—whether an infliction of pain is "wanton"—a court must inquire into an official's state of mind.<sup>42</sup> In making this subjective inquiry, a court must give "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged."<sup>43</sup>

Because wantonness depends on the type of conduct involved, the Supreme Court has not adopted a single standard for assessing "wantonness." Rather, the Court has established two culpability standards:

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suggested that a prisoner's redress could be an Eighth Amendment claim, a state law claim or an administrative grievance. *See id.*

32. *See Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (citing cases that have described the protection the Eighth Amendment affords to prisoners).

33. U.S. Const. amend. VIII.

34. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (quoting *Estelle*, 429 U.S. at 103) (internal citations omitted).

35. *See Wilson v. Seiter*, 111 S. Ct. 2321, 2324 (1991).

36. *See id.*

37. *See id.*

38. *See Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

39. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

40. *See Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980).

41. *See Rhodes*, 452 U.S. at 346-47.

42. *See Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991).

43. *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

whether a prison official acted with "deliberate indifference"<sup>44</sup> (the "deliberate indifference standard"); and whether a prison official acted "maliciously and sadistically for the very purpose of causing harm" (the "malice standard").<sup>45</sup> These standards apply in different circumstances.

The Supreme Court first articulated the deliberate-indifference standard in *Estelle v. Gamble*.<sup>46</sup> In *Estelle*, a bale of cotton fell on a prisoner while he was unloading a truck during the course of prison work.<sup>47</sup> The prisoner brought an Eighth Amendment action, claiming that prison officials gave him inadequate medical treatment after the injury.<sup>48</sup> The Court held that the prison officials' deliberate indifference to the prisoner's medical needs constituted cruel and unusual punishment that violated the Eighth Amendment.<sup>49</sup> In a later case, the Supreme Court explained that the deliberate-indifference standard was appropriate in *Estelle* because "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."<sup>50</sup>

In *Wilson v. Seiter*,<sup>51</sup> the Court broadened the *Estelle* holding.<sup>52</sup> In *Wilson*, an inmate alleged that the prison's overcrowding, unsanitary dining facilities and food preparation, improper ventilation, and inadequate heating and cooling constituted cruel and usual punishment in violation of the Eighth Amendment.<sup>53</sup> The Court emphasized that characterizing conduct as "wanton" depends upon the constraints an official faces.<sup>54</sup> The Court reasoned that the prison officials who made decisions about these nonmedical conditions faced constraints that were similar to the constraints that officials face when making decisions about medical conditions.<sup>55</sup> Thus, the Supreme Court concluded that courts should use the same standard to analyze claims alleging inadequate conditions of confinement and claims alleging inadequate medical care.<sup>56</sup> To aid courts in implementing the deliberate-indifference standard, the Court explained that a "condition of confinement" that a prisoner endures includes but is

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44. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

45. *Whitley*, 475 U.S. at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 1033 (1973)).

46. See *Gamble*, 429 U.S. at 97.

47. See *id.* at 99.

48. See *id.* at 99-101.

49. See *id.* at 104. The Court defined deliberate indifference as being more than negligent conduct. See *id.* at 105-06. The Court also determined that the inmate's claims against the prison's medical director were invalid. See *id.* at 107-08. The Court, however, remanded the case to the Court of Appeals to determine whether the prisoner had stated a cause of action against other prison officials. See *id.* at 108.

50. See *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

51. 111 S. Ct. 2321 (1991).

52. See *id.* at 2326.

53. See *id.* at 2323.

54. See *id.* at 2326.

55. See *id.* at 2327.

56. See *id.* at 2326.

not limited to "the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates."<sup>57</sup>

Following this pronouncement, courts have applied the deliberate-indifference standard in a variety of circumstances. They have applied it in cases involving medical treatment,<sup>58</sup> prison health conditions,<sup>59</sup> and a prisoner's safety from other prisoners.<sup>60</sup>

In *Whitley v. Albers*, the Supreme Court outlined the second standard—the malice standard—to determine whether a prison official's conduct was wanton.<sup>61</sup> This standard applies when a prison official makes and carries out "decisions involving the use of force to restore order in the face of a prison disturbance."<sup>62</sup> In such cases, the standard is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."<sup>63</sup>

Two factors justified a different standard for cases involving prison disturbances. First, because of the potential danger of harm during a prison disturbance, prison administrators' duty to ensure the safety of the prison staff, administrative personnel and visitors, and the inmates themselves substantially increases.<sup>64</sup> Second, prison officials make these decisions "in haste, under pressure, and frequently without the luxury of a second chance."<sup>65</sup>

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57. *Id.* at 2326-27.

58. *See, e.g.*, *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) (deciding that "the Eighth Amendment also protects against deliberate indifference to an inmate's serious mental health and safety needs"); *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (concluding that a paraplegic prisoner's Eighth Amendment rights were violated when the warden acted with deliberate indifference to his conditions of confinement).

Further, in *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir. 1990), the court concluded that a prison official violated an inmate's Eighth Amendment rights by compelling the inmate to work beyond his physical capacity.

59. *See, e.g.*, *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992) (concluding that inmate had to show that prison officials were deliberately indifferent to cell conditions to prevail on an Eighth Amendment claim); *Williams v. Griffin*, 952 F.2d 820, 824 (4th Cir. 1991) (determining that an Eighth Amendment violation requires deliberate indifference to prison conditions on the part of prison officials).

60. *See, e.g.*, *Bailey v. Wood*, 909 F.2d 1197 (8th Cir. 1990) (determining that a prisoner must show that prison warden acted with "deliberate indifference" when he failed to prevent violent attacks by another inmate); *Santiago v. Lane*, 894 F.2d 218 (7th Cir. 1990) (concluding that the Eighth Amendment rights of an inmate are violated by a prison official who with "deliberate indifference," fails to protect an inmate from attacks); *Walsh v. Mellas*, 837 F.2d 789 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988) (determining that officials acted with "deliberate indifference" by failing to screen cell-mates for inmates whom they knew risk of assault was a serious problem).

61. *See Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

62. *Id.* at 320.

63. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 1033 (1973)).

64. *See Whitley*, 475 U.S. at 320.

65. *Id.*

In *Hudson v. McMillian*,<sup>66</sup> the Supreme Court expanded the malice standard's application.<sup>67</sup> In *McMillian*, a prison inmate alleged that his Eighth Amendment rights had been violated when a prison guard, without cause, beat him excessively, loosening his teeth and cracking his partial dental plate.<sup>68</sup> Because many of the concerns underlying the malice standard arise whenever guards use force, the Court held that the malice standard applies to all cases in which a prisoner accuses a guard of using excessive physical force.<sup>69</sup>

The issue of which standard courts should apply when faced with an alleged unconstitutional, random, cross-gender clothed body search is both problematic and significant. If a court determines that random, cross-gender clothed body searches are a condition of confinement, then it must use the lower deliberate-indifference standard. On the other hand, if a court determines that such searches involve excessive physical force or are a response to a prison disturbance, then it must apply the higher malice standard. This issue arose in *Gardner*, where the majority used the deliberate-indifference standard and the dissent used the malice standard.<sup>70</sup>

### C. *The Fourth Amendment*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>71</sup>

In cases that do not involve prisoners, determining whether a search of an individual violates the Fourth Amendment requires a two-step analysis. First, a court must decide whether a person has a "constitutionally protected reasonable expectation of privacy."<sup>72</sup> This determination requires a court to make two inquiries: whether the individual has exhibited a subjective expectation of privacy and whether society recognizes that expectation as reasonable.<sup>73</sup> If a court finds that the individual has a reasonable expectation of privacy, a court must then proceed to the second step of the Fourth Amendment analysis: determining whether the governmental action is constitutional.<sup>74</sup> To make this determination, a court must decide whether, in the particular context, the interests asserted by the state actors are reasonable when balanced against the in-

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66. 112 S. Ct. 995 (1992).

67. *See id.* at 998-99.

68. *See id.* at 997.

69. *See id.* at 999.

70. *See Jordan v. Gardner*, 986 F.2d 1521, 1528, 1558 (Trott, J., dissenting) (9th Cir. 1993).

71. U.S. Const. amend. IV.

72. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *See also* *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (implementing the *Katz* inquiry as the first step in its Fourth Amendment analysis).

73. *See Covino*, 967 F.2d at 77; *see also Katz*, 389 U.S. at 361 (Harlan, J., concurring).

74. *See Covino*, 967 F.2d at 78.



mate's privacy expectations.<sup>75</sup>

Because prisoners have limited constitutional rights, however, courts do not apply this analysis to prisoner's Fourth Amendment claims. Instead, courts analyze a prisoner's Fourth Amendment claims by using the approach mandated in *Turner v. Safley*.<sup>76</sup> In *Turner*, prisoners brought a class action suit to determine the constitutionality of two prison regulations.<sup>77</sup> The first regulation limited correspondence between inmates at different institutions, and the second regulation permitted inmates to marry only with the superintendent's permission.<sup>78</sup> The Supreme Court upheld the correspondence regulation but struck down the marriage restriction.<sup>79</sup>

In arriving at these conclusions, the *Turner* Court established the standard of review for prison cases: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>80</sup> The Court stated that such a standard is necessary to permit prison administrators, rather than courts, to make difficult judgments concerning prison operations.<sup>81</sup> The Court made clear that it did not want prison officials' day-to-day judgments subjected to an inflexible strict-scrutiny analysis because such an analysis would hamper an administrator's decision-making process.<sup>82</sup>

In analyzing Fourth Amendment claims under a *Turner* analysis, courts logically have preceded it with an additional inquiry: whether prisoners possess any Fourth Amendment rights.<sup>83</sup> This inquiry is necessary because the Supreme Court has not decided whether prisoners have Fourth Amendment rights, and the *Turner* standard applies only when

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75. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

76. 482 U.S. 78 (1987).

77. See *id.* at 81-82.

78. See *id.*

79. See *id.* at 99-100.

80. *Id.* at 89. The court in *Turner* adopted this standard of review in order to reconcile the principle that inmates retain at least some constitutional rights despite incarceration. The Court recognized that prison officials are best able to make decisions regarding prison administration. See *Washington v. Harper*, 494 U.S. 210, 223-24 (1990).

Although the *Turner* case involved inmates' First and Fourteenth Amendment rights, the *Turner* standard has also been applied to prisoners' Fourth Amendment rights. See, e.g., *Covino v. Patrissi*, 967 F.2d 73, 78-79 (2d Cir. 1992) (applying the *Turner* test); *Cornwell v. Dahlberg*, 963 F.2d 912, 916-17 (6th Cir. 1992) (explicating the *Turner* test); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988) (applying the *Turner* test).

*Turner*, however, does not apply to Eighth Amendment cases. See *Jordan v. Gardner*, 986 F.2d 1521, 1535 n.8. (9th Cir. 1993).

81. See *Turner*, 482 U.S. at 89.

82. See *id.*

83. See, e.g., *Covino*, 967 F.2d at 78 (performing this inquiry before conducting a *Turner* analysis); *Michenfelder v. Sumner*, 860 F.2d 328, 333-34 (9th Cir. 1988) (same); *Smith v. Chrans*, 629 F. Supp. 606, 610-11 (C.D. Ill. 1986) (determining whether prisoners retain some limited Fourth Amendment protection before performing a Fourth Amendment analysis).

"a prison regulation impinges on inmates' constitutional rights."<sup>84</sup> Thus, if prisoners have no Fourth Amendment rights, *Turner* does not apply to prisoners' Fourth Amendment claims. Those circuit courts that have considered whether inmates have Fourth Amendment rights have concluded that inmates retain some limited Fourth Amendment protection.<sup>85</sup>

Further, several courts have considered the more narrow issue of whether inmates possess Fourth Amendment rights that "could be infringed by the cross-gender aspect of otherwise constitutional searches."<sup>86</sup> Courts have examined the cross-gender issue in a variety of circumstances. Several courts have determined that clothed body searches that do not include touching of the genitalia and buttocks do not violate the Constitution.<sup>87</sup> Other courts have concluded that clothed body searches that include this touching do not violate the Constitution.<sup>88</sup> Courts have also addressed whether the Fourth Amendment prohibits guards of one sex from seeing partially or totally nude prisoners of the opposite sex. Courts have addressed the issue in different contexts, including showering and dressing, and have arrived at different conclusions.<sup>89</sup>

Assuming *arguendo* that a prisoner has some Fourth Amendment

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

85. See, e.g., *Covino*, 967 F.2d at 78 (concluding that inmates do retain a limited right to bodily privacy); *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (explaining that a convicted prisoner maintains some reasonable expectations of privacy while in prison); *Cookish v. Powell*, 945 F.2d 441, 446 (1st Cir. 1991) (stating that some Fourth Amendment protection was available to inmates as to their persons); *Michenfelder*, 860 F.2d at 333 (recognizing that incarcerated prisoners retain a limited right of bodily privacy); *Smith*, 629 F. Supp. at 610-11 (C.D. Ill. 1986) (determining that a prisoner retains some limited Fourth Amendment protection). But see *Bagley v. Watson*, 579 F. Supp. 1099, 1103 (D. Or. 1983) (concluding that prisoners have no federal constitutional rights to freedom from clothed "pat-down" frisk searches and/or visual observations in states of undress performed by female correctional officer guards); *Grummett v. Rushen*, 779 F.2d 491, 495-96 (9th Cir. 1985) (concluding that the search was reasonable, and thus, not deciding whether the prisoner has these rights).

86. *Jordan v. Gardner*, 986 F.2d 1521, 1524 (9th Cir. 1993).

87. See, e.g., *Madyun v. Franzen*, 704 F.2d 954, 957 (7th Cir.), cert. denied, 464 U.S. 996 (1983) (permitting searches of males by female guards, even where there might be incidental contact with the genital area); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (determining that the search does not infringe upon any constitutional guaranteed right).

88. See, e.g., *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (allowing routine pat searches of male inmates by female guards where the pat search included probing of the groin area); *Bagley*, 579 F. Supp. at 1104-05 (upholding cross-gender searches by female guards that included a search of both the genital and buttock areas).

89. Some courts have held that the Fourth Amendment prohibits guards from viewing partially nude or totally nude prisoners of the opposite sex. See, e.g., *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (concluding that female guards viewing of nude male prisoners does not necessarily fall short of a cognizable constitutional claim); *Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (recognizing that prisoner's have a Fourth Amendment right to be free from unrestricted observation of private areas by prison officials of the opposite sex under normal prison conditions); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980) (holding that an inmate's rights were vio-

rights, a court must then apply the *Turner* standard and determine whether a prison regulation is reasonably related to a legitimate penological interest.<sup>90</sup> The *Turner* court identified four factors governing the review of prison regulations:<sup>91</sup> first, whether there is a "‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it";<sup>92</sup> second, whether there are "alternative means of exercising the right that remain open to prison inmates";<sup>93</sup> third, what impact accommodating "the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally";<sup>94</sup> and fourth, whether there are ready alternatives available to the prison authorities.<sup>95</sup> In discussing the fourth factor, the Court emphasized that the existence of an "obvious, easy alternative" that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests would indicate that a regulation does not satisfy the reasonable-relationship standard.<sup>96</sup>

## II. *JORDAN V. GARDNER*: BACKGROUND

The *Gardner* case arose from prison policies imposed at the Washington Corrections Center for Women. The WCCW, an all-female prison, imprisons minimum, medium, and maximum security convicted felons.<sup>97</sup> In December 1989, the prison housed 270 inmates.<sup>98</sup> Since its inception, the WCCW has employed both male and female guards.<sup>99</sup>

To ensure prison security, prison regulations permitted guards to perform "suspicionless searches."<sup>100</sup> Before mid-1989, only female guards performed suspicionless searches of prisoners, and they conducted these

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lated by the assignment of female guards to posts where they could view him while he was completely or entirely unclothed).

Courts have also reached the opposite conclusion. *See, e.g.,* *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (determining that female guards viewing strip searches of male prisoners did not constitute a Fourth Amendment violation where female officers were not routinely present); *Johnson v. Pennsylvania Bureau of Corrections*, 661 F. Supp. 425, 435 (W.D. Pa. 1987) (concluding that no constitutional violation occurred when female guards viewed naked male prisoners); *Smith v. Chrans*, 629 F. Supp. 606, 612 (C.D. Ill. 1986) (determining that inadvertent and occasional sightings of naked males by female guards do not constitute a Fourth Amendment violation); *Grummett*, 779 F.2d at 496 (concluding that allowing female correctional officers to view prisoners in states of undress or total nudity does not violate the Fourth amendment).

90. *See Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

91. *See id.*

92. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

93. *Id.* at 90.

94. *Id.* The Court emphasized that courts should be particularly deferential to prison officials' informed decisions when accommodation of an asserted right will have a significant "ripple effect." *See id.*

95. *See id.* at 90.

96. *See id.* at 91.

97. *See Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993).

98. *See id.*

99. *See id.*

100. *Id.*

searches only at fixed checkpoints.<sup>101</sup> Male guards performed searches only in emergency situations.<sup>102</sup> The WCCW prison policies did not include any random searches.<sup>103</sup>

### A. *The Origins of the Case*

The *Gardner* case arose out of two events. First, in 1988, female guards filed a grievance against a prison policy that required them to perform all routine searches at the prison.<sup>104</sup> These guards complained that their meal breaks, taken while they were still officially on duty, were occasionally interrupted to conduct searches at fixed points.<sup>105</sup> The Washington Department of Corrections denied the grievance.<sup>106</sup>

Second, in January 1989, Eldon Vail became the new WCCW Superintendent.<sup>107</sup> Because Vail believed that the fixed checkpoints were ineffective in controlling the movement of contraband in the prison, he instituted a random-search policy.<sup>108</sup> On February 26, 1989, Vail instituted another new policy that permitted male guards to conduct random searches of clothed inmates.<sup>109</sup> The policy took effect on July 5, 1989.<sup>110</sup>

The circuit judges disputed the reasons why Vail implemented this second policy. The majority opinion emphasized that the policy was a reaction to threatened legal action by the guards' union.<sup>111</sup> The union threatened to bring a sex discrimination suit to eliminate the inequality

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101. *See id.*

102. *See id.* The WCCW prison regulations expressly stated that "suspicionless searches" were to be conducted by female guards only. *See id.* at 1532 (Reinhardt, J., concurring). Male guards were permitted to conduct "suspicion searches"—a fully clothed body search performed when there was reason to suspect that a prisoner was carrying contraband or if there was an emergency. *See id.* In practice, however, "suspicion searches" were always conducted by female guards. *See id.*

103. *See id.* at 1523.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.* Superintendent Vail took over his job "in the shadow of an escape and with a mandate to tighten security. . . ." *Id.* at 1553 (Trott, J., dissenting).

The necessity for a random search policy was supplied by Vail's trial testimony:

From my experience, the ability for a correctional officer to conduct a pat search is a fundamental part of his or her job, and in most institutions or in other facilities that I had been in, what I had witnessed was that taking place. Inmates knew it and staff knew it, that searches of the clothed body can occur any place, any time when an officer decides that it needs to occur. That creates the unpredictable element in inmate movement throughout the institution so that inmates always have to be on guard a bit about packing contraband. That there's always at least a slim chance that someone will ask to search them. And overall, that was—that was and is the security issue that we've tried to implement.

*Id.* at 1548 (Trott, J., dissenting).

109. *See id.* at 1523.

110. *See id.*

111. *See id.* at 1529.

between male and female guards.<sup>112</sup> The dissent emphasized the security objectives Superintendent Vail hoped to achieve through the cross-gender searches.<sup>113</sup> Both the dissent and Vail contended that random searches performed only by female guards would be less effective than random cross-gender searches, because, if only female guards could perform the searches, prisoners would exploit the fact that male guards could not search them.<sup>114</sup> Vail asserted that if an inmate knew that there were only male guards in one area of the prison, then that inmate could freely move contraband through that area.<sup>115</sup> Thus, Vail testified that he implemented cross-gender random searches in order to create an unpredictable element within the institution "so that inmates always ha[d] to be on guard a bit about packing contraband."<sup>116</sup>

### B. *The WCCW Cross-Gender Clothed Body Search*

In conducting a cross-gender clothed body search, a guard runs his hands thoroughly over the inmate's clothed body, starting with the inmate's neck and working down to the feet.<sup>117</sup> The prison's training materials state that to conduct a proper search a guard must:

'Squeeze and knead the shoulders. . . . Knead . . . the inside of the waistband of trousers [and] pull[ ] the fly away from the body. From behind, . . . [use] both hands across the crotch[,] [p]ushing the hands across the crotch[,] . . . [s]queezing and kneading all seams . . . . The breast area shall be searched in a sweeping motion, using only the back of the hand. . . . The breasts of a female will be flattened by this method. Use a flat hand and a pushing motion across the crotch area. Maintain a flat, inward pushing motion. The edge of the hand in a downward motion can be used to check the crease in the buttocks. Push inward and upward when searching the crotch and upper thighs of the inmate.'<sup>118</sup>

Thus, while cross-gender clothed body searches are euphemistically called "pat-down" searches,<sup>119</sup> the searches involve far more than simply patting an inmate's body.

112. *See id.* at 1553, 1555 (Trott, J., dissenting).

113. *See id.* at 1547-48 (Trott, J., dissenting).

114. *See id.* at 1548 (Trott, J., dissenting).

115. *See id.* at 1554 (Trott, J., dissenting). Vail testified at trial that "[o]n numerous occasions, I have only men, for example, in a living unit on a particular shift, two males at the same time. If you want to move some contraband in the direction, you know now is the time." *Id.*

116. *Id.* at 1548 (Trott, J., dissenting).

117. *See id.* at 1523.

118. *Id.* at 1533 (Reinhardt, J., concurring) (citation omitted).

119. Both District Court Judge Bryan and Court of Appeals Judge O'Scannlain, writing for the majority, make clear that the term "pat-down" search is misleading. *See id.* at 1522 n.1. These searches involved not "'patting'" but rather motions that are more accurately described as 'rubbing,' 'squeezing,' and 'kneading.' We . . . decline to refer to the searches as 'pat-down' searches in favor of the neutral description 'cross-gender clothed body' searches." *Id.*

C. *Introduction of Random, Cross-Gender Clothed Body Searches to the WCCW*

On July 5, 1989, male guards began performing these searches on female inmates. During the day, guards searched several inmates; one inmate apparently suffered tremendous anguish. This prisoner, after submitting to the search, "had to have her fingers pried loose from the bars she had grabbed during the search, and she vomited after returning to her cell block."<sup>120</sup> That same day, the inmates filed a complaint in federal district court and obtained a preliminary injunction against male guards performing random, cross-gender searches on female prisoners.<sup>121</sup> After a six day trial, the court concluded that the cross-gender clothed body search violated inmates' First, Fourth, and Eighth Amendment rights.<sup>122</sup> After a complicated appeals process, the United States Court of Appeals heard the case *en banc* and, subsequently, issued a plurality opinion.

III. *JORDAN v. GARDNER: THE OPINIONS*

A. *The Majority Opinion*

The majority opinion, decided on Eighth Amendment grounds, begins by clarifying its reasons for not deciding the case on Fourth Amendment grounds.<sup>123</sup> The majority did not employ a Fourth Amendment analysis for two reasons. First, courts have not yet recognized that the Fourth Amendment protects inmates from cross-gender clothed body searches.<sup>124</sup> Courts, however, have established that the Eighth Amend-

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120. *Id.* at 1523.

121. *See id.* at 1523. After the first day of implementing the cross-gender search policy, the prison informally agreed to suspend the searches. Two days later, when Vail decided to reinstitute the searches, the inmates obtained the temporary restraining order. *See id.* at 1534 (Reinhardt, J., concurring).

122. *See id.* at 1522-24. The case was then appealed to the United States Court of Appeals, where a three-judge panel reversed the district court's decision. *See* 953 F.2d 1137. Subsequently, the appellate decision was vacated when an *en banc* rehearing of the case was granted. *See* 968 F.2d 984 (9th Cir. 1992), *reh'g en banc granted*.

123. *See id.* at 1524. The inmates also claimed that the random, cross-gender searches violated their First Amendment rights. *See id.* at 1524 n.3. The court addressed the inmates' Fourth Amendment and Eighth Amendment claims before their First Amendment claims because the Fourth and Eighth Amendments "more directly regulate the conduct at issue—searching, and inflicting pain and suffering—and affect a much larger part of the inmate population." *Id.*

A female inmate usually brings First Amendment claims in prison search cases when she has some religious objection to intimate contact by men not her husband. Men have also brought First Amendment claims in prison search cases employing similar reasoning. *See generally* Sam'I v. Mintzes, 554 F. Supp. 416, 417 (E.D. Mich. 1983) (analyzing a male prisoner's claim that pat-down searches performed by female guards violated his First Amendment rights).

124. *See Gardner*, 986 F.2d at 1524-25. The majority refers to two Ninth Circuit cases that suggest that prisoners' legitimate expectations of bodily privacy are extremely limited. *See id.* at 1524. In Grummett v. Rushen, 779 F.2d 491, 495-96 (9th Cir. 1985), the court held that pat-down searches of male inmates that included the groin area, con-

ment clearly protects inmates from unwarranted inflictions of pain.<sup>125</sup>

Second, the majority employed the Eighth Amendment instead of the Fourth Amendment because the inmates' claims focused on the pain inflicted by the cross-gender clothed body searches, rather than on invasions of privacy.<sup>126</sup> Although the majority concluded that both amendments applied, the majority did not address the Fourth Amendment claim because it affirmed the district court's decision on Eighth Amendment grounds.<sup>127</sup>

The majority took a two-step approach in deciding the Eighth Amendment claim. It considered whether the prisoner suffered "an 'infliction of pain,' and, if so, whether that infliction was 'unnecessary and wanton.'" <sup>128</sup>

No single rule can determine whether an infliction of pain is unconstitutional.<sup>129</sup> Rather, a court must objectively examine the infliction in the context of contemporary standards of decency.<sup>130</sup> If a prison policy offends contemporary standards of decency, it violates the Eighth Amendment's pain requirement. The *Gardner* majority looked at three objective factors in making this decision. First, the majority noted "[e]ighty-five percent of the inmates report a history of serious abuse to WCCW counselors, including rapes, molestations, beatings, and slavery."<sup>131</sup> Second, several inmates' depositions and one inmate's live testimony described the verbal, physical, and sexual abuse that many inmates suffered prior to their imprisonment.<sup>132</sup> Third, a psychologist testified that searches where a male guard touched a female inmate's breasts and genitals "would likely leave the inmate 'revictimiz[ed],' resulting in a number of symptoms of post-traumatic stress disorder."<sup>133</sup> Because of

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ducted by female guards, do not violate the Fourth Amendment. And in *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988), the court decided that occasional visual searches of male inmates do not violate the Fourth Amendment. The majority left the Fourth Amendment issue open by concluding that "[t]he frequency and scope of the searches in *Grummett* and *Michenfelder* were significantly less invasive than the searches at issue here, and hence those cases are not controlling." *Gardner*, 986 F.2d at 1524.

125. See *Gardner*, 986 F.2d at 1524-25.

126. See *id.* at 1524. The court was referring to the fact that *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) and *Grummet v. Rushen*, 779 F.2d 491 (9th Cir. 1985), were claims alleging invasions of privacy, not pain and suffering.

127. See *Gardner*, 986 F.2d at 1525.

128. *Id.*

129. See *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

130. See *supra* notes 40-41 and accompanying text.

131. *Gardner*, 986 F.2d at 1525.

132. See *id.* The inmate who testified at trial depicted the following abuses: rapes by husbands, boyfriends and strangers, beatings by various men, and deprivations of food. See *id.* Another testified by deposition "that her second husband beat her, strangled her, and ran her over with a truck." *Id.* Another had been "frequently strapped or handcuffed to a bed by her half-brother, who beat or raped her." *Id.* Another "was sixteen when her uncle impregnated her; after the failure of the uncle's attempts to induce an abortion using a broom handle, screwdriver, bleach, and Lysol, the uncle paid a man to marry her." *Id.*

133. *Id.* at 1526.

these objective factors, the majority agreed with the district court's conclusion that "[t]here is a high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates from these searches, even if properly conducted."<sup>134</sup> Thus, the court determined that the random cross-gender searches caused sufficient pain to satisfy the Eighth Amendment's pain requirement.<sup>135</sup>

The majority distinguished *Gardner* from *Grummett v. Rushen*,<sup>136</sup> a previous Ninth Circuit case that dealt with the issue of cross-gender searches. In *Grummett*, male prisoners claimed that pat down searches performed by female guards were cruel and unusual punishment in violation of the Eighth Amendment.<sup>137</sup> The *Grummett* court concluded "that the inmates had not shown sufficient evidence of pain to make out a cognizable Eighth Amendment claim."<sup>138</sup> The *Gardner* court distinguished *Grummett* by indicating that, unlike men, women are traumatized by cross-gender searches.<sup>139</sup> This conclusion was supported by several witnesses' trial testimony including testimony by experts in psychology and anthropology.<sup>140</sup>

The majority opinion then examined the Eighth Amendment analysis' second step, whether the infliction of pain was "unnecessary and wanton." The court began by focusing on the "unnecessary" element.<sup>141</sup> The court determined that the policy was unnecessary for two reasons. First, because the WCCW's security was not "impaired in the slightest" during the three years of litigation, the court decided that the WCCW's security did not depend upon cross-gender clothed body searches.<sup>142</sup> Apparently, random searches performed by female guards satisfied the prison's security needs.<sup>143</sup>

Second, the cross-gender clothed body search policy did not significantly affect male guards' employment opportunities. The court found that "not a single bid had been refused, promotion denied, nor guard replaced as a result of the ban on routine cross-gender clothed body searches."<sup>144</sup> After concluding that the infliction of pain was "unnecessary," the court examined whether the infliction was "wanton." The court began its "wanton" inquiry by deciding whether it should review the infliction of pain under the deliberate-indifference standard or the

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134. *Id.* at 1525 (citation omitted).

135. *See id.* This determination essentially satisfies the objective inquiry required by the Supreme Court. *See Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

136. 779 F.2d 491 (9th Cir. 1985).

137. *See id.* at 492-93.

138. *Grummett*, 779 F.2d at 493 n.1.

139. *See id.*

140. *See id.* These experts "discussed how the differences in gender socialization would lead to differences in the experiences of men and women with regard to sexuality." *Id.*

141. *See id.* at 1526-27.

142. *See id.* at 1526.

143. *See id.* at 1527.

144. *Id.*



malice standard.<sup>145</sup> Courts apply the deliberate-indifference standard in reviewing a prison official's conduct with respect to alleged unconstitutional conditions of confinement.<sup>146</sup> Courts apply the malice standard either when analyzing conduct that was undertaken in response to a prison disturbance or when a prisoner accuses a guard of using excessive physical force.<sup>147</sup>

In choosing to apply the deliberate-indifference standard, the court focused on three factors. First, Superintendent Vail instituted the cross-gender clothed body search policy only after lengthy consideration.<sup>148</sup> Second, the court recognized that, like conditions of confinement, a cross-gender clothed body search policy inflicts pain indefinitely.<sup>149</sup> Finally, the court noted that the officials faced no special constraints.<sup>150</sup>

Having established the applicable standard, the court then analyzed whether the inmates had proven that Superintendent Vail acted with deliberate indifference.<sup>151</sup> In order to establish that a prison official has acted with deliberate indifference, inmates must prove two things. First, inmates must prove that a prison official knew or should have known about the risk of harm to the inmates.<sup>152</sup> Second, inmates must establish that the prison official failed to act to prevent the harm.<sup>153</sup> The court

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145. See *id.* This is the second inquiry mandated by the Supreme Court in *Wilson v. Seiter*, 111 S. Ct. 2321, 2324-25 (1991).

146. See *supra* text accompanying notes 46-60.

147. See *supra* notes 61-69 and accompanying text.

148. See *Gardner*, 986 F.2d at 1528.

149. See *id.*

150. See *id.*

151. See *id.*

152. There is currently a split among the circuit courts regarding the quantum of knowledge possessed by a prison official necessary to satisfy the deliberate indifference standard. Some circuit courts require the prison official to have actual knowledge of the risk of harm. See, e.g., *Williams v. Griffin*, 952 F.2d 820, 826 (4th Cir. 1991) (requiring that an official have knowledge of poor prison conditions); *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991) (requiring that deliberate indifference be shown by establishing actual knowledge of impending harm that is easily preventable); *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991) (favoring an actual knowledge requirement); *Berry v. City of Muskogee*, 900 F.2d 1489, 1498 (10th Cir. 1990) (concluding that knowledge of risk of harm and failure to prevent the harm constituted deliberate indifference). Other circuit courts require that the prison official either knew of the risk of harm or should have known of the risk of harm. See, e.g., *Young v. Quinlan*, 960 F.2d 351, 360-61 (3rd Cir. 1992) (holding that a prison official is deliberately indifferent when he knows or should have known of a sufficient danger to an inmate); *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (holding that the Fourteenth Amendment imposes a duty not to act with reckless indifference where a prison official knows or should know of the danger facing the inmate).

In *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), *cert. granted*, 114 S. Ct. 56 (U.S. Oct 4, 1993) (No. 92-7247), the Supreme Court will most likely decide what quantum of knowledge is necessary. For a discussion of the *Farmer* case see 54 Crim. L. Rept. 3136 (Jan. 26, 1994).

For the purposes of *Gardner* the distinction is irrelevant because the Superintendent had actual knowledge of the possible harm. See *Gardner*, 986 F.2d at 1528-29.

153. See, e.g., *DesRosiers*, 949 F.2d at 19 (requiring failure to prevent the harm); *McGill*, 944 F.2d at 348 (requiring that prison official had knowledge of danger and failed to

found that both factors existed because the record showed that Vail's staff had advised Vail that these searches could cause serious harm, and that, nevertheless, he instituted the policy.<sup>154</sup> Having found all the elements of an Eighth Amendment violation, the court affirmed the district court's decision.<sup>155</sup>

### B. Judge Reinhardt's Concurrence

Judge Reinhardt believed that the search policy in *Gardner* violated both the Fourth and Eighth Amendments. He concluded, however, that *Gardner* should be decided on Fourth rather than Eighth Amendment grounds. In his view, the Supreme Court's decision in *Soldal v. Cook County*<sup>156</sup> dictated the approach to be taken.<sup>157</sup>

In *Soldal*, the Supreme Court analyzed a claim that alleged violations of both the Fourth Amendment and the Due Process Clause.<sup>158</sup> The Court emphasized that, when faced with a question of which constitutional provision to examine first, "the more 'explicit textual source of constitutional protection' " should be considered before the " 'more generalized notion.' " <sup>159</sup>

Judge Reinhardt believed that *Soldal* mandated a Fourth Amendment analysis for two reasons. First, Judge Reinhardt reasoned that the conduct at issue was clearly a search,<sup>160</sup> and "[t]he 'explicit textual source of constitutional protection' with respect to 'searches' of 'persons' is, without doubt, the fourth amendment, not the more general eighth amendment."<sup>161</sup> Second, a court's use of the term "search" in Fourth Amendment analysis has a specific meaning, and thus is "explicit,"<sup>162</sup>

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prevent it); *Williams*, 952 F.2d at 826 (same); *Berry*, 900 F.2d at 1498 (requiring failure to make reasonable efforts to avert the harm).

154. See *Gardner*, 986 F.2d at 1528-29.

155. See *id.* at 1531.

156. 113 S. Ct. 538 (1992).

157. See *Gardner*, 986 F.2d at 1540 (Reinhardt, J., concurring).

158. *Id.*

159. *Soldal v. Cook County*, 113 S.Ct. 538, 548 (quoting *Graham v. Conner*, 490 U.S. 386, 394-95 (1989)). The Supreme Court, in *Soldal*, unanimously reversed a Seventh Circuit decision that espoused looking only at the "dominant character of the conduct challenged" in determining which constitutional provision should be the basis of the analysis. See *Gardner*, 986 F.2d at 1540-41 (Reinhardt, J., concurring) (quoting *Soldal*, 942 F.2d at 1080 (en banc)).

160. See *Gardner*, 986 F.2d at 1541 (Reinhardt, J., concurring). The majority opinion admitted that the conduct was a search. See *id.* at 1524.

161. *Id.* at 1541 (Reinhardt, J., concurring) (quoting *Soldal*, 113 S. Ct. at 548) (citations omitted). Judge Reinhardt also argued that *Soldal* requires a court "to look to the fundamental conduct at issue before proceeding, if necessary, to more generalized characterizations of the challenged behavior." *Id.* Reinhardt challenged the majority's application of the Eighth Amendment on the grounds that the fundamental conduct in *Gardner* was the search, not the pain inflicted by the search. See *id.* "Pain is simply an incident of the unreasonable searches, not, as Judge O'Scannlain would have it, '[t]he gravamen of the inmates' charge.'" *Id.* (quoting the majority at 1524-25).

162. See *id.* "Insofar as searches of persons are concerned, the term applies to all such examinations of the individual—pat-down searches, clothed body searches, visual strip

while the term "cruel and unusual punishment" is not limited to one type of behavior, "but applies instead to a variety of forms of unconstitutional governmental conduct."<sup>163</sup>

Further, Judge Reinhardt argued that even if *Soldal* did not apply, a court should employ a Fourth Amendment analysis for two reasons. First, the Fourth Amendment should be applied because it is easier to apply than the Eighth Amendment. While the Fourth Amendment requires only an objective inquiry, the Eighth Amendment requires a more complicated, subjective inquiry.<sup>164</sup> Second, Judge Reinhardt reasoned that it would be more efficient to apply the Fourth Amendment because any search that violated the Eighth Amendment would be an "unreasonable" search under the Fourth Amendment.<sup>165</sup> Yet, "the converse is not true. . . . [A]n eighth amendment analysis may prove to be only a precursor to the necessarily duplicative fourth amendment review."<sup>166</sup> For these reasons, Judge Reinhardt concluded that the court should have decided *Gardner* on Fourth Amendment, rather than Eighth Amendment, grounds.<sup>167</sup>

Next, Judge Reinhardt examined what Fourth Amendment rights a person retains after incarceration. Reinhardt reasoned that the Fourth Amendment, besides protecting privacy, "also protects persons against infringements of bodily integrity, and personal dignity. . . . It is the privacy and dignitary interests of the female inmates that are violated here."<sup>168</sup> Thus, Reinhardt concluded that random, cross-gender clothed body searches implicate a prison inmate's rights of privacy and dignity.<sup>169</sup>

Reinhardt then addressed the prisoners' constitutional claim under the *Turner* standard: whether the prison policy is reasonably related to legitimate penological interests.<sup>170</sup> In evaluating the prisoners' claim, Judge Reinhardt examined the four factors that the Supreme Court enumerated in *Turner*.

First, there must be a rational connection between the cross-gender searches and a legitimate governmental interest.<sup>171</sup> Reinhardt, after an-

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searches, visual body cavity searches, and digital body cavity searches—no matter how minimal or how probing they may be." *Id.* (Reinhardt, J., concurring).

163. *Id.* at 1541-42 (Reinhardt, J., concurring). Courts have analyzed a variety of claims under the cruel and unusual punishments clause, including but not limited to "claims that sentences are unduly harsh or otherwise constitutionally inappropriate, claims that inmates have been subjected to physical abuse or unlawfully denied medical treatment." *Id.* at 1542 (Reinhardt, J., concurring) (citations omitted).

164. *See id.* at 1541 n.16, 1542 (Reinhardt, J., concurring).

165. *See id.* at 1542. (Reinhardt, J., concurring).

166. *Id.* at 1542-43 (Reinhardt, J., concurring).

167. *See id.* at 1543 (Reinhardt, J., concurring).

168. *Id.* at 1534 n.7 (Reinhardt, J., concurring) (citations omitted).

169. *See id.* at 1534 (Reinhardt, J., concurring).

170. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

171. *See Gardner*, 986 F.2d at 1536 (Reinhardt, J., concurring) (quoting *Turner*, 482 U.S. at 89).

alyzing prison administrators' assertions that prison security interests and guards' equal employment rights justified these searches, concluded that "the connection between any legitimate penological interest and cross-gender searches is tenuous."<sup>172</sup>

Second, the concurrence examined whether inmates have an alternative means of exercising their Fourth Amendment right to be free from unreasonable searches.<sup>173</sup> Reinhardt recognized that an inmate, by virtue of being incarcerated, cannot escape these searches.<sup>174</sup> Thus, the cross-gender search policy left the inmates with "no means of protecting their bodies against unreasonable searches."<sup>175</sup>

Third, the concurrence analyzed "the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison."<sup>176</sup> Reinhardt found that "[h]ere, there will, of course, be no adverse effect of any kind on other inmates if female guards instead of male guards conduct the body searches."<sup>177</sup>

Finally, the concurrence examined whether prison authorities had an "obvious, easy" alternative available.<sup>178</sup> Reinhardt found that there was an obvious, easy alternative—use only female guards to perform these searches.<sup>179</sup> Although this alternative would require administrative adjustments, these adjustments would be "relatively insignificant, both in themselves and when weighed against the constitutional interests at stake."<sup>180</sup>

Next, Reinhardt looked to *Bell v. Wolfish* for guidance on how to apply the *Turner* factors.<sup>181</sup> *Bell*, which was decided before *Turner*, mandated that unreasonable search cases "require[ ] a balancing of the need for the particular search against the invasion of personal rights that the search entails."<sup>182</sup> Thus Reinhardt reasoned that the ultimate determination was "whether the prison's need to use male guards to conduct the body searches—to the extent that such need exists—outweighs the constitutional injury resulting from the invasiveness of the intrusion."<sup>183</sup>

In applying the *Bell* balancing test, Judge Reinhardt identified the two interests that prison administrators advanced in support of the cross-gender clothed body searches: prison security and guards' equal employment rights.<sup>184</sup> As to prison security, prison administrators argued that

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172. *Id.* (emphasis omitted).

173. *See id.* (citing *Turner*, 482 U.S. at 90).

174. *See id.* at 1536.

175. *Id.*

176. *Id.* (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989)).

177. *Id.*

178. *See id.* (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

179. *See id.* at 1536-37 (Reinhardt, J., concurring).

180. *Id.* at 1537 (Reinhardt, J., concurring).

181. *See id.* at 1535 (Reinhardt, J., concurring).

182. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

183. *Gardner*, 986 F.2d at 1535 (Reinhardt, J., concurring).

184. *See id.* at 1537, 1539 (Reinhardt, J., concurring).

suspicionless searches serve to suppress the movement of contraband through prisons.<sup>185</sup> They further argued that prohibiting male guards from conducting these searches would reduce the element of unpredictability that random searches brought to a prison environment.<sup>186</sup> Judge Reinhardt rejected this argument because the record showed that the three-year-long injunction did not impair security in the slightest.<sup>187</sup>

Prison administrators also claimed that barring male guards from conducting random searches would require adjustments "of staff schedules and job responsibilities, and the overriding of the bid system in the collective bargaining agreement, possibly leading to litigation by the guards' union."<sup>188</sup> Judge Reinhardt noted, however, that prison authorities had not changed a single guard's job during the three-year-long injunction.<sup>189</sup> In fact, the prison complied with the injunction simply by adjusting guards' schedules and job assignments.<sup>190</sup> Further, Reinhardt explained that previously, in resolving these situations, neither the bid system nor the collective bargaining agreement was adversely affected.<sup>191</sup> In sum, he concluded that the prison had only a minor interest in the regulation.<sup>192</sup>

Reinhardt then analyzed the other facet of the *Bell* test: the invasion of personal rights that the search entails.<sup>193</sup> Judge Reinhardt agreed with the district court's determination that an unknown number of female inmates would suffer great harm if the prison instituted a cross-gender search policy.<sup>194</sup> Judge Reinhardt concluded that inmates suffered substantial harm from these searches.<sup>195</sup>

Judge Reinhardt completed his Fourth Amendment analysis by balancing the prison officials' interests against the harm inflicted on the inmates.<sup>196</sup> In balancing, Reinhardt found, that the cross-gender, clothed-body search policy failed the *Bell v. Wolfish* test as applied in light of the four *Turner* factors because the prison administration's interests are "significantly outweighed by the harm the policy inflicts on the inmates and the injury it does to their constitutional rights."<sup>197</sup>

### C. Judge Trott's Dissent

In dissent, Judge Trott first examined the issue of which Eighth Amendment standard of wantonness to apply in *Gardner*.<sup>198</sup> As de-

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185. See *id.* at 1537.

186. See *id.*

187. See *id.* at 1538 & 1534 (Reinhardt, J., concurring).

188. *Id.* at 1539 (Reinhardt, J., concurring).

189. See *id.*

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.*

194. See *id.*

195. See *id.* at 1539-1540 (Reinhardt, J., concurring).

196. See *id.* at 1540.

197. *Id.*

198. See *id.* at 1558 (Trott, J., dissenting).

scribed previously, the Supreme Court has outlined two different "wanton" standards.<sup>199</sup> In cases in which a prison official's decision does not conflict with competing administrative concerns, such as with conditions of confinement, the deliberate-indifference standard applies.<sup>200</sup> On the other hand, in cases that involve a prison guard's use of excessive force or where prison officials take action in response to a prison disturbance, the malice standard applies.<sup>201</sup>

Judge Trott, in determining whether the deliberate-indifference standard applied, found the Supreme Court's statement in *Wilson v. Seiter* to be controlling.<sup>202</sup> In *Wilson v. Seiter*, the Supreme Court made clear that the deliberate-indifference standard is to be used only where the "needs of prisoners [do] not . . . clash with other equally important governmental responsibilities."<sup>203</sup> Judge Trott concluded that Superintendent Vail faced a considerable constraint, the welfare of the inmates.<sup>204</sup> According to Judge Trott, cross-gender searches protect inmates' health and safety by eliminating weapons, drugs, and hypodermic needles from the prison.<sup>205</sup> Further, Vail faced a weighty constraint because he had a duty to protect the prisoners from such dangers.<sup>206</sup> Thus, Judge Trott declined to apply the deliberate-indifference standard.<sup>207</sup>

Next, Judge Trott analyzed whether to apply the malice standard. He identified two relevant factors. First, he reasoned that the Supreme Court had extended the malice standard to "all excessive force cases, even where no competing institutional concerns are present."<sup>208</sup> Judge Trott reasoned that "[i]t would be anomalous indeed for the law to impose the highest mental element standard where gratuitous beatings occur but not where valid competing institutional concerns are implicated."<sup>209</sup> To clarify his point Trott made clear that in *Gardner* the cross-gender clothed body search had a valid penological purpose: to stanch the flow of contraband within the institution.<sup>210</sup>

Second, Judge Trott found that the malice standard furthers "the long-standing principle that '[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices.'"<sup>211</sup> Judge Trott emphasized that judges lack the skill or

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199. See *supra* text accompanying notes 44-45.

200. See *supra* text accompanying notes 46-60.

201. See *supra* text accompanying notes 61-69.

202. See *Gardner*, 986 F.2d at 1559 (Trott, J., dissenting).

203. *Id.* (Trott, J., dissenting) (quoting *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986))).

204. See *Gardner*, 986 F.2d at 1558-59 (Trott, J., dissenting).

205. See *id.* at 1559 (Trott, J., dissenting).

206. See *id.*

207. See *id.*

208. *Id.* (quoting *Hudson v. McMillian* 112 S. Ct. 995, 1008 (1992)).

209. *Id.* at 1559 (Trott, J., dissenting).

210. See *id.*

211. *Id.* at 1559-60 (Trott, J., dissenting) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

knowledge required to run a corrections facility.<sup>212</sup> He noted that the majority's opinion would create several major problems:

[T]he opinion unleashes a management nightmare. . . . Now, any individual female or male prisoner previously abused sexually is immune from random pat-down searches conducted by a person of the gender of the prisoner's abuser. A male prisoner with a history of abuse as a child by a man—and our prisons are full of them—will surely be able to make a case against random pat-down searches by male correctional officers. A woman previously abused by a woman may be able to do the same. . . . What about the victimized prisoner who claims he or she cannot have his or her private parts touched by anyone regardless of gender without suffering psychological damage? Judge O'Scannlain's opinion creates the real specter of a special class of untouchable prisoners.<sup>213</sup>

For these reasons Judge Trott concluded that the malice standard applied.<sup>214</sup>

Judge Trott, in applying the malice standard, examined Superintendent Vail's deliberations regarding implementation of the cross-gender searches. Judge Trott noted that Superintendent Vail attempted to formulate a cross-gender search that prisoners would find less intrusive.<sup>215</sup> Further, Judge Trott explained that Superintendent Vail obviously had struggled with this difficult problem and had tried to determine what was best for the prison, his staff, and the inmates.<sup>216</sup> On this basis, Judge Trott determined that Superintendent Vail, in implementing cross-gender searches, had not acted maliciously or sadistically, but had acted in good faith.<sup>217</sup> Thus, Judge Trott concluded that the inmates had not proven the "wanton" element of an Eighth Amendment claim, and therefore the inmates' claim failed.<sup>218</sup>

#### D. Judge Wallace's Dissent

Chief Judge Wallace's dissent follows Judge Trott's dissent on all but one point.<sup>219</sup> Chief Judge Wallace took issue with Judge Reinhardt's Fourth Amendment analysis, which combined the balancing test from *Bell v. Wolfish*<sup>220</sup> with the four-factor test in *Turner v. Safley*.<sup>221</sup> Chief Judge Wallace stated that because *Turner* essentially overruled *Bell*, *Tur-*

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212. See *id.* at 1560 (Trott, J., dissenting).

213. *Id.* at 1561 (Trott, J., dissenting) (emphasis omitted).

214. See *id.* at 1558 (Trott, J., dissenting).

215. See *id.* at 1549-52 (Trott, J., dissenting).

216. See *id.* at 1562 (Trott, J., dissenting).

217. See *id.* at 1561 (Trott, J., dissenting).

218. See *id.* at 1566 (Trott, J., dissenting).

219. See *id.* at 1567 (Wallace, C.J., dissenting).

220. See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). See *supra* text accompanying note 182 for *Bell* test.

221. See *Gardner*, 986 F.2d at 1567 (Wallace, C.J., dissenting); see also *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (creating the four-factor test); text accompanying notes 76-96 (referring to *Turner* test).

ner does not permit such a balancing.<sup>222</sup>

#### IV. CRITICISM OF *GARDNER*'S EIGHTH AMENDMENT ANALYSIS

The *Gardner* majority employed the proper Eighth Amendment legal test, in determining whether the searches in *Gardner* violated the Eighth Amendment. Under an Eighth Amendment analysis, a court must consider whether there is an "infliction of pain," and if so, whether that infliction is "unnecessary and wanton."<sup>223</sup>

##### A. The "Infliction of Pain" Element

Whether there is an infliction of pain requires an objective inquiry into the severity of the pain. The Supreme Court has stated that no single, "static" test exists by which courts can determine whether an infliction of pain is sufficient.<sup>224</sup> Rather, the Eighth Amendment "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'"<sup>225</sup> The Court has made clear, however, that "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation."<sup>226</sup>

The *Gardner* court's determination that the inmate had suffered sufficient pain to constitute an Eighth Amendment violation was improper for several reasons. First, the *Gardner* court's conclusion that cross-gender searches violate the Eighth Amendment is contrary to the weight of modern authority. Other circuit courts that have addressed the issue of cross-gender searches have not concluded that these searches inflict sufficient pain to constitute an Eighth Amendment violation.<sup>227</sup>

222. See *Gardner*, 986 F.2d at 1567 (Wallace, C.J., dissenting).

223. *Id.* at 1525 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (citations omitted)).

224. See *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

225. *Id.* at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

226. *Wilson v. Seiter*, 111 S. Ct. 2321, 2324 (1991) (quoting *Rhodes*, 452 U.S. at 347 (citation omitted)).

227. See, e.g., *Grummett v. Rushen*, 779 F.2d 491, 493 n.1 (9th Cir. 1985) (allowing pat searches of male inmates by female guards); *Madyun v. Franzen*, 704 F.2d 954, 955 (7th Cir.) (permitting searches of males by female guards), *cert. denied*, 464 U.S. 996 (1983); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (concluding that a pat down search performed by a female guard on a male inmate, excluding the genital area, does not constitute an Eighth Amendment violation).

Courts have concluded, however, that body cavity searches of members of the opposite sex violate the Eighth Amendment. See *Lee v. Downs*, 470 F. Supp. 188, 193 (E.D. Va. 1979) (concluding that the forcible removal of a female inmate's clothes by male guards constituted cruel and unusual punishment), *aff'd*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (affirming the district court's decision, but only referring to an invasion of the prisoner's privacy); *Frazier v. Ward*, 426 F. Supp. 1354, 1366 (N.D.N.Y. 1977) (body cavity searches not supported by probable cause violate the Eighth Amendment); *cf. Sterling v. Cupp*, 625 P.2d 123, 136 (Or. 1981) (en banc) (frisking of male inmates by female prison guards violates Oregon Constitution prohibiting prisoners from being treated with "unnecessary rigor").



Second, although courts must analyze claims in the context of "contemporary standards of decency," prisons neither are, nor are expected to be, comfortable places even under contemporary standards. Prisoners routinely undergo a variety of body searches, including fully clothed body searches, visual body cavity searches, and body cavity searches. For example, a visual body cavity search of a male requires:

opening his mouth and moving his tongue from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his armpits, spreading his testicles to expose the area behind his testicles, and bending over and/or spreading his buttocks to expose his anus to the frisking officer. For females the procedures are similar except that females must also squat to expose the vagina.<sup>228</sup>

Although these searches are deeply invasive and humiliating, courts have found that visual cavity searches do not violate the Eighth Amendment.<sup>229</sup> Likewise, in the context of prison life, which includes many invasive searches, cross-gender clothed body searches comport with contemporary standards of decency.

Third, in considering a prison security measure's constitutionality, courts have applied a high standard to determine what constitutes a sufficient infliction of pain. Rectal searches, which can be extremely painful, do not violate the Eighth Amendment.<sup>230</sup> A court also has found that a prison guard's use of taser guns, which also are extremely painful, does not violate the Eighth Amendment.<sup>231</sup> Because cross-gender searches are no more painful and invasive than other security measures, these searches do not meet the Eighth Amendment's pain requirements.

Finally, in cases in which courts have found an Eighth Amendment violation, the claims are more extreme than the claims in *Gardner*. For example in *McCord v. Maggio*,<sup>232</sup> the Fifth Circuit found an Eighth Amendment violation when a prisoner was forced to live and sleep for two years in an unlit cell with backed up sewage and roaches.<sup>233</sup> In *Parish v. Johnson*,<sup>234</sup> the Sixth Circuit found that a prison guard violated a paraplegic inmate's Eighth Amendment rights by assaulting the inmate with a knife, extorting food from him, and forcing the prisoner to sit in his own feces.<sup>235</sup> In *Fruit v. Norris*,<sup>236</sup> the Eighth Circuit found an

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228. *Duamutef v. Leonardo*, No. 91-CV-1100, 1993 WL 428509, at \*12 n.1, (N.D.N.Y. Oct. 22, 1993).

229. See, e.g., *Rickman v. Avani*, 854 F.2d 327, 329 (9th Cir. 1988) (upholding visual body cavity searches); *Arruda v. Fair*, 710 F.2d 886, 888 (1st Cir.), cert. denied, 464 U.S. 999 (1983) (upholding routine visual body cavity searches of maximum security inmates).

230. See, e.g., *Bruscino v. Carlson*, 854 F.2d 162, 164 (7th Cir. 1988) (upholding routine probe searches).

231. See *Michenfelder v. Sumner*, 860 F.2d 328, 334-36 (9th Cir. 1988).

232. 927 F.2d 844 (5th Cir. 1991).

233. See *id.* at 846-47.

234. 800 F.2d 600 (6th Cir. 1986).

235. See *id.* at 605.

236. 905 F.2d 1147 (8th Cir. 1990).

Eighth Amendment violation when prison officials compelled inmates to work inside the prison's sewage lift-pump station without protective clothing and equipment.<sup>237</sup> Because the pain in these cases was more intense and more prolonged than the pain suffered by the inmate in *Gardner*, the pain in *Gardner* was insufficient to allege an Eighth Amendment violation.

Thus, the majority in *Gardner* erred in determining that the inmate's suffering constituted a sufficient infliction of pain. Further, by finding a sufficient infliction of pain where a court should have determined that the infliction was constitutionally insufficient, the *Gardner* majority lowered the necessary threshold of pain for future claimants.

### B. *The Unnecessary Element*

The *Gardner* court properly determined that the infliction of pain was "unnecessary," because neither the WCCW's security nor its equal-employment concerns depended on cross-gender searches.<sup>238</sup> Superintendent Vail explained that during the three-year period in which the district court's preliminary injunction was in effect, the WCCW's security was not "impaired in the slightest."<sup>239</sup> Moreover, Vail testified that allowing only female guards to perform random searches satisfied the prison's need for these searches.<sup>240</sup> As to the prison's employment concerns, prison officials testified that "not a single bid had been refused, promotion denied, nor guard replaced as a result of the ban on routine cross-gender clothed body searches."<sup>241</sup>

### C. *The "Wanton" Element*

For several reasons, the majority correctly determined that the deliberate-indifference standard applied in *Gardner*. First, because these random searches address the medical needs of the prisoners, the deliberate-indifference standard should apply. The Supreme Court has clearly indicated that the deliberate-indifference standard applies in cases involving medical care.<sup>242</sup> Because the random search policy attempts to stanch the flow of drugs and AIDS-infected syringes within the prison,<sup>243</sup> "these searches are designed to ameliorate a harmful condition of confinement that is inimical to other basic human and medical needs of inmates."<sup>244</sup>

Second, the deliberate-indifference standard applies because these random searches protect prisoners, and the Supreme Court has held that

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237. See *id.* at 1150-51.

238. See *Jordan v. Gardner*, 986 F.2d 1521, 1526-27 (9th Cir. 1993); see also *supra* text accompanying notes 141-44.

239. *Gardner*, 986 F.2d at 1526.

240. See *id.* at 1527.

241. See *id.*

242. See *supra* text accompanying note 49.

243. See *Gardner*, 986 F.2d at 1559 (Trott, J., dissenting).

244. *Id.* (Trott, J., dissenting).

prisoner protection is a condition of confinement.<sup>245</sup> In *Gardner*, Superintendent Vail implemented random searches in order to eliminate deadly weapons from the prison environment and thereby reduce violence between inmates and against prison staff.<sup>246</sup>

Third, the cross-gender search policy addresses a condition of confinement because the constraints facing Superintendent Vail in deciding to implement these searches are similar to the constraints that officials faced in making decisions addressing other conditions of confinement. The Supreme Court explained that the primary factor to examine in determining whether prison conditions are "conditions of confinement" are the constraints officials face in making decisions.<sup>247</sup> The Court held that if the constraints facing an official in making any decision are similar to those faced by an official making a decision concerning the inmates' medical care, that condition should be considered a "condition of confinement."<sup>248</sup> The constraints Superintendent Vail faced in implementing a cross-gender search policy are similar to those faced by officials in determining the medical care that an inmate requires. Both officials, in making these decisions, are constrained primarily by the size of their budgets and work forces. Thus, because the officials face similar constraints in both situations, the *Gardner* majority correctly chose to apply the deliberate-indifference standard.

Fourth, under the facts in *Gardner*, the malice standard is inappropriate. The malice standard applies in two situations: when reviewing decisions which involved "the use of force to restore order in the face of a prison disturbance;"<sup>249</sup> and when "prison officials stand accused of using excessive physical force in violation of the" Eighth Amendment.<sup>250</sup>

Clearly *Gardner* did not involve an action taken to quell a prison disturbance, because the searches in *Gardner* were non-emergency searches.<sup>251</sup> Further, prison officials faced no prison disturbance at the time when the guard in *Gardner* performed the challenged search.<sup>252</sup> In fact, unlike decisions made in response to a prison disturbance, the search policy in *Gardner* was developed over time.<sup>253</sup> Superintendent Vail considered the policy for one month before he decided to institute it, and he delayed implementing the policy for over four months in order to train guards to perform these searches.<sup>254</sup>

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245. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991). In *Wilson*, the Court specified that among the conditions of confinement was "the protection [an inmate] is afforded against other inmates." *Id.*

246. See *Gardner*, 986 F.2d at 1548.

247. See *Wilson*, 111 S. Ct. at 2326.

248. See *id.* at 2327.

249. *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

250. *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992).

251. See *Gardner*, 986 F.2d at 1531.

252. See *id.* at 1523.

253. See *id.* at 1528.

254. See *id.* at 1523.

Similarly, the malice standard does not apply to searches in *Gardner* because *Gardner* does not involve allegations of excessive physical force. The inmates in *Gardner* did not claim that the force used by the male guards violated their rights. Rather, they objected to the gender of the person performing the search.<sup>255</sup> Thus, because the malice standard does not apply, the majority appropriately chose to apply the deliberate-indifference standard.

The majority in *Gardner* properly determined that Superintendent Vail acted with deliberate indifference. The deliberate-indifference standard contains two elements: an element of knowledge and an element of conduct. The first element requires that a prison official either knew or should have known about the risk of harm.<sup>256</sup> The second element requires a failure to act in order to prevent the harm.<sup>257</sup> In *Gardner*, Superintendent Vail knew of the risk of harm when he instituted the policy because his staff warned him of the search's potential harm.<sup>258</sup> Despite these warnings, Vail implemented the policy and, hence, failed to prevent the ensuing harm.<sup>259</sup> Thus, as the *Gardner* court concluded, under the deliberate-indifference standard, the cross-gender policy satisfied the "wanton" element of an Eighth Amendment analysis.

#### D. *Effect of the Gardner Decision*

The *Gardner* majority correctly identified the appropriate Eighth Amendment legal analysis. Further, it properly determined that the infliction of pain suffered by the WCCW inmate was "unnecessary and wanton." The majority's conclusion that there was a sufficient infliction of pain, however, was incorrect. The *Gardner* court, by improperly finding a sufficient infliction of pain, lowered the standard of pain required to make out a constitutional violation. By creating a lower standard of pain than courts previously have recognized, the *Gardner* decision broadened the Eighth Amendment's application. This extension of the Eighth Amendment creates several problems.

First, *Gardner* may provoke a flood of Eighth Amendment claims. Male prisoners could file Eighth Amendment claims against prison policies that permit female guards to perform random clothed body searches.<sup>260</sup> Similarly, male prisoners who have been sexually abused or raped by men could file claims against prisons that permit male guards to search their person randomly.<sup>261</sup> Stretched to its utmost, *Gardner* could prevent guards of a certain race or religion from searching some in-

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255. See *id.* at 1524.

256. See *supra* note 152 and accompanying text.

257. See *supra* note 153 and accompanying text.

258. See *Gardner*, 986 F.2d at 1528-29.

259. See *id.* at 1528-29.

260. For example, male inmates could present expert testimony supporting the proposition that men do experience psychological trauma as a result of such searches.

261. See *Gardner*, 986 F.2d at 1561 (Trott, J., dissenting).

mates.<sup>262</sup> If an inmate claims to have been abused by a member of a particular race or religion, the prisoner could claim to be traumatized if a guard of that race or religion searched the prisoner.

Second, *Gardner* and the cases that may follow it could hamper prison administration. Because certain guards may be prohibited from searching certain inmates, prison job scheduling could become extremely complicated. This "management nightmare," as Judge Trott called it, could culminate in prisoners wearing badges that explain who may search them.<sup>263</sup>

In addition to the problems caused by extending application of the Eighth Amendment, the *Gardner* court's conclusions that male guards may not perform random clothed body searches on female inmates but that female guards may perform such searches on male inmates is problematic for two reasons. First, the distinction between male and female sensitivity may become blurred as male-rape statistics become more available and social scientists complete more thorough male-rape studies.<sup>264</sup> Second, *Gardner* and its progeny could prompt a flood of Equal Protection claims.<sup>265</sup> In states where courts prohibit male guards from performing clothed body searches on female prisoners, but do not prevent female guards from performing these searches on male prisoners, male prisoners could bring Equal Protection actions. Thus, the *Gardner* court may have drawn a line that it may have to reconsider in the future.

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262. Groups could be based on race, religion, gender, or sexual-orientation.

263. See *supra* text accompanying note 213.

264. It appears that the number of male rape victims is underreported. See, e.g., Nathan Gorenstein, *Men Raping Men: It's More Common than People Think*, Phila. Inquirer, Oct. 4, 1991, at B5 (explaining that "if only 10 percent to 25 percent of female rapes are reported, the rate for male rape is probably far lower"); Christol Powell, *Male Rape Victims: Help for an Underreported Abuse*, Wash. Post, Apr. 12, 1990, at C05 (detailing how a long-term study on child sexual abuse found that by 1986, 22.8 percent of the total number of cases reported were assaults on males ages newborn to 17).

265. Two courts have addressed this issue. Although each court took a different analytical approach in resolving the prisoner claim, each arrived at the same conclusion. In *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), prisoners in an all-male Nebraska state prison brought an action alleging "that differences in privacy protections afforded male and female inmates in the Nebraska penal system violate the equal protection clause of the fourteenth amendment." *Id.* at 1102-03. The court, after analyzing the claim, concluded that the male inmate's claim failed because male and female inmates "'are not similarly situated.'" *Id.* at 1103 (quoting *Timm v. Gunter*, No. CV85-L-501, at 15-16 (D. Neb. Dec. 13, 1988)).

In *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), prisoners claimed that the Illinois Department of Correction's policy of permitting only female guards to search female prisoners while permitting either male or female guards to search male prisoners violated the Fourteenth Amendment's Equal Protection Clause. See *id.* at 961-62. The court relied on the Supreme Court's statement that "any gender based distinction drawn by the state 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 962 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). The *Madyun* court concluded that the claim was invalid because the state had a legitimate objective: equal job opportunities for female guards. See *id.* at 962-963. Thus, although prisoners may bring Equal Protection claims, it appears unlikely that these claims will be successful.

## V. AN ALTERNATIVE ANALYSIS—THE FOURTH AMENDMENT

Because under a proper Eighth Amendment analysis, the prisoners' claims in *Gardner* should fail, a court will have to examine the claims under the Fourth Amendment. Unlike the Eighth Amendment, the Fourth Amendment does provide prisoners with some protection from intrusive cross-gender searches. A Fourth Amendment analysis also has several advantages over an Eighth Amendment analysis. Furthermore, by applying the Fourth Amendment, courts can avoid the problems created by the *Gardner* decision.

A. *The Fourth Amendment Analysis*

To determine whether the prison policy in *Gardner* violates the Fourth Amendment, a court must determine whether a prisoner possesses some limited Fourth Amendment rights while incarcerated<sup>266</sup> and whether the prison regulation is reasonably related to legitimate penological interests.<sup>267</sup> In performing the latter test, a court should examine four factors.<sup>268</sup>

Although the Supreme Court has not decided whether prison inmates have any Fourth Amendment rights,<sup>269</sup> the circuit courts that have considered the matter have determined that inmates retain some limited Fourth Amendment protection.<sup>270</sup> Thus, following the weight of modern authority, other courts should find that inmates possess some limited Fourth Amendment rights.

In determining whether a prison policy is reasonably related to legitimate penological interests, courts must first identify the governmental interests at stake. In *Gardner*, two penological interests existed: the prison's security interests and the guards' employment rights.<sup>271</sup>

In analyzing these interests, courts should distinguish between the entire random search policy and the cross-gender facet of the search policy. Courts should draw this distinction because the prisoners in *Gardner* did not claim that random searches violated their Fourth Amendment rights. Rather, prisoners claimed that the cross-gender aspect of the search violated their Fourth Amendment rights.<sup>272</sup> Thus, courts must decide whether the cross-gender aspect of an otherwise constitutional search<sup>273</sup> is reasonably related to either the prison's security interests or the guards' employment rights.

To make this determination, courts must examine each of the four fac-

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266. See *supra* text accompanying note 83.

267. See *supra* text accompanying note 80.

268. See *supra* text accompanying notes 91-96.

269. See *supra* text accompanying note 30.

270. See *supra* note 85 and accompanying text.

271. See *Jordan v. Gardner*, 986 F.2d 1521, 1537-39 (9th Cir. 1993) (Reinhardt, J., concurring).

272. See *id.* at 1524.

273. See *id.*

tors set out in *Turner*. First, a court must determine whether there is a "valid rational connection" between the prison regulation and the legitimate governmental interest."<sup>274</sup> Because Superintendent Vail implemented these cross-gender searches as a response to a labor grievance, there probably was a rational connection between the cross-gender random search policy and the guard's employment rights. Before the WCCW implemented the random, cross-gender search policy, female guards filed a grievance against the prison's policy requiring female guards to perform all routine searches at the prison.<sup>275</sup> When the prison implemented the new, random search policy, Superintendent Vail decided that, in order to prevent any further labor grievances, male guards should also perform random searches.<sup>276</sup>

To determine whether there is a rational connection between the random cross-gender search and the prison's security interests, it is necessary to ascertain whether the inmates could have taken advantage of a situation in which only female guards performed the random searches. It is unclear whether the search policy was rationally connected to the prison's security interests because the evidence regarding the policy's affect on prison security is contradictory.

On direct examination, Superintendent Vail testified that having only female officers searching the prisoners was analogous to "putting a red flag on half the officers . . . . Those with red flags can search; those without can't."<sup>277</sup> Yet, on cross examination, Superintendent Vail admitted that inmates would not ordinarily know the sex of the guards at any location in the prison, and therefore, the inmates could not anticipate where and when to move any contraband.<sup>278</sup> While Vail's testimony on direct examination seems to establish a rational connection between the search policy and a security interest, his testimony on cross-examination considerably undermines this connection.

The second *Turner* factor requires a court to examine whether inmates have an "alternative means of exercising the [constitutional] right."<sup>279</sup> Here, inmates claim a right to be free from cross-gender searches, and due to the nature of incarceration, they cannot avoid these searches. Thus, inmates have no other means of exercising their right to be free from such searches. Therefore, the second element indicates that these searches may be unconstitutional.

Third, a court must consider "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."<sup>280</sup> Accommodating the

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274. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

275. See *Gardner*, 986 F.2d at 1523.

276. See *id.* at 1523.

277. *Id.* at 1554 (Trott, J., dissenting) (quoting testimony of Superintendent Vail).

278. See *id.* at 1538 (Reinhardt, J., concurring).

279. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

280. *Id.*

inmates' rights in *Gardner* would have little impact on the allocation of prison resources. Prohibiting male guards from performing random searches resulted in only slight changes in the guards' work schedules.<sup>281</sup> Further, prohibiting male guards from performing these searches did not significantly affect the guards' employment rights.<sup>282</sup> The three-year-long injunction, which prohibited male guards from performing these searches, did not significantly affect the male guards' wages and promotions.<sup>283</sup> Thus, prohibiting these cross-gender searches would have no appreciable effect on guards and inmates.

Fourth, a court must determine whether an "obvious, easy" alternative to the challenged practice exists that will fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests.<sup>284</sup> Here, there is an "obvious, easy" alternative—use female guards to perform all random cross-gender searches. This alternative is obvious and easy because requiring female guards to perform all random, cross-gender searches will not jeopardize any of the prison's security interests.<sup>285</sup> In fact, superintendent Vail confirmed that random searches performed only by female guards satisfied the WCCW's need for random searches.<sup>286</sup>

Further, this alternative will not affect the guard's equal-employment rights because prison officials did not replace a single guard or deny a single promotion during the three years that the injunction was in place.<sup>287</sup> Superintendent Vail acknowledged that he made only slight adjustments to scheduling and job assignments during this three-year period when only female guards were permitted to perform random searches.<sup>288</sup> Because there is an "obvious, easy" alternative in this case, the regulation is not reasonable but is rather an exaggerated response to prison concerns.<sup>289</sup> In light of these four factors, the WCCW's policy is not reasonably related to a legitimate penological interest and, thus, violates the inmates' Fourth Amendment rights.

### B. Considerations Supporting a Fourth Amendment Approach

A court performing a Fourth Amendment analysis of cross-gender prison search claims gains certain advantages over a court performing an Eighth Amendment analysis. First, performing a Fourth Amendment analysis when addressing prison search claims is the most efficient dispo-

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281. See *Gardner*, 986 F.2d at 1539 (Reinhardt, J. concurring).

282. See *id.*

283. See *id.* at 1539 n.13 (Reinhardt, J., concurring), 1527.

284. See *Turner v. Safley*, 482 U.S. 78, 90-91 (1987).

285. Prison officials testified at trial that security at the WCCW had not been impaired in the slightest during the three year period that injunctions prohibited random, cross-gender searches. See *Gardner*, 986 F.2d at 1526-27.

286. See *id.* at 1526-27.

287. See *id.* at 1526-27, 1539 (Reinhardt, J., concurring).

288. See *id.* at 1539 (Reinhardt, J., concurring).

289. See *Turner v. Safley*, 482 U.S. 78, 90-91 (1987).



sition of the claim. Because any search which constitutes cruel and unusual punishment under the Eighth Amendment should be considered "unreasonable" under the Fourth Amendment, any search violating the Eighth Amendment will also violate the Fourth Amendment.<sup>290</sup> The converse, however, is not true.<sup>291</sup> Thus, by considering the Fourth Amendment first, a court will be performing its analysis more efficiently.

Second, a Fourth Amendment analysis has the advantage of simplicity. The Fourth Amendment analysis is relatively straightforward, requiring only an objective determination of whether the search is "unreasonable."<sup>292</sup> In contrast, an Eighth Amendment analysis requires a court to conduct a subjective inquiry into a prison official's state of mind,<sup>293</sup> in addition to other "complex issues posed by an exploration of eighth amendment doctrine."<sup>294</sup>

Furthermore, a court finding a Fourth Amendment violation will avoid the considerable problems that the *Gardner* court created when it found an Eighth Amendment violation. First, unlike *Gardner*, a court finding a Fourth Amendment violation will not provoke a flood of prisoner claims. Under the Fourth Amendment, a prison official must only prove that the search regulation is reasonably related to a legitimate governmental interest in order to defeat a prisoner's Fourth Amendment allegation.<sup>295</sup> Thus, a prisoner is burdened with a far more difficult task under the Fourth Amendment than under the Eighth Amendment as defined by the *Gardner* court. Because this heavier burden will discourage many prisoners from filing claims, applying a Fourth Amendment approach avoids the flood of litigation that the *Gardner* decision will create.

Second, because under the Fourth Amendment courts will find fewer violations, prison administrators will face fewer court-imposed search restrictions. Further, those search restrictions that courts impose will likely be easy to implement because a significant factor in determining whether a Fourth Amendment violation exists is an alternative's effect on prison resources. Thus, courts will avoid the managerial nightmare that Judge Trott envisioned.

Finally, by finding a Fourth Amendment violation a court avoids creating a problematic distinction between men and women's sensitivity. The *Gardner* court concluded that male guards may not perform random

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290. See *Jordan v. Gardner*, 986 F.2d 1521, 1542 (9th Cir. 1993) (Reinhardt, J. concurring). This argument is correct when comparing an Eighth Amendment analysis with the proper standard of care and a Fourth Amendment analysis. However, under the *Gardner* court's improper Eighth Amendment analysis with a lower standard of pain, this statement is incorrect because the Eighth Amendment analysis becomes almost ineffectual.

291. See *Gardner*, 986 F.2d at 1542 (Reinhardt, J. concurring).

292. See *id.*

293. See *supra* text accompanying note 42.

294. *Gardner*, 986 F.2d at 1542.

295. See *supra* text accompanying note 80.

clothed body searches on female inmates but that female guards may perform such searches on male inmates. In contrast, a Fourth Amendment finding does not create a bright-line gender distinction. Rather, it ascertains on a case-by-case basis whether the prison regulation is reasonably related to legitimate penological interests. Thus, because a Fourth Amendment analysis does not distinguish between men and women's sensitivity, it does not create a distinction which may have to be reconsidered in the future.

### C. Criticism of Judge Reinhardt's Fourth Amendment Analysis

Although arriving at the same conclusion, this Fourth Amendment analysis should not be misconstrued as a tacit acceptance of Judge Reinhardt's Fourth Amendment analysis.<sup>296</sup> As Chief Judge Wallace's dissent observed,<sup>297</sup> Judge Reinhardt's Fourth Amendment analysis is flawed in both its explanation and application of the appropriate Fourth Amendment law.

Although Reinhardt correctly set forth the *Turner* test and its four factors,<sup>298</sup> he stated that a court should look to *Bell v. Wolfish* for guidance in applying *Turner*.<sup>299</sup> Reinhardt's employment of the *Bell* standard is improper. The Supreme Court decided *Turner* after *Bell*<sup>300</sup> and effectively prohibited courts from applying the *Bell* test in prison cases.<sup>301</sup> *Bell* mandates that a court employ a balancing test when analyzing unreasonable search claims.<sup>302</sup> *Turner*, on the other hand, applies whenever "a prison regulation impinges on inmates' constitutional rights."<sup>303</sup> Therefore, because *Turner* was decided after *Bell* and the Supreme Court has made clear that *Turner* must be applied when prisoners bring any constitutional claim, the *Bell v. Wolfish* balancing test does not survive *Turner* in the prison context.

Thus, when Judge Reinhardt applied the four *Turner* factors, he employed an improper balancing approach.<sup>304</sup> *Turner* does not authorize such balancing. Rather, it requires a court to examine four factors to determine whether a regulation is reasonably related to legitimate penological interests.<sup>305</sup> Thus, Judge Reinhardt, while arriving at the correct conclusion, performed an improper Fourth Amendment analysis.

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296. See *supra* text accompanying notes 156-97.

297. See *supra* text accompanying notes 219-22.

298. See *supra* text accompanying notes 170-80.

299. See *supra* notes 181-82 and accompanying text.

300. The *Turner* case was decided in 1987, over eight years after the *Bell* case was decided.

301. See *Turner v. Safley* 482 U.S. 78, 89 (1987).

302. See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

303. See *Turner*, 482 U.S. at 89.

304. See *supra* text accompanying notes 181-97.

305. See *supra* text accompanying notes 76-96.

## CONCLUSION

The *Gardner* court addressed a prison search policy that implicated the Fourth Amendment and the Eighth Amendment. Although courts typically address prison search issues under the Fourth Amendment, the majority in *Gardner* concluded that the random, cross-gender clothed body searches at issue in that case violated the Eighth Amendment. It reached this conclusion by incorrectly finding that the prison policy inflicted sufficient pain on one inmate to constitute an Eighth Amendment violation. Had the court analyzed the pain element properly, it would have found that the infliction of pain the inmate suffered was insufficient to violate the Eighth Amendment.

The *Gardner* court's improper conclusion is problematic because it lowers the required threshold of pain necessary for an Eighth Amendment violation. This lowered standard could provoke a flood of Eighth Amendment claims and could create administrative problems within prisons. Moreover, the *Gardner* court's analysis is based in part on a gender-specific distinction in evaluating the amount of pain inflicted, and, as such is troublesome.

Courts should not follow the *Gardner* decision. Rather, courts should analyze prison searches under the Fourth Amendment. Under a Fourth Amendment analysis, the WCCW's random, cross-gender searches violated the prisoners' rights to be free from unreasonable searches. Moreover, a Fourth Amendment analysis affords courts an efficient and simple analytical framework for resolving these prison search claims. Thus, a Fourth Amendment analysis provides prisoners some protection from invasive cross-gender searches while avoiding the considerable problems the *Gardner* court created when it found an Eighth Amendment violation.