

PRISON GUARDS AND INMATES OF OPPOSITE GENDERS: EQUAL EMPLOYMENT OPPORTUNITY VERSUS RIGHT OF PRIVACY

JOHN DWIGHT INGRAM*

I. INTRODUCTION

An inevitable conflict exists between the right of prison guards to equal employment opportunities, regardless of the gender of the inmates in the prison, and the alleged right of the inmates to some degree of privacy. Title VII of the Civil Rights Act of 1964¹ prohibits gender discrimination in employment. At the same time, the Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons . . . against unreasonable searches . . .”² In the context of a prison, it becomes very clear that neither of these rights is absolute and unyielding. The guards' Title VII right can be limited by the statutory exception for a BFOQ, that is, “a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular . . . enterprise.”³ As to the inmates' privacy right, some judges and others have asserted that it does not exist; that is, prisoners have no right or expectation of privacy while they are incarcerated.⁴ Even those who do not go that far uniformly recognize that any right of privacy that inmates retain is a very limited one.⁵

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* Professor of Law, John Marshall Law School, A.B. Harvard University 1950; J.D. John Marshall Law School 1966. Professor Ingram gratefully acknowledges the valuable contributions of his very capable Research Assistants: Jennifer Goldstone, Lisa Santos, Christy Fisher, and Nella DiSanto. Professor Ingram also wishes to thank friends who gave advice and counsel on the differences in attitude between males and females on matters of bodily privacy and modesty: Pat Abelt, Betsy Bruemmer, Judy Currier, Tamar Fleishman, Beth Foster, Ardath Hamann, Cindy Hooper, Elizabeth Ingram, Emily Kelsey Ingram, Molly Ingram McDowell, Doris Long, Joyce Lopas, Ann Lousin, Michaela Murphy, Jodie Panariello, Alyson Ray, Alexandra Roginsky, Kelli Stebel, and Eve-Marie Swan.

1. Civil Rights Act of 1964 § VII, 42 U.S.C. § 2000e-2(a) (1999).
2. U.S. CONST. amend. IV.
3. 42 U.S.C. § 2000e-2(e) (1999).
4. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting) (“Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness.”); *Hudson v. Palmer*, 468 U.S. 517, 528 (1984) (declaring that inmates have no reasonable expectation of privacy in their prison cells; loss of privacy is an inherent incident of confinement); *Price v. Johnston*, 334 U.S. 266, 285 (1948) (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . .”); *Johnson v. Pennsylvania Bureau of Corrections*, 661 F. Supp. 425, 430 (W.D. Pa. 1987) (“The Constitution does not mandate that prisons which house prisoners convicted of serious crimes must be completely free of discomfort and affronts to a prisoners' [sic] dignity.”).
5. See, e.g., *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (noting that “persons in prison must surrender many rights of privacy which most people may claim . . .” However, for most peo-

In order to enjoy the full benefit of equal employment opportunity, guards of either gender must be eligible for any positions and duties in the prison, even those involving close supervision (including observation of unclothed inmates in cells, showers, and toilets) and physical contact (including pat-down and body cavity searches) with inmates of the opposite gender.⁶ However, many inmates assert that such activities by guards of the opposite gender is a violation of the inmates' right of privacy.⁷ The courts have struggled valiantly with attempts to find a reasonable and acceptable balance between these conflicting interests, but there remains a substantial amount of disagreement as to several specific issues, especially visual observation of unclothed inmates, and pat-down, strip, and body cavity searches.

II. INMATES' RIGHTS

A. In General

As discussed above,⁸ it is generally accepted that prison inmates have some degree of freedom from visual exposure of and physical contact with their bodies. However, whatever rights the inmates have must be balanced against the legitimate needs and interests of the prison authorities, which primarily involve the maintenance of security for both prison staff and inmates and the goal of rehabilitation of inmates.

Courts uniformly recognize that observation and search of inmates are necessary to prevent the obtaining and the possession of weapons, drugs, and other contraband by inmates.⁹ Disagreement arises, however, as to the level of observation and search¹⁰ that is necessary and as to whether guards of the opposite gender may participate.¹¹ Most courts give considerable deference to the experience and expertise of prison officials in these matters, as long as there is a rational basis for the procedures employed at the prison.¹²

ple the involuntary exposure of their genitals to people of the opposite gender "may be especially demeaning and humiliating," and should not be forced on prisoners unless reasonably necessary.); *Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (holding that prisoners have a limited right to privacy).

6. See, e.g., *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (holding that a prison policy and practice of allowing female correction officers to view male prisoners in states of partial or total nudity while dressing, showering, or being strip searched did not violate the inmates' rights under the Fourth or Fourteenth Amendments, and noting that to restrict the female guards from positions which involve occasional viewing of the inmates would possibly prejudice a right to the equal employment opportunities of the female guards).

7. See *id.* at 492.

8. See *supra* notes 4-5 and accompanying text.

9. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that body cavity searches are permissible to discover and deter smuggling of weapons, drugs and other contraband).

10. See *supra* notes 6-7.

11. See *infra* Section IIC.

12. See, e.g., *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995) (emphasizing the theme of the court's prison jurisprudence that "judges [must] respect hard choices made by prison administrators").

Some courts have also recognized that the goal of rehabilitation of inmates may best be served by having guards of only the same gender as the inmates, in some cases, or in other cases, by having guards of both genders. For example, in *Torres v. Wisconsin Department of Health & Social Services*,¹³ the court upheld a decision by a prison superintendent that the rehabilitation of inmates would be enhanced by using only female guards in the living units of female inmates. On the other hand, Judge Cudahy in his dissent in *Torres*, stated that there was evidence in the District Court “that the presence of males in the living quarters was valuable to inmates’ eventual ability to adjust to the outside world.”¹⁴ Judge Easterbrook went even further in his dissent, stating that “[r]ehabilitation as a justification for confinement has all but vanished from American penology.”¹⁵

Some courts have prohibited the use of prison policies that prohibit women guards from working within the housing of male residential units.¹⁶ In *Griffin v. Michigan Department of Corrections*,¹⁷ after holding that being male was not a BFOQ¹⁸ for a guard to work within the housing of residential units,¹⁹ the court went on to state that “the presence of women, where feasible, in [a male prison] is a healthy influence and contributes to more normal social conditions” and a “more rehabilitative atmosphere for inmates.”²⁰

B. Different Rules for Convicted and for Those Merely Accused?

It is sometimes suggested that different standards should apply to pretrial detainee inmates and sentenced inmates. As the court pointed out in *Wolfish v. Levi*:²¹

13. 859 F.2d 1523, 1524 (7th Cir. 1988). The court noted that the superintendent relied on her professional expertise and contact with inmates, and the fact that 60% of the inmates had been physically and sexually abused by males. *Id.* at 1530.

14. *Id.* at 1533 (Cudahy, J., dissenting).

15. *Id.* at 1537 (Easterbrook, J., dissenting). To emphasize his belief on this point, Judge Easterbrook added, “If a state wants to pursue the impossible dream, it may not do so at the expense of . . . sex discrimination” against the employment opportunities of male guards. *Id.*

Contrary to the attitude of Judge Easterbrook, there is certainly support for the view that prisoners deprived of “any residuum of privacy . . . devalue themselves and others . . .” *Hudson v. Palmer*, 468 U.S. 517, 552 (1984) (Stevens, J., dissenting in part and concurring in part) (citation omitted).

Without the privacy and dignity provided by fourth amendment coverage, an inmate’s opportunity to reform, as small as it may be, will further be diminished. It is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures.

Id. (citation omitted).

16. See *Griffin v. Michigan Dep’t of Corrections*, 654 F. Supp. 690, 692 (E.D. Mich. 1982).

17. *Id.*

18. See 42 U.S.C. § 2000e-2(e) (1999).

19. See *Griffin*, 654 F. Supp. at 700-01.

20. *Id.* at 704.

21. 573 F.2d 118 (2d Cir. 1978) (holding that the trial court acted correctly in ordering that “double-celling” be ended as to pretrial detainees, but that a bar against double-celling of convicted inmates was improper in the absence of a finding that double-celling conditions violated the inmates’ Eighth Amendment rights; trial court also acted correctly in ordering that pretrial detainees be allowed to observe the search of their rooms and belongings from a reasonable distance).

Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty We have demonstrated our belief in this basic principle by according to pretrial detainees the rights afforded unincarcerated individuals. Accordingly, it is not enough that the conditions of incarceration for individuals awaiting trial merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment. Time and again, we have stated without equivocation the indisputable rudiments of due process: pretrial detainees may be subjected to only those “restrictions and privations” which inhere in their confinement itself or which are justified by compelling necessities of jail administration.²²

The *Wolfish* court went on to state that, as to sentenced inmates,

The parameters of judicial intervention into the conditions of incarceration for sentenced prisoners are more restrictive than in the case of pretrial detainees. An institution's obligation under the eighth amendment is at an end if it furnished sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety. The Constitution does not require that sentenced prisoners be provided with every amenity which one might find desirable.²³

The Second Circuit then decided that different requirements for pretrial detainees and sentenced inmates could be justified as to double-celling of inmates and barring inmates from observing searches of their rooms.

This case reached the United States Supreme Court as *Bell v. Wolfish*.²⁴ As to the double-celling of inmates, the Court did not reach the issue of possible different rules for detainees and convicts, because it held that there was no undue hardship for detainees under the circumstances of their confinement in the New York City Metropolitan Correctional Center.²⁵ As to the exclusion of all inmates, including pretrial detainees, during cell searches, the Court held that this procedure facilitated safe and effective searches and that therefore no distinction need be made between pretrial detainees and sentenced inmates.²⁶

Thus, while there may be some basis for different procedures for pretrial detainees and sentenced inmates, if the procedure at issue relates to prison security it is likely that the prison authorities can justify the application of the same procedure to detainees and convicts alike.²⁷ As the court pointed out in *Dufrin v. Spreen*,²⁸ the Supreme Court had said in *Bell v. Wolfish*²⁹ that “[t]here is no basis

22. *Id.* at 124 (citations omitted).

23. *Id.* at 125 (citation omitted).

24. 441 U.S. 520 (1979) (holding specifically that a requirement that pretrial detainees remain outside their rooms during routine inspections by prison officials did not violate the Fourth Amendment, and more generally that absent an express intent to punish, if a particular condition or restriction imposed on a detainee is reasonably related to a nonpunitive governmental objective it does not, without more, amount to punishment).

25. *Id.* at 543.

26. *Id.* at 558.

27. *Dufrin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983) (noting that “[p]rison officials need not distinguish between convicted inmates and pretrial detainees in reviewing their security practices”).

28. 712 F.2d 1084, 1088 (6th Cir. 1983).

29. 441 U.S. 520 (1979).

for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order.”³⁰

C. Sources of Inmates' Rights

Inmates who seek to be free from some of the harsher aspects of prison life usually assert that they are protected by one or more of the Fourth,³¹ Eighth,³² and First³³ Amendments to the United States Constitution. As I have discussed before, the Fourth Amendment right is asserted to prohibit or limit certain visual observations and physical contacts, especially where guards of the opposite gender may be involved.³⁴ The Eighth Amendment right is asserted as to prison procedures which are claimed to be so humiliating and degrading that they constitute “cruel and unusual punishment.”³⁵ Finally, the First Amendment right is asserted when the claim is made that a prison practice interferes with an inmate's free exercise of his³⁶ religious beliefs, for example, to observe the “fundamental Christian tenet of modesty,”³⁷ by not being subjected to observation by female guards while showering or using the toilet.³⁸ To a large extent, perhaps totally, any First Amendment right of an inmate overlaps and is essentially the same as the alleged Fourth Amendment right, subject to the same rebutting justifications by prison authorities. Therefore, it will not be further discussed as a separate issue in this article.

1. Fourth Amendment

Perhaps the best way to study the role of a Fourth Amendment privacy right is to look at the invasions thereof in a prison context in ascending order of severity, that is, casual and occasional visual observation of unclothed inmates in cell, shower, etc.; regular and unannounced visual observation of unclothed inmates; pat-down searches of clothed inmates' bodies; visual searches of inmates' bodily cavities; and manual searches of inmates' bodily cavities.³⁹

30. *See id.* at 546 n.28.

31. U.S. CONST. amend. IV (The “right of the people to be secure in their persons . . . against unreasonable searches . . .”).

32. U.S. CONST. amend. XIII (“Excessive bail shall not be required, nor excessive time imposed, nor cruel and unusual punishments inflicted.”).

33. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”).

34. *See, e.g., Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987) (holding that where prisoner asserted that prison's policy of according female guards full and unrestricted access to view his naked body performing necessary bodily functions violated his limited Fourth Amendment right to privacy).

35. *Id.*

36. When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically, due to habit and my masculine personal orientation. By doing so I avoid the rather awkward “he or she” and the grammatically incorrect “they.” I trust that female authors will balance the scales on the other side.

37. *See Kent*, 821 F.2d at 1221.

38. *Id.* at 1224.

39. Few would argue with this rank ordering. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985) (citations omitted) (“[B]ody cavity searches are demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and sub-

As the court stated in *Levoy v. Mills*,⁴⁰ “[i]t is an established Fourth Amendment principle that ‘the greater the intrusion, the greater must be the reason for conducting a search.’”⁴¹ In furtherance of this concern, the Supreme Court, in *Turner v. Safley*, set forth the proper standard of review for prison procedures and regulations.⁴² As restated by the court in *Timm v. Gunter*, “when a prison regulation impinges on inmates’ constitutional rights the regulation is valid if it is reasonably related to legitimate penological interests.”⁴³

Four factors are relevant in deciding whether or not a regulation is reasonable. First, there must be a sufficient connection between the regulation and the governmental interest used to justify the regulation. Second, the availability of alternative means of exercising the right at issue must be considered. Third, consideration is required of the impact that accommodating the asserted right would have on guards, other inmates, and prison resources. Fourth, the availability of ready alternatives to the regulation should be considered.⁴⁴

Where the observation or search of inmates is done by guards of the same gender, the practice is almost always upheld by the courts as being necessary to the proper functioning of the prison and the maintenance of security.⁴⁵ It is usually only when the gender of the guards and inmates involved in the activity is not the same that the courts are more likely to find an unreasonable intrusion on the inmates’ rights.

a) Observation

Courts have usually held that infrequent and casual viewing of inmates of one gender by guards of the other does not violate the inmates’ privacy right, if such viewing is necessitated by security needs, efficient use and scheduling of guards, and providing equal employment opportunity for all guards.⁴⁶ In some cases, courts have suggested various ways in which the privacy rights of in-

mission.”); *Bell v. Wolfish*, 441 U.S. 520, 594 (1979) (Stevens, J., dissenting) (noting that body cavity searches are perhaps “the greatest personal indignity” searching officials can impose upon a person).

40. 788 F.2d 1437 (10th Cir. 1986) (declaring that to justifiably conduct a body cavity search of a prisoner the government must demonstrate a legitimate need to conduct the search and must also show that less intrusive measures would not satisfy that need).

41. *Id.* at 1439.

42. 482 U.S. 78 (1987) (rejecting an inmate marriage regulation which prohibited inmates from marrying unless the prison superintendent determined that there were compelling reasons for the marriage).

43. 917 F.2d 1093, 1099 (8th Cir. 1990) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

44. *Id.* (citations omitted).

45. See, e.g., *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1986) (holding that visual anal cavity searches, conducted as a condition of any movement outside segregation unit, did not violate the Fourth Amendment); *Daugherty v. Harris*, 476 F.2d 292 (10th Cir. 1973) (declaring that strip and rectal searches were necessary to discover concealed contraband).

46. See, e.g., *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995) (ruling that monitoring of naked prisoners is reasonable as precaution against drugs and weapons, and to address interprisoner violence); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Johnson v. Pennsylvania Bureau of Corrections*, 661 F. Supp. 425 (W.D. Pa. 1987) (declaring that the state may restrict or withdraw prisoners’ rights to the extent necessary to further the correctional system’s legitimate goals, and institutional security is chief among those legitimate goals); *Hudson v. Goodlander*, 494 F. Supp. 890 (D. Md. 1980) (noting that to the extent necessary to maintain security, prisoners’ employment of constitutional rights may be restricted).

mates might be accommodated without interfering unduly with prison security or efficiency. Among these are “allowing inmates to cover the window in their rooms for designated periods . . . [and] installing modesty panels in the shower and toilet facilities.”⁴⁷

Of course, these same protections could be required for same-gender guards. The privacy of inmates is invaded regardless of the gender of the guards. But when the courts speak of “privacy” in this context they seem to equate it with “modesty,” which, for most people, involves only viewing by a person of the opposite gender.⁴⁸ I have not seen any case where a court found an invasion of privacy because an unclothed inmate was observed by a guard of the same gender.

Some courts make a sharp distinction between cross-gender observation which is inadvertent, infrequent, announced, or required in an emergency, and observation which is frequent, at close range, and a required part of the guards' regular duties.⁴⁹ With inadvertent cross-gender observation, most courts will require, at most, some screening of the inmates.⁵⁰ When the observation is part of the daily duties of the guards, however, there is a wide range of judicial tolerance. Some courts require screening where it does not threaten security.⁵¹ Other courts hold that opposite gender guards may be excluded from employment in areas of the prison where a guard's duties require close and regular observation of unclothed inmates.⁵² At the other end of the spectrum, some courts hold that equal employment opportunity requires that all guards be eligible for all jobs in the prison,⁵³ and that viewing of unclothed inmates is not “intrinsically more odious” when the viewing is by members of the opposite gender.⁵⁴

b) Searches

The courts have generally upheld prison procedures which permit or require “frisk” or “pat-down” searches by opposite gender guards, especially when the guard is female and the inmate is male.⁵⁵ In *Smith v. Fairman*, the court

47. Karoline E. Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 993 (1998); see also *Forts v. Ward*, 621 F.2d 1210, 1216-17 (2d Cir. 1980) (holding that a prison could install translucent screens in showers, allow inmates to cover a cell window for brief intervals, and provide nightwear that will prevent exposure of inmates' private parts while sleeping).

48. The distinction between “privacy” and “modesty” will be discussed further in Section IV, *infra*.

49. See, e.g., *Hudson v. Goodlander*, 494 F. Supp. 890 (D. Md. 1980) (noting that when an emergency arises the nearest officers may render assistance, regardless of their sex, and any temporary violation of inmate privacy is justified by necessity to protect safety; conversely, anticipated events such as staff shortages, do not exempt guards from restrictions on duties).

50. See, e.g., *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987).

51. See *id.*

52. See, e.g., *Hudson v. Goodlander*, 494 F. Supp. 890 (D. Md. 1980) (holding that employees' interest in equal opportunities for women guards is not compelling enough to override inmates' privacy rights for positions where inmate nudity would be encountered on a regular basis).

53. See, e.g., *Griffin v. Michigan Dep't of Corrections*, 654 F. Supp. 690 (E.D. Mich. 1982).

54. *Id.* at 701.

55. See, e.g., *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983). Cases involving searches of female inmates by male guards are not likely to reach the courts, since it is very common for prisons

held that allowing female guards to conduct pat-down searches of male inmates, through clothing, and excluding the genital area, did not violate any privacy right of the inmates.⁵⁶ In *Timm v. Gunter*, the court went further and upheld a prison policy under which female guards conducted pat searches on the same basis as male guards, including the genital and anal areas.⁵⁷ The court found that the prison's policy was reasonable: all guards were "trained to perform pat searches in a professional manner";⁵⁸ any "touching of genital and anal areas [was] brief and incidental";⁵⁹ and any alternative policy would have more than a *de minimis* effect on security and the equal employment opportunity of male and female guards.⁶⁰

As courts have become more aware of the prisons' need to recognize employees' right to equal job opportunities, it was inevitable that some courts would hold that prison policies that permitted opposite-gender guards to conduct visual strip searches in the course of their duties did not constitute an invasion of the inmates' right of privacy.⁶¹ But since body-cavity searches are considered by most people to be the most serious invasion of privacy, it may be that most prisons do not yet provide for the conduct of such searches by opposite gender guards. This would be especially true in the case of a manual body-cavity search, and perhaps also of a visual search of a female inmate. Yet, as guards of both genders increasingly insist on equal employment opportunity, prison authorities will be pressed to assign and utilize guards without regard to their gender or the gender of the inmates. And, as cross-gender guarding becomes accepted practice, it may become necessary to eliminate any distinctions between genders as to observation and searches of any kind. In many cases there will be no other reasonable way to fulfill the prison's legitimate security needs and its need to deploy available staff effectively.⁶²

2. Eighth Amendment

Inmates of both genders have sometimes claimed that observation and searches by guards, especially guards of the opposite gender, constitute "cruel and unusual punishment" and thus violate the Eighth Amendment to the United States Constitution. Where the prison procedure involves guards and inmates of the same gender, it has been long accepted that any reasonably necessary search, conducted in a professional manner, does not constitute "cruel

housing women to have rules prohibiting searches of inmates by male guards, except in an emergency.

56. 678 F.2d 52, 55 (7th Cir. 1982).

57. 917 F.2d 1093, 1101 (8th Cir. 1990); *see also* *Bagley v. Watson*, 579 F. Supp. 1099, 1103 (D. Or. 1983) (relying on *Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding visual body cavity searches)). The *Bagley* court held that clothed pat-down searches including the anal-genital areas were clearly reasonable and constitutional searches, and a search of a nude inmate does not become unreasonable and unconstitutional if it is performed by a woman. *See id.* at 1103.

58. *Timm v. Gunter*, 917 F.2d 1093, 1100 (8th Cir. 1990).

59. *Id.*

60. *See id.* at 1100-01.

61. *See, e.g.,* *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (holding that the fact that female correctional officers might be able to observe routine strip searches of male prisoners did not violate prisoners' privacy rights).

62. *Id.* at 330, 334.

and unusual punishment.”⁶³ As the court said in *Jackson v. Werner*, “some deprivations and inconveniences are a necessary and expected result of being an inmate of a penal institution . . . [and] searches of inmates are designed for the protection of the prisoners and the prison authorities.”⁶⁴

Male inmates have challenged prison policies that allow for them to be searched by female guards.⁶⁵ Courts recognize that for many people a “frisk” is humiliating and degrading, and, for some, it may be more so if done by the opposite gender.⁶⁶ However, the court in *Smith* found the “frisk” involved in that case (pat-down search, through clothing, and excluding genital area) “clearly falls short of the kind of shocking, barbarous treatment proscribed by the Eighth Amendment.”⁶⁷

At least one court, however, has held that a prison policy requiring male guards to conduct random, non-emergency, suspicionless clothed-body searches on female inmates violates the inmates' Eighth Amendment rights. In *Jordan v. Gardner*, the court held that such searches constituted an unwarranted “infliction of pain” and therefore constituted “cruel and unusual punishment forbidden by the Eighth Amendment.”⁶⁸ The decision was clearly influenced by the fact that 85% of the inmates at this prison reported a history of sexual and physical abuse by men and, therefore, that a search by a man would create a high probability of severe psychological injury and emotional pain and suffering, even if the searches were properly conducted.⁶⁹

This decision may well be both over- and under- inclusive in Eighth Amendment terms. As I will discuss further in Section V, the exclusion from search by a male guard should perhaps not apply to a female inmate whose history does not suggest psychological trauma from such a search. And, perhaps the same exclusion should apply to a male inmate whose history suggests that he might be traumatized by a search by a female guard.

3. Inmates' Desire for Freedom from Observation and Search

The courts have long recognized “[t]he desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex”⁷⁰ Many of the cases have also noted that there is “a common assumption . . . that 'the nudity taboo . . . is much greater between the sexes than among members of

63. *Jackson v. Werner*, 394 F. Supp. 805, 806 (W.D. Pa. 1975) (citing U.S. CONST. amend. VIII).

64. *Id.* at 806.

65. *See, e.g., Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982) (male inmates challenged the prison's failure to enact rules prohibiting female guards from conducting “frisk” type searches of male inmates).

66. *Id.* at 53.

67. *Id.*; *see also Johnson v. Phelan*, 69 F.3d 144, 148 (7th Cir. 1995) (“How odd it would be to find in the Eighth Amendment a right not to be seen by the other sex.”); *Kent v. Johnson*, 821 F.2d 1220, 1229 (6th Cir. 1987) (Krupansky, J., concurring in part and dissenting in part) (“[A] purely subjective complaint of embarrassment and humiliation . . . does not rise to the level of egregious treatment that would support a constitutional infringement under the Eighth Amendment.”).

68. 986 F.2d 1521, 1525-26 (9th Cir. 1993) (citations omitted).

69. *See id.*

70. *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also Bagley v. Watson*, 579 F. Supp. 1099, 1104 (D. Or. 1983) (finding that search and observation by guards “may well offend most, if not all inmates.”).

the same sex.' . . . [This] appear[s] to assume that all of the relevant actors are heterosexual."⁷¹ There do not seem to be any cases involving an objection to search and observation of a homosexual inmate by a same-gender guard. Do the same issues come into play in this situation as we have found in the cross-gender situations? In any case, the fact remains, that for many inmates, searches and observations are degrading and humiliating, regardless of the gender of the guard.⁷²

III. EQUAL OPPORTUNITY FOR GUARDS

A. Title VII

Both male and female guards have frequently claimed a right to gender-neutral employment in prisons housing inmates of the opposite gender. Their claims are based on Title VII of the Civil Rights Act of 1964, which prohibits gender discrimination in employment.⁷³ Because there are far more male inmates in prison than there are females, in most states there are only one or two women's facilities.⁷⁴ If women can only guard women, there will be fewer jobs open to women, and it may well be that none of those that are available will be near the guard's home.⁷⁵ Even for male guards, the denial to them of job opportunities in women's prisons will reduce the jobs available to them.

Some of the earlier cases held that any denial of equal employment opportunity for the guards was outweighed by the privacy rights of the inmates,⁷⁶ or at least that the inmates' limited right of privacy must be given equal consideration along with equal job opportunities and the need for prison security and efficiency.⁷⁷ In *Hudson v. Goodlander*, in 1980, the court held that male inmates' right of privacy was violated when female guards could view them using the toilet,

71. *Canedy v. Boardman*, 16 F.3d 183, 185 n.1 (7th Cir. 1994).

72. Author's note: A prime example of a "degrading search," at least when first subjected to it, is the "short arm inspection" often required of enlisted men in the armed forces. While its purpose is health-oriented (discovery of venereal disease), it can be a strong factor in preparing men for submission to authority and loss of privacy and dignity. The degrading effect was clearly present even though these "inspections" were conducted by male superiors, as is probably still the case today. I would assume that these "inspections" are common in prison, especially at the time of an inmate's admission.

73. 42 U.S.C. § 2000e-2a (1999).

74. See Lisa Krim, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L.J. 85, 110 (1995). Women represented only 5.7% of total United States prisoner population in 1991. See *id.*

75. As a consequence, most Title VII claims of gender discrimination in the context of employment in prisons have been made by women.

76. See, e.g., *Hudson v. Goodlander*, 494 F. Supp. 890 (D. Md. 1980).

77. See, e.g., *Bowling v. Enomoto*, 514 F. Supp. 201 (N.D. Cal. 1981) (holding that inmates have limited privacy rights, including the right to be free from unrestricted observation of their genitals and bodily functions by prison officers of the opposite sex, and that prison officials should design procedures which take these privacy rights into account while trying to maximize equal job opportunities for female employees).

undressing, and showering.⁷⁸ Although the court recognized that this might limit the opportunities for advancement of female guards and give a “disproportionate share of onerous assignments” to male guards,⁷⁹ it held that denial of equal employment opportunity for guards of both genders was outweighed by the privacy right of inmates.⁸⁰

In *Bowling v. Enomoto* in 1981, the court took a somewhat weaker pro-prisoner position.⁸¹ The court held that inmates had a “limited right to privacy which included the right to be free from unrestricted observation of their genitals and bodily functions by guards of the opposite gender under normal prison conditions,”⁸² and that therefore the prison officials must propose procedures giving inmates the highest level of privacy consistent with proper prison security.⁸³ While the court also urged maximization of equal job opportunities for female officers, it was apparent that such maximization would be substantially limited by the inmates' privacy rights.⁸⁴

Most courts have been willing to accept the necessity for occasional and inadvertent observation of inmates by guards of the opposite gender; particularly of observation of men by women.⁸⁵ To hold otherwise would too severely limit the job opportunities of all guards, but especially of women.⁸⁶ Courts have also shown a willingness to protect the job opportunities of guards where protection could be accomplished by making some accommodations in procedures to increase the privacy of the inmates - for example, translucent screens in showers and allowing cell windows to be covered for brief periods.⁸⁷ Some would go farther and permit unlimited observation of inmates by opposite-gender guards. As Judge Krupansky stated in his concurring and dissenting opinion in *Kent v. Johnson*,⁸⁸ surveillance is not a “search” within the Fourth Amendment,⁸⁹ and in any case, prisoners do not have *any* reasonable expectation of privacy.⁹⁰ While not going so far as to totally negate any privacy rights of inmates, the court in *Johnson v. Phelan* made it clear that such rights would frequently have to yield to

78. 494 F. Supp. 890, 891, 893 (D. Md. 1980). The court said this would not apply to an inadvertent encounter, announced visit, or in an emergency. *See id.* at 891, 894.

79. *Id.* at 892.

80. *See id.* at 893.

81. 514 F. Supp. 201 (N.D. Cal. 1981).

82. *Id.* at 204.

83. *See id.*

84. *See id.* at 204-05.

85. *See, e.g., Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Johnson v. Pennsylvania Bureau of Corrections*, 661 F. Supp. 425 (W.D. Pa. 1987) (holding that inmates have certain Fourth Amendment privacy rights, including the right to not be viewed naked by officers of the opposite sex, but this right is not unlimited; equal employment opportunities and institutional security must be taken into consideration).

86. *See, e.g., Grummett*, 779 F.2d 491.

87. *See Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (upholding the district court's order of installation of translucent screen in shower area so that guards could tell that the shower was occupied but could not see inmates undressed; prison suggested rule change of allowing prisoners to cover their windows for a 15-minute interval).

88. 821 F.2d 1220, 1228 (6th Cir. 1987) (Krupansky, J., concurring in part and dissenting in part).

89. *Id.* at 1229.

90. *See id.*

a prison's interest in security and efficiency⁹¹ and to the right to equal job opportunities of the guards. The court took the position that “judges [must] respect hard choices made by prison administrators,”⁹² and that “[u]nless female guards are shuffled off to back office jobs . . . they are bound to see male prisoners in states of undress.”⁹³ Further, the court indicated that “[t]here are too many permutations to place guards and prisoners into multiple classes by sex, sexual orientation, and perhaps other criteria, allowing each group to be observed only by the corresponding groups that occasion the least unhappiness.”⁹⁴

As to searches by guards of the opposite gender, especially by female guards, courts have been increasingly willing to allow “frisk” or “pat-down” searches as part of normal prison routine. In *Smith v. Fairman*, male inmates challenged the prison's failure to prohibit female guards from conducting “frisk” searches.⁹⁵ The court said that allowing female guards to conduct such searches, through clothing, and excluding the genital area, was not unconstitutional.⁹⁶ Among other reasons, the court relied on the fact that the state must try to avoid discrimination in hiring and assignments at prisons and “must be allowed to utilize female guards to the fullest extent possible.”⁹⁷

Some courts have gone even further and allowed visual strip searches⁹⁸ and “pat-down” searches, including the genital and anal areas, of male inmates by female guards. In *Grummett v. Rushen*, the court noted that there was no intimate contact with the inmate's body and that the female guards conducted themselves in a professional manner.⁹⁹ “To restrict female guards from [the] positions [involved] . . . would [require great revision] of work schedules, [might create security risks, and would endanger the] equal employment opportunities of female guards.”¹⁰⁰

When the roles are reversed, however, and the observation or search is by male guards of female inmates, both courts and prison authorities have been more reluctant to allow such conduct. In *Madyun v. Franzen*, it was stated that under Illinois prison regulations, female inmates could be searched only by fe-

91. 69 F.3d 144, 147 (7th Cir. 1995). Cross-gender monitoring makes good use of staff; all guards can serve every role; female guards are fully useful; thus, more guards are not required.

92. *Id.* at 145 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

93. *Id.* at 146.

94. *Id.* at 147.

95. 678 F.2d 52 (7th Cir. 1982).

96. *Id.* at 53.

97. *Id.* at 54; *see also Madyun v. Franzen*, 704 F.2d 954, 960 (7th Cir. 1983) (allowing “frisk” searches of males by female guards serves the important state interest of equal job opportunities for women).

98. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (holding no violation of prisoner privacy rights if female correctional officers might be able to observe routine strip searches of male inmates).

99. 779 F.2d 491, 495 (9th Cir. 1985); *see also Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990) (finding that all guards are trained to perform pat searches in a professional manner and any touching of genital and anal areas is brief and incidental).

100. *Grummett*, 779 F.2d at 496; *see also Timm*, 917 F.2d at 1101 (holding that any alternative policy would have more than a de minimis effect on security and equal employment opportunity of male and female guards).

male guards.¹⁰¹ One male inmate urged that equal protection required that he not be subjected to searches by both male and female guards.¹⁰² The court rejected this argument, on grounds that the:

[D]ifferentiation serves the important state interest of equal job opportunity for women, since women prison guards cannot be truly effective unless they can perform the full range of prison security tasks. Conversely, there is no indication that males have suffered a lack of opportunity to serve as prison guards because they are precluded from frisk searching female inmates.¹⁰³

In *Forts v. Ward*,¹⁰⁴ however, the court found that there was a violation of Title VII when male guards were barred from nighttime assignments in a female prison because they could look through glass windows in cell doors.¹⁰⁵ The court said that, not only did this deny equal employment opportunity to male guards, it also impaired the equal opportunities of female guards by bumping them from preferred daytime shifts to which they were entitled by seniority.¹⁰⁶ The court added that the inmates' privacy could be protected by translucent screens in the showers, allowing cell windows to be covered for brief periods, and supplying appropriate nightwear.¹⁰⁷

On the other hand, in *Torres v. Wisconsin Department of Health and Social Services*,¹⁰⁸ the court upheld a rule in a women's prison that allowed only female guards to be assigned to living units. This rule was challenged by male guards who held the rank of "C03" and were then reassigned to "C02"¹⁰⁹ positions, with no loss of pay, but working under "C03s" with less seniority and experience than the reassigned male guards. The prison asserted that, in this situation, gender was a BFOQ.¹¹⁰

The court began its analysis by stating that,

[W]hile recognizing that sex-based differences may justify a limited number of distinctions between men and women, we must discipline our inquiry to ensure that our tolerance for such distinctions is not widened artificially by . . . our "own culturally induced proclivities." Nor . . . can we tolerate the same pre-conceptions or predilections on the part of employers. Rather, we must ask whether, given the reasonable objectives of the employer, the very womanhood or manhood of the employee undermines his or her capacity to perform a job satisfactorily.¹¹¹

101. 704 F.2d 954, 961 (7th Cir. 1983).

102. *Id.* at 961-62.

103. *Id.* at 962. One might well question if this rationale would still be used in the face of increased opposition to "affirmative action." The argument would be made that if a search of a male inmate by a female guard causes no real harm, why is there harm to a female searched by a male?

104. 621 F.2d 1210 (2d Cir. 1980).

105. *Id.* at 1212.

106. *See id.* at 1215-16.

107. *See id.* at 1216-17.

108. 859 F.2d 1523 (7th Cir. 1988).

109. "CO" stands for "Correction Officer"; grade 3 is above grade 2.

110. *See supra* note 3 and accompanying text.

111. *Torres*, 859 F.2d at 1528.

The court went on to “stress that this [was] not a case” where the guards' employment interest “simply conflicts with the basic privacy rights of the inmates.”¹¹² The Wisconsin legislature mandated that rehabilitation is an objective of the state's prison system,¹¹³ and the prison superintendent had decided that the rehabilitation of inmates would be enhanced by using only female guards in living units.¹¹⁴

It could well be argued that the precedent value of *Torres* is rather narrow, since it relies heavily on the rehabilitation justification and clearly suggests that the result might be different if the only interest competing with the guards' claim to equal employment opportunity was the inmates' right of privacy. As we have noted before, some strongly question if rehabilitation is still a realistic objective of the prison system.¹¹⁵ As Judge Cudahy pointed out in his dissent in *Torres*, the rehabilitation value of the female-guards-only rule is open to serious challenge. He noted that there was evidence in the District Court that the presence of males in the living quarters was valuable to the inmates' eventual ability to adjust to the outside world and that there was no evidence that the superintendent's plan had enhanced any rehabilitation efforts.¹¹⁶

B. Danger to the Guards

An often asserted reason for not hiring guards of the opposite gender to that of the inmates, or at least not assigning them to “contact” and close proximity positions, was concern for the safety of the guards. All of the reported cases to date have involved female guards in male prisons, and that is not likely to change.

An early case was *Dothard v. Rawlinson*, which involved conditions in a male prison which were not typical even in the 1970s and which have been referred to by courts in later cases as being extremely harsh¹¹⁷ and not relevant to the conditions in the prisons under consideration in these later cases. In *Dothard*, the Court upheld the prison authorities' position that male gender was a BFOQ in “contact” positions in a maximum security male penitentiary in Alabama, because violence was the order of the day, inmate access to guards was facilitated by dormitory living conditions, prisons were understaffed, and a substantial portion of the inmate population were sex offenders mixed at random with other prisoners.¹¹⁸ In this “jungle atmosphere,”¹¹⁹ the Court found that there was a real likelihood that sex offenders, and also others deprived of a

112. *Id.* at 1530.

113. *See id.*

114. *See id.* at 1524. The Superintendent relied on her professional expertise and contact with inmates, and the fact that 60% of the inmates had been physically and sexually abused by males. *See id.* at 1530.

115. *See supra* note 17 and accompanying text.

116. *Torres*, 859 F.2d at 1533 (Cudahy, J., dissenting).

117. 433 U.S. 321, 336 n.23 (1977) (holding that because the estimated 20% of the male prisoners who were sex offenders were spread out in the Alabama prison system, laws which set height and weight standards that excluded the majority of women from employment as correctional counselors were lawful).

118. *Id.* at 334-35.

119. *Id.* at 334 (quoting *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976)).

normal heterosexual environment, would assault women. Therefore, a guard's "very womanhood . . . [could] directly undermine her capacity to provide the [needed] security" ¹²⁰

Justices Marshall and Brennan, in their partial dissent, strongly disputed the majority's holding that male gender was a BFOQ in this prison. ¹²¹ They pointed out that "a bfoq [must] be reasonably necessary to the normal operation of [the] . . . enterprise." ¹²² But these prisons were certainly not "normal operations" of prisons. ¹²³ The dangers of security were inherent, regardless of the gender of the guards. ¹²⁴ If the situation is impossible for male guards, women cannot make it any worse. ¹²⁵ If attacks by inmates are likely, the remedy is swift and sure punitive action against the offenders. ¹²⁶ The dissenters then stated that the real basis for the policy of prison authorities which the majority of the Court here upheld was the fear that "women . . . guards [would] generate sexual assaults[,] . . . [thus] perpetuat[ing] . . . the old myth[] . . . that women . . . are seductive sexual objects." ¹²⁷

Not surprisingly, *Dothard* has had little effect on employment opportunities of women in prisons, because no other court has found prison conditions similar to the "rampant violence" and "jungle atmosphere" ¹²⁸ that were present in *Dothard*. No matter how much prison officials might want to exclude women, they are not likely to claim a need to do so based on "jungle-like" conditions in the prison. Such an admission of conditions, which today would be deemed blatantly unconstitutional, would certainly be used against them in subsequent cases brought by inmates alleging intolerable prison conditions.

More typical of the attitude of the courts is *Gunther v. Iowa State Men's Reformatory*, wherein the court held that a male prison's denial of promotion to Correction Officer II (COII, whose duties would involve closer contact with inmates) for all women was a violation of Title VII, and did not qualify as a BFOQ. ¹²⁹ According to the court, the prison had not shown that it was unable to rearrange job assignments to protect male inmates' privacy, ¹³⁰ or that such rearrangement would cause "undue hardship on the prison administration." ¹³¹

120. *Dothard*, at 336.

121. *Dothard v. Rawlinson*, 433 U.S. 321, 340-47 (1977) (Marshall and Brennan, J.J., concurring in part and dissenting in part).

122. *Id.* at 342.

123. *Id.*

124. *See id.*

125. *See id.* at 343.

126. *See Dothard*, 433 U.S. at 346.

127. *Id.* at 345. The dissenters also took issue with the prison officials' expressed concern for the inmates' privacy, pointing out that women were allowed in "contact" positions in non-maximum security institutions, yet here the officials were trying "to protect inmates' privacy in the prisons where personal freedom [was] most severely restricted." *Id.* at 346 n.5.

128. 433 U.S. at 334.

129. 612 F.2d 1079, 1086-87 (8th Cir. 1980).

130. *See id.* at 1086.

131. *Id.* at 1087. The court added that "[a]dministrative inconvenience cannot justify discrimination." *Id.*

The court approved the District Court's distinguishing of this case from *Dothard*, where the prison environment was "peculiarly inhospitable."¹³² While the Iowa prison in *Gunther* was "no rose garden . . . [,] neither [was] it the stygian spectre which faced the Supreme Court in *Dothard*."¹³³ Therefore, women guards were entitled to merit promotions to COII with appropriate adjustments in assignment of duties.

A similar approach, but one more favorable to women guards, was applied by the court in *Griffin v. Michigan Department of Corrections*.¹³⁴ Female guards had been denied promotion opportunities because the prison authorities would not allow women to work within the housing of residential units.¹³⁵ The court held that maleness did not constitute a BFOQ for these positions. Any danger of sexual assaults, and "the potential impact on prison discipline, are too small to warrant an exception to . . . Title VII."¹³⁶ As to the inmates' privacy, viewing of inmates in their cells was necessary for security, and was not "intrinsically more odious" when the viewing was by a member of the opposite gender.¹³⁷ The only basis for a contrary argument is a "stereotypical sexual characterization,"¹³⁸ which is expressly prohibited by Title VII.¹³⁹ The same rationale applies to the argument that the "job is too dangerous or unpleasant for all women . . ."¹⁴⁰ The women know the risks and burdens involved, and it is their choice whether to seek these jobs.¹⁴¹

The view that women in "contact" positions in male prisons are exposed to unwarranted danger was further refuted by the affidavit of an expert witness (apparently a psychologist) in *Bagley v. Watson*.¹⁴² The expert witness stated that since women have been working in male prisons, "we have learned that the suppressed sexuality of the prisoners does not manifest itself with the attempt to rape and subjugate the women staff."¹⁴³ When sexual assaults on women guards did occur, they were "almost always in the form of pinching and touching, pale shadows of the sexual aggressions some male prisoners force on other male prisoners."¹⁴⁴ Indeed, it was her "belief that women counter the development of brutish and violent prisons."¹⁴⁵ "Women can introduce a new and softening element . . . [and often] can reduce violent encounters by gentler means than

132. *Id.* at 1085 (quoting *Dothard v. Rawlinson*, 462 F. Supp. 952, 955 (N.D. Iowa 1979)).

133. *Id.*

134. 654 F. Supp. 690 (E.D. Mich. 1982).

135. *See id.* at 692.

136. *Id.* at 700-01.

137. *Id.* at 701.

138. *Id.*

139. *See Griffin*, 654 F. Supp. at 703.

140. *Id.* at 704.

141. *See id.* at 697. The court further supported its decision by stating that "the presence of women, where feasible, in [a male prison] is a healthy influence and contributes to more normal social conditions . . . [and to] a healthier and more rehabilitative atmosphere for the inmates." *Id.*

142. 579 F. Supp. 1099 (D. Or. 1983) (holding that female guards' right to equal employment under Title VII supersedes male inmates' Eighth Amendment argument that they prefer men to do the clothed pat-down searches or unclothed visual observation).

143. *Id.* at 1101.

144. *Id.*

145. *Id.* at 1100.

are effective by male guards.”¹⁴⁶ While “[i]t was once feared that the presence of women would excite untempered passions in the prisoners . . . it is [now] clear that, if anything women reduce the violent tensions in male prisons rather than contribute to them.”¹⁴⁷

C. Danger to the Inmates

As one would expect, the concern for the safety of inmates has focused entirely on situations where male guards are working in women's prisons. While this situation certainly creates the possibility of sexual assaults and abuse, improper sexual conduct by a female guard with a male inmate is also possible.¹⁴⁸ However, undoubtedly because of long-standing stereotypes as to sexual conduct and aggression between men and women, the court cases, and the policies of prison authorities involve only situations where the safety of female inmates is allegedly threatened by the presence of male guards.¹⁴⁹ It should be noted in passing, however, that an argument based on inmate safety can be made in favor of allowing women guards in “contact” positions with male inmates, including body cavity searches. It is widely recognized that male inmates fear homosexual attacks and that body cavity searches often make inmates feel humiliated and vulnerable to a homosexual assault.¹⁵⁰ There would be no reason to fear anal homosexual rape if the search were conducted by a female guard.

The recent case of *Jordan v. Gardner*¹⁵¹ is a good example of the apparently prevalent view that a rational distinction can be made, as to the potential danger and harm to inmates, between cross-gender guarding of male and female inmates. While there is a strong trend toward allowing more and more contact and observation of male inmates by female guards, there is still a strong reluctance to allow similar activities by male guards with female inmates. In *Jordan*, the court held that a prison policy requiring male guards to conduct random, non-emergency, suspicionless, clothed body searches on female inmates violated

146. *Id.* at 1101.

147. *Id.*

148. While there is dispute as to whether a woman can rape a man, in the sense of physically having intercourse with him by force, a man can certainly be pressured into sexual activity against his will, or have sexual contact forced upon him by the physical power of a woman.

149. Of course, it is well known that male inmates are often raped by other male inmates, and presumably there is always the possibility that a male guard would rape a male inmate. Such happenings do not seem to be discussed publicly, probably because of a general reluctance to admit or recognize the existence of homosexual activity. See generally Richard G. Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFF. L. REV. 669, 710-15 (1972). By the same token, it is entirely possible that a woman guard will force unwanted sexual activity on a woman inmate. This is seldom (if ever) discussed.

150. See *Goff v. Nix*, 803 F.2d 358, 373 n.4 (8th Cir. 1986) (Bright, S.J., dissenting) (majority holding that despite fear, prison policy subjecting prisoners to a visual cavity search before leaving maximum security unit was reasonable).

151. 986 F.2d 1521 (9th Cir. 1993) (ruling that prison policy requiring male guards to conduct random, non-emergency, suspicionless, clothed-body searches on female prisoners was cruel and unusual punishment in violation of the Eighth Amendment).

the inmates' Eighth Amendment rights.¹⁵² The court held that the cross-gender body search policy constituted "infliction of pain."¹⁵³ Finding that eighty-five percent of the inmates at this prison reported a history of sexual and physical abuse by men, the court stated that the physical, emotional and psychological differences between men and women may cause women, especially abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women.¹⁵⁴ The court found that there would be a high probability of great harm to some inmates, even if the searches were properly conducted.¹⁵⁵

The court distinguished this case from *Grummett v. Rushen*,¹⁵⁶ where female guards could conduct "pat-down" searches of male inmates, including the groin area. The *Grummett* court held that these searches did not unduly interfere with the inmates' rights, as they did not "involve intimate contact with the inmate's body," and the "female guards [had] conducted themselves in a professional manner."¹⁵⁷ The *Jordan* court therefore characterized the searches approved in *Grummett* as being such as would only cause momentary discomfort, with no indication that male inmates would experience any psychological trauma as a result of the search.¹⁵⁸

Having found a high probability of harm to the female inmates, the court gave little if any weight to the competing interests. Not only would its ruling deny equal employment opportunities to male guards, it would also place additional burdens on female guards, since their lunch periods or other activities might be interrupted frequently by the need for them to substitute for a male guard and conduct a search.¹⁵⁹ Also, as Judge Trott pointed out in his dissent, this ruling would have a negative effect on prison security. To be effective, these searches had to be unpredictable; any guard must be able to search at any time. If inmates know they are safe from male guards, they will use those opportunities to their advantage.¹⁶⁰

These competing interests of prison security and equal employment opportunity of guards have prevailed, and almost surely will continue to prevail, in cases involving searches of male inmates by female guards. This leaves unresolved the question of whether the psychological, emotional and physical differences in the responses of men and women to physical touching by a person of the opposite gender is real and should be recognized. It may well be a leftover from the habits and stereotypes of the past. Also, surely not *all* women will suffer great injury if subjected to a "pat-down" search by a man, and *some* men will

152. *Id.* at 1522. The court did not find it necessary to reach or discuss the First and Fourth Amendment claims of the female inmates. *See id.* at 1523.

153. *Id.* at 1526.

154. *See id.* at 1525-26, 1526 n.5.

155. *See id.* at 1525 (finding there to be severe psychological injury and emotional pain and suffering).

156. 779 F.2d 491, 495 (9th Cir. 1985).

157. *Id.*

158. *Jordan*, 986 F.2d at 1526.

159. *See id.* at 1530.

160. *See id.* at 1563-64 (Trott, J., dissenting).

probably suffer great injury if searched by a woman. I will discuss these issues further in Sections IV and V.

IV. PRIVACY V. MODESTY

A. Gender Affects Only Modesty, Not Privacy

An inmate's privacy is invaded just as much by observation or search by a guard of the same gender as it would be if the guard were of the opposite gender. The invasion is the search or observation itself, the unwanted exposure and physical contact.¹⁶¹ Inmates are constantly viewed by both guards and other inmates. They have “no real personal sphere;”¹⁶² a place where they can be “let alone.”

The real basis of the inmates' objections is their modesty, the long-standing societal tradition that it is improper or even immoral to be seen while naked or touched in certain parts of the body by a member of the opposite gender, unless there is a relationship between the man and woman involved that makes the viewing or touching acceptable to both.¹⁶³ This distinction between privacy and modesty was recognized in the *pro se* complaint of an inmate in *Kent v. Johnson*.¹⁶⁴ He asserted a Fourth Amendment right to privacy, but he also asserted a First Amendment right to free exercise of “his religious belief [] . . . to observe the 'fundamental Christian tenet of modesty,'” and to not be subjected to unrestricted viewing by female guards.¹⁶⁵

This interest in modesty by inmates rests largely on the widely held belief that, “while all forced observations or inspections of the naked body implicate a privacy concern, it is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex.”¹⁶⁶

B. Gender Segregation in Society Generally

While courts seem to be increasingly willing to find that equal employment opportunities for guards outweigh the inmates' limited right to privacy or mod-

161. See, e.g., *Griffin v. Michigan Dep't of Corrections*, 654 F. Supp. 690, 701 (E.D. Mich. 1982) (viewing of inmates in cells is not “intrinsically more odious” when viewing is by member of opposite gender).

162. Deborah M. Tharnish, *Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoners' Privacy Rights*, 65 IOWA L. REV. 428, 442 (1980).

163. See Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 593-94 (1977) (“[W]hat seems to be involved . . . is the importance of inculcating and preserving a sense of secrecy concerning the genitalia of the opposite sex[,] . . . the maintenance of that same sense of mystery or forbiddenness about the other sex's sexuality which is fostered by the general prohibition upon public nudity and unashamed viewing of genitalia.”).

164. 821 F.2d 1220 (6th Cir. 1987).

165. *Id.* at 221.

166. *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (citing *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)) (“The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”).

esty,¹⁶⁷ such is not the case in other contexts. Bathrooms and locker rooms are almost universally segregated by gender in the United States, and in the few reported cases, the courts have extended the segregation to include not only the users but also the attendants.¹⁶⁸ In *Brooks v. ACF Industries*,¹⁶⁹ a female janitor was transferred out of her job in the janitorial department because the duties of janitors included cleaning men's bathhouses. The court found that it would be highly impractical to close a bathhouse while it was being cleaned, or to have a female janitor leave when the facility was in use, because hundreds of men were constantly using it.¹⁷⁰ Since the court found that male employees had "legitimate privacy rights [while using the bathhouses] that would have been violated by a female's entering and performing janitorial duties therein during their use thereof," being male was a BFOQ for this job.¹⁷¹

In *Norwood v. Dale Maintenance System, Inc.*¹⁷² the court applied similar reasoning to hold that gender was a BFOQ for dayshift washroom attendant positions. An opposite gender attendant would infringe on the privacy rights of users of washrooms, which were in almost constant use during the day.¹⁷³

In the context of bathrooms and locker rooms, this attitude seems both over- and under- inclusive in terms of any right of privacy or modesty. If the right of equal employment opportunity is deemed to be very important, as is increasingly the case in the prison context, and as it should be elsewhere, then courts should insist that employers institute reasonable accommodations in the facilities involved to protect the rights of the users without discriminating against employees on the basis of gender. In the bathroom situation, it could be done by having "standing up" and "sitting down" facilities.¹⁷⁴ The genital area of a man standing at a properly constructed urinal is not visible except possibly to a man standing beside him. And in terms of privacy or modesty, the gender of a person in an adjoining closed stall really makes no difference to a person sitting on a toilet.¹⁷⁵ Similarly, in shower- or dressing-rooms, modesty can be preserved by using cubicles and curtains or other shields, and by the use of robes and towels by those who do not want to be seen naked.

Modesty between the genders seems to be much more expected and permitted in the United States than it is in many other parts of the world. I have often heard that communal bathing is quite common in Japan and other parts of Asia. Also, when in Europe, particularly Eastern Europe when it was behind the Iron Curtain, it was not at all unusual to see opposite gender attendants in bath-

167. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 148 (7th Cir. 1995).

168. See *id.* Exceptions have been judicially noted. See *id.* ("In exotic places such as California people regularly sit in saunas and hot tubs with unclothed strangers.")

169. 537 F. Supp. 1122 (S.D. W. Va. 1982).

170. See *id.* at 1127-28. When male janitors worked in a women's facility, they would leave it while women were using it. But there were only a few female employees at the plant who would use these facilities. See *id.* at 1125.

171. *Id.* at 1132.

172. 590 F. Supp. 1410 (N.D. Ill. 1984).

173. See *id.* at 1416-17.

174. Louise M. Antony, *Back to Androgyny: What Bathrooms Can Teach Us About Equality*, 9 J. CONT. LEGAL ISSUES 1, 5 (1998).

175. See *id.*

rooms and locker rooms. It was simply taken for granted, and non-Americans probably did not give it a thought.

Our attitudes toward privacy and modesty obviously depend largely on the current mores of our society and community. Given the construct of our society, these attitudes on modesty vary depending on gender.¹⁷⁶ In addition, our

176. Over most of my lifetime, it has been my impression that girls and women feel a stronger desire for modesty than do boys and men. Courts have recognized this difference in attitude toward observation and intimate touching by the opposite gender. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1526 n.5 (9th Cir. 1993). I have a pretty clear sense of the attitude of most boys and men from my own experience and observation, and from conversations with other males. To confirm my understanding as to the attitudes of girls and women, I informally polled some of my female faculty colleagues and other friends, with a wide variety of ages and backgrounds. To a large extent their responses were in line with my surmises, but I found them quite interesting nonetheless. In the interest of protecting the confidentiality of the input from my female friends, I will not attribute anything contained in this footnote to any particular person.

Regardless of the current ages of the women, all seem to have been taught from an early age to be modest about their bodies. For those born before 1950 this modesty has usually continued to the present. Women over 60 do not want to undress in front of others in a locker room, or even in front of another woman when sharing a room while traveling. Indeed, most don't like to go to a doctor (of either gender), because they'll be seen uncovered. For those born more recently, their need for modesty has often softened as the years go by and societal attitudes change. Although little girls are brought up to be modest, most apparently are not very self-conscious about their bodies, until about age nine or ten, if they change their clothes in front of other girls at school or camp. No later than age ten or eleven, however, girls become very conscious of the changes occurring in their bodies, and often feel embarrassed to be seen by other girls. (Of course, the same may be true for boys during puberty, but macho male society has never made much allowance for modesty or embarrassment of boys as they develop.). If at all possible, most girls from early puberty on into their teens will avoid being seen nude or even in their underwear in open showers or locker rooms. For women born before 1970 it was not uncommon for them, during their junior high and high school years, to undress after sports or gym class only to their underwear, and often not to change clothes at all. They would then go home or to their dormitory room to shower and change. One young friend told me that for her this was not really a matter of modesty. All of her "shampoos, soaps, makeup, moisturizer, etc. were at home – there's a lot more involved with women taking a shower, especially in high school when you want to look your best."

As women go on to college and then adult life, many of those born after 1950 have continued, or initiated, an interest in sports and physical fitness. This seems to have created an atmosphere in which women are less reluctant to be seen fully or partially naked by other women. While cubicles or curtains which provide full or partial screening are sometimes provided in showers and locker rooms in college and at health clubs, many women now undress in the open, though many will wrap themselves in a towel to go to the shower. This change is probably partly a matter of a gradual change in overall societal attitudes. But it may well be influenced by the fact that women who engage in sports and physical workouts are more outgoing, and less concerned about having their bodies seen because they are more likely to be in good physical condition. The more reserved, and those in poorer physical condition, are probably less likely to engage in sports and workouts, and thus are not faced with situations involving the possibility of being seen naked.

As for boys and men, while they may well be taught modesty in their early years, any possibility of *being* modest in showers and locker rooms is virtually nonexistent. As soon as boys begin sports and other physical activities, they learn that the expected conditions are almost always that they will be seen naked by other boys and men. That was certainly the norm as I grew up, and I have seen no change in the generations of my son and grandson. Boys and men routinely undress in open areas, walk naked to showers and toilets, and use showers and bathrooms in open view of others. This was especially true of my experiences in the U.S. Army in the early 1950s, and is probably still common in the armed forces today. If anyone is shy or embarrassed, he might as well get over it quickly, because there really is no choice.

attitudes have clearly changed over the years, are changing now, and will probably change in the future.¹⁷⁷ It is important to understand that ideas and arguments about modesty and privacy are to be viewed in the context of our societal attitudes and mores, and that these ideas change with each generation.

V. WHERE DO WE GO FROM HERE?

The courts have been increasingly willing to allow observation of naked prison inmates by guards of the opposite gender,¹⁷⁸ especially in situations involving male inmates and female guards. While the courts usually find that inmates retain at least some limited constitutional rights, the courts also hold that these rights may have to yield to the need for security and efficient administration in the prison, and may also be outweighed by the right to equal employment opportunity of the prison guards. If it is socially desirable to allow the greatest possible employment opportunities to all guards, and I think it is, then we must find ways to do so without jeopardizing the safety of either guards or inmates. We must also be more willing to accept, in the prison setting, society's increasingly liberal attitude toward modesty.

A. Professionalism

As the court noted in *Bagley v. Watson*, "many people lose their self-consciousness when they become convinced other people are not very interested in looking. Embarrassed modesty can subside in the presence of a person, for example, a nurse or a doctor, who evidences no personal interest in looking."¹⁷⁹ Doctors, nurses, and physical therapists of one gender routinely examine and treat patients of the other gender.¹⁸⁰ While some people may have a preference for a medical professional of their own gender, there are few people who would refuse medical help from the opposite gender in a time of need. Similarly, it is becoming more common to see athletic trainers of the opposite gender and to find opposite gender reporters in athletic locker rooms. The latter was a hotly contested issue in the '70s, but it has been largely resolved by requiring equal access to the athletes by all reporters. Typical of the attitude of the courts is *Ludtke v. Kuhn*,¹⁸¹ where a female reporter was denied access to the locker rooms during the 1977 World Series. The court said this was a clear denial of equal protection because much of the news about baseball comes from

It will be interesting to see if the gradual evolution in women's attitudes will continue, and if they will become more and more like men's. Even if this happens, will it lead to an increased societal willingness to allow less modesty between men and women in observation of and physical contact with the bodies of the other gender?

177. See Barbara A. Brown, et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Woman*, 80 YALE L.J. 871, 902 (1971).

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

179. 579 F. Supp. 1099, 1102 (D. Or. 1983).

180. See *Johnson*, 69 F.3d at 148.

181. 461 F. Supp. 86 (S.D.N.Y. 1978).

news-gathering in the clubhouses.¹⁸² The court noted that shower and toilet facilities were hidden from all reporters and that there were simple ways to protect the players' modesty.¹⁸³

The key factor in any of these cross-gender situations, including prisons, is that the observing and touching person must act professionally. Over the years we have found proper professional conduct to be the rule with medical professionals, though unfortunately there are occasional instances of abuse. Society insists on equally professional conduct from trainers and reporters, and there have been few suggestions that such is not the case.

Prison guards of either gender must be trained to act professionally in all their dealings with inmates of either gender.¹⁸⁴ The expectation of professionalism must then be enforced by proper supervision and, where necessary, by appropriate discipline.¹⁸⁵

B. Safety of Guards and Prison Security

Courts often express concern about the safety of female guards when they are assigned to positions requiring close contact with male inmates.¹⁸⁶ This concern seems to be based on women's presumed lack of physical strength and the potential for sexual assault.¹⁸⁷ Of course, the equal employment opportunity cases in recent years have made it clear that traditional assumptions as to the relative strength of men and women do not justify a gender-based BFOQ.¹⁸⁸ Some women are stronger than some men. As to the potential for sexual assaults by inmates, this is undoubtedly based on long-standing stereotypical views of the "macho" attitude of male inmates and the vulnerability of any woman to a macho male.¹⁸⁹

In reality, of course, the safety of guards from attacks by inmates is not dependent on the gender of either guard or inmate. The control of guards over inmates is based on the prison environment, the legal authority of the guards, and the threat of punishment of inmates who attack or threaten guards.¹⁹⁰

182. See *id.* at 90. The court also noted that many professional hockey, basketball, football, and soccer teams admitted accredited female reporters to locker rooms. See *id.* at 91.

183. See *id.* at 92.

184. See *Dothard v. Rawlinson*, 433 U.S. 321, 346 n.5 (1977) (Marshall, J., dissenting) (stating that if women guards act professionally, inmates "will recognize that their privacy is . . . invaded no more than if a woman doctor examine[d] them."); see also *Timm v. Gunter*, 917 F.2d 491, 495 (9th Cir. 1985) (when performing pat-down searches, female guards conduct themselves in a professional manner).

185. See *Bagley v. Watson*, 579 F. Supp. 1099, 1104 n.4 (D. Or. 1983) ("[T]he proper response to improprieties on the part of . . . female correctional officers is . . . to terminate the employment of the . . . correctional officer offenders.").

186. See *Dothard*, 433 U.S. at 335-36 (holding that inmates are likely to assault women, and a guard's very womanhood could directly undermine her capacity to provide the needed security). It is interesting to note that I have not seen a case where a court expressed concern for the safety of a male guard in close contact with women inmates.

187. See *id.* at 339 (Rehnquist, J., concurring).

188. See *Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1527 (7th Cir. 1988).

189. *Dothard*, 433 U.S. at 333.

190. See *id.* at 346. (Marshall, J., dissenting) (finding that if attacks by inmates on guards occur or are threatened, the remedy is "swift and sure punitive action against . . . offenders").

C. Psychological Problems of Inmates

Some courts have refused to allow prison procedures which involve intimate touching of female inmates by male guards. The leading case is *Jordan v. Gardner*.¹⁹¹ In *Jordan*, the court found that most of the female inmates in the prison in question had reported a history of sexual and physical abuse by men,¹⁹² and that searches of these inmates by male guards would be highly probable to cause severe psychological injury and emotional pain and suffering even if properly conducted.¹⁹³ In view of this, the court found that the prison's search policy involved a sufficient potential for "infliction of pain" to constitute a violation of the inmates' Eighth Amendment rights.¹⁹⁴

Of course, as discussed supra, the holding of the *Jordan* majority is both over- and under- inclusive. Not all female inmates have been physically or sexually abused by men; not all female inmates will suffer psychological trauma if searched by a male guard. The rehabilitation of some female inmates may well be helped along by physical contact with men who do not abuse them and who treat them with respect for their modesty and dignity.¹⁹⁵

By the same token, there are surely some male inmates who would suffer psychological trauma when searched by a female guard. There are also likely to be some inmates, especially homosexuals, who will suffer psychological trauma when searched by a guard of their own gender.

The appropriate way to avoid such psychological injuries is not to deny equal employment opportunity to guards. It is undoubtedly possible, and probably highly desirable, to determine which inmates in a prison have a high likelihood of trauma from the searches permitted by that prison's policies. Then, to the extent reasonably possible, prison procedures should be adopted which will minimize the contacts likely to cause trauma for an inmate or group of inmates. At the same time, inmates should be counseled and helped to overcome the fears which make the trauma possible, so that they will have a better chance of leading a normal and unthreatened life with members of the opposite gender (usually men) when they return to the outside world.

VI. CONCLUSION

Our goal should be to allow guards of either gender to perform *any* duties in *any* prison. I am sure it will be some time before judicial and societal attitudes change to such a great extent as to sanction that. But as I have shown in this article, we have come a long way. Courts increasingly recognize the importance of equal employment opportunity for guards, especially women. Indeed, they are increasingly willing to require that prison policies and procedures be modified, when possible, to balance this goal with the need for prison security, in-

191. 986 F.2d 1521 (9th Cir. 1993).

192. *Id.* at 1525.

193. *See id.* at 1526 (accepting expert testimony that a pat-down search of "breasts and genitals by men would likely leave the inmate 'revictimiz[ed]' . . .").

194. *Id.* at 1525-26.

195. *See Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1526 (7th Cir. 1988).

mates' rights to privacy and modesty, and inmates' rights to be protected from the infliction of psychological and emotional pain.

The key, of course, is the professionalism of guards, in both their attitudes and actions toward inmates. Inmates are undoubtedly required to submit to intimate viewing and touching by medical personnel, including members of the opposite gender. Most inmates probably give little thought to the gender of the medical personnel. Over time, it should be possible to achieve the same relationship between inmates and guards. If guards perform their duties, including viewing and touching of inmates, in a professional and objective manner, the gender of the guard should make no difference to the inmate.