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FEMALE CORRECTIONAL OFFICERS
AND PRISONER PRIVACY

MARY ANN FARKAS* AND KATHRYN R.L. RAND**

I. INTRODUCTION

Historically, women have only been employed in female correctional institutions in contact positions since the late nineteenth century. It was then that separate reformatories were established for females. Because jails and prisons were sex-segregated by correctional staff and inmates and there was generally only one state facility for women, only a small number of female officers could work in corrections at a given time.¹ The major reasons women were not hired in male prisons were concerns about their safety and security, their effect on the behavior of male inmates, and the possibility of violations of inmate privacy. Male prison administrators and male guards were either strongly opposed to the presence of women in male prisons or concerned about the consequences of their presence in the institutions.²

It was not until the 1970s that the integration of correctional staffs occurred in all-male institutions. This change was largely due to a growing realization among women of the greater job availability (more prisons for men), higher pay in men’s institutions, and the promotional opportunities available with the wider range of experience in the correctional system.³ The major impetus, however, was Title VII of the 1964 Civil Rights Act.⁴ The original Act prohibited employment discrimination on the basis of sex, but this proscription applied only to private sector employment.⁵ In 1972, Congress passed amendments to

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¹ See CLARICE FEINMAN, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 172 (3d ed. 1994).
³ Joycelyn M. Pollock, Gender, Justice, and Social Control, in WOMEN, LAW, AND SOCIAL CONTROL 28 (Alida V. Merlo & Joycelyn M. Pollock eds., 1995).
⁵ Id.
the Act which extended the prohibition of employment discrimination on the basis of sex to state, county, and local levels.\(^6\) In order to prove that sex discrimination had taken place, the plaintiff must demonstrate (1) that the employer had discriminated intentionally, or (2) that "facially neutral" employment practices had a disparate impact on women.\(^7\) Disparate impact of a facially neutral employment practice refers to a practice that is not intended to be discriminatory, but which results in disparate impact or discrimination in hiring, assignment, employment conditions, promotion, or discharge.\(^8\) Armed with Title VII, women were then able to bring suits against officials who had refused to hire them as corrections officers in all-male prisons.

Nevertheless, prisoner privacy remains an issue with regard to the employment of corrections officers. Employment discrimination suits brought by women were countered by a flood of prisoner litigation seeking to enforce constitutional privacy rights under 42 U.S.C. § 1983. The courts' response to these suits has been less than uniform, despite some clear directives from the United States Supreme Court. Several issues regarding prisoner privacy remain undecided, and, thus, their impact on the employment of women as corrections officers is unclear.

The tension between prisoner privacy and Title VII's prohibition on sex discrimination in employment comes to a head in the context of searches of inmates. When searches are conducted by guards of the opposite sex, the privacy implications are heightened. This Article will explore the extent and ramifications of privacy rights of prisoners against searches, particularly by guards of the opposite sex, in the context of employment of female corrections officers. Part II examines women's employment rights under Title VII and concludes that women have the right to work as corrections officers, and have the right to the same promotional opportunities as male officers. Part III similarly examines prisoners' constitutional rights in the context of searches, particularly those performed by guards of the opposite sex, and concludes that prisoners have at least a limited right to same-sex searches. Part IV identifies and discusses those issues presently undecided by the courts and their impact on the integration of correctional work. The Article concludes that in order for prison management to assess potential liability for cross-gender searches and to act accordingly, the courts must

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6. Id.
clearly and consistently delineate and apply existing law regarding prisoner privacy.

II. TITLE VII AND CORRECTIONAL WORK

Women were generally successful in using Title VII to gain employment in male prisons until 1977, when a critical ruling by the United States Supreme Court threatened to subvert the progress made by women.9 Dothard v. Rawlinson10 became the first and only case of unlawful sex discrimination in the hiring of female correctional officers to reach the highest court. In that case, Dianne Rawlinson used Title VII to challenge the validity of an Alabama statute specifying minimum height and weight requirements of five feet, two inches, and 120 pounds for employment as a prison guard, as well as an Alabama regulation prohibiting the hiring of women as prison guards in contact positions that require continual close proximity to inmates.11 Rawlinson had been rejected as a prison guard after failing to meet the minimum weight requirement.12 The Supreme Court concluded that Title VII prohibited application of Alabama’s facially neutral height and weight statute because (a) the plaintiff had established a prima facie case of unlawful sex discrimination upon showing that the statutory requirements would exclude over forty-one percent of the nation’s female population while excluding less than one percent of the male population,13 and (b) the prima facie case had not been rebutted on the ground that the statutory requirements were job-related as having a relationship to the strength essential to effective job performance as a prison guard, because no evidence was presented by the defendants to correlate the statutory requirements with the amount of strength thought to be essential.14

However, the Court held that the Alabama regulation barring the hiring of women guards in “contact positions”—that is positions requiring continual close proximity to inmates—at all male prisons fell within the ambit of section 703(e) of Title VII, which permits sex-based discrimination where sex is a “bona fide occupational qualification” (BFOQ).15 The Court reasoned that the use of women as guards in “contact

11. Id. at 323-24.
12. Id.
13. Id. at 329-30.
14. Id. at 331-32.
15. Id. at 334.
positions" in the particular conditions of the Alabama prison would pose a substantial security problem directly linked to the sex of the prison guard. Furthermore, the Court recognized the likelihood that inmates would assault a woman simply because she was a woman. The court believed that this constituted a threat not only to the assault victim, but also to the basic control of the prison and the protection of its inmates and other security personnel. Although Dothard is the only case of this nature to reach the Supreme Court, it did not establish a precedent for excluding women from work assignments involving direct inmate contact in male correctional institutions. Subsequent case law has distinguished Dothard on the basis of differences between prison conditions and the inmate populations in maximum security Alabama prisons.

In Gunther v. Iowa State Men's Reformatory, the single issue was whether Iowa's rules preventing women from obtaining jobs above the Correction Officer I ("CO I") level at the Reformatory fell within the extremely narrow BFOQ exception to Title VII's general prohibition against sex discrimination. The defendants contended that contact positions for female officers would violate inmate privacy rights, jeopardize prison security and rehabilitative programs, place both male and female guards in increased danger, and lead to major disciplinary problems. In addition, the defendants claimed that allowing women to achieve a CO II status and fashioning a rotation to avoid placing them in dangerous areas or areas where inmate privacy must be maintained would be unfair to male officers and would create serious administrative problems. The district court constructed three questions to decide whether a legitimate BFOQ existed:

(1) Would the essence of the institution and its goals be undermined by not hiring men only?
(2) Is there reasonable cause to believe (that is a factual basis for believing), that all or substantially all women would be unable to perform safely and efficiently the duties of the job?

16. Id. at 333-37. Conditions in the Alabama prison had been characterized by "rampant violence" with no attempt to classify or segregate inmates in the male, dormitory-style prisons according to their offenses or dangerousness. Id. at 334-35
17. Id. at 336.
20. Id. at 955.
21. Id.
(3) Would any personnel adjustments ... impinge on the efficient and effective operation of the facility? 22

The court ruled that the defendants failed to bear their burden of proof that a BFOQ was reasonably necessary to the normal functioning of the Reformatory or that denial of a BFOQ would create the possibility of a breakdown of legitimate governmental interests. 23 Similarly, the defendants failed to show that there were no reasonably available alternative practices with less discriminatory impact that would satisfy the legitimate needs of the institution. 24 Thus, the court ordered that the plaintiff be promoted to Correctional Officer II. 25

In the following year, another case questioned the legitimacy of a BFOQ prohibiting women from employment in the male quarters of a correctional institution. In Harden v. Dayton Human Rehabilitation Center, 26 Lena M. Harden brought an action against the Rehabilitation Center alleging sex discrimination. 27 Harden had been employed as a Rehabilitation Specialist I in the female quarters of the facility. 28 She was not allowed to transfer to the male section when the female quarters closed. 29 The defendants asserted that the BFOQ was instituted to protect male inmates' privacy. 30 The district court concluded that the plaintiff had established a prima facie case of discrimination by proving that the defendants had promulgated an occupational qualification prohibiting females from serving as specialists in the male quarters of the Rehabilitation Center. 31 The district court further ruled that the state failed to articulate legitimate nondiscriminatory reasons for establishing the bona fide occupational qualifications. 32 Finally, the Court found that the defendants failed to demonstrate:

(1) that they had a factual basis for believing that substantially all women would be unable to safely and efficiently perform the duties involved; (2) that they could not rearrange job responsibilities in a way to minimize the clash between privacy interests and [p]laintiff's equal employment opportunities; or (3) that the

22. Id. at 956.
23. Id. at 958.
24. Id.
25. Id.
27. Harden, 520 F. Supp. at 771.
28. Id.
29. Id.
30. Id.
31. Id.
32. Harden, 520 F. Supp. at 771.
[BFOQ] was based on administrative necessity rather than convenience.\textsuperscript{33}

In Griffin v. Michigan Department of Corrections,\textsuperscript{34} female correctional officers brought a class action against the Michigan Department of Corrections and the Michigan Civil Service Commission on behalf of "all women employees and correctional officers now working or who have worked at the all-male maximum security institutions in Michigan and who are denied or who have been denied promotional opportunities because of the defendants' policies of not allowing women to work within the housing of residential units."\textsuperscript{35} While the defendants acknowledged that female employees were not allowed to serve in certain sensitive custodial positions, they insisted that

the disadvantages (e.g. danger to safety of the female officer, impairment to the security of the correctional institution, and violation of the inmates' right to privacy), which are inherent in having women in close contact situations with inmates, greatly outweigh all of the advantages which would result from any other alternative solution.\textsuperscript{36}

The court held that (1) inmates did not possess any protected right under the Constitution against being viewed while naked by correctional officers of opposite sex, and thus, gender was not a "bona fide occupational qualification" for correctional officers who would be in the position to view inmates while naked;\textsuperscript{37} (2) probabilities of sexual assaults on female correctional officers and potential impact on prison discipline and rehabilitation opportunities were not of a magnitude that justified making gender a bona fide occupational qualification;\textsuperscript{38} and (3) employment and promotional policies and practices violated the prohibition against discrimination on the basis of gender.\textsuperscript{39}

\textsuperscript{33} Id. at 775.
\textsuperscript{34} 654 F. Supp. 690 (E.D. Mich. 1982).
\textsuperscript{35} Id. at 692.
\textsuperscript{36} Id. at 699.
\textsuperscript{37} Id. at 702-03.
\textsuperscript{38} Id. at 704.
\textsuperscript{39} Id. at 703-05. The court stated:
In order to sustain their BFOQ defense, defendants must initially show that the legitimate functions of the Michigan prisons, which were involved in this litigation, would have been undermined by the promotion of women to positions at the grade 07 level and above. Second, defendants must prove that there is reasonable cause to believe that all, or substantially all, of plaintiffs would have been unable to perform the job safely and efficiently. Finally, defendants, as employers, must show that the failure to promote women was based on actual sexual characteristics rather than upon stereotyped assumptions.
In two more recent cases, the courts have ruled in favor of the prison administration concerning the job assignments of women corrections officers. In particular, the courts have concurred with the prison administrators in their assertion of legitimate concerns for institutional safety and security in their job assignment policies. In *Tharp v. Iowa Department of Corrections*, 40 two male residential advisors (RAs) alleged that gender-based shift assignments, in which female RAs were assigned to the women’s unit of a mixed-gender minimum security prison, violated Title VII and the Iowa Civil Rights Act. 41 The Fort Des Moines Residential Facility adopted a policy that only female RAs would be assigned to the women’s unit in response to certain times when no female RAs were available to conduct same-sex searches or urinalysis of female residents. 42 The district court ruled that the shift assignment policy was adopted to meet “legitimate penological concerns” and that the plaintiffs had “many different shift assignments and promotions available to them.” 43 Hence the policy was a minimal restriction that “did not deprive them of employment opportunities or otherwise adversely affect their employment status.” 44 The court applied a “balancing analysis” in which a “prison employer’s reasonable gender-based job assignment policy, particularly a policy that is favorable to the protected class of women employees, will be upheld if it imposes only a ‘minimal restriction’ on other employees.” 45

In the second case, *Carl v. Angelone*, 46 male and female correctional officers brought an action against the Director of the Nevada Department of Prisons alleging that transferring male officers out of, and female officers to, women’s correctional facilities was intentionally discriminatory. 47 The defendant conceded his actions were gender-based; he made the transfers because “he wanted female correctional officers at the women’s correctional facilities and therefore transferred the male officers out because they were men and transferred the female officers in because they were women.” 48 In considering the issue of qualified

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41. *Tharp*, 68 F.3d at 224.
42. *Id.*
43. *Id.* at 225
44. *Id.* at 226.
45. *Id.*
47. *Id.* at 1436.
48. *Id.*
immunity to a public officer's use of the BFOQ doctrine to justify discriminatory action, the district court held that the defendant could not base his claim of qualified immunity on the BFOQ defense and that issues of fact precluded summary judgment based on the defense.\(^4^9\)

In summary, the courts have recognized the employment rights of women correctional officers to work in prisons, including all-male institutions. However, there is confusion with regard to equality in job assignments, particularly positions which involve direct inmate contact. The ambiguous and contradictory court rulings have provided no clear, definitive direction for resolution of the conflict between the equal employment rights of women correctional officers and the privacy rights of male inmates.

III. INMATES' "RIGHT TO PRIVACY"

A. Background of Prisoner Litigation Under Section 1983

Congress originally enacted Section 1983, which has been called "the workhorse of civil rights litigation,"\(^5^0\) as section 1 of the Civil Rights Act of 1871.\(^5^1\) Popularly known as the Ku Klux Act, Congress intended these reconstruction-era civil rights statutes to protect newly emancipated blacks from violence in the South.\(^5^2\) Congress intended section 1983 to serve three purposes: first, to override "invidious legislation by the States against the rights or privileges of citizens of the United States;"\(^5^3\) second, to provide a remedy where state law was inadequate;\(^5^4\) and third, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."\(^5^5\) This third purpose had the Klan specifically in mind;\(^5^6\) however, it is important to note that "the remedy created was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law."\(^5^7\) Congress mistrusted the state

\(^{49}\) Id. at 1437-42.

\(^{50}\) Morgan v. District of Columbia, 824 F.2d 1049, 1056 (D.C. Cir. 1987).

\(^{51}\) Ku Klux Act of April 20, 1871, Ch. 22, 17 Stat. 13.

\(^{52}\) See Monroe v. Pape, 365 U.S. 167, 172-83 (1961), overruled by Monell v. Dep't of Soc. Serv. of New York, 436 U.S. 658 (1978). This case describes the legislative history of § 1983 as "replete with references to the lawless conditions existing in the South in 1871." Id. at 174.

\(^{53}\) Id. at 173 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 268 (1871)).

\(^{54}\) Id. at 173-74 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 345).

\(^{55}\) Id. at 174 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 365-66).

\(^{56}\) Id. (citation omitted).

\(^{57}\) Id. at 175-76.
courts in particular: "[O]ne strong motive behind its enactment was grave congressional concern that the state courts had been deficient in protecting federal rights." Thus, Congress created a potentially strong and far-reaching federal remedy for citizens whose constitutional rights were infringed upon by state actors.

Despite section 1983's potentially broad reach, many plaintiffs did not utilize it to a great extent. Between 1871 and 1920, the courts decided only twenty-one cases under section 1983. The 1871 Congress' intentions notwithstanding, the federal civil rights program was not without its low points during this period. Southern Democrats were hostile toward radical reconstructionist control of their state governments and used the state political processes to undo black and Republican gains in the area of civil rights. The effectiveness of the civil rights laws was also undermined by racial prejudice in both the North and the South. State and federal elections were marked by racial violence, and supporters of racial equality were socially ostracized and physically threatened. Enforcement of the civil rights laws was not a popular cause.

The 1920s and 1930s saw modest gains in the development of civil rights, but it was not until the Supreme Court's landmark decision in Monroe v. Pape that section 1983 reclaimed its intended role as the premier means of enforcing federal civil rights. In Monroe, the Court held that by alleging misconduct by police while searching their home, the plaintiffs had established a cause of action under section 1983.

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60. THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 60 (3d ed. 1991).
61. Id. at 61.
63. The Court stated that "on October 28, 1958, at 5:45 a.m., thirteen Chicago police officers broke into the Monroes' home without an arrest or a search warrant." Monroe, 365 U.S. at 169. The officers routed the Monroes and their six children out of bed at gunpoint and made them stand naked in the living room while the officers "ransacked every room, emptying drawers and ripping mattress covers." Id. One of the officers, Detective Pape, struck Mr. Monroe several times with his flashlight and called him "nigger" and "black boy." Id. at 203. Other officers pushed, hit, and kicked Mrs. Monroe and the children. Id. Mr. Monroe then was taken to the police station, where the police interrogated him regarding a two-day-old murder. Id. Mr. Monroe was not taken before a magistrate, though one was available, and he was not allowed to call his family or an attorney. Id. After being held for ten hours on "open charges," Mr. Monroe was released without being charged with any crime. Id.
64. Id. at 187.
Following the generous interpretation given to section 1983 in *Monroe*, the Supreme Court issued several decisions that increased section 1983's attractiveness as a remedy to civil rights plaintiffs. The Court expanded the reach of section 1983 in *Monell v. Department of Social Services* by holding that municipalities were "persons" within the meaning of section 1983. The Court further ruled in *Owen v. City of Independence* that the good faith of a municipal employee is not a defense to municipal liability under section 1983. In *Maine v. Thiboutot*, the Court held that section 1983 is not limited to federal constitutional rights, but may also be used to vindicate federal statutory rights. Congress got into the act by passing the Civil Rights Attorney's Fees Awards Act of 1976, which authorized awards of attorney fees to prevailing parties in actions brought under section 1983. As a result of these developments, litigation under section 1983 has increased dramatically.

The Supreme Court created the basis for prisoner civil rights litigation a few years before *Monroe* with its decision in *Cooper v. Pate*. Cooper, an inmate at the Illinois State Penitentiary, filed a "petition for Relief Under Civil Rights Act" in federal district court alleging that he was not allowed to purchase religious publications and materials connected to the Black Muslim Movement. The district court dismissed Cooper's complaint and the Seventh Circuit affirmed, stating:

Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safe-guarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts. We think it is well settled that it is not the function of the

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66. *Id.* at 701.
68. *Id.* at 638.
69. 448 U.S. 1 (1980).
70. *Id.* at 9-10.
71. *Id.* at 8-9.
72. In 1960, 287 suits were filed in (or removed to) federal district court under the federal civil rights statutes. 1950 ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 232. In 1977, the number of such suits jumped to 13,113, and in 1985, 17,582. 1977 ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 189; 1985 ADMIN. OFF. OF THE U.S. CTS., Fed Jud. Workload Stats., A-12. This "flood" of civil rights litigation has generated great concern for the perceived over-burdening of the federal docket.
74. *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir. 1963), rev'd, 378 U.S. 546 (1964).
courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined. A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights.\textsuperscript{75}

The Supreme Court reversed in a one-paragraph opinion:

The petitioner, an inmate at the Illinois State Penitentiary, brought an action under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 alleging that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners. The District Court granted the respondent's motion to dismiss for failure to state a claim on which relief could be granted and the Court of Appeals affirmed. We reverse the judgment below. Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it.\textsuperscript{76}

The Court's cursory recognition that section 1983 afforded prisoners a civil remedy for constitutional violations belied the ramifications of its decision. \textit{Cooper} (and later \textit{Monroe}) effectively opened the floodgates on prisoner litigation.\textsuperscript{77}

Later Supreme Court cases first expanded prisoner civil rights, then retracted them in the face of the deluge of cases. To synopsize a few that effectively encouraged prisoner civil rights litigation: in \textit{Johnson v. Avery},\textsuperscript{78} the Court invalidated a ban on jailhouse lawyering; in \textit{Haines v. Kerner},\textsuperscript{79} the Court held that prisoner complaints should not be subject to summary dismissal to a greater extent than complaints filed by nonprisoner litigants; and in \textit{Bounds v. Smith},\textsuperscript{80} the Court upheld

\textsuperscript{75} \textit{Cooper}, 324 F.2d at 167 (quoting Kelly v. Dowd, 140 F.2d 81 (7th Cir. 1944) and Stroud v. Swope, 187 F.2d 850, 851 (9th Cir. 1951)) (citations and quotation marks omitted).

\textsuperscript{76} \textit{Cooper}, 378 U.S. at 546 (citations omitted).


\textsuperscript{78} 393 U.S. 483 (1969).

\textsuperscript{79} 404 U.S. 519 (1972).

\textsuperscript{80} 430 U.S. 817 (1977).
prisoners' right to adequate law libraries or other legal assistance. On
the other side, the Supreme Court has limited section 1983 in the prison
context by holding that section 1983 may not be used as a substitute for
a writ of habeas corpus, Preiser v. Rodriguez; that some forms of
equitable remedies as well as retroactive payment of damages are barred
by the Eleventh Amendment, Edelman v. Jordan; that negligence
cannot function as a basis for constitutional claims, Estelle v. Gamble;
that the Fourteenth Amendment protects against only deprivations of
liberty accomplished without due process, Baker v. McCollan; and that
the doctrines of res judicata and collateral estoppel apply to section 1983
actions, effectively requiring plaintiffs to choose a federal or state forum,
Allen v. McCurry.

The Court appears sensitive to the plight of the district courts in
managing prisoner complaints. Justice Powell warned that "[t]he current
flood of petitions . . . already threatens—because of sheer volume—to
submerge meritorious claims and even to produce a judicial insensitivity
to" claims brought by prisoners. Justice Blackmun has stated that
recent Court opinions "reflect a growing uneasiness with the heretofore
pronounced breadth of [section 1983] and, in my view, a tendency to
strain otherwise sound doctrines . . . ."

B. Prisoner Privacy and the Constitution

Prisoner civil rights claims run the gamut from allegations of
restrictions on prisoners' hairstyles to allegations of denial of hormone
treatments for transsexual prisoners. Section 1983 provides a remedy for
violations of "rights, privileges, or immunities secured by the Constitu-
tion and [federal] laws" that occur under color of state law. Thus, the
statute applies only to alleged deprivations of federal constitutional or
statutory rights. Prisoners typically raise civil rights claims under various
Amendments to the Constitution (most commonly the First, Fourth,
Eighth, and Fourteenth Amendments). While prisoners forfeit many

81. Id. at 828.
82. 411 U.S. 475, 500 (1973).
84. 429 U.S. 97, 107 (1976).
86. 449 U.S. 90 (1980).
88. Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights—Will
rights,90 "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."91 "The fact of confinement," however, "as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights."92 The orderly operation of prisons generally has been committed to prison officials, not the federal courts, which "are ill equipped to deal with the increasingly urgent problems of prison administration and reform."93 Such matters are within the peculiar expertise of corrections officials and, therefore, the courts generally will accord great deference to their expert judgment, unless there is substantial evidence to argue against it.94 "Prison administration is . . . a task that has been committed to the responsibility of [the legislative and executive branches] and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."95 Government actions that infringe on an inmate's constitutional rights are valid, generally speaking, if they have a rational relationship to legitimate penological interests.96

Obviously, incarceration requires some limitations on constitutional rights and privileges. These limitations are justified by the needs of prison security, as well as the penal objectives of deterrence and rehabilitation. Prison life necessarily involves invasions of privacy:

90. Bell v. Wolfish, 441 U.S. 520, 545-46 (1979) ("[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations . . . . A detainee simply does not possess the full range of freedoms of an unincarcerated individual.").
95. Turner, 482 U.S. at 85 (citations omitted).
96. Id. at 89. In making that determination, courts will consider four factors: First, whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; second, "whether there are alternative means of exercising the right that remain open to prison inmates"; third, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and fourth, whether there are "obvious, easy alternatives" to the prison regulation. Id. at 89-90. Where there is no suspect class involved, an inmate who challenges a particular prison practice or regulation must show that the regulation is not reasonably related to a legitimate governmental concern, but is an "exaggerated response" to that concern. Id. at 90.
A prisoner is mortified and vulgarized not only by having to continually expose himself as he is moved and stored in the company of others; he is also defiled by being subject to their exposure . . . . The custody orientation negates privacy in innumerable other ways. These include such purposive intrusions as periodic headcounts, nightly checks, inspections or shakedowns of prisoners' living areas and belongings. Whatever tends to disturb visibility is forbidden.\textsuperscript{97}

Courts, recognizing this reality, have not construed inmates' privacy rights broadly. Nevertheless, prisoners have challenged prison practices, ostensibly on privacy grounds, under both the Fourth and Eighth Amendments.\textsuperscript{98}

In \textit{Bell v. Wolfish},\textsuperscript{99} a class of pretrial detainees challenged the constitutionality of shakedown room searches and visual body cavity searches performed at a federal detention facility in New York City.\textsuperscript{100} The lower courts had applied a "compelling necessity" standard,\textsuperscript{101} that is, that pretrial detainees could be subjected only to restrictions which are "justified by the compelling necessities of jail administration,"\textsuperscript{102} and determined that the detainees had a right to observe searches of their rooms, as well as a right against body cavity searches, without probable cause to believe that the inmate was concealing contraband.\textsuperscript{103}

The Supreme Court reversed. Writing for the majority, Justice Rehnquist rejected the compelling-necessity standard, finding no constitutional basis for the standard.\textsuperscript{104} Instead, the Court directed that alleged violations of specific constitutional guarantees in the prison setting "must be evaluated in the light of the central objective of prison administration, safeguarding institutional security."\textsuperscript{105} With regard to the shakedown searches, the Court cautioned, "it may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore

\textsuperscript{98} The Fourth Amendment guards "against unreasonable searches and seizures," while the Eighth Amendment protects against infliction of "cruel and unusual punishments." U.S. CONST. amends. IV, VIII.
\textsuperscript{99} 441 U.S. 520 (1979).
\textsuperscript{100} \textit{Id.} at 523.
\textsuperscript{101} \textit{Id.} at 524.
\textsuperscript{102} \textit{Id.} at 523-24.
\textsuperscript{103} \textit{Id.} at 527-30.
\textsuperscript{104} \textit{Wolfish}, 441 U.S. at 532.
\textsuperscript{105} \textit{Id.} at 547 (citations omitted).
the Fourth Amendment provides no protection for such a person." 106 Nevertheless, the Court assumed that the detainees retained a diminished expectation of privacy. Applying this standard, the Court determined that unobserved shakedown room searches were not unreasonable under the Fourth Amendment. 107

The Court reached the same conclusion with regard to the visual body cavity searches. The detainees, like other federal prisoners, were "required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." 108 The Court, again applying a Fourth Amendment reasonableness analysis, stated:

Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates . . . retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable.

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. 109

The Court was not persuaded that the searches were made unreasonable because there had been only one instance of an attempt to smuggle contraband into the facility. 110

Thus, the Court concluded that the detainees (and, it follows, prisoners) 111 were subject to reasonable room and body searches, with reasonableness being a balance between the prisoner's interest in his

106. Id. at 556-57.
107. Id. at 562-63.
108. Id. at 558.
109. Wolfish, 441 U.S. at 558-59 (citations omitted).
110. Id. at 559.
111. See id. at 545 "A fortiori, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." Id. at 545.
privacy and/or bodily integrity and the institution's security interest.\textsuperscript{112} The proper balance, under the Court's analysis, did not require probable cause.\textsuperscript{113} It did, however, preclude conducting searches "in an abusive fashion."\textsuperscript{114} Despite this extremely narrow interpretation of pretrial detainee Fourth Amendment rights, lower courts continued to find Fourth Amendment violations in the prison setting after \textit{Wolfish}.

In \textit{Hudson v. Palmer},\textsuperscript{115} however, the Supreme Court denounced the Fourth Amendment reasonableness analysis in the prison context. Palmer, an inmate at a state penitentiary in Virginia, filed a civil rights complaint alleging that his property had been destroyed during a shakedown search of his cell.\textsuperscript{116} The appellate court, following \textit{Wolfish}, held that prisoners had a limited privacy right against searches conducted solely to harass or humiliate.\textsuperscript{117}

In an opinion written by Chief Justice Burger, the Supreme Court reversed, holding that the Fourth Amendment does not apply within a prison cell:

\textit{[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.}\textsuperscript{118}

Calling prisons "volatile 'communit[ies],'" the Court explained that prison officials "must be ever alert to attempts to introduce drugs and other contraband into the premises . . . ; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize."\textsuperscript{119} Thus, the Court concluded, "the prisoner's expectation of privacy [must] always yield to what must be considered the paramount interest in institutional security."\textsuperscript{120}

The Court suggested that although the Fourth Amendment would not

\textsuperscript{112} \textit{Id.} at 559-60.
\textsuperscript{113} \textit{Id.} at 560.
\textsuperscript{114} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 520.
\textsuperscript{117} \textit{Id.} at 521.
\textsuperscript{118} \textit{Id.} at 526.
\textsuperscript{119} \textit{Id.} at 526-27.
\textsuperscript{120} \textit{Palmer,} 468 U.S. at 528.
offer any protection in a prison cell, inmates might find redress under the Eighth Amendment:

Our holding that [Palmer] does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against "cruel and unusual punishments."121

_Hudson v. Palmer_ has been criticized as a stunningly narrow view of the Fourth Amendment. It closed off any possibility of Fourth Amendment protection for prisoners' cells, leaving only the Eighth Amendment to protect against harassing or injurious searches. It left open, however, whether the Fourth Amendment would apply to more intrusive searches, such as body cavity searches.

The Eighth Amendment proscribes "cruel and unusual punishments."122 In the context of searches, two aspects of Eighth Amendment jurisprudence are applicable: excessive force and conditions of confinement.

The "core judicial inquiry"123 in deciding an excessive physical force claim is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."124 Factors in deciding "whether the use of force could plausibly have been thought necessary . . . or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur" include the extent of the inmate's injury, the need for force as compared to the amount of force used, the threat perceived by the official, and "any efforts made to temper the severity of a forceful response."125 De minimis uses of physical force, however,

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121. _Id._ at 530.
122. U.S. CONST. amend VIII.
124. _Id._ (recognizing standards set forth in _Whitley_ v. _Albers_, 475 U.S. 312, 320-21 (1986)).
125. _Id._ (quoting _Whitley_, 475 U.S. at 321). The Supreme Court explained: While _Estelle_ v. _Gamble_, 429 U.S. 97 (1976),] establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. That point underlies the ruling that "application of the deliberate indifference standard is inappropriate" in one class of prison cases: when "officials stand accused of using excessive physical force."
are excluded from constitutional recognition, "provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'"\textsuperscript{126} "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights."\textsuperscript{127}

Valid Eighth Amendment claims based on a prisoner's conditions of confinement must contain an objective component which alleges a sufficiently serious deprivation, and a subjective component which shows or indicates that the defendant was deliberately indifferent to this serious deprivation.\textsuperscript{128} The Supreme Court recently articulated the deliberate indifference standard applicable to a conditions-of-confinement claim in \textit{Farmer v. Brennan}:\textsuperscript{129}

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the 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. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it

\textsuperscript{126} See \textit{Hudson v. McMillian}, 503 U.S. at 6-7; see also \textit{Whitley, supra}, 475 U.S. at 320.] In such situations, where the decisions of prison officials are typically made "in haste, under pressure, and frequently without the luxury of a second chance," [\textit{Hudson, 503 U.S.}, at 6, 112 S. Ct., at 998 (quoting \textit{Whitley, supra, 475 U.S. at 320})], an Eighth Amendment claimant must show more than "indifference," deliberate otherwise. The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm," [503 U.S. at 6] or, as the Court also put it, that officials used force with "a knowing willingness that [harm] occur." [503 U.S. at 7]. Farmer v. Brennan, 511 U.S. 825, 836-37 (1994) (some citations omitted).

\textsuperscript{127} Hudson, 503 U.S. at 10 (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

\textsuperscript{128} Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.1973), \textit{cert. denied}, Employee-Officer John v. Johnson, 414 U.S. 1033 (1973). The lower courts have applied \textit{Hudson}'s de minimis standard to hold that some uses of force do not rise to the level of a constitutional violation. See Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that spraying of prisoner with fire extinguisher, which caused no injury, was de minimis); Olson v. Coleman, 804 F. Supp. 148, 150 (D. Kan. 1992) (finding that a single blow to prisoner's head by guard, which caused a contusion, was de minimis and not repugnant); Gabai v. Jacoby, 800 F. Supp. 1149, 1155 (S.D.N.Y. 1992) (holding that prisoner's allegation that guard pushed him into a chair, causing a bruise on his arm, was insufficient to state a claim of excessive force); Candelaria v. Coughlin, 787 F. Supp. 368, 374 (S.D.N.Y.1992), \textit{aff'd}, 979 F.2d 845 (2d Cir. 1992) (finding that prisoner's allegation that guard "pushed his fist into my neck so that I couldn't move and I was losing my breath" was de minimis).

\textsuperscript{129} See \textit{Del Raine v. Williford}, 32 F.3d 1024, 1034-35 (7th Cir. 1994).

\textsuperscript{128} 511 U.S. 825 (1994).
outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an 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.\footnote{130}

Thus, the Supreme Court has left open whether a Fourth Amendment reasonableness analysis, albeit limited by the fact of incarceration, should apply to bodily searches of prisoners. Searches of prison cells, however, clearly are subject only to the Eighth Amendment's proscription against cruel and unusual punishments. The next section illustrates the monkey wrench of cross-gender searches in the Court's prison-search jurisprudence.

C. Prisoner Privacy Under the Fourth and Eighth Amendments in the Context of Cross-Gender Searches

The right to privacy, though not explicit, is among the individual liberties protected by the Constitution.\footnote{131} The Supreme Court has deemed it "settled now . . . that the Constitution places limits on a State's right to interfere with a person's [bodily integrity]."\footnote{132} As discussed above, it appears that prisoners may retain some Fourth Amendment protection against bodily searches. As the Supreme Court has admitted, body cavity searches "instinctively give us the most pause."\footnote{133}

Nakedness, it seems, particularly triggers one's right to privacy: "One of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy."\footnote{134} Nakedness witnessed by a member of the opposite sex is even worse, or at least courts have recognized it as such.\footnote{135} Inmates have challenged,
and courts have analyzed, such searches under both the Fourth and the Eighth Amendments.

Of course, only unreasonable searches are prohibited by the Fourth Amendment. Thus, to determine the reasonableness of a given search, the court must balance the privacy interests of the prisoner against the legitimate penological interests of the institution. In this context, the interest of the prison generally is identified as providing equal employment opportunities to female correction officers. The Eighth Amendment, on the other hand, protects against cruel and unusual punishments. This appears to be a more onerous burden for the prisoner, particularly if the prisoner is a male, when challenging cross-gender searches.

In *Grummett v. Rushen*, prison inmates brought a class action alleging that the prison's policy of allowing female guards to view male inmates in states of partial or total nudity while dressing, showering, being strip searched, or using toilet facilities violated the inmates' privacy rights. The court determined that although the prison's policy regarding female guards' duties created a "great" potential "for female guards to view male inmates disrobing, showering, and using toilet facilities, the actual viewing is not frequent." The court agreed that the inmates had an "interest in not being viewed naked by members of the opposite sex," which "is protected by the right of privacy," but believed that the infrequency of actual viewing by female guards of nude male inmates precluded relief. "[T]he inmates have not demonstrated that these restricted observations by members of the opposite sex are so degrading as to require intervention by this court."

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137. 779 F.2d 491 (9th Cir. 1985).
138. *Id.* at 492-93.
139. *Id.* at 492.
140. *Id.* at 494.
141. *Id.* at 495. The court characterized the female guards' observation of male inmates as limited:

Female guards are not assigned to positions requiring unrestricted and frequent surveillance. Rather, the positions to which they are assigned require infrequent and casual observation, or observation at a distance. Female guards working the tiers walk past the cells routinely, but do not stop for prolonged inspection. When they are not walking down the tiers, their view of the inmates in their cells is circum-
In *Smith v. Fairman*, a prisoner challenged the prison's policy of allowing female guards to conduct pat-down searches of male inmates. The court first analyzed Smith's claim under the Eighth Amendment and found it lacking. Despite the "humiliating and degrading experience" of a pat-down search conducted by a member of the opposite sex, Smith's claim "clearly falls short of the kind of shocking, barbarious [sic] treatment proscribed by the Eighth Amendment." The court accepted the argument that although a prisoner "clearly has no ground on which he could challenge the mere fact that he was frisked," the fact that a female conducted the frisk changed the constitutional posture of Smith's claim. Nevertheless, the court found the prison's policy of instructing female guards to exclude a prisoner's genital area when conducting a pat-down was a sufficient accommodation of Smith's privacy right.

scribed by the cell bars and by the distance and angle of their stations. Likewise, the observations by the female correctional officers stationed on the gunrails overlooking the tiers and the yard areas are obscured by the angle and distance of their locations. Female guards do not accompany male inmates to the individual or gang showers, and are not stationed on the tiers where the showers are located. Females are assigned to the more distant gunrail position overlooking showers, where, again, the surveillance is obscured.

Id. at 494-95 (footnote omitted).

142. 678 F.2d 52 (7th Cir. 1982), cert. denied, 461 U.S. 907 (1983).
143. Id. at 53.
144. Id. The court stated:

For our present purposes we will assume that having to endure what is commonly referred to as a frisk or pat-down search could to some persons be a humiliating and degrading experience. Even so limited a search as this "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be taken lightly." To require one not only to submit to such a search, but to have it performed by a member of the opposite sex could well, for many people, only add to the feeling of degradation. Rational prison management should recognize this basic fact of human behavior and, where possible, respond accordingly.

Id. (quoting Terry v. Ohio, 392 U.S. 1, 13, 17 (1968)) (citations omitted).

145. Id.
146. *Fairman*, 678 F.2d at 54.
147. Id. at 54-55.
148. Id. at 55. The court continued:

While plaintiff evidently finds even this limited touching by a person of the opposite sex to be offensive, we do not read the Constitution so broadly. As Judge Frankel aptly noted in *United States ex rel. Wolfish v. Levi*:

> [this]subject lies . . . in a sector of the community's mores where the state of flux is uniquely notable. . . .

> In the last analysis . . . the overriding facts may well be the phenomena of uncertainty and change. And these counsel a tentative and gingerly approach
In *Hudson v. Goodlander*, once again a male inmate complained that his privacy right was violated when female correctional officers viewed him using the toilet, undressing, and showering. The prison had issued a policy that “all female Correctional Officers will be assigned to all officer posts,” but also had directed that the policy “should not be interpreted to mean that female Correctional Officers must be assigned to inmate housing areas on a regular basis.” The court found that even the “infrequent assignment” of female guards to posts at which they might observe nude or partially nude male inmates created “literally hundreds of opportunities for incidents such as those complained of by plaintiff.” As a result, the court concluded, the plaintiff’s constitutional right to privacy was violated. The court granted the plaintiff injunctive relief, ordering the prison to exclude female guards from some areas.

At least one district court has bucked this trend, only to be reversed by the court of appeals. In *Canedy v. Boardman*, Canedy, a male inmate, raised a typical Fourth Amendment right to privacy challenge to female guards’ daily observation of male inmates dressing, sleeping, showering, and using toilet facilities, as well as a female guard’s participation in a strip search of Canedy. The district court dis-
missed the complaint for failure to state a claim, employing the balancing prescribed by the Supreme Court in *Bell v. Wolfish*:\(^{158}\)

I find it problematic to impose the condition of inadvertency or infrequency or randomness upon observations by guards of the opposite sex. As much as I can empathize with the dehumanization suffered by individuals who are confined to penal institutions and forced to surrender nearly every aspect of the privacy treasured in our society, I cannot accept the premise that the difference between being viewed by a prison official of one sex rather than the other is significant enough to warrant limitations on the employment opportunities of correctional officers of the opposite sex. When that differential in privacy is weighed against the rights of present and prospective prison officials to fair and equal employment opportunities, it is too light to tip the scales in favor of the inmate.\(^{159}\)

The United States Court of Appeals for the Seventh Circuit reversed, stating:

[Canedy's] complaint can fairly be read to allege that he has

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for a complete shakedown. There were ten or twelve officers present in front of cells one through six. Two female officers were in front of cells four and five.

Defendant Radtke ordered the strip search of the prisoners in unit #2. Plaintiff was stripped by a male officer and by defendant Boardman, who is female. Plaintiff was stripped nude and defendant Boardman saw his genitals. This event robbed petitioner of his elementary self-respect and personal dignity, and caused him embarrassment, humiliation, and mental distress. There was no need to have a female participate in the strip search because there were ten male officers present. Defendants knew that an inmate should not be strip searched in the presence of officers of the opposite sex.

On several occasions, plaintiff has written an inmate complaint about this incident. In the last complaint, #327-92, defendant Bell stated that "this is not a violation of any code or law." However, Wis. Admin. Code § DOC 306.16(7) states that a visual body inspection shall be conducted by a person of the same sex to preserve the dignity of the inmate.

Female officers observe male inmates in various states of undress and nudity daily, while the inmates dress, sleep, shower, and use toilet facilities. This creates a feeling of embarrassment and humiliation for the inmates.

Defendant Endicott knows these invasions of privacy occur and allows them to continue happening on a daily basis even though defendant Endicott has the power to make policies and enforce existing rules that would prohibit some of these infringements on prisoners' privacy. Defendant Bell's job is to protect inmates' rights, but he allows these deprivations to happen.

*Id.* at 255.

158. 441 U.S. 520, 559 (1979) ("The test for reasonableness under the Fourth Amendment . . . requires balancing of the need for the particular search against the invasion of personal rights that the search entails.").

been subject to strip searches by female prison guards, and that no effort has been made to accommodate his privacy interests with the prison’s legitimate interests in security and providing equal employment opportunity. The district court nonetheless dismissed the suit, apparently concluding that in light of the need to allow female guards “to observe male prisoners and conduct searches just as male officers would,” no such accommodation is necessary . . . .

But where it is reasonable—taking account of a state’s interests in prison security and in providing equal employment opportunity for female guards—to respect an inmate’s constitutional privacy interests, doing so is not just a palliative to be doled out at the state’s indulgence. It is a constitutional mandate.60

The usual prisoner case involving a female guard, then, is an allegation of a violation of a male inmate’s privacy right based on a female guard viewing or touching the inmate while he was at least partially nude. Most courts which have addressed the issue were persuaded that such a search implicated the Fourth Amendment’s protection against unreasonable searches. Other courts have analyzed claims involving cross-gender searches under both the Fourth and Eighth Amendments; at least one has restricted its analysis of such a claim to the Eighth Amendment’s proscription against cruel and unusual punishments. Additionally, some courts have suggested that a correction officer’s—male or female—abuse of authority during a bodily search may constitute a violation of the right to privacy under either the Fourth or Eighth Amendment.61

IV. THE INTERSECTION OF PRISONER PRIVACY AND FEMALE CORRECTIONAL OFFICERS—ISSUES UNDECIDED

As the court in Johnson v. Phelan62 recognized, women’s employ-

160. Canevy v. Boardman, 16 F.3d 183, 188 (7th Cir. 1994) (emphasis in original).
161. See Michenfelder v. Sumner, 860 F.2d 328, 332 (9th Cir. 1988) (“The Court [in Bell v. Wolfish] obviously recognized that not all strip search procedures will be reasonable; some could be excessive, vindictive, harassing, or unrelated to any legitimate penological interest.”); Goff v. Nix, 803 F.2d 358, 365 n.9 (8th Cir. 1986), cert. denied, 484 U.S. 835 (1987) (“[V]erbal harassment [by guards while conducting otherwise valid bodily searches] is unacceptable. It is demeaning and bears no relationship to the prison’s legitimate security needs . . . .”); Grummet v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (taking into account fact that “the female guards have conducted themselves in a professional manner”); Johnson v. Pennsylvania Bureau of Corrections, 661 F. Supp. 425, 435 (W.D. Pa. 1987) (considering fact that “the female guards have never abused the situation” of occasionally viewing nude male inmates).
ment rights under Title VII limit prisoners' claims to privacy in cases of cross-gender searches. "Unless female guards are shuffled off to back office jobs, itself problematic under Title VII, they are bound to see the male prisoners in states of undress. Frequently. Deliberately. Otherwise they are not doing their jobs." The extent of Title VII's limitation on prisoner privacy, however, is less than clear, in part because of the existing judicial disagreement on the delineation of prisoners' right to privacy.

A. Which Standard?

As evidenced by the cases discussed above, the Fourth Amendment is the basis of choice for the majority of published opinions dealing with male prisoner complaints against female correction officers. Most courts have agreed that inmates possess a privacy right against being viewed or touched, while nude or partially nude, by guards of the opposite sex. Some have directed prisons to implement policies protecting against the likelihood that a female guard will view a male prisoner while he is nude. Nevertheless, at least one court has indicated that the proper basis for analysis is the Eighth Amendment. Because of the differing standards, which amendment—the Fourth or the Eighth—underpins prisoners' rights against cross-gender searches is key to both the result of the individual case and the broader implications of prisoner privacy on employment issues.

Recently, in Johnson v. Phelan, the Seventh Circuit instructed that prisoner "privacy" claims properly are categorized as invoking the Eighth Amendment's proscription of cruel and unusual punishments. Albert Johnson complained that female guards at the Cook County Jail monitored male prisoners' movements, and could see the prisoners naked in their cells, the showers, and the toilets. The district court had dismissed Johnson's complaint for failure to state a claim upon which

163. Indeed, the court recognized that cross-sex prisoner monitoring "reduces the need for prisons to make sex a criterion of employment, and therefore reduces the potential for conflict with Title VII and the equal protection clause." Id. at 147.
164. Id. at 146.
165. Because the focus of this Article is on prisoner complaints involving female correction officers, we will examine complaints brought by male inmates. Similar claims involving male guards have been brought by female prisoners. See, e.g., Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (en banc); Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980).
166. 69 F.3d at 144.
167. Id. at 147.
168. Id. at 145.
relief may be granted. 169 The Court of Appeals for the Seventh Circuit stated that in light of its decision in Canedy v. Boardman, 170 Johnson’s argument merited discussion: “Our case involves visual rather than tactile inspections, and we must decide whether male prisoners are entitled to prevent female guards from watching them while undressed.” 171

In holding that prisoner privacy claims are governed by the Eighth rather than the Fourth Amendment, the Seventh Circuit noted simply that in Hudson v. Palmer, 172 the Supreme Court held that prisoners do not retain any right to privacy under the Fourth Amendment. 173 “[P]rivacy is the thing most surely extinguished by a judgment committing someone to prison. Guards take control of where and how prisoners live; they do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life.” 174 The court accordingly limited its holding in Canedy:

Anonymous visual inspections from afar are considerably less intrusive and carry less potential for “the unnecessary and wanton infliction of pain.” To the extent incautious language in Canedy implies that deliberate visual inspections are indistinguishable from physical palpitations, its discussion is dictum. Further reflection leads us to conclude that it should not be converted to a holding. 175

Finding no evidence of punishment, the court concluded that the district court was correct in dismissing Johnson’s claim:

The fourth amendment does not protect privacy interests within prisons. Moving to other amendments does not change the outcome. Cross-sex monitoring is not a senseless imposition. As a reconciliation of conflicting entitlements and desires, it satisfies the Turner standard. It cannot be called “inhumane” and therefore does not fall below the floor set by the objective component of the eighth amendment. 176

169. Id.
170. 16 F.3d 183 (7th Cir. 1994).
171. Johnson, 69 F.3d at 145.
173. Johnson, 69 F.3d at 146.
174. Id.
175. Id. at 148.
176. Id. 150-51. Chief Judge Posner concurred and dissented with the majority’s opinion in Johnson. First noting the existing confusion caused by references to prisoners’ “right to privacy” and analysis under the Fourth Amendment, Judge Posner agreed that the Eighth Amendment governed Johnson’s claim. Judge Posner made clear, however, that in his view, the Eighth Amendment “requires . . . that reasonable efforts be made to prevent frequent,
Despite the Seventh Circuit's sensible (in light of Supreme Court case law) conclusion that prisoners do not retain any privacy rights under the Fourth Amendment (with the possible exception of body-cavity searches), several courts continue to examine prisoner privacy claims under the Fourth Amendment, as discussed above. As the differing holdings in Canedy and Johnson hint, whether a prisoner's privacy claim is analyzed under the Fourth or the Eighth Amendment very well may affect the court's outcome. The Eighth Amendment's subjective requirement of deliberate indifference will preclude claims otherwise viable under the Fourth Amendment's objective "reasonableness" standard. Judicial disagreement over the correct constitutional standard thus confuses the boundaries of prisoner privacy.

The recent amendments to the Civil Rights of Institutionalized Persons Act increase the importance of the applied standard. Under the newly enacted amendments, prisoners must exhaust their administrative remedies before bringing section 1983 claims regarding "prison conditions." Further, prisoners may not bring such an action "for mental or emotional injury suffered while in custody without a prior showing of physical injury." Because "prison conditions" appear to be defined broadly, it is likely that these new limitations will apply to "privacy" (actually conditions of confinement) claims analyzed under the Eighth Amendment. The limitations will have the effect of decreasing the number of prisoner claims under section 1983, and thus lessening the potential liability of prisons for instituting cross-gender searches. However, if the court chooses to analyze a prisoner's privacy claim involving a cross-gender search under the Fourth Amendment, the Act's physical-injury limitation might be sidestepped.

B. Tactile v. Visual Searches

The Johnson court recognized a difference between tactile and visual intrusions on prisoner privacy, and even went so far as to suggest that cross-gender visual searches do not violate the Eighth Amendment:

How odd it would be to find in the eighth amendment a right

deliberate, gratuitous exposure of nude prisoners of one sex to guards of the other sex." Id. at 155 (Posner, C.J., concurring and dissenting).

177. See also, e.g., Tracy McMath, Comment, Do Prison Inmates Retain Any Fourth Amendment Protection From Body Cavity Searches?, 56 U. CIN. L. REV. 739 (1987).
not to be seen by the other sex. Physicians and nurses of one sex routinely examine the other. In exotic places such as California people regularly sit in saunas and hot tubs with unclothed strangers. Most persons' aversion to public nudity pales compared with the taboo against detailed inspections of body cavities, yet the Court found no constitutional obstacle to these in *Wolfish*; the Constitution does not require prison managers to respect the social conventions of free society. Drug testing is common, although this often requires observation of urination. More to the point, the clash between modesty and equal employment opportunities has been played out in sports. Women reporters routinely enter locker rooms after games. How could an imposition that male athletes tolerate be deemed cruel and unusual punishment?181

Although other courts have found that the Constitution forbids deliberate cross-gender monitoring in prisons, most courts have analyzed these claims under the Fourth Amendment.182 Under *Hudson v. Palmer*,183 however, this analysis is likely incorrect. Any Fourth Amendment rights retained by prisoners should apply only to tactile bodily searches. How (and whether) this last bastion of the Fourth Amendment in prisons will play out depends on courts' willingness to restrict or expand the hole *Hudson* left.

As a rule, visual searches will not cause physical injury, thus precluding recovery for mental or emotional injury under the amendments to the Civil Rights of Institutionalized Persons Act.184 Thus, cross-gender visual searches may become a moot consideration in terms of potential liability for prisons.

C. Gender Neutral or Gender Specific?

In cross-gender, clothed-body searches of inmates, the issue remains ambiguous as to whether a gender-specific or gender-neutral standard will be applied to alleged constitutional violations. Prior case law suggests that prisoners' legitimate rights to privacy—to be free from unnecessary searches of their private body areas by guards of the opposite sex or to have their naked bodies exposed unnecessarily to guards of the opposite sex—is extremely limited, and although the issue of gender is a consideration, it is not a deciding factor. The constitu-

181. *Johnson*, 69 F.3d at 148 (citations omitted).
184. See supra notes 174-76 and accompanying text.
tional questions have concerned the invasiveness of the cross-gender search, the manner in which it was conducted, and the necessity of the search.

For example, in *Smith v. Fairman*, the court held that allowing female prison guards to conduct pat down searches of male inmates, excluding the genital area, was constitutional. A male inmate objected to a clothed-body search by a member of the opposite sex. He alleged "that in conducting such a search, a female guard would place her hands on his neck, back, chest, stomach, waist, buttocks, and the outside of his thighs and legs." He asserted that "having female guards conduct such searches was totally unnecessary and was intended to degrade and humiliate male inmates." Furthermore, the inmate claimed that "requiring him to submit to such a search constituted cruel and unusual punishment . . . ."

The court did not agree that a pat down search of a male inmate by a female guard, excluding the genital area, was offensive to the Constitution, concluding that "requiring the plaintiff to submit to a limited frisk-type search by a female guard infringes upon no right guaranteed by the Constitution." In *Grummett v. Rushen*, the court ruled that pat down searches, including the groin area, of male prisoners by women guards do not violate the Fourth Amendment simply because a correctional officer of the opposite gender conducts such a search. The searches were non-invasive since they did not involve intimate contact with an inmate's body. In *Michenfelder v. Sumner*, the court found that occasion-

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185. 678 F.2d 52 (7th Cir. 1982).
186.  Id. at 53. The court recognized that the female guards did not conduct full searches but merely patted down the clothing over the inmate's neck, back, stomach, arms, and legs. They were given explicit instructions not to search the genital area. In addition, all correctional officers were instructed to conduct these searches in a polite, dignified manner and to avoid degrading or humiliating the inmate.
187.  Id.
188.  Id. at 53.
189.  Id.
190.  Id.
191.  Id. at 55.
192.  779 F.2d 491 (9th Cir. 1985).
193.  Id. at 491, 496. The Court found the pat down searches conducted by the female guards were not so offensive as to be unreasonable under the Fourth Amendment. *Id.* The searches were done briefly and while the inmates were fully clothed and thus did not involve contact with the inmates' bodies. *Id.* The record indicated that the searches were performed by the female guards in a professional manner and with respect for the inmates. *Id.*
194.  Id. at 495.
al visual strip searches by female guards do not violate the Fourth Amendment. Plaintiff alleged that he experienced some embarrassment “through a strip search by female officers.” The conclusion was that embarrassment alone because of casual observations by others does not offend the Constitution. The courts have recognized the momentary degradation and humiliation of frisk and pat down searches as a violation of inmate privacy. In previous rulings, a gender-neutral standard has been applied in which there is no discussion of the differing histories, perspectives, and experiences of male and female inmates and their relationship to the allegations of humiliation, degradation, and pain during and after cross-gender searches.

However, in at least one instance, a court has adopted a different standard in its evaluation of whether a prison security policy evinced the “unnecessary and wanton” infliction of pain for cruel and unusual punishment in cases concerning cross-gender searches. This standard has been termed “gender specific” because of its focus on the differing perceptions and experiences of women with regard to sexuality and abuse. Accordingly, these unique perceptions and experiences may trigger the cruel and unusual punishment clause protections under different prison conditions.

In Jordan v. Gardner, inmates at the Washington Corrections Center for Women (WCCW) challenged a policy which mandated that both male and female guards conduct random clothed-body searches of inmates. The district court held that the cross-gender searches at WCCW violated the First, Fourth, and Eighth Amendment rights of the women inmates. Although a panel of the Ninth Circuit reversed the district court on appeal, the Ninth Circuit sitting en banc upheld the district court’s conclusion that the cross gender policy at WCCW constituted cruel and unusual punishment in violation of the Eighth Amendment. The court’s findings of fact concerned the effects of cross-gender clothed-body searches on the women inmates.

195. 860 F.2d 328 (9th Cir. 1988).
196. Id. at 334.
197. Id. at 333.
198. Id. at 333-34.
200. Id. at 105.
201. Jordan v. Gardner, 986 F.2d at 1521, 1522 (9th Cir. 1993).
202. Jordon v. Gardner, 953 F.2d 1137 (9th Cir. 1992), vacated and superseded, 986 F.2d. 1521 (9th Cir. 1993).
At issue was the constitutionality of a search policy which permitted random cross-gender pat down searches of women inmates in order to control the flow of contraband within the prison. During the so-called “pat” search, a guard is to “[u]se a flat hand and pushing motion across the [inmate’s] crotch area.” The guard must “[p]ush inward and upward when searching the crotch and upper thighs of the inmate. All seams in the leg and the crotch area are to be squeezed and knead[ed].” Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be “flattened.”

The court observed that the intrusive, probing nature of the searches permit “men in positions of ultimate authority to flatten the breasts of women who are powerless and totally subject to their control . . . .” The policy was referred to as “offensive in the extreme to all women, regardless of their prior sexual history” and thus even inmates who did not have a history of sexual abuse would suffer similar substantial psychological harm. A gender-specific standard was apparent in the court’s consideration of the psychological impact of the cross-gender search on the women. The testimony of the women inmates and ten experts characterized the psychological impact of forced submission by male guards. Furthermore, the court considered the history of sexual abuse reported to WCCW counselors:

The record in the case, including the depositions of several inmates . . . , describes the shocking background of verbal, physical, and, in particular, sexual abuse endured by many of the inmates at WCCW. For example, one inmate, who gave live trial testimony, described rapes by strangers (twice) and by husbands or boyfriends. She was also beaten by various men in her life; two deprived her of adequate food; one pushed her out of a moving car. Her story is not particularly unique. Eighty-five percent of the inmates report a history of such abuse to WCCW counselors, including rapes, molestations, beatings, and slavery.

Several inmates were subjected to the searches on the day the policy

204. Id. at 1145 (citations omitted).
205. Jordan, 986 F.2d at 1540.
206. Id. (emphasis in original).
207. Id. at 1525-26.
208. Jordon, 953 F.2d at 1146.
was implemented. One, who had a long history of sexual abuse by men, unwillingly submitted to the cross-gender, clothed-body search and suffered severe distress: she had to have her fingers pried loose from the bars she had grabbed during the search, and she vomited later after returning to her cell block.\textsuperscript{209} The court was satisfied that the constitutional standard for a finding of "pain" was met.\textsuperscript{210} The court distinguished prior case law on the basis of the longer lasting psychological pain experienced by the women inmates at WCCW. Referring to \textit{Grummett v. Rushen}, the court asserted that the male inmates had not shown sufficient pain or likelihood of psychological trauma as a result of searches to make out a cognizable Eighth Amendment claim.\textsuperscript{211} The frequency and scope of the searches in \textit{Grummett} and \textit{Michenfelder} were significantly less invasive than the search at issue here.

Deliberate indifference to the possibility of psychological pain was also demonstrated by the actions of the warden. Despite warnings from psychologists on his staff that the cross-gender searches could cause severe psychological stress in some female inmates, the warden still implemented the policy.\textsuperscript{212} The court decided that the infliction of psychological pain on female inmates was "wanton" for Eighth Amendment purposes when prison officials acted with deliberate indifference to the harm such searches were likely to cause by implementing the search policy despite warnings regarding its effect on inmates.\textsuperscript{213} Furthermore, the cross-gender policy was developed over time, with ample opportunity for reflection.\textsuperscript{214}

Hence, in \textit{Jordan v. Gardner}, the court implicitly applied a gender-specific analysis in its evaluation of the pain inflicted by the cross-gender, clothed-body search from the perspective of women inmates. One commentator contends that this gender-specific standard should be adopted in determining whether cross-gender, clothed-body searches constitute an objectively cruel and unusual condition of confinement:

If one accepts the basic assumption that the cognitive perceptions of men and women sometimes differ and recognizes the fact that the experience of incarceration is different for men and women, the importance of building gender into the standard for the objective part of the test for cruel and unusual punishment in

\begin{itemize}
  \item \textsuperscript{209} \textit{Jordan}, 986 F.2d at 1523.
  \item \textsuperscript{210} \textit{Id.} at 1526.
  \item \textsuperscript{211} \textit{Id.}
  \item \textsuperscript{212} \textit{Id.} at 1523.
  \item \textsuperscript{213} \textit{Id.} at 1527-28.
  \item \textsuperscript{214} \textit{Id.} at 1528.
\end{itemize}
conditions of confinement becomes clear. Without recognizing these differences, the test is not truly "objective." In fact, an inquiry that fails to account for the differences between the sexes turns out, in our society, to be based on male experiences and to thus lose its objectivity. Without building into the standard the perceptions of both men and women, the standard is tailored for when a man perceives that conditions of confinement such as cross-gender searches have become cruel, without regard to when a woman perceives that the treatment has crossed the line.215

The standard should focus on gender so that no one in the prison system, regardless of gender, is treated in a way that is cruel and unusual.216 Whether Jordan v. Gardner is a portend for future cases concerning cross-gender searches of inmates remains an unresolved issue.

D. Impact on Employment Rights of Corrections Officers

Women clearly have obtained the right to work in men's prisons. Prior to 1972, virtually no women worked as correctional officers in male prisons; today, women supervise male inmates in every state and federal prison, as well as in most county institutions.217 Title VII provided entry to employment in men's prisons. Courts have held that gender is not a bona fide occupational qualification which precludes women from working in all-male facilities. In Dothard v. Rawlinson,218 the Supreme Court struck down institutional barriers in the form of height and weight requirements which excluded over forty-one percent of the female population and less than one percent of the male population from employment as a correctional officer.219 The showing of disparate impact of the height and weight standards on women based on national statistics sufficed to make out a prima facie case of employment discrimination.220

Although the courts have established the right of women to work in correctional employment, women have no guarantee of equal assignment and opportunity once hired. There is still considerable legal ambiguity with regard to equality in job assignments. Courts have been inconsistent and ambiguous in their rulings regarding the assignments of women

215. See Krim, supra note 200, at 105.
216. See id. at 89.
219. Id. at 329-30.
220. Id. at 331.
guards in relation to inmate privacy. The assignment to certain posts in men's prisons which do not involve direct inmate contact positions largely have been justified by administrators as necessary to protect inmate privacy. The courts have directed the prison administration to strike a balance between the equal employment rights of women correctional officers and the privacy rights of inmates. The resulting conflict between these competing interests generally has been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the women guards. For example, in *Gunther v. Iowa State Men's Reformatory*, the court questioned the validity of claims made by prison administrators that they could not adjust assignments so that women could qualify for CO II positions in non-privacy areas because it would be economically and administratively unsound and unfair to male co-workers. Job assignment adjustments within the facility in the past had not undermined the prison’s goals or essential functions. The court asserted that adjustments could be made without jeopardizing privacy rights of prisoners or disrupting efficient management or core goals.

Similarly, in *Harden v. Dayton Rehabilitation Center*, the court was unable to find that job reassignment would undermine the "essence of the job." The defendants were urged to make accommodations that would reconcile the competing interests of inmate privacy and equal employment opportunities for the women guards. Courts have suggested reorganization of prison assignments so that some assignments would be free of privacy-invading duties and the provision of privacy screens or barriers for inmates while engaged in intimate activities.

In other rulings, the courts appear to favor the equal employment rights of women correctional officers over prisoner privacy. In *Grummett v. Rushen*, the court ruled in favor of the women's employment rights and against the privacy claims of inmates. The court asserted that to "restrict the female guards from positions which involve occasional viewing of the inmates would necessitate a tremendous rearrangement of work schedules, and possibly produce a risk to both internal security

222. Id. at 957.
223. Id.
224. Id.
227. 779 F.2d 491 (9th Cir. 1985).
needs and equal employment opportunities for the female guards.\textsuperscript{228} In another case, \textit{Smith v. Fairman},\textsuperscript{229} the court recognized that the state had a strong interest in avoiding sex discrimination in its hiring practices at the prison. In light of this interest and given the limited scope of the search, the court concluded that allowing female officers to perform the search did not violate the plaintiff’s constitutional rights.\textsuperscript{230}

Professor Zimmer suggests that the \textit{Grummett} decision might be seen as the beginning of the erosion of prisoner rights and an expansion of women’s rights to equal assignments in the prison.\textsuperscript{231} The meaning of this subtle judicial shift toward the recognition of the interests of women guards to be treated fairly in the workplace, which includes equality in job assignments, is unclear. Whether case law signals a legal climate in which women’s rights to equal work opportunities will be safeguarded is also unclear. The different court rulings create confusion for prison administrators in the interpretation and implementation of job assignment policies within their prisons. Without a definitive and protective stance from the courts, female correctional officers will continue to experience discrimination and opposition in their work assignments, and prison administrators will remain reluctant to deploy and treat women on an equal basis with men.

V. CONCLUSION

Court decisions regarding prisoner privacy and cross-gender searches are all over the board, making it difficult for prison management to accurately take into account any potential liability and act accordingly. The failure of courts to analyze prisoner privacy claims uniformly has effectively limited employment opportunities for female correctional officers.

When Supreme Court precedent and federal law are read sensibly, however, the correct standards emerge. The vast majority of claims of prisoner “privacy” involving cross-gender searches, both visual and tactile, likely should be analyzed under the Eighth Amendment’s protection against cruel and unusual punishment. The settled requirements for Eighth Amendment claims, as well as the newly amended Civil Rights of Institutionalized Persons Act, will preclude prison liability in most cases, but will continue to protect prisoners from abusive practices.

\textsuperscript{228} Id. at 496.
\textsuperscript{229} 678 F.2d 52 (7th Cir. 1982).
\textsuperscript{230} Id. at 53.
\textsuperscript{231} Zimmer, supra note 218, at 61.
If a court decides to apply the Fourth Amendment's reasonableness standard in a particular case, it should be careful to square its analysis with existing law. Further, courts should take into account the differing experiences and perceptions of male and female prisoners when evaluating the harm of cross-gender searches. Most importantly, however, courts must be conscious of the effect of their rulings on women's employment rights.

It is up to the courts to take a more careful and reasoned approach to prisoner privacy claims. Appellate courts should follow the lead of the Seventh Circuit and state in no uncertain terms the applicable law. Only when some degree of uniformity is achieved will prisons be able to conform to the applicable standards. Uncertainty over potential liability encumbers prison management and compromises women's employment rights.