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Martin A. Geer

University of Nevada, Las Vegas -- William S. Boyd School of Law

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PROTECTION OF FEMALE PRISONERS: DISSOLVING STANDARDS OF DECENCY

MARTIN A. GEER*

Prisoners are persons whom most of us would rather not think about.

Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness.¹

Nearly every woman . . . interviewed reported various sexually aggressive acts of guards.²

Policies that permit unsupervised male guards to search and monitor in female prisoner housing units have been identified as a primary cause of the high degree of incidences of abuse in U.S. prisons.³

A present day Tocqueville⁴ might ask, “Just how did the right of equal employment opportunity for females, who have been historically discriminated against in the corrections workplace come to justify the placement of male officers in the housing units and shower rooms of female inmates?”

* Acting Clinical Director and Clinical Professor of Law, University of Nevada-Las Vegas, William S. Boyd School of Law. My gratitude to Deborah Labelle, Jennifer Sandoval, and Paloma Belmarez-Gordon for their assistance and to the Boyd School of Law for its support of my participation in this symposium.

1. O’Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

2. HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 236-37 (1996) (quoting letter from General Deval Patrick, U.S. Assistant Attorney General, U.S. Department of Justice, to John Engler, Governor, Michigan (March 27, 1995)), available at http://hrw.org/reports/1996/Us1.htm#_1_148. The letter was written during a Department of Justice investigation on the treatment of women prisoners in Michigan. *Id.*

3. Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law - A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 111 (2000).

4. One of the primary purposes of Tocqueville’s famous observations of the United States was to study the U.S. prison system practices and their application in France. MAX LERNER, INTRODUCTION TO ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, at xxv, xxix (J.P. Mayer & Max Lerner eds., George Lawrence, trans., Harper & Row 1988) (1835).

Almost fifty years ago, the United Nations set standards that reached international consensus and limited male correctional employees' activities in female inmate residences:

1. 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 women unless accompanied by a woman officer.
3. Women prisoners shall be attended and supervised only by women officers.⁵

In 1971 and 1973, the United Nations passed resolutions urging member states to employ all possible efforts to incorporate these standards into their domestic legislation.⁶ In 1975, the United States indicated substantial compliance with the basic principles and implementation of these standards.⁷ As late as 1980, U.S. courts noted that both the federal and state governments had generally adopted these standards.⁸ At the same time, Federal Bureau of Prison policies specifically directed that “[n]aturally, admission for women should be completely separate from that for men and should be conducted by female staff members” and, “if difficulties are to be avoided,” “all supervision of female prisoners must be by female employees,” and further that “male employees must be forbidden to enter the women’s section unless they are accompanied by the matron.”⁹

These restrictions were of particular importance to women prisoners. It is well documented that female prisoners who are particularly vulnerable, are traumatized by unwanted touching, assault,

5. *United Nations Minimum Standard Rules for Treatment of Prisoners*, E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *revised by* U.N. Doc. E/5988 (1977).

6. G.A. Res. 2858, 26 U.N. GAOR Supp. 29, at 94, U.N. Doc. A/8588 (1971); G.A. Res. 3144, 28 U.N. GAOR Supp. 30, at 85, U.N. Doc. A/9425 (1973).

7. *See Working Paper Prepared by the Secretariat*, Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Annex 1, Agenda Item 4 at 120-21, U.N. Doc. A/CONF. 56/6 (1975).

8. *See Sterling v. Cupp*, 625 P.2d 123, 131 (Or. 1981); *Lareau v. Manson*, 507 F. Supp. 1177, 1189 n.9 (D. Conn. 1980) (noting Connecticut’s adoption of the United Nation’s standards).

9. *Sterling*, 625 P.2d at 621 (quoting UNITED STATES BUREAU OF PRISONS, *THE JAIL: ITS OPERATION AND MANAGEMENT* 19, 71-72 (1971) (emphasis added)). The court also noted that “issues of . . . embarrassment and indignity arising from sexual differences traditionally have been stated with a view of the rights of female prisoners.” *Id.*

harassment, and invasion of their physical privacy and integrity.¹⁰ Female prisoners generally differ from their male counterparts in their history of victimization by men in positions of authority outside the prisons and in the incidences of cross-gender sexual assaults by correctional officers.¹¹ Despite this population's history and international legal standards, there was a significant turn around in penology. The resulting cross-gender supervision for housing units and body searches became the norm in the United States.

How did U.S. penal systems transpose themselves from the benign protectors of the modesty and dignity of female prisoners from the intrusions of male staff, to administering the present day correctional systems that generally permit cross-gender body searches and housing unit supervision in female prisons?

The dramatic shift was relatively rapid, although legally complex. The transition in cross-gender supervision policies must be viewed in its political and legal context to avoid the common pitfalls of abstractions in legal scholarship. Such analyses are a primary benefit of this journal's multi-disciplinary approach to legal-social problems.

Our inquiry begins by looking at the last quarter century, when we witnessed the assertion of employment rights by the increasing number of female correctional officers within the booming corrections economy.¹² The historical preclusion of female correctional officers in male housing units was a significant obstacle in the hiring and promotion of women.¹³ The relatively small number of women's penal facilities, and the corresponding employment positions for women, precluded equal employment opportunities for female

10. See *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993); Nicole Hahn Rafter, *Even in Prison, Women are Second-Class Citizens: Through a Series of Lawsuits, Women Inmates are Forcing us to Confront Basic Inequalities in the American Justice System*, 14 HUMAN RIGHTS 28, 30 (1987).

11. With all due respect to Dr. Kerle and his remarks, I characterize the problems at issue to be much more significant than protecting departments of corrections from lawsuits arising out of "sexual shenanigans" between staff and inmates. See Dr. Kenneth Kerle, *Women in the American World of Jails: Inmates and Staff*, 2 MARGINS 41, 58 (2002). In most states, these "shenanigans" are criminal rape. See generally Brenda V. Smith, *Sexual Abuse Against Women in Prison*, 16 CRIMINAL JUSTICE 30, 34 (2001). In 1990, only ten states and the federal government made sexual interaction between inmates and staff a crime. *Id.* As of 2001, forty-four states criminalized these activities. *Id.* Due to the coercive relationship, "consent" is generally not a defense. *Id.* The problems in the criminal prosecution of these cases are discussed. *Id.*

12. See, e.g., *Griffin v. Mich. Dep't of Corr.*, 654 F. Supp. 690 (E.D. Mich. 1982) (noting the growing practice in state and federal corrections systems permitting female officers in male prisoner housing units).

13. *Id.* at 704.

officers.¹⁴ When prison administrators declined to voluntarily change long-standing policies prohibiting female officers from employment in male prisoner housing units, the women went to court.¹⁵

In 1977, the U.S. Supreme Court addressed a female correctional officer's right to work in male housing units. In *Dothard v. Rawlinson*,¹⁶ the Court reviewed the make-up of the male prisoner population. It found that twenty percent of the male prisoners had a history of sexual assault.¹⁷ The Court held that gender-based restrictions that prohibit female officers from holding 'contact' positions with male prisoners were within the *bona fide* occupational qualification (BFOQ) exception in Title VII.¹⁸ The justification for these discriminatory practices against women was primarily based on the substantial security problems directly linked to the sex of the prison guard.¹⁹ Despite this ruling, women correctional officers continued to sue throughout the country. This litigation fueled significant breakthroughs by female correctional staff in gaining employment opportunities in male prison facilities.²⁰ The extensive post-*Dothard* litigation concerning cross-gender supervision and gender-based employment rights in the custodial context can be placed into three categories delineated by the following tables.

14. *Id.* See also 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, 100 (1995).

15. See *Griffin*, 654 F. Supp. at 690; John Dwight Ingram, *Prison Guards and Inmates of Opposite Gender: Equal Employment Opportunity Versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3 (2000).

16. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Alabama maintains a prison system where violence is rampant and a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners. *Id.* at 334-35. The use of women guards in 'contact' positions in the maximum security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard. *Id.* at 335-36.

17. *Id.* at 335.

18.

Notwithstanding any other provision of this subchapter, (1) it 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 or enterprise

42 U.S.C. § 2000e-2(e) (2000).

19. *Dothard*, 433 U.S. at 336.

20. See *Johnson v. Penn. Bureau of Corr.*, 661 F. Supp. 425 (W.D. Pa. 1987); *Griffin v. Mich. Dep't of Corr.*, 654 F. Supp. 690 (E.D. Mich. 1982); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983).

TABLE I — INCARCERATED WOMEN AND CROSS-GENDER SUPERVISION

Circuit	Case Name and Citation	Holding
First	<i>Blackburn v. Snow</i> 771 F.2d 556 (1st Cir. 1985)	Any inquiry into the constitutionality of security measures begins with the premise that prison administrators are given wide-ranging deference in the execution of policies and practices that in their judgment are needed to preserve institutional security. <i>Id.</i> at 562. The court then held that the strip search conducted on a prison visitor violated the visitor's rights in the absence of a legally cognizable consent. <i>Id.</i> at 569.
Second	<i>Forts v. Ward</i> 621 F.2d 1210 (2d Cir. 1980)	Injunction restricting male guards from certain duties requiring observation of female inmates, remained throughout the case. <i>Id.</i> at 1212-14. Only female guards were assigned to areas where women slept, showered, and used toilet facilities. <i>Id.</i> at 1213-14. State's remedy of scheduling clothing changes and privacy screens accord adequate protection to the privacy interests of the inmates and avoid denial of guards' rights to equal employment opportunities. <i>Id.</i> at 1216. The court acknowledged that there are no security or penological reasons to violate women's privacy. <i>Id.</i> at 1216 n.9. "While this Title VII grievance is asserted on behalf of men, we note that gender-based discrimination in prison employment opportunities generally disadvantages women." <i>Id.</i> at 1215.
	<i>Colman v. Vasquez</i> 142 F. Supp. 2d 226 (D. Conn. 2001)	Female prisoners' Fourth and Eighth Amendment rights were implicated by male guard pat-down searches. Privacy rights for females being supervised by men are qualitatively different than male prisoners supervised by female officers. <i>Id.</i> at 232. "[S]exual assault by prison guard may cause severe physical and psychological harm, amounting to violation of Eighth Amendment" <i>Id.</i> at 238 (citing <i>Boddie v. Schnieder</i> 105 F.3d 857, 859 (2d Cir. 1997)).

TABLE I - CONTINUED

Circuit	Case Name and Citation	Holding
Second (cont'd)	<i>Fisher v. Goord</i> 981 F. Supp. 140 (W.D.N.Y. 1997)	Verbal harassment, unsolicited stroking, and kissing of a female inmate does not rise to the level of an Eighth Amendment violation. <i>Id.</i> at 175. The behavior of a male guard who showed a female inmate naked pictures of himself, called her names, exposed himself, kicked her, and twisted her breast, was “inappropriate,” but was “questionable” whether it constituted an Eighth Amendment violation. <i>Id.</i> at 175 & n.42.
Third	<i>Carrigan v. Davis</i> 70 F. Supp. 2d 448 (D. Del. 1999)	“As a matter of law . . . an act of vaginal intercourse and/or fellatio between a prison inmate and a guard, whether consensual or not, is a <i>per se</i> violation of the Eighth Amendment.” <i>Id.</i> at 452-53 (emphasis added). Defendant could not assert plaintiff’s alleged consent as a defense. <i>Id.</i> at 453 n.3. Under the Eighth Amendment, “penal measures and conditions which violate civilized standards and concepts of humanity and decency are prohibited.” <i>Id.</i> at 452. “Vaginal intercourse and/or fellatio between an inmate and a guard is itself a felony, and . . . such conduct is clearly at odds with law enforcement goals.” <i>Id.</i> at 454. Conduct itself may evidence a culpable state of mind where it “serves no legitimate penological purpose.” <i>Id.</i>
	<i>Daniels v. Del.</i> 120 F. Supp. 2d 411 (D. Del. 2000)	Plaintiff alleged that she was raped by a correctional officer resulting in pregnancy and that the administration had notice that their employees were sexually harassing and intimidating inmates. <i>Id.</i> at 416. “Failure to act on this knowledge created an environment conducive to a pattern of such behavior, which amounted to a violation of their duty to provide Plaintiff with adequate care and demonstrated deliberate indifference to Plaintiff’s health and safety.” <i>Id.</i> at 416-17.
	<i>Goode v. Corr. Med. Services, Inc.</i> 168 F. Supp. 2d 289 (D. Del. 2001)	Pregnant prisoner alleged that the defendant nurses sexually assaulted her when she had contractions at the prison medical facility by “conducting an internal exam of plaintiff without gloves . . . giving plaintiff hugs and kisses, and giving plaintiff one of their home phone numbers.” <i>Id.</i> at 291.

Circuit	Case Name and Citation	Holding
Fourth	<i>Lee v. Downs</i> 641 F.2d 1117 (4th Cir. 1981)	Upheld jury verdict finding Eighth Amendment violation in favor of women prisoners forced to disrobe in presence of male officer. Persons in prison must surrender many rights of privacy which most people may claim in their private homes . . . many prisoners must be housed in cells with openings through which they may be seen by guards. Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons. <i>Id.</i> at 1119.
Sixth	<i>Reed v. County of Casey</i> 184 F.3d 597 (6th Cir. 1999)	Female officer raised Title VII challenge regarding her transfer to the third shift in order to maintain same sex supervision in a women's jail. <i>Id.</i> at 597-98. The court found the reassignment justified as a BFOQ in order to comply with state regulations that provided for same sex supervision of female inmates. <i>Id.</i> at 600.
	<i>Rushing v. Wayne County</i> 462 N.W.2d 23 (Mich. 1990)	Recognized a constitutional right for women inmates to be protected from viewing by male guards while semi-clothed or performing basic bodily functions. <i>Id.</i> at 250, 264-65.

TABLE I - CONTINUED

Circuit	Case Name and Citation	Holding
Seventh	<i>Torres v. Wis. Dep't of Health and Social Servs.</i> 859 F.2d 1523 (7th Cir. 1988)	Reversed district court's rejection of a BFOQ for female only assignments in a women's maximum security prison in Wisconsin; "a living environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation." <i>Id.</i> at 1530. "Certainly, it is hardly a 'myth or purely habitual assumption' that the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of stress to females." <i>Id.</i> at 1531 (quoting <i>Los Angeles Dep't of Water & Power v. Manhart</i> , 435 U.S. 702, 707 (1978)).
Eighth	<i>Tharp v. Iowa Dep't of Corr.</i> 68 F.3d 223 (8th Cir. 1995) (<i>en banc</i>)	Rejected male officers' Title VII challenges to female-only assignments in women's prisons; exclusion of male officers from female-only shifts constituted such a "minimal intrusion" on their employment that the court need not reach the BFOQ issue to uphold the policy. <i>Id.</i> at 226 (quoting <i>Timm v. Gunter</i> , 917 F.2d 1093, 1102 n.13 (8th Cir. 1990)). The court found that the policy of assigning female staff to the women's unit "addresses female inmate privacy concerns, improves the Facility's rehabilitative services to female inmates, and advances the interests of female employees." <i>Id.</i> at 226 (emphasis added).
Ninth	<i>Robino v. Iranon</i> 145 F.3d 1109 (9th Cir. 1998)	Rejected the Title VII claims in favor of maintaining gender specific assignments in women's prisons stating that gender constituted a BFOQ. While noting that "a person's interest in not being viewed unclothed by members of the opposite sex survives incarceration" the court also based its decision on penological goals of rehabilitation and security. <i>Id.</i> at 1111. "The male [officers] have not suffered any tangible job detriment beyond a reduced ability to select their preferred watches." <i>Id.</i> at 1110.

Circuit	Case Name and Citation	Holding
Ninth (cont'd)	<i>Jordan v. Gardner</i> 986 F.2d 1521 (9th Cir. 1993)	Policy requiring male guards to conduct random, non-emergency, suspicionless clothed body searches on female prisoners violated the Eighth Amendment. In such circumstances, "the conflict between the right of one sex not to be discriminated against in job opportunities and the other to maintain some level of privacy 'has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards.'" <i>Id.</i> at 1527 (quoting <i>Smith v. Fairman</i> , 678 F.2d 52, 55 (7th Cir. 1982)). Because there was evidence that many of the female inmates had been sexually abused prior to incarceration, searches which involved squeezing and kneading of the breast, groin, and thigh areas, were cruel because they inflicted psychological pain. <i>Id.</i> at 1525-26. The district court found that "physical, emotional and psychological differences between men and women 'may well cause women, and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women.'" <i>Id.</i> at 1525 (quoting <i>Jordan v. Gardner</i> , No. C89-339TB (W.D. Wash. 1990)).
	<i>Sepulveda v. Ramirez</i> 967 F.2d 1413 (9th Cir. 1992)	Found right to bodily integrity and denied qualified immunity to male officer who walked into bathroom of woman parolee while she was in the process of providing a urine sample. <i>Id.</i> at 1415. The constitutional rights of parolees are "more extensive than those of inmates." <i>Id.</i> at 1416.
	<i>Galvan v. Carothers</i> 855 F. Supp. 285 (D. Alaska 1994)	Injunction to move female prisoner out of male prison where she was subjected to supervision by male officers and viewed by male prisoners. The court found that "minimal standards of privacy and decency 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." <i>Id.</i> at 291.

TABLE I – CONTINUED

Ninth (cont'd)	<i>Carlin v. Manu</i> 72 F. Supp. 2d 1177 (D. Or. 1999)	There is no clearly established constitutional right for female inmates to be free from the presence of and viewing by male guards during strip searches. <i>Id.</i> at 1178. The court granted summary judgment for defendant prison guards. <i>Id.</i> at 1180.
Tenth	<i>Hovater v. Robinson</i> 1 F.3d 1063 (10th Cir. 1993)	A constitutional violation could not be established by a reliance upon unsupported assumptions about a single isolated incident involving an alleged sexual assault of an inmate by a detention officer. <i>Id.</i> at 1068. The court was unable to conclude that a male guard having sole custody of a female inmate in and of itself creates such a risk to the inmate's safety that it constitutes a violation of the Eighth Amendment's cruel and unusual punishment clause. <i>Id.</i> at 1066.
Eleventh	<i>Cason v. Seckinger</i> 231 F.3d 777 (11th Cir. 2000)	Referenced permanent injunction issued in 1994 prohibiting cross-gender supervision in women's facilities in Georgia as a result of alleged sexual harassment and abuse. <i>Id.</i> at 779 n.4.
D.C. Circuit	<i>Women Prisoners of D.C. Dep't of Corr. v. D.C.</i> 968 F. Supp. 744 (D. D.C. 1997)	Recognized both the privacy concerns and the threat of assault posed by male officers supervising women prisoners. <i>Id.</i> at 745.

TABLE II- THE BFOQ DEFENSE IN NON-PRISON SETTINGS

Circuit	Case Name and Citation	Holding
Second	<i>Jennings v. N.Y. State Office of Mental Health</i> 786 F. Supp. 376 (S.D. N.Y. 1992)	Court examined cross-gender policy in state institution for the criminally insane and determined that there needs to be a direct relationship between the policy and the actual ability of the staff to perform its job. <i>Id.</i> at 383. A person of the opposite gender would be unable to adequately perform some of the duties that successfully respect the privacy rights of the patient. <i>Id.</i> "Basic decency demands that their privacy be respected to whatever degree feasible." <i>Id.</i> at 384. "If the patient's naked body must be viewed or the patient requires assistance with personal hygiene, then the availability of [a staff member] of the same gender ensures that the privacy interests of the patient are respected." <i>Id.</i> at 385.

Circuit	Case Name and Citation	Holding
Second (cont'd)	<i>Ludtke v. Kuhn</i> 461 F. Supp. 86 (S.D. N.Y. 1978)	Female sports reporter was treated differently from her male counterparts when she was barred from conducting post-game interviews in the men's locker room solely because she is a woman. <i>Id.</i> at 96. The court found that the plaintiff's equal protection and due process rights were infringed. <i>Id.</i> The relationship between the protection of a player's privacy and the total exclusion of women from the Yankee locker room is insufficient and does not pass constitutional muster. <i>Id.</i> at 97.
Third	<i>Healy v. Southwood Psychiatric Hosp.</i> 78 F.3d 128 (3d. Cir. 1996)	"When open and explicit use of gender is employed . . . the systematic discrimination is in effect 'admitted' by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII." <i>Id.</i> at 132. The "essence of Southwood's business would be impaired if it could not staff at least one male and female child care specialist on each shift." <i>Id.</i> at 134. BFOQ upheld. <i>Id.</i> at 135.
	<i>Fesel v. Masonic Home of Del., Inc.</i> 447 F. Supp. 1346 (D. Del. 1978) <i>aff'd</i> , 591 F.2d 1334 (3d Cir. 1979).	Defendant retirement home showed that it had "a factual basis for believing that the employment of a male nurse's aide would directly undermine the essence of its business operation because (1) many of the female guests would not consent to intimate personal care by males, and (2) the operation of the retirement home . . . was sufficiently small" that it could not hire a male and female nurse's aide for all shifts "to attend to the personal care needs of those female guests objecting to male care." <i>Id.</i> at 1354.
	<i>Philadelphia v. Human Relations Comm'n</i> 300 A.2d 97 (Pa. Commw. Ct. 1973)	Extensive contact between supervisors and juveniles in youth center justified use of BFOQ. Constitutional right to privacy existed. <i>Id.</i> at 103.
Fourth	<i>Fisher v. Washington Metro. Area Transit Auth.</i> 690 F.2d 1133 (4th Cir. 1982)	Pretrial detainee had a constitutional right to not be subjected to involuntary naked exposure to members of the opposite sex unless that exposure was reasonably necessary in maintaining her detention. <i>Id.</i> at 1142.
Sixth	<i>Local 567 Am. Fed'n of State, County, and Mun. Employees v. Mich. Council 25</i> 635 F. Supp. 1010 (E.D. Mich. 1986)	"The privacy rights of mental health patients . . . justify a BFOQ to provide for same-sex personal hygiene care." <i>Id.</i> at 1013. In occupations where employees work with people "whose bodies are exposed in varying degrees," sex-based hiring practices may be justified. <i>Id.</i> at 1012.

TABLE II – CONTINUED

Circuit	Case Name and Citation	Holding
Seventh	<i>Norwood v. Dale Maint. Sys., Inc.</i> 590 F. Supp. 1410 (N.D. Ill. 1984)	Plaintiff claimed sex discrimination, contending she was improperly denied a position cleaning men's bathrooms during the daytime. <i>Id.</i> at 1410. The court held that gender was a BFOQ and no reasonable alternatives existed. <i>Id.</i> at 1410, 1423.
Eighth	<i>Backus v. Baptist Med. Ctr.</i> 510 F. Supp. 1191 (E.D. Ark. 1981)	Female-only nurses in OB-GYN department were a BFOQ. <i>Id.</i> at 1195. "[T]he body involves the most sacred and meaningful of all privacy rights." <i>Id.</i> at 1193. Unwanted sexual contact may lead to irreparable harm and trauma. <i>Id.</i> at 1194.
Ninth	<i>Olsen v. Marriott Int'l, Inc.</i> 75 F. Supp. 2d 1052 (D. Ariz. 1999)	Male massage therapist brought Title VII action, alleging that hotel refused to consider his application for employment in spa because of his gender. The test for necessity of a BFOQ "requires the employer to establish that (1) legitimate privacy rights of patients, clients, or inmates 'would be violated by hiring members of one sex' to fill the position at issue, and (2) 'there are no reasonable alternatives to a sex-based policy.'" <i>Id.</i> at 1069 (quoting <i>Hernandez v. Univ. of St. Thomas</i> , 793 F. Supp. 214, 216 (D. Minn. 1992)).
	<i>Kaiser Found. Hosps & Med. Ctrs v. Bldg. Serv. Employees Int'l Union</i> Local 399, 67-2 Lab. Arb. (CCH) 4665 (1967) (Jones, Arb.)	It is proper for a hospital to refuse to hire male nurses when there is a need to provide intimate personal care to female patients. <i>Id.</i> at 4670.

TABLE III- INCARCERATED MEN AND CROSS-GENDER SUPERVISION

Circuit	Case Name and Citation	Holding
Second	<i>Boddie v. Schnieder</i> 105 F.3d 857 (2d Cir. 1997)	Although sexual abuse by a correctional officer may give rise to an Eighth Amendment claim under 42 U.S.C. § 1983, plaintiff's sexual abuse claims were not serious enough to constitute cruel and unusual punishment. <i>Id.</i> at 862.
	<i>Covino v. Patnissi</i> 967 F.2d 73 (2d Cir. 1992)	Affirmed denial of inmate's motion for a preliminary injunction against visual body-cavity search procedure. <i>Id.</i> at 74.

Circuit	Case Name and Citation	Holding
Second (cont'd)	<i>Carey v. N.Y. State Human Rights Appeal Board</i> 61 A.D.2d 804 (N.Y. App. Div. 1978)	Upheld dismissal of male applicant's complaint regarding state policy limiting job eligibility to one sex when the duties of the position relate to the care of persons of the same sex. The limitations were constitutional under the equal protection clause and a valid BFOQ. <i>Id.</i> at 807.
Third	<i>Csizmadia v. Fauver</i> 746 F. Supp. 483 (D. N.J. 1990)	Conflict between employment rights (denial of employment and promotional opportunities, overtime pay, and vacation time) of prison guards and the prisoners' constitutional rights (regular surveillance of male prisoners by female guards while either naked or partially undressed violates privacy rights as well as "Muslim and certain Christian prisoners' First Amendment rights to free exercise of religion"). <i>Id.</i> at 486. Denied summary judgment for guards based on insufficient evidence of adverse impact on employment rights. <i>Id.</i> at 492.
	<i>Johnson v. Pa. Bureau of Corr.</i> 661 F. Supp. 425 (W.D. Pa. 1987)	Bureau assigned female correctional officers to various areas in the jail where they could view unclothed male prisoners. <i>Id.</i> at 427. The court granted the Bureau's motion for a directed verdict because it used a reasonable means to accommodate the prisoners' privacy interest when balanced against its legitimate interests in security and preventing sex discrimination. <i>Id.</i> at 432-35. The court applied a three-step analysis with shifting burdens of proof: 1) "plaintiffs must show that they have in fact been viewed naked by female guards;" 2) "the fact finder must decide whether or not the defendants have met their burden of proving that the existing policies regarding female guards . . . are reasonably necessary to further legitimate state interests;" and 3) "the fact finder must determine whether the plaintiffs have shown that they are routinely or regularly exposed to female guards while unclothed, as opposed to occasional, inadvertent encounters, or . . . that the defendants have exaggerated their concern for institutional security and preventing sex discrimination." <i>Id.</i> at 431.

TABLE III - CONTINUED

Circuit	Case Name and Citation	Holding
Fourth	<i>Hudson v. Goodlander</i> 494 F. Supp. 890 (D. Md. 1980)	Male inmate's privacy rights were violated by assignment of female guards to posts where they could view him while he was unclothed. <i>Id.</i> at 893. The need for injunctive relief was diminished because the restrictions on employment of female officers were voluntary and, with some modification, should adequately protect inmate privacy and could be properly exempted during certain emergencies. <i>Id.</i>
Fifth	<i>Coble v. Tex. Dep't of Corr.</i> No. Civ. A. H-77-707 1982 WL 1578 (S.D. Tex. Dec. 20, 1982)	"[P]olicy of not utilizing female correctional officers in . . . assignments which involve surveillance of areas where [male] prisoners are showering, dressing, using toilet facilities, or subject to strip searches on a random, non-emergency basis, is a justifiable BFOQ and does not violate Title VII." <i>Id.</i> at *11. State was ordered to "prepare a plan whereby female correctional officers may be routinely employed and utilized at the male prison units assignments that will also protect the inmates' privacy interests." <i>Id.</i>
	<i>Reynolds v. Wise</i> 375 F. Supp. 145 (N.D. Tex. 1974)	Plaintiff asserted that male prison employees were permitted to "rotate in jobs at the Federal Correctional Institution" thereby becoming qualified to progress to higher Civil Service ratings and, thus, higher pay classifications" while female employees, were "frozen" at lower ratings "because they are denied the right to rotate jobs." <i>Id.</i> at 147 (quoting from plaintiff's complaint). The court held: 1) "the policy . . . discriminated against women in that it provides that only males shall be appointed in institutions for men" in violation of 42 U.S.C. § 2000e-16(a); 2) selective work responsibilities assigned to male correction officers are "reasonable to insure privacy of inmates" and do not discriminate against women; 3) no business necessity nor BFOQ shown. <i>Id.</i> at 151.
Sixth	<i>Cornwell v. Dahlberg</i> 963 F.2d 912 (6th Cir. 1992)	In challenging the conditions of his outdoor strip search before several female correctional officers, the plaintiff raised a valid privacy claim under the Fourth Amendment. <i>Id.</i> at 916.

Circuit	Case Name and Citation	Holding
Sixth (cont'd)	<i>Kent v. Johnson</i> 821 F.2d 1220 (6th Cir. 1987)	Inmate alleged that policy of according "female prison guards full and unrestricted access to all areas of the housing unit" allowed them "to view him performing necessary bodily functions in his cell and . . . in the shower area." <i>Id.</i> at 1221. The appeals court reversed the dismissal of plaintiff's complaint because it was "conceivable that plaintiff could prove a set of facts establishing that he has a legitimate first amendment interest <i>and</i> that interest can be protected without impinging legitimate penological objectives such as the operational necessity of nondiscrimination in employment." <i>Id.</i> at 1226.
	<i>Rucker v. City of Kettering, Ohio</i> 84 F. Supp. 2d 917 (S.D. Ohio 2000)	Female plaintiff responded to a newspaper advertisement for a civilian jailer position. <i>Id.</i> at 920. The city refused to accept plaintiff's application as they hired only males as civilian jailers. <i>Id.</i> The court denied plaintiff's motion for a preliminary injunction finding that she did not demonstrate a substantial likelihood of success on the merits. <i>Id.</i> at 931.
	<i>Griffin v. Mich. Dep't of Corr.</i> 654 F. Supp. 690 (E.D. Mich. 1982)	The court referred to a growing practice in federal and state corrections systems permitting female guards in male prisoner housing units. <i>Id.</i> at 702-3.
	<i>Harden v. Dayton Human Rehab. Ctr.</i> 520 F. Supp. 769 (S.D. Ohio 1981)	Rehabilitation center violated Ohio civil rights law by BFOQ policy prohibiting females from serving as specialists in male section of the center. <i>Id.</i> at 771, 779-81. Defendants "failed to establish: (a) that they could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates and the equal employment rights of Plaintiff, (b) that the BFOQ was based upon administrative necessity rather than mere administrative inconvenience, and (c) that they had a factual basis for believing that substantially all women would be unable to safely and efficiently perform the duties of the job involved." <i>Id.</i> at 778.

TABLE III - CONTINUED

Circuit	Case Name and Holding	Holding
Seventh	<i>Johnson v. Phelan</i> 69 F.3d 144 (7th Cir. 1995)	Inmate alleged that cross-sex monitoring in the jail shower and toilet areas was unconstitutional. <i>Id.</i> at 145. In affirming the lower court's dismissal, the appeals court noted that prisoners did not "retain any right of seclusion or secrecy against their captors who were entitled to watch and regulate every detail of daily life." <i>Id.</i> at 146. The court rejected the argument that cross-sex monitoring violated the Fourth Amendment. <i>Id.</i> at 151. Such monitoring does not constitute cruel and unusual punishment under the Eighth Amendment when plaintiff fails to allege that defendants adopted the practice "because of, rather than in spite of, the embarrassment it caused some prisoners." <i>Id.</i> at 150-51.
	<i>Canedy v. Boardman</i> 16 F.3d 183 (7th Cir. 1994)	The court reversed dismissal because defendant prison officials only considered their own security and employment interests and failed to accommodate prisoner's constitutionally mandated privacy rights. <i>Id.</i> at 188. The court held that "[t]he resulting conflict between the two interests has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards." <i>Id.</i> at 187. The court found that inmates did have some right to avoid unwanted intrusions by persons of the opposite sex. <i>Id.</i> Where it was reasonable, taking into account the state's interests in prison security and providing equal employment opportunities for female guards, respect of an inmate's constitutional privacy interests was mandated. <i>Id.</i> at 188.
	<i>Madyun v. Franzen</i> 704 F.2d 954 (7th Cir. 1983)	Due to his religious beliefs, prisoner refused to allow female guards to frisk search him. <i>Id.</i> at 955. The court held that the state's interest in prison security was sufficient to overcome the prisoner's First and Fourth Amendment rights. <i>Id.</i> at 960. The state's interest in promoting equal job opportunities for female guards was sufficient to overcome the prisoner's equal protection claims. <i>Id.</i> at 961-63.

Circuit	Case Name and Holding	Holding
Seventh (cont'd)	<i>Smith v. Fairman</i> 678 F.2d 52 (7th Cir. 1982)	Inmate sued for a prison's failure to enact rules prohibiting female guards from conducting frisk searches of male inmates. <i>Id.</i> at 53. The court held that requiring the plaintiff to submit to a limited frisk search by female guards did not violate any constitutional right. <i>Id.</i> at 55. By limiting the nature and scope of the search female guards are allowed to conduct on male inmates, the prison sought to accommodate the right of women to equal employment opportunities with the male inmates' right to privacy. <i>Id.</i>
	<i>Smith v. Chrans</i> 629 F. Supp. 606 (C.D. Ill. 1986)	Intrusion into the plaintiffs' personal privacy while in their cells, or open shower and toilet facilities is certainly unwanted, "but their rights are necessarily limited as a result of their incarceration." <i>Id.</i> at 612. "The inadvertent and occasional sightings reported and the current policies and practices of the defendant do not rise to the level of constitutional infringements. Rather, the policy . . . seems to hold to a minimum unwanted intrusions by persons of the opposite sex and, in addition, avoids discrimination against women in job opportunities because of their gender." <i>Id.</i>
Eighth	<i>Timm v. Gunter</i> 917 F.2d 1093 (8th Cir. 1990)	The court found that the inmates' rights were not violated when they were subject to pat down searches by female guards. <i>Id.</i> at 1120. The searches were of such a short duration that they imposed a minimum intrusion on the inmates' rights of privacy. <i>Id.</i> Accommodating the inmates' right to be free from opposite-sex searches would greatly burden guards and prison resources. <i>Id.</i> at 1100. Since male inmates and female inmates were not similarly situated, the equal protection claim failed. <i>Id.</i> at 1103. When balanced against the legitimate equal employment rights of male and female guards and the internal security needs of the prison, any remaining privacy rights must give way to the use of pat searches on a sex-neutral basis. <i>Id.</i> at 1100. "Inmates may require different security measures, not solely because of their gender, but because of different security concerns." <i>Id.</i> at 1103 (quoting <i>Timm v. Gunter</i> , No. CV85-L-501, 15-16 (D. Neb. Dec. 13, 1998) (Memorandum of Decision)).

TABLE III - CONTINUED

Circuit	Case Name and Holding	Holding
Eighth (cont'd)	<i>Gunther v. Iowa State Men's Reformatory</i> 462 F. Supp. 952 (N.D. Iowa 1979) <i>aff'd</i> , 612 F.2d 1079 (8th Cir. 1980)	Employment practices which prevent women from obtaining higher-level jobs at a men's reformatory result in sex discrimination prohibited by Title VII. <i>Id.</i> at 952.
	<i>Iowa Dep't of Soc. Serv. v. Iowa Merit Employment Dep't</i> 261 N.W.2d 161 (Iowa 1977)	Men's prison had the right to discriminate against female guards, even though it prevented the guards from raising their employment classification to CO II, on the ground of business necessity because such practice was necessary for the prison's safe and efficient operation and protected the prisoners' rights. <i>Id.</i> at 167. "We agree there are certain duties routinely required of a CO II which, as a practical matter, are impossible for a woman to perform. We believe such impossibility renders the CO II classification a proper subject for a BFOQ." <i>Id.</i> at 162.
Ninth	<i>Somers v. Thurman</i> 109 F.3d 614 (9th Cir. 1997)	Plaintiff did not establish a constitutional right to privacy as to the search of his nude body by employees of the opposite sex or that his discomfort was cruel and unusual punishment. <i>Id.</i> at 624. "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." <i>Id.</i> at 617 (quoting <i>Hudson v. Palmer</i> , 468 U.S. 517, 527-28 (1984)). "So long as there is sufficient justification for a guard to view an unclothed male inmate, and the guard behaves in a professional manner, the gender of the guard is irrelevant." <i>Id.</i> at 620 (quoting <i>Canell v. Armenikis</i> , 840 F. Supp. 783, 784 (D. Or. 1993)).
	<i>Dehnhoff v. Harper</i> No. 86-4422 849 F.2d 1475 (9th Cir. June 15, 1988)	"An inmate's right to privacy is not violated by the occasional and infrequent viewing by female guards of [male] inmates showering, using the toilet, or being strip searched." <i>Id.</i> at 1475.

Circuit	Case Name and Citation	Holding
Ninth (cont'd)	<i>Michenfelder v. Sumner</i> 860 F.2d 328 (9th Cir. 1988)	Routine strip search procedures were reasonable “even when conducted outside the inmates’ cells by officers carrying taser guns and where female employees might occasionally view them” <i>Id.</i> at 338. Inmate’s Fourth and Eighth Amendment rights were not violated, given the prison’s legitimate security concerns and female prison guards’ rights to equal employment opportunities. <i>Id.</i> at 333-34. The test used to determine whether a search is reasonable requires the courts to weigh the “‘scope of the particular intrusion, the <i>manner</i> in which it is conducted, the <i>justification</i> for initiating it, and <i>place</i> in which it is conducted.’” <i>Id.</i> at 332 (quoting <i>Bell v. Wolfish</i> , 441 U.S. 520, 558 (1979)).
	<i>Grummett v. Rushen</i> 587 F. Supp. 913 (N.D. Cal. 1984) <i>aff’d</i> , 779 F.2d 491 (9th Cir 1988)	San Quentin prison officials’ actions were reasonable in that they successfully balanced the need for security with equal employment opportunities for female officers (these officers were assigned to work in housing units but were restricted from positions that would require close and direct view of unclad male inmates) and the prisoners’ interest in personal privacy. <i>Id.</i> at 916.
	<i>Bowling v. Enomoto</i> 514 F. Supp. 201 (N.D. Cal. 1981)	“[I]nmates have a limited right to privacy which includes a right to be free from the unrestricted observation of their genitals and bodily functions by prison officials of the opposite sex under normal prison conditions.” <i>Id.</i> at 204. Injunctive relief is appropriate unless it is shown that relief “would adversely affect necessary security routines.” <i>Id.</i>
	<i>Canell v. Armenikis</i> 840 F. Supp. 783 (D. Or. 1993)	“So long as there is sufficient justification for a guard to view an unclothed male inmate and the guard behaves in a professional manner, the gender of the guard is irrelevant.” <i>Id.</i> at 784.
	<i>Bagley v. Watson</i> 579 F. Supp. 1099 (D. Or. 1983)	“Male prisoners . . . have no federal constitutional rights to freedom from clothed ‘pat-down’ frisk searches and/or visual observations in states of undress performed by female correctional officer guards.” <i>Id.</i> at 1104. “The preference of some male inmates for male guards . . . do[es] not justify discrimination against women in employment” or constitute a BFOQ. <i>Id.</i> at 1105. “The female officers’ federal rights to equal employment opportunities under Title VII supersede the male inmates’ rights . . . under the Oregon constitution.” <i>Id.</i>

TABLE III – CONTINUED

Circuit	Case Name and Citation	Holding
Ninth (cont'd)	<i>Sterling v. Cupp</i> 625 P.2d 123 (Or. 1981)	The court upheld an injunction against female guards conducting “pat downs” of male prisoners’ anal-genital area except in emergency situations. <i>Id.</i> at 137.
	<i>In re Long</i> 127 Cal. Rptr. 732 (Cal. Ct. App. 1976)	Presence of female employees of the California Youth Authority in the male dormitories, restrooms, and shower facilities constituted an invasion of right to privacy. <i>Id.</i> at 737.
Tenth	<i>Cumbey v. Meachum</i> 684 F.2d 712 (10th Cir. 1982)	Determined that a “certain amount of viewing” by female guards during personal activities, such as undressing, using toilet facilities, or showering, “does not necessarily fall short of a cognizable constitutional claim.” <i>Id.</i> at 714.
	<i>Levoy v. Mills</i> 788 F.2d 1437 (10th Cir.1986)	Because the prisoner’s complaint alleged that he was subjected to a body cavity search without any justification whatsoever, it was possible that he could make a rational argument on the law and facts to support his Fourth Amendment claim based on the principle that “the greater the intrusion, the greater must be the reason for conducting a search.” <i>Id.</i> at 1439 (quoting <i>Blackburn v. Snow</i> , 771 F.2d 556, 565 (1st Cir. 1985)).
Eleventh	<i>Hardin v. Stynchcomb</i> 691 F.2d 1364 (11th Cir. 1982)	District court found that female who applied and was rejected for a position as a deputy sheriff was discriminated against, but the discrimination did not violate Title VII because gender met the BFOQ exception. <i>Id.</i> at 1365-66. The Court of Appeals reversed and remanded. <i>Id.</i> at 1374.

Notably, the courts have given little deference to the rights of male inmates. In their holdings, the courts generally failed to acknowledge in their discrimination analyses that gender based policies restricting cross-gender supervision in housing units had minimal impact upon male officers employment opportunities. Conversely, these policies placed almost insurmountable restrictions upon female officers. This judicial response was coupled with significant capitulation by federal and state correctional agencies allowing male officers into female inmate housing units. The restrictions on the placement of male officers in female inmate housing units were lifted based upon both the success of the male employees’

Title VII claims, and the lobbying of unions representing correctional staff.²¹

The era of expansion of employment opportunities for female correctional officers coincided with a major deconstruction of legal principles protecting prisoners' constitutional privacy and equal protection rights. In *Turner v. Safley*,²² the Court held that the infringements upon prisoners' constitutional rights need only be "reasonably related" to a legitimate penological purpose to withstand constitutional scrutiny.²³ The *Turner* Court, "in effect . . . elevated the judgments of correctional authorities to a near dispositive level."²⁴ As a result, constitutional doctrines protecting prisoner privacy,²⁵ as well as Eighth Amendment guarantees,²⁶ have been significantly weakened during the last twenty-five years.

This degradation of constitutional protections was exacerbated by the enactment of the Prisoner Litigation Reform Act (PLRA),²⁷ which significantly limited prisoners' access to courts and counsel. The PLRA also dramatically eviscerated the protections of existing consent judgments and remedies for future constitutional deprivations. This has resulted in a failure of law enforcement agencies to aggressively investigate and pursue criminal cases against male guards accused of sexual abuse of female prisoners.²⁸

21. See *Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1982); *Forts v. Ward*, 621 F.2d 1210, 1212 (2d Cir. 1980).

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

23. *Id.* at 89.

24. Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 863 (2001); *But see Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002), *cert. granted sub nom. Overton v. Bazzetta*, No. 02-94, 71 U.S.L.W. 3387 (U.S. Dec. 2, 2002) (affirming district court decision that struck down new visitation policies which barred some family members and caretakers of inmate's children). The court looked closely at the purpose of the new rules and found that they failed to meet the *Turner* test of "reasonableness." *Id.* at 317-19.

25. See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984) (precluding Fourth Amendment constitutional protections for prisoners).

26. *Harmelin v. Mich.*, 501 U.S. 957 (1991) (Scalia, J., dictum) (distinguishing state and international based prohibitions of "cruel *or* unusual punishment" from the Eighth Amendment's "cruel *and* unusual punishment" language). See e.g., *Stanford v. Ky.*, 492 U.S. 361 (1989) (permitting the execution of a sixteen year old despite international prohibitions).

27. 42 U.S.C. § 1997e (2000).

28. See generally Jennifer A. Pupilava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-Powers: Issue in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329 (1997); Deborah Decker, Comment, *Consent Decree and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS L. REV. 1275 (1997); Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997). See also *Martin v. Hadix*,

Other notable factors that have arguably contributed to the dissolution of the standards of decency in the area of cross-gender supervision in women's prisons include the significant increase of the female population. This increase is especially true for women of color, and is primarily caused by statutory changes mandating long-term sentences for non-violent drug-related crimes.²⁹ Other reasons why the number of minority women working in correctional institutions has risen, include the boom in prison construction and the corresponding state economic dependence upon the prison industry.³⁰

Several trends may be garnered from the clash of competing rights seen in these cases spanning the last twenty-five years. The *Dothard* Court's prison security concerns had little effect on equal employment opportunities for women correctional officers, because of the uniquely violent prison setting that allowed the BFOQ exception in that case.³¹ Generally, in the prison setting, BFOQs that prevent women from working in male housing units were routinely struck down.³²

In addition, male inmates' rights to privacy and religion have been trumped by the equal employment opportunity rights of employers and institutional discretion.³³ This result often occurred when male inmates were effectively barred from developing a full factual record on behalf of a class of affected male prisoners.³⁴ Most

527 U.S. 343, 374 (1999) (upholding the fee limitation provision and giving it retroactive effect to pending cases); *Zehner v. Trigg*, 133 F.3d 459, 461 (7th Cir. 1997) (finding that PLRA applies to Eighth Amendment claims and "does not permit recovery for custodial or emotional damages 'without a showing of physical injury'").

29. The issues of race and recent drug laws were the subject of skillful address by several panel members. MARGINS Symposium: Experiences of Women Inmates in the Twenty First Century, University of Maryland School of Law (March 14, 2002). For an excellent analysis on the relationship of race, gender, abuse, and poverty to incarceration, see BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (Routledge, 1996).

30. See generally DAVID SHICHOR, *PUNISHMENT FOR PROFIT: PRIVATE PRISONS: PUBLIC CONCERNS* (1995); MARC MAUER, *RACE TO INCARCERATE* (1999).

31. Ingram, *supra* note 16, at 17.

32. See generally Table III, *infra* pp. 10-16 (In non-prison settings, gender-based qualifications for staff working with patients, residents, and consumers in situations raising bodily integrity issues are generally approved as BFOQs); See generally Table II, *infra* pp.8-10; *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376 (S.D. N.Y. 1992); *Healy v. Southwood Psych Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996); *Fesel v. Masonic Home of Del.*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

33. *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425 (W.D. Pa. 1987); *Reynolds v. Wise*, 375 F. Supp. 145 (N.D. Tex. 1974); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983).

34. *Johnson*, 661 F. Supp. at 435; *Smith v. Chrans*, 629 F. Supp. 606, 611 (N.D. Ill. 1996); *Grummet v. Rushen*, 779 F.2d 491 (9th Cir. 1985).

male inmate cases were filed *pro se*³⁵ and class certification was not sought. In many of the significant cases filed by correctional officers, their unions, female inmates, or the U.S. Department of Justice, male prisoners were not even parties to the litigation. Female inmates, on the other hand, have been more likely to prevail when their cases are brought as class actions, with counsel, and include careful development of a strong factual record. Thereby, establishing the significant intrusions and psychological harm to this particularly vulnerable class of plaintiffs.³⁶ The plaintiffs were also successful when the evidence showed that gender-based BFOQs have an insignificant impact upon staff.³⁷

Finally, recent judicial tendencies show more concern with the privacy rights of female inmates than with male inmates regarding the observation and touching of intimate body parts.³⁸ This is often factually justified when advocates for female inmates have been careful to create a record showing their special history of abuse, particularized trauma, and other injuries caused by cross-gender supervision.³⁹

We can observe a regression in the practice and justifications for protections of female inmates from cross-gender housing supervision in the last twenty-five years. The policies shifted from the preclusion of cross-gender supervision based upon traditional notions of societal civility, to a state where there were no cross-gender prohibitions. The rapid evolution was initially premised upon doctrines of equality in both the contexts of corrections employment and the treatment of female and male prisoners. More recently, we have witnessed some retreat back, again providing greater protections for women inmates in cross-gender supervision. Notably, however, the current changes are based upon the courts' recognition of the special experiences of women as abuse victims by males prior to incarceration, as well as the significant psychological harm caused by assaults to bodily integrity.⁴⁰ In the prison setting, the courts and penal administrators are showing a willingness to reach a balance between

35. "In one's behalf." BLACK'S LAW DICTIONARY 1237 (7th ed. 1999).

36. *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1982); *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002).

37. *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 225 (8th Cir. 1995) (en banc).

38. *Id.*

39. *Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir.1993).

40. *See, e.g., Id.*; *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998); *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223 (8th Cir. 1995) (en banc).

equality in employment for male staff and respect for the strong evidence of harm to female inmates.

Interestingly, as I come to this drafting juncture, I received a phone call from a lawyer letting me know that a U.S. district court in Detroit has issued a seventy-page opinion addressing the very issues raised in this article. The conflict of interests created by the twenty-five year evolution that has permitted cross-gender supervision in female prison housing units, comes alive in *Everson v. Michigan Department of Corrections*.⁴¹

Cross-gender supervision, sexual assault, harassment, and privacy invasions in the Michigan prison system have a long litigation history pre-dating *Everson*.⁴² In 1982, in *Griffin v. Michigan Department of Corrections*,⁴³ the court upheld female officers' right to work in male inmate housing units to advance equal employment opportunity. The small number of female prisons provided very limited opportunities for the promotion and hiring of female corrections officers, if they were prohibited from working in male housing units. In *Griffin*, male inmates were not parties to the litigation and their privacy rights were given short shrift.⁴⁴ Further, there was no evidence concerning sexual assault, harassment, or the impact on inmates in allowing female staff into male housing units.⁴⁵ Michigan failed to appeal the decision despite *Dothard's* recent acceptance of a BFOQ preventing female employees in the male prison context. Subsequent lobbying and litigation by the corrections officers' unions resulted in new policies,⁴⁶ which, for the first time, permitted male officers to work in female prison housing units.

The shocking history of sexual assaults and harassment that followed is well documented by both domestic and international organizations.⁴⁷ When significant public exposure and litigation on

41. 222 F. Supp. 2d 864 (E.D. Mich. 2002).

42. For a more detailed account, see GEER, *supra* note 4, at 79-84.

43. 654 F. Supp 690 (E.D. Mich. 1982).

44. *Id.* at 702.

45. *Id.*

46. See Geer, *supra* note 4, at 113-14.

47. See HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) available at <http://hrw.org/reports/1996/Us1.htm>; AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998); HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS, 10 HUMAN RIGHTS WATCH 2(G) (1998), available at <http://www.hrw.org/reports98/women/index.htm>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 518 (Kathleen Maguire & Ann L. Pastore eds., 1996); GENDER SPECIFIC ASSIGNMENTS COMM., MICH. DEP'T OF CORR., FINAL

behalf of individual women did not result in a change in policies barring males from female housing unit supervision and body searches, a class action suit was brought. In *Nunn v. Michigan Department of Corrections*,⁴⁸ a claim was filed on behalf of women prisoners seeking injunctive relief and damages.⁴⁹ The United States Department of Justice later intervened in *Nunn* on behalf of female inmates after its own investigations substantiated the plaintiffs' allegations.⁵⁰

After two years of extensive discovery, a settlement agreement was reached in July 2000 mandating significant changes in cross-gender staffing policies including: screening and training of officers; a sexual misconduct reporting and investigation system that provided greater protections for female inmates and staff who feared retaliation; a preclusion of cross-gender pat-down searches; announcement of male officer presence in housing units; restrictions on the use of male officers in female inmate transport to hospitals and courts; providing locations within the housing units where "female prisoners may dress, shower and use the toilet without being observed by male staff."⁵¹ These policy changes were implemented by the Michigan Department of Corrections (MDOC). They included adopting a new state Civil Service rule making the female gender a *bona fide* occupational qualification for correctional officers in female housing units.⁵² Later that same year, correctional officers and their union brought an action asserting that the new policy violated male employee rights under Title VII and state law.⁵³ The female inmate plaintiff class in *Nunn* intervened and a trial was held in spring 2001.⁵⁴

The *Everson* court found that the exclusion of male officers from housing units violated both Title VII⁵⁵ and the state civil rights statute.⁵⁶ It also found that the MDOC did not meet its burden of

REPORT TO DIRECTOR KENNETH L. MCGINNIS (1998).

48. See *Nunn v. Mich. Dep't of Corr.*, No. 96-CV-71416 (E.D. Mich. Feb. 4, 1997).

49. See *id.*

50. See generally HUMAN RIGHTS WATCH, *supra* note 3.

51. See *id.* (citing Settlement Agreement Regarding Injunctive and Declaratory Relief, *Nunn* (No. 96-CV-71416)). A prior agreement between the United States and Michigan Department of Corrections included portions of this relief. *Nunn*, No. 96-CV-71416 (citing Settlement Agreement Regarding Injunctive and Declaratory Relief, *Nunn* (No. 96-CV-71416)).

52. *Griffin*, 654 F. Supp. at 703.

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

54. *Id.* at 874.

55. *Id.* at 893.

56. *Id.* at 894.

showing that alternative restrictions would be insufficient.⁵⁷ The court made numerous references to the fact that all but four states permit male officers in female housing units, and that the American Corrections Association standards did not prohibit male officers from working in female prisoner housing units.⁵⁸ The court showed little deference to the policy decisions of state officials, justified in part by the lack of qualifications of the MDOC Director.⁵⁹ More importantly, however, the court did approve of excluding male officers from “task specific” activities such as transport and urine collection.⁶⁰ The court went to great lengths to distinguish its decision from contrary recent appellate decisions in the Second,⁶¹ Eighth,⁶² Ninth,⁶³ Eleventh,⁶⁴ and even its own Sixth Circuit Court of Appeals.⁶⁵ As of this writing, the case is on appeal.⁶⁶ The resistance to returning to policies barring male guards from female prison housing units now comes primarily from male corrections officers, rather than state corrections administrators.

CONCLUSION

The intersection of the rights of male and female inmates, officers, and correctional administrators reflected in the last twenty-five years can never be properly adjudicated without fora that will allow an in-depth analysis of the factually complex context in which these important legal issues arise. We have witnessed the weaknesses in judicial decision-making when interested persons were not parties, were *pro se*, or when the underlying facts were not fully presented. While the *Everson* decision may not ultimately be correct in its findings of fact and legal conclusions, it is the best paradigm of a full process raising the disparate issues. The process reflected an effort to ensure that the parties’ interests were fully presented and understood by the court.⁶⁷ In prisoner rights litigation, access to a full and fair

57. *Id.* at 899.

58. *Id.*

59. *Id.* at 897.

60. *Id.* at 898-899.

61. *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980).

62. *Gunther v. Iowa State Men’s Reformatory*, 612 F.2d 1079 (8th Cir. 1980).

63. *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998).

64. *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982).

65. *Reed v. County of Casey*, 184 F.3d 597 (6th Cir. 1999).

66. *Everson v. Mich. Dep’t of Corr.*, No. 02-2028, (6th Cir. July 20, 2002).

67. *See, e.g., Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1992).

process has been particularly difficult in light of the PLRA's requirements for "physical injury,"⁶⁸ exhaustion of administrative remedies,⁶⁹ and the severe limitations on attorney fees and costs for prevailing parties, as well as the congressional intrusion into the remedial powers of the courts.⁷⁰

Non-litigation advocacy by lawyers and organizations must be pursued in conjunction with lawsuits, and include research on the efficacy of gender-based restrictions and alternative means to protect women from sexual assault by male employees. This data is not only important as an evidentiary tool, but also as persuasive information that may be used for revising correctional standards by groups such as the influential American Corrections Association (ACA). It can also be used to lobby for statutory revisions, and aggressive criminal justice enforcement.

Many important lessons can be learned from advocacy on behalf of women prisoners by both non-governmental organizations⁷¹ (NGOs) and international and domestic governmental agencies.⁷² The development of strong relations with the media resulted in important documentaries on the compelling stories of female prisoner victims⁷³ that inform public opinion and law enforcement priorities.

In the realm of legal strategy and doctrinal development, advocates must work together in developing constitutional paradigms

68. 42 U.S.C. § 1997e(e) (2000).

69. *Id.* § 1997e(a).

70. *Id.* § 1997e(a)(d)(e). *See also*, 45 C.F.R. §§ 1637.1-1637.3 (2002) (incorporating the restrictions under the Federal Legal Services Corporation Act precluding the representation of prisoners in civil litigation).

71. *See, e.g.*, HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) available at <http://hrw.org/reports/1996/Us1.htm>; AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998); HUMAN RIGHTS WATCH, WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICH. STATE PRISONS, 10 HUMAN RIGHTS WATCH 2(G) (1998), available at <http://www.hrw.org/reports98/women/index.htm>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 518 (Kathleen Maguire & Ann L. Pastore eds., 1996); GENDER SPECIFIC ASSIGNMENTS COMM., MICH. DEP'T OF CORR., FINAL REPORT TO DIRECTOR KENNETH L. MCGINNIS (1998).

72. *See Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Commission on Human Rights, 55th Sess., Agenda Item 12, U.N. Doc. E/CN.4/1999/68/Add.2 (1999); U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE HONORABLE ELEANOR HOLMES NORTON HOUSE OF REPRESENTATIVES, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (1999); MICH. WOMEN'S COMM'N, UNHEARD VOICES: A REPORT ON WOMEN IN MICH. COUNTY JAILS (1993).

73. *See, e.g.*, NBC Reports: *Women in Prison: Nowhere to Hide* (NBC television broadcast, Sept. 10, 1999).

that permit the legal recognition of the special impact of correctional policies upon women prisoners. This task can only be considered successful if it neither diminishes privacy protections for male inmates, nor interferes with the legitimate employment opportunities of correctional employees, nor returns us to traditional policies justified by paternalistic notions of women.⁷⁴ Strategies may include the incorporation of international law standards⁷⁵ and assertion of state constitutional guarantees.⁷⁶ In the internal administrative arena, advocates should vigorously pursue the establishment of effective, confidential, sexual misconduct reporting systems that protect both staff and inmates from retaliation.

In retrospect, one must applaud the significant progress of dedicated advocates and progressive correctional administrators reflected in litigation as well as legal and popular literature. They succeeded under very difficult conditions including new statutory obstacles,⁷⁷ scarce funds, and a clientele "*whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters awareness.*"⁷⁸

74. Miller, *supra* note 25; 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 & LAW 1 (1999). Compare CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 96 (1987), with DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RAPE, REPRODUCTION AND THE MEANING OF LIBERTY 300 (1997) and Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1477 (1991).

75. Geer, *supra* note 4; David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000); *Jama v. INS*, 22 F. Supp. 2d 353 (D. N.J. 1998); *White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998); See generally Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L. J. 39 (1994); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

76. Compare *Harmelin v. Mich.*, 501 U.S. 957 (1991) with *Mich. v. Bullock*, 485 N.W. 2d 866, 872 (Mich. 1992); see also, Geer, *supra* note 4, at 96 n.142.

77. 42 U.S.C. § 1997e (2000).

78. *O'Lone*, 482 U.S. at 354 (1987) (Brennan, J., dissenting).

APPENDIX
INDEX TO A HELPFUL SELECTION OF LAW REVIEW
ARTICLES, BOOKS AND OTHER SOURCES

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