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SEX & SURVEILLANCE:
GENDER, PRIVACY & THE SEXUALIZATION OF
POWER IN PRISON

*Teresa A. Miller**

In prison, surveillance is power and power is sexualized. Sex and surveillance, therefore, are profoundly linked. Whereas numerous penal scholars from Bentham to Foucault have theorized the force inherent in the visual monitoring of prisoners, the sexualization of power and the relationship between sex and surveillance is more academically obscure. This article criticizes the failure of federal courts to consider the strong and complex relationship between sex and surveillance in analyzing the constitutionality of prison searches, specifically, cross-gender searches.

The analysis proceeds in four parts. Part One introduces the issues posed by sex and surveillance. Part Two describes the sexually predacious prisoner subculture that frames the issue of cross-gender searches and demonstrates how the current doctrine participates in the allocation of power within prison without admitting it. Part Three presents the doctrinal background for cross-gender search cases. It traces the precedents that eroded the basic notion of prisoner privacy and charts the parallel ascendance of sex-based concerns in the regulation of prisons. It also demonstrates that the constitutional doctrine of cross-gender searches is in disarray and that the confusion within

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the doctrine centers on visual surveillance of male prisoners by female guards in "contact" positions. Part Four examines *Johnson v. Phelan*,¹ one of the few judicial opinions to draw attention to the realities of prison life in its discussion of visual surveillance. This section credits Judge Richard Posner's dissent for recognizing the limitations of privacy-based judicial approaches to cross-gender search cases, but criticizes it for blaming the doctrinal inadequacies on those who promote the entry of women into the field of corrections. Finally, this article concludes that judges need to take a new approach to prisoner privacy claims and look beyond traditional sex and power stereotypes.

I. AN INTRODUCTION TO SEX AND SURVEILLANCE

This article discusses how judges ignore the realities of sex and power behind bars, and how this failing skews the doctrine of cross-gender searches by focusing the constitutional privacy inquiry on sex role stereotypes, rather than sex, power, and the sexualization of power through sexual violence. To provide a background for these issues, this introduction draws upon two sources to introduce the difficult issues posed by sex and surveillance: (1) a prisoner's autobiography² and (2) recent reports of human rights groups on prison conditions in the United States.³

In *Revolutionary Suicide*, an autobiographical account of his imprisonment in a California maximum security prison, Huey Newton, a Black Panther, makes the following observations about power, sex and surveillance in the closed society that confronted him when the bars slammed shut behind him:

I did not know one person at the [California Men's Colony in San Luis Obispo] when I arrived. Eventually, I met other prisoners and tried to reach them, but I found it hard to politicize men who lived largely for the next sexual encounter. To them, sex was all. These men were exploited and controlled by the guards and the system. Their sexuality was perverted into a pseudosexuality that was used to control and

¹ *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995).

² See HUEY P. NEWTON, *REVOLUTIONARY SUICIDE* (1973).

³ See HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* (1996). This report reflects research conducted over a two-and-a-half-year period based on interviews with federal and state corrections' authorities, lawyers, prisoner aid organizations, and over sixty prisoners incarcerated in California, Georgia, Illinois, Michigan, New York and the District of Columbia.

undermine their normal yearnings for dignity and freedom. The system was the pusher in this case, and the prisoners were forced to become addicted to sex. Love and vulnerability and tenderness was distorted into functions of power, competition, and control.⁴

Newton describes the way in which prisoners at the Colony would make dates and engage in sexual liaisons unobserved by guards.

The guards were content to look the other way as long as things stayed cool. Only political action brought quick, repressive steps. The guards would simply threaten to put the political offender on a bus and send him away from his lover. These threats always worked. As a matter of fact, many guards were themselves homosexuals. Often as I showered, a guard would stand in the doorway, talking, looking not at my face but at my penis, and say, "Hey, Newton, how you doin' there, Newton? Wanna have some fun, Newton?" I laughed at them.⁵

Newton goes on to explain that even the introduction of conjugal visitation in California prisons—viewed by liberals as a step forward—did not diminish the sexual power of guards. "The same coercion and control are there, even more so, because guards can deny a man his woman just as they denied a man his man; but the inmate cannot easily find another woman. This is prison, where *every desire is used against you.*"⁶

Newton's account illustrates the sexualization of power. First, he describes a population of men exploited by their addiction to sex. Their dependence is created by an institution that denies sexual outlets to prisoners as an incident of their punishment. The prison system exploits the void to increase its control over the population.⁷ Newton's complaints about the difficulty of politicizing men living for the next sexual encounter attests to the effectiveness of the sexual

⁴ H. NEWTON, *supra* note 2, at 251-52.

⁵ *Id.*

⁶ *Id.* (emphasis added).

⁷ Prison regulations across the states and within the federal system uniformly proscribe sexual intercourse among prisoners. The necessity for such a rule can be debated elsewhere. The reality, however, is that short of imposing solitary confinement upon every prisoner, it is impossible for prison managers to police prisoners' sexual contact. Sex in prison is the alcohol of the Depression Era: outlawed, yet unstoppable. As with Prohibition, corruption is a predictable result of such an impossible task. Incapable of eliminating the market for sex, guards exploit it for the purposes of furthering more attainable correctional goals such as keeping order, discouraging aggressors and managing the population.

dependency cultivated by prison regulations and security staff in rendering the population less threatening. Second, Newton demonstrates the sexualization of power in his description of guards taunting him by talking to his penis rather than to his face, reducing the man to his sexual organ. Third, Newton's account also illustrates the power inherent in surveillance. Simply by looking the other way, guards condone conduct that violates prison rules. However, by ignoring inmate sexual liaisons "as long as things stayed cool," guards retain the authority to separate couples and generally exploit the sexual dependency of their charges.

The inescapable fact of sexuality—albeit distorted and manipulated as it is in prison—bears upon the application of the Fourth Amendment in prison. Judges determine the scope of prisoners' privacy based upon assumptions about the effects of various searches upon human dignity. Nowhere are these assumptions more evident than in judicial opinions that consider the constitutionality of body searches conducted by guards of the opposite sex of the prisoner. Federal judges are wildly inconsistent about the role of sexuality in searches. This lack of consensus largely reflects judges' attitudes about sex and power in relations between guards and inmates of the opposite sex. Some judges presume the sexual vulnerability of women regardless of their status as prisoners or guards.⁸ Many judges treat biological sex, sexual orientation, and gender as immutable characteristics, in spite of the fluidity of sexual and gender identity in prisons and jails.⁹ This is most obvious in the fallacious assumption by judges that a societal "nudity taboo" is broken, and thus privacy is violated only when guards and inmates from two biological categories of sex are involved: male and female. Indeed, this assumption is implicitly criticized in *Canedy v. Boardman*.¹⁰ The treatment of biological sex, sexual orientation and gender as static categories is further evident in the fact that privacy issues are not generally triggered in prisoner

⁸ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1979) (assuming the very nature of femaleness is sufficient to make women guards vulnerable to sexual attack by male prisoners).

⁹ See, e.g., *Canedy v. Boardman*, 16 F.3d 183 (9th Cir. 1963).

¹⁰ See *id.* at 185 n.1 ("York [*v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)], many of the cases . . . involving cross-gender observations and strip searches, as well as Canedy's brief on appeal here, make a common assumption. In their declaration that 'the nudity taboo', and hence the invasion of privacy involved when it is forcibly broken, is much greater between the sexes than among members of the same sex, [Plaintiff's Brief at 13, *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (No. 18280)], these authorities and submissions appear to assume that all of the relevant actors are heterosexual").

search cases in the absence of opposite sex contact between guards and inmates, even when the search conducted is highly invasive.¹¹ Nevertheless across the board, judges more readily acknowledge the impact of sexuality upon searches when male guards conduct invasive searches upon female prisoners.¹²

The link between searches and sexual violence against women prisoners has been made powerfully and repeatedly. Most recently, Amnesty International and Human Rights Watch — both influential international organizations — have published reports condemning cross-gender searches because of the danger that such unmonitored access poses to women prisoners. In the Human Rights Watch Report entitled, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*,¹³ investigators found evidence that male correctional officers had sex with female prisoners including vaginal, anal and oral rape. The investigation further revealed that male guards had not only used actual or threatened physical force, but capitalized upon their “near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex or, in other cases, to reward them for having done so.”¹⁴ The report is highly critical of policies allowing cross-gender searches, adding that in addition to having sex with prisoners, male officers “used mandatory pat-frisks or room searches to grope women’s breasts, buttocks, and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas.”¹⁵ Indeed, Human Rights Watch recommended that state penal authorities establish policies that limit “inappropriate visual surveillance of prisoners by employees of the opposite sex.”¹⁶

¹¹ See *Cameron v. Hendricks*, 942 F. Supp. 499 (D. Kan. 1996) (“The court likewise finds no legal basis for finding a Fourth Amendment violation on the fact that the guards and nurses were present during the rectal examination, administration of the enema, and the subsequent bowel movement. The plaintiff does not allege the presence of members of the opposite sex during any of these events.”).

¹² See *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1986) (criticizing the defendants’ disparagement of plaintiff male prisoners’ claim that being forced to stand naked “before the watchful eyes of female guards” is embarrassing, but also admitting that “no federal court has yet held that such conditions violated the Eighth and Fourteenth Amendments”).

¹³ HUMAN RIGHTS WATCH, *supra* note 3.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 14.

In its 1999 report, *Not Part of My Sentence: Violations of the Human Rights of Women In Custody*,¹⁷ Amnesty International criticizes state and federal prison authorities in the United States for ignoring international standards requiring close supervision of female prisoners by female guards.

Contrary to international standards, prisons and jails in the USA employ men to guard women and place relatively few restrictions on the duties of male staff. As a consequence, much of the touching and viewing of their bodies by staff that women experience as shocking and humiliating is permitted by law.¹⁸

Body searches and surveillance of naked female prisoners in particular have been tied to sexual misconduct and rape at the hands of male guards. Nevertheless, the link between searches and sexual violence against male prisoners remains largely unexplored. This is somewhat ironic because women prisoners are generally understudied and their experiences undertheorized.¹⁹ Several factors account for this irony. First, assumptions of heteronormativity, combined with the relatively low number of female correctional officers working in men's prisons raise few concerns for the male prisoner's wellbeing.²⁰ Second, men are perceived as more sexually aggressive than women and women are viewed as more sexually vulnerable. Third, dereliction of an established public duty is more clear when sexual violence is perpetrated by guards, and yet the greatest danger of sexual violence posed to most incarcerated men is from fellow prisoners. Finally, incarcerated women, as a group, are more sympathetic to the public than incarcerated men. Thus, the public interest in the conduct and consequences of searches is generally lower when male prisoners are involved.

While most people agree that punishment is an acceptable aspect of incarceration, judges disagree as to whether visual surveillance of

¹⁷ AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE," VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, AMR 51/01/99, Mar. 1999, at 39.

¹⁸ *Id.*

¹⁹ They have been described as a "forgotten population." See WOMEN PRISONERS: A FORGOTTEN POPULATION (Beverly R. Fletcher, et al. eds., 1993).

²⁰ The national average for female correction officers in 1996 was 18% of all correctional officers. However, in New York State, one of the ten states that incarcerate the largest number of women, only 7.5% of the correction officers were female. Gary Craig, *A 'Huge Problem' in Men Guarding Women*, DEMOCRAT & CHRON., Aug. 17, 1996, at A1.

nude prisoners by guards of the opposite sex goes beyond the limits of appropriate punishment into the realm of dehumanizing treatment that is neither legally nor morally justifiable. The issue of the appropriateness of such searches impacts three distinct interests: (1) prisoner privacy; (2) the institutional security of prisons; and (3) women's rights.

Resolution of these three issues is complicated by three related trends in prison law and policy: (1) the legal retrenchment of prisoner rights; (2) increasingly punitive attitudes toward prisoners; (3) and the impact of equal employment initiatives for women in corrections mandated by Title VII.²¹ The first has raised the bar for constitutionally cognizable claims. Consequently, treatment of prisoners that formerly would have established a cause of action might be considered a hardship that is a normal incident of incarceration. The second has erased bright line distinctions between various classes of persons held in custody. Therefore, standards for the treatment of prisoners awaiting trial, those persons who have been convicted of misdemeanors, those convicted of felonies, and to a lesser extent, those detained awaiting deportation have merged.

The third trend—increasing employment opportunities for women in corrections—has encouraged judges and others to position the privacy rights of prisoners and the employment rights of guards in diametric opposition. Indeed within the constitutional doctrine of prisoner's rights, the Eighth Amendment standard for failure (of guards) to protect prisoners from assault by other prisoners is far weaker than the legal standard for excessive use of force by guards on prisoners.²² This has led to “either or” judicial reasoning — driven by security concerns — that favors statutorily derived employment rights over constitutionally derived privacy. The issues raised in *Revolutionary Suicide* and the reports of the two human rights organiza-

²¹ 42 U.S.C. § 2000e, *et. seq.* (1994). Title VII of the Civil Rights Act of 1964 states, in pertinent part that: “It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex” *Id.* § 2000e-2.

²² *See, e.g.,* Farmer v. Brennan, 511 U.S. 825 (1994) (holding that the Eighth Amendment is violated when prison personnel knew of, and disregarded an excessive risk to inmate safety); Hudson v. MacMillian, 503 U.S. 1 (1992) (holding that the Eighth Amendment is violated when force by guards is applied maliciously and sadistically for the purpose of causing harm).

tions underscore the inconsistency and confusion in the doctrine of cross-gender searches.²³

Prisons are sites of sexual and gender complexity that require a far more nuanced understanding of the relationship between gender, nudity, sex and violence than that implicit in the doctrinal analysis of cross-gender search cases. Underlying the distinctions judges draw between permissible and impermissible searches are gross generalizations about the significance of being observed naked or only partially clothed by a stranger of the opposite sex. While they may be accurate in other privacy-related contexts, their applicability in the context of prisons must be re-examined.

Any discussion of the constitutional jurisprudence of cross-gender searches in prison must acknowledge the significance of power, and its sexualization in prison. Sexual aggression is the backdrop against which prison searches are played out. Men's high-security prisons and large urban jails are characterized by sexist, masculinized subcultures where power is allocated on the basis of one's ability to resist sexual victimization. First, guards relate to prisoners in sexually derogative ways that emphasize the prisoner's subordinate position. For example, guards commonly address male prisoners by sexually derogatory titles such as pussy, sissy, cunt and bitch. These pejorative titles emphasize and stigmatize the loss of authority incident to incarceration by likening it to unmanliness. Use of derogatory words such as "pussy" and "cunt" to refer to male prisoners emphasizes and stigmatizes the prisoner's lack of true male authority. Second, in rare instances where prisoners gain authority over guards, conversely power is sexualized through violence. For example, during prison riots, prisoners frequently sexually assault guards.²⁴ Finally, between male prisoners, a social pecking order is established and reinforced through acts of sexual subjugation (either consensual or coerced submission to sexual penetration).

These sexual acts occur with greater frequency in the shower, toilet and dressing areas of prisoners' living quarters, where female

²³ This is both troubling and ironic. The basic values that animated the movement to mainstream women into employment traditionally reserved for men include respecting human dignity and upholding the rights individuals who have been denied opportunity based upon stereotypes. Allowing the employment rights of women to trump the privacy rights of male prisoners is inconsistent with the Feminist Movement itself.

²⁴ See Rachel Larris, *Univ. Washington: Amnesty International Urges Criminalization of Prison Rape*, WASH. DAILY (Feb. 9, 1999).

guards have only recently been deployed pursuant to equal employment initiatives such as Title VII.²⁵ The presence of female guards exposes to “outsiders” a social hierarchy among males in prison established and maintained through sexual domination of other males who are either unwilling or unable to avoid sexual penetration.

While Fourth Amendment²⁶ privacy is the primary means by which prisoners challenge the presence of women in “contact” positions in men’s prisons, privacy doctrine is no panacea. The Fourth Amendment alone cannot resolve the issue of cross-gender nudity in an atmosphere of sexual violence. Privacy doctrine gives judges some leeway to treat prisoners as whole, nuanced beings rather than stereotypes of their sex. However, privacy doesn’t neatly resolve the security issue with regard to searches, particularly in men’s prisons. Bathrooms are dangerous places. Protecting prisoners’ privacy in shower and toilet areas by excluding the gaze of female security personnel will likely make these areas more hazardous than they already are. However, in eliminating privacy in these areas, courts run the risk of dehumanizing prisoners, and treating them (as one prominent Seventh Circuit judge suggests) like animals in a kennel.²⁷

Regardless of whether prisoners’ extremely limited rights of privacy wax or wane, federal courts must deal far more realistically with the sexualization of power in prison. When judges promote the employment of women in contact positions in men’s prisons by limiting prisoner privacy, courts must be willing to destabilize the homosocial, sexist and masculine subculture of sexual domination that exists in men’s prison. Judges must not hesitate to peer into the dark abyss of sexual predation that pervades the culture of men’s prisons. If judges reject cross-gender visual monitoring by female guards working in “contact” positions within men’s prisons by broadening the scope of prisoner privacy, they must acknowledge their complicity in the masculinist subculture of sexual domination that encourages sexual violence in men’s prisons. Alternatively, perhaps in arguing for more prisoner privacy, judges may be acting upon humanitarian impulses to allow subordinated men to “keep their business to them-

²⁵ See *supra* note 22.

²⁶ U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated”

²⁷ See *Johnson v. Phelan*, 69 F.3d 144, 151 (7th Cir. 1995) (Easterbrook, J., majority opinion).

selves.” However, turning a blind eye to sexual violence among prisoners can hardly be characterized as humane.

II. THE REALITIES OF PRISON LIFE

A. *Among Male Prisoners, Power is Ordered by a Hierarchy of Dominance and Submission.*

Masculinity is greatly valued among male prisoners. For most male prisoners in long-term confinement, the loss of liberty suffered during incarceration is accompanied by a psychological loss of manhood. Behaviors that the contemporary prison population of predominantly African American and Hispanic working class young men associates with manliness are discouraged by prison officials and punishable as violations of prison disciplinary rules.²⁸ Conduct that orders power among men on the outside—dominance, aggression, confrontation, independence, autonomy and sexual access to women—is off-limits to prisoners consistent with the disciplinary apparatus. Additionally, the rigid hierarchy of authority between guards and prisoners is a direct affront to manhood. As one theorist of prison masculinities explains: “[a]part from the enormous threat imposed by the loss of heterosexual contact . . . the prisoner’s masculinity is besieged from every side: through loss of autonomy and independence, enforced submission to authority, lack of access to material goods, all of which are central to his status as a ‘man.’”²⁹

In the castrating,³⁰ infantilizing world of involuntary correctional confinement, prisoners develop informal hierarchies that reconstruct masculinity and distribute power.³¹ These hierarchies have been doc-

²⁸ Stephen Donaldson, a former prisoner who published a first-hand account of sexual subordination in prison, points out that “disciplinary codes in American confinement institutions are unanimous in outlawing all sexual activity.” See Stephen Donaldson, *A Million Jockers, Punks and Queens: Sex among American Male Prisoners and its Implications for Concepts of Sexual Orientation* (1993) (visited July 17, 1998) <<http://www.igc.apc.org/spr/docs/prison-sex-lecture.html>>. Prison regulations also prohibit across-the-board verbal and physical aggression toward guards, as well as activities such as fighting and gambling among prisoners.

²⁹ Carolyn Newton, *Gender Theories and Prison Sociology: Using Theories of Masculinities to Interpret the Sociology of Prisons for Men*, 33 HOW. J. CRIM. JUST. 193, 197 (1994).

³⁰ See GRESHAM M. SYKES, *SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY 70* (Princeton Univ. Press 1971) (1958).

³¹ In his study of the environmental factors affecting the behavior of violent and victimized male prisoners, Kevin Wright suggests that manhood is the overarching construct into which prisoners’ insecurities about their surroundings and themselves are collapsed.

Within the twisted confines of an all-male institution, the personal threat of incarceration often becomes defined and reconciled as an issue of manhood. Doubts about one’s iden-

umented by several prison sociologists.³² Sexual dominance and subordination is the principal hierarchy that has emerged among male prisoners.³³ Social scientists offer a variety of explanations for the centrality of this particular hierarchy. Chodorow focuses broadly on the traumatic separation from the mother in creating a masculine gender identity that rejects and suppresses femininity.³⁴ Consequently, masculinity becomes defined by a rigid dichotomy of masculine versus feminine.³⁵ Platek suggests that a prisoner subjected to a totalitarian disciplinary apparatus must react as a radical in recapturing his identity.³⁶ Segal posits that the conflict between the lives of lower working class men and the image of masculinity as power contributes to the formation of a more aggressive masculinity.³⁷ Newton expands upon this notion, suggesting that the same forces that shape a tough, hypermasculine ideal among working class men, accompanied by abhorrence of femininity, are magnified in prison where prisoners' masculine identities are constantly under siege. He states: "[f]ar from being stripped of all props and having to find entirely new ways of dealing with the deprivations of imprisonment, men in prison can be seen to resort to time-honored techniques that have served to keep

tity are simplified to questions of manliness, and the status of inmates as men is played out by a ritual of testing to identify weaker individuals, a process which in turn substantiates the strength of those who dominate them.

Kevin Wright, *The Violent and the Victimized in the Male Prison*, in *PRISON VIOLENCE IN AMERICA* 104 (Michael C. Braswell, et al., eds. 2d ed. 1994).

³² See, e.g., Richard A. Cloward, SOCIAL SCIENCE RESEARCH COUNCIL, *Social Control in the Prison*, in *THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON* (Richard A. Cloward, et al. eds. 1960); see also Richard H. McCleery, SOCIAL SCIENCE RESEARCH COUNCIL, *Communication Patterns as Bases of Systems of Authority and Power*, in *THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON* (Richard A. Cloward, et al. eds., 1960).

³³ The mechanisms by which power is ordered among female prisoners are less understood. Although social relations among women prisoners have been studied less, the research generally characterizes the social order among women prisoners as family based, recreating familial relationships lost by removal from the family. The recent influx of female gang members and more violent female offenders has undoubtedly impacted the subculture in women's prisons. Nevertheless, sexual attack among female prisoners is considered much rarer. Prisoner family groupings (mother/daughter, husband/wife, aunt/niece, etc.) appear to be the source of power through which women who distrust each other guard against being cheated or hurt by other women. These attachments are often reinforced through sexual intimacy, rather than sexual violence. Even where female prisoners assume masculine roles, their behavior does not resemble the type of hierarchical political social organization that flourishes in many men's prisons.

³⁴ See NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS & THE SOCIOLOGY OF GENDER* (1978).

³⁵ See C. NEWTON, *supra* note 29, at 198.

³⁶ See M. Platek, *Prison Subculture In Poland*, 18 INT'L J. OF SOC. OF LAW 459, 469 (1990).

³⁷ See LYNNE SEGAL, *SLOW MOTION: CHANGING MASCULINITIES, CHANGING MEN* (1990).

men superordinate even when their masculinity has been severely under threat."³⁸

These masculine characteristics among prisoners have created a pecking order within prisoner subculture wherein manhood is characterized by one's ongoing ability to resist sexual penetration.³⁹ This hierarchy is particularly well-defined in juvenile facilities, large urban jail facilities and maximum security prisons. It consists of three general "classes" of prisoners: men, queens and punks.⁴⁰

A prisoner's position in the hierarchy of dominance and submission simultaneously defines his social and sexual status.⁴¹ Prisoners who are considered "men" have the greatest authority and power. They are at the top of the prisoner hierarchy. "Men" rule the joint and establish values and norms for the entire prison population.⁴² They are political leaders, gang members, and organizers of the drug trade, sex trade, protection rackets and the smuggling of contraband in prison.

A small class of "queens"⁴³ exists below "men." Generally no more than 1 or 2% of the population, they seek and are assigned the passive sexual role historically associated with women. They are referred to with feminine pronouns and terms. Their willingness to be sexually submissive makes them highly desirable as sexual partners. The queen is the foil that instantly defines his partner as a "man." However, consistent with the sexism that pervades the prison subculture, "queens" are excluded from positions of power within the inmate economy.

³⁸ C. NEWTON, *supra* note 29, at 198.

³⁹ Ordering power through the establishment of a pecking order serves the important function of reducing the amount of blood shed in the inevitable conflicts that arise when large numbers of racially and geographically diverse young men, convicted of crimes of varying degrees of severity, are involuntarily brought together and confined in close quarters. *See id.* at 197.

⁴⁰ *Id.*

⁴¹ "In prison, sexual status is a prisoner's social status." Donaldson, *supra* note 28. *See* Donald Tucker, *A Punk's Song: View from the Inside*, in *HOMOSEXUALITY AND GOVERNMENT, POLITICS AND PRISONS* (Wayne Dynes & Stephen Donaldson eds., 1982) (describing the sexual power structure in big city jails and medium-security prisons from the perspective of having been a Quaker protester arrested, confined and raped in the D.C. Jail in November 1980).

⁴² There are sub-categories within the category of "men," and the terminology for these sub-categories varies regionally and over time. For instance, a sexual active "man" is called a "jocker" or "pitcher." When a jocker is paired off with another prisoner, he becomes a "Daddy." "Men" who procure sex through coercion are known as "gorillas" or "booty bandits." *See id.* *See also* Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. OF SOC. OF LAW 135, 139 (1992).

⁴³ Queens are also referred to as "bitches," "broads" and "sissies."

At the bottom of the hierarchy are “punks” or “bitches.”⁴⁴ “Punks” are male prisoners who have been forced into sexual submission through rape or the credible threat thereof, either by an individual or a group of prisoners (i.e. gang rape). Punks are treated as slaves. Sexual access to their bodies is sold through prostitution, exchanged in satisfaction of debt and loaned to others for favors.⁴⁵

Queens and punks are treated similarly in many respects. Both are denied the privileges of manhood, enslaved by “men,” excluded from positions of leadership and are the subjects of sexual commerce. However, punks are lower in the hierarchy of power among prisoners because they bear the stigma of “fallen men,” incapable of resisting sexual penetration. This is not, however, a failing of queens who willingly submit to sexual penetration.

Because status within the hierarchy is acquired through the forcible subjugation of others,⁴⁶ and one’s status as a man can be lost irretrievably through a single incident of sexual submission, “men” must constantly demonstrate their manhood through sexual conquest. Those who do not vigorously demonstrate their manhood through sexual conquest are more apt to be challenged and be potentially overpowered. Hence, the surest way to minimize the risk of demotion is to aggressively prey on other prisoners.⁴⁷

⁴⁴ In his study of differences and similarities between the perpetrators and victims of prisoner violence, Kevin Wright describes the victims of prison rape as “often weaker inmates who cannot withstand the threats and aggressive advances of stronger inmates” and who “succumb to the constant pressure applied as masculinity is tested and may lack the physical and ego strength or social abilities to avoid conflict. According to Wright, victims of prisoner rape tend to be small, white, young, middle class and lack street smarts. See Wright, *supra* note 31.

⁴⁵ Punks are “for all practical purposes slaves and can be sold, traded, and rented or loaned out at the whim of their ‘Daddy.’” Donaldson, *supra* note 28.

⁴⁶ Gang affiliation, racial and ethnic affiliation, socioeconomic class, connections to organized crime, sexual preference, age, nature of offense, physical stature and length of sentence influence a prisoner’s status as well, and may mitigate—in certain circumstances—the degree to which a prisoner is subjected to sexual violence.

There is a fascinating racial component to the sex-based pecking order among prisoners that corresponds to the majority minority racial composition of contemporary prisons. White male prisoners are more likely to be raped than black male prisoners. They are also more likely to be raped by black prisoners. Furthermore, due to ethnic affiliation and tension, black prisoners as a group are more likely than white prisoners to close ranks to prevent black heterosexuals from being “turned out.” For a brief, but revealing consideration of rape and race, see LEE H. BOWKER, *PRISON VICTIMIZATION* (1980).

⁴⁷ See Wright, *supra* note 31. See also Dumond, *supra* note 42 (“one third of sexual assault victims exploit other [inmates], often as a means of earning respectability and avoiding the bottom of the ‘pecking order’ by becoming aggressive toward weaker peers”) (citing C. Bartollas &

The precariousness of manhood among prisoners creates an internal economy of prison sexual assault. "Queens" are vastly outnumbered by "men." And according to Donaldson, the vast majority of "punks" are "heterosexual by preference and history." Therefore the conversion of heterosexual males to "punks" serves to maintain equilibrium within the prison subculture. In Donaldson's own words:

The total population of queens and punks is rarely high enough to meet the demand for sexually submissive prisoners . . . and this imbalance of supply and demand is a key to understanding the social dynamics of relentless competition among the men, who in rough joints are in danger of "losing their manhood" at any time.⁴⁸

The pecking order is based upon a kind of gender-based misogyny that transcends categories such as sex and sexual orientation. Males unable or unwilling to resist "female" or passive sex roles are vilified. They are referred to with feminine pronouns and are frequently turned into sexual slaves of more dominant males. This social dynamic is distinct from the stigmatization of homosexuality.⁴⁹

B. Guards Participate in the Hierarchy of Domination and Submission among Male Prisoners.

1. The Relationship between Male Guards and Male Prisoners is based upon a Similar Hierarchy of Masculinity.

A strict hierarchical system of authority orders power between guards and prisoners. This hierarchy enables guards to supervise prisoners with less conflict and greater efficiency. Generally speaking, the higher the security level of the facility, the more rigid the hierarchy.⁵⁰ Prisoners vastly outnumber correctional officers. Consequently, hier-

C.M. Sieveides, *The Sexual Victim in a Co-Educational Juvenile Correctional Institution*, 58(1) PRISON J. 80-90 (1983).

⁴⁸ Donaldson, *supra* note 28.

⁴⁹ Connell explains the link between misogyny and homophobia. Although the derogation of homosexuality is the act of men against a minority of other men, it is the forced repression of the "feminine" in all men. In his words, "[t]he justifying ideology for the patriarchal core complex and the overall subordination of women requires the creation of a gender-based hierarchy among men." R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* 215 (1987).

⁵⁰ Thus, the hierarchy between guards and inmates bears some resemblance to the pecking order among prisoners, which similarly becomes more rigid in higher security facilities. WAYNE WOODEN & JAY PARKER, *MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON* 23 (1982).

archy creates and reinforces the guards' ability to control large numbers of diverse violence-prone individuals involuntarily confined together in close quarters. In this current era of prison expansionism and "get tough" prison policies, hierarchy is an essential component of the carceral machinery.⁵¹

At this early stage of the sexual integration of corrections, guard subculture continues to mirror the homosocial subculture of male prisoners. Prison guards and state prisoners come from predominantly working class origins. It is therefore not surprising that working class masculinities operate within both groups. Indeed the hypermasculine ideal is as prominent among guards as it is among prisoners. Masculinity is a strongly held group value. Guards who show fear threaten the safety of all other guards. They are derogated as being less than men, and other guards refer to them as "pussies" and "faggots."⁵²

The guard socialization process reinforces "toughness." Using obscene language and shouting orders at prisoners are crude devices for maintaining social distance.⁵³ The authoritarianism of guards may be linked to the fact that guards are at the bottom of a hierarchical administrative bureaucracy.⁵⁴ As such, they are the furthest removed from the decision-making process and the least likely to affect it. Nevertheless, they are subject to the rules and directives established at each higher level. Although there are many instances in which close

⁵¹ The rigid hierarchical structure through which guards control the male prison population creates problems for women guards whose role in men's prisons has only expanded to "contact" positions and security in the past thirty years. The field of corrections resembles the military. Like the military, authority among guards is established through rank. Guards hold titles of captain, major, lieutenant, etc. Each successive rank has authority greater than those holding any lesser rank. Also like the military, men have long dominated leadership within the field of corrections, and this history has made the supervision of lower status women problematic. In a field that was almost exclusively male until the 1970s, and in which men still outnumber women significantly, and advancement is difficult for women, women guards are generally subordinate to more privileged male officers. Female guards are frequently subjected to sexual harassment and scapegoating at the hands of male guards who disapprove of their presence.

Masculinized, authoritarian social interaction between prisoners and guards often creates difficulties for women guards. Women are relatively new to the field of corrections. They have distinctly different supervisory styles, hence they tend to interact differently with prisoners than male guards. Unlike their male colleagues, female guards are less likely to brutalize or victimize inmates. See LYNN ETTA ZIMMER, *WOMEN GUARDING MEN* 25 (1986).

⁵² *Id.*

⁵³ But this type of socialization is a double-edged sword. On the one hand, it reduces over-friendliness with prisoners that leads to reciprocal obligation and corruption. On the other hand, it encourages the abuse of authority by dehumanizing prisoners. See SYKES, *supra* note 30.

⁵⁴ See ZIMMER, *supra* note 51, at 16.

kinship relations may develop between officers and prisoners, the dominance of the guard always remains unquestioned.

2. *The Dominance of Guards over Prisoners is Sexualized in Words and Conduct.*

The subculture of male guards stresses machismo and overt displays of masculinity. In the dangerous environment inside prisons, exaggerated masculinity serves to discourage guards from appearing fearful, and therefore vulnerable to prisoners. The fearfulness of one guard affects the security of many other guards in the facility. Consequently, there is tremendous pressure on all guards to conform to an overtly masculine standard of conduct.⁵⁵

The authority of guards over prisoners is sexualized with great frequency in relationships between male guards and male prisoners.⁵⁶ First, sexually explicit language and sexual innuendo is frequently directed toward male prisoners by male guards to emphasize their powerlessness, their lack of masculinity, and to reinforce the authority of guards. Male guards constantly refer to male prisoners as “pussies” and “faggots” and “cunts.” Second, although the code of silence among prisoners and guards usually renders it practically invisible, occasionally improper sexual relations between guards and prisoners comes to light.⁵⁷ Third, although there is little scholarship on the role of guards in preventing or facilitating inmate-on-inmate sexual assault, Donaldson’s experience suggests that guards participate in, and often encourage, the rape-based pecking order even though sexual activity among prisoners uniformly violates the disciplinary rules of every state department of corrections.

⁵⁵ The machismo culture of male guards is not entirely attributable to the nature of the occupation. It reflects, at least in part, working class male culture, which emphasizes the importance of aggressiveness and sexual prowess.

⁵⁶ From Joanne Little to Amy Fisher, the public is most familiar with sexual coercion of female prisoners in high profile cases of custodial sexual misconduct. The lack of public awareness about improper sexual relations between male guards and male prisoners may be attributable to two factors: (1) under the inmate code to which male prisoners adhere, “ratting” is unmanly; and (2) being “turned out” by a guard jeopardizes one’s social status even more than being raped by a fellow inmate. Many cross-gender search cases reflect concern for the sexual vulnerability of female prisoners who may be victimized by guards misusing their authority. The numerous accounts of sexual violence against (and misconduct toward) women prisoners notwithstanding, it is far more common to see power over male prisoners sexualized.

⁵⁷ See Donatello Lorch, *Prisoner’s Cry of ‘Rape’ is Heard; Judge Rules a Man was Assaulted by a Suffolk Official*, N.Y. TIMES, Oct. 9, 1996, at B1.

For example, guards and administrators may knowingly approve housing requests submitted for the purpose of keeping couples together, particularly if it helps to maintain internal order by minimizing fights.⁵⁸ Conversely, guards may reject housing requests to punish a dominant prisoner or to put him in his place. Guards may even actively encourage an unmatched dominant prisoner who is perceived as disruptive to rape a less dominant prisoner on the theory that he will settle down once he has a steady sexual partner. Prison guards have even gone so far as to facilitate rape in exchange for payment, to destroy the leadership potential of a charismatic prisoner or to punish a particularly offensive inmate.⁵⁹ At least one study suggests that officers who are more tolerant of homosexuality facilitate victimization by failing to enforce policies prohibiting consensual sex on the theory that it is none of their business. These officers often overlook sexual victimization that occurs through coercion, but without obvious outward signs of force (like the brandishing of a knife or “shank”).⁶⁰

C. Searches are Threatening in a System where Fellow Inmates and Guards Participate in Ordering Power through Sexual Subjugation.

Searches of prisoners take place within this masculinized, sexualized environment where sexual language and conduct reinforce authority. Tactile searches can be initiated randomly and without notice. It is therefore not surprising that prisoners perceive searches as degrading, particularly when it is so easy for guards to use their

⁵⁸ In an interview with a correctional officer about staff attitudes toward homosexuality, Wooden and Parker suggested that sexual relationships between prisoners were tolerated, and even encouraged by prison staff. The officer responded: “To a degree this is true. It’s a way of keeping down trouble and maintaining order. Also it cuts down on the paperwork.” See WOODEN & PARKER, *supra* note 50, at 109.

⁵⁹ Guards have been known to pay prisoners, called “enforcers,” to rape and beat other prisoners. Indeed, last year, five guards at California’s Corcoran State Prison were indicted for ordering the brutal rape and the beating of inmate Eddie Dillard as retribution for kicking a female guard. Guards at Corcoran placed a 230-pound violent sexual predator in a cell with 23-year-old, 120-pound Dillard. For two days, Dillard was repeatedly raped and beaten by the enforcer despite his efforts to call for help by pounding on the floor and cell door. The enforcer was compensated with tennis shoes and extra food rations. See Jerry Bier & Matthew G. Kreamer, *5 Corcoran Guards Indicted; This case Follows Indictments Against Eight Other Prison Guards in February*, FRESNO BEE, Oct. 9, 1998, at A1.

⁶⁰ H. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers’ Attitudes Toward Male Rape and their Willingness to Respond to Acts of Rape*, in PRISON VIOLENCE IN AMERICA, *supra* note 31.

discretion to order searches maliciously and in retaliation for a prisoner's conduct.

Within an environment where authority is sexualized and guards are permitted to search prisoners randomly, searches conducted by female guards are easily perceived as degrading with the sole purpose of flaunting the powerlessness of male prisoners.

D. Courts Fail to Take into account the Sexualization of Power in Men's Prisons when Considering the Propriety of Female Guards Visually Monitoring Naked Male Prisoners.

Prison officials understand the clear link between tactile searches and violence. In the predacious prison environment, unwanted physical contact is extremely threatening, whether it is initiated by guards or by inmates. Consequently, even where prison administrators are given doctrinal leeway to conduct tactile searches across gender in non-emergency situations, they rarely do so. In an environment where manhood is defined as the ability to resist "feminization"—being forced to submit to sexual penetration (like a woman)—within a larger sexist society that reinforces male dominance over women, it is easy to understand how threatening it is for male prisoners to be involuntarily subjected to the gaze—the visual surveillance—of female guards. Female surveillance is unmanly in a culture where manliness is highly prized and is therefore degrading. For many men in prison, the presence of female guards is a psychological bridge to a more conventional, masculine lifestyle of the past.⁶¹ Yet the idea that visual surveillance by female guards would affect more than a prisoner's modesty or preference is absent from most judicial opinions on cross-gender surveillance.

Even when courts and commentators explicitly focus on the relationship between sex and power in prison, they overwhelmingly focus on the sexual conduct of male guards toward female prisoners.⁶² This

⁶¹ Various prison scholars have described the positive impact of female guards on inmates in men's prisons. See generally ZIMMER, *supra* note 51, at 151-53.

⁶² The news media overwhelmingly focuses on the sexual abuse of female prisoners by guards. See Ann Scott Tyson, *Sexual Abuse Rises as More Women Do Time*, CHRISTIAN SCI. MONITOR, Dec. 9, 1996, at 1; Craig, *supra* note 20; Rhonda Cook, *Prison Scandal Continues as Rookie Guard is Fired - He Admitted to Inmate Sex, Official's Say*, ATLANTA J. CONST., Dec. 17, 1992, at E6; Lori Montgomery & Dawson Bell, *U.S. Alleges Sex Abuse of Women at 2 Prisons - State Official Blasts Findings as 'Absurd'*, DET. FREE PRESS, Mar. 30, 1995, at 1A.

Power is sexualized in women's prisons, but less is understood about how. Historically, male guards have used their authority to procure sexual favors from female prisoners. Custodial

reflects not only a gender bias—that power in sexual relationships is exercised by men (dominant) upon women (vulnerable)—but a heterosexual presumption that sex between guards and prisoners always involves individuals of two different sexes. Only very recently have stories of men sexually victimized in prison—either at the hands of fellow prisoners or prison guards—began to emerge in the media.⁶³ As the case of *Dothard v. Rawlinson*⁶⁴ demonstrates, even when the facts present women as authority figures—guards in contact positions in men's prisons—concern for their vulnerability is in the forefront, and the vulnerability of their male counterparts is not acknowledged.

III. THE DEVELOPMENT OF AN INCONSISTENT CROSS-GENDER SEARCH DOCTRINE AND ITS FAILURE TO ACKNOWLEDGE THE REALITIES OF PRISON LIFE

Women have long been excluded from employment as security personnel in men's prisons. Historically, it was thought to be inappropriate for women to perform such dangerous, masculine work because their physical safety would be jeopardized by virtue of their biological sex. However, over the past thirty years, as federal sex discrimination and equal employment legislation have provided women with entry into this non-traditional field, prisoners and male correctional officers have judicially challenged prison policies permitting female guards to conduct searches of male prisoners and visually monitor prisoners in their living quarters.⁶⁵

sexual misconduct continues to present a crisis in women's prisons, although recent studies of economies of sexual favoritism in women's prisons suggest that not all sexual encounters between guards and female prisoners are unilaterally coercive, and that power is exercised on both ends. Indeed, sex is often offered in exchange for favors guards are uniquely suited to perform, including overlooking rule violations and favoritism. This clear example of abuse of authority by guards supports the need for a more conservative approach to cross-gender supervision and searches in women's prisons, or at the least, a different approach to cross-gender searches than that employed in men's prisons.

⁶³ See Greg Burton, *Prison Rapes Covered Up, Inmates Charge*, SALT LAKE TRIB., Nov. 9, 1997, at B1.

⁶⁴ 433 U.S. 321 (1977).

⁶⁵ Although women have been involved in corrections since the beginning of incarceration, their early role as matrons in women's reformatories and later as counselors in juvenile facilities reflect sexual stereotyping. Matrons were seen as role models for misguided women. Women were viewed as particularly suited to be juvenile corrections' personnel due to their maternal influence on delinquent youth. See JOCELYN POLLOCK, *SEX AND SUPERVISION: GUARDING MALE AND FEMALE INMATES* 8 (1986); ZIMMER, *supra* note 51, at 1. The historical practice of hiring only men to guard male prisoners changed only after the Civil Rights Act of 1964 was amended to include gender discrimination in 1972.

The judicial opinions resolving these challenges have established boundaries of permissible and impermissible searches by relying heavily on the Fourth Amendment proscription of unreasonable searches and seizures.⁶⁶ There are significant advantages to this approach. Privacy is genderless. It creates a zone of protection by limiting the search authority of public actors. However, as the protection of prisoner privacy has declined in recent years—consistent with the broader retrenchment of prisoner's rights—the bar for what constitutes an unreasonable search has risen steadily. Some judges have gone so far as to reduce protection of prisoner privacy to the far narrower ambit of the Eighth Amendment, virtually eliminating the Fourth Amendment as a check on the search authority of guards.⁶⁷

In the absence of all but a residuum of prisoner privacy, judges increasingly focus on the moral and distributive dimensions of women guarding men. Thus, the taboo against an individual being seen naked before a stranger of the opposite sex drives the doctrine. This formalistic judicial emphasis on biological sex is dubious in the context of today's high security men's prisons. First, it overlooks the significance of the sexual orientation of the guard and the prisoner, as prisons are arenas of complex and transitional sexualities. Second, it fails to interrogate the hierarchy of masculinity that sexualizes power among inmates, and bears upon the desirability of women guarding men in their living quarters. In sum, courts conflate gender, sex and sexual orientation in a manner that makes the doctrine of cross-gender searches incoherent.

Part Three of this article focuses on the limitations of the cross-gender search doctrine. It takes as its starting point the decline of prisoner privacy and the resulting lack of harmony among the federal courts. It goes on to chronicle the conflation of gender, sex and sexual orientation; the distracting insistence upon formal symmetry; and the failure of the doctrine to take into account hierarchies of masculinity at work in higher security men's prisons. These factors complicate the constitutional question of when (and under what circumstances) female guards—as a matter of law and policy—should be allowed to search male prisoners.

⁶⁶ U.S. CONST. amend. IV.

⁶⁷ See *Hudson v. Palmer*, 468 U.S. 517 (1984).

A. *The Supreme Court Has Eroded the Privacy Protection for Prisoners.*

In the last twenty years, the Supreme Court has retrenched protection of prisoner privacy. Incarceration has traditionally limited the full exercise of prisoners' constitutional rights, particularly when that exercise compromises a punitive objective.⁶⁸ But courts have long held that prisoners do not forfeit all their constitutional protections when they enter the custody of correctional officials.⁶⁹ The impact of incarceration is that prisoners' constitutional rights are limited, not barred. However, within the last ten years, prisoners challenging searches on Fourth Amendment grounds are finding that precious little of their constitutional rights remain. They are fighting an uphill battle, for within the current penal system maintaining security dominates all other penological objectives. Prison officials rely heavily upon searches to maintain security by flushing out contraband weapons and drugs. Consequently, the legitimate impingement upon prisoners' Fourth Amendment rights that is a limitation in theory, has begun to resemble a bar in practice.

The retrenchment of Fourth Amendment privacy in prison that began in the late 1970s was foreshadowed at least a decade earlier by material changes in the law of criminal procedure. At the time it was decided, *Katz v. United States*⁷⁰ expanded the privacy of criminal suspects by liberating privacy protections from rights grounded in property, trespass and theft. Ironically, however, the objective standard established in *Katz* has been used to support even more restrictive constructions of privacy. *Katz* first established that a government search violates the Fourth Amendment only when an individual has a "constitutionally protected reasonable expectation of privacy."⁷¹ *Katz*

⁶⁸ See *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (stating that judicial restraint and deference to prison authorities must temper federal courts' consideration of prisoners' constitutional claims).

⁶⁹ See *Wolff v. McDonnell*, 418 U.S. 538 (1974) ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.' But though the needs and exigencies of the institutional environment may diminish his rights, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." (citation omitted)).

⁷⁰ 389 U.S. 347 (1967).

⁷¹ *Id.* at 360 (Harlan, J., concurring). Thus, after *Katz*, a property interest is no longer sufficient to establish a legitimate expectation of privacy in items or activity conducted in a particular place. It is one of several factors to be considered. In the prison context, Fourth Amend-

involved a Fourth Amendment challenge to the admission into evidence of a telephone conversation in which illegal bets were being placed. FBI agents taped the conversation by attaching an electronic recording device to the outside of the public phone booth where the defendant placed his calls. The majority reversed the conviction on the ground that the government failed to obtain advance authorization for the wiretap by a magistrate upon a show of cause.

In *Katz*, the court disengaged the privacy analysis from a property-based analysis that previously required physical trespass upon a constitutionally protected area before the Fourth Amendment was violated. *Katz* emphasized that privacy inures to the person rather than to places. Justice Harlan's concurrence imposed a two-fold requirement for governmental intrusions upon a person's privacy. First, a person must have exhibited a subjective expectation of privacy; and second, the expectation must be one that society is prepared to recognize as "reasonable." Even though the majority opinion (in conjunction with Justice Harlan's concurrence) was read to expand privacy protections of intangible matter such as telephone conversations, the objective aspect of the "reasonableness" test was interpreted by later cases to narrow the scope of Fourth Amendment privacy. As a result, *Katz* has tethered an individual's protection from governmental intrusion into areas and activities she wishes to remain private to external assessments of what society accepts as reasonable.⁷²

Katz created a ripple whose effects would eventually be felt much farther down the chain of custody. It established the landscape upon which the Supreme Court would revisit the privacy analysis and so narrowly apply it to prisons as to sanction all but the most invasive

ment protections detached from property interests might potentially benefit inmates, since they are confined on state property, with few personal possessions.

⁷² Over the past twenty years, application of the *Katz* standard has narrowly restricted the scope of Fourth Amendment privacy for criminal suspects in a variety of search contexts. When individuals erected fences, and posted clearly visible "No Trespassing" signs on secluded, wooded private property approximately one mile from their house, the Kentucky State Police were held not to have violated their Fourth Amendment rights by disregarding the signs and entering the property, finding two marijuana patches. The Court found no societal interest in protecting the privacy of the cultivation of crops in open fields not effectively concealed from public observation in spite of the individuals' subjective intent to keep their activity private through the use of signage and fencing in the remote location. See, e.g., *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Place*, 462 U.S. 696 (1983) (holding that exposure of suspect's luggage, to a trained canine was not a "search" within the meaning of the Fourth Amendment).

searches. The Supreme Court narrowed the grounds upon which prisoners could object to searches in three pivotal cases: *Bell v. Wolfish*,⁷³ *Hudson v. Palmer*⁷⁴ and *Turner v. Safley*.⁷⁵ *Hudson* applies the Fourth Amendment privacy doctrine narrowed by *Katz* and its progeny to cell searches in prison. *Bell* and *Turner* curtail the standard for judicial review of prisoners' constitutional challenges to prison regulations. Although none of these cases specifically address the permissibility of cross-gender searches, all three dominate the analysis of claims challenging and defending cross-gender search policies.

Bell v. Wolfish marked the end of the Warren Court Era wherein prisoner rights were expanded, primarily to protect prisoners from overzealous correctional authorities with a history of abusing power under color of law. In formulating legal standards that required prison officials to justify their actions—and in many cases demonstrate that these actions constituted the least restrictive means of accomplishing a legitimate correctional goal—courts hoped to prevent the reoccurrence of deplorable prison conditions and abuses of power which came to light in the 1950s and 1960s. *Bell* heralded the abandonment of such broad standards of review.

Bell considered the claims of pretrial detainees at a federally operated short-term custodial facility in New York City. These detainees challenged, *inter alia*, a policy of conducting visual body cavity searches after every contact visit on the ground that it was more intrusive than necessary to satisfy prison officials' legitimate interest in maintaining security; therefore, the policy constituted an excessive and unreasonable search in violation of the Fourth Amendment.⁷⁶ Authorities at the detention facility could not demonstrate that visual body cavity searches had been effective in deterring the possession of contraband. Nevertheless, the Supreme Court held that the legitimate security interests of prison officials outweighed the more limited privacy interests of inmates in being free from visual body cavity searches.⁷⁷ The Court avoided articulating the precise scope of the

⁷³ 441 U.S. 520 (1979).

⁷⁴ 468 U.S. 517 (1984).

⁷⁵ 482 U.S. 78 (1987).

⁷⁶ As pre-trial detainees lack the protection of the Eighth Amendment, the prisoners' claims were limited to the Fourth Amendment and the Due Process Clause of the Fifth Amendment. See *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979).

⁷⁷ Indeed, the Court was persuaded that the very fact that no correlation between the searches and the interception of contraband could be demonstrated was more "a testament to

Fourth Amendment in a detention facility. Instead, it found that as long as the search policy was rationally related to a legitimate non-punitive governmental purpose, there was no clear violation of the Fourth Amendment.⁷⁸ Writing for the majority, Justice Rehnquist criticized federal courts for second-guessing the “judgment calls” of prison management, and restored to officials outside of the Judicial Branch of Government policy determinations that do not blatantly violate the Constitution.⁷⁹ *Bell* has been broadly applied in the lower federal courts, standing for the proposition that prisoners lose a substantial amount of Fourth Amendment privacy protection when they enter the prison gate.⁸⁰

Five years later, in *Hudson v. Palmer*,⁸¹ the Supreme Court again considered the application of the Fourth Amendment in prison, this

the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.” *Id.* at 559.

⁷⁸ See *Bell*, 441 U.S. at 538.

⁷⁹ *Id.* at 458.

⁸⁰ In *Bell*, the Supreme Court employs several important discursive techniques that are applied in subsequent judicial analyses of cross-gender searches. Alan Hyde catalogues these techniques in his survey of legal constructions of the body. See ALAN HYDE, *BODIES OF LAW* 163 (1997). First, *Bell* humanizes the prison environment while dehumanizing the prisoner’s body. Justice Rehnquist describes the detention facility involved in some detail, obviously impressed by its “modern design” and “innovative features.” He distinguishes the facility from the traditional, historicized notion of the dank, colorless jail with “clanging steel gates,” noting that it has been described as “the architectural embodiment of the best and most progressive penological planning,” while refraining from referring to the facility by its popular title, “the Tombs.” *Bell*, 441 U.S. at 525. In contrast to the detailed description of the detention facility, the majority characterizes the inmates as potential security threats. It is the dissent that draws attention to medical testimony that inmates view the body cavity searches conducted in the Tombs as humiliating, engendering fears of sexual assault and physical abuse by guards.

Bell reinforces the notion of prisoners as dangerous, undifferentiated masses by treating the protections afforded pre-trial detainees under the Fourth Amendment as no broader than those afforded convicted felons. In response to the conclusion of the Court of Appeals that persons only charged with a criminal offense should have greater substantive rights with respect to their conditions of confinement, the majority was quick to dismiss a doctrine it describes as “axiomatic” and “elementary” to the administration of criminal law as having no application to the determination of the rights of pre-trial detainees during confinement. *Id.* at 533. Thus, the majority establishes that the entrance to the prison or jail as the point at which a significant Fourth Amendment protections are shed. See *id.* at 556-57.

Secondly, *Bell* employs an “interest balancing” test which weighs the diffuse, unindividuated interest of the prisoner in bodily privacy against the particularized needs of the prison. Hyde observes that the very metaphor of balancing demonstrates how law assumes power over the body: “[t]he metaphor thus strips the body . . . of the ‘weight’ that it bears in pounds, metamorphoses the body into an interest, then reifies the interest as if it had weight to be put into a balance.” HYDE *supra*, at 159.

⁸¹ 468 U.S. 517 (1984).

time in the context of a random, unannounced search of a prisoner's cell, known as a "shakedown" search. Palmer, a prisoner in a Virginia prison facility, complained that a guard searched his cell randomly and without notice, falsely charged him with an infraction of prison disciplinary rules, and destroyed non-contraband personal property in the form of legal papers. This time, the Court announced unequivocally that the Fourth Amendment does not apply to the confines of a prison cell.⁸² The Court found a prisoner's interest in privacy within his cell to be irreconcilable with "the concept of incarceration" and the "objectives of penal institutions," and as such, non-existent.⁸³ Chief Justice Burger for the majority stated:

we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.⁸⁴

In contrast to the holding of the appellate court in *Bell*, the Supreme Court held in *Hudson* that prisoners do not possess even the *limited* Fourth Amendment protection against searches conducted solely to harass or humiliate.⁸⁵ The Court construed the recognition of any quantum of protection, even if only against searches conducted purely to harass, as effectively challenging the reasonableness of the search.⁸⁶ Absent application of the Fourth Amendment to the prison cell, such a challenge to the reasonableness of a search has no basis in

⁸² See *id.* at 536 ("we hold that the Fourth Amendment has no applicability to a prison cell").

⁸³ *Hudson*, 468 U.S. at 526.

⁸⁴ *Id.* at 525-26.

⁸⁵ "The Court of Appeals was troubled by the possibility of searches conducted solely to harass inmates; it reasoned that a requirement that searches be conducted only pursuant to an established policy or upon reasonable suspicion would prevent such searches to the maximum extent possible. Of course, there is a risk of maliciously motivated searches, and of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society. However, we disagree with the court's proposed solution. The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband." *Id.* at 528.

⁸⁶ See *id.* at 530.

law. The Court relegated such claims to the Eighth Amendment and state tort or common law remedies.⁸⁷

The sweeping language of the majority in *Hudson* effectively eviscerates privacy in prison. The majority attributes to all prisoners a level of antisocial conduct and violence so high as to command unlimited access to their cells.⁸⁸ As the dissent points out, in justifying such access, the majority presumes the reasonableness of *all* conduct by guards.⁸⁹ The Court opens the door to the elimination of privacy in *all* areas of a prison and in all aspects of prison life when it holds that traditional Fourth Amendment privacy is “fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.”⁹⁰

Justice O'Connor's concurrence in *Hudson* categorically exempts searches of prisoners' cells from the ambit of the Fourth Amendment.⁹¹ In O'Connor's view, persons incarcerated after an arrest or conviction forfeit *as a class* “all legitimate Fourth Amendment privacy and possessory interests in personal effects.”⁹² Citing two instances in which the Court moved in the direction of a blanket determination of reasonableness rather than a case-by-case determination, O'Connor argues that cell searches and seizures merit categorical treatment.⁹³

⁸⁷ “Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against ‘cruel and unusual punishments.’ By the same token, there are adequate state tort and common-law remedies available to respondent to redress the alleged destruction of his personal property.” *Id.* at 530.

⁸⁸ *See Hudson*, 468 U.S. at 526.

⁸⁹ “Today's holding cannot be squared with the text of the Constitution, nor with common sense. The Fourth Amendment is of ‘general application,’ and its text requires that every search or seizure of ‘papers and effects’ be evaluated for its reasonableness. The Court's refusal to inquire into the reasonableness of official conduct whenever a prisoner is involved—its conclusive presumption that all searches and seizures of prisoners' property are reasonable—can be squared neither with the constitutional text, nor with the reality, acknowledged by the Court, that our prison system is less than ideal.” *Id.* at 555-56 (Stevens, J. concurring in part and dissenting in part, joined by Brennan, J., Marshall, J., and Blackmun, J.).

⁹⁰ *Id.* at 527-28 (emphasis added).

⁹¹ *See id.* at 537-40.

⁹² *Id.* at 538.

⁹³ “The Fourth Amendment ‘reasonableness’ determination is generally conducted on a case-by-case basis, with the Court weighing the asserted governmental interests against the particular invasion of the individual's privacy and possessory interests as established by the facts of the case. In some contexts, however, the Court has rejected the case-by-case approach to the ‘reasonableness’ inquiry in favor of an approach that determines the reasonableness of contested

This blanket exemption sharply departs from the earlier view that necessities of incarceration justifying limitations of prisoners' rights should be determined on a case-by-case basis.

Hudson left open the possibility that the prisoner's body itself might lose the protection of the Fourth Amendment. Indeed, in a case where a body (rather than a cell) search policy was at issue, the maverick Seventh Circuit read *Hudson* expansively for the proposition that prisoners no longer retain a right of privacy *in their bodies* under the Fourth Amendment. In the words of the Circuit Court,

[*Bell v.*] *Wolfish* assumed without deciding that prisoners retain some right of privacy under the [F]ourth [A]mendment. Five years later the Court held that they do not. *Hudson v. Palmer* observes that privacy is the thing most surely extinguished by a judgment committing someone to prison. Guards take control of where and how prisoners live; [prisoners] do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life.⁹⁴

By eliminating the Fourth Amendment as a source of privacy in the prisoner's body, the Seventh Circuit requires prisoners to meet a much higher Eighth Amendment standard to successfully challenge cross-gender searches. In other words, a prisoner must prove that the search constitutes an unnecessary and wanton infliction of pain. A federal court has reached this conclusion in only one cross-gender search case; one in which the prisoner searched was female.⁹⁵

practices in a categorical fashion. For the reasons stated by the Court, I agree that the government's compelling interest in prison safety, together with the necessarily ad hoc judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment." *Id.* at 537-38 (O'Connor, J. concurring) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979) (prison room search and body cavity search rules); *United States v. Robinson*, 414 U.S. 218 (1973) (searches incident to lawful custodial arrest); *Terry v. Ohio*, 392 U.S. 1 (1968)).

⁹⁴ *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (citation omitted).

⁹⁵ See *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc) (involving clothed body searches conducted by male guards at the Washington Corrections Center for Women). Pursuant to prison policy, a guard would randomly stop a female prisoner, run his hands over her entire body from head to toe, squeezing and kneading her breasts, probing her crotch by pressing the flat of the hand against her genitals, and squeezing and kneading seams in her crotch area. The impact on the female prisoners searched—most of whom had histories of violent sexual abuse—was severe. One woman clung to the bars of a nearby cell so tightly during the search that her fingers had to be pried loose. Many women vomited and exhibited signs of shock.

Finally, *Turner v. Safley*,⁹⁶ although decided outside the context of Fourth Amendment searches, is particularly restrictive in its application to privacy. In *Turner*, prisoners challenged regulations restricting inmates' ability to marry⁹⁷ and correspond with other inmates.⁹⁸ In a 5-4 decision upholding the correspondence regulation and striking down the marriage rule, the Supreme Court articulated a rational basis test for all infringements of prisoners' constitutional rights. Prior to the *Turner* decision, different levels of scrutiny were applied to various challenges to prison regulations and practices alleged to infringe the constitutional rights of prisoners.⁹⁹

Justice O'Connor, writing for the majority, synthesized the various principles applied in a series of First Amendment cases to arrive at a single standard for reviewing *all* prisoners' constitutional claims: prison regulations which restrict prisoners' constitutional rights are valid if they are *reasonably related* to legitimate penological interests. She contends that this rational basis standard is necessary to ensure that courts afford prison managers the kind of deference they require to "anticipate security problems and adopt innovative solutions to the intractable problems of prison administration."¹⁰⁰ Factors relevant to the determination of reasonableness include: (1) a legitimate governmental interest not connected to the content of expression; (2) a rational, valid connection between the rule and the governmental interest put forward to justify it; (3) the availability of alternative

⁹⁶ 482 U.S. 78 (1987).

⁹⁷ The marriage regulation prohibited inmates from marrying other inmates or civilians unless the Superintendent approved the marriage after finding that there were "compelling reasons" for doing so. Generally, only pregnancy or the birth of a child was considered compelling. *See id.*

⁹⁸ The correspondence regulation barred inmates in one Missouri correctional facility from corresponding with inmates at a different facility. *See id.*

⁹⁹ For example, regulations infringing upon prisoners' First Amendment rights to free speech were required to further an important or substantial governmental interest and be narrowly drawn to further that interest. *See Procunier v. Martinez*, 416 U.S. 396 (1974) (noting that rules broadly restricting the content of inmate correspondence were invalidated where not found to be necessary to the furtherance of a legitimate governmental interest). Regulations restricting the receipt of incoming mail were judged by the higher "strict scrutiny" standard because they implicate the free speech rights of those who are not incarcerated. *Id.* However, regulations restricting prisoners' First Amendment rights to free association were judged by a lower "reasonableness" standard due to the limitations on association inherent in incarceration. *See Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (noting that rules inhibiting the activities of prisoner labor union upheld as reasonable and consistent with the legitimate operational considerations of the correctional facility).

¹⁰⁰ *Turner*, 482 U.S. at 89.

means of exercising the right; (4) the impact of accommodating the right on guards, prisoners and resources;¹⁰¹ and (5) the absence of obvious, easy alternatives.¹⁰²

This consolidated approach to the diverse body of prisoners' constitutional claims strikes particularly hard in the area of privacy. After *Turner*, whenever a warden asserts a security-based justification for restricting prisoners' privacy, it is presumptively reasonable. Since surveillance is inherently linked to security, an unreasonable search in violation of the Fourth Amendment must be so outrageous and unjustified as to be malicious and sadistic, and conducted for the sole purpose of causing harm. Thus, the standard for an unreasonable search has begun to approach the rigorous Eighth Amendment standard for cruel and unusual punishment.¹⁰³ And as the dissent points out, *Turner* reduces the actual showing the judiciary demands of prison officials in order to uphold regulations restricting the exercise of constitutional rights in prison.¹⁰⁴ Again, by its unitary approach to the constitutional claims of inmates, the *Turner* opinion typifies the retreat from judicial determination of the necessities of incarceration on a case-by-case basis and the increasing treatment of prisoners as an unindividuated, dangerous class of persons undeserving of a more nuanced determination of the scope of their constitutional rights.

The *Turner* "rational basis" test has been the controlling precedent for cross-gender search cases since 1987. Because it prioritizes maintaining internal security and mandates deference to the judgments of prison officials, it has done little to encourage courts to consider the broader context of sexual intimidation and domination in determining the propriety of cross-gender searches. In its zeal to prevent federal judges from second-guessing the judgements of prison

¹⁰¹ The Court counseled particular deference to the "informed discretion" of guards when accommodating a right will have a significant "ripple effect" on prisoners and staff. *Id.* at 90.

¹⁰² Ready alternatives would be evidence that prison officials had exaggerated their response to their concerns. However, any alternative that imposes more than a *de minimis* cost on the correctional facility or on the pursuit of correctional goals need not be considered. Furthermore, the Court is careful to point out that the principle of questioning the availability of ready alternatives (as evidence of reasonableness) does not constitute a "least restrictive means" test. *Id.* at 83.

¹⁰³ See generally *Whitley v. Albers*, 475 U.S. 312 (1986).

¹⁰⁴ "Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation." 482 U.S. at 100-01.

administrators, *Turner* overlooks the fact that while security may be well within the expertise of prison authorities, gender differences, sex roles and the equitable treatment of members of the opposite sex are not. Indeed, prison officials frequently collude—maliciously or benevolently—in the sexual intimidation and violence that orders power among male prisoners. Yet, courts are presently required to accept whatever policy-based rationale prison administrators give for permitting or prohibiting cross-gender searches of prisoners' bodies as long as it is facially linked to a valid penological objective: security, deterrence, incapacitation, rehabilitation, or even the efficient use of security staff.

In sum, *Katz* limited the right of privacy of the criminally accused to those expectations society recognizes as "reasonable." *Bell* carried the *Katz* analysis into prisons, recognizing that prisoners have a limited right of privacy, but giving prison officials virtually unchecked discretion to invade that privacy by performing highly invasive searches on prisoners, as long as the basis for the search, and the manner in which it is conducted, is reasonable. *Hudson* completely eliminated the application of the Fourth Amendment within a prison cell, concluding that society does not recognize as reasonable any expectation of privacy a prisoner may have in his cell. The decision left open the effect that this new standard would have on the scope of a prisoner's right to privacy on his own body, both inside and outside the prison cell. Finally, *Turner* established a reasonableness standard of review for all infringements upon prisoners' fundamental constitutional rights, requiring only the barest connection between the limitation of the right and a governmental interest justifying the limitation, and affording great deference to the judgements of prison authorities.

The clear mandate of the *Bell*, *Hudson* and *Turner* cases is that searches of even a highly intrusive nature are permissible under the Fourth Amendment. Over the past twenty years federal courts have applied the declining privacy protections of *Katz*, *Hudson*, and *Bell*, and the heightened standards for judicial scrutiny of prisoners' constitutional claims in *Turner* to a vast array of disputes over searches of prisoners' bodies. The standard that has evolved for resolving these disputes gives broad discretion to prison officials to subject prisoners to routine, random, suspicionless searches of a highly intrusive nature without transgressing the Constitution. As the Seventh Circuit found in a recent case: "given the considerable deference prison officials

enjoy to run their institutions it is difficult to conjure up too many real-life scenarios where [even highly intrusive] prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment.¹⁰⁵ Indeed judges need only conclude that the search bears some rational relation to maintaining security in order to pass Fourth Amendment scrutiny.¹⁰⁶ This standard functionally excludes all but a negligible amount of searches conducted solely for the purpose of harassment.

Lower federal courts have uniformly adhered to this mandate in deciding cases challenging the search authority of guards. They have rejected challenges to many types of highly invasive searches of prisoners' bodies conducted randomly and without suspicion of wrongdoing. Prison officials are free to search prisoners' body fluids without any suspicion of misconduct. The Fourth and Ninth Circuits and various district courts have held that involuntary blood tests of inmates for the purpose of DNA testing do not violate the Fourth Amendment.¹⁰⁷ Similarly, the Tenth and Eleventh Circuits have condoned non-consensual AIDS testing of prisoners' blood.¹⁰⁸

Prisoners' challenges to random, suspicionless searches of their body cavities run aground on the receding tide of Fourth Amendment protection. Since *Bell*, *Hudson* and *Turner* were decided, at least five federal courts of appeals have ruled on the constitutionality of strip searches and body cavity searches. The Second, Fifth, Seventh, Ninth and Tenth Circuits have affirmed the constitutionality of routine suspicionless body cavity and strip searches on prisoners, according wide-ranging deference to the experience and expertise of prison officials in determining the appropriateness of these searches.¹⁰⁹

¹⁰⁵ *Peckham v. Wisconsin Dep't of Corrections*, 141 F.3d 694 (7th Cir. 1998).

¹⁰⁶ See *Turner*, 482 U.S. at 100.

¹⁰⁷ See generally *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *Kruger v. Erickson*, 875 F. Supp. 583 (D. Minn. 1995); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493 (E.D. Wash. 1993); *Gilbert v. Peters*, Nos. 930-C-20012, 92-C-20354, 1994 WL 369643 (N.D. Ill. June 28, 1994) (unreported decision).

¹⁰⁸ See *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989). However, the Eleventh Circuit has held that the scope of a prisoner's constitutional right of privacy extends to prohibiting non-consensual disclosure of the results of HIV tests. See *Harris v. Thigpen*, 941 F.2d 1495, 1512 (11th Cir. 1991).

¹⁰⁹ See *Peckham v. Wisconsin Dep't of Corrections*, 141 F.3d 694 (7th Cir. 1998); *Harris v. Rocchio*, 132 F.3d 42 (10th Cir. 1997) (strip search of prisoner alleged to be in possession of unauthorized paperwork withstood Fourth Amendment scrutiny); *Swepton v. Hargett*, 124 F.3d 217 (10th Cir. 1997) (court declined to second guess judgment of prison officials who conducted digital search of prisoner's rectum during the investigation of a suspected escape attempt);

When prison officials perceive the need for heightened security procedures due to potential or actual disruption or unrest, they are given even greater latitude to perform highly invasive searches. For example, in *Elliott v. Lynn*, an inmate subjected to a visual body cavity search in the general presence of other inmates, guards and non-essential personnel including media representatives as part of an institution-wide "shakedown," brought an action against prison officials, alleging that the inappropriate manner and place of the search violated his Fourth Amendment right to privacy.¹¹⁰ The Fifth Circuit held that the measures taken were reasonable in light of the fact that prison administrators were to be accorded "great deference and flexibility" in responding to increased incidents of murders, suicides, stabbings and cuttings among the prison population.¹¹¹

Under the diminished privacy regime within prison, only a narrow category of highly intrusive searches is considered "unreasonable" under the Fourth Amendment. Included in this category are highly intrusive searches performed unprofessionally, unhygienically,¹¹² abusively or purely for the purpose of harassment.¹¹³ Those searches are both unreasonable under the Fourth Amendment and violate the Eighth Amendment prohibition on cruel and unusual punishment when they are conducted purely for the purpose of harassment or the unnecessary or wanton infliction of pain.

B. The Supreme Court Has Provided Little Guidance to Federal Courts Regarding Searches by Opposite Sex Guards.

When the basis of challenges to the search authority of guards is a gender difference between guard and prisoner, the Supreme Court provides little guidance to lower federal courts. The seminal Supreme Court cases, which have broadened the authority of prison officials to

Thompson v. Souza, 111 F.3d 694 (9th Cir. 1997) (visual body cavity search and nonrandom, compelled urinalysis test found to be permissible under the Fourth Amendment); Elliott v. Lynn, 38 F.3d 188 (5th Cir. 1994) (visual body cavity search in presence of others is reasonable); Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992) (noting random, suspicionless visual body cavity search of pre-trial detainee commingled with sentenced inmates found to satisfy the *Turner* test).

¹¹⁰ 38 F.3d 188 (5th Cir. 1994).

¹¹¹ *Id.* at 191.

¹¹² See Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986).

¹¹³ See Watson v. Jones, 980 F.2d 1165 (8th Cir. 1992) (noting factual allegations that a female correctional officer made sexual advances in pat-down search, including tickling and deliberately examining male prisoner's genital, anal, lower stomach and thigh area sufficient to preclude summary judgment for the officer on Fourth Amendment claim).

search prisoners, have left open the legal significance of the gender of the guard and prisoner. The searches at issue in *Katz*, *Bell*, and *Hudson* were not cross-gender searches. Moreover, the Court did not address the significance of the sex, either within the main body of the opinions or in dicta.¹¹⁴

Even when directly presented with the opportunity to address the constitutional dimensions of cross-gender searches, the Supreme Court has declined to do so. On at least four separate occasions, the Court has denied certiorari to review the opinions of lower federal courts directly on point.¹¹⁵

In *Dothard v. Rawlison*, the single instance where the Supreme Court discussed sexuality and coercion in the context of cross-gender guarding, the employment rights of women—not the privacy rights of prisoners—were at issue.¹¹⁶ In considering the constitutionality of barriers to women's employment in contact positions in the men's prisons, the Supreme Court focused on the sexual vulnerability of female guards, neither acknowledging nor discussing the sexual vulnerability of male prisoners.

In *Dothard*, a twenty-two year old woman with an undergraduate degree in correctional psychology — Dianne Rawlinson — applied to the Alabama Board of Corrections for a job as a prison guard and was rejected. Subsequently, she challenged the constitutionality of minimum statutory height and weight requirements for employment as a guard, as well as an Regulation 204, an administrative rule adopted during the lawsuit, which barred women from working in contact positions in men's maximum security prisons.¹¹⁷

¹¹⁴ The *Turner* case did not involve a search at all. Rather *Turner* determined the constitutionality of restrictions of prisoner correspondence and marriage regulations. Because the Supreme Court explicitly applied the scope of the holding in *Turner* to all constitutional claims of prisoners, the standard articulated in *Turner* is central to all Fourth Amendment based challenges to the constitutionality of prison searches.

¹¹⁵ See *Somers v. Thurman*, 109 F.3d 614 (9th Cir.), cert. denied, 522 U.S. 852 (1997); *Johnson v. Sheahan*, 69 F.3d 144 (7th Cir. 1995), cert. denied, see 519 U.S. 1006 (1996); *Tharp v. Iowa Dep't of Corrections*, 68 F.3d 223 (8th Cir. 1995), cert. denied, 517 U.S. 1135 (1996); *Smith v. Fairman*, 461 U.S. 907 (1983).

¹¹⁶ See *Dothard v. Rawlison*, 433 U.S. 321 (1979).

¹¹⁷ Alabama Administrative Regulation 204 established gender criteria for assigning correctional officers to maximum-security institutions for contact positions. Contact positions were defined as positions requiring continual close physical proximity to inmates of the institution. Rawlinson amended her complaint to challenge Regulation 204 on the ground that it violated Title VII and the Fourteenth Amendment. See *id.* at 324-29 n.6 (citing ALA. ADMIN. CODE R. 204).

Although it affirmed the district court's elimination of the minimum height and weight requirements, the Supreme Court reversed the invalidation of Regulation 204. The Court concluded that the rule constituted a *bona fide* occupational qualification, even though it explicitly discriminated against women, and excluded women from 75% of the available positions as prison guards in the State of Alabama.¹¹⁸ The rule was therefore exempt from the general prohibition on sex-based discrimination under Title VII. The Court found that the potential for sexual violence directed toward female guards justified making maleness a criterion of employment in the Alabama State Penitentiary.¹¹⁹ The majority stated:

[m]ore is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a "contact" position in a maximum-security male prison. The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they are women.¹²⁰

At first glance, the above excerpt from *Dothard* looks fairly insightful. Rather than ignore the connection between physiological sex and violence as do many judges confronted with cross-gender searches, the *Dothard* majority highlights it. Indeed, *Dothard* became the first federal case to discuss the connection between sexuality and violence in a case dealing with the supervision of prisoners by opposite sex guards. However, upon further examination, it is clear that Justice Stewart's discussion of sexual violence is stereotyped. His opinion views women as sexually vulnerable and men as sexually dominant, regardless of the status of the individual at the top or the

¹¹⁸ See *Dothard*, 433 U.S. at 333 n.16.

¹¹⁹ See *id.* at 335.

¹²⁰ *Id.* at 335-36.

bottom of the prison disciplinary apparatus.¹²¹ Stewart suggests that sexually deprived prisoners would sexually assault female guards “because they were women,” as if mere physical proximity to a female guard triggers an assault.¹²² Stewart’s focus on the sexual vulnerability of women guards overlooks the possibility that male prisoners can be victims of both sexual coercion by fellow prisoners and custodial sexual misconduct by guards—even female guards. *Dothard’s* singular emphasis on the sexual vulnerability of women—even when they are clothed in the substantial authority of the State—is a stereotyped treatment of women that (1) ignores the male-on-male sexual assault which is endemic and pervasive within men’s prisons, and (2) ignores the coercion inherent in donning a badge and a uniform.

Dothard has been criticized for its unprecedented expansion of what was designed to be an extremely narrow exception to the law forbidding sex discrimination. The same result could have been justified on the basis that prisoners’ privacy interests outweighed the employment interests of female guards seeking employment in contact positions. However, as one commentator suggested, the Court was not willing to expand prisoner rights in exchange for a more credible defense of Regulation 204.¹²³ Additionally, one can understand the Court’s reluctance to base its decision on the privacy doctrine rather than employment discrimination law when one considers the hard blow the Supreme Court dealt to prisoners’ privacy rights less than two years later in *Bell v. Wolfish*.

Dothard illustrates at least one major flaw in the doctrine of cross-gender searches.¹²⁴ The Supreme Court’s focus on the sexual

121 “The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault [presumed to be a woman] but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee’s very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility.” *Id.* at 336.

122 *Id.* at 335.

123 “One suspects that the Court was not anxious to resolve [*Dothard v. Rawlinson*] by recognizing a privacy right or interest, despite the fact that such a position might have been more defensible than the one the Court actually took.” *Female Guards in Men’s Prisons*, in JAMES B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* (1983).

124 Although *Dothard* has been characterized as limited in its influence due to the extraordinary danger inherent in working as an Alabama State Penitentiary corrections officer, at the time, prison conditions have deteriorated so in the past twenty years that the circumstances described in the case—lack of firmly established control over the inmate population, sexual offenders in general population, understaffing and overcrowding—are hardly remarkable. See *Dothard*, 433 U.S. at 335-36.

victimization of women guards in the context of discussing sex and power in prison established a theme whose influence can be observed in later cross-gender search cases that focus on the difference in the sex of the searcher and the searched, but ignore male prisoners' vulnerability to sexual assault by guards and fellow prisoners.

C. *Federal Law Regulating Cross-Gender Searches in Prison is in Disarray.*

The constitutionality of cross-gender searches is not settled law today and has not been for years. Federal courts acknowledge this confusion when they consider the qualified immunity claims of correctional officers sued in their personal capacities by prisoners subjected to cross-gender searches. The doctrine of qualified immunity is an affirmative defense that protects government officials from liability for civil damages where the officials could reasonably believe that their conduct did not violate clearly established rights.¹²⁵ The Ninth and Eleventh Circuits have affirmed decisions granting qualified immunity to correctional officers who searched prisoners of the opposite sex.¹²⁶

In 1997, the Ninth Circuit concluded that Keith Somers, a prisoner subjected to surveillance while showering and visual body cavity searches by female guards, did not prove that his right to be free from cross-gender searches had been clearly established.¹²⁷ Thus, the court reversed the holding of the district court, finding that: "[t]he Supreme Court had not spoken definitively on [the] issue [in 1993 and 1994], nor has it today [1997]."¹²⁸ In *Hudson v. Palmer*,¹²⁹ Judge Trott criticized the Supreme Court decision for its dicta, which obfuscated the privacy analysis by failing to clarify whether prisoners retained any Fourth Amendment rights against body searches or whether their only recourse was under the Eighth Amendment.¹³⁰ In *Fortner v.*

¹²⁵ When qualified immunity is claimed, courts must determine whether the law was clearly established at the time the defendant committed the alleged improper acts.

¹²⁶ See *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997); *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993). *But cf.* *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986) (denying qualified immunity for same-sex body cavity searches conducted by prison guards on basis that female prisoners had "clearly established" Fourth Amendment right to be free of body cavity searches conducted in conjunction with general security search of prison).

¹²⁷ See *Somers*, 109 F.3d at 620.

¹²⁸ *Id.* at 617.

¹²⁹ 468 U.S. 517 (1984).

¹³⁰ See *Somers*, 109 F.3d at 617-18.

Thomas,¹³¹ the Eleventh Circuit affirmed the district court decision granting the defendant's, a correctional officer, motion to dismiss based on qualified immunity from suit for monetary damages. The appellate court agreed that the Court or the Eleventh Circuit had not recognized a prisoner's right to bodily privacy.¹³² Likewise, in *Csizmadia v. Fauver*,¹³³ a New Jersey district court found that federal cross-gender search cases had reached "disparate and contradictory results,"¹³⁴ making it impossible to establish that a correctional policy permitting female guards to patrol housing units where they might see male prisoners naked while showering, toileting, or undressing was clearly unlawful in 1989.¹³⁵ The frequency with which federal courts have granted or affirmed granting qualified immunity to prison guards, who conducted cross-gender searches, attests to the absence of clear guidelines regarding the significance of gender in analyzing the privacy aspects of prisoner searches.

The case law has been criticized as lacking both uniformity and consistency and for its confusing doctrinal framework.¹³⁶ Although *Hudson*¹³⁷ did not address the privacy rights that prisoners retain outside their cells, the Court's decisions in that case¹³⁸ and in *Bell*,¹³⁹ and *Turner*¹⁴⁰ clearly articulate a diminished scope of privacy in prison.¹⁴¹ However, the Court has provided little guidance to lower federal courts on the impact of cross-gender searches on prisoners'

¹³¹ 983 F.2d 1024, 1030, 1032 (11th Cir. 1993).

¹³² See *id.* at 1028. In *Fortner*, the Eleventh Circuit recognized that prisoners retain a constitutional right to bodily privacy. While qualified immunity protected prison officials from liability for damages arising prior to the *Fortner* decision, it did not protect them from prisoners' claims for injunctive relief. See *id.* at 1030, 1032.

¹³³ 746 F. Supp. 483 (D.N.J. 1990).

¹³⁴ *Id.* at 490.

¹³⁵ See *id.* at 485.

¹³⁶ See Mary Ann Farkas & Kathryn R.L. Rand, *Female Correctional Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995, 1029 (1997) ("Court decisions regarding prisoner privacy and cross-gender searches are all over the board, making it difficult for prison management to accurately take into account any potential liability and act accordingly. The failure of courts to analyze prisoner privacy claims uniformly has effectively limited employment opportunities for female correctional officers); Phillip E. Friduss & Ellen Gendernalik, *Update on Fourth Amendment Search Cases: the New and Confused Framework*, 28 URB. L.W. 679, 696-98 (1996).

¹³⁷ *Hudson v. Palmer*, 468 U.S. 517 (1984).

¹³⁸ See *id.* at 524 ("imprisonment carries with it the circumscription or loss of many significant rights").

¹³⁹ *Bell v. Wolfish*, 441 U.S. 520 (1979).

¹⁴⁰ *Turner v. Safley*, 482 U.S. 78, 81 (1987) ("We hold that a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules.").

¹⁴¹ See *supra* Part III.A.

privacy rights. While the Court has had the opportunity to provide standards or broad principles to guide lower courts, it has not done so. Consequently, despite the large number of privacy-based challenges to cross-gender searches, federal courts have produced a body of case law that lacks uniformity and have failed to articulate a single constitutional standard.

Cross-gender search cases generally arise out of one of two scenarios in which conflicting rights must be resolved. In the first, more common scenario, prisoners invoke their right to privacy by challenging "gender neutral" policies established by prison administrators, which permit both male and female guards to perform searches ranging from highly invasive strip searches and body cavity searches to less invasive searches such as pat frisks and visual surveillance of prisoners engaged in bodily functions. In the second scenario, prison guards invoke their right to equal employment opportunities in order to challenge "gender specific" employment policies limiting the scope of their duties with respect to prisoners of the opposite sex.¹⁴² Both male

¹⁴² In general, female guards are disproportionately burdened by same sex search policies. This disadvantage — to which female guards employed in both men's and women's prisons are subject — is a function of the meager representation of women as correctional officers. On January 1, 1998, women comprised only 20.3% of line correctional staff in state and federal correctional facilities nationally (excluding the District of Columbia and U.S. territories). See 1998 CORRECTIONS YEARBOOK 135 (Am. Correctional Assoc. 1999). A total of 30,743 women (82.1% of all female correctional officers) were assigned to men's state and federal facilities. See *id.* at 136. A same sex search restriction in men's prisons excludes female guards from high security areas where searches are routinely and frequently performed; reduces their authority over male prisoners; and curtails their professional development (because they are not allowed to master a valuable and necessary job skill). A same sex search restriction in women's prisons often has the same impact. Women compose 30% of the prison guards in state prisons for women, based on the national average. See Barbara Vobejda, *Report: Female Inmates Subjected to Sexual Abuse; Male Guards' Misconduct a Common Practice*, HOUSTON CHRON., Mar. 5, 1999, at 19. However, the American Correctional Association estimates that only 7,388 female correctional officers (17.9% of all female correctional officers) were assigned to female facilities. In order to fulfil the requirements of a same sex search policy, this small group of female guards are spread so thinly across the population that they spend most of their time on duty performing searches, rather than practicing the full range of employment skills. And in spite of the fact that the one skill they are allowed to hone is highly valued in general, the ability to search a female prisoner is not as highly valued as the ability to search a male prisoner. There are at least two reasons for this. First, male prisoners are generally considered more dangerous, thus requiring more advanced search skills. Second, the vast majority of positions for guards are in men's prisons; therefore, skill in search male prisoners is in greater demand.

Male guards challenge same sex search policies for different reasons. Same sex search policies in women's prisons often entail more minimal restrictions on the employment of male guards, such as rearrangement of work shifts, limitations of duty assignments within the facility, and infringements on seniority. For example, in *Tharp v. Iowa Department of Corrections*, a co-

and female guards have filed lawsuits to overturn gender restrictions on assignments and duties, including “female only” and “male only” shift assignments, geographic restrictions on the employment of opposite sex guards within correctional facilities, prohibitions against certain cross-gender searches and requirements that guards obtain consent for certain searches of prisoners of the opposite sex.

Courts have resolved each of these conflicts in a variety of ways. The general trend has shifted from mutual accommodation of privacy and employment rights consistent with the interest-balancing approach in *Bell*,¹⁴³ to only partially accommodating prisoner privacy or overriding privacy claims entirely when the basis for the underlying policy is internal security or equal opportunity employment. Nevertheless, judicial resolution of these conflicts remains inconsistent in many respects.

The degree of invasiveness of cross-gender searches is probative, but does not always determine the constitutionality of the search. Federal judges appear to be less comfortable sanctioning searches of prisoners conducted by, or in the presence of guards of the opposite sex. This discomfort is particularly acute when the type of search is highly intrusive involving manual contact with breasts, genitalia, and anal areas.¹⁴⁴ Nevertheless, highly intrusive cross-gender searches are not uniformly prohibited. Some courts have condoned strip searches in the presence of guards of the opposite sex, particularly when secur-

ed minimum security facility in Des Moines, with two male units and one female unit, adopted a policy of assigning only female security staff to the women's unit. The same sex guarding policy was adopted to alleviate the problem of having too few female security staff available to conduct searches on female residents of the facility and to provide more positive role models for the female residents. The new policy made four of the sixteen shifts available only to female guards. The two guards with the greatest seniority, both male, challenged the policy because the shifts they bid on were assigned to female guards with less seniority. At stake was their first choice of shifts based upon seniority, not their ability to perform an important job duty. See *Tharp v. Iowa Dep't of Corrections*, 68 F.3d 23 (8th Cir. 1995). Similarly, in *Forts v. Ward*, male guards in the sole maximum security women's prison in the State of New York challenged—through their union—a court order enjoining male guards from duty assignments “requiring observation of female inmates through the windows of their cell doors during nighttime hours.” The same sex nighttime surveillance order was issued in response to a suit brought by prisoners at Bedford Hills, complaining that male guards were observing them nude and partially nude while showering, toileting and sleeping. See *Forts v. Ward*, 621 F.2d 1210, 1214 (2d Cir. 1980).

¹⁴³ 441 U.S. at 560.

¹⁴⁴ See *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (explaining *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981) (en banc)) (distinguishing a search conducted in close proximity to genitalia or even grazing genitalia from one entailing a deliberate search of the genital area).

ity concerns are heightened.¹⁴⁵ Thus, while some courts have upheld highly invasive cross-gender searches, others have determined that the more invasive the search, the more offensive it is to have personnel of the opposite sex conduct the search.

Courts accord vastly different legal significance to the frequency and deliberateness with which guards observe the naked bodies of prisoners of the opposite sex. Some courts have found that a prisoner's right to privacy is violated when guards of the opposite sex frequently and regularly observe the prisoner partially or completely nude while engaging in intimate activities such as showering, toileting, changing clothes, being searched or undergoing a medical examination.¹⁴⁶ Courts that take this view have upheld a variety of searches conducted by or in the presence of guards of the opposite sex when exposure to naked prisoners is incidental or infrequent.¹⁴⁷

Other courts have found frequent and regular exposure of unclad prisoners to guards of the opposite sex constitutionally sound.¹⁴⁸ The Seventh Circuit has held that neither the Fourth, Eighth nor Fourteenth Amendments is abridged when female guards frequently and deliberately observe male prisoners undressed when showering, toileting, and changing clothes.¹⁴⁹ Indeed the Seventh Circuit reasoned that frequent and deliberate observation of male prisoners in states of undress by female guards is requisite to their employment on a non-discriminatory basis.¹⁵⁰

¹⁴⁵ See *Letcher v. Turner*, 968 F.2d 508 (5th Cir. 1992) (holding that the presence of female guards during a strip search of a male prisoner did not violate a prisoner's right of privacy where organized disturbance had just occurred); *Jones v. Harrison*, 864 F. Supp. 166 (D. Kan. 1994) (holding that the presence of a female officer during strip search of a male prisoner believed to be a participant in a potentially violent disturbance did not violate prisoner's privacy).

¹⁴⁶ See *Johnson v. Pennsylvania Bureau of Corrections*, 661 F. Supp. 425, 431 (W.D. Pa. 1987); *Hudson v. Goodlander*, 494 F. Supp. 890 (D. Md. 1980) (routine and regular exposure of nude prisoners by opposite sex guards was held to violate the Fourth Amendment); *Kuntz v. Wilson*, 33 F.3d 59 (9th Cir. 1994) (unpublished opinion).

¹⁴⁷ The Ninth Circuit takes this view. See *Michenfelder v. Sumner*, 860 F.2d 491 (9th Cir. 1985); *Grummet v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Smith v. Chrans*, 629 F. Supp. 606 (C.D. Ill. 1986). *Rodriguez v. Hall*, 19 F.3d 29 (9th Cir. 1994) (unpublished opinion) (use of female guards to supervise showering male inmates and observe strip searches of male prisoners did not violate prisoners' Fourth Amendment right to privacy).

¹⁴⁸ See *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983).

¹⁴⁹ See *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995).

¹⁵⁰ See *id.* at 147 ("if only men can monitor showers, then female guards are less useful to the prison . . . [An] interest in efficient deployment of staff supports cross-sex monitoring").

Some courts focus on the degree to which the guard's view of the prisoner's nude body is restricted or unrestricted. In *Bowling v. Enimoto*,¹⁵¹ a prisoner in the protective custody unit of the all-male Soledad Prison challenged the assignment of female guards to his unit. The plaintiff was housed in a 6-by-10 foot cell with a cell door that was solid save for four 5.5-by-8.5 inch windows that permitted viewing the entire interior of the cell, including the toilet and the bed. Prison regulations forbade covering the windows "for any purpose at any time" so that guards could conduct continuous unannounced surveillance.¹⁵² While the district court declined to prohibit the assignment of female officers to the protective custody unit, it held that prisoners have the "right to be free from unrestricted observation of their genitals and bodily functions by prison officials of the opposite sex" under non-emergency conditions.¹⁵³

A similar decision was reached in *Forts v. Ward*,¹⁵⁴ where prisoners in the all-female Bedford Hills Correctional Facility challenged a policy permitting the assignment of male guards to areas of the prison where they could observe partially or fully undressed prisoners receiving medical treatment in the prison infirmary, showering, toileting, or sleeping in the housing units. While the Second Circuit vacated the prohibition of the nighttime assignment of male guards to dormitory areas, it affirmed the requirement of installing translucent screens to obstruct the view of shower areas and approved the amendment of prison rules to permit inmates to cover the window of their cells during toileting and dressing.¹⁵⁵

Some judges have concluded that this accommodation is required by the Fourth Amendment when guards patrol the living areas of prisoners of the opposite sex.¹⁵⁶ Privacy panels are a common solution

¹⁵¹ 514 F. Supp. 201 (N.D. Cal. 1981).

¹⁵² *Id.* at 202.

¹⁵³ *Id.* at 204. At least two factors suggest that this case might be decided differently today. At the time, the practice complained of violated the California Department of Corrections' own administrative rule prohibiting assigning officers to areas where "a substantial portion of the duties include observation or search of unclothed persons of the opposite sex." *Id.* at 203. The rule violation may have significantly influenced the court's decision. Furthermore, the case of *Hudson v. Palmer* was subsequently decided by the U.S. Supreme Court eliminating the application of the Fourth Amendment to prison cells and casting into doubt the existence of a prisoner's right of bodily privacy. 468 U.S. 517 (1984).

¹⁵⁴ 621 F.2d 1210 (2d Cir. 1980).

¹⁵⁵ *See id.* at 1216.

¹⁵⁶ *See Bowling*, 514 F. Supp. at 203-04, *following Forts*, 621 F.2d 1210.

because they allow temporary obstruction of guards' view while prisoners are using the toilet or dressing. Others have found this accommodation unnecessary.¹⁵⁷

Still other courts have found that a single incident involving viewing of a naked prisoner by members of the opposite sex is sufficient to constitute a Fourth Amendment violation. In *Hayes v. Marriott*, the Tenth Circuit held that a male prisoner subjected to a body cavity search "in the presence of over 100 people, including female secretaries and case managers" on only one occasion had established a material issue of fact precluding summary judgment in favor of defendant prison officials.¹⁵⁸

D. Confusion Within the Cross-Gender Search Doctrine Centers on Visual Surveillance of Unclad Prisoners by Guards of the Opposite Sex.

The disarray among federal courts centers on the assignment of security personnel of the opposite sex to perform less intrusive, non-tactile searches. These searches provoke a considerable amount of prisoner litigation and garner the least consensus among federal courts. Where consensus does exist, it is not with respect to cross-gender visual surveillance, but in the more extreme cases of tactile, hands on searches. There is consensus among federal courts that deliberate cross-gender touching of prisoners' genital, breast and anal areas violates the Fourth Amendment. Even under the diminished privacy regime of *Hudson*,¹⁵⁹ manual contact with genitalia, anus and breasts violates the Fourth Amendment.

So why do courts find it easier to agree about the more intrusive cross-gender searches? In part, because tactile searches raise a different set of practical issues. Most state departments of corrections take the initiative by promulgating regulations that prohibit cross-gender tactile searches of anal and genital areas. It is in the state's best interest to impose limits on intimate cross-gender touching. Tactical cross-gender searches are susceptible to abuse by prison guards. Establishing administrative limitations on cross-gender searches reduces incidents of sexual harassment and custodial sexual misconduct. Invasive

¹⁵⁷ See *Johnson v. Pennsylvania Bureau of Corrections*, 661 F. Supp. 425, 433 (W.D. Pa. 1987).

¹⁵⁸ See *Hayes v. Marriott*, 70 F.3d 1144, 1147-48 (10th Cir. 1996).

¹⁵⁹ 468 U.S. 517.

searches generate hostility and provoke assaults on guards even when they are conducted by guards of the same sex as the prisoners. Deploying guards of the opposite sex under these tense and volatile circumstances simply fans the flames of prisoners' resentment.

Consequently, most states have resolved the issue legislatively by adopting administrative regulations prohibiting tactile searches of sexual and excretory orifices. Furthermore, courts have long recognized a heightened privacy interest in being free from non-consensual contact with one's sexual and excretory organs. The anal, genital, and breast areas are considered the "final bastion of privacy" on the human body.¹⁶⁰ Accordingly, deliberate contact with those areas is prohibited.¹⁶¹ Incidental contact is discouraged, but distinguished as legitimate in some instances.¹⁶²

Ironically, it is the least tactile and, what some might describe as the least invasive form of prisoner search¹⁶³ that has occasioned the most litigation and the least judicial consensus. Visual surveillance of prisoners under circumstances in which they are exposed to physical conduct by guards of the opposite sex complicates the Fourth Amendment analysis because it involves other constitutional issues. First, limiting surveillance in these so-called "contact positions" has a substantial negative impact on employment opportunities for female guards. The majority of assignments for correctional officers are in contact positions. Excluding women from contact positions relegates women to a minor role in men's prisons and in the profession and

¹⁶⁰ *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (quoting *Sterling v. Cupp*, 625 P.2d 123, 132 (Or. 1981)).

¹⁶¹ The exception to the prohibition on deliberate contact with sexually private areas of the body is the same exception that uniformly applies to all prison searches. Where prison officials have heightened security concerns, courts have accorded them more latitude to utilize personnel as they deem necessary. This includes having guards conduct searches on prisoners of the opposite sex, including searches of private areas of the body. See *Lee v. Downs*, 641 F.2d 117 (4th Cir. 1981). Cf. *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992).

¹⁶² See *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994) ("pat-down searches and occasional or inadvertent sighting by female prison employees of inmates in their cells or open showers do not violate the inmates' right to privacy"); *Kuntz v. Wilson*, 33 F.3d 59 (9th Cir. 1994) (holding that district court properly dismissed complaint alleging "only a single isolated instance in which a female correctional employee was able to observe him naked"); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) ("assigned positions of female guards that require only infrequent and casual observation . . . and that are reasonably related to prison needs are not so degrading as to warrant court interference"); *Merritt-Bey v. Salts*, 747 F. Supp. 536 (E.D. Mo. 1990) (adopting the position of the Ninth Circuit that the presence of female guards during strip searches does not violate prisoners' privacy rights").

¹⁶³ See *Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995).

turns the sexual equality clock back several decades.¹⁶⁴ The employment interests of guards is a high priority for correctional administrators seeking maximum flexibility in deploying security personnel while minimizing their exposure to legal liability for sex discrimination. Consequently, prison officials are not inclined to adopt self-imposed limitations on cross-gender visual surveillance. For these reasons, limiting female guards' opportunities to visually observe male prisoners in their living quarters has a much more significant impact on the status of female guards than does limiting female guards' opportunities to conduct intrusive hands-on searches.¹⁶⁵

Second, surveillance is the cornerstone of punishment. It is the type of search most frequently and unreservedly conducted in prison. Challenging the authority of guards to visually monitor prisoners jeopardizes the fundamental process of incarceration. Michel Foucault described the introduction of surveillance-based incarceration into prisons during the 17th and 18th centuries as a technological innovation which improved the exercise of power over prisoners "by making it lighter, more rapid, more effective . . . [and] more subtle."¹⁶⁶ Surveillance uniquely disciplines without relying upon the use of force. Instead, the prisoner participates in his own discipline through self-censure. According to Foucault:

¹⁶⁴ Prior to 1972, women were excluded from employment in men's prisons. Only after the Civil Rights Act of 1964 was amended in 1972 were female correctional officers placed in men's prisons. The duties were initially limited to searching female visitors and administrative "front-office" tasks. Only gradually were female guards assigned to more varied duties, including staffing posts in the living quarters of male prisoners. See JOCELYN M. POLLOCK, *SEX AND SUPERVISION: GUARDING MALE AND FEMALE INMATES* 8 (1986). A 1979 survey reported that only 29.3% of correctional staff were female, and that they were over-represented in clerical and support functions. Only 41% had contact with prisoners. Female correctional officers have been inordinately assigned to institutions for women and juveniles. All these restrictions on the presence of women in contract positions in men's prisons have contributed to female correctional workers being limited to narrower career ladders, lower salaries and lower status compared to their male counterparts. See JOCELYN M. POLLOCK, *WOMEN, PRISON & CRIME* 114-17 (1990).

¹⁶⁵ In most maximum-security facilities for men, there remain discreet areas—usually for the isolation and punishment of the most violent prisoners—to which women guards are not assigned. There is little if any litigation of same sex guarding policies in these units. Prisoners held in these units do not generally have access to clothing. Therefore, even surveillance, the most passive form of guarding requires guards to deliberately and regularly observe naked prisoners. Under these circumstances, sex is a bona fide occupational qualification ("BFOQ"). The reservation of these same sex assignments doesn't require litigation under a BFOQ standard.

¹⁶⁶ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 123-26, 209 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1978).

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection . . . it is a perpetual victory that avoids any physical confrontation and which is always decided in advance.¹⁶⁷

A guard's liberty to observe the prison population without reservation or qualification is central to the effectiveness of the modern penal system. In spite of a long history of physical abuse of prisoners at the hands of guards, non-tactile and less physical searches by guards of the opposite sex pose the greatest challenge to the cornerstone of corrections. While correctional administrators, guards and prisoners alike take into account the gravity of seemingly, more benign visual searches, courts approach the issue with less uniformity.

E. Federal Judges Base Their Decisions about the Acceptability of Cross-Gender Surveillance on Dramatically Different Views of the Significance of Gender.

In deciding whether cross-gender surveillance is permissible, federal judges base their decisions on dramatically different views of the significance of gender. For instance, in *Canell v. Armenikis*,¹⁶⁸ the District Court for the District of Oregon considered the gender of the guard conducting the search to be irrelevant. The court weighed the claims of male prisoners challenging the presence of female guards in their living quarters, who—among other duties—monitored them while undressing and performing bodily functions. On the basis of the plaintiffs' sexually suggestive factual allegations,¹⁶⁹ the court defined the scope of the issue as going beyond the mere determination of whether the facts justified the search. Similar to the Court's opinion in *Dothard*,¹⁷⁰ the district court construed the issue before it as the significance of gender to the duties of a prison guard, a question of

¹⁶⁷ *Id.* at 202-03.

¹⁶⁸ 840 F. Supp. 783 (D. Or. 1993).

¹⁶⁹ The male prisoners' claims included allegations that "deprived" female guards were acting like "cats in a fish market" and that prison policies failed to "stop female guards from shopping for male flesh." They further complained that one female guard "shopped around on the tiers, found an admirer and passed notes and letters among other things." *Id.* at 783-84.

¹⁷⁰ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

first impression within the Ninth Circuit.¹⁷¹ The district court considered whether the Constitution prohibits a female guard from visually monitoring unclothed male prisoners in circumstances in which the identical conduct by a male guard would be proper. Granting the defendant's motion to dismiss, the district court reasoned that as long as the guard has sufficient justification to search the prisoner and conducts the search professionally, the gender of the guard is irrelevant.¹⁷²

In contrast to *Canell*, in *Timm v. Gunter*, Senior Circuit Judge Bright's dissent cautioned us not to ignore the differences between men and women.¹⁷³ In *Timm*, the Eighth Circuit reversed portions of a district court order requiring the Nebraska State Penitentiary to modify policies, schedules and architecture to accommodate the privacy of male prisoners subject to pat frisks and visual surveillance by female guards. The Eighth Circuit concluded, *inter alia*, that pat frisks and visual surveillance of male inmates by female guards, performed on the same basis as identical searches of male prisoners by male guards, do not violate the privacy rights of male prisoners.¹⁷⁴ In a post-feminist voice, Senior Circuit Judge Bright's dissent argues that treating men and women as equals does not require courts to ignore the differences that exist between them. He accused the majority of stripping prisoners of their privacy rights in order to equalize the employment opportunities for male and female guards.¹⁷⁵

F. Concern for Symmetry in the Treatment of Searches Conducted by Male and Female Guards Distract some Judges from Interrogating Hierarchies of Masculinity, which Threaten the Safety of many Male Prisoners.

One aspect of the development of the cross-gender search doctrine that is particularly disturbing is the insistence by some judges that rules regulating cross-gender searches in men's prisons must be identical to rules regulating searches in women's prisons. By requiring identical rules, these judges overlook critical differences in the sexualization of power in men and women's prisons.

¹⁷¹ See *Canell*, 840 F. Supp. at 784.

¹⁷² See *id.*

¹⁷³ 917 F.2d 1093, 1103 (8th Cir. 1990) (Bright, J., dissenting).

¹⁷⁴ See *id.* at 1100 (Bright, J., dissenting).

¹⁷⁵ See *id.* at 1102-03 (Bright, J., dissenting).

Some judges believe that men and women's prisons must be symmetrical for the rules of cross-gender searches to be constitutional. For example, the Nebraska correctional system accommodates the privacy rights of female prisoners by severely restricting the employment of male guards in contact positions at the Nebraska Center for Women.¹⁷⁶ In his dissent, Senior Circuit Judge Bright implies in *Timm* that the asymmetry created by denying comparable privacy accommodations for male prisoners in a system, which accommodates the privacy of female prisoners by eliminating cross-gender contact between prisoners and guards, is inequitable and treats male prisoners unfairly.¹⁷⁷

The problem inherent in the search for symmetry is that it ignores the unique problems of sex and power in men and women's prisons, which are similar to those arising in the context of equal protection for whites and blacks. Sexual vulnerability of male and female prisoners is not identical and there are genuine differences in the sexualization of power in men and women's prisons. For example, far more guard-on-prisoner sexual violence is thought to occur between male guards and prisoners in women's prisons than in men's prisons. On the other hand, far more prisoner-on-prisoner sexual violence is believed to occur in men's prisons. Judicial insistence upon formal symmetry fails to recognize that men and women experience unwanted intimate physical contact and nudity before members of the opposite sex differently. Indeed one commentator noted that using the same standard for searches of male and female prisoners affords female prisoners a substantial advantage over their male counterparts.¹⁷⁸

Courts and commentators also err when they characterize the experiences of male and female prisoners as entirely distinct. For example, Lisa Krim argues that courts should adopt an asymmetrical, gender-specific, "reasonable woman" Eighth Amendment standard for judging the propriety of cross-gender, clothed body searches.¹⁷⁹ Krim acknowledges the heightened danger that arises from the interaction of power and sexuality in social relations between guards and

¹⁷⁶ See *id.* at 1097-98 n.5 (Bright J., dissenting).

¹⁷⁷ See *id.* at 1103-04 (Bright, J., dissenting).

¹⁷⁸ See Karoline E. Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prison: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 971-74 (1998).

¹⁷⁹ See Lisa Krim, *A Reasonable Woman's Version of Cruel And Unusual Punishment: Cross-Gender, Clothed-Body Searches Of Women Prisoners*, 6 S. CAL. REV. L. & WOMEN'S STUD. 85, 89, 116-18 (1995).

prisoners, but sets out to prove by distinguishing them from male prisoners that women need special protection from sexual misconduct by male guards. She focuses on the particular sexualized violence to which female prisoners are vulnerable, and refutes opposing positions by asserting that “the experiences of male inmates with female guards do not demonstrate that [sexual abuse by female guards] is a real danger.”¹⁸⁰ This forecloses the possibility of limiting cross-gender searches on the basis of intra-gender sexual abuse. Krim focuses on the histories of sexual abuse common to incarcerated women, but ignores the fact that many incarcerated men also have histories of sexual abuse, often at the hands of other men (fathers, uncles, etc.) and are statistically more likely to be sexually preyed upon in prison by fellow prisoners than incarcerated women are by male guards.

The harsh facts of life in America’s predacious, overcrowded prisons provide a much needed reality check on judicial discussions of gender—and the propriety of searches across gender lines in prison. They influence how searches are conducted by guards and perceived by prisoners. Yet, with few exceptions, federal courts largely ignore the sexually charged tenor of the complaints, emphasizing instead the penological objectives of maintaining security and avoiding discrimination on the basis of gender. Sexual frustration and intimidation pervade the allegations of prisoners challenging cross-gender surveillance policies. The constitutional analysis of cross-gender searches must consider the context of sexualized power and violence out of which these challenges emerge. It must not consist merely of formalistic rationalizations for deferring to the judgments of prison officials.

Searches of male prisoners by female guards take place within a violent, rigidly hierarchical subculture in which sexual status defines social status, and associations with passivity or femininity (interchangeable in the sexist context of prison) are severely penalized. Searches of female prisoners by male guards occur in an environment in which male prison staff use their authority to procure sex from prisoners in exchange for privileges and favors that relieve some of the hardships of incarceration. If courts take the constitutional guarantees of individual rights seriously, they must go beyond ritualistic incantations of doctrine and seriously examine how power is sexualized in prison to arrive at a just resolution of the conflict between prisoner privacy and the employment rights of guards.

¹⁸⁰ *Id.* at 108.

IV. *JOHNSON V. PHELAN*

On its face, *Johnson v. Phelan*¹⁸¹ appears to be yet another in a line of cases that interpret the law of cross-gender searches while overlooking inconsistencies in the doctrine. Indeed, the opinion reflects the “cut and paste” recitation of doctrine from *Bell*,¹⁸² *Hudson*¹⁸³ and *Turner*¹⁸⁴ and other precedents that are standard among these cases. However, Chief Judge Richard Posner’s dissent stands out as the first post-*Hudson* opinion to broadly condemn the failure of courts to take into account the realities of prison life when examining the propriety of cross-gender searches. Posner consciously probed the moral and legal issues raised by cross-gender searches, drawing attention to the essentialization of prisoners in the context of the constitutional doctrine.¹⁸⁵

The majority and dissenting opinions in *Phelan* took opposing positions on the permissibility of assigning female guards to contact positions in men’s prisons where they are able to observe prisoners naked in showers and toileting areas. In contrast to the majority’s meticulous, albeit soul-less explication of conflicting privacy and employment rights,¹⁸⁶ the dissenting opinion interprets the Constitution in light of the gendered realities of prison life.¹⁸⁷ Posner’s dissent emphasizes the extent to which the legal analysis of privacy and gender has become estranged from the realities of prison life. Although a fuller discussion of the realities of prison life (including the sexual predation that is an aspect of the broader sexualization of power) is displaced by Posner’s harangue of “radical feminists,”¹⁸⁸ his dissenting opinion nevertheless broke new doctrinal ground.

Part Four of this article focuses on Judge Posner’s critical insight into the shortsightedness of traditional privacy-based analysis of cross-gender searches. After briefly describing the disposition of *Johnson v. Phelan* by the district court, Part Four describes and contrasts the reasoning of the majority and dissenting opinions, emphasizing the

¹⁸¹ 69 F.3d 144 (7th Cir. 1995).

¹⁸² 441 U.S. 520 (1979).

¹⁸³ 468 U.S. 517 (1984).

¹⁸⁴ 482 U.S. 78 (1987).

¹⁸⁵ See *Phelan*, 69 F.3d at 151 (Posner, C.J., concurring and dissenting).

¹⁸⁶ See *id.* at 144.

¹⁸⁷ See *id.* at 151.

¹⁸⁸ *Id.* at 153-54.

potential in Judge Posner's earnest argument for a new, more coherent constitutional analysis of cross-gender searches in prisons.

A. *The District Court Quickly Disposed of Johnson's Privacy Claim.*

During his confinement in Chicago's enormous Cook County Jail, Albert Johnson filed a lawsuit against Cook County, Illinois officials claiming that his constitutional right to privacy had been violated. Johnson alleged that female guards had observed him naked in the showers of the jail and through a faulty partition using the toilet in the detainee's bathroom of the Cook County Criminal Courthouse on occasions when he had to appear in court.¹⁸⁹ Each of the five defendants moved to dismiss Johnson's complaint.¹⁹⁰ The district court considered each of the alleged privacy violations and dismissed the claims against all five defendants in their individual and official capacities in a brief, unreported opinion.¹⁹¹

Johnson's privacy-based challenge to the jail's cross-gender monitoring policy was disposed of by the district court in four short paragraphs.¹⁹² Judge Alesia balanced the limited privacy rights of prisoners against two other competing interests: (1) the vitally important interest of jail officials in maintaining internal security—particularly in showers where violent attacks on prisoners are more likely to occur; and (2) the rights of women to equal opportunity in correctional employment.¹⁹³ In doing so, Judge Alesia concluded that the employment rights of the guards and the security interest of the jail outweighed Johnson's right of privacy.¹⁹⁴

In rejecting Johnson's privacy claim, Judge Alesia relied on the diminished scope of prisoner privacy and the incidental and inadver-

¹⁸⁹ Johnson v. Phelan, No. 92 C 1943, 1993 WL 388827, at *1 (N.D. Ill. Sept. 28, 1993) (unreported decision).

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.* The incidental observation by female guards of male inmates through a faulty partition raises issues distinct from cross-gender visual surveillance in living areas of correctional facilities. First, female guards were able to observe male detainees using the toilet due to a broken fixture—an exceptional circumstance—rather than an official policy of cross-gender monitoring. Secondly, the inadvertent observation took place in a courthouse, rather than the Cook County Jail, therefore causation is more difficult to establish.

¹⁹³ See *id.* at *3-4.

¹⁹⁴ See *id.* at *4.

tent nature of the observation.¹⁹⁵ Whereas the judge predictably intoned language from *Bell v. Wolfish* narrowly restricting the scope of prisoner privacy,¹⁹⁶ he cited *Hudson*¹⁹⁷ (as Chief Judge Posner did at the appellate level)¹⁹⁸ for the proposition that prisoners nonetheless retain some degree of privacy to their bodies¹⁹⁹ — rather than for the frequently cited maxim that privacy is fundamentally incompatible with incarceration. Ultimately, Judge Alesia concluded that Johnson failed to state a claim upon which relief could be granted, and dismissed the case with prejudice.²⁰⁰

Johnson appealed the district court's holding on the single count relating to visual surveillance in the showers of the Cook County Jail. Chief Judge Richard Posner and Circuit Judges Frank Easterbrook and Wilbur Pell heard the appeal. Historically allied both as leaders within the school of law and economics and as co-authors of a popular antitrust casebook, Posner and Easterbrook diverged radically on this issue.

B. Easterbrook's Majority Opinion Drastically Departs from the Seventh Circuit's Earlier Decision in Canedy v. Boardman.

Judge Easterbrook, writing for the majority, took the extreme view that *Hudson* eliminated the application of the Fourth Amendment to prisoners. His view was extreme in two respects. First, in taking the position that the Cruel and Unusual Punishment Clause of the Eighth Amendment is the only constitutional protection prisoners enjoy against involuntary exposure to guards of the opposite sex, Easterbrook departs from even the most conservative interpretations of

¹⁹⁵ “Johnson does not claim that female correctional officers are assigned to observe inmates while showering. Any observation by female guards appears to be incidental and inadvertent.” *Phelan*, 1993 WL 388827 at *4 (unreported decision). “Since Jail officials have a legitimate interest in maintaining some level of observation of inmates while in the showers, and since the occasional viewing of male inmates by female correctional officers appears to be at most infrequent and incidental to their legitimate presence in the institution, the court finds that Johnson has failed to state a claim that his privacy rights were violated in the instance.” *Id.*

¹⁹⁶ See *id.* at *2. “Loss of freedom of choice and privacy are inherent incidents of confinement.” *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

¹⁹⁷ 468 U.S. 517, 528 (1983).

¹⁹⁸ See *Johnson v. Phelan*, 69 F.3d 144, 152-54 (7th Cir. 1995) (Posner, C.J., concurring & dissenting).

¹⁹⁹ See *Phelan*, 1993 WL 388827, at *2.

²⁰⁰ See *id.* at *4.

Hudson.²⁰¹ Second, Easterbrook's narrow interpretation of prisoner privacy in the context of visual surveillance contrasts sharply with the Seventh Circuit's posture in *Canedy v. Boardman*.²⁰² *Canedy* was the first cross-gender search case heard by the Seventh Circuit after the Supreme Court decided *Hudson*.

Easterbrook's opinion overturns the holding in *Canedy* that frequent and deliberate visual monitoring of nude inmates by guards of the opposite sex violates prisoner privacy.²⁰³ In *Canedy*, a male inmate in Wisconsin's Columbia Correctional Institution complained of being regularly observed in various states of undress while showering, toileting, dressing and sleeping. He also complained of being humiliated and embarrassed by strip searches conducted by female guards. *Canedy* unequivocally held that frequent and deliberate visual monitoring of inmates in their living quarters by opposite sex guards was unconstitutional.²⁰⁴ The Seventh Circuit's decision in *Phelan*, only nine months later, departed dramatically from this holding.

The majority opinion in *Canedy* coheres around the principal that the constitutionality of cross-gender searches must be evaluated contextually, rather than categorically. Writing for the majority, Judge Cudahy concluded that accommodating the conflicting rights of male prisoners and female guards is the remedy appropriate to the facts in *Canedy* and to cross-gender search cases generally.

For the overwhelming majority of the cases have declined to fashion such categorical rules, but rather have required that reasonable

²⁰¹ Easterbrook's interpretation of *Hudson* was unprecedented. Other cases read *Hudson* as eliminating privacy in a prisoner's cell, but none had gone so far as to find that *Hudson* eliminated privacy in prisoners' bodies, within or without their cells. Although *Hudson* left the door open, no court had gone so far as to extend to prisoners' bodies *Hudson's* retrenchment of privacy in prisoners' cells. See generally *Phelan*, 69 F.3d 144; *Canedy*, 16 F.3d 183.

²⁰² 16 F.3d 183 (7th Cir. 1994).

²⁰³ Indeed, Easterbrook vociferously defends frequent and deliberate cross-sex visual observation even though the district court characterized the surveillance at issue as incidental.

²⁰⁴ In *Canedy*, the Seventh Circuit cited *Hudson* for the proposition that "some diminution of privacy is of course to be expected in prison," but quickly went on to add that nevertheless "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protection when he is imprisoned for a crime." *Canedy*, 16 F.3d. at 186-87. In contrast to its later treatment of the issue in *Phelan*, the Seventh Circuit in *Canedy* distinguishes cases that categorically exempt prisoners from protection against visual observation while nude.

accommodations be made, and that the respective interests be balanced.²⁰⁵

Consistent with its contextual analysis, the *Canedy* court drew a clear distinction between searches it considered less objectionable (e.g., inadvertent or occasional sightings of nude prisoners) from those it considered more objectionable, namely regular, deliberate monitoring of shower, toilet and dressing areas.²⁰⁶ Judge Cudahy cited nearly twenty federal cases and a law review article to support his reasoning. In acknowledging this distinction, Cudahy challenges the notion that the physicality of the search determines the degree to which it impinges upon constitutional privacy. Yet this is the aspect of the *Canedy* decision that most disturbs Judge Easterbrook.

Judge Easterbrook wholly rejects the Foucauldian notion that the disembodied gaze can be more intrusive, more threatening, more legally troubling than tactile “hands on” body searches. In short order, Judge Easterbrook relegates the contextual analysis of cross-gender searches in *Canedy* to dictum.

Anonymous visual inspections from afar are considerably less intrusive and carry less potential for “the unnecessary and wanton infliction of pain.” To the extent incautious language in *Canedy* implies that deliberate visual inspections are indistinguishable from physical palpitations, its discussion is dictum. Further reflection leads us to conclude that it should not be converted to a holding.²⁰⁷

²⁰⁵ *Canedy*, 16 F.3d at 188.

²⁰⁶ Federal courts have trouble reconciling equal opportunities for women and the privacy right of male prisoners.

[A] state’s interest in providing equal employment opportunity for female guards needs to be weighed against the privacy rights of prisoners. The cases therefore hold that sex is not a bona fide occupational qualification preventing women from working in all-male prisons, and that *pat-down searches and occasional or inadvertent sighting by female prison employees of inmates in their cells or open showers do not violate the inmates’ right to privacy. But that right is violated where this observation is more intrusive (like a strip search, in the absence of an emergency) or a regular occurrence.*

Canedy, 16 F.3d at 187 (emphasis added) (citations omitted).

²⁰⁷ *Phelan*, 69 F.3d at 148.

C. *Easterbrook's Majority Opinion Concludes that Unfettered Visual Surveillance of Male Prisoners while Showering and Toileting is a Necessary and Constitutionally Acceptable Security Measure.*

Easterbrook ultimately affirmed the district court's dismissal of Johnson's claim that his privacy was violated when female guards observed him naked in the showers of the Cook County Jail. He reasoned by an almost syllogistic process of eliminating individual constitutional theories that would limit cross-gender surveillance by guards in prisoners' living areas. First, he dispensed with the Fourth Amendment as an impediment to visual monitoring by: (1) invoking *Bell* for its admonition that judges refrain from substituting their judgment for that of prison officials; (2) citing *Hudson* for the proposition that the Fourth Amendment no longer applies to prisoners; and (3) reconstructing persuasive invocations of privacy in *Canedy* as weak Eighth Amendment claims in disguise. "We therefore think it best to understand the references to "privacy" in *Canedy* and similar cases as invocations of the Eighth Amendment's ban on cruel and unusual punishments."²⁰⁸ Easterbrook urged that together, *Bell* and *Hudson* not only permit frequent and deliberate monitoring of naked prisoners, but also actually mandate it.²⁰⁹ Easterbrook was emphatic — even delirious, as one commentator suggested²¹⁰ — that in the wake of the *Bell* and *Wolfish* decisions, unfettered surveillance is paramount to effective security. "[C]onstant vigilance without regard to the state of the prisoner's dress is essential. Vigilance over showers, vigilance over cells — vigilance everywhere, which means that guards gaze upon naked inmates."²¹¹

Next, Easterbrook eliminated the Fifth Amendment substantive due process as an obstacle to monitoring. He applied the doctrine of *Turner v. Safely*, which set a unified standard for *all* impingements upon prisoners' constitutional rights.²¹² Under *Turner*, the test of a regulation's constitutional validity is whether the regulation is reasonably related to a legitimate penological objective.²¹³ *Turner* triggers a discussion of the penological interests advanced by visual monitoring

²⁰⁸ *Id.* at 147.

²⁰⁹ *See id.* at 146.

²¹⁰ *See* HYDE, *supra* note 80, at 163.

²¹¹ *Phelan*, 69 F.3d at 146.

²¹² 482 U.S. 78, 89 (1987).

²¹³ *See id.* at 89-90.

of naked male prisoners by female guards. Easterbrook focused on two: (1) the obligation of prison officials' under Title VII of the Civil Rights Act of 1964 to employ women on an equal basis as men, and (2) deference to the decisions of prison administrators. Easterbrook concluded that the court was bound to Cook County's decision to deploy female guards in areas where male prisoners can be seen nude, frequently and deliberately.

Finally, Easterbrook eliminated the Eighth Amendment as a means of challenging the constitutionality of cross-gender monitoring in the showers. This is the denouement of Easterbrook's rights retrenching narrative. Since the Eighth Amendment's proscription of Cruel and Unusual Punishment is violated only when prisoners are intentionally subjected to "unnecessary and wanton infliction of pain," Easterbrook needed to find only that such monitoring has some alternative penological purpose. Such as (1) the efficient deployment of security staff; and (2) the prevention of impermissible sex discrimination:

Monitoring is vital, but how about the cross-sex part? For this there are two justifications. First, it makes good use of the staff . . . Second, cross-sex monitoring reduces the need for prisons to make sex a criterion of employment, and therefore reduces the potential for conflict with Title VII and the equal protection clause.²¹⁴

The "infliction of pain" standard for Eighth Amendment violations is extremely high because it focuses largely on the prisoner's subjective experience of pain. In *Jordan v. Gardner*, a case challenging cross-gender clothed body searches of female prisoners in a Washington state women's correctional facility, the Ninth Circuit concluded that this high Eighth Amendment threshold was met when female prisoners subjectively experienced pain in reaction to "hands on," cross-gender clothed body searches.²¹⁵ Easterbrook foreclosed the argument that cross-sex surveillance is *ipso facto* cruel and unusual in two parts. First, he articulated two alternative justifications for cross-gender visual observation. Second, he distinguished the basis of Johnson's complaint as an objection not to the search itself, but to

²¹⁴ *Id.* at 147.

²¹⁵ 986 F.2d 1521 (9th Cir. 1993).

deploying opposite-sex staff to conduct it. Easterbrook summarizes his analysis as follows:

Where does this leave us? The Fourth Amendment does not protect privacy interests within prisons. Moving to other amendments does not change the outcome. Cross-sex monitoring is not a senseless imposition. As a reconciliation of conflicting entitlements and desires, it satisfies the *Turner* standard. It cannot be called “inhumane” and therefore does not fall below the floor set by the objective component of the Eighth Amendment. And Johnson does not contend that his captors adopted their monitoring patterns because of, rather than in spite of, the embarrassment it causes some prisoners. He does not submit that the warden ignored his sensibilities; he argues only that they received too little weight in the felicific calculus. Like the district court, therefore, we conclude that the complaint fails to state a claim on which relief may be granted.²¹⁶

Easterbrook’s analysis of the opposite sex surveillance in the Cook County Jail is savvier than most, yet his opinion still echoes inconsistencies that characterize the larger body of cross-gender search doctrine. For instance, he addressed only one aspect of cross-gender monitoring — women guarding men — overlooking legal precedents and constitutional analysis in cases where cross-gender monitoring involved men guarding women. In doing so, Easterbrook neatly avoided the problem of formal symmetry.²¹⁷ Further, Easterbrook acknowledged that the biological sex of guards and prisoners is only one of several criteria, including sexual orientation, that bear upon the propriety of security assignments. Nevertheless, he dismissed the lack of fit as inconsequential.²¹⁸ Through the lens of the Eighth Amendment, only treatment of prisoners that wantonly and unnecessarily inflicts pain registers on Easterbrook’s radar screen. Reading *Hudson* more narrowly and placing more emphasis on the decision than the court did in *Canedy*, Easterbrook easily dispensed with prisoners’ objections to cross-sex monitoring as overly burden-

²¹⁶ *Id.* at 150-51.

²¹⁷ “The interest of women in equal treatment is a solid reason with more secure footing in American law than prisoners’ modesty.” *Phelan*, 69 F.3d at 148.

²¹⁸ There are too many permutations to place guards and prisoners into multiple classes by sex, sexual orientation, and perhaps other criteria, allowing each group to be observed only by the corresponding groups that occasion the least unhappiness. *See id.* at 147.

some personal preferences, which prison officials are entitled to ignore.

D. Posner's Dissenting Opinion Analyzes the Conflict between Prisoners' Privacy and Women's Employment as Guards Contextually, Rather Than Categorically.

Judge Easterbrook favored the application of categorical rules to the privacy claims of prisoners. In stark contrast, Chief Judge Posner's dissenting opinion emphasized the importance of context in the constitutional analysis of those claims. Indeed Posner likened the Eighth Amendment to a Rorschach test, reflecting judicial values shaped largely by personal values and morality.²¹⁹ The strength of Posner's dissent is the realism he lends to the constitutional analysis of cross-gender search cases, by: (1) rejecting one-dimensional, essentializing characterizations of prisoners; (2) drawing attention to inconsistency and confusion within the doctrine of cross-gender searches; and (3) acknowledging the force inherent in subjecting a nude subject to the unobstructed gaze of a stranger of the opposite sex. Posner takes us beyond the abstract balancing of privacy and employment rights that fails to do justice to the complex relationship between privacy, sex, sexuality and violence.

1. Posner Rejected the One-dimensional, Essentializing Characterizations of Prisoners.

Posner's dissenting opinion proceeds from the basic notion that prisoners are individuals deserving of fundamental constitutional protection, rather than an abstract category of legal subjects to which the Bill of Rights only remotely applies. Posner focused on the realities of prison life and the moral dubiety of cross-gender surveillance. In doing so, he articulated the human dimension of cross-gender surveillance.

One way is to look upon [prisoners] as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing

²¹⁹ "The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, like so much in the Bill of Rights, is a Rorschach test. What the judge sees in it is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources or moral judgment." *Id.* at 151.

treatment of prisoners would arise. In particular there would be no inhibitions about using prisoners as the subject of experiments, including social experiments such as the experiment of seeing whether the sexes can be made interchangeable. The parading of naked male inmates in front of female guards, or of naked female inmates in front of male guards, would be no more problematic than “cross-sex surveillance” in a kennel. I do not [] consider the 1.5 million inmates of American prisons and jails in that light.²²⁰

In one of the most generous characterizations of prisoners since the Prisoners Rights Era, Posner reminds us that prisoners are not a monolithic group and warns us of the danger of constructing prisoners as a class of outsiders undeserving of humane consideration.

A substantial number of these prison and jail inmates, including the plaintiff in this case, have not been convicted of a crime. They are merely charged with a crime, and awaiting trial. Some of them may actually be innocent. Of the guilty, many are guilty of sumptuary offenses, or of other victimless crimes uncannily similar to lawful activity (gambling offenses are an example), or of esoteric financial and regulatory offenses (such as violation of the migratory game laws) some of which do not even require a guilty intent . . .²²¹

In marked contrast to Easterbrook’s reasoning that the challenged cross-gender surveillance is permissible because no constitutional standard specifically forbids it, Posner immediately asserts the importance of the interest at stake, then argues for its protection.

[W]e should have a realistic conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them. We must not exaggerate the distance between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.²²²

²²⁰ *Id.* at 151 (Posner, J. concurring & dissenting).

²²¹ *Id.*

²²² *Id.* at 152.

Thus, Posner vehemently dissents from the majority's conclusion that allowing female guards to conduct visual surveillance on male prisoners in their living quarters does not offend the constitution.²²³

2. *Posner Criticized the Confused Doctrinal Framework in which the Propriety of Cross-Gender Searches is Analyzed.*

Posner criticized courts for conflating several different notions of privacy in determining the constitutionality of various prisoner search policies. Posner observed that the term "privacy" in its everyday use has quite a different meaning than the formal legal concept of privacy. He then enumerated some of the varied meanings of privacy.²²⁴ These meanings included reproductive autonomy; tort-based privacy, which protects an individual from public disclosure of private facts; confidentiality in certain documents and conversations; and Fourth Amendment based privacy, which protects individuals from unreasonable government searches and seizures. Indeed, a vast array of prisoners' claims have been litigated under the rubric of privacy and courts have accorded vastly different levels of protection to these various claims.²²⁵ Posner rightly points out that the sources of law giving rise to these claims—the Fourth Amendment, the Eighth Amendment, substantive due process, the unenumerated penumbra of the Bill of Rights — as well as the legal standards by which they are judged, have

²²³ "Animals have no right to wear clothing. Why prisoners, if they are no better than animals? There is no answer, if the premise is accepted. But it should be rejected, and if it is rejected, and the duty of a society that would like to think of itself as civilized to treat its prisoners humanely therefore acknowledged, then I think that the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex bathroom movement and requires us to reverse the judgment of the district court throwing out this lawsuit." *Phelan*, 69 F.3d at 152.

²²⁴ Specifically, Posner contends "[t]he problem is that the term 'right of privacy' bears meanings in law that are remote from its primary ordinary language meaning . . ." *Id.* at 152.

²²⁵ Privacy in the sense of disclosure of "private" facts about a prisoner (e.g. HIV status) is very different than the type of confidentiality privacy potentially invaded when a prisoner's mail is read. The former is more related to tort-based privacy, while the latter invasion of privacy implicates the First Amendment. Both these types of privacy claims differ from the privacy that might be violated by involuntary exposure of a prisoner's naked body to a guard of the opposite sex, . . . a claim generally litigated under the Fourth and Eighth Amendments. Finally, the type of privacy affect when a pregnant prisoner is denied an abortion – reproductive privacy – is yet another form of privacy implicated by incarceration. See *Bryand v. Mafucci*, 923 F.2d 979 (2d Cir. 1991). See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

been confused and collapsed in constitutional jurisprudence.²²⁶ Posner's discomfort with the evolution of the privacy doctrine is right on target, in spite of his ultimate argument that such confusion would be neatly eliminated by adoption of a single Eighth Amendment standard by which all prisoner surveillance cases would be measured.²²⁷ He asserts that in the rush to reduce the scope of constitutional protections enjoyed by prisoners, the fine line doctrinal distinctions are disappearing.

Posner draws attention to the lack of clear guidelines for a legally acceptable balance between prohibited sex discrimination against guards and constitutionally protected privacy for prisoners.²²⁸ Indeed, the cases display a tremendous lack of uniformity in the weight federal courts accord the two major justifications for limiting prisoner privacy—internal security and equal employment—in balancing the interests of the prison and the prisoner. Following *Dothard v. Rawlinson*, some courts weighed equal employment against the disruption affording such opportunities to women would cause to prison security. However, the nature of the balancing changed dramatically after *Bell* and *Hudson*. Given the emphasis on maintaining internal security in *Bell*, and the drastic reduction of privacy in *Hudson*, equal employment policies condoning same sex searches were assumed to be consistent with the security interests of prisons. After *Turner*, the balance shifted again. Courts increasingly viewed equal employment as a legitimate penological objective, a factor that need only have a rational connection to a prison policy to override the prisoner's privacy claim.²²⁹

²²⁶ "The problem is that the term 'right of privacy' bears meanings in law that are remote from its primary ordinary language meaning, which happens to be the meaning that a suit of this sort invokes." *Phelan*, 69 F.3d at 152.

²²⁷ "I consider [analyzing cross-gender surveillance on the basis of privacy doctrine] too tortuous and uncertain a route to follow in the quest for constitutional limitations on the infliction of humiliation on prison inmates. The Eighth Amendment forbids the federal government to inflict cruel and unusual punishments . . ." *Id.*

²²⁸ "I have no patience with the suggestion that Title VII of the Civil Rights Act of 1964 forbids a prison or jail to impede, however slightly, the career opportunities of female guards by shielding naked male prisoners from their eyes . . . [T]itle VII cannot override the Constitution." *Id.* at 153.

²²⁹ See *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988); *Kent v. Johnson*, 821 F.2d 1220, 1225 (6th Cir. 1987) ("To the extent that it is an operational or administrative necessity, nondiscrimination is also, by definition, a legitimate penological objective.").

Another aspect of confusion within the doctrine of cross-gender searches relates to an unspoken, nevertheless pervasive assumption that only visual surveillance by a member of the opposite sex is problematic. There are many instances of sexual intimidation through gazing, which cannot be addressed within a conventional heterosexual paradigm of gender. The fact that same sex surveillance of the nude bodies of prisoners is implicitly unproblematic in these cases is troubling. It is evidence of a heterosexual presumption that is hardly appropriate in the transgendered context of prison.²³⁰ Furthermore, it exempts from judicial scrutiny the same type of sexually intimidating gazing that, if practiced across gender or in the (non-carceral) workplace, would be problematic. Male prisoners observed naked by gay male guards have no cognizable Fourth Amendment claim; likewise for female prisoners viewed naked by lesbian guards. And what of transgendered prisoners under the eye of guards of either sex?²³¹ Judge Posner's dissenting opinion in *Phelan* serves to remind us that courts have neglected to regulate visual surveillance by guards of pris-

²³⁰ In a candid footnote, the majority opinion in *Canedy v. Boardman* points out the heterosexual presumption contained in the appellate briefs in that case, and more generally, in the many of the cross-gender search cases. "[M]any of the cases discussed below involving cross-gender observations and strip searches, as well as Canedy's brief on appeal here, make a common assumption. In their declaration that 'the nudity taboo, and hence the invasion of privacy involved when it is forcibly broken, is much greater between the sexes than among members of the same sex,' these authorities and submissions appear to assume that all the relevant actors are heterosexual." *Canedy*, 16 F.2d at 185 n.1 (citation omitted).

²³¹ The failure of federal courts to factor sex, sexual orientation and sexual domination into the analysis of cross-gender searches is consistent with the conflation of sex, gender and sexual orientation described by queer theorist Frank Valdes. See Frank Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). Valdes deconstructs sex and gender in the context of American anti-discrimination law. He contends that Western culture and American Law conflate, among others, sex and sexual orientation. In doing so, he posits the legal and normative construction of sex, gender and sexual orientation in relation to each other in ways that both bias anti-discrimination laws and fail to reflect the broad spectrum of human experience. Professor Valdes similarly claims that legal doctrine is out of touch with the reality of many people's lives.

The doctrine of cross-gender searches similarly conflates gender and sexual orientation. This is perhaps the most troubling when courts restrict surveillance of naked prisoners to guards of the same sex because they reason that it is consistent with sexual modesty regarding exposure to non-intimates of the opposite sex. This logic contains an inherent heterosexist bias that prisoners searched by guards of the same sex do not experience sexual modesty. It assumes that a person's gender determines their sexual orientation. The Seventh Circuit pointed this out in *Canedy v. Boardman*.

oners on a more qualitative, more substantively meaningful, and less equivocal basis than gender.

Judge Easterbrook both acknowledged and accepted this limitation, rationalizing that "there are too many permutations to place guards and prisoners into multiple classes by sex, sexual orientation, and perhaps other criteria, allowing each group to be observed only by the corresponding groups that occasion the least unhappiness."²³² Moreover, the overtly sexual gazing of inmate-on-inmate occasions no violation of privacy. This suggests that the limitations on gazing serve to reduce the potential liability of prisons for Title VII violations, rather than protect prisoner privacy.

Posner's realism interrogates Easterbrook's assertion that deference to prison officials resolves the conflict between prisoners' privacy rights and the employment rights of guards. Easterbrook's insistence on deference neatly avoids the problem of formal symmetry that has troubled other courts. As I discussed earlier, federal judges have

²³² *Phelan*, 69 F.3d at 147. The work of art historians and critical film theorists suggest an alternative basis for the nature of surveillance, a nudity taboo that informs and expands the limited work of feminist legal theorists on gender, privacy and surveillance in prisons. Theorists of art history have analyzed the power inherent in gazing. In *Rethinking Art History: Meditations on a Coy Science*, Donald Preziosi theorizes the relationship between the heterotopic architecture of the museum and the disciplinary transmission of knowledge. Preziosi posits that technological apparatuses such as projected voices and the third person voice of historical narrative order the museum goer's understanding of what she sees. See DAVID PREZIOSI, *RETHINKING ART HISTORY: MEDITATIONS ON A COY SCIENCE* 54-79 (1989).

Most useful to feminist scholars of incarceration is that Preziosi links the disciplinary transmission of knowledge within museums to that of prisons. Whereas Preziosi focuses upon the power of the *anonymous* gaze in the Eighteenth Century carceral setting of Bentham's Panopticon, critical feminist film theorists focus on the gendered nature of spectatorship and the inherent difference in power and authority reflected in the gaze when the woman is its initiator rather than its object. See *THE FEMALE GAZE: WOMEN AS VIEWERS OF POPULAR CULTURE* (Lorraine Gamman & Marsha Marshment, eds., 1989). Their work stems from Laura Mulvey's thesis in "Visual Pleasure and Narrative Cinema" that visual pleasure in mainstream Hollywood cinema derives and reproduces a structure of male gazing and female objectification which replicates the structure of unequal power relations between men and women. They are suspicious, however, of privileging gender as the category which structures perspective and suggest that other categories (such as class, race or sexual orientation) may equally organize power relations through the process of visual objectification.

Borrowing from the work of media theorists contributes to our understanding of the gendered power relationship that is reproduced in the act of gazing. That relationship is more complex, and less reciprocal than a moral taboo. To the extent that men are more accustomed to objectifying women through the act of looking than vice-versa, men are disempowered by cross-gender surveillance, particularly when partially or entirely undressed. More accustomed to objectification by men, women are similarly disempowered by cross-sex surveillance, but no more so than before they were incarcerated.

grappled with the propriety of cross-gender searches in correctional systems that permit female guards to search male prisoners, while prohibiting the converse. Easterbrook frames the issue as one of deference to prison administrators. His logic implies that courts are bound to defer to the judgements of prison administrators regarding how best to deploy female and male guards to achieve institutional objectives. However, as Posner points out, the reality is that women (not men) are seeking opportunities within the field of corrections. Prison officials are rarely under pressure to expand employment opportunities for male guards. Therefore, it is most often the case that deference will favor the deployment of female guards in contact positions where they are likely to observe male prisoners in states of undress, and work against the interests of male prisoners in bodily privacy.

3. *Posner Erroneously Acknowledges the Force Inherent in Subjecting a Nude Subject to the Unobstructed Gaze of a Stranger of the Opposite Sex and its Moral Objectionability.*

Posner posits the existence of a taboo against being seen nude by a stranger of the opposite sex.

The nudity taboo retains great strength in the United States. It should not be confused with prudery. It is a taboo against being seen in the nude by strangers, not by one's intimates . . . The taboo is particularly strong when the stranger belongs to the opposite sex.²³³

In identifying a religion-based historically derived norm against cross-sex gazing, Posner appeals to a higher moral authority than the correctional administrator to whom many courts give deference to decide whether or not to have guards monitor nude prisoners of the opposite sex. He is also suggesting that the intangible, impalpable gaze itself—when directed at a nude prisoner of the opposite sex—contains a sexual power that the categorical analyses of cross-sex searches overlooks.

Posner's dissenting opinion is an insightful critique of the doctrine of cross-gender searches and the failure of federal courts to analyze the constitutional validity of these searches with an eye toward the

²³³ *Phelan*, 69 F.3d at 152.

realities of life inside America's correctional warehouses. Nevertheless, Posner's own biases cloud his analysis. The weaknesses in Posner's argument are primarily threefold: (1) the relativism in what Posner characterizes as a universal taboo against being seen naked by non-inmates; (2) Posner's scapegoating of "radical feminists;" and (3) his essentialization of prisons as male. I will address each of these criticisms in turn.

First, Posner posits that a culturally normative nudity taboo overrides any construction of positive law that would permit women to gaze upon the bodies of naked men who are not intimates and vice-versa.²³⁴ He asserts that the nudity taboo is strongest between members of the opposite sex and distinct from prudery. The strength of Posner's natural law proscription is specious. As Judge Easterbrook points out, accepted practices such as medical examination by a physician or nurse of the opposite sex, co-ed hot tubs and saunas and the constitutionally protected practice of nude dancing belie the strength of such a norm in the United States. The growing popularity of strip-o-grams as entertainment at office, birthday and stag parties similarly casts doubt upon the existence of such a norm. Its uniformity is doubtful as well. The aversion to nudity before strangers of the opposite sex (by Posner's own admission) tends to be experienced more by the religiously devout than others in this country's "morally diverse populace."²³⁵

Nevertheless, invoking the taboo enables Judge Posner to position basic human values (such as the humane treatment of prisoners) in direct opposition to the notions of workplace equality for women embraced by liberal feminists, whom he criticizes for deconstructing gender as an instrument of patriarchy. To the extent that a moral taboo constructs boundaries between the sexes, the boundaries are "real" and impervious to the agenda of (those Posner refers to as) "radical feminists" whom Posner accuses of de-sexing prisoners on the road to employment equity for women.

Second, Posner makes a sweeping generalization about gender in penal institutions to support of the right of male prisoners to be clothed in the presence of female guards, and the ability of prison officials to exclude women from whole areas of men's prisons. He stated:

²³⁴ *See id.*

²³⁵ *Id.* at 152.

The reality is that crime is gendered, and the gender is male . . . The vast majority of criminals are males. The vast majority of their victims are males. The vast majority of police and correctional officers are males. These are inescapable realities in the design of penal institutions and the validation of penal practices.²³⁶

With this assertion, Posner imputes an immutable gender-bound trait to prisons. A critique of this approach is well developed within feminist jurisprudence, and among feminist scholars of penology. The essentialization of prisons as male ignores a long history of women's incarceration that has often been harsher than the criminal punishment of men.²³⁷ Furthermore, it ignores the fact that growth in the female prison population is currently outpacing that of men.

Third, Posner blames the dehumanization of male prisoners on the feminist movement because of its efforts to provide equal employment opportunities within corrections for women, rather than the correctional administrators and legislative bodies who have far greater authority to define the quality of life of prisoners. Indirectly blaming women for resisting oppression in the workplace, Posner's analysis stops short of analyzing the sexualization of power in relation to cross-gender searches. Posner's criticism of feminists who have championed equal employment opportunities for women in the non-traditional prison workplace diverts attention away from the complicity of correctional administrators in perpetuating sexist hierarchies of masculinity that privilege sexual aggression. These hierarchies of masculinity order power among guards as well as prisoners.²³⁸

²³⁶ *Id.* at 155.

²³⁷ See NICOLE H. RAFTER, *PARTIAL JUSTICE: WOMEN, PRISONS & SOCIAL CONTROL* (2d ed. 1990).

²³⁸ Although this article has discussed the ordering of power among male prisoners, it has said little about the role of masculinities in ordering power among guards. In the traditionally male-dominated and overwhelmingly numerically male prison workplace, female guards frequently encounter sex-based opposition and harassment from male colleagues. The competency of female guards is questioned in the basis of their biological sex. In a survey of nearly one hundred male guards, Lynn Zimmer found that male guards had negative attitudes about working with female guards for two principle reasons. They felt women impaired the security of the prison and jeopardized the safety of the male guards by not being sufficiently intimidating or aggressive toward inmates. See ZIMMER, *supra* note 51, at 54-55. Strong male opposition to women in the blue-collar prison workplace frequently finds expression in harassing conduct, another means of re-asserting male dominance over intrusive female colleagues. Female guards have reported serious forms of harassment such as hazing, undermining performance evaluations, and receiving unfavorable work assignments after refusing sexual advances from superiors;

Posner's opinion errs in blaming diminished prisoner privacy—and the indignity prisoners suffer therefore—on women who seek employment opportunities previously reserved to men. However, these women (and the feminists who support their equal employment) ultimately lack the power to mediate the sexism, patriarchy and hierarchical masculinities that encourage sexual predation in men's prisons. Indeed the small number of women employed as guards in men's higher security prisons and jails are treated harshly by male counterparts who object to their presence. Correctional administrators have far more agency to influence the conditions under which female guards work (and under which vulnerable male prisoners are confined) than feminists. As I discussed previously, prison guards manipulate the sexually predacious environment in men's prisons to their advantage. Ultimately, Posner's critique of the doctrine of cross-gender searches is limited. In targeting the movement of women into non-traditional employment as correctional officers, his argument cannot reach beyond moral taboo to discuss complexities of gender, sex and sexual orientation at the base of the regulation of cross-gender searches.

V. CONCLUSION

This article has demonstrated that cross-gender searches raise many complex issues beyond the constitutional scope of prisoner privacy. They suggest that the way in which judges use and apply notions of sex, gender and sexual orientation are outdated in the context of prisons. Cross-gender searches also raise the issue of the role of women as security staff in men's prisons. For instance, the frequency with which cross-gender searches are challenged in men's prisons demonstrates that women guarding men is viewed differently than men guarding women. A close look at the institutional context of these searches in men's prisons reveals an underlying tension with respect to introducing women to a violent, masculinized and punitive environment. The propriety of cross-gender searches spotlights the sexualization of power in prison, the violent and sexually predacious environment in which prisoners are incarcerated, and the complicity of guards in maintaining the environment in their decisions to exercise or refrain from exercising their search authority.

as well as less serious but unremitting comments about physical appearance, gossip among male colleagues about their sexual preference and sexually derogatory nicknames. *See id.* at 93-96.