

# BEYOND MODESTY: PRIVACY IN PRISON AND THE RISK OF SEXUAL ABUSE

KIM SHAYO BUCHANAN\*

“[B]eing a woman prisoner in U.S. state prisons can be a terrifying experience. If you are sexually abused, you cannot escape from your abuser.”<sup>1</sup>

Unsolicited sexual touching, harassment, and coercion are “simply not part of the penalty that criminal offenders pay for their offenses against society.”<sup>2</sup> Nonetheless, U.S. women’s prisons have become notorious for the severe and pervasive sexual abuse of women prisoners by male guards that too often occurs there.<sup>3</sup> This sexual abuse

---

\* J.S.D. Candidate, Columbia. LL.B. University of Toronto, 1995; LL.M. Columbia 2003. I am grateful to Professor Kimberlé Crenshaw for inspiring this Article, and for her comments on early drafts; to Professor Susan Sturm for her enthusiasm and great advice; and to Professor Philip Genty for bringing it down to earth. My deepest thanks go to my parents, Delphine and Brock Buchanan, whose love and support made this possible.

1. Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, (Dec. 1996), at <http://www.hrw.org/summaries/s.us96d.html> (last visited Jan. 21, 2005) [hereinafter Human Rights Watch, *All Too Familiar*].

2. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted) (quoting *Rhodes v. Chapman*, 425 U.S. 337, 347 (1981)).

3. See, e.g., Amnesty International, “*Not Part of My Sentence*”: *Violation of the Human Rights of Women in Custody*, at <http://web.amnesty.org/library/Index/engAMR510011999> (1999) (last visited Jan. 21, 2005) [hereinafter Amnesty International, *Not Part of My Sentence*]; Radhika Coomaraswamy, *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, in Accordance with Commission on Human Rights Resolution 1997/44* (1999); Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, at <http://www.hrw.org/reports98/women/Mich.htm> (1998) (last visited Jan. 21, 2005) [hereinafter Human Rights Watch, *Nowhere to Hide*]; Human Rights Watch, *All Too Familiar*, *supra* note 1. Custodial sexual abuse of women prisoners has been described as “one of the most heinous state-sanctioned human rights violations within the U.S. today.” Angela Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 351 (1998).

While sexual abuse of male prisoners also occurs, “most sexual assaults on male prisoners are committed by fellow prisoners,” and custodial sexual abuse by female guards is far less common than custodial sexual abuse by male guards. Teresa A. Miller, *Keeping the Government’s Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy*

comprises various forms of sexual assault, exploitation, and harassment. In 1996, Human Rights Watch described the ongoing abuses in U.S. women's prisons as follows:

[M]ale correctional employees have vaginally, anally, and orally raped female prisoners and sexually assaulted and abused them. We found that in the course of committing such gross misconduct, male officers have not only used actual or threatened physical force, but have also used 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. In other cases, male officers have violated their most basic professional duty and engaged in sexual contact with female prisoners absent the use or threat of force or any material exchange. In addition to engaging in sexual relations with prisoners, male officers have 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. Male correctional officers and staff have also engaged in regular verbal degradation and harassment of female prisoners, thus contributing to a custodial environment in the state prisons for women which is often highly sexualized and excessively hostile.<sup>4</sup>

As various correctional departments<sup>5</sup> and human rights organizations have observed, an important factor contributing to custodial sexual abuse in US women's prisons is that "the United States, despite authoritative international rules to the contrary, allows male correctional employees to hold contact positions over prisoners."<sup>6</sup>

In many states, "a male guard may watch over a woman, even when she is dressing or showering or using the toilet. He may touch every part of her body when he searches for contraband."<sup>7</sup> Thus, "much of the touching and viewing of [women prisoners'] bodies by staff that women

---

in *Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 868 n.29 (2001) [hereinafter Miller, *Government's Hands*].

4. Human Rights Watch, *All Too Familiar*, *supra* note 1.

5. See, e.g., *Torres v. Wisconsin*, 859 F.2d 1523 (7th Cir. 1988); *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002).

6. Human Rights Watch, *All Too Familiar*, *supra* note 1; Amnesty International, *Not Part of My Sentence*, *supra* note 3.

7. Amnesty International, *Not Part of My Sentence*, *supra* note 3; see also, e.g., *Everson*, 222 F. Supp. 2d 864; *Carl v. Angelone*, 883 F. Supp. 1433 (D. Nev. 1995).

experience as shocking and humiliating is permitted by law.”<sup>8</sup> It is not surprising, then, that “[t]here is a strong correlation between cross-gender searches and custodial sexual misconduct [by] male guards.”<sup>9</sup>

Women’s exposure to custodial sexual abuse is also racialized. About fifty-two percent of women prisoners in the United States are African-American.<sup>10</sup> Hispanic women are also grossly overrepresented.<sup>11</sup> By contrast, seventy percent of guards in U.S. federal prisons for women are men.<sup>12</sup> Most of these men are white.<sup>13</sup> The courts’ failure to effectively protect women prisoners from sexual abuse both reflects and constructs the devaluation of black women and other women of color in the criminal justice system and illustrates the lack of seriousness with which assaults on women of color are generally taken by the courts.<sup>14</sup>

An estimated forty to eighty-eight percent of women prisoners have been sexually or physically abused by men prior to their imprisonment.<sup>15</sup> As a result, many women prisoners fear the male guards who have absolute authority over their lives:

More than half the women in here have been sexually abused at one time in their lives, some as small children by father, uncle, granddad, mother’s lover. They fear men, even despise men.

8. Amnesty International, *Not Part of My Sentence*, *supra* note 3.

9. Miller, *Government’s Hands*, *supra* note 3, at 867.

10. Human Rights Watch, *All Too Familiar*, *supra* note 1.

11. Amnesty International, *Not Part of My Sentence*, *supra* note 3.

12. *Id.*

13. The Georgia state director of Southern Prison Ministries “has attributed a major part of the problem of sexual abuse to the fact that the prisons are run almost exclusively by white men.” Laderberg, *infra* note 15, at 340 n.108; *see also* Miller, *Government’s Hands*, *supra* note 3, at 886.

14. *See, e.g.*, Kimberle Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992) [hereinafter Crenshaw, *Race, Gender*].

15. Amnesty International, *Not Part of My Sentence*, *supra* note 3, estimates the percentage at 48–80%; *see also* Amy Laderberg, Note, *The “Dirty Little Secret”: Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 338 n.97 (1998). In *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (en banc), the uncontroverted expert evidence of a psychologist at a California women’s prison was that eighty-five percent of the women prisoners reported having been sexually abused. In 1990, the American Correctional Association published a profile indicating that the typical female prisoner was sexually abused “between the ages of five and fourteen, usually by a male of her immediate family.” Lisa Krim, *A Reasonable Woman’s Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN’S L.J. 85, 113 (1995).

There are hookers who hate men. There are some very young girls in here who are afraid to function in prison without a "protector."<sup>16</sup>

Not only does a woman's prior history "hypersensitize" her to sexual abuse, it also renders her more vulnerable to attacks in prison.<sup>17</sup> Thus a woman's prior sexual abuse increases both her fear of sexual abuse and the likelihood that that fear will materialize.

As Angela Davis points out, the ideological division of private and public obscures the links between domestic abuse and abuse of women prisoners by guards: "Domestic violence as a form of punishment is rarely perceived as integrally connected to the modes of punishment implemented by the State."<sup>18</sup> Even "as 'private' sexual and physical assaults against women are increasingly constructed as 'crimes' and, therefore, subject to 'public' sanctions,"<sup>19</sup> she points out, "'public' imprisonment of women remains as hidden as ever."<sup>20</sup>

Women of color face a "continued pandemic of private punishment"<sup>21</sup> even as the number of women of color incarcerated in jails and prison skyrockets. Thus, Davis points out, "the lives of poor, working-class and racially marginalized women [are] overdetermined by punishment."<sup>22</sup> When courts fail to respond to violence against women, whether in the home or in prison, they effectively "privatize" it,<sup>23</sup> removing it from the public realm: "[judicial] silence is permissive, implicitly condoning the existing violence and encouraging its perpetuation."<sup>24</sup>

At the same time, as I describe in this Article, women prisoners deploy the "privacy" protections of the Fourth Amendment<sup>25</sup> to

16. JEAN HARRIS, *THEY ALWAYS CALL US LADIËS: STORIES FROM PRISON* 116 (1988).

17. Laderberg, *supra* note 15, at 338.

18. *Id.* at 341.

19. *Id.*

20. *Id.*

21. *Id.* at 344.

22. *Id.*

23. Increasingly, as the operation of prisons is turned over from government to private corporations, violence against prisoners is actually committed by private actors. The question of the impact of the privatization of prisons on prisoners' constitutional rights and remedies, however, is beyond the scope of this Article.

24. Zanita Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995, 1012 (1999); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 96 (1987).

25. "The right of the people to be secure in their persons, houses, papers, and effects,

challenge the pervasive authority of male guards over their lives. They have used the privacy guarantee to challenge the assignment of male guards to women prisoners' housing units, as well as to challenge prison policies that authorize male guards to physically search them and view them unclothed. These practices, the prisoners have argued, degrade them, violate their personal dignity, and leave them vulnerable to sexual assault. Their privacy challenges have met with mixed success.

In this Article, I seek to develop an approach to Fourth Amendment privacy that places the underlying, largely inchoate concern of gender privacy law—the risk of sexual abuse<sup>26</sup>—at the center of the analysis. Only by addressing the risk of prison sexual abuse in context, I argue, can privacy law transcend its discriminatory roots and offer genuine protection to male and female prisoners against sexual abuse.

In Part I, I discuss the standard of Fourth Amendment review as it is applied to prisoners, and demonstrate that, rather than protecting prisoners' privacy and human dignity, as it purports to do, the Fourth Amendment jurisprudence effectively privatizes custodial sexual abuse by immunizing prisons from liability for it. In prison, "privacy" serves, as it traditionally did in the context of domestic violence, as a shield behind which women can be abused by their keepers, without interference by the courts.

In Part II, I discuss the critiques of prison privacy offered by Professors Amy Kapczynski,<sup>27</sup> Teresa Miller,<sup>28</sup> and Rebecca Jurado.<sup>29</sup> These scholars demonstrate that contemporary privacy jurisprudence serves mainly to enforce stereotypical norms of feminine modesty. These modesty critics contend that the privacy cases stereotype prisoners as delicate victims who need legal shelter from the male gaze, and express great concern that privacy law not stereotype men as sexual aggressors. Their emphasis on the symbolic harm of gender stereotyping leads the modesty critics to advocate a gender-neutral interpretation of privacy in which male guards would continue to be

---

against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

26. Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003).

27. *Id.* at 1280.

28. Teresa Miller, *Sex Surveillance: Gender, Privacy and the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291 (2000) [hereinafter Miller, *Sex Surveillance*]; Miller, *Government's Hands*, *supra* note 3.

29. Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1 (1999).

permitted to physically search women prisoners and view them unclothed. This solution, I contend, would continue to expose women prisoners to custodial sexual abuse.

I argue that the modesty critics' concern about stereotyping is misguided. I draw upon Professor MacKinnon to argue that, when women prisoners are sexually exploited by guards, they *are* victims of sexual aggression; feminists do them no favor by pretending that they are not. Secondly, the stereotype that so greatly concerns Professors Kapczynski, Miller, and Jurado—that of the fragile, modest woman who has to be confined to a pedestal and protected against her own sexuality—has never applied to the black, working-class, and criminal women who populate U.S. prisons. The intersection of gender, race, class, and criminality has excluded these women from this feminine ideal. Such women have never been overprotected from sexual abuse, and they are clearly not being adequately protected in prison. Rather, their failure to conform to the ideal of feminine modesty exposes them to sexual abuse by men, and informs the courts' indifference to that abuse.

Finally, in Part III, I propose a reinterpretation of the Fourth Amendment privacy guarantee: Rather than protecting “modesty,” Fourth Amendment privacy should recognize a constitutional right to be free from the fear, risk, and reality of sexual abuse in prison.<sup>30</sup> This approach to privacy addresses the inadequacies of privacy doctrine that I have identify in Part I, and the criticisms of Professors Kapczynski, Miller, and Jurado discussed in Part II. This reconceptualization of privacy will replace stereotypical conjecture with a contextual analysis of the evidence of risks of sexual abuse. It offers an alternative to prisoner “modesty” that merits greater weight in the balance against institutional priorities and the Title VII rights of guards, avoids the gender-blind pitfalls of the modesty critique, and responds to the gendered realities of sex and power in prison to offer equal protection to male and female prisoners.

---

30. Presumably, this analysis could equally apply to nonsexual abuses in prison, but in this Article, my analysis centers on the sexual abuse that (understandably, given the courts' emphasis on the cross-gender aspect of privacy) has given rise to most of the prison privacy litigation.

## I. PRISON PRIVACY IN PRACTICE

### A. *Fourth Amendment Privacy: The Standard*

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."<sup>31</sup> This entails not only a right to dignity and security of the person, but also a privacy right whose dimensions have not been fully demarcated by the courts.

In general, when faced with a claim by an individual that his or her Fourth Amendment privacy rights have been violated, the courts apply a two-step test: First, the court must determine whether the individual has a "constitutionally protected reasonable expectation of privacy."<sup>32</sup> This inquiry entails both a subjective individual expectation of privacy and an objective determination that society recognizes that expectation as reasonable.<sup>33</sup> Second, the court engages in a balancing analysis: The individual expectation of privacy is balanced against the interests asserted by the state actor.<sup>34</sup>

In *Turner v. Safley*,<sup>35</sup> the Supreme Court established a special, deferential standard of scrutiny for prisoners' constitutional claims. Where the person claiming the privacy right is a prisoner, the level of scrutiny is minimal: rather than enjoying the protection of strict scrutiny, prisoners' Fourth Amendment rights can be infringed as long as the government offers a "reasonable basis" for the infringement. Thus, any state intrusion into prisoners' privacy is permissible as long as the infringement is "reasonably related to legitimate penological interests."<sup>36</sup>

#### 1. Scope of Prisoner Privacy: Defined by the Prison

In *Hudson v. Palmer*,<sup>37</sup> the Supreme Court held that prisoners have no reasonable expectation of privacy with respect to searches of their cells and property. "Society," the majority held in *Hudson*, "is not prepared to recognize as legitimate any subjective expectation of

---

31. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

32. *United States v. White*, 401 U.S. 745, 751-52 (1971); *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

33. *Katz*, 389 U.S. at 361.

34. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Hudson v. Palmer*, 468 U.S. 517, 527 (1983).

35. 482 U.S. 78 (1987).

36. *Id.* at 89.

37. 468 U.S. 517 (1983).

privacy that a prisoner might have in his prison cell.”<sup>38</sup> Prisoners are disallowed any constitutional privacy right with respect to their cells or property because recognition of such a right would inconvenience the prison administration and limit its ability to keep prisoners under control. Justice Burger held in *Hudson*:

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. . . . [I]t would be literally impossible to accomplish the prison objectives identified above if inmates retained a right of privacy in their cells. . . . A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.<sup>39</sup>

Thus, prisoners’ rights to privacy are not judicially recognized unless those rights are consistent with the interests of the state.<sup>40</sup> Indeed, the scope and very existence of prisoners’ privacy rights are determined from a majoritarian perspective: “[S]ociety would insist that the prisoner’s expectation of privacy always yield to what must be considered the paramount interest in institutional security.”<sup>41</sup>

Normally, the very essence of individual rights is that they conflict with the interests of the state.<sup>42</sup> As Ronald Dworkin contends, rights serve as “political trumps held by individuals.”<sup>43</sup> Individual rights are *intended* to pose obstacles and impose burdens on governmental action.<sup>44</sup> The Supreme Court’s determination that prisoners’ privacy rights are limited by the interests of the state, rather than the other way around, means that prisoners have no privacy rights at all.

The majority in *Hudson* held that it was not leaving prisoners “without a remedy for calculated harassment unrelated to prison needs.

---

38. *Id.* at 526.

39. *Id.* at 527–28. I have found no case in which the interest of the prison in maintaining “security” was found to encompass its duty to protect women inmates from sexual abuse. *See, e.g.,* *Everson v. Mich. Dep’t of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002).

40. *See Hudson*, 468 U.S. at 527–28.

41. *Id.* at 528 (emphasis added).

42. *See, e.g.,* LOUIS HENKIN ET AL., *HUMAN RIGHTS* 25–27, 44 (1999) (citing JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* §§ 135–38 (1690); JOHN STUART MILL, *ON LIBERTY* (1849)).

43. *See* HENKIN ET AL., *supra* note 42, at 77 (quoting Ronald Dworkin).

44. *Id.*



Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity."<sup>45</sup> Though the Fourth Amendment does not assist them, prisoners are said to enjoy the protection of the Eighth Amendment against malicious searches of their property: "The Eighth Amendment always stands as protection against 'cruel and unusual punishment.'"<sup>46</sup>

This backup remedy, however, is no remedy at all. The Eighth Amendment has been "even less effective" than the Fourth Amendment for prisoner-plaintiffs challenging searches.<sup>47</sup> The courts' interpretation of the Eighth Amendment, which requires subjective "deliberate indifference" to the prisoner's treatment, is in practice so permissive of sexual abuse (which is defined as a "condition of confinement")<sup>48</sup> that the Eighth Amendment jurisprudence presents an "insurmountable obstacle"<sup>49</sup> to any prisoner claiming redress for such abuse.<sup>50</sup>

For a prisoner challenging sexually abusive search or surveillance practices, then, the only remaining Fourth Amendment issue is this: Does a prisoner have a vestigial Fourth Amendment right of privacy regarding guards' ability to view and touch her body, or not?

The Supreme Court has not definitively resolved this issue.<sup>51</sup> In *Bell v. Wolfish*,<sup>52</sup> the Supreme Court assumed, without deciding, that

45. 468 U.S. at 530.

46. *Id.*

47. Jurado, *supra* note 29, at 35.

48. See *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994). As the Court held in *Farmer*, no matter how harshly a prisoner is sexually abused, there is no constitutional violation unless:

[T]he [prison] official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . . But [the prison] official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

*Id.*

49. Laderberg, *supra* note 15, at 328; see also Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. SCH. L. REV. 281, 291 (2001) ("The deliberate indifference standard under the Eighth Amendment is too stringent to allow any reasonable opportunity to obtain relief.").

50. Laderberg argues that class actions are the *only* means by which a prisoner-plaintiff has a chance to establish an Eighth Amendment violation resulting from custodial sexual abuse: If the prisoner-plaintiff sues alone, she is sure to fail. Laderberg, *supra* note 15, at 352.

51. Jurado, *supra* note 29, at 47.

52. 441 U.S. 520 (1979).

prisoners might “retain some Fourth Amendment rights upon commitment to a corrections facility.”<sup>53</sup> The circuit courts are divided as to whether prisoners have any privacy rights at all.<sup>54</sup> In the leading case, *York v. Story*,<sup>55</sup> the Ninth Circuit held that it could not “conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”<sup>56</sup> While most circuit courts have recognized a limited privacy right of prisoners with respect to invasive cross-gender searches,<sup>57</sup> the Seventh Circuit has held that prisoners have no Fourth Amendment privacy rights whatsoever.<sup>58</sup>

Finally, if prisoners retain some privacy right in respect of their bodies, its content is minimal.<sup>59</sup> In *Bell*, the Supreme Court found that a prison policy subjecting prisoners to visual searches of their body cavities without probable cause did not violate any Fourth Amendment privacy right prisoners or detainees might enjoy.<sup>60</sup>

If the purpose of the Fourth Amendment is, as the Supreme Court held in *Schmerber v. California*,<sup>61</sup> the protection of “personal privacy

---

53. *Id.* at 558.

54. The Supreme Court has declined to grant certiorari at least four times regarding the constitutionality of cross-gender search or surveillance. Jennifer Weiser, *The Fourth Amendment Right of Female Inmates to be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31, 41 n.67 (2002).

55. 324 F.2d 450 (9th Cir. 1963).

56. *Id.* at 455 (containing a Fourteenth Amendment due process challenge by a female assault victim who was required by the defendant-officers to pose in indecent positions, after which the photographs were distributed among police officers). *But see* Grummet v. Rushen, 779 F.2d 491, 494 (9th Cir. 1985) (containing a prisoner as a complainant who was distinguished from the *York v. Story* complainant as a victim of crime).

57. *See, e.g.*, *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002); *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998); *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988); *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986).

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

59. Weiser, *supra* note 54, at 39; *Forts v. Ward*, 471 F. Supp. 1095, 1102 (S.D.N.Y. 1979).

60. *Bell*, 441 U.S. at 559. The gender of the prisoners whose body cavities were being searched, and of the guards conducting the searches, was not mentioned in *Bell*. *Id.*; *see also* Weiser, *supra* note 54, at 41 n.66 (citing the following cases: *Covino*, 967 F.2d 73; *Elliott v. Lynn*, 38 F.3d 188 (5th Cir. 1994); *Peckham v. Wis. Dep’t of Corr.*, 141 F.3d 694 (7th Cir. 1988); *Thompson v. Souza*, 111 F.3d 694 (9th Cir. 1997); *Harris v. Rocchio*, 132 F.3d 42 (10th Cir. 1997)). In dissent, Justice Marshall argued that “body-cavity searches . . . represent one of the most grievous offenses against personal dignity and common decency.” *Bell*, 441 U.S. at 576–77 (Marshall, J., dissenting).

61. 384 U.S. 757 (1966).

and dignity against unwarranted intrusion by the State,"<sup>62</sup> no one needs that protection more than prisoners do.<sup>63</sup>

## 2. Standard of Review

If the prisoner succeeds in establishing a cognizable privacy interest that is infringed by the prison practice, she must also establish that the intrusion was not "reasonably related to legitimate penological interests."<sup>64</sup> In this analysis, every government intrusion into a prisoner's privacy will be found constitutional, as long as the government offers a "legitimate and neutral" reason for the regulation, and there is a "valid, rational connection" between the restriction and the governmental objective.<sup>65</sup> A restriction on prisoner privacy does not violate the Fourth Amendment unless it is "arbitrary or irrational."<sup>66</sup>

In *Turner*, the Court identified two other factors with respect to the "reasonableness" criterion. First, where "there are alternative means" for the *prisoner* to exercise the right, courts should be particularly deferential to the prison administration.<sup>67</sup> The government need not justify the means it has chosen to restrict the prisoner's constitutional rights, as it would have to do with a free person;<sup>68</sup> it need only demonstrate that the prisoner could exercise her right to privacy in some other way.<sup>69</sup>

62. *Id.* at 767.

63. As Catharine MacKinnon has argued, "The least privileged women, not the most, [are and should be the] center and foundation of feminist theory." Catharine MacKinnon, *Keeping it Real: On Anti-Essentialism*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2000); see also JOHN RAWLS, A THEORY OF JUSTICE (1971). The second of Rawls' two principles of justice is, in part, that social and economic inequalities "must be to the greatest benefit of the least advantaged members of society." *Id.*

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

65. *Id.*

66. *Id.* at 90.

67. *Id.*

68. The prison administration need not choose the least restrictive alternative for achieving its objectives. Rather, the onus is on the *prisoner* to prove the existence of "an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91; see also *Bell v. Wolfish*, 441 U.S. 520, 559–60 n.40 (1979); *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995). If this is proven, the court "may"—but need not—"consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.*

69. It seems clear that the government could point to some other part of the prisoner's privacy right that had not been restricted. For example, if the impugned policy invades the prisoner's privacy by mandating cross-gender clothed searches, the government could argue that the prisoner can nonetheless "exercise" her privacy right by not being subjected to, say, a

Finally, if accommodation of the prisoner's Fourth Amendment privacy right would likely affect fellow prisoners, guards or "the allocation of prison resources generally," the prison administration is entitled to judicial deference.<sup>70</sup>

The "reasonableness" standard of review was expressly designed to make the jobs of prison administrators easier (as well as to relieve the courts of the anticipated flood of prisoners' rights litigation that would otherwise be expected to result).<sup>71</sup> As Justice O'Connor held in *Turner*:

[S]uch a standard is necessary if "prison administrators . . . , and not the courts, are to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.<sup>72</sup>

It is hardly surprising that, in "[b]alancing the state's 'need for the particular search' against the extent of the invasion suffered by the inmate, courts have generally found that the institutional concerns of the prison outweigh the intrusiveness of the searches."<sup>73</sup> In the words of Judge Easterbrook in *Johnson v. Phelan*: "[T]he animating theme of the Court's prison jurisprudence for the last 20 years [has been] the requirement that judges respect hard choices made by prison administrators."<sup>74</sup> The judgments of prison officials as to the treatment of prisoners are, from a constitutional point of view, "all but dispositive."<sup>75</sup>

---

cross-gender strip search.

70. *Turner v. Safley*, 482 U.S. 78, 90 (1987); see also *Bell*, 441 U.S. at 547.

71. Judicial and legislative apprehension about a deluge of frivolous prisoner litigation is unfounded: Prisoners are no more litigious *per capita* than other Americans. James Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 142 (2000); Margot Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1573 (2003).

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

73. Weiser, *supra* note 54, at 34 (citation omitted).

74. *Johnson*, 69 F.3d at 145.

75. Miller, *Government's Hands*, *supra* note 3, at 883.

Guards' sexual harassment and exploitation of prisoners, then, are practically unreviewable under the Fourth Amendment.<sup>76</sup> When the courts refuse to prohibit abusive behavior, their silence amounts to an "abdication of judicial responsibility that permits delegation to a non-legitimate actor."<sup>77</sup> This uncritical judicial deference, which abandons prisoners' well-being almost entirely to the discretion of guards and wardens, effectively privatizes the abuse of prisoners: prisoners, and their treatment, have been removed from the public realm. "Like the patriarchal authority of the husband within the traditionally ordered home, the authority of prison administrators within the prison cannot be gainsaid."<sup>78</sup>

Thus, Fourth Amendment privacy doctrine inverts the prisoner's right to privacy: It becomes a private right of prison officials, within very broad parameters, to treat prisoners as they see fit.<sup>79</sup>

### *B. Privacy in Practice: Cross-Gender Search and Surveillance*

As many international and domestic observers have pointed out,<sup>80</sup>

76. This is even more true of the Eighth Amendment prohibition on cruel and unusual punishment, but that issue is beyond the scope of this Article.

77. Fenton, *supra* note 24, at 1041.

78. Miller, *Government's Hands*, *supra* note 3, at 883. Miller argues:

Within the private sphere of home and family, patriarchal power is magnified by virtue of women's exclusion from the public sphere, and, [*sic*] women's power is diminished by their resulting dependence on men. As a consequence, extreme abuses of power within the home—such as domestic violence and spousal rape—go unnoticed by society. Thus privacy functions as a veneer that obscures the sexual oppression of women by protecting and simultaneously disempowering them in an isolated sphere. Likewise prisons—although they are quintessentially public institutions—exist within a separate, "closed" sphere of discipline and punishment.

*Id.* at 882.

79. The banishment of black women and women of color to prisons where they are subjected to sexual abuse, forced labor, and the appropriation of their children, all under color of lawful authority, evokes black women's historical experiences as slaves. *See, e.g.*, Davis, *supra* note 3, at 350 ("Since the population of women in prison is now comprised of a majority of women of color, the historical resonances of slavery, colonization and genocide should not be missed in these images of women in chains and shackles.").

80. *See supra* notes 3, 6–9, and accompanying text. Amy Laderberg observes:

The lack of privacy inherent in a prison environment necessarily means that women are exposed and vulnerable on a twenty-four-hour basis. While in prison, women inmates "are in a position where sexual harassment behaviors can take place with relative impunity." Jails are not constructed with the privacy of inmates as a major concern. Male guards may observe prisoners undressed in their cells, showers, toilets or during searches by jail matrons. "Some officers apparently seek out

the courts' refusal to recognize meaningful privacy rights for prisoners exposes women prisoners to the constant risk of sexual abuse. Guards exercise absolute authority over women prisoners.<sup>81</sup> In many women's prisons, male guards conduct surveillance of women prisoners while they are unclothed and perform what are euphemistically<sup>82</sup> described as "pat-frisks," which virtually invite sexual harassment and abuse. For example, in Washington federal prisons, the authorized method in which a male guard is to conduct a pat-frisk of a woman prisoner is to "run his hands over [the prisoner's] clothed body starting with her neck and working down to her feet," using "a flat hand and pushing motion across the inmate's crotch area." When searching the woman's crotch and upper thighs, the guard is to "push inward and upward," "squeeze[ing]" and "knead[ing]" all seams in the leg and crotch area. The guard is to use the back of his hands in a "sweeping motion" to "flatten[ ]" the breasts of the prisoner.<sup>83</sup>

Obviously, women prisoners experience touching of their breasts or genital area by a male guard as a sexual invasion.<sup>84</sup> As Judge Reinhardt noted in a concurring opinion in *Jordan v. Gardner*,<sup>85</sup> "[s]uch conduct is offensive in the extreme to *all* women, regardless of their prior sexual history."<sup>86</sup>

Were a man to touch a woman in this manner without consent outside the prison context, such touching would amount to a sexual assault. Such touching of prisoners by male guards is inherently sexualized, regardless of the intent of the guard.

As MacKinnon argues, "the social relation between the sexes is organized so that men may dominate and women must submit and this

---

opportunities to observe females in various degrees of undress." After a while, the constant exposure of women's bodies and the sexual relations between inmates and staff become accepted occurrences. "You get the impression from the prison staff . . . that it was a sexual smorgasbord and they could pick and choose whom they wanted."

Laderberg, *supra* note 15, at 342.

81. See generally, e.g., KATHRYN WATTERSON BURKHART, *WOMEN IN PRISON* (1973); HARRIS, *supra* note 16; ANDI RIERDEN, *THE FARM: LIFE INSIDE A WOMEN'S PRISON* (1997).

82. *Jordan v. Gardner*, 986 F.2d 1521, 1523 n.1 (9th Cir. 1993) (en banc) (rejecting the prison's euphemistic description of male guards' invasive physical of women prisoners as "pat-down" searches).

83. *Jordan*, 986 F.2d at 1523 (quoting Washington Corrections Center for Women, *Pat-Down Searches of Female Inmates* manual).

84. Weiser, *supra* note 54, at 32 n.5.

85. 986 F.2d 1521 (9th Cir. 1993).

86. *Id.* at 1540.

relation is sexual—in fact, is sex.”<sup>87</sup> This observation is particularly true for women in prison, whose prior relationships with men have generally been abusive, and who are now subject to the unquestionable authority of male guards. These women can experience “revictimization, anxiety, depression, and possibly increased suicide attempts” as a result of cross-gender physical searches, which impose “almost an unendurable psychological threat and stress.”<sup>88</sup> In *Jordan*, a woman prisoner who reported a lengthy history of sexual abuse was so traumatized by such a search conducted by a male guard that “she had to have her fingers pried loose from bars she had grabbed during the search, and she vomited after returning to her cell block.”<sup>89</sup> As Jennifer Weiser contends, prisoners are likely to fear sexual assault when they are subjected to such intrusive physical searches by male guards.<sup>90</sup> “Furthermore, there is a substantially lesser threat of other females making inappropriate sexual contact, verbalizations, or intimidation.”<sup>91</sup>

Thus, as Judge Reinhardt pointed out in *Jordan*, the consequences of such searches go beyond moral offense: “[I]nvasive searches of the bodies of female prisoners by male prison guards are harmful both because they constitute and reinforce gender subordination, and because they offend our basic values and our concepts of human dignity.”<sup>92</sup>

International norms that govern the treatment of prisoners provide that women prisoners should be “attended and supervised” by women guards only<sup>93</sup> and that body searches be “carried out in a manner

87. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, FEMINIST THEORY OF THE STATE]. In *Everson v. Mich. Dep’t of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002), two experts apparently testified as to the “normalizing effect” on imprisoned women of “cross-gender supervision.” *Id.* at 881. There is nothing normal about life in prison. This evidence could make sense only if women’s subjection to the absolute authority of men were considered “normal.”

88. *Jordan*, 986 F.2d at 1540 (Reinhardt, J., concurring) (summarizing expert evidence).

89. *Id.* at 1523.

90. Weiser, *supra* note 54, at 32.

91. *Id.* at 32 n.5.

92. *Jordan*, 986 F.2d at 1540.

93. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, at <http://www.ohchr.org/english/law/treatmentprisoners.htm> (last visited Jan. 21, 2005). These rules provide that:

(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for

consistent with the dignity of the person who is being searched”<sup>94</sup> by a guard or health care worker of the same sex.<sup>95</sup> Nonetheless, because the courts’ Fourth Amendment analysis has generally favored prisons’ institutional security concerns and guards’ equal employment rights<sup>96</sup> at the expense of prisoners’ rights to be free from sexual abuse, U.S. courts have condoned, tolerated, and even required the employment of men to guard women prisoners.<sup>97</sup> Thus, guards’ “employment rights define prisoners’ expectations of privacy.”<sup>98</sup>

Fourth Amendment challenges brought by male inmates to physical searches by female guards have generally been rejected. The rights of male prisoners to “privacy” are given much less weight than is given to prison security concerns or to female guards’ rights to equality in employment.<sup>99</sup>

In only one case, *Dothard v. Rawlinson*,<sup>100</sup> has the complete exclusion

women unless accompanied by a woman officer.

(3) *Women prisoners shall be attended and supervised only by women officers.* This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.

*Id.* (emphasis added).

94. Eur. H.R. Comm., General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, Article 17, ¶ 8 (1988), at <http://www.ohchr.org/english/bodies/hrc/comments.htm>. (last visited Jan. 21, 2005).

95. *Id.* (“Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.”).

96. In other words, the Title VII right of corrections officers to guard prisoners of the opposite gender, with or without restrictions as to their job responsibilities in relation to prisoners.

97. *See, e.g., U.S. v. Gregory*, 818 F.2d 1114 (4th Cir. 1987); *Everson v. Mich. Dep’t of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002).

98. Jurado, *supra* note 29, at 30.

99. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (infrequent and casual observation “not so degrading as to warrant court interference”); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (searches performed “professionally” while prisoners fully clothed); *Timm v. Gunter*, 917 F.2d 1093, 1100 n.10 (8th Cir. 1990); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983) (no requirement of “deliberate examination” of genital area); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (prisoners’ privacy interests adequately protected by excluding genital area from search); *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983); *see also* Jurado, *supra* note 29, at 30.

As Kapczynski points out, *supra* note 26, at 1266 n.52, courts were somewhat more willing to restrict search and surveillance of unclothed male prisoners by female guards in the earlier cases. *See, e.g., Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980); *Iowa Dep’t of Soc. Servs., Iowa Men’s Reformatory v. Iowa Merit Employment Dep’t*, 261 N.W.2d 161, 165 (Iowa 1977).

100. 433 U.S. 321 (1977).



of female guards from a men's prison<sup>101</sup> been upheld by a court. The exclusion of women was found to constitute a *bona fide* occupational qualification ("BFOQ") because the Supreme Court was prepared to assume, in the absence of evidence, that women guards were likely to be assaulted by "sex offenders who have criminally assaulted women in the past" or by "other inmates, deprived of a normal heterosexual environment."<sup>102</sup> As Jurado points out, the Court ignored the imbalance of power between guards and prisoners, replacing reality with an "image of female guards as vulnerable and male prisoners as powerful."<sup>103</sup> The Court described conditions in the Alabama prison as "characterized by 'rampant violence' and a 'jungle atmosphere,' . . . [that are] constitutionally intolerable."<sup>104</sup>

The racial overtones of this language speak for themselves. Given that the *Dothard* prison was in Alabama, one might expect that a high proportion of the prisoners would have been imagined as black. It is possible that stereotypes about the supposed propensity of black men to rape may have filled in for the missing evidence of any substantial risk that prisoners would rape female guards.

In any case, in *Dothard*, the "employer's well-founded concern about the risk of sexual assault against a female [was] allowed to limit women's employment opportunities,"<sup>105</sup> while no obligation was imposed on the employer to "decrease or eliminate the source of the risk of sexual assault."<sup>106</sup>

While some courts have found a limited Fourth Amendment privacy right of prisoners to shield their naked bodies and genitals from the opposite sex,<sup>107</sup> "[w]hen male prisoners have asserted their right to bodily privacy, the rights of male prisoners have lost to the employment rights of female guards."<sup>108</sup> *Dothard* has been distinguished by

101. In *Dothard*, the exclusion of female guards from the men's prison was achieved through height and weight requirements, which were upheld as a BFOQ. *Id.*

102. *Id.* at 335.

103. Jurado, *supra* note 29, at 29.

104. *Dothard*, 433 U.S. at 335.

105. Jurado, *supra* note 29, at 25-26.

106. *Id.*

107. See, e.g., *Forner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993); *Hill v. McKinley*, 311 F.3d 899, 903-04 (8th Cir. 2002); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992); see also *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

108. Jurado, *supra* note 29, at 39; Kapczynski, *supra* note 26, at 1266; see *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd* 612 F.2d 1079 (8th Cir. 1980); *Griffin v. Michigan Dep't of Corr.*, 654 F. Supp. 690 (E.D. Mich. 1982); *Timm v.*

subsequent courts as restricted to its facts based on the intolerable conditions in that prison.<sup>109</sup>

In the Fourth Amendment privacy cases, courts often characterize prisoners' privacy interests as claims to modesty or "decency," both of which are traditionally linked to norms of women's sexual morality.<sup>110</sup> It is not surprising, then, that women prisoners' privacy interests against being viewed naked or physically searched by male guards have typically weighed more heavily than men's in the balance against guards' Title VII rights to equal employment.<sup>111</sup> In *Jordan*, for example, the Ninth Circuit, sitting *en banc*, found cognizable Eighth Amendment harm when male guards were permitted to conduct clothed body searches of women prisoners; in a concurring opinion, Judge Reinhardt held that the cross-gender searches violated the prisoners' Fourth Amendment "right of privacy and dignity in their persons."<sup>112</sup> The evidence in *Jordan* emphasized the psychological pain and trauma that cross-gender searches caused to women prisoners, eighty-five percent of whom reported having been sexually abused. The reasons advanced by the prison—staff morale and a desire to keep searches unpredictable—were found to be insubstantial in comparison with the severe harm inflicted on to women prisoners.<sup>113</sup>

In *Forts v. Ward*,<sup>114</sup> women prisoners sought to enjoin the assignment of male guards to duties in the housing units of the prison on the basis that such assignments would violate their privacy.<sup>115</sup> The prisoners' privacy rights were outweighed by male guards' Title VII rights to

---

Gunter, 917 F.2d 1100 (8th Cir. 1990); Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985); Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982); Bagley v. Watson, 579 F. Supp. 1099 (D. Or. 1993); Johnson v. Pennsylvania Bureau of Corr., 661 F. Supp. 415 (W.D. Pa. 1987); Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995). But see cases cited *supra* note 99.

109. Edwards v. Dep't of Corr., 615 F. Supp. 804 (M.D. Ala. 1985); Griffin v. Michigan Dep't of Corr., 654 F. Supp. 690, 700-01 (E.D. Mich. 1982); Gunther, 462 F. Supp. 952.

110. See, e.g., Bell v. Wolfish, 441 U.S. 520, 577 (1979) (Marshall, J., dissenting); Johnson v. Phelan, 69 F.3d 144, 148 (7th Cir. 1995) (characterizing male prisoners' claim against being viewed unclothed by female guards as a "clash between modesty and equal employment opportunities" equivalent in gravity to male athletes' objection to female reporters entering the locker room after a game); Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988); Everson v. Michigan, 222 F. Supp.2d 864 (E.D. Mich. 2002); Galvan v. Carothers, 855 F. Supp. 285 (D. Alaska 1994); Forts v. Ward, 521 F.2d 1210 (N.Y. App. 1980).

111. See, e.g., York, 324 F.2d at 452; Forts, 621 F.2d at 1215; Covino, 967 F.2d at 78; Galvan, 855 F. Supp. at 292.

112. Jordan v. Gardner, 986 F.2d 1521, 1534 & n.7 (9th Cir. 1993).

113. *Id.* at 1535-36.

114. 621 F.2d 1210 (2d Cir. 1980).

115. *Id.* at 1212-13.

equality in employment, although the court proposed accommodations such that male guards would not likely see the women prisoners naked.<sup>116</sup>

Female-only guard policies are more often upheld when they are proposed by the prison, rather than by the prisoner.<sup>117</sup> In *Torres v. Wisconsin*,<sup>118</sup> for example, the Seventh Circuit, sitting *en banc*, upheld a prison policy requiring that only female guards be assigned to the living units of the women's prison.<sup>119</sup> Rather than asking whether a man would be unable to do the job, the Seventh Circuit considered "whether, given the reasonable objectives of the employer, the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily."<sup>120</sup> The Seventh Circuit held that, although neither prison security nor inmate "privacy" sufficed to legitimize the women-only guard policy as a BFOQ, the prison's goal of "inmate rehabilitation" did constitute an employer objective sufficient to outweigh the guards' equality rights.<sup>121</sup> In the absence of any evidence in support of or against the prison administrator's theory of rehabilitation, the court deferred to the administrator's judgment that, because sixty percent of the women prisoners had been physically or sexually abused by men, "a living environment free of the presence of males in a position of authority was necessary to foster the goal of rehabilitation."<sup>122</sup>

More recently, in *Robino v. Iranon*,<sup>123</sup> the Ninth Circuit upheld a women-only policy for six out of forty-one guard positions at a women's

---

116. See *id.* at 1217.

117. See *Reed v. County of Casey*, 184 F.3d 597 (6th Cir. 1999) (reassignment of female guard to night shift justified as BFOQ to comply with Kentucky Department of Corrections policy that female jailer had to be present when woman kept in prison); *Tharp v. Iowa Department of Corr.*, 68 F.3d 223 (8th Cir. 1995) (upholding prison's shift assignment policy reserving four out of 16 shifts for women guards only, so that only female guards would do "face-to-face urinalysis" for women prisoners); *Torres v. Wisconsin*, 859 F.2d 1523, 1533 (7th Cir. 1988).

118. *Torres*, 859 F.2d at 1523.

119. Implementation of this policy required that two male officers be demoted to lower-ranked positions with no loss of pay. *Id.* at 1525.

120. *Id.* at 1528.

121. Jurado argues that the *Torres* court departed from the jurisprudence adopted in male prisoners' challenges to opposite-gender search and surveillance by relying on "the premise that modesty for women, even those in prison, must prevail. . . . [T]he court knows what society will tolerate regarding acceptable cross-gender behavior." Jurado, *supra* note 29, at 46. However, the court's rationale rested explicitly on rehabilitation of abused women prisoners, not on their "modesty." *Torres*, 859 F.2d at 1530.

122. *Id.*

123. 145 F.3d 1109 (9th Cir. 1998).

prison. The women-only positions required the guard to "observe the inmates in the showers and toilet areas" or have "unsupervised access to the inmates."<sup>124</sup> The Court held that the policy constituted a "*de minimis*" restriction which did not warrant a BFOQ inquiry.<sup>125</sup> It further held, in the alternative, that the legitimate penological interests advanced by the state to justify the policy—"to protect female inmates and to prevent allegations of sexual misconduct"<sup>126</sup>—"outweigh[ed] whatever interest the male ACOs may have" in assignment to the six positions. The policy was found to constitute a "reasonable response to concerns about inmate privacy and allegations of abuse by male ACOs."<sup>127</sup>

In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*,<sup>128</sup> a class action challenging the pervasive sexual abuse of women prisoners as well as various inhumane and discriminatory conditions of confinement, the trial judge, Judge Green, found that the severe and pervasive sexual assault, coercion, harassment, and abuse at the prison violated the Eighth Amendment (for convicted prisoners) and the Fifth Amendment due process guarantee (for pretrial detainees).<sup>129</sup> The "vulgar sexual remarks of prison officers,"<sup>130</sup> the lack of privacy within women's cells (the cells were visible to male prisoners and guards), and the "refusal of some male guards to announce their presence in the living areas of women prisoners" constituted an independent violation of the Eighth Amendment.<sup>131</sup> Judge Green declined to determine whether the custodial sexual harassment constituted a violation of women inmates' Fourth Amendment privacy rights.<sup>132</sup>

Thus, it seems that the claims of women prisoners to be free from

---

124. *Id.* at 1111.

125. *Id.* at 1110.

126. *Id.*

127. *Id.* at 1111.

128. *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 665 (D.D.C. 1994), *vacated in part, modified in part* 899 F. Supp. 649 (D.D.C. 1995), *remanded by* 93 F.3d 910 (D.C. Cir. 1996), *cert. denied* 520 U.S. 1196 (1997).

129. *Id.* at 665 ("The physical assaults endured by women prisoners at the [D.C. facilities included] . . . [r]ape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees . . .")

130. *Id.* These "vulgar remarks" included comments on the women's breasts and buttocks and sexual threats such as, "[w]ell, you go ahead and do that and I'll be in there and stick my rod up in you." *Id.* at 640.

131. *Id.* at 665.

132. *Id.* at 665 n.39.

search and surveillance that expose them to sexual abuse and harassment are most likely to succeed when the women are portrayed as victims of current or prior sexual abuse. However, even this characterization is not always successful in protecting women from the risk of sexual abuse by male guards. In a recent decision, *Everson v. Michigan Department of Corrections*,<sup>133</sup> the district court invalidated a women-only guard policy that had been adopted in response to the severe, ongoing problems of custodial sexual abuse at Michigan prisons for women.<sup>134</sup> Until the adoption of the policy in 2000, sixty percent of guards at Michigan women's prisons had been men.<sup>135</sup>

Michigan's refusal to do anything about the widespread, notorious custodial sexual abuse in its women's prisons finally led the federal government to sue Michigan,<sup>136</sup> alleging that women prisoners in Michigan were "subject to sexual misconduct, sexual harassment, overfamiliarity and invasion of privacy" by male guards.<sup>137</sup>

The trial judge distinguished *Dothard* on the basis that "in *Dothard*, the Supreme Court was considering a brutal, jungle-like, maximum security environment in Alabama."<sup>138</sup> For women prisoners in Michigan, though, their wholesale subjection to sexual assault, abuse, harassment, and coercion by the male guards of the Michigan Department of Corrections may have seemed equally brutal, violent, lawless, and constitutionally intolerable. The severity and extent of the custodial sexual abuse problem in Michigan,<sup>139</sup> and the state's persistent refusal to remedy it, could have been argued to match or exceed the exceptional facts of *Dothard*, and therefore to have justified the exclusion of male guards.<sup>140</sup>

The settlement of the Michigan women prisoners' lawsuit regarding

133. 222 F. Supp. 2d 864 (E.D. Mich. 2002).

134. See Amnesty International, *Not Part of My Sentence*, *supra* note 3; Human Rights Watch, *All Too Familiar*, *supra* note 1; Human Rights Watch, *Nowhere to Hide*, *supra* note 3; Coomaraswamy, *supra* note 3.

135. *Everson*, 222 F. Supp. 2d at 888.

136. United States' Memorandum In Support of Stipulation to Dismiss (March 7, 2000) (No. 97-CV-71514-DT).

137. *Everson*, 222 F. Supp. 2d at 877.

138. *Id.* at 889 n.33 (quoting *Griffin v. Michigan Dep't of Corr.*, 654 F. Supp. 690 (E.D. Mich. 1982)).

139. See Amnesty International, *Not Part of My Sentence*, *supra* note 3; Human Rights Watch, *All Too Familiar*, *supra* note 1; Human Rights Watch, *Nowhere to Hide*, *supra* note 3.

140. See Intervening Defendant-Appellants' Proof Brief on Appeal at 55, *Everson* (No. 02-2028, 02-2033, 02-2084).

custodial sexual abuse and harassment<sup>141</sup> required that the Michigan Department of Corrections (“MDOC”) make a good faith effort to limit the assignment of staff on women’s housing units to women officers.<sup>142</sup> The policy challenged in *Everson* had required that all guards on the female housing units be women. MDOC sought to transfer female guards into the prison and male guards out.<sup>143</sup> The guards brought a Title VII challenge to this rule.<sup>144</sup>

At trial, Judge Cohn held that Michigan had failed to establish a BFOQ. In defense of its women-only policy, Michigan had offered the following penological reasons for the infringement of the guards’ Title VII rights, as summarized by the judge:

[S]ame sex supervision would enhance the privacy of female prisoners, reduce the likelihood of sexual misconduct, the reduction of fear of sexual misconduct will enhance the ability of the Department to achieve its mission, security capabilities would be improved due to much less reluctance by female staff to perform observation duties, and female staff only in housing units would reduce the likelihood of instances where individual male staff and individual female prisoners would be involved in long isolated contacts.<sup>145</sup>

Evidence at trial was “largely devoted to the benefits and burdens to female prison operations of limiting full-time housing officers in a female prison to females in light of the potential for sexual assault, sexual harassment, and overfamiliarization when male corrections officers have custodial responsibility in the housing units.”<sup>146</sup> Indeed, the uncontroverted evidence of the director of MDOC was that, despite policies adopted in 1999 to reduce the incidence of sexual abuse, “sexual misconduct and allegations of sexual misconduct had not ended and removal of males from the female housing unit was necessary to bring the level of misconduct as low as possible.”<sup>147</sup> Rejecting the deference to prison administrators mandated by Supreme Court and appellate

---

141. *Nunn v. Mich. Dep’t of Corr.*, 1997 U.S. Dist. Lexis 22970 (E.D. Mich. 1997).

142. *Everson*, 222 F. Supp. 2d at 872.

143. *Id.*

144. *Id.*

145. *Id.* at 877.

146. *Id.* at 880.

147. *Id.* at 884.

jurisprudence,<sup>148</sup> Judge Cohn drew an adverse inference from the prison director's refusal to answer a question regarding privileged legal advice he may have received,<sup>149</sup> and supplanted the prison director's judgment—that a female-only guard policy was necessary in the circumstances—with his own opinion that it was illegal.

Despite considerable evidence of the continuing risk and reality of sexual abuse by guards in Michigan prisons, Judge Cohn characterized the women prisoners' Fourth Amendment interest, which had to be balanced against guards' Title VII rights, as a mere "right to be protected against unwarranted intrusion by male corrections officers."<sup>150</sup> Thus, the rights the prisoners (and prison) had asserted—freedom from sexual assault and the fear of it—were transformed, by the trial judge's slight of hand, into a minimal privacy right ensuring merely that male guards could not strip search them. Not surprisingly, the guards' equal employment rights were found to outweigh this minimal privacy interest.

Thus, even when an attempt is made to emphasize the vulnerability of women prisoners to sexual abuse by guards, their safety will not always outweigh male guards' rights to guard them. In *Everson*, although the MDOC, and the prisoners who intervened in the case, had emphasized the importance of protecting the women prisoners from sexual abuse, the nature of the prisoners' interest was downgraded to a form of privacy akin to modesty and accorded minimal weight.<sup>151</sup>

## II. PRIVACY AS MODESTY: THE CRITIQUE

### A. Privacy As Stereotyping: The Modesty Critique

Professors Miller,<sup>152</sup> Jurado,<sup>153</sup> and Kapczynski<sup>154</sup> (collectively, the

148. *Id.* at 890–91; see also *id.* at 897 (“[The Director] had no qualifications from past training[,] employment or experience to make a reasoned judgment on the subject [of staffing] and his leaving corrections as a profession simply confirms this.”).

149. *Id.* at 884–85, 885 n.31.

150. *Id.* at 893. Judge Cohn is not without shameless contradiction on this subject. Compare *id.* at 896 (“Females being viewed by males is qualitatively different than males being viewed by females.”), with *id.* at 898 n.37 (“To have one policy in male prisons and another in female prisons regarding cross-gender supervision suggests stereotyping beyond the confines of prison operation policies.”).

151. *Everson v. Mich. Dep’t of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002).

152. Miller, *Sex Surveillance*, *supra* note 28.

153. Jurado, *supra* note 29.

154. Kapczynski, *supra* note 26.

“modesty critics”) have offered a useful but, I contend, inadequate critique of the discriminatory effects of constitutional privacy in prison. In this Part, I respond to their critique, using an intersectional approach to highlight its insights and illuminate its limitations.

### 1. Stereotyping of Women as Victims

The main insight of the modesty critique is that, in prison, privacy has been interpreted as a form of feminine modesty that stereotypes women as sexual victims and men as sexual aggressors. While this allegation is accurate, as far as it goes, it neglects the reality that custodial sexual abuse is a severe and widespread problem in U.S. women’s prisons. The victims of this abuse are women, and the perpetrators are men. An adequate response to the shortcomings of privacy law must take this reality into account.

As Miller observes, “[gendered] stereotypes are almost all that remain of privacy in prison. When these stereotypes are exploded, there is little left with which to protect incarcerated women from sexualized abuse of power.”<sup>155</sup>

The harm of privacy doctrine, as the modesty critics describe it, is primarily symbolic. Kapczynski, for example, contends that privacy doctrine “create[s] a world of gender meanings that have real and discriminatory effects,”<sup>156</sup> creating legal subjects who “are defined by an essentialized bodily modesty, one that is gendered female. They also imagine women as constitutively vulnerable to sexualized assault (again, from lower-class men—but not from women, or men higher up on the professionalism scale) and as unable to protect themselves.”<sup>157</sup> These stereotypes, Kapczynski argues, “tend[ ] to propertize women and deny them sexual agency.”<sup>158</sup>

As Kapczynski points out, same-sex privacy caters to the very “prejudices that generate gendered stratification and hierarchy in the work force in the first place.”<sup>159</sup> Essentially, Kapczynski argues, the law of privacy protects the “psychic safety”<sup>160</sup> of middle-class women from perceived threats from men of the lower orders:

---

155. Miller, *Government’s Hands*, *supra* note 3, at 870.

156. Kapczynski, *supra* note 26, at 1287.

157. *Id.*

158. *Id.* at 1261–62.

159. *Id.* at 1264.

160. *Id.* at 1274.



The presumption is, of course, that women do not mind male doctors but they do mind male nurses—just as courts like the one in *Fesel* insist that men do not mind female nurses. But this is plainly less a judgment about “privacy” than about the comparative likelihood of those lower down in status hierarchies to be professional with, and respectful of, clients.<sup>161</sup>

These prejudices also inform the very limited scope that judges allow for privacy claims in prison. Prison is the only context in which judges often reject gender as a BFOQ, and is the only context in which the courts “invert[ ] the usual tendency to value privacy over employment rights.”<sup>162</sup> Thus, “[c]ourts have been more solicitous of the privacy interests of white collar men who fear that a cleaning woman might knock on their bathroom door than of the privacy interests of women and men incarcerated in prisons that are often the site of severe violations of physical and sexual integrity.”<sup>163</sup>

The modesty critics urge the abandonment of “gendered stereotypes” that women are vulnerable to sexual abuse by male guards, and that male guards might be sexual aggressors. In spite of all the modesty critics’ recognition that it is common for male guards to sexually abuse women in prison,<sup>164</sup> in skeptical quotation marks, Miller dismisses the gender “stereotype” that sexual “‘vulnerabilities’ [are] associated with gender socialization.”<sup>165</sup> By dismissing women prisoners’ real exposure to sexual abuse as quote-vulnerability-unquote or as “gendered stereotype,” the modesty critics fall into the same error for which Miller criticizes the courts: they “idealize, rather than contextualize, the experiences of incarcerated women.”<sup>166</sup>

Like Miller, Jurado laments “the courts’ reliance on the fact that women are the victims of rape, as well as its reliance on the societal notion that any touching of a woman is sexual misconduct,” which she describes as “disheartening bases upon which to establish a greater

---

161. *Id.* at 1286 (emphasis omitted).

162. *Id.* at 1266 n.52.

163. *Id.* at 1286.

164. *Id.* at 1288–90; Miller, *Sex Surveillance*, *supra* note 28, at 295, 338. Jurado, by contrast, cites Human Rights Watch, *All Too Familiar* in a footnote. Jurado, *supra* note 29, at 7 n.23, and so must be aware of the reality of custodial sexual abuse in U.S. women’s prisons but does not acknowledge this risk in her argument.

165. Miller, *Government’s Hands*, *supra* note 3, at 866.

166. *Id.* at 873.

expectation of privacy in women.”<sup>167</sup> She objects to the “stereotypical” notion that “in their essence women are to be protected from all possibilities of sexual assault because they are powerless and subject to the authority of men.”<sup>168</sup>

In response, Weiser’s quote from MacKinnon is apposite: “I am merely telling it as it is.”<sup>169</sup> “Perpetrators of sexual abuse against females are almost exclusively male.”<sup>170</sup> “Disheartening” though it may be, the reality of the continuing abuse of women prisoners cannot be theorized away. As Miller acknowledges,

The power disparity that exists between men and women in society is magnified within the rigidly hierarchical and closed prison apparatus. Power is sexualized in prison. Because prison guards exercise near total authority over prisoners, the potential for male guards to abuse their legitimate access to women’s bodies to conduct bodily searches of women and to visually monitor them nude or only partially dressed in ways that are overtly sexual is great.<sup>171</sup>

When women prisoners are being sexually abused by guards, they are “powerless and subject to the authority of men.”<sup>172</sup> They are certainly not, as Jurado suggests, “protected from all possibilities of sexual assault.” Rather than being protected from sexual abuse, women prisoners continue to be exposed to it without hope of relief or redress.<sup>173</sup>

When prisoners report the abuse, they face retaliation.<sup>174</sup> Women

167. Jurado, *supra* note 29, at 6.

168. *Id.* at 52.

169. Weiser, *supra* note 54, at 63 (quoting CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 220 (1997)).

170. *Id.* at 32 n.5.

171. Miller, *Government’s Hands*, *supra* note 3, at 867–68.

172. Laderberg argues that this power disparity renders custodial sexual abuse analogous to child sexual abuse. “A bigger and more powerful person used his/her strength or authority over a smaller, weaker and more vulnerable individual,” and the victim was unable “to resist, and therefore . . . there was no real or true choice in the matter.” Laderberg, *supra* note 15, at 351.

173. Amnesty International, *Not Part of My Sentence*, *supra* note 3; Human Rights Watch, *Nowhere to Hide*, *supra* note 3; Dinos, *supra* note 49.

174. Amnesty International, *Not Part of My Sentence*, *supra* note 3; Human Rights Watch, *All Too Familiar*, *supra* note 1; Human Rights Watch, *Nowhere to Hide*, *supra* note 3; see also *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 877 F. Supp. 634, 666 (D.D.C. 1994) (“By leaking private information [about complaints] prison officials

prisoners, like black women traditionally, are excluded from the legal "protection" supposedly offered to them by chivalrous archetypes. The most pressing problem, for these women, is not the possibility that the courts might "stereotype" them as "victims" (which they are), but that the courts might refuse to protect them at all.<sup>175</sup>

The difficulty with the modesty critics' argument against "stereotyping," as with many antistereotyping arguments, is that it locates "the injury of stereotyping on the level of *image*, when the injury of sexual harassment is both on the level of image and on the level of reality."<sup>176</sup> As MacKinnon points out,

The parade of horrors demonstrating the systematic victimization of women often produces the criticism that for me to *say* women are victimized reinforces the stereotype that women "are" victims, which in turn contributes to their victimization. If this stereotype is a stereotype, it has already been accomplished, and I come after. To those who think "it isn't good for women to think of themselves as victims," and thus seek to deny the reality of their victimization, how can it be good for women to deny what is happening to them? Since when is politics therapy?<sup>177</sup>

Unfortunately, the modesty critics miss the point that gender stereotypes are not the primary cause of women's victimization. They arise from and naturalize the gender inequality that also sets up women's real-life vulnerability to sexual assaults by men. Though this reality may conform to a gender stereotype, it is "no false picture or illusion. These social relations themselves are shaped by an arguably false but, nevertheless, socially controlling image of relations between women and men."<sup>178</sup>

This is not to argue that prisoners are passive in response to the

---

coerce women prisoners and staff into silence and insulate themselves from scrutiny.").

175. As Judge Green recognized in *Women Prisoners*, sexual harassment and abuse of prisoners who have a history of sexual abuse "can lead to severe depression, reinforcement of a 'victim' self-image and a belief that, as in childhood, they have no control over their lives." 877 F. Supp. at 643.

176. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 179 (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*].

177. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 220 (1987), *quoted in* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 329 (1995).

178. MACKINNON, *supra* note 177, at 180.

authority of their keepers: prison narratives show that prisoners, like battered women, engage in “daily acts of self-preservation, familial protection, and outright resistance”<sup>179</sup> to abusive—or merely intrusive—authority.<sup>180</sup> Prisoners are not passive in the face of prison authority, but “if you want to do something fun or something you enjoy, you have to sneak.”<sup>181</sup> “[P]risoners who fight custody and control, who refuse to be dependent or to agree with the authority’s determinations about their values and actions, maintain a sense of autonomy and control over their own lives.”<sup>182</sup> The term “victim,” then, is not moral, prescriptive, or strategic: “It is descriptive: who does what to whom and gets away with it.”<sup>183</sup>

Like battered women, though, all prisoners are constrained by the economic and physical force of their keepers; in prison, this coercion, “abusive and battering in its very nature,”<sup>184</sup> is conferred by law.<sup>185</sup> In prison, “orders are given as to what prisoners wear, what they eat, how much they eat, how they work, where they work, what they read, whom they see, what they write, when they can write, when they can talk, and what they can say.”<sup>186</sup> Prisoners who resist their subordination, either by fighting back or by “ignor[ing] the regulations and maxims laid down to govern their behavior,”<sup>187</sup> end up being labeled “‘problem prisoners’ and they are apt to spend a lot of time in [solitary confinement] and be labeled ‘incurable.’ . . . They are often denied parole . . . . They often stay in prison until expiration of sentence.”<sup>188</sup>

---

179. Abrams, *supra* note 177, at 345; see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

180. See generally JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* 68 (1985); PAULA JOHNSON, *INNER LIVES: VOICES OF AFRICAN-AMERICAN WOMEN IN PRISON* (2003); WATTERSON, *supra* note 81, at 120–35; HARRIS, *supra* note 16; RIERDEN, *supra* note 81.

181. WATTERSON, *supra* note 81, at 124.

182. *Id.* at 131.

183. MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 87, at 138.

184. *Id.* at 129.

185. The analogy to domestic violence, though illuminating, should not be overstretched. A number of salient difference include: prisoners ordinarily do not have a loving (or formerly loving) relationship with their keepers; the authoritarian relationship emanates from a group of guards, rather than from one man; while they fear for their children’s well-being, they do not ordinarily have reason for concern that guards may harm them; and though the prison is authorized to use force to prevent the woman’s escape; when her custodial sentence is complete, separation violence is not a risk.

186. *Id.* at 130.

187. WATTERSON, *supra* note 81, at 131.

188. *Id.* at 132.

Like a battering relationship, then, the relationship between prisoners and guards, even at the best-run institutions, can be understood as a deeply skewed but “two-way struggle for power and control.”<sup>189</sup> Indeed, some prisoners argue that, in practice, prisoners run the prisons.<sup>190</sup> Perhaps to maintain a sense of “autonomy and control,” many prisoners describe relationships with guards, in which they exchange sex for cigarettes, food, drugs, or privileges such as visits or telephone calls, as an exchange in which they are exploiting the guard, rather than the other way around.<sup>191</sup> Of course, prisoners’ needs to strike such a bargain are created by guards’ absolute authority over whether and when prisoners can eat, smoke, take drugs, or talk to their friends and families.

If women are being victimized by male guards in prison, it does them no harm to expose the problem by saying so. Kimberlé Crenshaw points out that black women are often discouraged from speaking out about sexual abuse because of concerns that, by speaking out about sexual harassment by black men, black women “will reinforce negative racial stereotypes about Blacks in general and about Black men in particular.”<sup>192</sup> This silencing suppresses knowledge of, and resistance to, black women’s oppression, in the name of protecting black people—that is, men—from (sexualized) racial stereotyping. Of course, it is unlikely that black women’s silence would change sexualized racist ideas about

---

189. ABRAMS, *supra* note 177, at 345–46; Mahoney, *supra* note 179, at 53–60.

190. WATTERSON, *supra* note 81, at 7. Teresa Miller argues that, in men’s prisons, guards and administrators are complicit in prisoners’ establishment of a hierarchy of “real men” on top, “queens” (gay men) below, and “punks” (straight men who are sexually assaulted by “real men” because they are deemed more feminine) at the bottom. Miller, *Sex Surveillance*, *supra* note 28, at 304–08, 355. This hierarchy, she argues, helps the prison to maintain order. *Id.*

191. For example, Rierden quotes Delia Robinson, a long-term prisoner who “tries not to get involved,” describing the sexual “connivances” of other prisoners, who seek sex with guards:

Delia calls them the spider women, “because they’re always out to seduce and destroy.” One of the women got a nurse at the medical unit to fall in love with her. The nurse, who used to bring the inmate grinders and cocaine, got fired. The same inmate had an affair with a maintenance man. Then her roommate, spider woman number two, fell in love with a female [guard], who ended up leaving her husband and two children. The [guard] got fired but still comes to visit the inmate. “These people can be very crafty if you’re crazy enough to believe them,” she says. “They’re real scroungers.”

Rierdan, *supra* note 81, at 158. Similarly, Jean Harris observes: “Flattery and flirting go a lot further in here than a good day’s work.” HARRIS, *supra* note 16, at 62.

192. Crenshaw, *Race, Gender*, *supra* note 14, at 1472.

black men anyway.

In the same way, when feminists minimize or dismiss women prisoners' reports that they are being abused by male guards to make sure that women are not "stereotyped" as victims, they silence prisoners without challenging the gender inequality that underlies the stereotype. As Crenshaw observes, "[T]his silence creates a classic double bind. To speak, one risks the censure of one's closest allies. To remain silent renders one continually vulnerable to the kinds of abuses heaped upon people who have no voice."<sup>193</sup>

## 2. Stereotyping Men as Aggressors

Kapczynski, Miller, and Jurado vigorously critique the "stereotype" that men are aggressors. They observe, accurately, that the differential protection accorded to the bodily privacy interests of male and female prisoners rests on the discriminatory assumption that "men, who are socialized to take on harsh situations, are not negatively affected by being viewed by women. This conclusion rests in part on the societal view that men are not and cannot be threatened by women even if they hold the power in the situation."<sup>194</sup>

The "stereotype" of male sexual aggressiveness and female sexual vulnerability in prisons, Miller argues, is harmful because judges are "writing rules around the fact that 'boys will be boys' rather than facilitating a culture change within prisons that requires male guards to conduct themselves professionally, and in the process, to respect the basic human dignity of women prisoners."<sup>195</sup>

Of course, it might plausibly be argued as well that the courts ought not subject women prisoners to the ongoing risk of sexual assault while they await the advent of the "culture change" whereby male guards will learn to respect their human dignity.

In the Fourth Amendment privacy analysis, the heterosexuality of both prisoners and guards tends to be assumed.<sup>196</sup> Miller criticizes the "judicial assumption" that, "[i]n cross-gender search doctrine, the power dynamic is always gendered and (hetero)sexed (that is to say, female

---

193. *Id.*

194. Jurado, *supra* note 29, at 40; *see also* Kapczynski, *supra* note 26, at 1284; Miller, *Sex Surveillance*, *supra* note 28, at 324-25.

195. Miller, *Government's Hands*, *supra* note 3, at 871.

196. The assumption of heterosexuality was noted by the Seventh Circuit in *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) and *Johnson v. Phelan*, 69 F.3d 144, 147 (7th Cir. 1995).

prisoners are presumed to be at greater risk when male guards visually monitor them in states of undress than when male prisoners are identically monitored by female guards).<sup>197</sup> Jurado goes further, challenging the “stereotypical” notions that women prisoners will experience physical body searches by male guards as sexually invasive,<sup>198</sup> and that “male guards cannot experience such touching as merely professional.”<sup>199</sup>

The modesty critics contend that the courts’ gendered interpretations of assault risks in prison are heterosexist: the courts “assume that its [*sic*] is degrading to be view[ed] unclothed by a stranger of the opposite sex only.”<sup>200</sup> “[O]nly the most egregious same-gender search procedures have been found to be unconstitutional.”<sup>201</sup> The assumption is that prisoners are safe when the guards who view or touch them are of the same sex. Kapczynski asks “why it is less private to be seen in a state of undress by one sex rather than the other,”<sup>202</sup> pointing out that “in no other realm of law does the ‘privacy’ of an act depend upon not just who sees which body under what conditions, but also upon what sex the viewer is.”<sup>203</sup>

In describing the harm resulting from the gender stereotypes of privacy law, the modesty critics express their deepest concern about the effect of stereotyping on men. Miller is quite frank in expressing the primacy of men’s interests in confronting sex discrimination. She acknowledges the risk that male guards’ surveillance of women prisoners will result in the guards assaulting them<sup>204</sup> while women guards’ surveillance of male prisoners will likely keep them safer.<sup>205</sup> Nonetheless, she contends, manly pride is more important than women’s safety:

To the extent that men are more accustomed to objectifying women through the act of looking than vice-versa, men are

197. Miller, *Government’s Hands*, *supra* note 3, at 874–75 n.37.

198. Jurado, *supra* note 29, at 52.

199. *Id.*

200. Miller, *Government’s Hands*, *supra* note 3, at 874.

201. Jurado, *supra* note 29, at 33 (citing *Draper v. Walsh*, 790 F. Supp 1553, 1560 (W.D. Okla. 1991) (holding that a policy of strip searching all persons arrested for traffic violations and minor offences was unconstitutional)).

202. Kapczynski, *supra* note 26, at 1269 (emphasis omitted).

203. *Id.* at 1269 (emphasis omitted).

204. Miller, *Sex Surveillance*, *supra* note 28, at 338.

205. *Id.* at 299.

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.<sup>206</sup>

Apparently, degradation is more harmful to men than to women because, lacking gender privilege, women have nothing to lose.

Kapczynski advocates that male prisoners be placed at the center of feminist privacy analysis:

[C]onsider the sexual profiling question from the perspective of male inmates . . . . Despite the fact that male guards appear to be responsible for a considerable proportion of sexual assaults against male inmates, there is no evidence, in case law or otherwise, that prison administrators are attempting to remove male guards from male housing units.<sup>207</sup>

She correctly notes that heterosexist norms fail to protect male prisoners from sexual abuse by male guards.<sup>208</sup> However, she dismisses out of hand the possibility of regulating male guards' sexualized surveillance of male prisoners:

This is not to say that the best answer to sexual assaults in prison is to remove men from all guard positions—quite the opposite. It is to suggest that in almost every case, sex-neutral measures—for example, improving reporting systems and prosecutions—will likely be more effective at protecting inmates from sexual assault and harassment (as well as other kinds of abuse) than sexual profiling.<sup>209</sup>

Rather than proposing regulations to control male guards' access to male prisoners, she proposes removing the restrictions on their access to female prisoners instead. That way, prisoners of both sexes will be exposed to the risk of sexual abuse by male guards. This is a textbook

---

206. *Id.* at 352 n.232.

207. Kapczynski, *supra* note 26, at 1290. "Though sexual assaults have become much less frequent [in men's jails], they are still a significant element in jail folklore, and inexperienced prisoners are very fearful of them." IRWIN, *supra* note 180, at 64.

208. See Kapczynski, *supra* note 26, at 1290.

209. Kapczynski, *supra* note 26, at 1291 (emphasis omitted).



example of "equality with a vengeance."<sup>210</sup>

Meanwhile, Miller, who exhorts the courts to seriously examine the "sexualization of power in men's prisons,"<sup>211</sup> expresses more concern for the effect of cross-gender surveillance on male prisoners than on women prisoners. She observes that male prisoners' society is divided into a hierarchy of masculinity: "real men" at the top, who sexually exploit the "queens" (gay men) below them, and sexually assault the "punks" (straight men who are deemed feminine or weak) at the bottom.<sup>212</sup> She contends that surveillance by a woman tends to feminize the man in the prison hierarchy of masculinity:

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.<sup>213</sup>

She criticizes the courts for "fail[ing] to take into account the sexualization of power in men's prisons when considering the propriety of female guards visually monitoring naked male prisoners."<sup>214</sup> One can only infer that her concern is that courts maintain the sexual and psychic privileges of "real men" in the prison hierarchy by preventing their demotion to the status of "punks." This vision of privacy offers no protection to low-status "queens" or "punks" who have been gender-demoted and who are already at high risk of sexual abuse.

By contrast, Miller contends that male guards should be authorized to conduct surveillance when the women are naked or using the toilet, out of concern that preventing them from doing so would stereotype the guards as abusers:

[W]hen judges presume the sexual vulnerability of female

---

210. See generally Meda Chesney-Lind & Jocelyn M. Pollock, *Women's Prisons: Equality with a Vengeance*, in WOMEN, LAW & SOCIAL CONTROL 160 (Alida V. Merlo & Jocelyn M. Pollock, eds., 1995); Claire L'Heureux-Dubé, *Equality and the Economic Consequences of Spousal Support: A Canadian Perspective*, 7 U. FLA. J. L. & PUB. POL'Y 1, 13 (1994).

211. Miller, *Sex Surveillance*, *supra* note 28, at 308, 356.

212. *Id.* at 300–308, 355; see also Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999).

213. Miller, *Sex Surveillance*, *supra* note 28, at 308.

214. *Id.*

prisoners, they conversely presume that male guards are sexually aggressive. When judges employ gendered stereotypes of men as sexually aggressive, and therefore limit the assignment of male guards within the housing units of women's prisons, they are accepting as a given that male guards are unable to respect the human dignity of women when observing them nude in the act of toileting, showering, and undressing. . . .<sup>215</sup>

Thus, for Miller, the harm of stereotyping men as sexual aggressors merits more protection than the harm of exposing women to custodial sexual abuse.

Kapczynski challenges the notion that concerns about custodial sexual abuse in women's prisons—even in *Everson*, where custodial sexual abuse proved to be a severe and intractable problem—can justify a same-sex BFOQ for guards in women's prisons. She criticizes this argument as an invidious form of sex discrimination, namely the stereotypical “sexual profiling” of men as sexual aggressors.<sup>216</sup>

Despite the risk and reality that male guards are abusing women in U.S. women's prisons, and the fear that that abuse engenders when women are, literally, exposed to male guards, the modesty critics insist that prisoners be subjected to cross-gender searches and surveillance that give rise to a fear of sexual abuse, in order to avoid stereotyping men.

Kapczynski, unlike Miller and Jurado, expresses some concern about the emotional toll of cross-gender searches on women prisoners. Unlike Miller and Jurado, Kapczynski at least calls for “improv[ements to] reporting systems and prosecutions”<sup>217</sup> to protect prisoners against sexual abuse.<sup>218</sup> Miller and Jurado, by contrast, are content to continue exposing prisoners to male guards in order to combat the stereotype that men might abuse them—even though they do.

Kapczynski urges courts to “attend to who bears the costs of changing gender norms”<sup>219</sup> when defining gender privacy. As

---

215. Miller, *Government's Hands*, *supra* note 3, at 870–71.

216. Kapczynski, *supra* note 26, at 1281.

217. *Id.* at 1291.

218. I agree that “systemic . . . approaches” can be very effective as “prophylaxis against abuse and anxiety about abuse because they will better serve to correct power imbalances that generate risk of abuse and make that abuse so injurious.” *Id.* at 1293. Systemic solutions, once they are devised, should be implemented immediately. But until they take effect, women prisoners are immeasurably safer from custodial sexual abuse if their guards are women.

219. *Id.* at 1288.

Kapczynski observes:

When male prison guards were assigned to conduct random, clothed body searches of female inmates and [a *Jordan v. Gardner* plaintiff] was forced to undergo one against her will, she was so distressed that “her fingers had to be pried loose from the bars she had grabbed; she returned to her cell-block, vomited, and broke down.” We could insist, of course, that her reaction was a kind of false consciousness, that she was misidentifying all men as a threat, or at least misidentifying this man as a threat. There is a way in which these things in fact might be true—but is this the place to make that point? Would it be possible, in a context in which approximately eighty-five percent of women have been sexually or physically abused by men, to remake associations between gender and assault by ignoring them?<sup>220</sup>

Nonetheless, Kapczynski’s commitment to gender neutrality causes her to back down from the logical outcome of these questions, namely, same-sex staffing in women’s prisons. “This is not to say that the best answer to sexual assaults in prison is to remove men from all guard positions—quite the opposite.”<sup>221</sup> Rather, in addressing cross-gender search and surveillance, Kapczynski proposes, the courts should balance the risk of stereotyping against its “costs,” namely the fear and risk of sexual abuse.<sup>222</sup> In her balance, the symbolism of stereotype clearly outweighs the reality of abuse. “[E]ffective resolution of this dilemma will usually not reside in sex segregation, but rather in non-sex-specific measures to alleviate the kinds of risks and costs we too quickly identify with sex itself.”<sup>223</sup>

Sexual abuse, in prison as outside, is not a gender-neutral phenomenon. Like sexual harassment, it is a “technology of sexism”<sup>224</sup> by which traditional gender roles are constructed and enforced. As Katherine Franke points out:

[S]exual harassment is a kind of sex discrimination not because

---

220. *Id.* (emphasis omitted).

221. *Id.* at 1291.

222. “[F]irst, . . . we must consider the symbolically as well as materially discriminatory effects of gender norms to decide which norms to challenge, and, second, . . . our inquiry must not end there.” *Id.* at 1282 (emphasis omitted).

223. *Id.*

224. Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997).

the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because . . . it perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.<sup>225</sup>

The employment of male guards in women's prisons—regardless of the actual sexual orientation of prisoners or guards—creates a power dynamic that is “gendered and (hetero)sexed.”<sup>226</sup> Outside prison, men are overwhelmingly perpetrators and not victims of custodial sexual abuse; the victims are overwhelmingly women.<sup>227</sup> Male, not female, guards are nearly exclusively the perpetrators of sexual abuse in men's prisons. Because sexual abuse tends to masculinize the perpetrators as well as feminize its victims,<sup>228</sup> it is extremely rare—though it has happened<sup>229</sup>—that female guards are alleged to have sexually abused

225. *Id.*

226. Miller, *Government's Hands*, *supra* note 3, at 875 n.37.

227. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); Amnesty International, *supra* note 3.

228. Franke, *supra* note 224, at 696–98; Miller, *Sex Surveillance*, *supra* note 28, at 308, 338; Robertson, *supra* note 212, at 9–11. MacKinnon suggests that this is true of normative heterosexual relations in general. MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 87, at 178–79. As MacKinnon points out,

[Sexually coercive] behaviors are almost never observed in women. Powerful social conditioning of women to passivity, gentleness, submissiveness, and receptivity to male initiation, particularly in sexual contact, tends effectively to constrain women from expressing aggression (or even assertion) sexually, or sexuality assertively.

MACKINNON, *SEXUAL HARASSMENT*, *supra* note 176, at 156.

229. Human Rights Watch has documented “rare” instances of sexual abuse of women prisoners by female guards. Human Rights Watch, *All Too Familiar*, *supra* note 1.

Women guards are also capable of abusing their power to sexually abuse and humiliate male prisoners, as was extensively documented in coverage of the torture and sexual abuse committed by U.S. troops at Abu Ghraib prison in Iraq in 2003–04. *See, e.g.,* Seymour Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, THE NEW YORKER, May 10, at 42; Seymour Hersh, *Chain of Command: How the Department of National Defence Mishandled the Disaster at Abu Ghraib*, THE NEW YORKER, May 17, 2004, at 38; Seymour Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, THE NEW YORKER, May 24, 2004, at 38.

In three 1997 Illinois cases, male prisoners alleged systematic and humiliating sexual harassment by female guards. In their complaints, each of the prisoners alleged that he was handcuffed, taken to a room where approximately eight male and female guards were waiting, and ordered to strip. When they refused, they were threatened with bodily harm. No investigative reason was given for the searches. Each was allegedly forced to perform humiliating acts such as “spreading his buttocks for them to see,” while the guards made “sexual ribald comments.” Dorn and Calhoun alleged that the guards told them, “You have

male or female prisoners.<sup>230</sup> “[G]iven existing sex roles,”<sup>231</sup> sexual harassment by women “will probably be only slightly more common than occurrences of a man raped by a woman or incest initiated by women against male children. . . . The rarity of such instances demonstrates how deep the social determinants go.”<sup>232</sup>

The absolute authority of prison guards invites not only sexual, but also physical and psychological abuse, which may be perpetrated by guards of any gender upon prisoners of any gender. As Miller argues, powerful “stereotypes of men as sexual aggressors and women either as sexual victims (female prisoners) or asexual nurturers (female guards)”<sup>233</sup> should not overshadow the “actual disparity of power that exists between correctional officers and inmates.”<sup>234</sup> Jurado points out that it is a “gendered stereotype that women do not have power over men, even when women hold the keys to the prison.”<sup>235</sup>

Indeed, the exposure of the atrocities committed by U.S. troops at Abu Ghraib, a U.S.-run detention facility in Iraq, demonstrates that when prison authorities create an institutional culture that encourages and condones the sexual, physical, and psychological abuse of prisoners, female guards may join with their male colleagues in sexual, as well as physical and psychological, torture.<sup>236</sup>

It cannot, therefore, be assumed that women prisoners are entirely safe when the guards to whose absolute control they are subjected are women, rather than men. Indeed, women detainees still feel deeply humiliated when female guards perform invasive inspections of their

---

no rights in the penitentiary, and females’ rights to equal employment supersedes prisoners’ right to privacy.” *Dorn v. DeTella*, No. 96 C 3830, 1997 WL 85145, at \*2 (N.D. Ill. Feb. 24, 1997); *Calhoun v. DeTella*, No. 96 C 3564, 1997 WL 75658, at \*2 (N.D. Ill. Feb. 18, 1997); *Hollimon v. DeTella*, No. 96 C 3452, 1997 WL 45309 at \*2 (N.D. Ill. Jan. 30, 1997).

230. Human Rights Watch, *All Too Familiar*, *supra* note 1; Human Rights Watch, *Nowhere to Hide*, *supra* note 3; Amnesty International, *Not Part of My Sentence*, *supra* note 3; Coomaraswamy, *supra* note 3.

231. MACKINNON, SEXUAL HARASSMENT, *supra* note 176, at 202.

232. *Id.*

233. Miller, *Government’s Hands*, *supra* note 3, at 863.

234. *Id.*

235. Jurado, *supra* note 29, at 53. However, even when *men* have the keys to the prison, Jurado insists that it is a sexist “gender role stereotype” to consider women “powerless and subject to the authority of men.” *Id.* at 52.

236. See *supra* note 229. It is tempting to speculate as to whether systematic custodial sexual abuse would have occurred at Abu Ghraib if the prison authorities had not condoned it (as they did) and the guard staff was not overwhelmingly male (as it was). I am not aware of any prison environments in which an overwhelmingly female guard staff has developed a practice of widespread and systematic sexual abuse of prisoners.

genitalia.<sup>237</sup> I would certainly argue that Fourth, Fifth, and Eighth Amendment doctrines be reconceptualized to offer real protection to prisoners from every kind of custodial abuse. As an intermediate step, however, women-only staffing policies in women's prisons, and mixed-gender staffing policies in men's prisons, would, at a minimum, greatly reduce the likelihood and occurrence of custodial sexual abuse.<sup>238</sup>

### B. Modesty and Women Prisoners: An Intersectional Analysis

Miller argues that "judges employ stereotypes of incarcerated women as modest and in need of protection from their own sexuality."<sup>239</sup> In this Article, I contend that this is not the case. As Kapczynski points out, prisons are the only context in which courts invert their "usual tendency to value privacy over employment rights."<sup>240</sup> Indeed, prisons are the only context in which courts have "question[ed] the logic that conflates notions of privacy with notions of sex."<sup>241</sup> Kapczynski recognizes that this disparity reflects that the bodies of male and female prisoners are "seen as less sacrosanct"<sup>242</sup> than those of women in the outside world.

The modesty critics challenge a stereotype of the chaste, modest victim that is not universal. It ordinarily applies to "economically comfortable" white women<sup>243</sup>—not the poor women of color who

237. JOHNSON, *supra* note 180, at 41.

238. See generally Iman R. Soliman, *Male Officers in Women's Prisons: The Need for Segregation of Officers in Certain Positions*, 10 TEX. J. WOMEN & L. 45 (2000).

239. Miller, *Government's Hands*, *supra* note 3, at 865–66.

240. Kapczynski, *supra* note 26, at 1266 n.52.

241. *Id.* at 1272 (emphasis omitted) (citing *Gunther v. Iowa State Reformatory*, 462 F. Supp. 952, 956 n.4 (N.D. Iowa 1979)); *Griffin v. Mich. Dep't of Corr.*, 654 F. Supp. 690, 701 (E.D. Mich. 1982). In *Griffin*, the court held:

Mores as to being viewed naked by members of the opposite sex under certain circumstances are bound to change as women become further integrated into the occupational and professional world . . . . The traditional rule that only a male guard may view male inmates under these conditions may derive from just the type of stereotypical value system condemned by Title VII.

*Id.*

242. Kapczynski, *supra* note 26, at 1273.

243. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 307 (2002). In this article, Ehrenreich observed:

[T]he very same set of stereotypes that privileges economically comfortable white women also subordinates them. Seen as nurturers, they struggle to be thought of as rational, competent, public actors. Seen as passive sexual objects, they must fight to

populate U.S. women's prisons.<sup>244</sup>

Over the past ten years, the rate of increase in imprisonment of black and Hispanic women has exceeded the rate of increase for white women.<sup>245</sup> Today, the overwhelming majority of U.S. women prisoners are black or Latina.<sup>246</sup> Their treatment in prison, particularly the lack of protection or redress for sexual assault, may reflect the devaluation of these women in this society.<sup>247</sup>

Representations of black men and women as criminals and of women as sexual objects intersect to create an image of "[b]lack women as sexual deviants—as a combination of the criminal and the sexual."<sup>248</sup> As deviants, they are stereotyped as violent, not as potential victims.<sup>249</sup> As sexual deviants, they lack credibility in the justice system.<sup>250</sup> Even when their accounts of sexual abuse are believed, these myths and stereotypes "also influence whether the insult and the injury [black women have] experienced is thought to be relevant or important."<sup>251</sup>

attain a sense of, and a recognition of, their sexual agency. Seen as weaker and less aggressive than white men, they find their options limited by patriarchal norms. Thus, both their subordination and their dominant status are effectuated by the same set of stereotypes.

*Id.*

244. The majority of women in U.S. women's prisons are African-American or Latina. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: WOMEN OFFENDERS 7 (1999) [hereinafter DOJ, WOMEN OFFENDERS]; Human Rights Watch, *All Too Familiar*, *supra* note 1; Amnesty International, *Not Part of My Sentence*, *supra* note 3.

245. Amnesty International, *Not Part of My Sentence*, *supra* note 3 ("The rate of increase of imprisonment of black and Hispanic women has slightly exceeded the rate of increase of imprisonment of white women throughout this decade (From 1990–96, the number of imprisoned white females increased by 67%, black females by 72% and Hispanic females by 71%.)" (citation omitted)).

246. DOJ, WOMEN OFFENDERS, *supra* note 244, at 7 (explaining the racial breakdown of the women's prison population as follows in Federal prisons: "Black" 35%, "Hispanic" 32%, "White" 29%, Other 4%. State prisons: Black 48%, Hispanic 15%, White 33%, Other 4% and for local jails: Black 44%, Hispanic 15%, White 36%, Other 5%).

247. See generally Crenshaw, *Race, Gender*, *supra* note 14, at 1471–72.

248. *Id.* at 1471.

249. See generally Fenton, *supra* note 24; Schneider, *infra* note 346.

250. Crenshaw, *Race, Gender*, *supra* note 14, at 1470 ("In our own legal system, . . . [b]ecause Black women were not expected to be chaste . . . they were [seen as] unlikely to tell the truth.").

251. *Id.* For example, an administrator at the women's correctional facilities of the District of Columbia testified that, even where a prisoner's allegations of sexual abuse are believed, the department takes the view that it cannot act against the guard:

There are . . . cases where we believe the inmate. In fact, the inmate's story in some cases is more credible than the employee's story, but you cannot take adverse or

Crenshaw identifies the pervasive stereotypical belief among jurors that “[b]lack women are different from white women and that sexually abusive behavior directed toward them is somehow less objectionable.”<sup>252</sup>

The sexual stereotype that the modesty critics attribute to “women” in general is racialized and class-based, as well as being gendered.<sup>253</sup> Either these scholars really believe—despite their acknowledgment that custodial sexual abuse is commonplace in women’s prisons—that the “modesty” of women prisoners is being overprotected against sexual abuse, or they are willing to sacrifice women prisoners’ sexual integrity in order to transform the stereotypes that afflict male guards and middle-class white women. This disparity heightens Kapczynski’s concern about “who bears the costs” of challenging gender norms.

It is true, as Kapczynski observes, that “notions of bodily modesty and chastity . . . have long operated to deny women sexual autonomy.”<sup>254</sup> However, this stereotype, as she describes it, applied to respectable, richer, white women, a subgroup whose members were and are rarely imprisoned.<sup>255</sup> This stereotype exists only in contrast to its flip side: the

---

corrective action against the employee because you believe the inmate over the employee. In cases like that we relocate the employee and make sure the employee does not come in contact with that inmate, does not work in that institution.

Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia, 877 F. Supp. 634, 642 (D.D.C. 1994) (quoting evidence of William Plaut, Deputy Director of Operations and Acting Deputy Director for Programs).

252. Crenshaw, *Race, Gender*, *supra* note 14, at 1470. While the average sentence for a man convicted of sexually assaulting a white woman is ten years, the average sentence for a man convicted of sexually assaulting a black woman is two years. *Id.*

253. This demonstrates that even feminists of color must be vigilant to avoid what Adrienne Davis describes as “white solipsism” in feminist theory. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

254. Kapczynski, *supra* note 26, at 1284.

255. For example, Watterson observes:

[I]n Washington, D.C., administrators say that every class of woman is arrested—white, black, rich, poor. But after the initial hearings, it is the poor black and poor white women who are held in jail. Two women are arrested for larceny or petty theft. The bail is set at \$3,000. The white woman is out of custody within hours. The black woman spends months in jail awaiting trial. One study showed that black women have a one-and-a-half times greater chance of being returned to jail after their initial hearing than white women.

Another study in . . . Pennsylvania showed that bail and fines tended to be higher and sentences longer for black women than for white women on similar charges. One exception was that courts seemed to be more offended when white women practiced prostitution, and thus set their bail higher than for their black counterparts.



image of the "bad" black woman or prostitute, who is unchaste, immodest, and undeserving of protection.<sup>256</sup>

The treatment of black women in prison has always reflected this degrading stereotype. Davis observes that prisons have traditionally served to enforce racially stereotyped gender roles for women.<sup>257</sup> Women's prisons sought to "encourage and ingrain 'appropriate' gender roles, such as vocational training in cooking, sewing, and cleaning,"<sup>258</sup> and women's "reformatory cottages were usually designed with kitchens, living rooms, and even some nurseries for prisoners with infants."<sup>259</sup> "[F]eminized modes of punishment—the cottage system, domestic training, etc.—were designed, ideologically, to reform white women, relegating women of color, in large part, to realms of public punishment that made no pretense of offering them femininity."<sup>260</sup>

Black women were not offered the more humane conditions offered for the refeminization of white women. If they were admitted to women's reformatories, they were often segregated from white women.<sup>261</sup> Furthermore, they were often incarcerated in men's prisons, where they "endured the cruelties of the convict lease system unmitigated by the feminization of punishment; neither their sentences, nor the labor they were compelled to do, were lessened by virtue of their gender."<sup>262</sup>

Today, neither prison nor society has undergone any epiphany by which black prisoners have been transformed into stereotypically chaste, modest ladies who require vigorous protection. For example, in *Lucas v. White*,<sup>263</sup> male guards were alleged to have "committed, orchestrated and facilitated" sexual abuse of women prisoners at a California detention facility.<sup>264</sup> Although both white and African American women prisoners were abused, the white women were transferred immediately

---

WATTERSON, *supra* note 81, at 34–35.

256. *Id.*; see TONI MORRISON, RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY (1992); Davis, *supra* note 3, at 346; Crenshaw, *Race, Gender*, *supra* note 14, at 1471; Ehrenreich, *supra* note 243, at 269.

257. *Id.*

258. Davis, *supra* note 3, at 346.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*; see also JOHNSON, *supra* note 180, at 32.

263. Amnesty International, *Not Part of My Sentence*, *supra* note 3 (citing *Lucas v. White*, 63 F. Supp. 2d 1046 (N.D. Cal. 1999)).

264. *Lucas*, 63 F. Supp. 2d 1046.

after they reported their abuse to officials, but the African American women were not moved for another three days. During those three days, the African American women were subjected to retaliatory sexual abuse. One of the women reported that, during these three days, she was "beaten, raped and sodomized by three men who in the course of the attack told her that they were attacking her in retaliation for providing a statement to investigators."<sup>265</sup>

The modesty mystique, which constructs "respectable" white women as modest, chaste, and needing chivalrous protection, does subordinate women prisoners, but not in the direct way that Kapczynski, Miller, and Jurado suggest. Black women and women prisoners are not stereotyped as modest ladies; they are exposed to sexual abuse because they do not fit that stereotype.<sup>266</sup>

As Kapczynski points out, same-sex privacy jurisprudence "construct[s] women's bodies as more private than men's, by insisting that women have an inviolable 'right' to same-sex privacy that men do not. . . . [This] resonates uncomfortably with the historical construction of women's bodies and concerns as the domain of the private rather than public sphere."<sup>267</sup>

Women are considered more "private" than men in part because they were viewed as the property of men.<sup>268</sup> However, black women and prostitutes were considered less "private" than white women. Respectable white women were constructed as the property of one man: the only man who could legally sexual assault one was her husband.<sup>269</sup>

By contrast, black women, prostitutes, unchaste women, working women,<sup>270</sup> and other nontraditional women were, in a sense, the property

265. *Id.*

266. ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 175-77 (1981).

267. Kapczynski, *supra* note 26, at 1284.

268. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 176, at 169-70.

269. Thus, all common law torts with respect to sexual interference rested on a common premise: "that a man's wife's sexuality belonged to him, in the sense that another man was liable to him in damages for sexual acts with her, even with her consent. This attitude may be no less prevalent although it is no longer legally enforceable in this way." *Id.*

270. Even today,

[m]en in almost every working context attribute sexual desire to women workers based upon their mere presence as workers in that particular environment. This assumption is professed equally about women who are seen as anomalies on the job (any woman who would seek a male-defined work situation must be there because of men) as for those who are in women's jobs (any woman who would choose a feminine job must be looking for a man.).

*Id.* at 50.

of all men. It was basically legal for any man to assault them.<sup>271</sup> As Professor Angela Harris points out:

[A]s a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime. Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature. In contrast to the partial or at least formal protection white women had against sexual brutalization, black women frequently had no legal protection whatsoever.<sup>272</sup>

Privacy and property traditionally converged to establish a zone of protection for men, within which they could abuse women without interference from the law.<sup>273</sup> Professor Zanita Fenton's observations regarding domestic violence are equally apposite to custodial abuses in prison:

Relegation of [domestic violence] to the private is tantamount to forced silence; it is in the public arena where public debate and speech have meaningful impact. Ironically this is precisely the reason this crime is the most serious and deserving of the most vociferous public condemnations. "In no other category of violent crime does one find the offender going home to live with the victim." The interaction of patriarchy with the concepts of the "private" dictate the manner in which issues of domestic abuse are addressed. Unfortunately, judicial silence on these issues not only contributes to the "private" conceptualization, but also denies a primary avenue for public awareness, one with the weight of authority to change the *status quo*.<sup>274</sup>

"In private," MacKinnon contends, "means more than 'while

271. As Professor MacKinnon observes, "From women's point of view, rape is not prohibited; it is regulated." MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 87, at 179.

272. Harris, *supra* note 253, at 599; see also DAVIS, *supra* note 266, 175–76; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251 n.35 (1991);

273. Fenton, *supra* note 24, at 1017; MACKINNON, *SEXUAL HARASSMENT*, *supra* note 176, at 161–62.

274. Fenton, *supra* note 24, at 1017–18.

alone.' . . . Privacy sanctifies the zone of the sexual,"<sup>275</sup> making it an area that is safe from judicial scrutiny. "Such a conception of the 'private' . . . turns men's 'right to be let alone' into a shield behind which isolated women can be sexually abused one at a time"<sup>276</sup>—or, in prison, en masse.

### III. BEYOND MODESTY: PRIVACY AND THE RISK OF CUSTODIAL SEXUAL ABUSE

#### A. *A Reinterpretation of Privacy: Freedom from Fear of Sexual Abuse*

As Kapczynski observes, "an unspoken but looming concern about sexual abuse"<sup>277</sup> hovers in the background of all same-sex privacy cases. Because this concern remains unacknowledged in nonprison cases, privacy law is currently interpreted in a way that assesses the unspoken risk based on fears and prejudices about the imagined propensity of black and working-class men to sexually assault or affront middle-class white women.<sup>278</sup>

In this Article, I seek to bring this unacknowledged concern into the open in order to more honestly address the reasons courts should grant or refuse claims to privacy in prison.<sup>279</sup> If the courts directly confront the concern about sexual abuse in privacy claims, they can more easily distinguish real risks from fears that arise from discriminatory conjecture. I propose an alternate vision of privacy that, unlike contemporary privacy doctrine, will protect prisoners against the risk of custodial sexual abuse that, for them, has proven to be all too real.

Fourth Amendment privacy is an individual constitutional right. Theoretically, it makes little sense to construe its primary aim as the erosion of gender stereotypes. The purpose of a Fourth Amendment privacy claim is to protect the prisoner, not to facilitate prison administration, as the courts have interpreted it,<sup>280</sup> and not to eradicate

275. MACKINNON, SEXUAL HARASSMENT, *supra* note 176, at 162.

276. *Id.*

277. Kapczynski, *supra* note 26, at 1280.

278. *Id.* at 1287. In North American law and society, the archetypal rape is imagined to be one committed by a black stranger against a white woman. See, e.g., DAVIS, *supra* note 266, at 172–74; SUSAN ESTRICH, REAL RAPE (1987); MACKINNON, FEMINIST THEORY OF THE STATE, *supra* note 87, at 175–76, 181; Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 706–07 (2000).

279. The privacy analysis I propose here may also be applicable, with modifications, to nonconstitutional privacy claims outside the prison context, but that is not the focus of this Article.

280. See generally *supra* Part I.

symbolic harms to persons other than the claimant—especially when those persons, such as male guards, are adverse in interest to the prisoner-plaintiff, or, like middle-class white women, are greatly advantaged in comparison with her (or him). Particularly in light of the high incidence of sexual abuse by guards in women's and men's prisons, the primary purpose of prisoners' bodily privacy should be to protect them against custodial abuse.

If privacy law is to protect prisoners against sexual abuse, it must be gender-conscious, not gender-neutral. Custodial sexual abuse is a deeply gendered practice, no matter what the genders of victim and perpetrator.<sup>281</sup> If privacy is to have a hope of preventing sexual abuse and harassment, a gender-blind solution will not likely work any better than color-blind solutions work to eradicate racism.<sup>282</sup> If the privacy guarantee is to encompass a right to be free from the threat and reality of sexual abuse, it must recognize that these threats and realities are gendered.

At present, the Fourth Amendment affords little meaningful protection to women prisoners against the conditions that leave them vulnerable to sexual exploitation and abuse. In its current discriminatory interpretation, it serves essentially to propertize prisoners as women, and to deny their vulnerability as men.<sup>283</sup> Thus, as in the law of domestic violence, prison privacy law creates a zone in which prisoners, male and female, cannot challenge the search and surveillance that puts them at risk of sexual abuse. As slave law did to African slaves, prison privacy law does for their descendants: "from the experiential perspective of blacks, there was and is no such thing as 'slave law.' The legal system did not provide blacks with structured expectations, promises, or reasonable reliances of any sort."<sup>284</sup>

How, then, to rehabilitate "privacy," making it a genuine,

281. See *supra* notes 224–232 and accompanying text.

282. Indeed, as many critical race scholars have noted, race-blind interpretation of prohibitions on race discrimination end up benefiting the racially privileged, whites, at the expense of the racially subordinated, people of color. Color-blind race equality "denies the real linkage between race and oppression under systematic white supremacy." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1768 (1993) [hereinafter Harris, *Whiteness*]; see generally *id.* at 1768–77; Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1, 40–52 (1991). As is demonstrated in Part II.A, an analogous problem arises from gender-blind approaches to subordination.

283. Jurado, *supra* note 29, at 51; Kapczynski, *supra* note 26, at 1290–91; Miller, *Sex Surveillance*, *supra* note 28, at 296.

284. Patricia Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 417 (1987) (emphasis omitted).

enforceable legal claim by prisoners, rather than a constitutional immunity for prisons? As Miller urges, Fourth Amendment privacy doctrine must be reinterpreted “in a manner that deals realistically with the contours of life in prison.” It must embody a “contextualized notion of personal privacy that goes beyond gendered stereotypes to vest privacy in the body.”<sup>285</sup>

As the District Court held in *Galvan v. Carothers*,<sup>286</sup> minimum standards of privacy should “include the right not to be subject to sexual advances, to use the toilet without being observed by members of the opposite sex, and to shower without being viewed by members of the opposite sex.”<sup>287</sup> However, the basis for this privacy interest is not “decency” or “modesty,” as the court suggested in this and many other cases,<sup>288</sup> as was demonstrated in Parts I and II, privacy as modesty offers inadequate protection to women prisoners, and almost none to men. The interest protected by prisoners’ privacy must be understood to encompass a right to be free from sexual abuse and from the threat of it.

If Fourth Amendment privacy is to reduce women prisoners’ vulnerability to sexual abuse, it must be interpreted to protect them against the *fear* of sexual assault, as well as against all forms of sexual abuse, including sexual assault, harassment, and exploitation.<sup>289</sup> Lisa Krim observes:

Women inmates not only experience the degradation of having the most intimate parts of their bodies exposed or explored, but also experience the fear that male guards will abuse their power in the situation and rape or sexually abuse them. This fear of rape is doubly painful because the search itself and the fear of future rape or sexual abuse resurrects the pain many female inmates have suffered in past rapes or sexual abuse.<sup>290</sup>

Krim argues persuasively that the “pervasive fear of sexual abuse” experienced by women prisoners “is a form of cruel and unusual punishment that women inmates experience during intrusive searches or

---

285. Miller, *Government's Hands*, *supra* note 3, at 886.

286. 855 F. Supp. 285 (D. Alaska 1994).

287. *Id.* at 291.

288. See *supra* note 110 and accompanying text.

289. See also LOUISE ARBOUR *et al.*, COMMISSION OF INQUIRY INTO CERTAIN EVENTS AT THE PRISON FOR WOMEN IN KINGSTON, ch. 4.2.9 (Ottawa: Public Works and Government Services Canada, 1996).

290. Krim, *supra* note 15, at 107–08.

exposure of their bodies to male guards" that male prisoners do not share when searched by or exposed to women.<sup>291</sup> Since the "deliberate indifference" standard seems to preclude Eighth Amendment liability,<sup>292</sup> Fourth Amendment privacy can and should be expanded to recognize a constitutional privacy interest—as part of a substantive right to human dignity—that encompasses a right to be free from state-imposed fear of sexual assault.<sup>293</sup>

Like Miller, I advocate that "the privacy-based challenges to cross-gender searches [should be viewed] more broadly as claims to human dignity and personhood generally denied prisoners."<sup>294</sup> The incorporation of a right to human dignity into the Fourth Amendment's "privacy" provisions is consistent not only with U.S. constitutional law,<sup>295</sup> but also with the international law obligations of the U.S., which require it to respect and ensure the rights of prisoners (and others) to human dignity.<sup>296</sup> A Fourth Amendment right to freedom from the threat of

291. *Id.* at 108.

292. *See, e.g.,* Dinos, *supra* note 49, at 291; Laderberg, *supra* note 15, at 328. Furthermore, in *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995), the Tenth Circuit held that a well-founded fear of sexual abuse was insufficiently serious to provide any basis for an Eighth Amendment violation. In this case, a guard repeatedly commented on the prisoner's body and boasted about his sexual prowess. One night, while Ms. Adkins was sleeping, the guard entered her cell and looked at her, then told her she had "nice breasts." Although Adkins apparently did not make any explicit Fourth Amendment claim, she alleged that "the right of privacy is not entirely extinguished in a prison setting nor exclusively bounded by the contours of the Eighth Amendment." *Id.* at 1036. She argued that the guard's behavior constituted an "implicit threat . . . sufficient to amount to a type of physical assault." *Id.* The Court held that the guard's conduct constituted a *de minimis* threat which did not meet the Eighth Amendment threshold. *Id.* at 1037.

293. As Justice Wilson observed for a plurality of the Supreme Court of Canada in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 207, any meaningful concept of "'security of the person' must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself."

294. Miller, *Government's Hands*, *supra* note 3, at 884.

295. *Bell v. Wolfish*, 444 U.S. 520, 577 (1979) (Powell, J., concurring in part, dissenting in part); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state."); *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (holding that a prisoner has a "constitutional right to be secure in her bodily integrity and free from attack by prison guards," including a right not to be sexually assaulted).

296. International Covenant on Civil and Political Rights, Preamble, Art. 10(1). Art. 10(1) provides: (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Human Rights Committee requires that personal and body searches of prisoners and detainees be conducted "in a manner consistent with the dignity of the person being searched." Eur. H.R. Comm., General Comment 16, *supra* note 94, at ¶ 8; *see also* Body of Principles for the Protection of All Persons under Any Form of Imprisonment, Dec. 9 1988, at

sexual assault could serve as an important step toward operationalizing the concept of human dignity.

Given that fears of sexual assault may reflect real risks, groundless stereotypes, or some point in between, the question arises: which fears merit constitutional protection as justiciable Fourth Amendment privacy interests?

Kapczynski identifies two ways in which cross-gender supervision may engage the kind of “anxiety associated with the sense of exposure to risk of sexual assault and harassment”<sup>297</sup> that merits recognition as a privacy interest: “one associated with the fact that assault or harassment may occur in scenes of cross-sex bodily exposure and the other associated with the fear of assault, or in more extreme cases, the sense that cross-sex exposure itself is assaulting.”<sup>298</sup> I would add a third consequence: Beyond the subjective fear engendered when male guards are allowed to view or touch women prisoners who have been abused by men in the past, cross-gender search and surveillance also creates an unnecessary risk that women will be sexually harassed or abused.<sup>299</sup>

Lisa Krim argues that the courts should assess prisoners’ fear of sexual abuse based on a “reasonable woman” standard.<sup>300</sup> This standard, of course, offers little protection to men who have been abused. It would also likely fail to protect women prisoners.<sup>301</sup> Because of their history of prior sexual abuse by men, many prisoners are hypersensitized to sexual abuse. Some of them may fear sexual abuse even when the male guards to whom they are exposed present no actual risk in the circumstances (although it is difficult to imagine how the absence of risk could be proven).<sup>302</sup> Moreover, not all prisoners will be equally sensitized to sexual abuse; not all the plaintiffs in *Jordan* experienced a reaction as severe as the one described above.<sup>303</sup> Yet,

---

<http://www.un.org/documents/ga/res/43/a43r173.htm>, Principle 1: (“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”).

297. Kapczynski, *supra* note 26, at 1288–89.

298. *Id.* at 1289 (emphasis omitted).

299. Human Rights Watch, *All Too Familiar*, *supra* note 1; Amnesty International, *Not Part of My Sentence*, *supra* note 3.

300. Krim, *supra* note 15, at 117–18.

301. This is particularly true because Krim’s proposed “reasonable woman” incorporates standards of “decency” that, as the modesty critics point out, are inherently discriminatory, and tend not to work for women prisoners because they are not seen by the courts as decent women. *Id.*

302. Laderberg, *supra* note 15, at 338.

303. *Jordan v. Gardner*, 986 F.2d 1521, 1534–36 (9th Cir. 1992).



presumably, it is the most sensitive prisoners who most urgently require the Fourth Amendment's protection against search and surveillance that could traumatize them—even if their fears, based on traumatic past experiences, may not be entirely rational.

On the other hand, a subjective determination would likely be unpalatable to courts, which would be reluctant to constrain prison administrators' staffing decisions on the basis of objectively baseless prisoner fears. To distinguish legitimate from discriminatory bases for privacy claims, then, the best solution is to require the prisoner privacy claimant to adduce evidence, on a balance of probabilities, that either (1) the impugned search or surveillance heightens the risk of sexual abuse (including sexual harassment as well as touching); or (2) the search or surveillance itself is traumatic because of the fear of abuse that it engenders. In balancing this privacy interest against guards' Title VII claims, the courts should acknowledge that prisoners' right to be free from the fear or risk of sexual abuse outweighs male guards' interest in "equality" with female guards with respect to the kinds of intrusive search and surveillance, such as body searches or viewing of naked prisoners, that give rise to that fear and risk.<sup>304</sup>

It may be an uphill battle to convince the courts that prisoners' Fourth Amendment privacy should incorporate a substantive right to "human dignity." In an era of mass incarceration and "getting tough" on prisoners, imprisonment is—and is intended to be—dehumanizing.<sup>305</sup> However, *Women Prisoners*, *Robino*, and *Jordan* offer some hope that the courts might at least be prepared to recognize a more limited constitutional right of prisoners, under the Fourth or Eighth Amendments, to be free from the threat of sexual assault.

### *B. Advantages of Privacy As Protection Against Sexual Abuse*

The approach I propose in this article—Fourth Amendment privacy as a right to human dignity which includes, but is not limited to, freedom

---

304. Krim asks the following: "When a search requires that male guards touch women's most intimate body parts, the woman inmate will have tremendous difficulty proving to another guard that a 'flat hand,' the appropriate procedure, became a 'grab.' Who will believe her?" Krim, *supra* note 15, at 108.

305. Miller, *Government's Hands*, *supra* note 3, at 884; see also HARRIS, *supra* note 16; RIERDEN, *supra* note 16; WATTERSON, *supra* note 81; Davis, *supra* note 3, at 347 ("In the twentieth century, women's prisons have begun to look more like their male counterparts, particularly those . . . constructed in the era of the prison industrial complex. As corporate involvement in punishment begins to mirror corporate involvement in military production, rehabilitation is becoming displaced by penal aims of incapacitation.").

from the fear and reality of sexual abuse—offers several advantages over the current Fourth Amendment jurisprudence regarding prisoners' privacy. First, it redirects the courts' attention from a focus on prisoners' genteel feminine modesty (or lack thereof) to the power disparity between guards and prisoners.<sup>306</sup>

This approach also helps transcend the false dichotomy between "victimization" and "agency."<sup>307</sup> Vulnerability to sexual assault is a common concern of women, whether or not they have actually been victims of gendered violence.<sup>308</sup> Moreover, while privacy as modesty undoubtedly reinforces gender stereotypes, privacy as protection against sexual abuse can potentially protect prisoners of either gender against sexual abuse by guards of any gender without relying on gender, race, or class stereotypes to do so.

Recognition of such a right would also lay the groundwork for a right of prisoners to be free from the less violent forms of sexual abuse, such as verbal sexual harassment, groping, and *quid pro quo* sexual coercion. The courts have often failed to treat sexual harassment as sufficiently serious to merit constitutional scrutiny.<sup>309</sup> As Fenton points out, gendered violence is not "something we need only deal with in its extreme manifestations. We need to understand that the potential for violence is part of human reality and is a phenomenon we should deal with on a more comprehensive basis."<sup>310</sup> In circumstances in which the harasser has absolute control over every aspect of the prisoner's life, sexual harassment is often a precursor to a more violent form of sexual assault, and prisoners are entitled to constitutional protection from it.<sup>311</sup>

---

306. As MacKinnon points out, "Resistance to sexual harassment can be misconstrued as a revival of moral delicacy only until it is grasped that sexual harassment is less an issue of right and wrong than an issue of power." MACKINNON, *SEXUAL HARASSMENT*, *supra* note 176, at 184.

307. Schneider, *infra* note 346.

308. MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 87, at 133–35.

309. See, e.g., *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995) (sexual harassment of woman prisoner by male guard a *de minimis* violation that did not engage the Eighth Amendment).

310. Fenton, *supra* note 24, at 1038–39.

311. As Judge Green held in *Women Prisoners*:

There is a substantial risk of injury when officers make sexual remarks in an environment where sexual assaults of women prisoners by officers are well known and inadequately addressed. In free society, a woman who experiences harassment may seek the protection of police officers, friends, coworkers or relevant social service agencies. She may also have the option of moving to locations where the harassment would no longer occur. In sharp contrast, the safety of women prisoners

Moreover, sexual harassment by guards is a violation of human dignity sufficiently serious to merit constitutional protection in itself, quite apart from the realistic fear of sexual assault it engenders.<sup>312</sup>

Intrusive surveillance of women prisoners by male guards, even if condoned by the prison administration, gives rise to a fear of sexual assault: "Routine invasions of bodily privacy, such as men peering into women's cells . . . or the unannounced presence of male guards in female living areas provide a reminder to women prisoners that their exposure to abuse is almost endless."<sup>313</sup> The Fourth Amendment's protections against unreasonable search should take this reality into account.

Furthermore, Fourth Amendment protection from the threat of sexual assault would also strengthen women prisoners' constitutional claims that they should not be guarded by men at all. All guards have near-absolute authority over every aspect of prisoners' lives. As Krim argues, "one could argue that the danger of [sexual] abuse is always present in female prisons with male guards, even without body searches or exposure of women inmates' bodies."<sup>314</sup>

### 1. The Place of Privacy in Prison

A fundamental problem with privacy as a basis for women prisoners' Fourth Amendment claims to be free from intrusive and sexualized search and surveillance is that a prisoner's claim to "privacy" may seem

---

is entrusted to prison officials, some of whom harass women prisoners and many of whom tolerate the harassment. Furthermore, the women are tightly confined, making their escape from harassment as unlikely as escape from the jail itself.

887 F. Supp. 634, 665 (D.D.C. 1994). As a result, sexual harassment has a "profound" effect on women in prison:

The effect of sexual harassment on women prisoners is profound. The abuse has a significant impact on a woman's concentration, and it lowers confidence and self-esteem. It leads to irritability, anxiety and nervousness. Women may be angry that the incident is happening and fearful that they will be continually exposed to it. Women prisoners who experience sexual harassment report significant depression, nausea, frequent headaches, insomnia and feelings of fatigue. Those who report the harassment often experience increased stress and may end up becoming isolated from other women in the institution. Women can feel self-doubt, and disillusionment at the failure of the organization to protect them. Women prisoners lose confidence in the system and may decide not to complain about additional incidents.

*Id.* at 642-43.

312. *Id.* at 634 (citations omitted).

313. *Id.* at 665.

314. Krim, *supra* note 15, at 108.

misplaced in prison.<sup>315</sup> In jail, we expect prisoners to be subject to surveillance.<sup>316</sup> A prisoner's claim to "privacy" within the prison may thus seem, at first glance, to be frivolous; such claims have been given little weight by the courts when balanced against guards' claims to equality in employment. As the district court judge put it in *Everson*, "there is nothing . . . to suggest that the 'privacy of prisoners, especially female' as the term privacy is conventionally used, is a mission of the [correctional system]. Indeed, security, not privacy, is a more appropriate focus for a prison."<sup>317</sup>

Furthermore, the fact that prisoners are presumed to have transgressed societal norms of conduct<sup>318</sup> is purported to justify their removal from constitutional protections. In *Grummett v. Rushen*,<sup>319</sup> the court distinguished the prisoner-plaintiff from the plaintiff in *York* on the basis that the *York* plaintiff was a victim of crime.<sup>320</sup> Thus, the status of a person as prisoner is determinative in determining the existence, scope, and content of his or her privacy rights.

315. "[C]ommon sense' norms of gender are much more likely to seem persuasive and important to protect in genteel settings like nursing homes or the Standard Oil building than in settings such as prisons." Kapczynski, *supra* note 26, at 1286.

In prison, prisoners are legally subjected to "numerous mortifying rituals, such as searching, stripping, bathing, spraying, and the taking of personal property, that are conducted with the institutional purpose of converting newcomers into manageable inmates." IRWIN, *supra* note 180, at 68-69.

316. *Hudson v. Palmer*, 468 U.S. 517, 528 n.39 (1984); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) ("loss of freedom of choice and privacy are inherent incidents of confinement").

317. *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864, 878 (E.D. Mich. 2002); see also *Hudson*, 468 U.S. at 526. In the prison privacy cases, institutional "security" is typically contrasted with prisoners' claims to be free from abusive search or surveillance by guards. I have not found any case in which the prison's interest in "security" was found to encompass any obligation to protect prisoners' security of the person.

318. Although the presumption of innocence should preclude the judicial endorsement of such assumptions about pretrial detainees, they have not been substantively accorded any greater Fourth Amendment privacy rights than have been accorded to convicted prisoners.

319. 779 F.2d 491 (9th Cir. 1985).

320. *Id.* at 494; see also *Local 567 Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Mich. Council 25, Am. Fed'n of State, County, & Mun. Employees*, 635 F. Supp. 1010, 1014 (E.D. Mich. 1986) (contrasting the privacy interests of mental health patients from the privacy interests of prisoners: "It would be a strange doctrine . . . that would decree that the sanctity of the right to privacy in the performance of excretory functions, fully respected in a public restroom, is forfeited by . . . falling ill and becoming hospitalized" with "prisoners have relinquished much of their privacy rights."). For other cases recognizing a privacy interest in not being seen by the opposite sex that outweighed the equal employment interests of employees, see, e.g., *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159, 163 (W.D. Okla. 1982) (employment of male nurses in labor and delivery area), *Backus v. Baptist Medical Center*, 510 F. Supp. 1191 (E.D. Ark. 1981) (same), and *Norwood v. Dale Maintenance System*, 590 F. Supp. 1410 (N.D. Ill. 1984) (public restroom attendant).

The courts have also adopted a punitive rationale for refusing to recognize prisoners' claims to privacy. In *Hudson*, Chief Justice Burger held:

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.<sup>321</sup>

The implication is that, whether they are detained before trial or incarcerated after conviction, prisoners have forfeited their constitutional rights.

If freedom from fear of sexual assault were recognized as part of a cognizable constitutional right to human dignity protected by the Fourth Amendment,<sup>322</sup> a female prisoner's claim to a right not to have her breasts or genitals be touched by men, and that male guards not see her naked, would be recognized as more than gendered "decency" or "modesty."<sup>323</sup> Modesty and decency are claims that courts may find ill-suited to prisoners, given the stereotypes of black women and prisoners as prostitutes or sexual deviants, and given prisoners' failure in general to conform to ideals of white, middle-class feminine gentility. A right to be free from the fear of sexual assault would likely be accorded greater weight by courts.

In practice, guards can and do search the bodies and cells of prisoners, at any time, for any or no reason. Often, the searches are abusive.<sup>324</sup> For prisoners, the lack of privacy in prison is severe, disorienting, and dehumanizing, even when the guards do not present a sexual threat. Jean Harris, a prisoner at Bedford Hills Correctional Facility, observes that any guard "could walk into my cell as I sit here and tear up the pictures of my sons and the manuscript I am writing and anything else that strikes their fancy, and they can do so with the

---

321. *Hudson*, 468 U.S. at 526.

322. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

323. *Jurado*, *supra* note 29, at 42; *Miller, Government's Hands*, *supra* note 3, at 868.

324. *See, e.g., Harris*, *supra* note 16, at 236-37; *IRWIN*, *supra* note 180, at 68-69; *JOHNSON*, *supra* note 180, at 193.

approval of the United States Supreme Court.”<sup>325</sup>

One prisoner wrote to Kathryn Watterson Burkhart:

At shower time . . . they have a room where its something like a supply room, about 8 feet by 10 feet. As many as can goes into this room and undress, for your shower. Then you walk across the hall NUDE and there is another room about the same size. . . . There are as many women as can squeeze in this area. About 15 women crowd into this space, because the nurse wants them to hurry up and get through with their showers so that the nurse can sit back down. The nurses *all* of them do the same thing. They sit on a stool in the hall in front of the shower room and yells, to different patients that are standing under the water too long, “Alright, Sally, Mary, etc. get away from that shower so someone else can use some water. Move over, so Mary can get wet.” When you get soaped up, you are then allowed to get under the shower and rinse off. The nurse sitting on the stool holds a can of Right Guard, and you hold your arms up and she sprays them for you. Then the nurse puts some lotion in your hand, to lotion with.<sup>326</sup>

Such intrusive supervision, of course, is degrading and dehumanizing to all prisoners. To allow a man to perform such functions for women who have been abused and are afraid of men, though, would introduce a profound level of fear and psychological trauma, and a risk of sexual abuse, that the courts should not condone.

## 2. “Sexual Profiling”: Not All Men Will Sexually Abuse Women

As Kapczynski observes, the current law of privacy “circumscrib[es] a zone where gender, sexuality, and notions of physical and psychic safety overlap.”<sup>327</sup> Employers justify discriminatory employment practices by attributing racist, sexist, class-based fears and prejudices to their customers, and call those prejudices privacy. “How could it be,” Kapczynski asks, “that women would have a constitutional right to a same-sex nurse but men would not, or that women would have a

---

325. HARRIS, *supra* note 16, at 238; see also *Hudson v. Palmer*, 468 U.S. at 550 (holding that even property searches that “serve[ ] no purpose but harassment” engage no privacy “interest that society considers reasonable,” and thus do not engage the Fourth Amendment).

326. WATTERSON, *supra* note 81, at 67.

327. Kapczynski, *supra* note 26, at 1274.

constitutional right to a same-sex nurse but not to a same-sex doctor?”<sup>328</sup>

Privacy as protection against abuse offers an answer to Kapczynski's question: There is no such right, unless the privacy-claiming litigant proves that male nurses are somehow more dangerous than male physicians (an assertion that, as Kapczynski suggests, almost certainly reflects gender and class prejudice). Litigants must prove that the fears they attribute to their clients (or prisoners) are based on a real, heightened risk of sexual abuse, or trauma from the treatment *per se*; they cannot rely on discriminatory conjecture.

As Kapczynski, Jurado, and Miller point out, “not all men would abuse inmates; only some might.”<sup>329</sup> When the constitutional issues are framed from guards' perspective, it will seem patently false that all male employees are unable to perform the duties of the job.<sup>330</sup> Jurado, for example, argues that it is a conceptual “leap” from the fact that custodial sexual abuse is overwhelmingly committed by men guards on women prisoners to the conclusion that “only female officers can successfully perform their responsibilities.”<sup>331</sup> Viewed from the guard's perspective, this argument seems compelling.

328. *Id.* at 1271.

329. *Id.* at 1281 (emphasis omitted); see also Jurado, *supra* note 29, at 52; Miller, *Government's Hands*, *supra* note 3, at 871.

330. Gender is a BFOQ “only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job, duties that Title VII defines as ‘necessary to the normal operation of the particular business or enterprise.’” *Hayes v. Shelby Mem'l Hosp.*, 726 F.2d 1543, 1547 (11th Cir. 1984). 42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer –

- (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive . . . or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.* 42 U.S.C. § 20003-2(e) provides for a BFOQ exception:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business enterprise.

*Id.*

331. Jurado, *supra* note 29, at 52.

However, when the constitutional issues are framed from the perspective of the prisoner's privacy and bodily integrity, the analysis changes. The risk to a prisoner's sexual integrity is posed almost exclusively by men. The prisoner who is subject to cross-gender search and surveillance has no way to tell which of the men is likely to sexually abuse her. In light of her likely history of physical and sexual abuse by men, she is likely to fear sexual abuse from all of them.

Courts are understandably reluctant to treat all male guards as potential sexual abusers. Many courts have had difficulty finding a gender BFOQ for guards in women's prisons because not all male guards will sexually assault women inmates. For example, in *Everson*, Judge Cohn found:

There has simply been no showing that there is reasonable cause to find that all, or substantially all, males are not able to perform safely and efficiently the duties of a CO and RUO in the housing units in the female prisons. Very few male CO or RUO's are likely to be involved in improper activities. The few that are likely to be involved does [*sic*] not justify a BFOQ requirement in the face of federal and state law clearly prohibiting gender based discrimination.<sup>332</sup>

Thus even where, as in *Everson*, the uncontroverted evidence was that prisoners were continuing to allege incidents of sexual abuse, women's right to be free from sexual abuse was subordinate to the equal employment interests of male guards. Guards had a right to be presumed not to be sexual abusers even where the evidence was that many (not "very few") male guards had been sexually abusing female inmates for years.

Courts have proved reluctant to brand all men as potential sexual abusers. This reticence leads them to reject most prisoners' privacy claims that male guards should be excluded from women's housing units.<sup>333</sup> When the courts have upheld women-only guard policies, it has been on the basis of the women's pre-existing psychological vulnerability, not the guards' sexual aggression.<sup>334</sup>

Judicial resistance to acknowledging the threat posed by male guards

---

332. 222 F. Supp. 2d 864, 994-95 (E.D. Mich. 2002)

333. See, e.g., *id.* at 864; *Edwards v. Dep't of Corr.*, 615 F. Supp. 804 (M.D. Ala. 1985).

334. See *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998); *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1992); *Torres v. Wisconsin*, 859 F.2d 1523 (7th Cir. 1988).



reflects what Fenton describes as the “fiction that violence is exceptional.”<sup>335</sup> “Violence,” she points out, is constructed as “the domain of the other,” and is “antithetical to the way in which we imagine ourselves behaving.”<sup>336</sup> Thus, in *Dothard*, the Supreme Court presumed an undifferentiated risk that male *prisoners* (who are assumed to be deviant) would sexually assault female guards, and sacrificed the guards’ employment interests to protect them against it.<sup>337</sup> The institutional status of guards, on the other hand, insulates them from being labeled violent, even when they are.<sup>338</sup>

It is almost impossible for a prisoner to demonstrate that a particular male guard poses a risk of sexual abuse. Custodial sexual abuse is likely to be even more severely underreported than is sexual abuse or assault outside the prison:<sup>339</sup> “[d]ue to the threat of retaliation by guards, women are fearful to report incidents of sexual abuse.”<sup>340</sup> Because of the underreporting of sexual abuse, “a guard might pose a high assault risk

335. Fenton, *supra* note 24, at 1035.

336. *Id.* at 1027.

337. 433 U.S. 321 (1977).

338. Fenton, *supra* note 24, at 1028–29 (“We are resistant to discussing actions of the police as violent because we view the police as institutionally legitimate. This is particularly the case when such acts are committed against those belonging to groups who are stereotyped as violent.”).

339. Violence in prison is substantially underreported, either because prisoners are intimidated or because prison staff are indifferent to or discourage reports by prisoners. Laderberg, *supra* note 15, at 360. Furthermore, prisoner grievances are often leaked to prison staff, and prisoners often face retaliation for reporting their abuse. Human Rights Watch, *Nowhere to Hide*, *supra* note 3; Amnesty International, *Not Part of My Sentence*, *supra* note 1. They also enjoy no prospect of escape from their abusers. Dinos, *supra* note 49, at 293.

Finally, the usual factors that deter women from reporting abuse on the outside are redoubled in prison: shame; fear of disclosure; fear of retaliation; concern that they will not be believed; skepticism by investigators and courts toward allegations of sexual offences; a belief, instilled by the perpetrator’s behavior, that complaint is useless; and the victim’s desire to assert “control” over the situation by containing their emotions and remaining silent. DIANA MAJURY, THE TIP OF THE DISCRIMINATION ICEBERG: BARRIERS TO DISCLOSURE OF THE ABUSE AND MISTREATMENT OF FEDERALLY SENTENCED WOMEN: A SUBMISSION BY THE WOMEN’S LEGAL EDUCATION AND ACTION FUND (LEAF) TO THE CANADIAN HUMAN RIGHTS COMMISSION IN RELATION TO THEIR SPECIAL REPORT ADDRESSING THE TREATMENT OF WOMEN SERVING FEDERAL TERMS OF IMPRISONMENT 7 (May 2003) [unpublished brief to Canadian Human Rights Commission], at <http://www.elizabethfry.ca/submissn/leaf/leaf.pdf> (last visited Jan. 21, 2005).

Moreover, prison records “have been found to be too self-serving to meet the reliability requirements of the public records and reports rule.” *Id.* (citing John Boston *et al.*, Farmer v. Brennan: *Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 104 (1994)). The problems of underreporting are exacerbated when the violence prisoners suffer is sexual. Laderberg, *supra* note 15.

340. Dinos, *supra* note 49, at 293.

yet still not have a record.”<sup>341</sup> Moreover, “departments of corrections often fail to record complaints or even to investigate them in an organized and centralized manner.”<sup>342</sup> Indeed, the “deliberate indifference” standard imposed for Eighth Amendment liability creates a legal incentive for prisons to discourage, dismiss, or fail to record prisoners’ complaints of sexual abuse (or other mistreatment).<sup>343</sup>

Fenton’s insight into the ordinary (as opposed to exceptional) nature of violence helps to resolve what Elizabeth Schneider challenges as the “false dichotomy” between women’s “victimization” and women’s “agency”<sup>344</sup> illustrated by the tension between the approaches of the modesty critics, on one hand, and of Weiser, Laderberg, and Dinos, on the other. As Fenton points out, the fictional notion that violence is exceptional “is fundamental to stereotypes that portray battered women as helpless, dependent, and pathological. If it were understood that violence is really everywhere, then it would not be difficult to accept that violence happens to ordinary women”<sup>345</sup>—often at the hands of ordinary men, including guards.

### 3. Equal Protection of Men and Women

As Kapczynski contends, privacy as modesty “can only successfully defend individuals from a particular kind of assault and harassment—the kind that happens in scenes of genital exposure between different sexes.”<sup>346</sup> Sexual abuse, of course, can occur in areas where prisoners are not naked, and guards can abuse prisoners of the same gender as themselves.<sup>347</sup>

In prison, privacy claims should be assessed on the basis of whether the impugned search or surveillance gives rise to a realistic fear of sexual abuse. This shift, I propose, can help to address the “symmetry”

---

341. *Id.*

342. Laderberg, *supra* note 15, at 323.

343. See *Farmer v. Brennan*, 511 U.S. 825 (1994). If an assaulted prisoner brings an Eighth Amendment claim in respect of sexual abuse committed against her by a guard, courts will not find that the prison has been “deliberately indifferent” to the risk of sexual assault upon her unless the prison has received and recorded previous reports of sexual abuse by the same perpetrator. *Id.*; see *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998); *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997). Thus, as long as a male guard has not been identified as a likely abuser, the prison is likely to be immune from liability for sexual assaults he may commit.

344. Elizabeth Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. REV. 387 (1993).

345. Fenton, *supra* note 24, at 1035.

346. Kapczynski, *supra* note 26, at 1290.

347. *Id.* at 1290; Miller, *Sex Surveillance*, *supra* note 28, at 309.

argument that there is something unfair in treating female guards' search and surveillance of male prisoners differently from male guards' search and surveillance of women prisoners.<sup>348</sup> However, as Miller points out,

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.<sup>349</sup>

The symmetry argument leads the modesty critics to a notion of gender "equality" between prisoners that would clearly subject women prisoners to a heightened risk of sexual assault.<sup>350</sup> For example, as Karoline Jackson points out, the majority decision in *Johnson v. Phelan*<sup>351</sup> to allow female guards to view male prisoners in the shower "is not surprising in that it works to deny relief to male inmates."<sup>352</sup>

[I]ts implications are shocking if this line of reasoning continues into the future. It would appear that at least in the Seventh Circuit, allowing male guards to observe female inmates showering and performing bodily functions would also be constitutionally reasonable. Given the Seventh Circuit's denial of all privacy rights to inmates, it would also be reasonable to allow male guards to conduct body-cavity searches on female inmates.<sup>353</sup>

If privacy is reconceptualized to incorporate freedom from fear of sexual abuse, it can avoid the notion that the zone of privacy afforded to male and female prisoners must be identical. Rather, both male and

---

348. See, e.g., *Timm v. Gunter*, 917 F.2d 1093, 1103-04 (8th Cir. 1990) (Bright, J., dissenting). This argument is discussed in Miller, *Sex Surveillance*, *supra* note 28, at 336-38.

349. Miller, *Sex Surveillance*, *supra* note 28, at 337.

350. This, of course, would be, and is, the consequence of the *status quo*, cross-gender staffing in men's and women's prisons—an arrangement which the modesty critics seek to maintain.

351. 69 F.3d 144 (7th Cir. 1995).

352. Karoline E. Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 975-74 (1998).

353. *Id.*

female prisoners must be protected against the well-founded fear of sexual abuse, through whatever safeguards are appropriate and effective. This avoids establishing either male or female prisoners as a baseline which establishes the scope of the privacy protection afforded to the other gender.<sup>354</sup> Rather, the question that Fourth Amendment privacy would raise is whether the officially sanctioned search and surveillance heightens prisoners' vulnerability to sexual assault by guards of any gender.

If cross-gender surveillance gives rise to fear of sexual abuse in a prison, whether the prisoners are men or women, they should be protected from it. However, the context of cross-gender surveillance gives rise to distinct fears in men's and women's prisons. If a litigant seeks to challenge physical searches of women by male guards, she or it might adduce evidence that such searches increase the risk of sexual abuse and are likely to be traumatic in themselves because of the fear they engender. If the litigant seeks to challenge physical searches of men by female guards, the litigant would have to address the same issues—heightened risk of sexual abuse, or, alternatively, direct trauma from the searches themselves. In all likelihood, the evidence in each case would be different and might lead to differing outcomes.

The reconceptualization of privacy I propose helps distinguish the legitimate claims of male or female prisoners who seek to be freed from the threat of sexual abuse from those of men who, like those described by Miller, simply resent female guards' search powers because women's authority over them challenges their identity and privilege as "real men" in a "culture where manliness is highly prized."<sup>355</sup>

Miller suggests that being searched by a female guard could result in the gender demotion of a "real man" to "punk" status, increasing the likelihood that the man might be sexually abused by other prisoners or guards. Under a regime of privacy as protection from sexual abuse, a male prisoner challenging such cross-gender searches would have to establish that cross-gender searches really do result in such demotion, and that the risk of consequent sexual assault was greater if it is women guards who perform the searches, rather than men. Given that it is male guards and not women who are sexually abusing male prisoners, and that the presence of female guards probably makes men's prisons

---

354. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 176, at 144. ("[T]he most striking yet the most concealed flaw of discrimination doctrine [is that] in the guise of setting a single standard for persons, women are measured by the standards of men.").

355. Miller, *Sex Surveillance*, *supra* note 28, at 309.

somewhat safer from sexual abuse,<sup>356</sup> it is unlikely that such a claim would succeed.

Moreover, since the hierarchy of “real men” over “punks” or “fags” is in large part established by the ability of real men to rape and the vulnerability of punks and fags to be raped, real men’s claim to continued sexual privilege is, to say the least, not an interest the Constitution should protect.<sup>357</sup> Moreover, recognition of male prisoners’ interest in avoiding gender demotion cannot amount to a cognizable Fourth Amendment interest because such an interest would exclude the “real men’s” victims, the “punks” and “queens,” from constitutional protection: they are not masculine enough to be demoted.<sup>358</sup>

Miller and Kapczynski critique the “heterosexual presumption that sex between guards and prisoners always involves individuals of two different sexes,”<sup>359</sup> arguing that “[s]ame-sex sexual privacy doctrine participates in the closeting of homosexuality because it presumes everyone to experience their gender, their sexuality, and their bodies in the same way, the ‘right’ way.”<sup>360</sup> As they point out, same-sex sexual abuse, perpetrated by both prisoners and guards, is a severe problem in

---

356. Miller acknowledges that the presence of female guards notes that excluding female guards from male prisoners’ shower and toilet areas “would likely make these areas more dangerous than they already are.” *Id.* at 299. It is interesting that, while criticizing the “gender bias that power in sexual relationships is exercised by men (dominant) upon women (vulnerable).” *Id.* at 309. Miller does not cite any authority for the proposition that all-male showers would be more dangerous than showers supervised by women.

357. In Kapczynski’s analysis, this interest would qualify as a mere discriminatory “customer preference” that is contrary to the purpose of Title VII and does not merit legal recognition as a privacy interest in the counterbalance. Kapczynski, *supra* note 26, at 1261; see generally *Diaz v. Pan Am. World Airlines*, 442 F.2d 385 (5th Cir. 1971). Kapczynski observes that courts offer two interrelated justifications for the privacy exception to Title VII:

First, courts insist that same-sex privacy norms are so deeply held and so fundamental to our sense of identity that they are legitimately cast beyond the reach of antidiscrimination law. Second, courts imply that same-sex privacy norms should be respected because they are necessary for the physical and psychological protection of individuals.

Kapczynski, *supra* note 26, at 1261. The former justification accurately characterizes male prisoners’ aversion to being searched by female guards on the basis that it compromises their masculinity, and, as Kapczynski contends, is unworthy of legal recognition.

358. This is consistent with Miller’s assertion that disempowerment is more harmful to men than to women because, lacking gender privilege, women have nothing to lose, discussed *supra* note 206 and accompanying text.

359. Miller, *Sex Surveillance*, *supra* note 28, at 309; see also Kapczynski, *supra* note 26, at 1293.

360. Kapczynski, *supra* note 26, at 1287.

men's prisons.<sup>361</sup> Given, however, that same-sex sexual abuse is not reported to be a major problem in women's prisons, this is not an argument in favor of gender-neutral privacy. Rather, an assessment of the risk of sexual abuse must take into account that the perpetrators of custodial sexual abuse in men's and women's prisons are overwhelmingly men.

At the same time, if a particular form of search or surveillance increases the risk of sexual abuse regardless of whether the guards are men or women, it would still raise a cognizable Fourth Amendment claim, but the remedy, obviously, would be one that did not target guards of a particular gender. Thus, this privacy as protection against the risk and fear of sexual abuse does not "foreclose[ ] the possibility of limiting cross-gender searches on the basis of intra-gender sexual abuse,"<sup>362</sup> as Miller contends other gender-conscious remedies do.

Thus, a reconceptualization of privacy as a right to be free from the fear of sexual abuse would enable Fourth Amendment privacy to protect prisoners against abuse beyond the narrow context of cross-gender surveillance of unclothed women prisoners.

#### IV. CONCLUSION

Thus far, the Fourth Amendment privacy doctrine has offered virtually no protection to prisoners seeking protection against custodial sexual abuse. The scope of prisoners' constitutional privacy rights is entirely limited by the interests of guards and prisons. Fourth Amendment privacy jurisprudence has served better to immunize prisons from liability than to protect any dignitary or privacy interests of prisoners.

Furthermore, as the modesty critics point out, the content of existing privacy law is little more than a conception of feminine modesty that depends for its currency on discriminatory notions of gender, race, and class. As a result, privacy has failed to protect prisoners against the risk and reality of sexual abuse.

In this Article, I have presented an alternative interpretation of prisoners' Fourth Amendment privacy that confronts the underlying concern about sexual abuse in privacy doctrine by putting it at the center of the privacy analysis. The interest protected by Fourth Amendment privacy must be reconceptualized: it is not a gendered

---

361. *Id.* at 1291 n.154; Miller, *Sex Surveillance*, *supra* note 28, at 300–08.

362. Miller, *Sex Surveillance*, *supra* note 28, at 300–08.

notion of modesty or decency, but a constitutional right to be free of the state-imposed risk, fear, and reality of sexual abuse in prison.

Thus, in addressing claims of privacy in prison, the courts should take a gender-conscious, contextual approach to the evidentiary inquiry to answer two questions: (1) Does the impugned search or surveillance increase the risk of sexual abuse? or (2) Does the impugned practice itself traumatize prisoners because of the fear of sexual abuse that it engenders?

By adopting this approach, the courts may transcend the gender, race, and class biases that have informed the failure of the Fourth Amendment to protect prisoners against custodial sexual abuse.

\* \* \*