

## THE FOURTH AMENDMENT RIGHT OF FEMALE INMATES TO BE FREE FROM CROSS-GENDER PAT-FRISKS

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‘[U]se a flat hand and pushing motion across the [inmate’s] crotch area. . . . [P]ush inward and upward when searching the crotch area and upper thighs of the inmate.’ All seams in the leg and the crotch area are to be ‘squeezed and kneaded.’ 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.’<sup>1</sup>

These were the training instructions given to male prison guards at the Washington Corrections Center for Women (“WCCW”) when, in February of 1989, the superintendent of the women’s correctional facility instituted a pat-frisk policy that permitted male guards to search the clothed bodies of female inmates.<sup>2</sup> The change from a same-gender to cross-gender random search policy was done in order to create an “unpredictable element” within the institution so that inmates would always be on guard about transporting contraband.<sup>3</sup> Yet, no regard was paid to the psychological effect this procedure would have on the female inmates — eighty-five percent of whom had been victims of physical and/or sexual abuse<sup>4</sup> — who would be

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<sup>1</sup> *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (citing Washington Corrections Center for Women prison training material).

<sup>2</sup> Eldon Vail became the new WCCW Superintendent in January of 1989. *Id.* at 1523. Shortly thereafter, he authorized random searches because he thought the fixed checkpoints were “ineffective in controlling the movement of contraband” throughout the prison. *Id.* Then on February 26, 1989, Vail instituted another new policy that permitted male guards to conduct random searches of female inmates and took effect on July 5, 1989. *Id.*

<sup>3</sup> *Jordan*, 986 F.2d at 1548 (Trott, J., dissenting). Vail asserted that if an inmate knew there were only male guards in one area of the prison, then that inmate could freely move contraband through that area. *Id.* at 1554.

<sup>4</sup> *Id.* at 1525 (relying on a study conducted by a former child psychologist at the prison).

subjected to this highly intrusive form of unwanted sexualized touching.<sup>5</sup>

#### INTRODUCTION

Permitting male prison guards to touch the breasts and crotches of female prisoners in the context of routine pat-frisks offends moral and ethical standards of human dignity.<sup>6</sup> In addition, the psychological consequences can be profound. Given the extreme power imbalance in prison, these procedures have a clear psychological parallel to childhood sexual abuse or adult rape or sexual assault, and can bring to mind devastating experiences of past violation.<sup>7</sup> Nevertheless, courts have yet to declare clothed body

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<sup>5</sup> Pat-frisks involve physical contact that is commonly associated with sexualized touching (e.g., the touching of the breast or vaginal area), especially when performed on a woman by a man. Unwanted sexualized touching can have deleterious psychological effects, particularly for women who have histories of sexual abuse. For women, pat-frisks by females are less likely to be associated with sexualized touching. Furthermore, there is a substantially lesser threat of other females making inappropriate sexual contact, verbalizations, or intimidation. Perpetrators of sexual abuse against females are almost exclusively male. *See, e.g.*, Jan Heney & Connie M. Kristiansen, *An Analysis of the Impact of Prison on Women Survivors of Childhood Sexual Abuse*, *WOMEN AND THERAPY* 29-44 (1998); C.G. COLL ET AL., *The Experience of Women in Prison: Implications for Service and Prevention*, *WOMEN AND THERAPY* 11-28 (1998).

<sup>6</sup> *See, e.g.*, HUMAN RIGHTS WATCH, WOMEN'S RIGHTS PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS, 52-55 (1996), *available at* <http://www.hrw.org/reports/1996>; United Nations Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, REPORT OF THE MISSION TO THE UNITED STATES ON ISSUE OF VIOLENCE AGAINST WOMEN IN STATE AND FEDERAL PRISON (1999), U.N. Doc. E/CN.4/1999/68/Add.255-57, *available at* <http://www.unhchr.ch>; AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), *available at* <http://web.amnesty.org>. Cross-gender pat-frisk policies also depart from internationally accepted policy, which restricts the presence of male corrections officers inside women's prisons to non-contact positions or requires that any male corrections officer be accompanied at all times by a female corrections officer. *See* Standard Minimum Rules for the Treatment of Prisoners (SMR), adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; *see also* 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 (2000) (analyzing the sexual abuse of women by male corrections officials under international human rights standards).

<sup>7</sup> Researchers have established the capacity for unwanted sexual contact to induce a resurfacing of emotions and beliefs associated with prior victimization, creating the potential for retraumatization. *See, e.g.*, Heney & Kristiansen, *supra* note 5, at 29-44.

searches of females inmates by male corrections officers unconstitutional under the Fourth Amendment.<sup>8</sup>

Whether and to what extent the Constitution protects prisoners' bodily privacy and integrity is unclear because the Supreme Court has never ruled on this issue.<sup>9</sup> While most federal appellate courts have recognized the retention of such a right, they differ in the extent to which they have required prisoners' privacy rights to yield to institutional concerns.<sup>10</sup>

Almost all of the cases that have challenged the constitutionality of cross-gender searches under the Fourth Amendment have done so in the context of allegations by male inmates that their privacy rights were violated when searched by female officers.<sup>11</sup> While some courts have recognized that male inmates have a constitutionally-protected privacy right to be free from strip and body-cavity searches<sup>12</sup> by female

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<sup>8</sup> Most state Departments of Corrections have taken the initiative to prohibit cross-gender pat-frisks through administrative regulations, recognizing that it is in their best interest to fashion self-imposed limits on intimate cross-gender touching because these types of searches are readily susceptible to abuses of power. See National Institute of Corrections, U.S. DEPARTMENT OF JUSTICE, SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE AND PREVENTION (1996), available at <http://www.nicic.org/pubs/prisons.htm>.

<sup>9</sup> The sole Supreme Court pronouncement in the female guard/male prisoner arena is *Dothard v. Rawlinson*, 433 U.S. 321 (1977), in which the Court concluded that the particularly dangerous, jungle-like conditions in the Alabama prisons made women officers especially vulnerable to sexual attack. *Id.* at 334-36. Thus the Court held that prison administrators had a sufficiently strong security interest in excluding female guards despite their employment rights. *Id.* at 334. A strong dissent by Justice Marshall, however, denounced the majority's decision as depriving the plaintiff of employment because of her womanhood, the very result that Title VII was designed to prevent. *Dothard v. Rawlinson*, 433 U.S. 321, 340 (1977) (Marshall, J., dissenting).

<sup>10</sup> See *infra* PART I.

<sup>11</sup> The allegations in such cases are that the cross-gender search policies are unreasonable or harmful specifically because a guard of the opposite gender is conducting the otherwise reasonable search. See, e.g., *Cornwell v. Dahlberg*, 963 F.2d 912, 915 (6th Cir. 1992); *Canedy v. Boardman*, 16 F.3d 183, 184 (7th Cir. 1994); *Grummett v. Rushen*, 779 F.2d 491, 492 (9th Cir. 1985).

<sup>12</sup> During a strip search, a prisoner is required to completely disrobe in front of a corrections official. See *Bell v. Wolfish*, 441 U.S. 520, 558 n.39 (1979) (citing *Wolfish v. Levi*, 573 F.2d 118, 131 (2d Cir. 1978)). In addition, the inmate may be asked to open his mouth, display the soles of his feet, and present open hands and arms. *Id.* Visual body-cavity examinations of male inmates involve the additional step of bending over, lifting the genitals, and spreading the buttocks to allow a visual inspection of the anus. *Id.* Females must follow a similar procedure, including a visual vaginal inspection. *Id.* It should be noted, however, that jurisdictions define these searches differently. For example, states like Illinois define strip searches to include visual body-cavity examinations. 725 ILL. COMP. STAT. ANN. 5/103-1(d) (2002). In contrast, New Jersey defines strip searches and body-cavity searches separately, with the latter including both visual and manual searches of body-cavities.

officers,<sup>13</sup> most have upheld clothed body searches of male inmates by female officers as “reasonable” under the Fourth Amendment.<sup>14</sup> These courts have considered the degree of nudity, the amount of observation, whether the guard would touch the prisoner, and whether the exclusion of the female guards promoted gender-based stereotypes.<sup>15</sup> Balancing the state’s “need for the particular search” against the extent of the invasion suffered by the inmate, courts have generally found that the institutional concerns of the prison outweigh the intrusiveness of the searches.<sup>16</sup>

There is only one case, *Jordan v. Gardner*,<sup>17</sup> that has looked directly at the reverse situation: female inmates subjected to clothed body searches by male officers. While the Court of Appeals for the Ninth Circuit found in favor of the female inmates in *Jordan*, it did so under the Eighth Amendment rather than the Fourth Amendment.<sup>18</sup> In spite of the majority’s avoidance of a Fourth Amendment analysis, Judge Reinhardt’s concurrence in that case has sparked a debate regarding the appropriateness of the court’s analysis of cross-gender

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N.J. STAT. ANN. 2A:161A-4 (2002).

<sup>13</sup> See, e.g., *Cornwell*, 963 F.2d at 913-15 (finding that a Fourth Amendment claim is stated when an inmate is strip-searched outdoors before several female correctional officers after a prison uprising); *Canedy*, 16 F.3d at 184-88 (finding that a Fourth Amendment claim is stated when female prison guards are routinely allowed to conduct strip searches and observe male inmates “in various stages of undress”).

<sup>14</sup> See, e.g., *Grummett*, 779 F.2d at 495-96 (finding no Fourth Amendment violation where correctional officers of the opposite gender conduct routine pat-down searches); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983) (finding reasonable a cross-gender pat-frisk policy in which female guards frisk male inmates); *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (finding policy allowing female guards to pat-frisk and view naked male prisoners reasonable).

<sup>15</sup> See, e.g., *Timm*, 917 F.2d at 1099 (discussing relevant factors).

<sup>16</sup> See, e.g., *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983) (finding a policy requiring strip searches of security unit prisoners when entering or leaving the unit or after meeting visitors justified because the prison operated under maximum security and the unit housed the most dangerous prison inmates); *Covino v. Patrissi*, 967 F.2d 73, 78-79 (2d Cir. 1992) (finding a policy requiring random visual body-cavity searches justified by security problems, despite the inmates’ subjective expectations of bodily privacy); *Elliott v. Lynn*, 38 F.3d 188, 191-92 (5th Cir. 1994) (finding the subjection of prisoners to visual body-cavity searches in the general presence of other inmates and non-searching officers justified as part of an institution-wide shakedown following an increase in murders); *Thompson v. Souza*, 111 F.3d 69, 697, 700 (9th Cir. 1997) (finding that a visual strip-search of a prisoner is reasonably related to a legitimate penological interest in keeping drugs out of the prison). In *Thompson*, the court found no Fourth Amendment violation in spite of the fact that guards directed prisoner to run his fingers around his gums after manipulating genitalia and conducted the searches in view of other prisoners. *Id.*

<sup>17</sup> 986 F.2d 1521, 1533 (9th Cir. 1993).

<sup>18</sup> *Id.* at 1522-23.

searches under the Eighth versus the Fourth Amendment.<sup>19</sup> Little, however, has been said about the majority's reluctance to distinguish *Jordan* from prior Fourth Amendment cases in which cross-gender searches of male inmates by female officers were upheld.

This article explores the unwillingness of the Ninth Circuit to analyze cross-gender, clothed body searches under search and seizure law. It demonstrates that a finding that the cross-gender pat-frisks in *Jordan* violated the Fourth Amendment would not have been inconsistent with Fourth Amendment case law because the plaintiffs in *Jordan* proved, based on statistical psychological evidence, an unprecedented level of harm resulting from the cross-gender searches. This harm renders the searches in *Jordan* "unreasonable" when balanced against the institutional concerns of the prison.

The article begins with an overview of the application of the Fourth Amendment in prison, particularly in the context of cross-gender searches. Part II then summarizes the factual and legal findings of the Ninth Circuit in *Jordan*. Part III addresses the majority's reluctance to decide the female inmates' Fourth Amendment claim. Part IV distinguishes *Jordan* from the cases addressing clothed body searches of male inmates by female corrections officers on the basis of the intrusiveness of the search. Part V offers an explanation of the majority's unwillingness to address the Fourth Amendment issues and addresses potential feminist concerns. The article concludes with an explanation of how the court's factual findings regarding the psychological harm caused by cross-gender pat-frisks of female inmates support a legal finding that the searches violate both the Fourth and Eighth Amendments.

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<sup>19</sup> See David J. Stollman, Comment, *Jordan v. Gardner: Female Prisoners' Rights to be Free From Random, Cross-Gender Clothed Body Searches*, 62 FORDHAM L. REV. 1877 (1994) (criticizing *Jordan*'s reliance on the Eighth Amendment and arguing that courts should instead analyze cross-gender pat-frisk cases under the Fourth Amendment); Rebecca Jurado, *The Essence of Her Womanhood: Defining The Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM U.J. GENDER SOC. POL'Y & L. 1 (1999) (criticizing *Jordan*'s majority and concurring opinions' reliance on gender stereotypes in analyzing the search under the Eighth and Fourth amendments respectively); Lisa Krim, Essay, *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 (1995) (arguing for review of cross-gender pat-frisks of female inmates under the Eighth Amendment using a "reasonable woman" standard).

## I. PRISONERS' CONSTITUTIONAL RIGHTS

Unlike free citizens, prisoners are not entitled to the Constitution's full protection.<sup>20</sup> The Supreme Court has declared that "imprisonment carries with it the circumscription or loss of many significant rights,"<sup>21</sup> particularly when the exercise of those rights compromises a punitive objective.<sup>22</sup> The Supreme Court has also made clear, however, that persons who have been convicted of crimes do not forfeit all of their rights under the Constitution when they pass through prison gates.<sup>23</sup> No "iron curtain" separates prison inmates from constitutional protections.<sup>24</sup> Rather, inmates retain "those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."<sup>25</sup> For example, prisoners may not be subjected to invidious racial discrimination,<sup>26</sup> denied access to the courts,<sup>27</sup> or subjected to cruel and unusual punishment.<sup>28</sup> They are entitled to due process of law<sup>29</sup> and may petition the government for a redress of grievances.<sup>30</sup> In short, while the Supreme Court has held that prison inmates retain some minimum level of Fourth Amendment rights,<sup>31</sup> the scope of those

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<sup>20</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (declaring that "[I]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen").

<sup>21</sup> *Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (citing *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)).

<sup>22</sup> See *Turner v. Safely*, 482 U.S. 78, 85 (1987) (stating that judicial restraint and deference to prison authorities must temper federal courts' consideration of prisoners' constitutional claims).

<sup>23</sup> *Wolff*, 418 U.S. at 555 ("[T]hough [a prisoner's] rights may be diminished by the needs and exigencies of the institutional environment, [he] is not wholly stripped of constitutional protections when he is imprisoned for a crime."); see generally Patrick J.A. McClain et al., *Substantive Rights Retained by Prisoners*, 86 GEO. L.J. 1953 (1998) (discussing limited constitutional rights retained by prisoners, such as the rights of freedom of speech, association, and religion; the right to procedural due process; and the right to adequate assistance of counsel).

<sup>24</sup> *Wolff*, 418 U.S. at 555-56.

<sup>25</sup> *Hudson*, 468 U.S. at 523.

<sup>26</sup> *Lee v. Washington*, 390 U.S. 333 (1968) (per curium).

<sup>27</sup> *Bounds v. Smith*, 430 U.S. 817 (1977).

<sup>28</sup> *Hudson v. McMillian*, 503 U.S. 1 (1992).

<sup>29</sup> *Wolff*, 418 U.S. at 539.

<sup>30</sup> *Johnson v. Avery*, 393 U.S. 483 (1969).

<sup>31</sup> See *Lanza v. New York*, 370 U.S. 139, 143-44 (1962) (confirming that convicted prisoners and pretrial detainees retain Fourth Amendment rights while incarcerated).

rights remains unclear.<sup>32</sup>

A. *The Fourth Amendment in Prison*

The Fourth Amendment to the United States Constitution guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>33</sup> In cases not involving prisoners, determining whether a search of an individual violates the Fourth Amendment requires a two-step analysis. First, a court must decide whether a person has a “constitutionally protected reasonable expectation of privacy.”<sup>34</sup> This requires a court to determine whether the individual has exhibited a subjective expectation of privacy, and whether society recognizes that expectation as reasonable.<sup>35</sup> Second, a court must determine whether the governmental action is constitutional.<sup>36</sup> To make this determination, a court must decide whether, in the particular context, the interests asserted by the state actors are reasonable when balanced against the individual’s privacy expectations.<sup>37</sup>

Since prisoners have limited constitutional rights, courts do not apply this same inquiry to the analysis of their Fourth Amendment claims. Instead, courts analyze a prisoner’s Fourth Amendment claim using the approach mandated by the Supreme Court in *Turner v. Safely*,<sup>38</sup> a class action suit brought by inmates challenging two prison regulations relating to inmate-to-inmate mail correspondence and inmate marriages.<sup>39</sup> In *Turner*, the Supreme Court refused to apply the strict scrutiny standard of review that the Eighth Circuit had used

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<sup>32</sup> See *infra* PART I.B.

<sup>33</sup> U.S. CONST. amend. IV. The Fourth Amendment was made applicable to the states through the due process clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *rev’d on other grounds*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>34</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). In *Katz*, the Court disengaged the Fourth Amendment privacy analysis from a property-based analysis, emphasizing that privacy attaches to people rather than to places. *Id.* at 352-53; see also *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (using the *Katz* inquiry as the first step in its Fourth Amendment analysis).

<sup>35</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>36</sup> See *Covino*, 967 F.2d at 77-78.

<sup>37</sup> See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

<sup>38</sup> 482 U.S. 78, 89 (1987).

<sup>39</sup> The first regulation limited correspondence between inmates at different institutions and the second regulation prohibited inmate marriages unless the prison superintendent approved the marriage due to “compelling reasons.” *Id.* at 78. The Court upheld the limitation on the inmate-to-inmate correspondence, but struck down the marriage restriction. *Id.* at 88-93, 97-99.

to analyze male prisoners' claims.<sup>40</sup> Instead, it used a rational basis test,<sup>41</sup> stating that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>42</sup> The Court concluded that when claims are evaluated under *Turner*, appropriate deference must be given to prison officials because the judiciary is "ill-equipped to deal with the increasingly urgent problems of prison administration and reform."<sup>43</sup>

Before a court can analyze a prisoner's Fourth Amendment claim under *Turner*, it must first consider whether prisoners have constitutionally-protected rights under the Fourth Amendment.<sup>44</sup>

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<sup>40</sup> See *Turner v. Safely*, 777 F.2d 1307, 1313-14 (8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78 (1987).

<sup>41</sup> The rational basis test set forth in *Turner* has been the basis for review of most prisoners' claims of constitutional violations by prison officials since 1987. See James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161, 180-81 (2000) (noting that after *Turner*, the Supreme Court employed the rational basis test to uphold prison regulations restricting religious practices, prohibiting prisoners' receipt of publications, and authorizing forced antipsychotic medication to a mentally competent inmate). Prior to the *Turner* decision, the Court applied different levels of scrutiny to various challenged prison regulations and practices alleged to infringe on prisoners' constitutional rights. Compare *Procunier v. Martinez*, 416 U.S. 396 (1974) (invalidating regulations restricting the content of inmate correspondence under the "strict scrutiny" standard because of the implications for the free speech rights of those not incarcerated) with *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (upholding regulations restricting activities of a prisoner labor union under a lower "reasonableness" standard due to the limitations on free association inherent in incarceration).

<sup>42</sup> *Turner*, 482 U.S. at 89. Although the *Turner* test appears to strike a balance between the inmates' rights and prison's institutional concerns, courts uphold many prison regulations under the rational-basis standard because of the current application of the four factors and the extreme deference afforded to prison administrators. For a discussion of deference afforded to prison administrators, see *supra* note 16.

<sup>43</sup> *Turner*, 482 U.S. at 84 (quoting *Procunier*, 416 U.S. at 405). Federal courts are generally reluctant to interfere with the internal administration of prisons. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (citing *Wolff v. McDonnell*, 418 U.S. 539, 561-63 (1974), for the proposition that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984) (citing *Bell v. Wolfish*, 441 U.S. 520, 540-541 (1979), for the principle that courts should defer to the "expert judgment" of prison authorities); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (stating that courts should not assume that prison officials are insensitive to constitutional requirements or to the problems of achieving penal system goals); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (reasoning that courts should give wide-ranging deference to decisions of prison officials).

<sup>44</sup> *Jordan v. Gardner*, 986 F.2d 1521, 1524 (9th Cir. 1993) (stating that before turning to the *Turner* analysis the court must determine "how the inmate's Fourth Amendment rights are infringed"). If the court finds that prisoners have no such



This inquiry is not entirely straightforward because the Supreme Court has never addressed the issue of whether prisoners retain a right to bodily privacy or dignity in their persons.<sup>45</sup> The Supreme Court has ruled that certain Fourth Amendment rights are extinguished upon confinement in prison. Prisoners do not, for example, have a reasonable expectation of privacy within the confines of their cells<sup>46</sup> and can be subjected to visual body-cavity inspections.<sup>47</sup> On the other hand, the Supreme Court has held that the principal objective of the Fourth Amendment is the protection of individual privacy rather than the protection of property.<sup>48</sup> The Court has also held that the Fourth Amendment protects against infringements of personal dignity<sup>49</sup> and has stated that privacy and dignity interests are most acute with respect to the body.<sup>50</sup> Taken together, these decisions suggest that if prisoners do retain any Fourth Amendment rights, they are limited.

Despite the Supreme Court's failure to make a clear pronouncement on the issue, most circuit courts have recognized that inmates do, in fact, retain a limited Fourth Amendment right to

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rights, *Turner* does not apply. *See id.*

<sup>45</sup> A Nebraska magistrate judge aptly observed:

Although the Supreme Court has not specifically said that one has a protected privacy right to urinate, defecate, or bathe outside the viewing of a person of the opposite sex, or not to be touched in the genital area, even through clothing, by a member of the opposite sex, these things are so fundamental to personal dignity and self respect in this culture that I believe if presented with such issues, the Supreme Court would find one's own body and its personal functions protected by the recognized privacy rights of unincarcerated citizens.

*Braasch v. Gunter*, Nos CV83-L-459, CV83-L-682, 1985 WL 3530, at \*10 (D. Neb. July 15, 1985), *overruled by* *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990).

<sup>46</sup> *Hudson v. Palmer*, 468 U.S. 517, 536 (1984) (holding "[t]hat the Fourth Amendment has no applicability to a prison cell").

<sup>47</sup> *Bell*, 441 U.S. at 520, 560. In *Bell*, the Supreme Court recognized that unclothed body searches or strip searches might be offensive. *Id.* Nevertheless, the Court held these searches were neither unreasonable nor cruel and unusual when done in a professional manner. *Id.* Although the Supreme Court held that body-cavity searches are reasonable under the Fourth Amendment, it has not indicated that the gender of the guards conducting the searches is irrelevant. *See id.*

<sup>48</sup> *See Soldal v. Cook County*, 506 U.S. 56, 64 (1992) (holding that tearing a mobile home from the ground constituted a Fourth Amendment seizure even though the seizure effected property instead of privacy interests, the fulcrum of Fourth Amendment protection).

<sup>49</sup> *See Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

<sup>50</sup> *Bell*, 441 U.S. at 576-77 (Marshall, J., concurring in part and dissenting in part) ("body-cavity searches . . . represent one of the most grievous offenses against personal dignity and common decency").

bodily privacy. For example, the Second Circuit has stated that it has little doubt “[t]hat society is prepared to recognize as reasonable the retention of a limited right of bodily privacy even in the prison context.”<sup>51</sup> Likewise, the Sixth Circuit has held that it joins others in recognizing that a convicted prisoner maintains some reasonable expectations of privacy while in prison, even though those privacy rights may be less than those enjoyed by non-prisoners.<sup>52</sup> The exception is the Seventh Circuit, which has held that the Fourth Amendment does not protect privacy interests within prison.<sup>53</sup>

Assuming *arguendo* that a prisoner has some Fourth Amendment rights, a court must then determine whether the prison regulation is reasonably related to legitimate penological interests.<sup>54</sup> In *Turner v. Safely*, the Supreme Court identified four factors in determining the reasonableness of a prison regulation: 1) whether a “valid, rational connection” exists “between the prison regulation and the legitimate governmental interests” advanced to justify it;<sup>55</sup> 2) “whether there are alternative means of exercising the right that remain open to prison inmates;”<sup>56</sup> 3) whether and to what extent accommodation of the asserted right will adversely affect guards, other inmates, and the allocation of prison resources generally;<sup>57</sup> and 4) whether an obvious alternative to the regulation exists “that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests.”<sup>58</sup> Although the Court rejected a “least restrictive alternative” test,<sup>59</sup> the existence of easy alternatives may be evidence that the regulation is

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<sup>51</sup> Covino v. Patrissi, 967 F.2d 73, 78 (2d Cir. 1992).

<sup>52</sup> Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992); *see also* Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993) (holding that prisoners have a constitutional right to bodily privacy, which is obstructed when they are observed by the opposite sex in their living quarters). In addition, the Tenth, Fourth, and Fifth Circuits have each recognized such a right. *Oliver v. Scott*, 276 F.3d 736, 745 n.13 (5th Cir. 2002) (noting several courts of appeals’ findings of a limited constitutional right to a prisoner’s bodily privacy).

<sup>53</sup> *Johnson v. Phelan*, 69 F.3d 144, 150 (7th Cir. 1995) (holding that a prisoner’s due process rights are not violated by a cross-gender prison guard’s observation of his naked body); *see also* *Somers v. Thurman*, 109 F.3d 614, 619 (9th Cir. 1997) (noting that “the Seventh Circuit stands alone in its peremptory declaration that prisoners do not retain a right to bodily privacy”).

<sup>54</sup> *See* *Turner v. Safely*, 482 U.S. 78, 89-91 (1987).

<sup>55</sup> *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

<sup>56</sup> *Id.* at 90.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 90-91.

<sup>59</sup> *Turner*, 482 U.S. at 90. Under a “least restrictive alternative” test, prison officials would be required to “set up and then shoot down every conceivable alternative method of accommodating” the asserted right. *Id.*

an unreasonable, “‘exaggerated response’ to prison concerns.”<sup>60</sup>

The *Turner* factors must be applied in light of the type of constitutional violation involved and the circumstances of the particular case.<sup>61</sup> *Bell v. Wolfish* offers guidance on how *Turner* is to be applied in “unreasonable” search cases:

In each case [the test of reasonableness] 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.<sup>62</sup>

Thus, the more intrusive the search, the heavier the government’s burden of proving its reasonableness.<sup>63</sup>

Applying these tests, the Supreme Court has concluded that strip searches and visual body-cavity searches do not violate inmates’ rights to be free from unreasonable searches because they are necessary to maintain security.<sup>64</sup> It has also held that constant surveillance of prisoners is constitutionally permissible because institutional security needs outweigh prisoners’ privacy interests.<sup>65</sup> Following the Supreme Court’s pronouncement in this area, the Second, Fifth, Seventh, Ninth, and Tenth Circuits have affirmed the constitutionality of routine body-cavity and strip-searches on prisoners, according wide-ranging deference to the expertise of prison officials in determining the appropriateness of these searches.<sup>66</sup>

When, however, the basis of a challenge to a prison search is a gender difference between a guard and prisoner, the Supreme Court has provided little guidance to the lower federal courts.<sup>67</sup> The

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<sup>60</sup> *Id.*

<sup>61</sup> *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

<sup>62</sup> *Id.*

<sup>63</sup> *United States v. Lilly*, 576 F.2d 1240, 1245-46 (5th Cir. 1978) (establishing the intrusiveness of the search as a key factor of the Fourth Amendment analysis).

<sup>64</sup> *See Bell*, 441 U.S. at 560.

<sup>65</sup> *See Hudson v. Palmer*, 468 U.S. 517, 527 (1984) (finding that institutional security requires a “close and continual surveillance of inmates”).

<sup>66</sup> *See Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992); *Elliott v. Lynn*, 38 F.3d 188 (5th Cir. 1994); *Peckham v. Wisconsin Dep’t of Corrs.*, 141 F.3d 694 (7th Cir. 1998); *Thompson v. Souza*, 111 F.3d 694 (9th Cir. 1997); *Harris v. Rocchio*, 132 F.3d 42 (10th Cir. 1997).

<sup>67</sup> When presented with the opportunity to address the constitutionality of cross-gender searches, on four occasions the Supreme Court has denied *certiorari* to review the opinions of lower federal courts. *See Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997), *cert. denied*, 522 U.S. 852 (1997); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996); *Tharp v. Iowa Dep’t of Corrs.*, 68 F.3d 223 (8th Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996); *Smith v. Fairman*, 678 F.2d 52 (7th

Court's silence on this issue leaves open the possibility that gender may affect the balance between prisoners' privacy and the penological interests of an institution.<sup>68</sup> Searches by opposite-sex guards may infringe upon inmates' rights more than those by same-sex guards.<sup>69</sup> In addition, opposite-sex guards are not necessary to maintain security. Thus, a prison's use of opposite-sex guards may be found to violate constitutional rights to privacy unless the prison can show another legitimate goal besides maintaining security, such as promoting equal employment opportunity.<sup>70</sup>

*B. Caselaw on Cross-Gender Pat-frisks*

Federal judges appear to be somewhat uncomfortable sanctioning searches conducted by guards of the opposite sex. This discomfort is heightened when the search is highly intrusive, involving physical contact with breasts, genitalia, and anal areas. Nevertheless, the federal courts that have considered the constitutionality of cross-gender pat-frisks have generally held that while prisoners have a limited right to privacy, their interest in protecting bodily privacy is not as strong as the state's interest in internal security or equal opportunity employment for correctional officers.

For example, in *Grummet v. Rushen*,<sup>71</sup> the Ninth Circuit upheld pat-down searches by female officers of male inmates that included

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Cir. 1982), *cert. denied*, 461 U.S. 907 (1983).

<sup>68</sup> The searches at issue in *Katz*, *Bell*, and *Hudson*, the seminal Supreme Court cases, were not cross-gender searches. The Court was therefore not required to address the legal significance of the gender of the guard and prisoner in either the main body or dicta of the opinions.

<sup>69</sup> The majority of the courts that have analyzed the privacy side of the balancing test have concluded that when opposite-sex guards perform the touching and viewing necessary to maintain security, they infringe on inmates' privacy rights more than if guards of the same gender performed the duties. *See, e.g.*, *Forts v. Ward*, 471 F. Supp. 1095 (S.D.N.Y. 1978) (concluding that when same-sex guards perform contact duties, they invade prisoner privacy less than when opposite-sex guards perform the same duties). *But see* *Griffin v. Michigan Dep't of Corrs.*, 654 F. Supp. 690, 703 (E.D. Mich. 1982) (rejecting as a stereotypical sexual characterization the argument that the viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing by a member of one's own sex).

<sup>70</sup> In *Pell v. Procunier*, 417 U.S. 817, 822 (1974), the Supreme Court indicated that prisoners retain constitutional rights that are "[n]ot inconsistent . . . with the legitimate penological objectives of the corrections system." Since equal employment is not clearly a penological objective, courts may reject it as a legitimate reason for infringing on inmates' rights.

<sup>71</sup> 779 F.2d 491 (9th Cir. 1985).

the groin area.<sup>72</sup> Analyzing these claims under both the Fourteenth and Fourth Amendment,<sup>73</sup> the court concluded that the pat-down searches did not violate the privacy interests of the male inmates.<sup>74</sup> Under the Fourteenth Amendment, the court assumed that the male inmates retained the right to shield their naked bodies and genitals from members of the opposite sex, yet found that the state had “devised the least intrusive means to” further the state’s interest in prison security.<sup>75</sup> Similarly, the court assumed, but did not find, that prisoners retained Fourth Amendment protections while incarcerated: specifically, a legitimate expectation of privacy in shielding their naked bodies and genitals from members of the opposite sex.<sup>76</sup> Nevertheless, the Ninth Circuit upheld the prison regulations under the Fourth Amendment because it believed that security needs justified the pat-down searches.<sup>77</sup> The court further found the cross-gender aspect of the searches “reasonable” because they were done briefly and professionally while inmates were fully clothed.<sup>78</sup>

Applying the *Turner* standard, the Eighth Circuit held in *Timm v Gunter* that cross-gender, pat-down searches did not violate male inmates’ privacy rights. The Court concluded that prohibiting female officers from conducting pat-down searches, which included the groin area of male inmates “[could] severely impede overall internal security.”<sup>79</sup> Furthermore, the court reasoned that the limitation on female guards would create “resentment by male guards, tension among male and female employees, [and a] deterioration of morale.”<sup>80</sup>

In *Smith v. Fairman*,<sup>81</sup> the Seventh Circuit found that “inmates *do* have some right to avoid unwanted intrusions by persons of the opposite sex,”<sup>82</sup> suggesting that this protection can be found in the Fourth Amendment or in the more general right to personal

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<sup>72</sup> *Id.* at 492.

<sup>73</sup> *See id.* at 493 n.1.

<sup>74</sup> *Id.* at 496.

<sup>75</sup> *Id.* at 494.

<sup>76</sup> *See id.* at 493.

<sup>77</sup> *Grummett*, 779 F.2d at 494. The court did not, however, indicate that the security of the institution depended on female officers conducting the searches. *See id.*

<sup>78</sup> *Id.* at 495.

<sup>79</sup> *Timm v. Gunter*, 917 F.2d at 1100 n.10.

<sup>80</sup> *Id.*

<sup>81</sup> 678 F.2d 52 (7th Cir. 1982).

<sup>82</sup> *Id.* at 55 (emphasis added).

privacy.<sup>83</sup> The court nevertheless upheld the prison's policy of allowing female guards to conduct pat-down searches of male inmates, holding that the inmates' privacy interests had been accommodated because the searches were limited so as not to include the groin area.<sup>84</sup> The court implied, however, that had the searches included the genital area, a constitutional violation would have been found.<sup>85</sup> One year later, in *Madyun v. Franzen*,<sup>86</sup> the Seventh Circuit again ruled that a pat-down search performed by a female officer did not violate the inmate's Fourth Amendment rights because the search did not require deliberate examination of the genital area.<sup>87</sup>

In *Michenfelder v. Sumner*,<sup>88</sup> the plaintiff, a male inmate, alleged that the policy of female guards viewing unclothed male prisoners during strip-searches was an unconstitutional infringement of prisoners' privacy rights.<sup>89</sup> The Ninth Circuit concluded, however, that infrequent and casual observation by female officers is "not so degrading as to warrant court interference."<sup>90</sup> The court reasoned that requiring men to replace female employees during strip searches would displace officers throughout the prison.<sup>91</sup> Moreover, "the prison's current allocation of responsibilities among male and female employees already represent[ed] an attempt to accommodate prisoners' privacy concerns consistent with internal security needs and equal employment concerns."<sup>92</sup>

Although there is little consistency in the federal case law on cross-gender pat-frisks, there is a movement away from mutual accommodation of privacy and employment rights and an increasing tendency for courts to override prisoner privacy claims when the justification for a pat-search policy is institutional security or equal

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<sup>83</sup> *Id.* at 53-54.

<sup>84</sup> *Id.* at 55. Female officers were not permitted to conduct full searches and were given "explicit instructions not to search the genital area." *Id.* at 53.

<sup>85</sup> *Id.* at 55 (distinguishing this case from a case that found a Fourth Amendment violation where female corrections officers performed full frisks of a male inmate's anal and genital areas). Given Judge Easterbrook's very different analysis of prisoners' Fourth Amendment rights in more recent cases, such as *Johnson v. Phelan*, 69 F.3d 144 (1995), it is safe to assume that *Fairman* would be decided differently today.

<sup>86</sup> 704 F.2d 954 (7th Cir. 1983).

<sup>87</sup> *Id.* at 957. Again, given the *Johnson* decision, the Seventh Circuit would likely not be as generous today.

<sup>88</sup> 860 F.2d 328 (9th Cir. 1988).

<sup>89</sup> *Id.* at 329-30.

<sup>90</sup> *Id.* at 334.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

employment opportunity.<sup>93</sup> This trend is predicated on two beliefs: 1) the opportunity for female officers to advance within the state's correctional hierarchy is extremely important;<sup>94</sup> and 2) the viewing or touching of men by women does not significantly harm men.<sup>95</sup> While, however, the degree of invasiveness of the cross-gender pat-frisk is probative, it is not always determinative of the constitutionality of the search.<sup>96</sup>

## II. *JORDAN V. GARDNER*

On July 5, 1989, male guards at the WCCW began performing clothed body searches of female inmates that included the touching of the breast and genital areas.<sup>97</sup> During that day, guards searched several inmates, one of whom suffered tremendous anguish.<sup>98</sup> After reluctantly submitting to the search, this inmate "had to have her fingers pried loose from the bars she had grabbed during the search, and she vomited after returning to her cell block."<sup>99</sup>

That same day, the WCCW inmates filed a *pro se* complaint in the Western District of Washington requesting a preliminary injunction prohibiting male guards from performing random, clothed body searches on female prisoners.<sup>100</sup> The inmates were granted a temporary restraining order.<sup>101</sup> They were later granted a preliminary injunction and certified as a class.<sup>102</sup>

After a bench trial, the district court held that the cross-gender searches at WCCW violated the female inmates' First, Fourth, and Eighth Amendment rights.<sup>103</sup> The district court concluded that:

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<sup>93</sup> See Teresa A. Miller, *Sex Surveillance: Gender, Privacy & the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291, 297 (2000) (arguing that "driven by security concerns" courts have "favor[ed] statutorily derived employment rights over constitutionally derived privacy").

<sup>94</sup> See, e.g., *Michenfelder*, 860 F.2d at 334 (recognizing prison's legitimate interest in providing equal employment opportunities).

<sup>95</sup> See, e.g., *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (holding that females viewing male prisoners while naked is not degrading enough to warrant intervention by the courts).

<sup>96</sup> See *id.*

<sup>97</sup> See *supra* note 1 and accompanying text.

<sup>98</sup> *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Appellees' Brief at 9, *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (Nos. 90-35307/90-35552).

<sup>103</sup> *Jordan v. Gardner*, No. C89-339TB (W.D. Wash. Feb. 28, 1990), *rev'd*, 953 F.2d 1137 (9th Cir. 1992), *vacated and superseded en banc*, 986 F.2d 1521 (9th Cir. 1993).

under the laws of the State of Washington and other states . . . some areas of the human body have more privacy attached to them than do other parts. The standards of decency in society also recognize a right to privacy in the intimate parts of a human body.<sup>104</sup>

Turning to the Fourth Amendment claim, the district court relied on *Turner v. Safely* and held that the cross-gender, clothed body searches were unreasonable and thus violated the Fourth Amendment.<sup>105</sup>

A panel of the Ninth Circuit reversed the district court on all three grounds.<sup>106</sup> The Ninth Circuit then granted an *en banc* rehearing of the case and vacated the panel decision.<sup>107</sup> A majority of the judges affirmed the district court's holding as it pertained to the Eighth Amendment, but only a plurality agreed on the Fourth Amendment grounds.<sup>108</sup> Judge O'Scannlain, writing for four judges, refused to address the inmates' First and Fourth Amendment claims after concluding that the cross-gender searches were unconstitutional under the Eighth Amendment.<sup>109</sup>

#### A. *The Ninth Circuit Majority Opinion*

The majority began its opinion by clarifying its reasons for declining to decide the case under the Fourth Amendment and instead proceeding under the Eighth Amendment.<sup>110</sup> Judge O'Scannlain, writing for the majority, noted that courts have not yet recognized that the Fourth Amendment protects inmates from cross-gender, clothed body searches,<sup>111</sup> whereas the right to be free from "unwarranted infliction of pain" is clearly established.<sup>112</sup> Second, the majority reasoned that the evidence put forward by the inmates focused on the pain inflicted by the cross-gender, clothed body searches, rather than on their expectations of privacy.<sup>113</sup> Lastly, the majority found that once it had affirmed the district court's decision on Eighth Amendment grounds, it was unnecessarily duplicative to

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<sup>104</sup> *Id.* at 9.

<sup>105</sup> *Id.* at 12.

<sup>106</sup> 953 F.2d 1137 (9th Cir. 1992), *vacated and superceded en banc*, Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).

<sup>107</sup> Jordan v. Gardner, 968 F.2d 984 (9th Cir. 1992) (granting rehearing en banc).

<sup>108</sup> *See* Jordan, 986 F.2d 1521.

<sup>109</sup> *Id.* at 1524 n.3.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1524-25.

<sup>112</sup> *Id.* at 1525.

<sup>113</sup> *Id.* at 1524.



address the inmates' Fourth Amendment claim.<sup>114</sup>

In analyzing the inmates' Eighth Amendment claim, the court concluded that sufficient evidence had been presented to the district court to meet the constitutional standard for a finding of "infliction of pain."<sup>115</sup> The court noted that the female inmates in the institution had histories of sexual and physical abuse by men, and that experts support the conclusion that women react differently than men to unwanted intimate touching by the opposite sex.<sup>116</sup> The court also found compelling expert testimony stating that female inmates who had prior histories of abuse were likely to be re-victimized by the unwilling submission to intimate contact of their breasts and genitals by men.<sup>117</sup> Thus, the high probability that survivors of abuse would suffer severe psychological injury and emotional pain and suffering led the court to find that the random cross-gender searches caused sufficient pain to constitute an Eighth Amendment violation.

The court next determined that this infliction of pain was unnecessary and wanton because the security of the institution did not depend upon the cross-gender aspect of the search.<sup>118</sup> Furthermore, the court found that the inmates had met their burden of establishing deliberate indifference on the part of the superintendent, by showing that in implementing the cross-gender search policy he had disregarded the concerns of his advisors regarding the possible psychological trauma to the inmates.<sup>119</sup>

In order to reach this conclusion, the Ninth Circuit had to distinguish *Jordan* from *Grummett v. Rushen*,<sup>120</sup> a Ninth Circuit case that had permitted similar cross-gender searches of male inmates by female guards. It was able to do so for two reasons. First, *Grummett* involved searches that were much less invasive.<sup>121</sup> Second, the male inmates were unable to establish a finding of pain under the Eighth Amendment because they could point to nothing more than "momentary discomfort caused by the search procedures."<sup>122</sup> According to Judge O'Scannlain, "[n]othing in *Grummett* indicates

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<sup>114</sup> *Jordan*, 986 F.2d at 1525.

<sup>115</sup> *Id.* at 1526.

<sup>116</sup> *Id.* at 1525-26.

<sup>117</sup> *Id.* at 1526.

<sup>118</sup> *Id.* at 1528.

<sup>119</sup> *Jordan*, 986 F.2d at 1528.

<sup>120</sup> 779 F.2d 491 (9th Cir. 1985).

<sup>121</sup> See *Jordan*, 986 F.2d at 1524 (noting that the frequency and scope of the female guards' pat-down searches of male inmates in *Grummett* were significantly less invasive than the ones at issue before the court).

<sup>122</sup> *Id.* at 1526.

that the men had particular vulnerabilities that would cause the cross-gender clothed body searches to exacerbate symptoms of pre-existing mental conditions.”<sup>123</sup> In contrast, the female inmates at WCCW could show on the basis of expert psychological and anthropological testimony that they were traumatized by cross-gender searches.<sup>124</sup> The majority concluded that it was proper to consider this gender difference in evaluating the objective part of the women’s claim—whether the searches constituted an “infliction of pain.”<sup>125</sup>

*B. Judge Reinhardt’s Concurrence*

Although Judge Reinhardt believed that the cross-gender search policy in *Jordan* violated both the Fourth and Eighth Amendments, he suggested in his concurrence that the case should have been decided on Fourth, rather than Eighth Amendment grounds.<sup>126</sup> Judge Reinhardt offered several reasons why a Fourth Amendment analysis is preferable. First, Judge Reinhardt viewed the conduct at issue as clearly a search and noted that “[t]he ‘explicit textual source of constitutional protection’ with respect to ‘searches’ of ‘persons’ is, without doubt, the Fourth Amendment, not the more general Eighth Amendment.”<sup>127</sup> Second, Judge Reinhardt asserted that the Fourth Amendment is easier to apply than the Eighth Amendment, suggesting that while the Fourth Amendment requires only an objective inquiry, the Eighth Amendment requires a more complicated subjective inquiry.<sup>128</sup> Third, Judge Reinhardt reasoned that it would be more efficient to apply the Fourth Amendment because any search that violated the Eighth Amendment would be an “unreasonable” search under the Fourth Amendment.<sup>129</sup>

Next, Judge Reinhardt examined the Fourth Amendment rights retained by prisoners. The judge reasoned that in addition to protecting privacy, the Fourth Amendment “also protects persons against infringements of bodily integrity and personal dignity. . . . It

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Jordan*, 986 F.2d at 1540–41 (Reinhardt, J., concurring).

<sup>127</sup> *Id.* at 1541 (Reinhardt, J., concurring). Judge Reinhardt challenged the majority’s application of the Eighth Amendment on the grounds that the fundamental conduct at issue in *Jordan* was the search, not the pain inflicted by the search. See *id.* at 1540 (Reinhardt, J., concurring) (“Pain is simply an incident of the unreasonable searches, not, as Judge O’Scannlain would have it, ‘the gravamen of the inmates’ charge.’”).

<sup>128</sup> *Id.* at 1541 n.16 (Reinhardt, J., concurring).

<sup>129</sup> *Id.* at 1542 (Reinhardt, J., concurring).

is the privacy and dignitary interests of the female inmates that are violated here.”<sup>130</sup> Thus, Judge Reinhardt concluded that random, cross-gender, clothed body searches implicate a prison inmate’s rights of privacy and dignity.<sup>131</sup>

Once Judge Reinhardt recognized that female inmates do, in fact, possess a right to bodily privacy, he analyzed their claim under the four factors enumerated in *Turner*. First, considering prison administrators’ assertions that prison security interests and guards’ equal employment rights justified these searches, he found that “the connection between any legitimate penological interest and cross-gender searches [was] tenuous.”<sup>132</sup> Second, he recognized that since inmates cannot escape these searches by virtue of their incarceration, the cross-gender search policy left them with “no means of protecting their bodies against unreasonable searches.”<sup>133</sup> Third, Judge Reinhardt analyzed the impact that the accommodation of the inmates’ constitutional rights would have on other inmates and found that “[h]ere, there will, of course, be no adverse effect of any kind on other inmates if female guards instead of male guards conduct the body searches . . . .”<sup>134</sup> Finally, he found that an obvious, easy alternative was available: the prison could use only female guards to perform these searches.<sup>135</sup> Although this alternative would require administrative adjustments, these adjustments would be “relatively insignificant, both in themselves and when weighed against the constitutional interests at stake.”<sup>136</sup>

In applying the *Bell* balancing test, Judge Reinhardt addressed the two interests that prison administrators advanced in support of the cross-gender, clothed body searches, namely prison security and guards’ equal employment rights.<sup>137</sup> Judge Reinhardt rejected the prison administrators’ security argument because the record showed that the injunction imposed by the district court, which had since enjoined the prison from implementing its cross-gender pat-frisk policy, did not impair security in any way.<sup>138</sup> Judge Reinhardt found that the government’s additional argument that barring male guards from conducting random searches would require adjustments “of

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<sup>130</sup> *Id.* at 1534 n.7 (Reinhardt, J., concurring) (internal citation omitted).

<sup>131</sup> *Jordan*, 986 F.2d at 1534 (Reinhardt, J., concurring).

<sup>132</sup> *Id.* at 1536 (Reinhardt, J., concurring).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1536-37 (Reinhardt, J., concurring).

<sup>136</sup> *Id.* at 1537 (Reinhardt, J., concurring).

<sup>137</sup> *Jordan*, 986 F.2d at 1537-39 (Reinhardt, J., concurring).

<sup>138</sup> *Id.* at 1538 (Reinhardt, J., concurring).

staff schedules and job responsibilities, and the overriding of the bid system in the collective bargaining agreement” also lacked merit. The judge noted that prison authorities had not changed a single guard’s job during the injunction period.<sup>139</sup>

Next, Judge Reinhardt analyzed the invasion of personal rights engendered by the searches, agreeing with the district court’s determination “that an unknown number of” female inmates would suffer substantial harm from cross-gender searches.<sup>140</sup> Judge Reinhardt completed his Fourth Amendment analysis by balancing the prison officials’ interests against the harm inflicted on the inmates.<sup>141</sup> As a result, Judge Reinhardt found that the cross-gender, clothed body search policy failed the *Bell v. Wolfish* test because “the harm the policy inflict[ed] on the inmates and the injury it [did] to their constitutional rights” significantly outweighed the prison administration’s interests.<sup>142</sup>

### C. Judge Trott’s Dissent

In dissent, Judge Trott addressed the question of which Eighth Amendment standard of wantonness to apply in *Jordan*.<sup>143</sup> First, he noted that the majority’s opinion would cause several problems, such as the creation of “a special class of untouchable prisoners” by exempting any previously sexually abused prisoner, whether female or male, from random pat-frisks “by a person of the gender of the prisoner’s abuser.”<sup>144</sup> Fearful that too many prisoners would qualify for such protection, he applied the malice standard, a more difficult burden for prisoners to meet.<sup>145</sup> Judge Trott concluded that the inmates’ failed to prove the “wanton” element of an Eighth Amendment violation,<sup>146</sup> because Superintendent Vail had not acted maliciously or sadistically, but rather had acted in good faith when he

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<sup>139</sup> *Id.* at 1539 (Reinhardt, J., concurring).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1540 (Reinhardt, J., concurring).

<sup>142</sup> *Id.*

<sup>143</sup> *Jordan*, 986 F.2d at 1558 (Trott, J., dissenting). The Supreme Court has outlined two different “wanton” standards. In cases in which a prison official’s decision does not conflict with competing administrative concerns, the deliberate-indifference standard applies. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that prison officials’ deliberate indifference to a prisoner’s medical needs after suffering an injury during the course of prison work would constitute cruel and unusual punishment and violate the Eighth Amendment). In excessive force cases, the malice standard applies. *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

<sup>144</sup> *Jordan*, 986 F.2d at 1561 (Trott, J., dissenting).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1566 (Trott, J., dissenting).

implemented the cross-gender searches.<sup>147</sup>

*D. Judge Wallace's Dissent*

Chief Judge Wallace's dissent followed Judge Trott's reasoning in all but one respect.<sup>148</sup> Chief Judge Wallace disagreed with Judge Reinhardt's Fourth Amendment analysis, reasoning that it impermissibly combined the balancing test from *Bell v. Wolfish* with the four *Turner* factors.<sup>149</sup> According to Chief Judge Wallace, because *Turner* had essentially overruled *Bell*, such balancing was inappropriate.<sup>150</sup>

III. THE MAJORITY'S RELUCTANCE TO DECIDE THE INMATES' FOURTH AMENDMENT CLAIM

The *Jordan* majority justified its decision not to decide the female inmates' Fourth Amendment claim by questioning the extent to which prisoners retain a right to bodily privacy,<sup>151</sup> despite the Ninth Circuit's previous recognition of such a right.<sup>152</sup> In its brief discussion of Fourth Amendment precedent, the court did not address whether searches of female inmates by male guards could be differentiated from searches of male inmates by female guards. The failure to discuss gender with respect to the plaintiffs' Fourth Amendment claim is curious for a number of reasons. First, both the district court and a panel of the Ninth Circuit addressed the issue of a gender difference and reached opposite conclusions with respect to its significance.<sup>153</sup> Second, the majority gave great consideration to gender in its analysis of the inmates' Eighth Amendment claim.<sup>154</sup> Third, some of the relevant case law on cross-gender searches acknowledges the differential effect that such searches may have on

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<sup>147</sup> *Id.* at 1561 (Trott, J., dissenting).

<sup>148</sup> *Jordan*, 986 F.2d at 1566-67 (Wallace, C.J., dissenting).

<sup>149</sup> *Id.* at 1566-67 (citing *Bell v. Wolfish*, 441 U.S. 520, 529 (1979); *Turner v. Safely*, 482 U.S. 78, 89-91 (1987)); *see also Turner*, 482 U.S. at 89-91.

<sup>150</sup> *Jordan*, 986 F.2d at 1567 (Wallace, C.J., dissenting).

<sup>151</sup> *Id.* at 1524-25 ("Although the inmates here may have protected privacy interests in freedom from cross-gender clothed body searches, such interests have not yet been judicially recognized.")

<sup>152</sup> *See, e.g., Michenfelder*, 860 F.2d at 333 ("We recognize that incarcerated prisoners retain a limited right to bodily privacy."); *Grummet v. Rushen*, 779 F.2d 491, 494 (9th Cir. 1985) (stating that "the right of privacy is a fundamental right").

<sup>153</sup> *See Jordan v. Gardner*, No. C89-339TB (W.D. Wash. Feb 28, 1990); *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992), *vacated and superseded en banc*, 986 F.2d 1521 (9th Cir. 1993).

<sup>154</sup> *See Jordan*, 986 F.2d at 1526.

women.<sup>155</sup> Therefore it would not have been inconsistent for the Ninth Circuit, in its analysis of the reasonableness of the cross-gender searches at issue in *Jordan*, to have considered how the gender of the inmates influenced their subjective experiences of the pat-frisks.

A. *Conflicting Considerations of Gender in Earlier Jordan Decisions*

A panel of the Ninth Circuit found in 1992 that cross-gender searches do not violate the Fourth Amendment because there was “no principled way to distinguish *Grummett*,” an earlier Ninth Circuit case, which “rejected a constitutional challenge to a prison policy that permitted female guards to perform pat-searches of clothed male inmates and occasionally view naked inmates.”<sup>156</sup> Although the panel justified its position with several factual comparisons between the two cases, it gave no consideration to what the district court found was the most significant fact distinguishing this case from *Grummett*—the extreme psychological effects of the searches on women who have histories of physical and sexual abuse at the hands of men.<sup>157</sup> Because the two prior decisions in *Jordan* reflect alternative perspectives on whether the case is distinguishable from precedent on the basis of the differential psychological effect of the searches on female inmates, one would expect the Ninth Circuit to have addressed the issue when it reheard the case *en banc*. However, in the *en banc* decision, the Ninth Circuit remained silent on the question of a gender distinction and determined that *Grummett* and *Michenfelder* did not control.<sup>158</sup> The court reasoned that the frequency and scope of the searches in those cases were “significantly less invasive.”<sup>159</sup> While one can presume that the gender of the inmates in *Jordan* factored into the court’s Fourth Amendment

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<sup>155</sup> See, e.g., *Colman v. Vasquez*, 142 F. Supp.2d 226, 232 (D. Conn. 2001) (noting that “a number of courts have viewed female inmates’ privacy rights vis-à-vis being monitored or searched by male guards as qualitatively different than the same rights asserted by male inmates vis-à-vis female prison guards”). In *Timm v. Gunter*, for example, the Eighth Circuit held that differences in privacy protections afforded male and female inmates do not violate the Fourteenth Amendment equal protection clause as male and female inmates “are not similarly situated.” 917 F.2d 1093, 1102-03 (8th Cir. 1990) quoting *Timm v. Gunter*, No. CV85-L-501, at 15-16 (D. Neb. Dec. 13, 1988) (Memorandum of Decision).

<sup>156</sup> *Jordan*, 953 F.2d at 1141.

<sup>157</sup> See *id.* The district court found “[p]hysical, 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.” *Jordan v. Gardner*, Do. C89-339T B (W.D. Wash. Feb. 28, 1990).

<sup>158</sup> *Jordan*, 986 F.2d at 1524.

<sup>159</sup> *Id.*

analysis of the intrusiveness of the searches, the majority did not explicitly make this point.<sup>160</sup> The majority raised the significance of the inmates' gender only in the context of the inmates' Eighth Amendment claim.

*B. The Majority's Gender-Based Analysis of "Pain" Under the Eighth Amendment*

The Ninth Circuit, in determining whether cross-gender, clothed body searches constituted an objectively cruel and unusual condition of confinement, considered the psychological impact of the cross-gender searches from the perspective of the female inmates.<sup>161</sup> The court paid particular attention to the prevalence of sexual abuse histories among the female inmate population, noting that:

The record in the case, including the depositions of several inmates . . . describes the shocking histories of verbal, physical, and, in particular, sexual abuse endured by many of the inmates prior to their incarceration at WCCW. For example, [one inmate], who gave live trial testimony, described rapes by strangers (twice) and by husbands or boyfriends. She described how she had been 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 unique. Eighty-five percent of the inmates report a history of serious abuse to WCCW counselors, including rapes, molestations, beatings, and slavery.<sup>162</sup>

Relying on a Ninth Circuit sexual harassment case, *Ellison v. Bradley*,<sup>163</sup> the court found that "because women are disproportionately victims of rape and sexual assault," they may respond differently than men in situations that are sexually charged.<sup>164</sup> The court reasoned that since men and women are vulnerable in different ways, the severity and pervasiveness of sexual harassment should be evaluated from the victim's perspective.<sup>165</sup> Thus, the court held that due to the "differences in the experiences of men and women with regard to sexuality,"<sup>166</sup> the cross-gender nature of the searches caused an unconstitutional level of "pain" for all female inmates, even those

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<sup>160</sup> *See id.*

<sup>161</sup> *Jordan*, 986 F.2d at 1526.

<sup>162</sup> *Id.* at 1525.

<sup>163</sup> 924 F.2d 872 (9th Cir. 1991).

<sup>164</sup> *Jordan*, 986 F.2d at 1526.

<sup>165</sup> *Id.* at 1526 n.5.

<sup>166</sup> *Id.* at 1526.

who did not have a history of sexual abuse.<sup>167</sup>

By reaching the conclusion that the female inmates at WCCW may suffer harm if subjected to intrusive, clothed body searches conducted by male guards, the court was able to distinguish prior case law. The court noted that similar searches of male prisoners by female guards had not been shown to cause the same level of psychological harm.<sup>168</sup> In *Grummett*, for example, the court asserted that the male “inmates had not shown sufficient evidence of pain” or likelihood of psychological trauma as a result of the searches “to make out a cognizable Eighth Amendment claim.”<sup>169</sup> Thus, the majority reasoned that because the precedent was based solely on a male prisoner’s reaction to being searched by a female guard, which does not raise the same societal and constitutional concerns as the touching of a woman by a man, it was inapposite.<sup>170</sup> By explicitly weighing the significance of gender, the court was able to reach a conclusion contrary to controlling precedent.<sup>171</sup>

The consideration of gender when analyzing whether conditions of confinement constitute cruel and unusual punishment is not improper under current Eighth Amendment doctrine.<sup>172</sup> “The Eighth Amendment is supposed to protect *all* prisoners, regardless of gender, from cruel and unusual punishment in conditions of confinement.”<sup>173</sup> If one accepts the basic assumption that cognitive perceptions of men and women sometimes differ, then the experience of incarceration for men and women should also differ. As a result, the “objective” part of the test for cruel and unusual punishment must take into account the perceptions of both men and women.<sup>174</sup> An inquiry that fails to consider gender differences would be based on male experiences and would therefore lose its objectivity.<sup>175</sup> Thus, the test for cruel and unusual punishment must

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Jordan*, 986 F.2d at 1526.

<sup>170</sup> *Id.*

<sup>171</sup> *See id.*

<sup>172</sup> *See Krim*, *supra* note 19, at 105.

<sup>173</sup> *Id.* (emphasis added).

<sup>174</sup> *See id.* In *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Supreme Court held that when interpreting the Eighth Amendment, courts must recognize that the power to punish must be “exercised within the limits of civilized standards.” The Court noted that courts “must draw [the Eighth Amendment’s meaning from evolving standards of decency that mark the progress of a maturing society.” *Id.*

<sup>175</sup> Feminist legal scholars call the adoption of men’s experiences as neutral standards “masculine jurisprudence.” Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); *see also* SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?



properly measure the psychological harm to female inmates, as well as men.

The Ninth Circuit is certainly not the only court that recognized the importance of distinguishing the needs of men and women in a legal context.<sup>176</sup> Evidence of how women's perceptions can differ from men's perceptions can be found in sexual harassment law. Hostile environment doctrine, for example, begins from an understanding of the way in which women and men are likely to experience differently practices challenged as sexual harassment.<sup>177</sup> For example, although many women hold positive attitudes about consensual sex,<sup>178</sup> "their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters."<sup>179</sup> This perspective is also consistent with feminist scholarship in several areas of the criminal law that asks advocates and judges to adopt the perspective of the woman (usually the victim) in formulating and adjudicating the elements of a crime.<sup>180</sup> In *State v. Wanrow*,<sup>181</sup> for

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THINKING OF WOMEN'S LIVES 134-37 (1991); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 32 (1989).

<sup>176</sup> See, e.g., *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) (acknowledging that "men and women are vulnerable in different ways and offended by different behavior").

<sup>177</sup> In sexual harassment cases, courts have routinely used a gender-sensitive reasonable person standard in assessing whether workplace conditions represent a hostile or abusive environment. See, e.g., *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (reiterating that the "critical issue" in harassment cases is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

<sup>178</sup> Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989).

<sup>179</sup> *Id.*; see also BARBARA GUTER, *SEX AND THE WORKPLACE* 47-54 (1985). Barbara Gutek's empirical investigation of sex in the workplace reveals that women are more likely to regard a sexual encounter — verbal or physical — as coercive. *Id.* They are less likely to view such encounters as flattering and more likely to see them as signs of the virility of the perpetrator. *Id.* In contrast, men are less likely to regard such conduct as harassing, and more likely to view it as a flattering reflection of their attributes. *Id.* Men are also more likely to perceive such encounters as mutually desired, whereas women are more apt to regard the encounters as desired only by the more powerful, initiating party. *Id.*

<sup>180</sup> See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091-94 (1986) (arguing that "[i]n rape, the male standard defines a crime committed against women," and urging revision of standards used for adjudicating force and resistance to reflect women's perspectives); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 630-38 (1980) (arguing that in cases involving homicide by battered women legal rules governing the reasonableness of self-defense evaluate women's conduct by a male standard but should reflect the perspective of the battered woman).

<sup>181</sup> 559 P.2d 548 (Wash. 1977).

example, the Washington State Supreme Court allowed the use of a “battered woman” defense, noting:

Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination.<sup>182</sup>

In fact, in the majority of jurisdictions, juries are instructed to use a reasonableness standard, which includes the defendant’s individual subjective experiences.<sup>183</sup> Thus, courts should likewise measure the psychological harm women suffer when subjected to unwanted sexualized touching by male security guards by how women perceive the harm.

*C. Courts’ Acknowledgment of the Differential Effect of Cross-Gender Searches on Women*

The plight of women in prison has become a growing societal concern in the past twenty years as the number of incarcerated women has increased dramatically.<sup>184</sup> Consequently, courts and state legislators are beginning to recognize that female inmates have unique needs.<sup>185</sup> In addressing the legal claims of female inmates, the courts have, for the most part, applied standards developed within the context of the experiences of male prisoners.<sup>186</sup> Yet, in the application of these standards, some attention has been paid to the differential effect of such policies on women and the significance of

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<sup>182</sup> *Id.* at 559.

<sup>183</sup> See Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195, 219 (1986); see also Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN’S L.J. 121, 125 (1985) (describing the majority test as requiring reference to the defendant’s individual circumstances, but nonetheless labeling the test “an objective standard”).

<sup>184</sup> See George J. Church, *The View from Behind the Bars: The Number of Women Inmates Tripled in the Past Decade. Most of Them are Mothers. They Face a System Designed and Run for Men by Men*, TIME, Sept. 1990, at 20.

<sup>185</sup> The lack of access to abortions, treatment for drug-addicted pregnant women, gynecological care, child custody rights, HIV treatment protocols, and prison programs and services have been challenged as constitutionally inadequate. See, e.g., *Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910, 913-19 (D.C. Cir. 1996) (illustrating the types of challenges pertinent to female prisoners including “sexual misconduct, their general living conditions, the quality of their obstetrical and gynecological care, and discrimination in access to academic, vocational, work, and recreational programs”).

<sup>186</sup> See Jurado, *supra* note 19, at 6.

the gender of the inmates and guards.<sup>187</sup>

For example, in *Forts v. Ward*,<sup>188</sup> female inmates incarcerated at New York State's Bedford Hills Correctional Facility claimed that the policy of assigning male guards to the prison's living and sleeping corridors, which included the areas where women showered, violated their right to privacy because they would be "involuntarily exposed to view while partially or completely unclothed . . . ."<sup>189</sup> The district court found no reason to ban male guards from assignment in the housing corridors during the day because the prison permitted inmates to cover their cell door windows for up to fifteen minutes while dressing.<sup>190</sup> The court, however, found that the assignment of male guards to the corridors during the night, when the prison prohibited inmates from covering their windows, violated the inmates' right of privacy.<sup>191</sup> The lower court also found that installing screens in the shower facilities could easily correct invasions of privacy that occurred while inmates were showering.<sup>192</sup> On appeal, the Second Circuit overturned the removal of male guards from nighttime shifts, holding that the exclusion was unjustifiable gender-based employment discrimination.<sup>193</sup> The court reasoned that the prison could accommodate the privacy rights of female prisoners by providing appropriate sleepwear and by allowing the women to cover their cell door for fifteen minutes during the evening just as they are permitted to do during the day time.<sup>194</sup> The Ninth Circuit has not made similar accommodations when male prisoners have asserted their right to be free from cross-gender surveillance.<sup>195</sup> Thus, by

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<sup>187</sup> See *Colman v. Vasquez*, 142 F. Supp. 2d 226, 232 (D. Conn. 2001) (noting courts' recognition of the difference in privacy rights when male guards monitor female inmates and female guards monitor male inmates); *Timm v. Gunter*, 917 F.2d 1093, 1102-03 (8th Cir. 1990) (quoting *Timm v. Gunter*, No. CV85-L-501, at 15-16 (D. Neb. Dec. 13, 1988) (Memorandum of Decision)) (stating that differences in privacy protections afforded to male and female inmates do not violate the Fourteenth Amendment Equal Protection Clause because male and female inmates "are not similarly situated").

<sup>188</sup> 621 F.2d 1210 (2d Cir. 1980).

<sup>189</sup> *Id.* at 1213. The male guards' duties required them to look into the cells of female prisoners during the evening "count." *Id.* at 1216.

<sup>190</sup> *Id.* (citing *Forts v. Ward*, 471 F. Supp. 1095, 1101 (S.D.N.Y. 1977)).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1214 (citing *Forts*, 471 F. Supp. at 1102).

<sup>193</sup> *Id.* at 1215.

<sup>194</sup> *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980).

<sup>195</sup> See, e.g., *Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997) (stating that it is "highly questionable even today" whether prisoners have a right to be free from cross-gender surveillance when unclothed); *Michenfelder v. Sumner*, 860 F.2d 328, 333-34 (9th Cir. 1988) (finding no constitutional violation of privacy where male

allowing female prisoners to maintain a greater degree of modesty than had generally been afforded to male prisoners, the Second Circuit implicitly acknowledged the unique needs of women in prison.<sup>196</sup>

In *Torres v. Wisconsin Department of Health and Social Services*,<sup>197</sup> male guards challenged their exclusion from surveillance posts within a women's prison. The Seventh Circuit held that the department of corrections had not established a sufficient basis to justify a gender-based exclusion because it had complied with the policies set forth in *Forts v. Ward*.<sup>198</sup> The court found that the existing prison policies provided sufficient opportunity, through the use of curtains, shower doors, and privacy cards, for women prisoners to shield themselves from male officers.<sup>199</sup> It is notable, however, that the Wisconsin system did not provide male prisoners the same opportunity for privacy from cross-gender viewing.<sup>200</sup> Thus, the court did not reach the same result with respect to the privacy interests of female prisoners subject to cross-gender surveillance as it had with the rights of male prisoners.

The defendants in *Torres* also argued that the assignment of male guards to the women's unit would undermine the prisoners' rehabilitation because the women had suffered physical and/or sexual abuse at the hands of men.<sup>201</sup> The trial court and initial appellate court opinions refused to accept this argument because the defendants did not present objective evidence to support their theory.<sup>202</sup> An *en banc* panel vacated the appellate decision and

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guards performed visual body-cavity searches of male prisoners occasionally in view of female guards); *Grummett v. Rushen*, 779 F.2d 491, 492 (9th Cir. 1985) (rejecting the Fourth Amendment challenge to a prison policy that allowed "female correctional officers to view male inmates in states of partial or total nudity while dressing, showering, being strip searched, or using toilet facilities . . . .")

<sup>196</sup> See *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (upholding a jury verdict for the violation of the privacy interests of a female inmate forced to undress in the presence of male guards).

<sup>197</sup> 859 F.2d 1523 (7th Cir. 1988).

<sup>198</sup> *Id.* at 1526.

<sup>199</sup> *Id.*

<sup>200</sup> *Torres v. Wisconsin Dep't of Health and Soc. Serv.*, 639 F. Supp. 271, 277 (E.D. Wisc. 1986) ("Female correctional officers employed at male prisons in Wisconsin testified at trial that they routinely conduct inspections of the shower and toilet areas at those prisons and often see male inmates in various states of undress at those prisons. Furthermore, they are authorized, and sometimes required to conduct pat-searches on male inmates.")

<sup>201</sup> *Torres*, 859 F.2d at 1530 (noting that sixty percent of female inmates had been sexually abused in the past, which could cause them to be uncomfortable with surveillance by male guards).

<sup>202</sup> *Id.* at 1532.

reversed and remanded the trial court order and judgment.<sup>203</sup> The Seventh Circuit held that the trial court had applied too strict a requirement of empirical evidence,<sup>204</sup> acknowledging that it is socially accepted wisdom that “the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of stress to females.”<sup>205</sup>

In *Coleman v. Vasquez*,<sup>206</sup> a female inmate placed in a special unit for victims of sexual abuse filed a Section 1983 action against prison officials alleging that she was sexually abused by a male guard, and challenging the constitutionality of the prison’s cross-gender pat-searches. The defendants filed a motion to dismiss arguing that the complaint did not allege a cause of action under the Fourth Amendment since the Eighth Amendment is the “explicit textual source of constitutional protection” for alleged infringements of prisoners’ rights.<sup>207</sup> The district court denied the motion, rejecting as a matter of law the suggestion that an inmate in the given circumstance has no claim under the Fourth Amendment.<sup>208</sup> Acknowledging that the defendants may be able to prove at trial that the prison conducted the searches “pursuant to a constitutionally valid policy,”<sup>209</sup> the court refused to decide on the pleadings alone whether the plaintiff’s Fourth Amendment right was “clearly established.”<sup>210</sup> The court stressed the need for further factual development on the specific “pat-search policy, the justification for its adoption, the frequency with which inmates in the Sexual Trauma Unit are subject to pat-searches, and the other [*Turner* factors].”<sup>211</sup> Although the court did not reach this ultimate issue, it carefully distinguished the situation in which an inmate has “particular vulnerabilities” due to her sexual abuse history from the numerous cases in other jurisdictions allowing pat-searches by guards of the opposite sex.<sup>212</sup>

The gender of the inmates in each case clearly influenced the

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<sup>203</sup> *Id.* at 1532-33.

<sup>204</sup> *Id.* at 1531-32 (asserting that defendant need not supply empirical evidence to establish a bona fide occupational qualification, known as a BFOQ defense).

<sup>205</sup> *Id.* (referencing cases that upheld the exclusion of male nurses in the labor and delivery areas of hospitals).

<sup>206</sup> 142 F. Supp. 2d 226 (D. Conn. 2001).

<sup>207</sup> *Id.* at 230.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 232.

<sup>210</sup> *Id.* at 233.

<sup>211</sup> *Id.*

<sup>212</sup> *Coleman*, 142 F. Supp. 2d at 232.

courts' reasoning in *Forts*, *Torres*, and *Coleman*. The court deemed appropriate increased protection for women on the basis of their experiences as victims of sexual abuse at the hands of males. This consideration of gender difference is consistent with the holding in *Jordan* that the female inmates suffered "pain" when subjected to intrusive clothed body searches performed by male guards.

#### IV. THE RELATIVE UNINTRUSIVENESS OF CROSS-GENDER SEARCHES OF MALE INMATES

While some courts have acknowledged that pat-down searches are indeed offensive,<sup>213</sup> they nevertheless justify their findings that searches of male inmates by female officers are reasonable on the basis of the relatively unintrusive nature of the challenged conduct.<sup>214</sup> In *Michenfelder v. Sumner*,<sup>215</sup> for example, the Ninth Circuit held that because the searches were merely visual and involved no touching, they were distinguishable from those held to be unreasonable by the First Circuit in *Bonitz v. Fair*.<sup>216</sup> In *Bonitz*, police officers conducted contact body-cavity searches of female inmates without medical personnel, in a non-hygienic manner, and "in the presence of male officers."<sup>217</sup> Thus, the relative unintrusiveness of the searches at issue in *Michenfelder* made them more acceptable.

Likewise, the Seventh Circuit in *Smith v. Fairman*,<sup>218</sup> held that by instructing female guards to exclude the genital area on male inmates when conducting frisks, the defendants "afforded plaintiff whatever privacy right" to which he may be entitled.<sup>219</sup> While the Ninth Circuit embraced York's concern about shielding one's naked body from the view of persons of the opposite gender,<sup>220</sup> it nevertheless held in *Grummett* that the search did not violate this limited privacy right because the viewing was occasional, the clothed pat-down searches did "not involve intimate contact with an inmate's

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<sup>213</sup> See, e.g., *Smith v. Fairman*, 678 F.2d 52, 53 (7th Cir. 1982) ("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.'").

<sup>214</sup> See *United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978).

<sup>215</sup> 860 F.2d 328 (9th Cir. 1988).

<sup>216</sup> 804 F.2d 164 (1st Cir. 1986).

<sup>217</sup> *Id.* at 172.

<sup>218</sup> 678 F.2d 52 (7th Cir. 1982).

<sup>219</sup> *Id.* at 55.

<sup>220</sup> *Grummett*, 779 F.2d at 495.

body, [and] . . . the female guards conducted themselves in a professional manner.”<sup>221</sup>

The District Court of Oregon in *Bagley v. Watson*<sup>222</sup> articulated a standard for determining the extent to which cross-gender search policies impinge on a male prisoner’s reasonable expectation of privacy.<sup>223</sup> In holding that male prisoners did not suffer any constitutional harm by being viewed or searched by female guards, the court relied upon expert testimony that described the possible reason for the male prisoners’ claims of harm:

According to Kissel and Siedel, the majority of men who claim that having women in the housing units constitutes an invasion of their privacy are, upon closer inspection of their complaints, merely complaining about the inconvenience caused by having to maintain their privacy, largely, as they see it, for the needs of the women officers. . . . It is my belief that it is misleading to label concern with this inconvenience with women ‘invading privacy.’<sup>224</sup>

The court therefore held that while men may prefer to be searched or viewed by male guards, “the indignity perceived by some male inmates . . . do[es] not justify discrimination against women in employment so as to constitute a BFOQ exception”—a bona fide occupational qualification justifying the discriminatory employment practice under Title VII of the Civil Rights Act.<sup>225</sup> Thus, the *Bagley* court reasoned that while society is prepared to recognize men’s interest in bodily privacy, this interest is *de minimis* when compared to the employment rights of female officers.<sup>226</sup> The court made clear, however, that its opinion was limited to the rights of male prisoners, explicitly stating that male guards searching female prisoners was a different issue.<sup>227</sup> The distinction drawn by the court suggests that the harm imposed when men search women may be more significant than when women search men and therefore merits greater consideration when weighed against the employment rights of male guards.

The searches at issue in the *Jordan* case were significantly more

<sup>221</sup> *Id.*

<sup>222</sup> 579 F. Supp. 1099 (D. Or. 1983).

<sup>223</sup> *Id.* at 1102.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1105.

<sup>226</sup> *See id.* (noting that “the female officers’ federal rights to equal employment . . . supercede the male inmates’ rights to be free from unnecessary rigor under the Oregon constitution”).

<sup>227</sup> *Id.*

intrusive than those in prior cases, because in all of the cases considered by the Ninth Circuit the male guards did not touch the female inmates' breasts, buttocks, or genital areas.<sup>228</sup> Likewise, none of the plaintiffs in prior cases had shown on the basis of statistical psychological evidence that cross-gender searches could cause psychological trauma. The fact that gender may influence whether an inmate experiences a search as overly intrusive requires courts to re-examine the balance previously struck wherein courts accorded less protection to the privacy rights of male inmates than to the equal employment rights of female prison guards.

#### V. ONE POSSIBLE EXPLANATION FOR THE *JORDAN* MAJORITY'S FOURTH AMENDMENT ANALYSIS

The absence of any mention of gender with respect to the inmates' Fourth Amendment claim in the *Jordan* opinion indicates that there was more to the court's careful reluctance to reach the Fourth Amendment issues than the opinion suggests. While it is impossible to know for certain why the majority preferred the Eighth Amendment to the Fourth Amendment, it may have been concerned about the legal and societal implications of recognizing a constitutional right for women that had not previously been recognized for men. It may have also thought that to use societal expectations as the standard for evaluating privacy expectations would have undermined Title VII's mandate that stereotypes not limit employment opportunities.<sup>229</sup> One theorist, Rebecca Jurado, has explicitly voiced such concern.<sup>230</sup> She argues that "courts' reliance on the fact that women are victims of rape, as well as . . . the societal notion that any touching of a woman is sexual misconduct," has imbued women with a greater need for privacy than men.<sup>231</sup> According to Jurado, the court's reliance on this information supports the notion that there is an essential nature to all women—namely, that all women are potential victims.<sup>232</sup> In Jurado's view, the rights of women should instead be "founded upon their strengths and experiences, not in continuing stereotypes that limit their role to

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<sup>228</sup> See the discussion of Ninth Circuit inmate pat-frisk cases discussed *supra* note 195.

<sup>229</sup> See 42 U.S.C. § 2000e-2(a) (2002).

<sup>230</sup> See Jurado, *supra* note 19, at 53.

<sup>231</sup> *Id.* at 6; see also 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 (2001).

<sup>232</sup> Jurado, *supra* note 18, at 2-3.



that of victims.”<sup>233</sup>

The group of feminist legal theorists known as equal treatment advocates have voiced the more general fear that by focusing on women’s differences the legal system will exacerbate discrimination against women.<sup>234</sup> They argue that by using a “special” standard for women, the courts perpetuate traditional gender imagery of men as aggressive actors and women as passive victims.<sup>235</sup> While I recognize that my argument emphasizes that women have been victimized by sexualized repression, I would respond to such criticism as Catherine MacKinnon has: “I am merely telling it as it is.”<sup>236</sup>

Contrary to what Jurado and possibly the *Jordan* majority thought, the consideration of gender with respect to the inmates’ Fourth Amendment claim would not have necessitated the recognition of a greater right to privacy for women. Nor would it have required the articulation of a separate standard for women. All that was needed was for the court, when it balanced the limited privacy rights of all inmates, to have analyzed the intrusiveness of the searches from the perspective of women who have most likely been abused at the hands of men. A finding that WCCW’s cross-gender policy violated the Fourth Amendment would merely have meant that for this population of female inmates, the psychological harm caused by these searches made them “unreasonable.”

Pat-frisks of intimate body parts are intrusive and degrading to inmates in all contexts. When, however, a male guard searches a female inmate’s body, a woman is apt to experience not only the degradation of having the most intimate parts of her body exposed or explored, but also fear that the male guard will abuse his power in

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<sup>233</sup> *Id.* at 53.

<sup>234</sup> For an overview of feminist legal theory, see Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992). For a discussion of feminist analysis of privacy in cross-gender searches, see Miller, *supra* note 231, at 875-89.

<sup>235</sup> See, e.g., Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352, 377 (1988).

<sup>236</sup> CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES OF LIFE AND LAW* 220 (1987). Mackinnon writes:

[T]he parade of horrors demonstrating the systematic victimization of women often produces the criticism that for me to say women are victimized reinforces the stereotype that women ‘are’ victims, which in turn contributes to their victimization. If this stereotype is a stereotype, it has already been accomplished, and I come after. To those who think ‘it isn’t good for women to think of themselves as victims,’ and thus seek to deny the reality of their victimization, how can it be good for women to deny what is happening to them?

*Id.*

the situation and sexually abuse her.<sup>237</sup> The fear is even more acute for those who have suffered past abuse.<sup>238</sup> The extreme invasiveness of these searches makes the state's burden of establishing that these searches are reasonably necessary to accommodate a legitimate penological interest — and that there is no realistic alternative to accomplish the same goal — much harder to meet. Constitutional theorist Akhil Amar has called this idea the proportionality principle, arguing that more serious intrusions require more weighty justifications.<sup>239</sup>

Under Fourth Amendment law, the permissibility of a given intrusion turns on its “reasonableness” under particular circumstances.<sup>240</sup> The Supreme Court has emphasized, however, that the concept of “reasonableness,” must take into account the common sense of ordinary people.<sup>241</sup> Searches that “create opportunities for sexual oppression, harassment, or embarrassment” generally offend basic notions of morality.<sup>242</sup> Therefore, common sense tells us that they cannot be “reasonable” in the ordinary sense of the word. How can a search that is adjudged to cause a sufficient level of “pain” as to constitute “cruel and unusual punishment” under the Eighth Amendment be considered “reasonable”? A policy allowing men to touch women in a sexualized manner capable of triggering a traumatic response must therefore be “unreasonable” under the Fourth Amendment—unreasonable because it reinforces gender subordination and offends basic values and concepts of human dignity.<sup>243</sup>

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<sup>237</sup> This fear of abuse is based on widespread instances of sexual abuse in women's prisons. See, e.g., Human Rights Watch, *supra* note 6, at 1-2, finding that male correctional officers often misuse their search authority to have inappropriate sexual contact with female prisoners. See also AMNESTY INTERNATIONAL, *supra* note 6, at 55-56.

<sup>238</sup> See Heney & Kristiansen, *supra* note 7 and accompanying text.

<sup>239</sup> Akhil Reed Amar, *Terry and the Future: Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1120 (1998) (noting that the Supreme Court focused in *Terry v. Ohio* on both the “depth and breadth of an intrusion”).

<sup>240</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

<sup>241</sup> See Jerome Atrens, *A Comparison of Canadian and American Constitutional Law Relating to Search and Seizure*, 1 SW. J.L. & TRADE AM. 29, 35 (1994) (discussing the Supreme Court's emphasis on normative reasonableness or what “the ordinary person has come to expect in society” in its Fourth Amendment jurisprudence); Amar, *supra* note 239, at 1120 (common sense understanding should inform “the interpretation of a Constitution that speaks in the name of ordinary people”).

<sup>242</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808-809 (1994); see also *Terry v. Ohio*, 392 U.S. 1, 17 n.14 (stating that “the degree of community resentment aroused by particular practices is clearly relevant”).

<sup>243</sup> See Amar, *supra* note 242, at 41.

Rather than suggesting that women have a greater right to bodily privacy than men, I am arguing that privacy analysis under the Fourth Amendment must be highly contextualized and grounded in fundamental respect for human dignity and bodily integrity. For example, for the particular population of women subjected to the *Jordan* policy, the psychological harm caused by cross-gender searches is “unreasonable” when balanced against the institutional concerns of the prison. That women’s claims should be highly contextualized does not prevent men from demonstrating Fourth Amendment violations when appropriate; if male inmates can show a comparable level of psychological harm as a result of cross-gender pat-frisks, then they too should be able to sustain a claim under the Fourth Amendment. Critics may claim that consideration of the subjective experiences of women will impose a huge burden on the courts. By focusing, however, on the intrusiveness of the searches, the courts already employ a fact-specific approach.

#### CONCLUSION

One way out of this quagmire would be for courts to recognize a general right to bodily integrity for both free and incarcerated individuals. Such a view flows out of the Ninth Circuit’s expressed concern in *York v. Story*<sup>244</sup> about privacy in the naked body. “The desire to shield one’s unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”<sup>245</sup> While agreeing with the basic nature of this aspect of privacy, some courts distinguish *York* because it involved a female crime victim rather than a prisoner. Thus, until society is ready to recognize that prisoners are individuals worthy of the same constitutional protections as free citizens, the courts must continue to consider all relevant contextual factors when determining the reasonableness of a cross-gender body search under the Fourth Amendment. In the situation of male corrections officers searching female inmates, this means that the courts must take into account the subjective experience of unwanted sexualized touching from the perspective of a woman, who may or may not have been abused prior to incarceration. Although privacy is genderless, concern for symmetry in the treatment of searches must not mean

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<sup>244</sup> 324 F.2d 450 (9th Cir. 1963).

<sup>245</sup> *Id.* at 455. In holding that the distribution of photographs of a nude female assault victim invaded the privacy rights guaranteed by the Due Process Clause of the Fourteenth Amendment, the court wrote that it could not “conceive of a more basic subject of privacy than the naked body.” *Id.*

that critical differences in the sexualization of power get overlooked.