The Legitimacy of Cross-Gender Searches and Snrveillance in Prisons: Defining an Appropriate and Uniform Review

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"Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness."[1]

INTRODUCTION

In 1967, Justice Stewart wrote, "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[2] However, thirty years later this statement does not hold much truth for the almost 1.6 million men and women in this nation's prisons and jails.[3] Justice Stewart's statement had absolutely no meaning for the male prisoners in the state correctional institutions of Oregon.[4] The district court decided that the United States Constitution permitted male inmates to be watched by female guards while showering, undressing, using toilet facilities, or otherwise in a state of undress. The court further felt that the Constitution allowed for female guards to perform "pat-down" searches on male inmates, which included touching of the genital and anal area. The court seemed to have no sympathy for the male inmates' feelings of humiliation or embarrassment in being constantly monitored and searched by female guards when it stated that the Constitution would not protect them.[5] This type of cross-gender searching and monitoring has become a harsh reality for many inmates across the U.S. These inmates are constantly reminded that our society and our courts regard their bodily integrity and privacy as meaningless. It seems Justice Stewart's statement would more accurately reflect today's judicial trend if it would have read, "Wherever a man may be, except if that place is prison, he is entitled to know that he will remain free from unreasonable searches and seizures."

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

2. Katz v. United States, 389 U.S. 347, 359 (1967).

3. *See* DARREL K. GILLARD & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONS AND JAIL INMATES, 1995, at 1 (1996).

4. *See* Bagley v. Watson, 579 F. Supp. 1099, 1103 (D. Or. 1983) ("Male prisoners in the Oregon correctional institutions have no federal constitutional rights to freedom from clothed 'pat-down' frisk searches and/or visual observations in states of undress performed by female correctional officer guards.").

5. *See id.* However, the court did recognize that male inmates have the right under the Oregon Constitution to not be treated with "unnecessary rigor." *Id.*

Although a prisoner is no longer considered a "slave of the State"[6] as was true a century ago, the judicial system has been slow to recognize both a prisoner's constitutional right to privacy as well as the need for humane and dignitary treatment during confinement. If inmates of the prisons, jails, and reformatories across the U.S. are viewed as "members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect,"[7] then the judicial resistance to recognizing inmates' claims of privacy invasions would be understandable, if not applauded. However, neither courts nor society in general should adopt such a barbaric view. It would be hard to fathom that any court would explicitly condone that view of inmates, yet the growing number of judicial decisions implicitly reinforces this conception. As Chief Judge Posner of the Seventh Circuit clearly articulated, "[w]e must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration."[8]

Although disagreement continues over the scope and sometimes even the existence of prisoners' constitutional right to privacy, it is well established that prisoners have limited constitutional protections while incarcerated.[9] Whether inmates possess a constitutional right to be free from searches and surveillance by guards of the opposite sex has been a hotly contested issue, with courts not

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6. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

7. Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring and dissenting).

8. *Id.* at 152 (Posner, C.J., concurring and dissenting). Chief Judge Posner emphasized that a substantial number of inmates have not even been convicted of a crime and are simply awaiting trial. Another large number of inmates may only be guilty of sumptuary offenses. It would be unwise to decide that inmates are "scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them" without first having a realistic view of the composition of the inmate population. *Id.* (Posner, C.J., concurring and dissenting). Justice Brennan aptly observed:

> It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic. When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987) (Brennan, J., dissenting).

9. The Supreme Court declared:

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." But, though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.

Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (citation omitted) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

only deciding the issue differently, but also deciding it on different grounds. This Note explores the tension between inmates' constitutional rights and the countervailing and usually overriding concerns of prison institutional security and prison guards' equal-employment rights.

Part I of this Note describes the standard set forth by the U.S. Supreme Court in *Turner v. Safley* for resolving prisoners' claims of constitutional violations, as well as the four-part inquiry established to decide whether a prison regulation is "reasonably related to legitimate penological interests."[10] Part II will examine the various avenues that inmates have pursued to establish their right to be free from cross-gender searches and surveillance. Part III will review how the lower courts have resolved the issue of cross-gender searches and surveillance within the prison setting. It will illustrate the confusion experienced by these lower courts in determining whether inmates possess constitutional rights to privacy and how those asserted rights are weighed against the prison system's competing penological interests. Part III will also demonstrate the difficulty facing male inmates in establishing invasion-of-privacy claims as compared to their female counterparts. Part IV will show that the current methods of resolving these issues by the courts offer insufficient protection of inmates' privacy interests. The courts' various approaches are in need of serious reformation in order to promote uniform protection of inmates' dignitary interests. The courts should: (1) explicitly recognize inmates' constitutional right to be free from cross-gender searches and cross-gender monitoring while nude; (2) rigorously apply the *Turner* test; and (3) limit the currently extensive deference afforded to prison administrators.

I. THE *TURNER V. SAFLEY* RATIONAL-REVIEW STANDARD

Turner involved a class-action suit brought by inmates challenging two prison regulations relating to inmate-to-inmate mail correspondence and inmate marriages.[11] 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 the existence of "compelling reasons."[12] The Court upheld the limitation on the inmate-to-inmate correspondence, but struck down the marriage restriction.

The Supreme Court did not apply the strict-scrutiny standard of review that the Eighth Circuit had used to analyze the male prisoners' claims.[13] Instead the Court used a rational-basis standard of review stating that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[14] The Court concluded that this lesser standard of scrutiny was necessary so that prison administrators,

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

11. *See id.* at 81-82.

12. *See id.* at 82. Prison officials testified that generally only a pregnancy or birth of an illegitimate child would be considered a "compelling reason." *Id.*

13. *See* Safley v. Turner, 777 F.2d 1307, 1313-14 (8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78.

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

instead of the courts, would be allowed to make difficult judgments in operating and managing a prison.[15] The Court felt that subjecting prison officials' day-to-day judgments to strict-scrutiny review would hamper administrators' ability to deal with the demanding problems of prison administration.[16]

The Court delineated four factors to be considered in determining the reasonableness of a regulation. First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[17] Second, do the prison inmates have "alternative means of exercising the right" despite the prison restriction?[18] If alternate avenues are available to the inmate, then courts should be "particularly conscious" of the deference owed to prison administrators.[19] Third, courts should consider the impact that the "accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[20] Finally, courts should recognize that the "absence of ready alternatives is evidence of the reasonableness of a prison regulation."[21]

The rational-basis test set forth in *Turner* is the foundation for the review of most prisoners' claims of constitutional violations by prison officials.[22] Although the *Turner* test appears to reach a balance in accommodating inmates' rights and prison concerns, the current application of the four factors, combined with the extreme deference afforded to prison administrators,[23] demonstrate that many prison regulations can pass muster under the rational-basis standard.

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15. *See id.*

16. *See id.* The Court also pointed out that a strict-scrutiny review would further entangle the courts in the administrative problems of prison management. "[E]very administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem . . . ." *Id.*

17. *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). Essentially, the first prong of *Turner* is a two-fold consideration: (1) the government interest underlying the regulation must be legitimate; and (2) if it is, the regulation must be rationally related to that objective. These considerations must be analyzed in light of *Turner*'s overarching goal of determining whether the regulation is reasonably related to legitimate penological interests.

18. *Id.* at 90.

19. *Id.*

20. *Id.* This factor is commonly referred to as the "ripple effect." If the accommodation of the right will have a "significant 'ripple effect' on fellow inmates or on prison staff," courts again should be especially deferential to the judgment of prison officials. *Id.*

21. *Id.* The Court warned that this is not a "least restrictive alteruative" test. However, the existence of ready alternatives may show that the regulation is an "exaggerated response" to prison concerns and as such is not reasonable. *Id.*

22. However, as the Ninth Circuit recognized in *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993), the *Turner* standard has not been applied to Eighth Amendment claims. *Turner* has only been applied to the claims of inmates that involve constitutional rights that have been limited in scope due to exigencies of incarceration. However, since the Eighth Amendment exists solely for the protection of those convicted of a crime, the rights secured by that Amendment are not limited. *See id.* at 1530.

23. *See* Bell v. Wolfish, 441 U.S. 520, 547 (1979) (instructing that prison administrators be accorded wide-ranging deference).

II. CONSTITUTIONAL THEORIES EMPLOYED BY INMATES[24]

Inmates have made various arguments in order to establish their right to be free from cross-gender searches and surveillance. Courts have reacted differently to these claims depending on which avenue the inmate pursued. Most of these claims are brought under 42 U.S.C. § 1983.[25] Section 1983 is used as a vehicle to seek relief from those persons who, acting under color of state law, violate constitutional rights. However, individual state constitutions may provide broader rights and remedies for state inmates. In establishing the federal constitutional right to be free from cross-gender searches and visual observation while naked or performing private bodily functions, prisoners advance five main theories.

A. The Fourth Amendment

Not surprisingly, the Fourth Amendment has been a common basis for these claims. The Fourth Amendment[26] protects citizens from unreasonable searches and seizures. Although the Supreme Court has not decided whether inmates are deprived of all Fourth Amendment rights while incarcerated, it has held that certain Fourth Amendment rights are extinguished upon confinement in prison. For example, the Supreme Court has concluded that inmates have no reasonable expectation of privacy in their cells[27] and that inmates can be subjected to visual body-cavity inspections.[28] In deciding whether inmates enjoy Fourth Amendment protections, the Supreme Court has stated that the answer depends on whether

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24. This Part is meant merely to summarize the various constitutional theories asserted by prisoners, including the general bases for their arguments and the appropriate constitutional standard for analysis. However, this Part does not attempt to prove that these constitutional theories are valid or that the constitutional standard of review is flawed. See *infra* Part IV for a discussion analyzing the validity of both constitutional rights asserted by prisoners and the corresponding standards of constitutional review.

25. This section provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (1994).

Although § 1983 only applies to state actors, a similar claim can also be brought against federal actors. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971) (allowing a federal cause of action for damages against federal agents acting under color of federal law).

26. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

27. *See* Hudson v. Palmer, 468 U.S. 517, 536 (1984) (holding that sinee inmate had no reasonable expectation of privacy in his cell he was not entitled to any Fourth Amendment protections).

28. *See Wolfish*, 441 U.S. at 560 (holding in part that conducting visual body-cavity searches of inmates following contact visits did not violate the Fourth Amendment). The gender of the guards conducting the body-cavity searches was not at issue in this case.

"the person invoking its protection can claim a . . . 'legitimate expectation of privacy' that has been invaded by government action."[29]

Accordingly, most courts facing the question of whether the cross-gender aspect of otherwise constitutional searches and observation violates the Fourth Amendment must first determine whether the prisoner had a legitimate expectation of privacy. Inmates contend that under the Fourth Amendment they have a reasonable expectation of privacy in their bodily integrity.[30] Therefore, a reasonable search under the Fourth Amendment becomes unreasonable when the cross-gender aspect is introduced. Assuming that inmates do possess a reasonable expectation of privacy in their bodily integrity,[31] a court would have to apply the rational-basis test as set forth in *Turner*. In order to establish that their right has been violated, inmates will have to demonstrate that the prison regulation allowing for the cross-gender search is not reasonably related to a legitimate penological interest.[32]

B. The Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment.[33] Unlike other constitutional rights that prisoners may possess, the protection afforded by the Eighth Amendment is not limited by the fact of incarceration. The Eighth Amendment exists for the express protection of persons convicted of criminal activity.[34]

"It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . . ."[35] In determining "wantonness" the Supreme Court has applied differing standards of review to prisoners' Eighth Amendment claims depending on the facts of the case. If the inmate alleged excessive use of force by prison guards or officials, the Court has employed a "malice" standard.[36] This requires the inmate to prove that the force was applied "maliciously and sadistically for

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29. *Palmer*, 468 U.S. at 525 (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)).

30. Inmates do not claim that body-cavity searches, pat-down searches, or observations are improper or could not be properly performed by officers of the same sex as the prisoners. Rather it is the forced exposure of their naked bodies to guards of the opposite sex and the forced exposure to intimate touching by guards of the opposite sex that invade the prisoners' Fourth Amendment rights.

31. Many courts have assumed the existence of such rights in order to proceed with the appropriate constitutional analysis. However, see *infra* notes 143-52 and accompanying text for a discussion regarding the Fourth Amendment as a source of constitutional protection for inmates' privacy interests.

32. *See supra* notes 14-23 and accompanying text.

33. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

34. In contrast, the Due Process Clause of the Fifth Amendment protects those inmates who have been arrested and are awaiting trial from the infliction of cruel and unusual punishments. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979).

35. Whitley v. Albers, 475 U.S. 312, 319 (1986).

36. *Id.* at 320-21.

the very purpose of causing harm."[37] If, however, the inmate alleged that the conditions of confinement amounted to cruel and unusual punishment, the Court has employed a "deliberate indifference" standard. Here the prisoner must be able to show that prison officials were deliberately indifferent to the effect that the conditions would have on the inmates.[38]

It is unclear what standard should be used to analyze inmates' claims that allege an Eighth Amendment violation due to a cross-gender search, since the Supreme Court has not yet addressed this specific issue. If the search is seen as a condition of confinement, then an inmate would only have to show deliberate indifference on the part of prison officials.[39] However, it is possible that courts could view the concerns surrounding cross-gender searches as more appropriately reviewed under the higher malice standard, even though the facts do not fall within the excessive-use-of-force cases.[40] With this approach inmates face the tougher burden of establishing malice on the part of the officials or guards.

Although the Supreme Court has not spoken directly to the issue of cross-gender searches, it has stated that "[t]he Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"[41] The Court has concluded that the Eighth Amendment is offended when punishments are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'"[42] This view indicates that the psychological effects of the

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37. *Id.*; *see also* Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) (applying malice standard in an excessive-use-of-force case). Excessive-use-of-force cases generally arise in a situation where prison guards, responding to a prison disturbance, use force to maintain or restore order.

38. *See* Farmer v. Brennan, 511 U.S. 825 (1994); Wilson v. Seiter, 501 U.S. 294, 297 (1991). The Supreme Court has equated "deliberate indifference" to the reckless disregard of a substantial risk of serious harm. *See Farmer*, 511 U.S. at 836.

39. *See* Jordan v. Gardner, 986 F.2d 1521, 1528 (9th Cir. 1993) (applying the deliberate-indifference standard to a claim that cross-gender clothed-body searches constituted cruel and unusual punishment). The Ninth Circuit concluded that the deliberate-indifference standard was appropriate since the implementation of this search policy was developed over time with the opportunity for adequate consideration of the effects the search policy would have on inmates. The court reasoned that the higher malice standard is only necessary for the review of those situations where officers must act immediately and under pressure, without the opportunity for ample reflection, in order to defuse potentially dangerous situations. *See id.*

40. In the dissenting opinion of *Jordan*, Judge Trott argued that the higher standard of "maliciously and sadistically" should apply, mainly because "[i]t would be anomalous indeed for the law to impose the highest mental element standard where gratuitous beatings occur but not where valid competing institutional concerns are implicated." *Id.* at 1559 (Trott, J., dissenting). Judge Trott also stated that the higher standard is necessary to honor the principle that wide-ranging deference should be given to prison administrators. *See id.* at 1559-60 (Trott, J., dissenting); *see also* Ian M. Ogilvie, Comment, *Cruel and Unusual Punishment: The Ninth Circuit Analyzes Prison Security Policy with "Deliberate Indifference" to Penological Needs in* Jordan v. Gardner, 68 ST. JOHN'S L. REV. 259 (1994).

41. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

42. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

conditions of confinement are implicated in Eighth Amendment reviews.[43] However, inmates must be able to present sufficient evidence of psychological pain to establish a cognizable Eighth Amendment claim.[44]

C. The First Amendment

The First Amendment is another constitutional theory under which inmates may find protection from cross-gender body searches and surveillance. The First Amendment[45] affords individuals the right to freely exercise their religion. The Supreme Court stated that "[i]nmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion."[46] The inmate's claim usually entails the allegation that the cross-gender search or observation is offensive to religious beliefs in modesty or otherwise contravenes the tenets of religious practice. For example, the inmate in *Kent v. Johnson*[47] claimed that the ability of female guards to see him using the bathroom facilities and showering was offensive to his religious beliefs of Christian modesty,[48] and the inmate in *Madyun v. Franzen*[49] claimed that pat-down searches conducted by female guards violated his belief in the Islamic religion, which forbade such physical contact with a woman other than his wife or mother.

In analyzing First Amendment free-exercise claims, courts have used the *Turner* standard to determine whether the prison regulation is reasonably related

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43. *See* Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring in the judgment) ("It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment."); Babcock v. White, 102 F.3d 267, 273 (7th Cir. 1996) ("[W]e [do not] intend to preclude suits by prisoners under the Eighth Amendment grounded solely on claims of psychological injury.").

44. In *Jordan*, the Ninth Circuit concluded that the women in the state prison had satisfied the standard for a finding of pain resulting from cross-gender pat-down searches. Their evidence was based on witnesses, psychology experts, and testimony from the female inmates describing their histories of physical and sexual abuse. *See Jordan*, 986 F.2d at 1525-26.

However, in a similar case that involved female guards performing pat-down searches on male inmates, the Ninth Circuit stated that male inmates had failed to satisfy the constitutional standard for a finding of pain. Their evidence must point to something more than momentary discomfort. *See* Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985); *see also Hudson*, 503 U.S. at 9 (arguing that "routine discomfort is 'part of the penalty that criminal offenders pay for their offense against society'") (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

45. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. 1.

46. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (citations omitted).

47. 821 F.2d 1220 (6th Cir. 1987).

48. Eventually, Kent's First Amendment claims were denied on the ground that the prison policy satisfied the *Turner* test. *See* Kent v. Johnson, No. 84-CV-71307-DT, 1990 WL 507413, at *4 (E.D. Mich. Aug. 3, 1990).

49. 704 F.2d 954 (7th Cir. 1983) (holding that male prisoners' First Amendment rights are not violated by limited frisk searches conducted by female guards).

to legitimate penological interests.[50] However, in 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA")[51] which might have significantly altered the method by which courts would examine prisoners' religious free-exercise claims.[52] RFRA would have imposed a higher standard for the government once a prisoner had established that a regulation substantially burdened his religious exercise.[53] However, the Supreme Court recently held that the enactment of RFRA was an invalid exercise of Congress's authority.[54] Therefore, prisoners' First Amendment free-exercise claims will still be analyzed under the *Turner* standard.

D. General Right to Privacy

Prisoners may retain a general constitutional right to privacy even though such a right is not an express guarantee of the Constitution. The source of this right is said to emanate from the "penumbra" of the specific guarantees enumerated in the Bill of Rights.[55] The general right to privacy falls within the realm of this penumbra.[56] The Supreme Court has stated that "[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[57] Mainly the Court has recognized that this penumbral right to privacy protects private

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50. *See O'Lone*, 482 U.S. at 349; Salaam v. Lockhart, 905 F.2d 1168, 1169 (8th Cir. 1990); *Kent*, 821 F.2d at 1229 (remanding for reconsideration in light of *Turner*); Sasnett v. Sullivan, 908 F. Supp. 1429, 1450 (W.D. Wis. 1996).

51. Pub. L. No. 103-141, 107 Stat. 852 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)) (held unconstitutional by City of Boerne v. Flores, 117 S. Ct. 2157 (1997)).

52. *See* Shann R. Jeffery, *Tenth Circuit Survey: Prisoner's Rights*, 73 DENV. U. L. REV. 883, 883-85 (1996) (arguing that RFRA legislatively overturned the *Turner* test with regard to religious-exercise cases).

53. Under RFRA, the regulation was presumed invalid unless the government could show both that the regulation furthered a compelling state interest, and that the regulation was the least restrictive means of furthering that interest. Thus, RFRA imposed a much higher standard than the *Turner* rational-review standard that is employed in most prisoners' rights cases.

However, RFRA was enacted to overturn a Supreme Court ruling in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), in order to re-establish the standard of review set forth in pre-*Smith* cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963). *See supra* note 51. RFRA was silent as to whether prisoners' claims of free-exercise violations also enjoyed this heightened standard of review. It should be recognized that courts may not have applied RFRA to prisoners' claims since the *Turner* standard was established in the pre-*Smith* times and as such met RFRA's goal of returning to the pre-*Smith* standard of review. Nonetheless, this controversy is now moot since the Supreme Court recently declared that the enactment of RFRA was an invalid exercise of Congress's authority. *See Flores*, 117 S. Ct. at 2172. An extensive discussion of the implications of the Supreme Court's recent decision in *Flores* is beyond the scope of this Note.

54. *See Flores*, 117 S. Ct. at 2172.

55. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("Various guarantees create zones of privacy.").

56. *See* Roe v. Wade, 410 U.S. 113 (1973).

57. *Id.* at 152.

decisionmaking in personal matters.[58] However, the Court has not decided whether this notion of a zone of privacy extends to prisoners' interests in being free from cross-gender searches and surveillance.[59] Assuming that inmates retain this penumbral right to privacy,[60] the inmates' claims would be analyzed under the *Turner* rational-review standard. However, given the Supreme Court's attitude towards prisoners' claims of constitutional deprivations,[61] it is likely that prison regulations impinging this general constitutional right to privacy will satisfy the *Turner* test.

E. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment[62] generally requires the government to treat similarly situated people the same. In states where prison regulations forbid cross-gender searches with respect to female inmates and not to male inmates, male prisoners may be able to establish an equal-protection violation. However, to establish a viable equal-protection claim, male prisoners would first have to show that they are similarly situated to female inmates who are receiving favorable treatment. Although courts dealing with equal-protection claims in the prison setting admit the disparity between the prison policies regarding male and female inmates,[63] they usually conclude that male and female inmates are not similarly situated.[64]

Regulations that contain overt facial classifications based on gender are subjected to a heightened, intermediate standard of review. The Supreme Court has concluded that any gender-based distinction "must serve important

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58. Such private decisionmaking includes matters relating to marriage, procreation, abortion, family relationships, child rearing, and education. *See* Paul v. Davis, 424 U.S. 693, 712-13 (1976); *Roe*, 410 U.S. at 726; *Griswold*, 381 U.S. at 483.

59. However, the Supreme Court has held that prisoners retain those constitutional rights not inconsistent with the objectives of incarceration. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974); *see also* Wolff v. McDonnell, 418 U.S. 539 (1974); *supra* text accompanying note 9.

60. See *infra* notes 153-60 and accompanying text for a discussion regarding the general right to privacy as a source of constitutional protection for inmates' privacy interests.

61. *See* Jack E. Call, *The Supreme Court and Prisoner's Rights*, FED. PROBATION, Mar. 1995, at 36, 36-38 (analyzing Supreme Court case law on prisoners' rights and recognizing three distinct periods: (1) the Hands-Off Period, (2) the Rights Period, and (3) the current Deference Period).

62. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

63. Madyun v. Franzen, 704 F.2d 954, 962 (7th Cir. 1983) ("True, there is a disparity in the treatment of the sexes by the Department of Corrections—a distinction drawn on the basis of gender.").

64. *See* Kcevan v. Smith, 100 F.3d 644, 650 (8th Cir. 1996) (holding female and male inmates are not similarly situated with regard to prison-industry employment); Pargo v. Elliot, 69 F.3d 280, 281 (8th Cir. 1995) (holding female and male inmates are not similarly situated with regard to prison programs and services); Klinger v. Nebraska Dep't of Corrections, 31 F.3d 727, 733 (8th Cir. 1994) (same); Timm v. Gunter, 917 F.2d 1093, 1102-03 (8th Cir. 1990) (holding male and female inmatcs are not similarly situated with regard to prison security measures); *see also Madyun*, 704 F.2d at 961-63 (holding that gender-based distinction in prison search policy serves an important state interest).

governmental objectives and must be substantially related to the achievement of those objectives."[65] Prison search regulations that classify on the basis of whether the inmate is male or female would constitute an overt facial classification that would be subject to the intermediate standard of review. Although this would seem to be a successful avenue for male inmates to use to free themselves from cross-gender searches, the courts have not been receptive to such an approach.[66]

III. THE DISPOSITION OF THE LOWER COURTS

Courts considering cross-gender issues within the prison setting have dealt with two controversial areas: visual observation of unclothed inmates by opposite-sex officers and cross-gender pat-down searches.[67] The majority of cases has relied on the *Turner* standard in resolving these conflicts, although there have been some recent controversial departures. The conflict surrounds both inmates' right to bodily privacy and integrity and the competing concerns of institutional security, as well as guards' equal-employment rights as secured by the Civil Rights Act of 1964. This conflict is resolved against a backdrop that requires courts to accord wide-ranging deference to the decisions of prison officials.[68]

A. Visual Observations

In *Grummett v. Rushen*,[69] male inmates brought a class action alleging that the prison policy of allowing female officers to view them in states of nudity violated their right to privacy. The Ninth Circuit affirmed the district court's grant of summary judgment for the California Department of Corrections.[70] The court concluded that under the Fourteenth Amendment,[71] the prisoners' right to privacy

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65. Craig v. Boren, 429 U.S. 190, 197 (1976). The government must establish that the gender classification has an important purpose and that the relationship between purpose and classification is substantial. *See id.*

Regulations that contain nonfacial classifications are subject to a heightened scrutiny only if it is proven that the regulation has a disparate impact on a protected group, and only if it is motivated by a diseriminatory intent. *See* Personnel Adm'r of Mass. v. Feeny, 442 U.S. 256 (1979). For a complete discussion of equal-protection analysis, see generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 14.20-.23 (5th ed. 1995).

66. *See Timm*, 917 F.2d at 1102-03; *Madyun*, 704 F.2d at 963.

67. Courts have also dealt with cross-gender issues surrounding strip searches and visual body-cavity searches. These types of searches involve the same conflicting rights and issues that will be developed throughout the discussion of this Part. Therefore, a detailed examination of the case law involving cross-gender strip searches and visual body-cavity searches will not be pursued in this Note.

68. *See* Bell v. Wolfish, 441 U.S. 520 (1979).

69. 779 F.2d 491 (9th Cir. 1985).

70. *See id.* at 496.

71. The court articulated the inmates' interest as the right not to be viewed naked by members of the opposite sex. The court stated that the source of this right may be found in the zone of privacy created by the Constitution and secured by the Fourteenth Amendment.

was not violated by the viewing of their naked bodies by guards of the opposite sex.[72] The court felt that prison officials had developed the least intrusive means to further the state's interest in prison security.[73] Further, it seemed important that the female guards were assigned to positions that only required casual observation of the inmates from a distance instead of positions that required unrestricted and frequent surveillance.[74] The court also concluded that the inmates' Fourth Amendment rights had not been violated[75] since the observations were restricted by distance. The court also noted that to restrict female guards from positions in which they might observe nude inmates would pose a risk to their equal-employment opportunities.[76]

Two years later the Sixth Circuit in *Kent v. Johnson*[77] stated that a male inmate's claim alleging violations of his constitutional rights under the First, Fourth, and Eighth Amendments based on surveillance of his naked body by female officers should not be dismissed. This seemed to indicate that male inmates' right-to-privacy claims were being taken more seriously. The court remanded the case, instructing the lower court to incorporate the *Turner* standard.[78] However, on remand the U.S. District Court for the Eastern District of Michigan found that the visual observations by female guards did not occur on a regular, unobstructed basis. The district court concluded that the inmate's

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However, the court expressly declined to decide whether the inmates' right was protected by this general right to privacy, and instead only assumed the existenee of such a right for purposes of resolving the case. *See id.* at 493-94 ("Assuming that, in this circuit, the interest in not being viewed naked by members of the opposite sex is protected by the right of privacy, our inquiry must focus on whether the female guards' conduct invaded the prisoners' interest.").

72. *See id.* at 495. *Grummett* also dealt with the issue of routine pat-down searches of male inmates by female offieers. *See infra* notes 100-03 and accompanying text.

73. *Grummett*, 779 F.2d at 494.

74. *See id. But see* Johnson v. Phelan, 69 F.3d 144, 148 (7th Cir. 1995) (concluding that female guards' restrieted view of male inmates as emphasized in *Grummett* is not determinative).

75. Again the Ninth Circuit explicitly declined to decide whether prisoners retain Fourth Amendment rights that would extend to the search of the prisoner himself. The eourt assumed, without deciding, that visual observations constituted searches for purposes of the Fourth Amendment. *See Grummett*, 779 F.2d at 495. However, because the court concluded that such a search was reasonable, it did not need to decide whether the prisoner retained any Fourth Amendment rights. *See id.* at 496 n.3.

Grummett was decided before the Supreme Court's announcement of the rational-basis standard in *Turner*. However, given the Ninth Circuit's least-intrusive-means analysis, the regulation at issue in *Grummett* would have easily passed muster under the lesser-scrutiny standard of *Turner*.

76. *See id.* at 496.

77. 821 F.2d 1220 (6th Cir. 1987).

78. *See id.* at 1229-30. The Sixth Circuit held only that the inmate's pleadings were sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted. The court emphasized that the lower court should incorporate the subsequent standards issued by the Supreme Court in *Turner* and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). *See Kent*, 821 F.2d at 1229-30.

claim still did not constitute a cause of action.[79] Several cases that have dealt with male inmates' claims of constitutional violations based on female guards' observation of them while naked have been met with the same resistance.[80]

However, it is interesting to note that female inmates' claims of invasions of privacy appear to have been taken more seriously with somewhat favorable results.[81] In *Forts v. Ward*,[82] female prisoners filed suit protesting the placement of male officers in housing areas where the female prisoners could be viewed while partially or completely undressed. The female inmates claimed that this placement deprived them of their constitutionally guaranteed right to privacy. In contrast to the arguments challenging the existence of male inmates' privacy rights, the state in this situation did not even dispute that the female inmates retained a constitutional right to privacy while incarcerated.[83] Similarly, in *Rushing v. Wayne County*,[84] the female inmate's right to privacy was not even contested by the state.[85] In *Lee v. Downs*[86] the court upheld a jury verdict for a female inmate who had been forced to disrobe in the presence of male guards. In

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79. Kent v. Johnson, No. 84-CV-71307-DT, 1990 WL 507413, at *6 (E.D. Mich. Aug. 3, 1990). The court went on to conclude that assuming the viewings did violate the inmate's right to privacy, the prison policy satisfied the *Turner* rational-basis test. The court also refused to require the prison to install modesty panels to accommodate the inmate's right to privacy, stating that "*Turner* provides no authority for this court to mandate the implementation of an alternative policy or practice." *Id.* at *7.

80. *See* Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (dismissing male pretrial detainee's action based on female guards' observation of him while naked for failure to state a claim); Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990) (holding that surveillance of male prisoners while nude by female guards violated no privacy interest which prisoners might retain); Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982) (holding that inmates' right to privacy must yield to the prison system's need for security); Canell v. Armenikis, 840 F. Supp. 783 (D. Or. 1993) (holding that the Constitution does not prohibit a female guard from viewing unclothed male inmates); Johnson v. Pennsylvania Bureau of Corrections, 661 F. Supp. 425 (W.D. Pa. 1987) (holding that female guards' limited viewings of male inmates did not violate inmates' right to privacy); Miles v. Bell, 621 F. Supp. 51 (D. Conn. 1985) (holding that female guards' occasional viewing of male inmates while naked did not violate prisoners' privacy rights); Bagley v. Watson, 579 F. Supp. 1099 (D. Or. 1983) (holding that male inmates in states of undress have no federal constitutional right to be free from visual observation by female guards).

81. *See infra* notes 82-87 and accompanying text.

82. 621 F.2d 1210 (2d Cir. 1980).

83. *See id.* at 1214 ("The acquiescence of the State defendants means that there is no longer any dispute . . . as to whether the nighttime viewing of completely or partially unclothed women inmates by male prison guards violates the constitutional privacy rights of the inmates.").

The dispute in *Forts* centered on whether prohibiting male guards from working the nighttime shifts in the female housing units denied male guards their right to equal employment opportunities. The court determined that since appropriate sleepwear could protect the female inmates' privacy interest, "its use should be preferred to any loss of employment opportunities." *Id.* at 1217.

84. 462 N.W.2d 23 (Mich. 1990).

85. *See id.* at 31 ("The defendant in the instant case does not dispute the existence of Ms. Rushing's protected liberty interest in not being exposed to members of the opposite sex.").

86. 641 F.2d 1117 (4th Cir. 1981).

Torres v. Wisconsin Department of Health & Social Services,[87] the Seventh Circuit concluded that a state could exclude male guards from its female prisons in order to promote the female prisoners' rehabilitation without violating the guards' right to equal employment opportunities. The tone of these judicial decisions indicates that when a female inmate is the complaining party, her complaint will be seriously considered.

However, in 1995, the Seventh Circuit in *Johnson v. Phelan*[88] reached an astonishing conclusion regarding the privacy rights of those who are incarcerated. Johnson, a pretrial detainee, claimed that female guards' monitoring of him while he was naked violated his constitutional right to privacy. However, Judge Easterbrook found that under the Fourth, Fifth, and Eighth Amendments, Johnson had not stated a claim on which relief could be granted. Judge Easterbrook concluded that prisoners do not retain *any* right to privacy under the Fourth Amendment,[89] a conclusion that other courts had been unwilling to make. He also felt that any general notion of a right to privacy would not protect Johnson.[90] He then noted that moving to the Fifth Amendment would not help Johnson. Although Judge Easterbrook cited *Turner* as the appropriate standard of review, his analysis failed to even apply the rational-basis test.[91] Judge

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87. 859 F.2d 1523 (7th Cir. 1988). *Torres* was decided before the Seventh Circuit's broad restriction on inmates' privacy rights in *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995). *See infra* notes 88-99 and accompanying text.

88. 69 F.3d 144.

89. *See id.* at 146 ("[T]hey do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life."); *id.* at 150 ("The fourth amendment does not protect privacy interests within prisons.").

90. *See id.* at 146. Judge Easterbrook felt that where the Constitution already provides an analytical framework (in this case the Fourth Amendment), substantive due process analysis should not be substituted for that framework. *See id.*

91. Judge Easterbrook stated that under the Fifth Amendment the inquiry is "whether the regulation is 'reasonably related to legitimate penological interests,'" citing *Turner* for this proposition. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). However, nowhere in his opinion did Judge Easterbrook set forth or apply the four *Turner* factors as mandated by the Supreme Court. *See id.* Judge Easterbrook appeared to analyze the first *Turner* factor in the part of his opinion which analyzed Johnson's Eighth Amendment claim. *See id.* at 147. Here, he analyzed the state's interests in cross-sex monitoring, but did so in the context of determining whether such monitoring serves a function beyond the infliction of pain. Judge Easterbrook then held that "[a]ny practice allowed under the due process analysis of *Turner* is acceptable under the eighth amendment too." *Id.* at 149. He further stated that "[a]s a reconciliation of conflicting entitlements and desires, [cross-sex monitoring] satisfies the *Turner* standard." *Id.* at 151. However, the fallacy of this statement lies in the fact that an appropriate *Turner* analysis was never conducted.

Further, implicit in Judge Easterbrook's opinion is that *Turner* is not the appropriate inquiry under the Fourth Amendment. *See id.* at 146. He stated that the Supreme Court's decision in *Hudson v. Palmer*, 486 U.S. 517 (1984), extinguished the privacy rights of prisoners: "*[Bell v.] Wolfish*[, 441 U.S. 520 (1979)] assumed without deciding that prisoners retain some right of privacy under the fourth amendment. Five years later the Court held that they do not." *Johnson*, 69 F.3d at 146. However, the Court in *Palmer* did not hold this. In fact, the Court only held that prisoners have no Fourth Amendment protections with regard to their prison cells. *See Palmer*, 468 U.S. at 536. The Supreme Court was not deciding whether prisoners retained limited Fourth Amendment protections with regard to searches of their "person." *See*

Easterbrook concluded without much discussion that the surveillance of prisoners is essential to the security interests of prisons.[92] He also noted that shuffling female guards to positions which would keep them from observing male inmates while nude would be problematic under Title VII of the Civil Rights Act of 1964.[93] For these reasons, Judge Easterbrook held that the prison regulation was "'reasonably related to legitimate penological interests'" of the prison.[94]

Finally, the court held that the Eighth Amendment could not protect Johnson since he had not alleged any deliberate infliction of psychological injury and because cross-sex monitoring served a function beyond the infliction of pain.[95] Judge Easterbrook concluded that cross-sex monitoring made good use of the staff and reduced the need for prisons to make sex a criterion of employment.[96]

Judge Easterbrook's opinion breaks with the other line of cases denying relief to male inmates from cross-sex monitoring for two main reasons. First, he claimed to be applying the *Turner* standard when in fact he failed to consider the factors set forth by the Supreme Court in order to determine the reasonableness of a prison regulation. He appeared to examine only whether there was a rational connection between the regulation and the legitimate interest put forward to justify it.[97] Second, Judge Easterbrook explicitly stated that prisoners retain no Fourth Amendment rights while incarcerated.[98] He further held that other amendments would not provide inmates with any right to privacy.[99] Although the outcome of this case is not surprising in that it works to deny relief to male inmates, its implications are shocking if this line of reasoning continues into the future. It would appear that at least in the Seventh Circuit, allowing male guards to observe female inmates showering and performing bodily functions would also

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id. at 555 n.31 (Stevens, J., concurring in part and dissenting in part).

92. *See Johnson*, 69 F.3d at 146. However, Judge Easterbrook did not require any substantive evidence that the prison's security was dependent on the cross-gender aspect of the surveillance at issue. *See id.*

93. *See id.* The court stated that female officers would not be "doing their jobs" if they failed to frequently and deliberately observe male inmates while nude. *Id.* The court distinguished *Torres* which permitted male guards to be "shuffled" completely out of a women's prison on the grounds of judicial deference to the choices of prison administrators. "Today deference leads to the opposite result: . . . evenhanded willingness to accept prison administrators' decisions about debatable issues means that Johnson cannot prevail under the due process clause." *Id.* at 146-47.

94. *See id.* at 146 (quoting *Turner*, 482 U.S. at 89).

95. *See id.* at 147. The court indicated that had Johnson alleged that prison guards or officials deliberately harassed him by assigning female guards to monitor him while nude, then he would have stated a valid Eighth Amendment claim. *See id.*

96. *See id.*

97. The failure to examine the other three factors set forth in *Turner* seems to be a result of Judge Easterbrook's belief that Johnson had not asserted any constitutional right worthy of review. "The fourth amendment does not protect privacy interests within prisons. Moving to other amendments does not change the outcome." *Id.* at 150.

98. *See id.* at 146, 150; *see* Somers v. Thurman, 109 F.3d 614, 619 (9th Cir.) ("[T]he Seventh Circuit stands alone in its peremptory declaration that prisoners do not retain a right to bodily privacy."), *cert. denied*, 118 S. Ct. 143 (1997).

99. *See Johnson*, 69 F.3d at 150.

be constitutionally reasonable. Given the Seventh Circuit's denial of all privacy rights to inmates, it would also be reasonable to allow male guards to conduct body-cavity searches on female inmates.

B. Pat-Down Searches

Cases addressing cross-gender clothed-body searches are perhaps in even greater conflict. In *Grummett v. Rushen*,[100] female officers were allowed to conduct pat-down searches of male inmates which included the groin area.[101] The Ninth Circuit concluded that these pat-down searches did not violate the privacy interests of the male inmates.[102] The Ninth Circuit felt that these pat-down searches were justified by security needs. Further, the court found the cross-gender aspect of these searches reasonable because they were done briefly while inmates were fully clothed and because they were performed in a professional manner.[103] Applying the *Turner* standard, the Eighth Circuit in *Timm v. Gunter*[104] held 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" and "would severely diminish the effectiveness of the search."[105] However, *Smith v. Fairman*[106] found that "inmates do have some right to avoid unwanted intrusions by persons of the opposite sex."[107] The

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100. 779 F.2d 491, 492 (9th Cir. 1985).

101. *See id.*

102. The court analyzed these claims under both the Fourteenth and Fourth Amendments. *See id.* at 493 n.1. 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. However, it then held that the state had devised the least intrusive means in furthering the state's interest in prison security. *See id.* at 494. Similarly, the court assumed, without deciding, that prisoners retained Fourth Amendment protections while incarcerated—that is, that prisoners had a legitimate expectation of privacy in shielding their naked bodies and genitals from the opposite sex. However, the prison regulations were found to be reasonable. *See id.* at 495.

103. *See id.* at 496. The court emphasized the fact that the searches were performed in a professional manner and with respect for the male inmates. *See id.* However, the court did not indicate that the security of the institution depended on female officers conducting these searches. Failure to require substantive evidence of security concerns necessarily dilutes the strength of the court's analysis.

104. 917 F.2d 1093 (8th Cir. 1990).

105. *Id.* at 1100 n.10. The court found that accommodating the inmates' right to privacy, assuming that they retained such rights, would serve to diminish overall internal security. The court found that prohibiting female guards from conducting such searches would create resentment among male guards, tension between the male and female employees, and a deterioration of morale. These factors combined, the court concluded, would work to severely impede internal security. *See id.*

106. 678 F.2d 52 (7th Cir. 1982).

107. *Id.* at 55. The court implied that this type of protection is found in the Fourth Amendment or in the more general right to personal privacy. *See id.* at 53. However, given Judge Easterbrook's more current analysis in *Johnson*, it is safe to assume that *Fairman* would be decided differently today. *See supra* notes 88-99 and accompanying text.

court found that the prison had accommodated the inmates' privacy interests by limiting the search so as not to include the groin area.[108]

One year later, the Seventh Circuit in *Madyun v. Franzen*[109] again ruled that a pat-down search performed by a female officer did not violate the Fourth Amendment because the search did not require deliberate examination of the genital area.[110] However, the male inmate further alleged a violation of the Equal Protection Clause of the Fourteenth Amendment. The court acknowledged that the Illinois Department of Corrections allowed female prisoners to be searched only by female guards, while male prisoners were subjected to cross-gender searches.[111] The court admitted that "there is a disparity in the treatment of the sexes by the Department of Corrections—a distinction drawn on the basis of gender."[112] Yet the court found that this distinction served the important governmental interest of equalizing employment opportunities for women in corrections.[113]

Then in 1993 the Ninth Circuit declared that a Washington state prison regulation requiring male guards to conduct random, nonemergency, suspicionless, clothed-body searches on female prisoners was cruel and unusual punishment in contravention of the Eighth Amendment.[114] The facts leading up to this case deserve review. Five years before the institution of this suit, the female correctional staff had filed a grievance against a same-gender search policy which was then in effect at this institution.[115] The female guards complained that they were being interrupted during their meal breaks to conduct searches at the fixed checkpoints.[116] The Washington Department of Corrections

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108. Female officers are not allowed to conduct full searches and are given "explicit instructions not to search the genital area." *Fairman*, 678 F.2d at 53. The court implied that had the searches included the groin area, a constitutional violation would have been found. *But see supra* note 107.

109. 704 F.2d 954 (7th Cir. 1983).

110. *See id.* at 957. The court held that "the search procedure would not have intruded unreasonably" on the inmate's Fourth Amendment rights. *Id.* Again, however, it should be noted that given the *Johnson* decision, the Seventh Circuit would not be this generous today. *See supra* notes 88-99 and accompanying text.

111. *See Madyun*, 704 F.2d at 961. "Under Illinois Department of Corrections regulations, female prisoners are frisk searched only by female guards, while male prisoners are subject to frisk searches by male and female guards." *Id.*

112. *Id.* at 962.

113. *See id.* The court also noted that males have not "suffered a lack of opportunity to serve as prison guards because they are precluded from frisk searching female inmates." *Id.* Although the court did not imply that the gender-based distinction served to protect female inmates, it cannot be doubted that this was at least one purpose for the differing search policies. This is an implicit recognition that male inmates, as compared to female inmates, do not feel "harm" as a result of being searched by an opposite-sex officer. See *infra* notes 167-69 and accompanying text for a discussion of the perpetuation of male stereotypes in the law.

114. *See* Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993). The court declined to reach the First and Fourth Amendment claims since the search was prohibited under the Eighth Amendment. *See id.* at 1524.

115. *See id.* at 1523.

116. *See id.*

denied this grievance.[117] However, in January of 1989, a new superintendent instituted a policy of random, instead of routine, searches in order to control the flow of contraband through the institution more effectively.[118] To avoid any additional grievances by the female officers due to the increase in searches, the superintendent also implemented a cross-gender search policy. The search required the male guard to run his hands over the female prisoner's entire body, push "'inward and upward when searching the crotch and upper thighs,'" flatten the breasts, and "'squeeze and knead'" the seams in the leg and crotch area.[119] The same day the new policy was implemented, the female inmates filed this civil-rights action. The district court found the search policy violated the female prisoners' First, Fourth, and Eighth Amendment rights.[120] The Ninth Circuit, in a three-judge panel decision, overturned the district court's judgment. However, a year later, sitting en banc, the Ninth Circuit vacated their earlier opinion and affirmed the district court on Eighth Amendment grounds, declining to reach the inmates' other constitutional claims.[121]

The majority resolved the constitutionality of these cross-gender searches on relatively narrow grounds. Judge O'Scannlain acknowledged that prisoners may retain privacy interests in freedom from cross-gender searches while in prison, but that these interests had not yet been judicially recognized.[122] However, the Eighth Amendment right to be free from "the unwarranted infliction of pain is clearly established."[123] In analyzing the Eighth Amendment claim, the court concluded that sufficient evidence was presented to establish a finding of pain. The court noted that the female inmates in this institution had histories of sexual and physical abuse by men and that experts supported the conclusion that women react differently to unwanted intimate touching by men than men subject to similar searches by women.[124] The court also found compelling the expert testimony stating that female inmates who had prior histories of abuse were likely to feel revictimized by the unwilling submission to intimate contact of their breasts and genitals by men. The psychological fragility of abused women led the

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117. *See id.*

118. *See id.*

119. *Id.* (quoting WASHINGTON CORRECTIONS CENTER FOR WOMEN, GUIDELINES FOR PAT-DOWN SEARCHES OF FEMALE INMATES).

120. *See id.* at 1522.

121. *See id.* at 1522-23.

122. *See id.* at 1524-25. "Whether such rights exist—whether the inmates possess privacy interests that could be infringed by the cross-gender aspect of otherwise constitutional searches—is a difficult and novel question, and one that cannot be dismissed lightly." *Id.* at 1524.

123. *Id.* at 1525. For this reason, the court declined to reach the Fourth Amendment claims. It also did not reach the First Amendment claims since the Eighth Amendment "more directly regulate[s] the conduct at issue." *Id.* at 1524 n.3. In following the command from *Soldal v. Cook County*, 506 U.S. 56 (1992), the court felt compelled to look to the "'"explicit textual source of constitutional protection."'" *Jordan*, 986 F.2d at 1524 n.3 (quoting *Soldal*, 506 U.S. at 70 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989))).

124. *See Jordan*, 986 F.2d at 1526.

court to find that the female inmates had or would experience pain from being searched by a male guard.[125]

The court went on to determine that this infliction of pain was unnecessary and wanton.[126] It was unnecessary because the security of the institution was not dependent upon the cross-gender search.[127] Further, the cross-gender searches did not affect the male guards' equal-employment opportunities. The prison's own witnesses testified that "not a single bid had been refused, promotion denied, nor guard replaced as a result of the ban" on cross-gender searches.[128] The court then found the inmates had met their burden of establishing deliberate indifference on the part of the superintendent in implementing the cross-gender search policy. The prison official's action was not required for security concerns,[129] but it was nonetheless adopted despite the concerns of prison staff of possible psychological trauma to the inmates.[130] These factors led the majority to conclude that prison officials had acted with deliberate indifference as to the harmful effects the cross-gender, clothed-body search would have on the inmates.

In reaching this conclusion, the Ninth Circuit had to distinguish its prior case law that had permitted similar cross-gender searches of male inmates by female guards.[131] The court found the prior cases not controlling because the searches at issue in those cases were less invasive. However, it seemed more important to the court that the male inmates' claims had rested upon invasions of privacy and not the unnecessary and wanton infliction of pain forbidden by the Eighth Amendment.[132] Moreover, the Ninth Circuit went on to note that the male inmates

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125. *See id.* "We do not chart new territory in . . . finding that men and women may experience unwanted intimate touching by members of the opposite gender differently." *Id.* at 1526 n.5. Although men and women may experience "different" feelings from unwanted sexual situations, courts should not be so quick to conclude that male inmates feel nothing, or just "discomfort," from such experiences. *See infra* notes 167-69 and accompanying text.

126. *See Jordan*, 986 F.2d at 1527-28. The court employed the deliberate-indifference standard in analyzing whether the infliction of pain was wanton. *See id.*; *supra* notes 36-38 and accompanying text.

127. *See Jordan*, 986 F.2d at 1527. The court noted that the superintendent even confirmed that the security of the institution had not been impaired during the three years that the injunction prohibiting the cross-gender searches had been in place. *See id.* at 1526-27.

128. *Id.* at 1527.

129. The court also rejected the theory that the desire to avoid a lawsuit by the employees' union justified violating the commands of the Eighth Amendment. *See id.* at 1529. Further, any attempt to conduct the searches in a professional manner did not invalidate the result that the prison official was deliberately indifferent to the pain of the inmates. *See id. But see* Grummett v. Rushen, 779 F.2d 491, 495-96 (9th Cir. 1985) (implying that the professionalism of female guards limited the invasiveness of pat-down searches on male inmates).

130. *See Jordan*, 986 F.2d at 1528. The court also noted that the prison official was still intent upon re-instituting the cross-gender search despite the testimony revealing its harmful effects. *See id.* at 1529.

131. *See, e.g.*, Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988) (holding that occasional visual strip searches, including visual body-cavity searches, of male inmates by female guards did not violate the Fourth Amendment); *Grummett*, 779 F.2d at 496 (holding that pat-down searches of male inmates, including the groin area, by female guards and the viewing of unclothed male inmates by female guards, did not violate the Fourth Amendment).

132. *See Jordan*, 986 F.2d at 1524.

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."[133] The court felt these differences in the male inmates' claims justified a result different from the one reached in the *Jordan* case.

IV. REFORMING THE CURRENT APPROACH

The above cases demonstrate that circuit and district courts are having difficulty uniformly treating inmates' privacy claims. First, those decisions recognizing inmates' privacy rights have rested on differing sources of constitutional protection. Second, courts that have recognized a constitutional right to privacy or assumed the existence of such a right for purposes of analysis have applied the *Turner* test, if at all, with haphazard results. In order to provide consistent treatment of inmates complaining of cross-gender searches or monitoring, courts must first recognize that inmates do possess a limited right to privacy while incarcerated and then conscientiously apply the *Turner* test.

In *Turner v. Safley*,[134] the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[135] For inmates to satisfy the *Turner* test, courts must first recognize that inmates possess the asserted constitutional right. As a preliminary matter, courts addressing the issue of cross-gender searches and surveillance in prison must first identify the precise right implicated by the challenged regulation. Therefore, courts must determine whether inmates even possess a constitutional right to privacy that would protect them from unwanted cross-gender searches and surveillance. Put more simply, the threshold question is whether inmates possess a constitutional right to privacy in their own person while incarcerated.[136]

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133. *Id.* at 1526; *see id.* ("[N]othing in *Grummett* indicates that the male prisoners had experienced or would be likely to experience any psychological trauma as a result of the searches.").

134. 482 U.S. 78 (1987).

135. *Id.* at 89.

136. Some courts have assumed the existence of such a right to privacy in order to proceed with the constitutional analysis. *See, e.g.*, Timm v. Gunter, 917 F.2d 1093, 1100 (8th Cir. 1990) ("[a]lthough an inmate may very well retain some privacy rights when entering a prison"); Kent v. Johnson, 821 F.2d 1220, 1227 (6th Cir. 1987) ("assuming that there is some vestige of the right to privacy retained by state prisoners and that this right protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex"); *Grummett*, 779 F.2d at 494 ("[a]ssuming that, in this circuit, the interest in not being viewed naked by members of the opposite sex is protected by the right of privacy"). Some courts, although recognizing a constitutional right to privacy, have found that right embodied in the Fourth Amendment, *see, e.g.*, Somers v. Thurman, 109 F.3d 614, 618-19 (9th Cir.) (listing those cases that have recognized inmates' privacy rights under the Fourth Amendment), *cert. denied*, 118 S. Ct. 143 (1997); Johnson v. Pennsylvania Bureau of Corrections, 661 F. Supp. 425, 430 (W.D. Pa. 1987) ("We recognize that the plaintiffs . . . do retain certain rights of privacy under the Fourth Amendment . . . ."), or in the general constitutional right to privacy, *see, e.g.*, Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982) (recognizing that inmates retain a constitutional right to privacy while incarcerated); Miles v. Bell, 621 F. Supp. 51, 67 (D. Conn. 1985) (same); Coble v. Texas Dep't of Corrections, No. H-77-707, 1982 WL 1578, at *10 (S.D. Tex. Dec.

Although the Supreme Court has not directly decided this issue, it has dealt with inmates' right to privacy in other contexts. For example, under the Fourth Amendment, inmates do not have a legitimate expectation of privacy in their prison cells so as to prevent searches.[137] The Court has also held that body-cavity searches of inmates are constitutional in order to ensure institutional security.[138] However, the Court has not addressed whether inmates have a right to privacy that would prevent their unclothed bodies from being viewed by opposite-sex officers or from being pat-down searched by opposite-sex officers. The inquiry into whether inmates possess such a constitutional right to privacy must begin with the recognition that prisoners do not forfeit their constitutional privileges when they are confined in prison.[139] However, the Court has also recognized that inmates' constitutional rights can be restricted due to "the legitimate goals and policies of the penal institution."[140] The question then becomes whether inmates' right to privacy in their own person should be limited due to a legitimate penological goal.[141] Clearly, searches and observations of inmates are necessary for the serious security concerns that arise in penal institutions. In this aspect, a prisoner's right to privacy is certainly eroded by imprisonment. However, the distinction is whether the cross-gender aspect of these searches is warranted by the needs of the prison environment.

20, 1982) (same); Bowling v. Enomoto, 514 F. Supp. 201, 203 (N.D. Cal. 1981) (same), while other courts have failed to make clear the source of constitutional protection, *see, e.g., Michenfelder*, 860 F.2d at 333; *Kent*, 821 F.2d at 1226 (citing cases that have recognized or considered prisoners' right to privacy, without "detailing its constitutional origins"); Rodriguez v. Pearce, No. 91-306-FR, 1992 WL 189524, at *3 (D. Or. July 27, 1992). *See also* Csizmadia v. Fauver, 746 F. Supp. 483, 491 n.11 (D.N.J. 1990) (listing conflicting cases regarding whether prisoners' privacy rights derive from the Fourth Amendment or from a penumbral right under the Fourteenth Amendment). The Seventh Circuit alone has held that inmates possess no constitutional right to privacy in their own person. *See* Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995).

137. *See* Hudson v. Palmer, 468 U.S. 517 (1984).

138. *See* Bell v. Wolfish, 441 U.S. 520 (1979).

139. *See id.* at 545; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987); *Palmer*, 468 U.S. at 523 ("We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other.").

140. *Wolfish*, 441 U.S. at 546; *see also Palmer*, 468 U.S. at 523 ("[W]e have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.").

141. Here, courts must decide whether the constitutional right asserted by an inmate survives incarceration.

A. The Right to Be Free from Cross-Gender Searches and Surveillance in Prisons: The Fourth Amendment, the General Right to Privacy, and the Eighth Amendment[142]

1. The Fourth Amendment

The right to freedom from cross-gender searches can be derived from at least two constitutional sources protecting the right to privacy. First, implicit in the Fourth Amendment is a guarantee that people have a right to be secure in their persons from unreasonable searches.[143] The Supreme Court has never held that a prisoner retains no Fourth Amendment rights upon incarceration.[144] In fact, a prisoner can invoke the Fourth Amendment's protection if he or she has a "legitimate expectation of privacy" in his or her own body that "society is prepared to recognize as 'reasonable.'"[145] A Nebraska magistrate 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 body and its personal functions protected by the recognized privacy rights of unincarcerated citizens.[146]

Forced observations and inspections of an inmate's body by members of the opposite sex should be viewed as impinging on the inmate's constitutional rights protected by the Fourth Amendment.[147] Although extensive diminution of privacy is to be expected in prison, the Supreme Court has not indicated that this loss of privacy is absolute.[148] The right to shield one's body from the eyes of the opposite sex and to shield one's genitals from the hands of the opposite sex is a

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142. This Part will not consider First Amendment or Equal Protection arguments advanced by prisoners. This is not to suggest that such claims are not viable methods of establishing the right to be free from cross-gender searches and surveillance.

143. "The right of the people to be secure in their persons, . . . against unreasonable searches . . . shall not be violated . . . ." U.S. CONST. amend. IV.

144. In fact, Justice Stevens has concluded that the Court "believes that at least a prisoner's 'person' is secure from unreasonable search and seizure." *Palmer*, 468 U.S. at 555 n.31 (Stevens, J., concurring in part and dissenting in part).

145. *Id.* at 525 (citing Katz v. United States, 389 U.S. 347, 360 (1967)).

146. 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).

147. Clearly, pat-down searches are encompassed within the Fourth Amendment's proscription against "unreasonable searches." However, observation is also a form of a search and as such is also encompassed by the Fourth Amendment.

148. Although the Supreme Court has held that body-cavity searches of inmates are reasonable under the Fourth Amendment, it has not indicated that the gender of the guards conducting such searches is irrelevant. *See* Bell v. Wolfish, 441 U.S. 520, 560 (1979).

legitimate expectation, even for those incarcerated.[149] "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."[150] Further, the Supreme Court has held that the principal object of the Fourth Amendment is the protection of individual privacy rather than the protection of property.[151]

The Fourth Amendment, a protection of individual privacy, protects the right to shield one's naked body and genitals from strangers of the opposite sex—an aspect fundamentally encompassed in the right to privacy. However, is this right inconsistent with the objectives of incarceration? Incarceration necessarily restricts inmates' privacy. It is true that the needs of the prison environment require inmates to be searched and monitored in a way that would be unreasonable outside of the prison gates. However, inmates do not waive all their constitutional rights once the prison gates slam behind them.[152] Constitutional rights are fundamental and vital to our society. They are an integral part of every facet of life in which our society operates, including prisons. The restriction of such important and fundamental rights must be done for specific and clearly articulated reasons.

To hold that citizens of the United States, once incarcerated, give up the right to keep their naked bodies and genitals from strangers of the opposite sex is to say that prisoners have no legitimate expectation of privacy whatsoever. Such a holding would allow for male guards under the Fourth Amendment to conduct visual, as well as digital, body-cavity searches on female inmates. The needs of the prison environment do not require that inmates sacrifice every facet of their personal privacy. Characterizing the issue as whether "society" is prepared to recognize this as reasonable allows the Court to impose its own beliefs about the treatment of citizens convicted, justly or unjustly, of criminal activity. The Fourth Amendment's protection against unreasonable searches of a person's body does not evaporate in the confines of a prison. Therefore, the Fourth Amendment should protect inmates' privacy rights including the right to be free from cross-gender searches and surveillance.

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149. The Supreme Court of Oregon recognized this expectation when it referred to the examination of these intimate, private areas as the "final bastion of privacy" on the human body. Sterling v. Cupp, 625 P.2d 123, 132 (Or. 1981). The court further concluded that "'[if] a person is entitled to any shred of privacy, then it is to privacy as to these matters.'" *Id.* (alteration in original) (quoting Sterling v. Cupp, 607 P.2d 206, 208 (Or. Ct. App. 1980), *aff'd as modified*, 625 P.2d 123).

150. York v. Story, 324 F.2d 450, 455 (9th Cir. 1963).

151. *See* Soldal v. Cook County, 506 U.S. 56, 64 (1992).

152. *See* Hudson v. Palmer, 468 U.S. 517, 523 (1984). Prisoners still retain constitutional rights protecting religious free-exercise, freedom of speech, the right to petition the government, the right of due process, and the right to be free from racial discrimination. *See id.*

2. The General Right to Privacy

Second, the right to privacy is also firmly rooted in the fundamental liberties protected by the Constitution. The Supreme Court has declared that the Constitution places a limit on the states' right to interfere with a person's bodily integrity.[153] Further, the Court has recognized that a right to personal privacy exists under the Constitution with the source of this right emanating from the "penumbras of the Bill of Rights."[154] Those privacy rights protected by the penumbras are limited to those which are "fundamental" or "implicit in the concept of ordered liberty."[155] Although many rights protected by this constitutional zone of privacy have dealt with the right to make private and personal decisions,[156] the Court has noted that the outer limits of this zone of privacy have not yet been defined.[157] If the right to privacy secured by the penumbras of the Bill of Rights is to mean anything, it surely must protect the naked body. There is nothing more fundamentally private than the naked body and genitalia.[158]

This general right to privacy also survives incarceration for reasons similar to those expressed above in the Fourth Amendment context.[159] However, the penumbral right to privacy extends beyond just limits on unreasonable searches. If this type of general right to privacy were held to be extinguished upon incarceration, then inmates would have no recourse in protecting their bodies or intimate functions from any type of intrusion. For example, it would be reasonable for anyone, not just guards, to view inmates while naked. Further, such a holding would allow for the prison to house male and female inmates in the same cell, require them to shower in the same area, and use the same toilet facilities. Surely these types of practices would not be condoned. The general right to privacy protects the naked body and its physical functions, and is a right which should extend to prisoners. The prisoner should not be expected to "abandon his 'outside' sense of personal dignity in matters of bodily privacy."[160]

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153. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

154. Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965)).

155. *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

156. *See supra* note 58 and accompanying text.

157. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).

158. *See* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body.").

159. *See supra* Part IV.A.1.

160. Sterling v. Cupp, 625 P.2d 123, 132 (Or. 1981).

3. The Eighth Amendment

The protection the Eighth Amendment provides clearly survives incarceration since the Amendment expressly protects persons convicted of criminal activity.[161] The Eighth Amendment protects prisoners from cruel and unusual punishment, which has been defined as the "unnecessary and wanton infliction of pain."[162] For prisoners to establish an Eighth Amendment violation based on cross-gender monitoring and search policies, they must prove: (1) that "pain" was inflicted and (2) that the infliction was "unnecessary and wanton."[163] However, it is difficult for male inmates to make the requisite evidentiary showing of pain resulting from cross-gender search and observation policies.[164]

Courts have observed that males and females experience unwanted touching and observation by the opposite sex differently.[165] Therefore, it has been easier for female inmates to establish "infliction of pain" based on expert testimony concerning the debilitating and dehumanizing effect that cross-gender search policies have on female inmates,[166] an advantage that male inmates do not possess. However, the central issue is whether male inmates can indeed make the evidentiary showing that pain has been inflicted or at least establish that the cross-gender search and observation policies are equally disabling for both sexes.

Admittedly, male inmates using the Eighth Amendment have not been able to establish a constitutional finding of pain. Although this is not to imply that such

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161. Prisoners' Eighth Amendment claims are not governed by the *Turner* standard. *See* Turner v. Safley, 482 U.S. 78 (1987); *supra* note 22. The *Turner* test has been developed to analyze inmates' claims that an asserted constitutional right is impinged by a prison regulation. If the regulation is reasonably related to a valid penological interest, the regulation will be upheld regardless of its infringement on an inmate's constitutional right. Since prison regulations cannot infringe on Eighth Amendment rights, they are not subject to the *Turner* standard. This subpart will focus on the appropriate Eighth Amendment analysis and various problems encountered by inmates who invoke its protection. An analysis of the *Turner* test as it relates to inmates' constitutional rights to privacy under the Fourth Amendment and the penumbral privacy rights will be discussed *infra* Part IV.B.

162. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

163. The first prong is an objective inquiry into whether the "injury" was sufficiently serious, *see* Farmer v. Brennan, 511 U.S. 825, 834 (1994), while the second prong of the Eighth Amendment is a subjective inquiry into whether the prison official's state of mind was sufficiently culpable, *see id.* Depending on the specific context of the claim, the eulpable state of mind may be "deliberate indifference," *id.* at 836, or "maliciously and sadistically for the very purpose of causing harm," Whitley v. Albers, 475 U.S. 312, 320-21 (1986). *See supra* notes 35-38 and accompanying text.

164. The Ninth Circuit in discussing the *Grummett* case, *see* Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985), stated that the male inmates had not shown sufficient evidence of pain in order to sustain an Eighth Amendment violation. *See* Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993) ("[N]othing in *Grummett* indicates that the male prisoners had experienced or would be likely to experience any psychological trauma as a result of the searches.").

165. *See Jordan*, 986 F.2d at 1526 n.5.

166. In *Jordan*, a psyehologist testified that "unwilling submission to bodily contact with the breasts and genitals by men would likely leave the inmate 'revietimiz[ed].'" *Id.* at 1526 (alteration in original).

a finding is impossible to make, it cannot be discounted that female inmates, in general, can provide more reliable evidence and expert testimony concerning the psychologically debilitating effects of such cross-gender searches. A possible avenue for male inmates is to focus more closely on evidencing "pain" to the court. In order for male prisoners to make out a cognizable Eighth Amendment claim, they cannot ignore the necessary evidence required by the law. Male prisoners must be able to present expert testimony and research that evidences a psychologically debilitating effect due to the cross-gender searches and/or observations. Although male prisoners' reaction to such searches may be different from female prisoners' reaction, if the reaction is still psychologically debilitating, then courts should be more likely to recognize a "finding of pain."[167] A second possible avenue is for male prisoners to draw analogies to the Title VII context and the proliferation of sexual-harassment claims brought by male employees against female supervisors.[168] Such analogies may aid male prisoners in establishing that males do experience degrading and debilitating emotions when faced with unwanted touching and observation by the opposite sex. For example, in the sexual-harassment context, one commentator has suggested:

> Courts send a powerful message about gender roles: . . . perhaps the message is that men do not suffer, or that 'real men' do not suffer. Courts reveal a general unwillingness to believe that men could be offended by instances of sexual harassment. . . . This approach reinforces social stereotypes of men as tough, sexually aggressive, and impervious to pain. Furthermore, it

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167. Although females may feel "revictimized" by cross-gender searches, if males can show that such searches produced antisocial feelings, actions of violence aimed at themselves or others, or any other type of psychological trauma, the final effect in either case is still the same—psychological debilitation. It is beyond the scope of this Note to examine the psychological effects of unwanted sexual situations on males. However, see generally Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996), for an extensive discussion regarding the various harms of perpetuating male-gender stereotypes.

168. *See id.* at 1064 n.123 (citing authorities which note that sexual harassment of men accounts for at least 9% of the total harassment cases occurring and that "'[a]lthough less common, the instances of female supervisors harassing male employees seems [sic] to increase with the number of female supervisors'") (alterations added) (quoting Bradley Golden, Note, Harris v. Forklift: *The Supreme Court Takes One Step Forward and Two Steps Back on the Issue of Hostile Work Environment Sexual Harassment*, 1994 DET. C.L. REV. 1151, 1173); *see also* Aimee L. Widor, Comment, *Fact or Fiction?: Role-Reversal Sexual Harassment in the Modern Workplace*, 58 U. PITT. L. REV. 225, 226 (1996) ("Role-reversal harassment is one of the fastest-growing areas of litigation.").

> contributes to a cultural climate in which men cannot express their humiliation, their sense of invasion, or their emotional suffering.[169]

The second prong of the Eighth Amendment inquiry requires prisoners to establish that the infliction of pain is "unnecessary and wanton." Judges are in disagreement regarding the appropriate standard of "unnecessar[iness] and wanton[ness]" for cross-gender search and observation policies.[170] If the prisoner is claiming the infliction of pain in a condition-of-confinement case, the inmate must show that the prison officials were "deliberately indifferent" to the inmate's suffering.[171] If, however, the prisoner is claiming the infliction of pain in an excessive-use-of-force case, the inmate must show that the pain was inflicted "maliciously and sadistically for the very purpose of causing harm."[172]

Cross-gender search and observation policies are more correctly viewed in a condition-of-confinement context. Searches and observations are a necessary and continuing condition of incarceration. Searches happen countless times during the course of one day in prison. This is completely unlike the excessive-use-of-force cases where prison officials face a specific situation that requires an immediate and decisive judgment. In those contexts, more protection is given to the judgments of prison officials so as not to chill effective prison action.[173] Examining cross-gender search and observation policies as a condition-of-confinement case will not chill effective prison action. These policies are adopted by prison officials who have an adequate amount of time to consider the effect and consequences of routine, everyday, cross-gender searches on prison inmates.

The deliberate-indifference standard requires inmates to prove that prison officials knew of the risk of harm to the inmates and yet failed to prevent such harm.[174] Again, this type of showing will be more difficult for male inmates. Since it is difficult for male inmates to evidence "pain," it will be even more difficult for male inmates to show that prison officials were aware of the likelihood for "pain." Given these serious hurdles, male inmates are currently better served by pursuing their objection to cross-gender searches and

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169. Levit, *supra* note 167, at 1072. Levit also states that "courts accept pervasive social stereotypes either explicitly or implicitly in ways that diminish the harms suffered by males." *Id.* at 1063. "Laws and legal doctrines contain ideological messages. What courts say and do matters, since legal language shapes and reinforces social meanings. Courts and commentators must critically examine the social and legal constructs that keep both genders in their prescribed roles." *Id.* at 1115. See Widor, *supra* note 168, at 244-47, who argues that male victims of sexual harassment must "overcome an additional barrier of stigma and bias due to their gender." These types of arguments would apply directly to male inmates attempting to evidence harm suffered due to cross-gender search and surveillance policies.

170. *See supra* notes 35-40 and accompanying text.

171. Farmer v. Brennan, 511 U.S. 825, 836 (1994).

172. Whitley v. Albers, 475 U.S. 312, 320-21 (1986); *see supra* notes 36-40 and accompanying text.

173. The standard of "maliciously and sadistically" is used in those situations where corrections officials make decisions "'in haste, under pressure, and frequently without the luxury of a second chance.'" Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting *Whitley*, 475 U.S. at 320).

174. *See Farmer*, 511 U.S. 825; Wilson v. Seiter, 501 U.S. 294 (1991).

surveillance through other constitutional protections, such as the Fourth Amendment or the general constitutional right to privacy.

B. The Turner *Analysis*

Having established that prisoners retain the limited constitutional right[175] to shield their genitals and unclothed bodies from the opposite sex, it is clear that prison regulations that require officers to perform pat-down searches on opposite-sex inmates and to observe opposite-sex inmates perform bodily functions impinge this constitutional right of inmates. At this point, the inquiry shifts to the test set forth in *Turner* where the Supreme Court delineated the four factors used to determine whether a prison regulation is reasonably related to legitimate penological goals.[176]

1. The First Prong of *Turner*

The first factor requires a "valid rational connection" between the prison regulation and the asserted governmental interest.[177] Generally, prisons have asserted two main interests as legitimate penological goals in support of cross-gender search and surveillance regulations: (1) the maintenance of institutional security and order, and (2) the promotion of equal employment opportunities.[178] In assessing *Turner*'s first factor, it must be determined whether these justifications are legitimate penological objectives. The Supreme Court has repeatedly enumerated what it perceives are the "paramount" objectives of the penal institution. These legitimate penological goals include: the deterrence of crime, the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of prisoners.[179]

a. Institutional Security and Order

In evaluating the prisons' asserted interests in cross-gender search and surveillance regulations, it is self-evident that the maintenance of security and internal order is a legitimate penological objective. The Court has stated that "central to all other corrections goals is the institutional consideration of internal

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175. The source of this constitutional right is found in the Fourth Amendment or in the penumbras of the Bill of Rights. *See supra* Part IV.A.1-2.

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

177. *Id.* at 89-90; *see supra* note 17 and accompanying text.

178. *See, e.g.*, Johnson v. Phelan, 69 F.3d 144, 147-48 (7th Cir. 1995); Cancdy v. Boardman, 16 F.3d 183, 186 (7th Cir. 1994); Jordan v. Gardner, 986 F.2d 1521, 1537-38 (9th Cir. 1993); Timm v. Gunter, 917 F.2d 1093, 1100 n.10 (8th Cir. 1990); Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988); Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985); Miller v. Boyd, No. 93 C 4201, 1994 WL 529385, at *2 (N.D. Ill. Sept. 27, 1994).

179. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977); Pell v. Procunier, 417 U.S. 817, 822-23 (1974); Procunier v. Martinez, 416 U.S. 396, 412 (1974).

security within the corrections facilities themselves."[180] Obviously, prisons present serious and substantial security concerns. The prison environment is at times volatile and dangerous and the Court has admonished that prison administrators "are under an obligation" to ensure the safety of inmates, visitors, and prison staff and personnel.[181] The maintenance of order and discipline inside a penal institution is provided by the constant monitoring and surveillance of inmates and those who enter and exit the institution. Prison regulations that provide for these types of security measures are certainly valid.

However, the second step of *Turner*'s first prong requires that prison regulations have a valid rational connection to the preservation of security.[182] Do the cross-gender aspects of prison search regulations have a valid connection to internal security? The answer to this question, in most instances, is "no." Although monumentally important, prison security concerns do not usually justify the cross-gender aspect of security regulations. Security is not compromised when female guards search only female inmates or when male guards search only male inmates.[183] Cross-gender aspects should only be introduced in prison regulations when the security of the institution is dependent on them. Not only do prison officials have to put forth a legitimate penological interest, but they must also provide evidence that the "interest proffered is the

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180. *Pell*, 417 U.S. at 823.

181. Hudson v. Palmer, 468 U.S. 517, 526-27 (1984).

182. *Turner*, 482 U.S. at 89-90.

183. The security of penal institutions is dependent on searches and surveillance of inmates and visitors alike. However, this security does not depend on having female guards search male inmates or having male guards search female inmates. As argued in *Jordan*, the prison administrator cited the need for "unpredictability" to ensure institutional security when instituting a cross-gender search policy. *Jordan*, 986 F.2d at 1537. The Ninth Circuit correctly held that the security needs of the Washington facility were not dependent on the cross-gender searches, and that any security concerns were already adequately met by the established searches conducted by female guards. *See id.* at 1526-27. This is not to imply that male guards are not capable of adequately searching female inmates or that female guards are not capable of adequately searching male inmates. But, when examined solely in light of a prison's security concerns, cross-gender searches are not usually needed to protect the security and internal order of penal institutions.

Further, courts should not blindly accept the proposition that the preservation of institutional security is reasonably related to cross-gender search regulations absent substantive evidence that the security of the prison institution is, in fact, in jeopardy without the cross-gender regulation in place. *See id.* at 1538 ("Superintendent Vail's speculation is similar to the type of general assertion regarding security concerns advanced by prison officials in *Turner* and rejected by the Court."); Bowling v. Enomoto, 514 F. Supp. 201, 204 (N.D. Cal. 1981) ("They have made no showing whatsoever that prison security specifically requires unrestricted opportunities for female officers to inspect male inmates at any and all times."); *cf.* O'Lone v. Estate of Shabazz, 482 U.S. 342, 367-68 (1987) (Brennan, J., dissenting) ("If the Court's standard of review is to represent anything more than reflexive deference to prison officials, any finding of reasonableness must rest on firmer ground than the record now presents."); *Johnson*, 69 F.3d at 156 (Posner, C.J., concurring and dissenting) ("There is no basis in the record . . . for believing that an effort to limit cross-sex surveillance would involve an inefficient use of staff. . . .").

reason why the regulation was adopted or enforced."[184] For instance, when emergency situations arise and the security of the prison institution is breached, any prison guard, regardless of gender, should take appropriate measures to ensure the safety of the inmates and other prison personnel. It has also been suggested that in highly "dangerous" all-male prisons, the use of female guards poses substantial security risks to the prison. In those types of prison environments, a gender-specific prison measure is valid in order to protect institutional security.[185] However, in a normal prison environment, the imposition of cross-gender searching and monitoring is not relevant to the preservation of internal security.[186] As such, the cross-gender aspect of search and surveillance regulations must exist for a reason other than the preservation of internal security.

b. Equal Employment Opportunities

A second justification advanced by prisons is the promotion of equal-employment opportunities. Based on the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex.[187] There is no question that this is an important state interest and a legitimate objective of every employer. However, the *Turner* test requires that the prison regulation be reasonably related to legitimate *penological* goals.[188] The Supreme Court did not require the prison regulation to be reasonably related to employer goals or other types of important state interests. If the Court had wanted prison regulations to conform with other types of state interests, it knew how to accomplish this. Instead, the Court specifically inserted the word "penological" when it very well could have used a different word to obtain a different standard.[189] The promotion of equal employment opportunities is simply not a

184. Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990).

185. *See* Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) ("[T]he use of women as guards in 'contact' positions under the existing conditions . . . would pose a substantial security problem, directly linked to the sex of the prison guard.").

186. *See Jordan*, 986 F.2d at 1526-27 ("WCCW's [Washington Corrections Center for Women] security is not dependent upon cross-gender clothed body searches. The prison officials do not argue that WCCW's security has been impaired in the slightest during the pendency of the district court's injunctions, preliminary and permanent, which have been in effect for three years.").

187. *See generally* 42 U.S.C. §§ 2000e to 2000e-17 (1994).

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

189. "Penological" is defined by *Webster Dictionary* as "of or pertaining to penology." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1671 (unabr. ed. 1993). "Penology" is further defined by *Webster Dictionary* as "the science or art of punishment." *Id. Black's Law Dictionary* defines "penology" as "the science of prison management and rehabilitation of criminals." BLACK'S LAW DICTIONARY 785 (6th ed. 1991). The administration of a prison, whose primary goals are security of the institution and rehabilitation of the inmates, does not depend on promoting equal employment opportunities.

penological objective.[190] A prison does not exist "to encourage laudable societal movement toward equality of sex roles."[191] Although competing constitutional values are at stake here, when viewed in terms of the Supreme Court's mandate in *Turner* it becomes clear that the interest in equal employment rights of guards is not sufficient to pass muster under the first prong of *Turner*.[192] The prison regulation must be reasonably related to penological objectives; but the civil-rights claims of prison guards are wholly unrelated to the *penological* needs of a prison.[193] Although the goal of equal employment opportunity is legitimate and socially important, it is just not consistent with penological objectives. Therefore, the use of equal employment as a justification to impose cross-gender

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190. As indicated earlier, the Supreme Court has identified the important and paramount goals of the corrections system. Nowhere has the Court indicated that the provision of equal employment opportunities is an important goal of penology. *See supra* text accompanying note 179.

191. Braasch v. Gunter, Nos. CV83-L-459, CV83-L-682, 1985 WL 3530, at *12 (D. Neb. July 15, 1985), *overruled by* Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990).

192. An analogy has been made to the situation where the media's access to prisons has been restricted. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978). Although competing constitutional values were at stake in that case as well, the Court held that the First Amendment did not mandate the media's right of access to prisons. *See id.* at 15. "Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the media or by media reporters, however 'educational' the process may be for others." *Id.* at 5 n.2. The magistrate in *Braasch* analogized: "Just as inmates are not animals in the zoo for the public's indiscriminate gaze, neither are they a population whose standards of modesty may be forcibly lowered in order to achieve inroads on public attitudes toward women in sexually sensitive areas of employment." *Braasch*, 1985 WL 3530, at *12.

193. Certainly, accommodation of male inmates' privacy rights will have some impact on the equal-employment opportunities of female guards, and vice versa. However, such accommodation does not necessarily mean that the prison is in violation of Title VII. An extensive analysis of Title VII implications is beyond the scope of this Note. However, it must be questioned why, if at all, guards' equal-employment rights should take precedence over inmates' privacy rights. Both rights involve important and fundamental constitutional principles. Courts cannot justifiably run roughshod over inmates' privacy rights, thereby giving more validity to guards' equal-employment claims. One constitutional provision does not have greater weight than any other constitutional provision. The only way which such an approach can be explained is that courts do not care about the rights of inmates, especially when those rights are in conflict with the rights of free citizens.

It should also be recognized that our society supports accommodation between privacy rights and equal-employment opportunities in other contexts. How often are male janitors seen in women's restrooms? How often are female janitors seen in male restrooms? *See* Norwood v. Dale Maintenance Sys., Inc., 590 F. Supp. 1410 (N.D. Ill. 1984) (upholding male-gender qualification for janitorial positions in male restrooms in order to protect the privacy rights of clients, guests, and employees); Brooks v. ACF Indus., Inc., 537 F. Supp. 1122 (S.D. W. Va. 1982) (recognizing that privacy rights of male employees are violated by female janitors' presence in male restrooms). Equal-employment rights are implicated in these situations as well. Why then, in the context of prisons, do these conflicting constitutional principles evoke such debate? Again, perhaps courts simply do not care about the rights of inmates and thus see no problem in recognizing guards' equal-employment rights as a legitimate justification for imposing on inmates' privacy rights. If this is the case, courts should be frank and forthright about their approach, rather than hiding behind Title VII.

searches and surveillance should fail. As a result, those courts that have accepted the foregoing justifications for cross-gender search regulations are in error. These justifications are either not a legitimate penological objective or they are not reasonably related to the penological needs of the prison.

c. Rehabilitation

In further support of the argument that most cross-gender search regulations should fail the first prong of the *Turner* test is the recognition that rehabilitation of prisoners is a paramount penological goal.[194] "Sociologists have recognized that prisoners deprived of any residuum of privacy devalue themselves and others."[195] As Justice Stevens has recognized:

> "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."[196]

Cross-gender search regulations that require inmates to expose their naked bodies to opposite-sex officers or that allow opposite-sex officers to touch their genital area is degrading and causes humiliation and embarrassment for many inmates.[197] As the Fourth Circuit recognized:

> Most people . . . have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be espccially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.[198]

Demeaning and humiliating experiences caused by cross-gender searches and surveillance severely impede the overall success of rehabilitation: "'Treatment that degrades the inmate, invades his privacy, and frustrates the ability to . . .

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194. *See supra* note 179 and accompanying text.

195. Hudson v. Palmer, 468 U.S. 517, 552 (1984) (Stevens, J., dissenting in part and concurring in part) (citing Barry Schwartz, *Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 229 (1972)).

196. *Id.* (Stevens, J., dissenting in part and concurring in part) (quoting Paul C. Giannelli & Francis A. Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1069 (1976)).

197. Some courts and commentators question whether male inmates really cxperience "pain" as a result of cross-gender search policies. As can be seen from the number of male inmates across the U.S. that have brought suit complaining of cross-gender search policies, it is clear that many male inmates find these experiences degrading and humiliating. It is not relevant, in this context, whethcr in a court of law the male inmates can make the requisite evidentiary showing of "pain" necessary for an Eighth Amendment violation. Here, the concern is only that the implementation of cross-gender search policies has a devastating effect on the rehabilitative function of prisons.

198. Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981).

gain self-respect erodes the very foundations upon which he can prepare for a socially useful life.'"[199]

Some courts and commentators have suggested that the presence of female guards in a male prison has a "normalizing" effect on male inmates that furthers the penological goal of rehabilitation.[200] However, such a suggestion is hardly convincing in the context of cross-gender search and monitoring regulations. In society at large, people do not undress, shower, or use the restroom in the presence of strangers of the opposite sex. This type of policy "aggravates, rather than mitigates, the disparity between the prison environment and society at large."[201] Therefore, such policies are wholly inapposite to the rehabilitative goals of the penal institution.

2. The Second Prong of *Turner*

The second prong of *Turner* requires courts to examine whether "alternative means of exercising the right . . . remain open to prison inmates."[202] There are no alternatives for inmates to protect their privacy when prison policies require inmates to submit to searches of the genital area by opposite-sex officers. As such, those prison policies fail the second prong of *Turner* and are unreasonable. However, inmates faced with cross-gender monitoring policies may have alternative ways in which to protect their privacy. It has been suggested that inmates can protect their privacy by: (1) covering up with a towel, (2) facing the shower wall while showering, (3) showering in shorts or a swimsuit, (4) taking a newspaper or towel to the toilet facilities, or (5) sleeping in appropriate sleepwear.[203] However, privacy rights of inmates to defecate, urinate, or shower without the opposite sex being present is not protected just because the inmates turn the other way or cover themselves. The personal bodily functions of inmates are still being observed by members of the opposite sex. The resolution of this issue will depend on a fact-specific inquiry into the conditions of the prison environment. In some cases, inmates could conceivably protect their privacy rights by not walking to the shower in the nude or not sleeping in the nude. However, requiring inmates to shower in swimsuits or cover themselves while using the toilet facilities is not a reasonable alternative for inmates to exercise their already limited right to privacy.

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199. O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 n.8 (1987) (Brennan, J., dissenting) (omission added) (quoting Barnett v. Rogers, 410 F.2d 995, 1002 (D.C. Cir. 1969)).

200. *See* LYNN E. ZIMMER, WOMEN GUARDING MEN 151-54 (1986); Deborah M. Tharnish, Comment, *Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoners' Privacy Rights*, 65 IOWA L. REV. 428, 442 n.156 (1980).

201. Hudson v. Goodlander, 494 F. Supp. 890, 893 (D. Md. 1980); *see* Bowling v. Enomoto, 514 F. Supp. 201, 203-04 (N.D. Cal. 1981).

202. Turner v. Safley, 482 U.S. 78, 90 (1987); *see also* Goodwin v. Turner, 908 F.2d 1395, 1405 (8th Cir. 1990) ("This prong of the *Turner* test focuses on the extent the inmate has been deprived of the asserted right.").

203. *See* Timm v. Gunter, 917 F.2d 1093, 1102 (8th Cir. 1990); Forts v. Ward, 621 F.2d 1210, 1216 (2d Cir. 1980); Riddick v. Sutton, 794 F. Supp. 169, 172 (E.D.N.C. 1992); Csizmadia v. Fauver, 746 F. Supp. 483, 486 (D.N.J. 1990); Kent v. Johnson, No. 84-CV-71307-DT, 1990 WL 507413, at *4 (E.D. Mich. Aug. 3, 1990).

3. The Third Prong of *Turner*

The third prong of *Turner* requires courts to examine the impact that the accommodation of the inmate's right would have on "guards and other inmates, and on the allocation of prison resources generally."[204] Any number of nonpenological interests will fall into this category, such as rearranging work shifts, allocating prison resources to install modesty panels or hiring more guards, maintaining employee morale, or efficiently operating the prison institution.[205] Again, a fact-specific inquiry is required in order to ascertain the actual burden that accommodating inmates' privacy rights would have on the guards and the allocation of prison resources.

However, the burden of readjusting scheduling and job assignments to accommodate inmates' privacy rights is no greater than the burden of readjusting scheduling for a variety of other matters. The effect on employee morale of having a fair distribution of work posts is no different than when male guards have been prohibited from conducting visual body-cavity searches of female inmates.[206] Further, in light of the overall cost of operating a prison, the added costs associated with new personnel or the installation of modesty panels are a minor burden. Although implementing new changes into a prison is not easy for prison administrators, "the easiest course for jail officials is not always one that our Constitution allows them to take."[207] The general point is that any changes made in the closed environment of a prison "will have . . . ramifications on the liberty of others or on the use of the prison's limited resources."[208] It is only when the ramifications on others or on prison resources are significant that the courts should be "particularly deferential to the informed discretion of

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204. *Turner*, 482 U.S. at 90.

205. Although some prison superintendents proffer these concerns as legitimate penological interests, courts should recognize that these interests do not rise to the level of a penological goal. Only when the security of the institution is jeopardized by the lack of efficiency would these interests become a penological objective. The Supreme Court created the third *Turner* factor for the express purpose of analyzing whether accommodating inmates' rights would have a significant effect on the administration and allocation of prison resources. *See id.* Allowing prison superintendents to assert efficiency-of-the-institution as a legitimate penological interest would, in effect, count the same interest twice.

206. In *Jordan*, Judge Noonan observed:

> The prison warden has not ordered his male guards to conduct cavity searches of his women prisoners. Why? It is surely no less deprivation of an employment opportunity for the men. It is surely no less an extra duty for the female officers. It would surely improve security for such searches to be conducted by both sexes. . . . But common sense, or rather, common decency has told the warden that no one could stomach such gross sexual contact between male guards and women prisoners. Naked genitalia of one gender cannot be routinely inspected by guards of the other gender. Indecency of this kind is beyond our expectation as a society and beyond what the Constitution countenances.

Jordan v. Gardner, 986 F.2d 1521, 1543 (9th Cir. 1993) (Noonan, J., concurring).

207. Bell v. Wolfish, 441 U.S. 520, 595 (1979) (Stevens, J., dissenting).

208. *Turner*, 482 U.S. at 90.

corrections officials."[209] Accommodating the inmates' right to shield their genitals and unclothed bodies from opposite-sex officers will inevitably affect prison resources and guards. However, these effects are relatively minor in the overall context of operating a prison. The outcome may be different if, for example, female guards were completely prohibited in male prisons or assigned to only administrative tasks. However, female guards need not be excluded entirely from male prisoners in order to accommodate male inmates' privacy needs. One court has suggested that guards' work schedules could be rearranged so that for one full shift the shower facilities would be guarded by only male officers.[210] This would allow those inmates that desired privacy to shower during that shift. There are innovative and simple solutions that exist to protect inmates' privacy that do not also require a significant burden on guards or the administration of the prison.

4. The Fourth Prong of *Turner*

The fourth prong of *Turner* is closely related to the second prong. The fourth prong requires courts to recognize that the "absence of ready alternatives is evidence of the reasonableness of a prison regulation."[211] Institutions can take various measures to accommodate inmates' privacy rights. These measures include: (1) allowing inmates to cover the window in their rooms for designated periods, (2) removing opposite-sex officers from shower and toilet facilities, (3) requiring the announcement of opposite-sex officers, or (4) installing modesty panels in the shower and toilet facilities. Again, in resolving the fourth prong of *Turner*, a fact-specific inquiry into measures that the prison has already implemented to protect inmates' privacy rights must be conducted. However, generally speaking, the prison has ready alternatives to protect inmates' privacy rights.

Both the Fourth Amendment and the general constitutional right to privacy protect inmates' right to shield themselves from opposite-sex officers. This right is not circumscribed by any penological interest of the prison, although it does at times pose a de minimis burden on other prison interests. However, in following the mandate of *Turner*, most courts have failed to recognize that the civil-rights claims of guards are wholly unrelated to the penological objectives of penal institutions. Those decisions that have, in part, rested on this justification are in error and such reasoning should no longer continue. Further, courts should require prisons to present substantive evidence that institutional security would be breached without the use of cross-gender search and surveillance policies. As a final issue, courts should recognize that measures to accommodate inmates' privacy rights do not always pose a significant burden on prison resources and guards. The relative increased burden should be examined

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209. *Id.*

210. *See* Braasch v. Gunter, Nos. CV83-L-459, CV83-L-682, 1985 WL 3530, at *14 (D. Neb. July 15, 1985), *overruled by* Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990).

211. *Turner*, 482 U.S. at 90. The Court further elaborated that "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

in light of the total burdens that face prison administrators. When these burdens do rise to a significant level, courts again should require substantive evidence of such costs.[212]

C. Limiting the Deference Accorded to Prison Administrators

Although the Supreme Court set forth the factors which must be taken into consideration when determining whether a prison regulation is reasonable, many courts have failed to follow its mandate. For many courts, applying *Turner* is at best an exercise in formality, while other courts do not even bother paying lip service to the relevant considerations in the *Turner* rational-review standard.[213] This ambivalence is a result of the overriding deference accorded to the judgment of prison officials. Although the Supreme Court has instructed that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices,"[214] this does not mean the policies should be wholly beyond reproach. Yet, many courts readily succumb to the judgment of prison officials anytime institutional security is asserted.[215] This has resulted in a standard of review that is for all practical purposes nonexistent.[216]

For inmates challenging prison regulations requiring cross-gender searches and surveillance, this abandonment of a truly rational review has provided an obvious hurdle to inmates asserting their privacy interests. The solution is simple:

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212. The Supreme Court has not given guidance regarding how to resolve the *Turner* analysis if, for example, only three of the *Turner* factors favor upholding the prison regulation. It does not appear that the Supreme Court has authorized a balancing of these factors. However, if an inmate can establish that prison administrators have not advanced a legitimate penological interest for the prison regulation, the first *Turner* prong would appear to be determinative.

213. Although the Supreme Court had a recent opportunity to review a decision that completely failed to apply the *Turner* rational-review standard, it chose not to grant certiorari. *See* Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 506 (1996); *supra* notes 88-99 and accompanyiug text. Although the Supreme Court denies certiorari for a whole host of reasons, this particular denial of certiorari could indicate either the strength of the *Turner* precedent or the current stance of the Supreme Court towards prisoners' rights.

214. Bell v. Wolfish, 441 U.S. 520, 547 (1979).

215. Justice Brennan commented:

> Mere assertious of exigency have a way of providing a colorable defense for governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society. Prisons are too often shielded from public view; there is no need to make them virtually invisible.

O'Lone v. Estate of Shabazz, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting).

216. Justice Marshall has observed that "according virtually unlimited deference" to prisou officials dilutes the effectiveness of the standard of review set forth by the Court. *Wolfish*, 441 U.S. at 563 (Marshall, J., dissenting); *see* Thornburgh v. Abbott, 490 U.S. 401, 429 (1989) (Stevens, J., concurring in part and dissenting in part) ("I am concerned that the Court too readily 'substitute[s] the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting.'") (alteration in original) (quoting Block v. Rutherford, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring in judgment)). With the current approach of the courts, Justices Stevens's and Blackmun's concerns have materialized.

deference does not mean abdication. The consideration given to the judgments of prison officials should not carry the analysis.[217] Certainly everyone can share the courts' concern over the difficult judgments that prison officials make every day. Yet it would seem an odd statement that the protection afforded to inmates by the Constitution depends on what a prison administrator is willing to give them. This indeed would be a sad declaration, but it is a declaration that the courts are implicitly making in their reflexive deference to prison officials' decisions.

CONCLUSION

Courts should explicitly recognize inmates' constitutional right to be free from cross-gender searches and surveillance. Sources of this constitutional right are found both in the privacy rights of the Fourth Amendment and the penumbras of the Bill of Rights. Forced inspections and observations of inmates by opposite-sex officers are degrading, humiliating, and violate the basic tenets of human decency. In analyzing inmates' claims of constitutional deprivations, courts should be extremely faithful in applying the *Turner* standard of review. Courts must clearly and specifically analyze all prongs of the *Turner* test. No longer can courts infringe on inmates' privacy rights based on nonpenological objectives and the speculative concerns of prison superintendents. Otherwise, the problems that have plagued many courts' decisions will continue. Further, courts can no longer accord unlimited deference to the decisions of prison officials. Such unlimited deference renders the *Turner* test meaningless.

Alternatively, inmates can assert their right to be free from cross-gender searches and surveillance through the Eighth Amendment. However, in analyzing male inmates' Eighth Amendment claims, courts must avoid employing male-gender stereotypes. Perpetuating these stereotypes not only causes further harm to male inmates and society, but it also deprives male inmates of any opportunity to gain legal recognition of "harm."

It has been said that "the way a society treats those who have transgressed against it is evidence of the essential character of that society."[218] Refusing to protect inmates' bodily integrity from the probing eyes and hands of opposite-sex officers reveals indifference and disrespect. Should not our society reflect a character of the highest integrity and fairness? We should require no less.

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217. For example, the Seventh Circuit held in *Torres* that male guards could be excluded from female prisons in order to promote rehabilitation. Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523 (7th Cir. 1988). However, the Seventh Circuit also held that cross-sex monitoring of male inmates by female guards is constitutional in order to promote penological objectives. The Seventh Circuit explained this result by stating that "evenhanded willingness to accept prison administrators' decisions about debatable issues means that Johnson cannot prevail under the due process clause." *Johnson*, 69 F.3d at 146-47. See *supra* notes 88-99 and accompanying text for a discussion regarding the decision in *Johnson*.

218. Hudson v. Palmer, 468 U.S. 517, 523-24 (1984).