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Women Prisoners: Freedom From Sexual Harassment - A Constitutional Analysis

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WOMEN PRISONERS: FREEDOM FROM SEXUAL HARASSMENT—A CONSTITUTIONAL ANALYSIS

> In terms of sexual harassment inside it certainly happens often and consistently. That's why women inside often put forth the demand for all female guards. The harassment occurs on many levels—from a guard walking in on a woman undressing (that happens regularly), to sexual attacks by guards and staff. Any prisoner would say there's sexual harassment inside (if she wasn't afraid of repercussions, that is.)[1]

Sexual harassment[2] of female inmates by male guards permeates American prisons because the imbalance of power between the guard and the prisoner allows and encourages it to exist.[3] Sexual harassment in prison is not a series of isolated incidents;[4] rather, it is so much a part of the power structure that it is almost invisible.[5]

Women prisoners are forced to endure invasions of their

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1. Letter from Stephanie Erickson, writer for THROUGH THE LOOKING GLASS, to Laurie Hanson (Sept. 6, 1982). (THROUGH THE LOOKING GLASS is a women's and children's prison newsletter published by a prisoner rights' group in Seattle, Washington).

2. Sexual harassment is "any unwanted sexual attention a woman experiences . . . ranging from leering, pinching, patting, verbal comments, and subtle pressure for sexual activity, to attempted rape and rape." ALLIANCE AGAINST SEXUAL COERCION, FIGHTING SEXUAL HARASSMENT 3 (1979) [hereinafter cited as ALLIANCE AGAINST SEXUAL COERCION] (ALLIANCE AGAINST SEXUAL COERCION was formed in Boston to work against sexual harassment in the workplace).

3. *Id.* at 7. All literature on the subject deals with sexual harrassment in the market place. As the imbalance of power in prison is more marked than on the outside, all statistics and analyses are used by analogy. *See also*, C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1-23, 156-58, 174-82 (1979) [hereinafter cited as MACKINNON] for an excellent discussion of male dominance over women as the background for sexual harassment. The author also discusses occupational segregation and income inequality which are forms of sexual harassment in and of themselves. "[S]exual harassment of women can occur largely because women occupy inferior job positions and job roles; at the same time, sexual harassment works to keep women in such positions. Sexual harassment, then, uses and helps create women's structurally inferior status." *Id.* at 9-10.

4. ALLIANCE AGAINST SEXUAL COERCION, *supra* note 2, at 10. In 1976, *Redbook Magazine* conducted a survey in which 88% of the 9,000 respondents reported that they had experienced one or more forms of sexual harassment on the job. *Id.* at 10.

5. MACKINNON, *supra* note 3, at 1.

bodily privacy ranging from being viewed in the nude[6] to being forced to submit to body cavity and pat searches in the presence of, and in emergencies by, male guards.[7] At times they engage in "voluntary"[8] relations with the guards—bartering sex for psychological and physical freedom.[9] If a staff member requests sex-

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6. *See, e.g.*, Forts v. Ward, 434 F. Supp. 946 (S.D.N.Y. 1977), *rev'd and remanded*, 566 F.2d 849 (2d Cir. 1977), *on remand*, 471 F. Supp. 1095 (1978), *vacated in part*, 621 F.2d 1210 (1980) (inmates brought suit alleging invasion of privacy due to presence of male guards in living quarters and infirmary). *See infra* notes 83-105 and accompanying text; *An Inside Look from Raleigh, North Carolina*, No More Cages, Oct. 1980, at 9-10 (allegations that from any location on camp, a male officer can stand and watch women undress through the window); *Male Guards-The Struggle is Spreading*, No More Cages, Dec. 1980, at 121 (female inmates in Oregon filed a civil suit on the basis of lack of privacy suffered because of the presence of male guards at the prison).

7. *See, e.g.*, Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981) (body cavity search in the presence of male guards); K. Burkhart, Women in Prison 94 (1976) [hereinafter cited as Burkhart] (quoting a male warden: "[b]eing in jail is harder on a woman than a man . . . . She comes in here and we undress her and tell her to 'bend over lady' to look for contraband. We make her bathe in front of everyone . . . . That sort of thing can break your spirit."); *Bedford Hills Again . . .*, Through the Looking Glass, Dec. 1979, at 5 (allegations that women were being stripped naked in front of male officers); *Another Bed of Nails to Chew on*, No More Cages, Dec. 1980, at 44 (women from California Institution for Women speak out on humiliation felt when stripped naked by two male officers and one female officer); Burkhart, *supra* at 155 (in Clinton, New Jersey male guard tore clothes off female inmate and forced her to lie down in a spread-eagle position; matron did nothing).

8. Letter from Dr. Jan Mickish, Professor of Criminology at Ball State University to William C. Erbecker, attorney (Sept. 1, 1981) (copy on file with Laurie Hanson).

> Any sexual activity between inmate and staff must be viewed in the context of the social setting from which it has emerged and the prison setting within which it occurs. Men and women have long been socialized to view sex as as female commodity: to be sought after by males, to be exchanged for goods and services by females. This social characterization of males, females, and sex continues into the prison setting where male correctional officers have powers beyond their counterparts in the non prison setting . . . . For a staff member to request sexual activity is tantamount to a demand. For a staff member to agree to a sexual request made by an inmate is to compromise his position as an agent of the state . . . . Throughout this whole process, it is the staff member who has the ultimate power over the inmate.

9. *See, e.g.*, Burkhart, supra note 7, at 302-03 (female prisoner working as a domestic worker for warden became pregnant); Jones, *One Woman Who Chose to Say No*, The Nation 456 (April 17, 1982) [hereinafter cited as Jones] Carol Ann Wilds, an inmate at Indiana Women's Prison, is a victim of sexual harassment, exploitation and abuse by male personnel. She became pregnant while in prison and filed suit against the prison for damages. She has subsequently dropped the charges. When an investigator interviewed two dozen inmates of Women's Prison, all had witnessed or knew of instances of sexual exploitation. Thirty-eight inmates signed a petition supporting Wild's allegations. *Id.* at 459. At a hearing at the California Institution for Women (CIW) in 1977, a California

ual favors, it may be perceived by the inmate as a demand. Thus, even so-called "voluntary" sexual activity must be viewed as coercive.[10] Women prisoners are also victims of sexual abuse and rape.[11]

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assembly committee found that: "Inmates are subject to sexual coercion and in at least one instance an inmate has become pregnant while serving her sentence at CIW with no apparent disciplinary measures taken against the staff person or persons involved." THE CALIFORNIA ASSEMBLY SELECT COMM. ON CORRECTIONS, THE CALIFORNIA INSTITUTION FOR WOMEN: ONE YEAR LATER, at iv (July 21, 1977). *Life and Love in a Co-ed Prison*, 7 STUDENT LAWYER, Feb. 1979, at 52-53 (in Seagoville, Texas, guards had to leave because too emotionally involved with prisoners); Adams v. Matthias, 458 F. Supp. 302, 306 (S.D. Ala. 1978) (the court stated that upon occasion jail officials engaged in sexual activity with female inmates at the jail; one inmate became pregnant and subsequently had an abortion); *Muncy Prison Inmate Gives Birth to Baby Boy*, THE GUIDE, June 13, 1979, at 1 Col. 1. In Muncy, Pennsylvania, a 16-year-old became pregnant while incarcerated; the guard charged pleaded *nolo contendere*. Four additional women who complained about sexual exploitation at Muncy have all taken lie detector tests and passed. "Sexual Harassment is not only the process of the staff asking for sexual activity, but also it is the staff member accepting, for this accepting sets into motion a whole series of sexual and psychological patterns that will ultimately victimize all female inmates." Letter from Dr. Jan Mickish, *supra* note 8.

10. *See Rape as a Political Tool*, NO MORE CAGES, June/July 1979, 32:

> Rape of women prisoners by male guards is a common occurrence. Whether it is just a matter of sexual abuse of women in a defenseless situation, a tool to generally harass, humiliate and break their spirit and will, or a means of intimidation and punishment for those who persist in struggling and maintaining their strength and integrity; rape is the one act of violence specifically reserved for women.

Id.

11. *See Who's Who at Bedford Hills: Sexual Harassment by Male Guards*, THROUGH THE LOOKING GLASS, July/August 1982, 6. There have been allegations of numerous sex abuses at Bedford Hills. One guard from Bedford Hills has recently been indicted for rape in the first degree, three counts of coercion, and one count of official misconduct. Another guard pleaded guilty to official misconduct and was sentenced to one year conditional discharge. Telephone interview with David Klein, Branch Chief of Northern Westchester District Attorney's Office, New York (March, 1983).

Carol Ann Wilds and another prisoner at Indiana Women's Prison were raped while in the hospital facilities. All personnel involved have been transferred or have resigned. Jones, *supra* note 9, at 459. *See* J. CHAPMAN, ECONOMIC REALITIES AND THE FEMALE OFFENDER, 152 (1981) [hereinafter cited as CHAPMAN] (attempted rape of JoAnne Little by prison guard in North Carolina).

See also Bedford Hills: Segregation is Dangerous to Your Health, NO MORE CAGES, June/July 1979, 9 "Things were pretty bad before the male guards came back, and their presence there has already aggravated the situation . . . . [T]he mere fact that they walk around with long night sticks when no female guards carry these nightsticks is an irritating threat to women;" BURKHART, *supra* note 7, at 325-27 (prisoners of Women's House of Detention list allegations including being beaten by guards); *Focus on Marysville*, NO MORE CAGES, Oct. 1980, 32 (Ohio women spoke out against brutality of male guards). As a result of speaking out, however, NO MORE CAGES was banned from the Ohio institution. *Stop Prison Censorship!*, NO MORE CAGES, July/Aug. 1981, 7.

There are few reported cases of sexual harassment of women prisoners. Until recently sexual harassment, even outside the prison, went unnoticed.[12] Also, if a prisoner reports sexual abuse, the prison administration will generally blame the prisoner, or deny the accusation, but only occasionally fire the guard.[13] Consequently, prisoners infrequently report abuses. Further, women prisoners as a class have received little attention.[14] They do not bring lawsuits to protest grievances because they fear for their own safety.[15] It is difficult for women prisoners to gain access to the courts due to a lack of available services within the prisons.[16] In recent years, however, interest in female prisoners' plight has been renewed. Suits have been filed on their behalf which have identified issues unique to them,[17] in-

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12. *See* Jones, *supra* note 9, at 456 ("women don't challenge the conditions of . . . confinement . . . because prison is much like the oppression [women face] in the outside world."); L. FARLEY, SEXUAL SHAKEDOWN 12 (1978) "[S]exual harassment of working women has been practiced by men since women first went to work for wages. It . . . has gone virtually unchallenged, largely as a result of a wide social acceptance of such behavior."

13. *See supra* notes 9 & 11. In regard to the *Wilds* case, discussed *supra* note 9, an Indiana Women's Prison guard, while calling Wilds' charges false, added that if he had to get up on the stand and say "I know there is no sexual harassment," he couldn't do that. Frederick & Iknovian, *Sex Behind Bars?*, WOMANKIND, at 9 (1981).

14. Historically, women have only comprised 4-5% of the prison population. CHAPMAN, *supra* note 11, at 3-4. *See also* Albert, *Women Prisoners and the Law: Which Way will the Pendulum Swing?*, 10 J. CRIM. L. 38 (1982) [hereinafter cited as Albert]. Traditionally courts were reluctant to get involved in prison issues at all, and left the prison administration to govern as it saw fit. This "hands off" doctrine began changing in the late 1960's and to date there are some legal remedies available. *See infra* notes 83-92 and accompanying text. Most prison litigation has been on behalf of male prisoners. Prison reform workers have also not taken as great an interest in the female prisoner because conditions in the women's prisons are often not brought to public attention. Women's prisons are not threatened by the riots and violence that plague men's institutions and create sensational press coverage. *See also* Fabian, *Toward the Best Interests of Women Prisoners: Is The System Working?*, NEW ENG. J. PRISON L. 1, 32 (1979); CHAPMAN, *supra* note 11, at 2, 5 (women perceived as passive and non-threatening to institutional security).

15. Jones, *supra* note 9, at 456, 459. A few of the women were willing to talk on the record to the investigator "though prison pressure against that was formidable." *Id.*

16. Albert, *supra* note 14, at 38; Fabian, *supra* note 14, at 33. Until recently, jailhouse lawyers in women's institutions were uncommon. *Id.*

17. Snow, *Women in Prison*, CLEARINGHOUSE REV. 1065 (1981) [hereinafter cited as Snow]. Issues identified have included: (1) equal access to vocational and educational program, Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979) (discrepancy in educational and vocational programs); Molar v. Gates, 98 Cal. App. 3d 1, 159 Cal. Rptr. 239 (1979) (denial of minimum security jail facilities and their attendant privileges); (2) the right to health and adequate gynecological services, Todaro v. Ward, 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1979), *aff'd sub nom.* Todaro v. Couglin, 652 F.2d

cluding rape and sexual abuse by guards[18] and the right to bodily privacy.[19]

Prisoners necessarily face unwanted surveillance and touching by prison personnel for the purpose of detecting contraband and for institutional security.[20] Sexual harassment is distinguished from desired, mutual sexual activity by the fact that the recipient views the attention as *unwanted*. Since all observation in prison is basically unwanted, it is crucial that formal boundaries be established as to the type of viewing or touching duties a male guard may perform. This Comment will examine the tension that results from placing male guards in female correctional facilities and suggest the boundaries which must be established to ensure that the prisoners' rights are protected. While there are other avenues available to the inmate, both legal and admin-

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54 (2d Cir. 1981) (substandard medical care for women inmates held unconstitutional as a violation of the eighth amendment); (3) the right to retain and breast feed infants born during incarceration and other issues surrounding pregnancy, *see generally* Note, *Nine Months to Life—The Law and the Pregnant Inmate*, 20 J. FAM. L. 523 (1981); and (4) the right to retain contact with her children during incarceration, *see* Snow, *supra* at 1065; Note, *Nine Months to Life—The Law and the Pregnant Inmate, supra* at 536. The *Statement of purpose,* NO MORE CAGES, (June/July 1979) declares:

> We have chosen to focus on *women* in prison because . . . there are problems special to women in prison, as distinguished from the oppression faced by all those in prison: The presence and physical threat of male guards, the overall sexism of the prison system, the lack of specialized training which leads to fewer available jobs, the tragedy of mothers separated from their children, the assault on women's reproductive organs, and much more.

On November 7, 1980, there was a national conference on women in prison. Workshop and speaker issues included the physical and psychological aspects of imprisonment (sexual and medical abuse) and examples of sexual abuse in prison including unnecessary and humiliating vaginal searches. *See also Conference on Women in Prison: Report from Atlanta, GA.,* NO MORE CAGES, Dec. 1980, 41-42).

According to Chapman, this new interest in the female offender and prisoner is due in part to the perception that criminal activity has increased among women, but, she feels the major impetus seems to be the women's movement. Women are (re)discovering the role sexism plays in the criminal process as they identify the disparate treatment men and women receive throughout the judicial process and incarceration. CHAPMAN, *supra* note 11, at 6, 21-38.

18. *See supra* notes 9-11 and accompanying text.

19. *See infra* notes 68-92 and accompanying text; Snow, *supra* note 17, at 1065 (mentions the right not to be guarded by males which flows directly from rape and privacy issues).

20. Bell v. Wolfish, 441 U.S. 520, 553-560 (1978) (although inmates retain privacy rights upon incarceration, they must be balanced against significant and legitimate security interests of the institution). *See also infra* notes 122-128 and accompanying text.

istrative,[21] the establishment of a constitutional right to bodily privacy lays the groundwork for protection against any form of sexual harassment from which other remedies may evolve. Women inmates have a constitutional right to privacy, dignity, and autonomy in regard to their own bodies, and this includes the right to be free from sexual abuse and harassment by male guards. There is no reasonable justification for any infringement upon this right.

I. BACKGROUND: SEXUAL ABUSE IN AMERICAN PRISONS

Sexual harassment of women in prison as well as the subsequent disregard for the victims of the harassment is not a new phenomenon. The earliest documented incident between a male guard and a female prisoner occured in 1826.[22] When a grand jury investigated the death of an Auburn prisoner and discovered that she had died during childbirth after she had received a severe flogging, they ignored the fact that she had become pregnant while in solitary confinement.[23] The scandal created when knowledge of this incident reached the public may have spurred the passage of the 1828 law which required segregation of male and female prisoners.[24] Even when prisoners were successfully segregated by sex, however, women prisoners were supervised by male guards who often took sexual liberties with them;[25] due to over-crowding and basic disinterest in women prisoners and their rehabilitation, even the presence of matrons did not lessen the abuse.[26] The pregnancy at Auburn was not an isolated inci-

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21. For a discussion of tort remedies for sexual harassment *see* Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879 (1980); For a discussion of sexual harassment as sex discrimination *see* MACKINNON, *supra* note 3; For a discussion of Title VII remedies *see* Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977). Administrative remedies are also available. *See infra* notes 150-152 and accompanying text. *See also* Fabian, *supra* note 14, at 53. It would be to the prisoners' benefit to have members of community groups, such as local rape crisis centers, serve on committees which both oversee the administration of the prison and have direct contact with the prisoners.

22. E. FREEDMAN, THEIR SISTER'S KEEPERS 15 (1981) [hereinafter cited as FREEDMAN]; N. Shafer, By Women For Women: America's First Separate Prison for Women 17 n.32 (1982) [hereinafter cited as Shafer] (unpublished manuscript) (copy on file with Laurie Hanson).

23. *Id.*

24. *Id.*

25. Albert, *supra* note 14, at 37.

26. Shafer, *supra* note 22, at 9-10. This is still true today; *see supra* note 14. BURKHART, *supra* note 7, at 155, 326, 332; FREEDMAN, *supra* note 22, at 16; *But cf.* CHAPMAN,

dent, as most accounts of prisons during the 1800's mention illegitimate births.[27]

Society regarded women prisoners as "fallen" women and beyond redemption.[28] Socially, women were seen as having a "*superior morality*" to that of men.[29] Therefore, if a woman committed a crime, she had denied her own pure nature and was "more depraved than her male counterpart."[30] In the 1860's the plight of the "fallen" woman was reconsidered and the notion that she could be reformed (by women) was embraced by novelists and Christian reform workers.[31] The commitment to create a pleasant, supportive, productive community of women came in part from the reformers' belief that most women were not intentional criminals but were lured into such activity by their husbands or boyfriends, or out of economic necessity.[32]

Women prisoners were considered useless and were neglected by prison authorities because their numbers were few and their labor could not be sold. The neglect, however, was not benign "[R]ather a pattern of overcrowding, harsh treatment and sexual abuse recurred throughout prison histories."[33] Prison authorities opposed the segregation movement, even though they considered the women prisoners useless, because they did not want to lose their domestic help.[34]

In 1868 the governor of Indiana solicited two Quaker prison reformers to investigate conditions at the state prison and submit a report to him.[35] Although the Quakers observed many abuses occurring within the prison, they were most distressed by the sexual abuses the women suffered:

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supra note 11, at 3-4 (high incidence of sexual abuse in southern jails attributed to the almost total absence of matrons.)

27. *See* FREEDMAN, *supra* note 22, at 16, 59, 60; Shafer, *supra* note 22, at 6-11, 17.

28. Shafer, *supra* note 22, at 17.

29. FREEDMAN, *supra* note 22, at 17.

30. Shafer, *supra* note 22, at 14-21 (general discussion of the "fallen" woman and her threat to Victorian society.)

31. *Id.* at 40.

32. Note, *Pioneers in Prison*, 44 FED. PROBATION 30, 31 (Sept. 1980); *See also* BURKHART, *supra* note 4, at 366-68; CHAPMAN, *supra* note 11, at 15-17. For a general discussion of the professional reformers see FREEDMAN, *supra* note 22.

33. FREEDMAN, *supra* note 22, at 15.

34. Albert, *supra* note 14, at 37.

35. Shafer, *supra* note 22, at 5.

> A number of the guards had keys to the women's prison and entered when they wished to gratify their lusts. If the women could be bought up, they gave them trinkets or goods out of the government store, if they did not yield, they were reported as incorrigible and stripped and whipped in the presence of as many as wished to see. In the court of the prison there was a large reservoir. . . . On sabbath afternoons, the women prisoners were brought out and compelled to strip and . . . required to run from the opposite side and jump into the water, the guards using, if necessary, their lashes to drive them out to the howling amusement of the guards and their friends who were permitted to be present, keeping it up as long as they pleased.[36]

When the scandals the Quakers uncovered came to light in the late 1860's, the progressive movement to reform women prisoners and to create humane facilities for each sex gained considerable support.[37] The reformers believed that separate facilities were necessary to protect the women from physical abuse[38] as well as sexism. Many reformers believed that, just as in society at large, men contributed to, rather than cured, women's delinquency.[39] Therefore, to reform the female offender and to keep her free from sexual abuse, a separate facility (reformatory) was necessary. Reform could only be achieved if women were governed by a staff who could supply them with the necessary morals and feminine treatment.[40] "[S]ince industry, morality and religion were regarded as the province of women, only women were capable of staffing the reformatory."[41]

The first women's prison opened in Indiana in 1873.[42] By

36. *Id. See also* FREEDMAN, *supra* note 22, at 59-60 (prostitution rings and other abuses operating within prisons). It is interesting that in almost every other account of the reform and segregation movement, the incidence of sexual abuse is not mentioned. Sexual abuse and rape of women has traditionally been hidden, and prison is no exception.

37. Shafer, *supra* note 22, at 12.

38. FREEDMAN, *supra* note 22, at 52,59,60; *see also* BURKHART, *supra* note 4, at 83; Shafer, *supra* note 22, at 6-10.

39. *Id.*

40. Shafer, *supra* note 22, at 7-14.

41. *Id.* at 14.

42. FREEDMAN, *supra* note 22, at 144-45.

1940 a total of twenty-three states had established separate women's prisons, and by 1975 only sixteen states lacked them.[43] However, the idealism and energy of the reformers did not survive the changes in prison administration over the years.[44] As early as the 1920's the separate prison, although run by women, no longer existed to serve women. Rather, the prisons were administered by women who did not share the feminist philosophy that women prisoners could be reformed. These administrators were not critical of men's prisons or male dominated institutions.[45] Today, female prisoners find themselves in "punitive-security-based environments the women's prison reform movement was organized to oppose" because prison authorities question whether institutional rehabilitation (reform) is successful.[46] Indeed, what began as a measure to help and protect women, deteriorated over the years into more neglect and restrictive and unequal separation.[47]

The segregation of prisons did not end sexual harassment of women prisoners. Some states did not create separate facilities at all,[48] and others allowed men to guard women with no restrictions.[49] The problem of sexual harassment of women prisoners is still rampant.[50]

> Whatever the shortcomings of the institutions the reformers created, they had clear insight into the dangers of male-dominated institutions. Many of the hostile attitudes toward female criminals they identified a hundred years ago persist today throughout society. The stigma of woman's fall may be less critical, but the fact that most women prisoners are now not only poor but also nonwhite compounds their powerlessness. The old reformist concern for women's victimization has new foundations that necessitate continued scrutiny of the criminal justice system.[51]

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43. *Id.*
44. CHAPMAN, *supra* note 1, at 16.
45. FREEDMAN, *supra* note 22, at 155.
46. Fabian, *supra* note 14, at 6.
47. Snow, *supra* note 17, at 1065.
48. *See supra* note 44 and accompanying text.
49. *See* Appendix A, *infra* for present day statistics regarding the number of male guards in women's prisons and the restrictions placed on them.
50. *See supra* notes 6-11 and accompanying text.
51. FREEDMAN, *supra* note 22, at 157.

II. The Right of Privacy: Protecting Bodily Integrity

The basis for a prisoner's right to freedom from sexual harassment, or the right to bodily integrity may be found within the fourth amendment guarantee of freedom from unreasonable searches or the more general right of privacy which has been recognized within that amendment.

Prior to 1967, fourth amendment violations occurred if there was a finding of physical trespass.[52] That privacy and dignity could be invaded without a physical trespass of any sort was not part of any judicial privacy theory.[53] Justice Brandeis, however, laid the groundwork for such a concept in his dissent in *Olmstead v. United States*.[54] "[T]o protect [the right to be let alone] every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment."[55] Brandeis' concept of privacy was adopted fifty years later in *Katz v. United States* when the United States Supreme Court held that fourth amendment protection cannot stop with physical trespass.[56] *Katz* laid the foundation for the "reasonable expectation of privacy" theory upon which many fourth amendment decisions now rest, including decisions protecting reasonable expectations of physical or bodily privacy.[57] Involuntary exposure of one's naked body has been held to be a violation of that right.[58] Thus, the unwanted observation of female inmates by male guards may be a violation of a reasonable expectation of bodily privacy.

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52. Katz v. United States, 389 U.S. 347 (1967), was the first decision in which the Court enunciated that a fourth amendment violation could occur without physical trespass. The Court held that evidence heard over a wiretap during the course of a criminal investigation was illegally obtained because defendant had a reasonable expectation of privacy while placing a call in a phone booth. The Court stated that the fourth amendment protects people, not places. *Id.* at 353.

53. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (evidence heard over a wiretap was legally obtained because there was no physical trespass).

54. 227 U.S. 438 (1928).

55. *Id.* at 478 (Brandeis, J., dissenting).

56. 389 U.S. at 353.

57. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) (stop and frisk procedures are within the purview of the fourth amendment).

58. York v. Storey, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, Storey v. York, 376 U.S. 939 (1964) (police officers who unnecessarily photographed female assault victim and subsequently passed the photographs around were held to have violated the woman's right to privacy).

The right to bodily privacy may also be found within the concept of privacy developed from the Supreme Court's 1965 decision in *Griswold v. Connecticut*.[59] The articulation of this concept of privacy,[60] philosophical in both its analysis and effect, was the beginning of a new era of substantive due process and, hence, an expansion of individual human rights. In *Griswold*, the concept of privacy has its roots in specific constitutional provisions, but it is not restricted in scope or content solely by the express language of the enumerated rights.[61] *Griswold* and its progeny[62] protect an interest similar to that found in the fourth amendment—the interest in avoiding disclosure of personal matters, specifically matters relating to procreation. This interest is protected from unwarranted governmental intrusion.[63]

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59. 381 U.S. 479 (1965). In *Griswold*, the Court struck down as unconstitutional a Connecticut statute prohibiting distribution of, and married persons' use of, contraceptives. The Court held that in light of, and emanating from, decisions which embrace rights peripheral to the first amendment, and various guarantees implicit in the third, fourth, fifth, and ninth amendments, a zone of privacy is created. Thus, even though marriage is not specifically enumerated in the Constitution, it may be included in this zone of privacy and thereby deemed fundamental.

60. The right to privacy is not specifically enumerated in the Constitution and its origin is unclear. Privacy is a judicially developed concept, whose birth and growth reflect the Court's determination to advance principles it feels society is willing or ready to accept. The "right" was first discussed in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891), where the Court stated: "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Id. As individuals bring suit to contest governmental control over certain aspects of their lives, decisions are rendered which clarify the "rights" the Supreme Court deems fundamental. Thus, the Constitution can be seen as a "statement of political principles, to be interpreted and applied by the Court in light of changing circumstances." Beany, *The Griswold Case and the Expanding Right To Privacy*, WIS. L. REV. 979, 986 (1966) [hereinafter cited as Beany]. The author quotes Chief Justice Marshall: "We must never forget that it is a Constitution we are expounding," a Constitution "intended to endure for ages to come, and consequently to be adapted to the various crises in human affairs." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819).

61. According to the Court, this right derives from natural law; from the ninth amendment; from the word "liberty" in the due process clauses of the fifth and fourteenth amendments, as shadows or penumbras of the bill of Rights, thus creating "zones of privacy"; or as a combination of all these expressions. *See generally*, Beany, *supra* note 60.

62. Eisenstadt v. Baird, 405 U.S. 438 (1972) (extended the right to be free from governmental intrusion when buying contraceptives to individuals, regardless of marital status, on the theory that prohibiting the sale of, or information regarding, contraceptives to unmarried persons, while permitting it to married persons, violated the equal protection clause of the fourteenth amendment as well as the unmarried persons' right to privacy).

63. In *Griswold*, part of the rationale for finding the statute unconstitutional was

In *Roe v. Wade*,[64] the Supreme Court enunciated a new interest emanating from a different source.[65] This interest, founded in the fourteenth amendment's concept of personal liberty and restrictions upon state action, was broad enough to encompass a woman's right to privacy in deciding whether or not to terminate her pregnancy.[66] Thus, there exists a fundamental right for a woman to make certain choices regarding her body and reproduction.

This general concept of privacy found within the fourth amendment, *Griswold, Roe*, and their progeny encompasses developing interests which flow from the basic guidelines expressed by the Court.[67] The autonomy and dignity of a woman prisoner to remain free from sexual harassment should certainly be protected by this general concept of privacy.

III. Bodily Integrity Inside the Prison Walls

A prison is, almost by definition, a place where the resident has lost her privacy.[68] Therefore, it is not surprising that a concept of a right to bodily privacy and autonomy for women prisoners has not yet been formulated by the Supreme Court.[69]

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the knowledge that to find otherwise would mandate that the government patrol marital bedrooms looking for evidence, clearly an invasion of privacy. 479 U.S. at 485-86. *See also* Carey v. Population Services International, 431 U.S. 678 (1977) (invalidating restrictions on distribution of nonprescription contraceptives as being at the heart of constitutionally protected choices; access to contraceptives is necessary to protect the fundamental right guaranteed in *Griswold*).

64. 410 U.S. 113 (1973).

65. *Id.* at 153. The Court stressed that the right may emanate from the ninth amendment; that the liberty which is protected from infringement by the federal government or the states by the fifth and fourteenth amendments is not restricted only to those rights specifically mentioned in the first eight amendments.

66. *Id.*

67. If a concept of privacy is to be complete, it must embrace both momentous (Roe, 410 U.S. 113, (right to have an abortion); In re Quinlan, 355 A.2d 647 (N.J.1976), (right to choose between life and death) and every day ends of the spectrum (Kelly v. Johnson, 425 U.S. 238 (1976) (county regulation limiting the length of county policemen's hair does not violate the fourteenth amendment); for if it does not, it "leaves the state free to interfere with those aspects of individual lives which have no direct bearing on the ability of others to enjoy their liberty." Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970) ("within the commodious concept of liberty embracing freedoms great and small, is the right to wear one's hair as he wishes.").

68. *See generally* Singer, *Privacy, Autonomy, and Dignity in the Prison*, 21 Buffalo L. Rev. 669 (1971) [hereinafter cited as Singer] (discussion of the constitutional aspects of the degradation process in prisons).

69. This concept is, however, working its way up the federal circuits. *See infra* notes

There was a time when prisoners had no rights at all:

> The bill of rights is a declaration of general principles to govern a society of freemen and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are slaves of the state . . . they must be subject to the regulations of the institution . . . .[70]

Recently, however, the Supreme Court has established that convicted prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[71] Constitutional guarantees which have been held to survive the prison wall include: freedom from unreasonable searches and seizures under the fourth amendment,[72] religious freedom under the first and fourteenth amendments,[73] protection against racial discrimination under the equal protection clause of the fourteenth amendment,[74] equal access to the courts,[75] freedom from cruel and unusual punishment under the eighth amendment,[76] and due process of law.[77] Whether the right to privacy can be extended to women prisoners as a basis for protection against sexual harassment is the subject of the remainder of this Comment.

93-105 and accompanying text.

70. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (principles declared in the bill of rights are not applicable to convicted felons).

71. Bell v. Wolfish, 441 U.S. 520, 545 (1978) (class action suit challenging the constitutionality of conditions in federal institution).

72. *See infra* notes 94-109 and accompanying text.

73. Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam) (Texas violated the first and fourteenth amendments by not allowing a Buddhist a reasonable opportunity to pursue his faith).

74. Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (Alabama statutes requiring segregation of the races in prisons and jails violate the fourteenth amendment).

75. Gilmore v. Lynch, 319 F. Supp. 105, 109 (1970), *aff'd per curiam sub nom*, Younger v. Gilmore, 404 U.S. 15 (1971) (reasonable access to the courts is a constitutional imperative which prevails against a variety of state interests).

76. Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (cruel and unusual punishment clause covers conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment).

77. Haines v. Kerner, 404 U.S. 519, 521 (1972) (per curiam) (since the court cannot prove beyond a doubt that allegations of prisoner's *pro se* complaint cannot be supported, he is entitled to an opportunity to offer proof).

A. Bodily Integrity: Freedom from Unwanted Viewing by Male Guards

In western culture certain values are second nature and mandatory, such as clothing one's body or, more specifically, one's genitals. Women and men appear to have an innate need for privacy in certain areas of living as evidenced by the fact that toilet facilities are enclosed in the home and segregated in public.[78] The desire to protect one's nudity from unwanted exposure, particularly to members of the opposite sex, involves both a physical instinct and an emotional and social craving for privacy. In expanding the right to privacy to include the unwarranted observation of one's naked body, the Ninth Circuit stated: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."[79] This desire for dignity transcends the prison walls. Indeed, state and federal courts have held that if guards are in a position to watch inmates of the opposite sex who are engaged in personal private activities, such as undressing, using toilet facilities, showering, or talking to medical personnel, the inmates' constitutional rights of privacy have been violated.[80]

Until now, however, female prisoners have instituted only one suit[81] challenging these prison practices.[82] In *Forts v. Ward*,

78. Forts v. Ward, 471 F. Supp. 1095, 1098 (S.D.N.Y. 1978), *vacated in part*, 621 F.2d 1210 (2d Cir. 1980) (administrative remedy granted to balance right of a female prison inmate to privacy with the right of equal job opportunity regardless of sex).

79. York v. Storey, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, Storey v. York, 376 U.S. 939 (1964).

80. *See* Gumbey v. Meachum, 684 F.2d 712, 714 (1982) (male plaintiffs' statements that they were subject to a "certain amount of viewing" by female guards does not necessarily fall short of a cognizable claim); Dawson v. Kendrick, 527 F. Supp. 1252, 1316-17 (S.D. W. Va. 1981) (privacy of female prisoners severely infringed because male deputies could peer into their cells); Bowling v. Enomoto, 514 F. Supp. 201 (N.D. Cal. 1981) (female guards viewing male inmates; inmate has a limited right to privacy which includes the right to be free from unrestricted observation of their genitals by members of the opposite sex); Hudson v. Goodlander, 494 F. Supp. 890 (D. Md. 1980) (female guards viewing male inmates; inmate has a limited right to privacy which includes the right to be free from unrestricted observation of their genitals by members of the opposite sex); Forts v. Ward, 471 F. Supp. 1095, 1098 (S.D.N.Y. 1978), *vacated in part*, 621 F.2d 1210 (2d Cir. 1980).

81. Forts v. Ward, 434 F. Supp. 946 (S.D.N.Y. 1977), *rev'd and remanded*, 566 F.2d 849 (2d Cir. 1977), *on remand*, 471 F. Supp. 1095 (S.D.N.Y. 1978), *vacated in part*, 621

the inmates charged that they were severely humiliated and deprived of their dignity because male guards were regularly permitted to view them naked.[83] At the trial level, the court enjoined the assignment of male guards to night duty,[84] from the infirmary, and from making first rounds in the morning. The court further ordered that the showers be modified so that guards could not observe the women while showering.[85]

> It is neither penologically required nor permissible (1) that during the day an inmate be in a situation where (a) she may be or must risk being viewed completely or partly in the nude by a male guard in the course of his duties or (b) she may be observed while using the toilet; (2) that during the night she be observed rising from sleep to use the toilet, or suffer herself to be observed perhaps numerous times during her sleep in whatever may be her disarray of bed clothes or nightgown—or no garments at all on a hot and airless night; (3) that her head be directly observed by a male guard while she is taking a shower; and (4) that a male guard in the prison hospital be so stationed

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

82. The ruling in *Dawson* on behalf of the women prisoners was part of an opinion which found that a county facility operated in violation of many rights of both female and male prisoners. 527 F. Supp. at 1317.

83. In 1977, women inmates at Bedford Hills Correctional Facility sued for injunctive relief and damages, pursuant to 42 U.S.C. § 1983 (1976), for redress of deprivation of their right of privacy under the first, ninth and fourteenth amendments caused by the posting of male guards in various places in the prison including the housing units. *Forts*, 434 F. Supp. 946. The complaint also alleged that the practices complained of constituted an unwarranted intrusion into the privacy and person of the plaintiffs under the fourth amendment and that the mere placement of men in women's prisons is designed to strip women prisoners of their dignity and moral integrity and was a violation of the eighth amendment. Plaintiff's Class Action Complaint, at 9, cited in Forts v. Ward, 434 F. Supp. 946 (S.D.N.Y. 1977).

The male corrections officers at Bedford Hills perform all duties previously performed by women corrections officers. The male officers were assigned to the housing and hospital units in February, 1977, in response to Title VII of the Civil Rights Act of 1964. This complaint was filed two months later, in April 1977. 471 F. Supp. at 1097-98.

84. This ruling was modified in *Forts*, 621 F.2d at 1217, where the appellate court vacated the order which prohibited the assignment of male guards to the nighttime shifts. "We seriously doubt that the inmates' interests in style or even in avoiding the occasional discomfort of warmth from a sleeping garment are of sufficient gravity to justify denial of equal employment opportunities [for the male guards]." *Id.* While such a ruling at least provides a choice for the prisoner, the court makes it clear that the right to dignity and autonomy for women is not as important as equal job opportunity for men.

85. *Forts*, 471 F. Supp. at 1099-1101.

> as to permit him under normal circumstances to view an inmate wholly or partially unclothed.[86]

Crucial to its opinion was the court's conclusion that a woman's right to bodily privacy is invaded if her head is observed when she showers even though her entire body is not visible to the male guard. Because the prisoner can see the guard and knows she has no clothes on, her own sense of dignity and bodily integrity is invaded.[87] The court based its holding on the fact that virtually all societies have rules for concealing female genitals,[88] and recognized a woman's particular need for bodily privacy.[89]

Involuntary exposure takes on a greater significance for women than for men in our society, where a woman's body is viewed as a sexual object and commodity[90] and where pornography and violence against women is acceptable.[91] For women, unwanted exposure is harassment *in and of itself*. Sometimes the observation may be inadvertent, other times deliberate; but no matter what the justification, the female will most always feel embarrassment, humiliation, and shame. She will feel all that is associated with the knowledge that her body is being viewed as a sexual object.[92] Therefore, to subject a female prisoner to the unwanted gaze of male guards while she is nude deprives her of

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86. *Id.* at 1099-1100.

87. *Id.* at 1100, n.20.

88. *Id.* at 1098. "The fact that a need for privacy is the product of social conditioning makes it no less embarrassing or occasions no less feeling of shame when the privacy is invaded." *Id.*

89. *Id.*

90. *See, e.g.*, S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 6-22 (1975) [hereinafter cited as BROWNMILLER] (study of women's status as chattel throughout history); MACKINNON, *supra*, note 3 at 174-75 (historically, women have been required to exchange sexual services for material survival in one form or another); Note, *Sexual Display of Women's Bodies—A Violation of Privacy*, 10 GOLDEN GATE U. L. REV. 1211 (1980).

91. A. MEDEA & K. THOMPSON, AGAINST RAPE 3-7 (1974) (pervasiveness of violence against women in this country); A. DWORKIN, PORNOGRAPHY, MEN POSSESSING WOMEN 101-28 (1981) (pornography and the objectification of women).

92. The gut distaste that a majority of women feel when we look at pornography . . . comes, I think from the gut knowledge that we and our bodies are being stripped, exposed and contorted for the purpose of ridicule to bolster that 'masculine esteem' which gets its kick and sense of power from viewing females as anonymous, panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded. . . . This, of course, is also the philosophy of rape.

BROWNMILLER, *supra* note 90, at 442.

her integrity and is a violation of constitutionally guaranteed privacy.

B. The Physical Aspect: Freedom from Touching

Laws which prescribe punishment for rape, sexual abuse, assault, and battery provide the protections society has deemed necessary in order to keep each individual free from unwanted touching and violence. These protections extend to prisoners.[93] There are some situations however, where unwanted touching in the form of searches is necessary to investigate crimes[94] or to keep prisons free of contraband.[95] The fourth amendment protects individuals from illegal invasions of their "persons, houses, papers, and effects" by the government.[96] Courts have treated body searches as serious intrusions, even those as slight as a "frisk", because they inflict great indignity and arouse strong resentment.[97]

Courts have indicated that a body cavity or genital search by a member of the opposite sex is a violation of the inmate's right to privacy.[98] A prison's interest in excluding all contraband justifies its surveillance of the prisoners and their cells, and justifies body searches as well.[99] But that security interest, as well as the reasonableness of the search, is balanced against the inva-

93. Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973). Prisoners have a constitutional right to be reasonably protected from the constant threat of violence and sexual assault. In a §1983 action, prisoners must demonstrate a "pervasive risk of harm to inmates from other prisoners" and that prison officials "failed to exercise reasonable care" to prevent the unreasonable risk of harm or harm itself." *Id.*

94. Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967).

95. Daugherty v. Harris, 476 F.2d 292 (9th Cir. 1973), *cert. denied*, 414 U.S. 872 (1973).

96. Coolidge v. New Hampshire, 403 U.S. 433, 454 n.4 (1971) (warrantless search and seizure of automobile unconstitutional under the fourth amendment).

97. 392 U.S. at 9.

98. Sterling v. Cupp, 625 P.2d 123 (Or. 1981). Pat searches excluding genital areas by female guards upon male inmates did not violate their constitutional right to privacy. The court stated, however, that a search of the genitals by a member of the opposite sex was a needless indignity that is an imposition insofar as it goes beyond recognized necessity. *Id.* at 137. Smith v. Fairman, 687 F.2d 122 (7th Cir. 1982) (instructing female guards to exclude the genital area on male inmates when conducting a frisk affords the inmate the privacy he is entitled to in this context).

99. United States v. Stumes, 549 F.2d 831, 832 (8th Cir. 1977) (lack of warrant requirement in prison rests upon lack of expectation of privacy and exigencies inherent in prison atmosphere).

sion of the prisoner's dignity.[100] "To require one to not only submit to such a search, but to have it performed by a member of the opposite sex could well, for many people, only add to the feeling of degradation."[101]

In a Fourth Circuit case, it was found to be an unreasonable invasion of the female inmate's privacy to be stripped by a female guard in the presence of male guards.[102] The court reasoned that generally people have a special sense of privacy about their genitals, and involuntary exposure to someone of the opposite sex may be especially demeaning and humiliating.[103] Certainly, if it is an unreasonable invasion of privacy to be stripped and searched in the presence of male guards, it is unreasonable to be searched by male guards. Indeed, that "special sense of privacy" has been the basis for decisions which have dealt with body searches by members of the opposite sex.[104] In cases which have involved female guards and male prisoners, courts have held that pat searches were allowed so long as the genital areas were excluded.[105] A body search of a female prisoner by a male guard which includes the genitals or breasts is a violation of the fourth amendment because it unreasonably invades her expecta-

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100. United States v. Lilly, 576 F.2d 1240, 1247 (5th Cir. 1978) (body cavity search found unreasonable because the woman was not given notice that her voluntary absences from prison could subject her to random searches). *See, e.g.*, Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975) (court concluded that the right of privacy includes a prohibition of humiliating and unnecessary searches, but allows a prison regulation authorizing random shakedowns). "We hold that a prisoner enjoys the protection of the [f]ourth [a]mendment against unreasonable searches, at least to some minimal extent." *Id.*

It is settled law that the determination of reasonableness in any fourth amendment case depends on the particular facts of the case. To determine whether a particular search or seizure was reasonable, the court must balance the public interest in conducting the search against the individual's fourth amendment interest. *See* United States v. Martinez Fuerle, 428 U.S. 543, 555 (1976) (border patrol's permanent checkpoint station does not violate the fourth amendment). *See also* Hodges v. Klein, 412 F. Supp. 896, 903 (D.N.J. 1976) (guards cannot conduct a visual and anal search of an inmate unless there is a reasonably clear indication that the inmate is concealing something in a body cavity); Frazier v. Ward, 426 F. Supp. 1354, 1366 (D.N.J. 1976) (routine rectal and testicle searches conducted in a debasing manner and not for any genuine security purpose constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments).

101. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 159 (S.D.N.Y. 1977).

102. Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981).

103. *Id.* at 1119.

104. Smith v. Fairman, 687 F.2d 122; Sterling v. Cupp, 625 P.2d 132 (Or. 1981).

105. Smith v. Fairman, 687 F.2d 122; Sterling v. Cupp, 625 P.2d 132 (Or. 1981).

tion of privacy.

This limited protection (i.e. excluding genitals and breasts), however, is not enough. Because of the imbalance of power in prison,[106] the possibilities of rape and other forms of sexual abuse dramatically increase if male guards are allowed to touch the prisoners in any way.[107] Any touching, except that in a *bona fide* emergency,[108] should therefore be viewed as a violation of the fourth amendment and should not be permitted.[109]

C. *Freedom from Sexual Exploitation*

The right to privacy, as set forth in *Roe* and its progeny, encompasses the freedom to make certain important decisions.[110] Although the right to privacy has been narrowly interpreted, the Supreme Court has recognized at least the need for autonomy in making decisions related to reproduction.[111] Since a risk in any sexual relationship between a female inmate and a male guard is the possibility of pregnancy, the choice of whether or not to participate in that relationship should be protected by *Roe*. Any choice involving autonomy and dignity in decision making related to procreation must necessarily be recognized in the fourteenth amendment notion of liberty.

Sexual relationships between inmates and guards are the product of sexual exploitation and cannot be defined as voluntary.[112] While most prisons have a policy that guards may not "fraternize" with inmates,[113] that policy does not afford the prisoner adequate protection.[114] Often a prisoner will maintain a

106. *See supra* notes 1-11 and accompanying text.

107. *See supra* notes 2-19 and accompanying text. *But cf.* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 159 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 118 (2d Cir. 1978), *rev'd on other grounds sub nom.*, Bell v. Wolfish, 441 U.S. 520 (1979).

108. Ruiz v. Estelle, 666 F.2d 854, 866 (5th Cir. 1982) (only in a bona fide emergency may the officer in charge depart from standards governing the use of force).

109. Violation of the fourth amendment in this sense is a violation of the compound of privacy found within that amendment. *See generally* Singer, *supra* note 68, at 671-84.

110. Roe v. Wade, 410 U.S. 113 (1973); *See supra* notes 64-67 and accompanying text.

111. *Id.*

112. Telephone interview with Dr. Jan Mickish, Professor of Criminology, Ball State University (Sept. 16, 1982).

113. *See, e.g.*, United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 159 (S.D.N.Y. 1977).

114. *See supra* notes 1-11 and accompanying text.

sexual relationship with a guard because she has been threatened with some form of further punishment if she does not cooperate.[115] Generally, women prisoners do not voice complaints due to fear for their own safety and because they doubt that any action will be taken to prevent the carrying out of the threats or the sex abuse.[116]

The pattern of sexual exploitation which pervades prisons may constitute cruel and unusual punishment under the eighth and fourteenth amendments.[117] If the patterns of exploitation rise to the level of an eighth amendment violation, the prisoner's right to be free from sexual exploitation has been violated.[118] This right may be included within the penumbra of the eighth amendment and should therefore be included within the protected zone of privacy articulated in *Griswold*.[119] Thus, under *Roe* and *Griswold* the prisoner would have a right to privacy which includes freedom from forced sexual relationships.

Since the right to privacy is fundamental, it may be infringed upon only if the government shows a compelling state interest.[120] Because the power imbalance in the prisoner-guard relationship is so great, government itself must eliminate sexual harassment in prison or assume responsibility for prisoner ex-

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115. Telephone interview with David Klein, Branch Chief of Northern Westchester District Attorney's Office, New York (March 23, 1983). Recently two guards at Bedford Hill's were charged with official misconduct and one with rape as a result of coercive sexual encounters even though there was no physical force involved. Id.

116. *Id.*

117. Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) For conduct to be characterized as "cruel and unusual" under the eighth amendment, it must not be spontaneous, but rather, due to conditions which make imprisonment intolerable. *Id.* at 1032.

118. The basic concept which underlies the eighth amendment is nothing less than the dignity of men (women). Trop v. Dulles, 356 U.S. 86, 100 (1958). To prove that sexual exploitation rises to the level of an eighth amendment violation, there are three principal tests which must be applied:

1. The punishment in question must not shock the collective conscience of our society;

2. The punishment must not be unnecessarily cruel; and

3. The punishment not go beyond the legitimate goals of the state.

Albert, *supra* note 14, at 40. The failure to provide an inmate with an environment that does not impair his physical and mental health violates due process. Failure to provide adequate living space and to provide security violates the eighth amendment. Adams v. Matthias, 458 F. Supp. 302 (S.D. Ala. 1978).

119. Griswold v. Connecticut, 381 U.S. 479 (1965).

120. Carey v. Population Services International, 431 U.S. 678 (1977).

ploitation. The government's inaction in this case is as harmful as pointedly condoning the activity.[121] Therefore, the relevant question is whether the government has a compelling interest not to interfere in the sexual exploitation in prisons. Unless the government has an interest in maintaining the power structure and the sexual exploitation of female prisoners, a woman prisoner's right to be free from sexual harassment in prison, implicit within the right of privacy, has been violated.

IV. Inadequate Justifications for Infringement upon Human Dignity

The right to dignity and autonomy in prison has not yet been recognized as fully as is necessary to protect women prisoners adequately.[122] Generally, inmates retain rights that are not inconsistent with prisoner status or with government interests in rehabilitation and institutional security.[123] Because women prisoners are generally less violent than male prisoners,[124] institutional security, absent a *bona fide* emergency,[125] should not be the chief factor in establishing the parameters of female prisoners' rights. For security reasons it may be necessary to conduct body searches to keep the prison free from contraband.[126] However, even though the purpose of the search is legitimate, if it "broadly stifle[s] fundamental personal liberties"[127] it may not be pursued if the desired end can be reached by narrower means.[128] Since a body search by a male is an invasion of the woman's right to privacy, another less intrusive procedure must be followed.

In *United States v. Lilly*[129] the Fifth Circuit held that since the prisoner did not have notice that there would be random

121. Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment).

122. *See infra* notes 123-159.

123. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974) (correctional inmates retain first amendment communicative rights which are not inconsistent with prisoner status or with governmental interests in institutional security and rehabilitation). *See also supra* notes 12-19 and accompanying text.

124. CHAPMAN, *supra* note 11, at 5.

125. 666 F.2d at 866.

126. *See supra* note 20 and accompanying text.

127. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

128. *Id.*

129. 576 F.2d 1240 (5th Cir. 1978).

body searches, performing them was unreasonable and in contravention of her fourth amendment rights.[130] Because notice is required, there should never be a situation in which a female guard is not on duty to perform the necessary search. It is an infringement of a woman's dignity and fundamental right to privacy to be searched by,[131] or in the presence of,[132] male guards, when there is a narrower means to achieve the governmental objective. There is therefore *no* institutional security interest absent an extreme, *bona fide* emergency, strong enough to infringe upon the prisoner's right to dignity. Thus, a male guard should never have occasion to touch a female inmate.

Certainly, the government has no rehabilitation interest in subjecting prisoners to unnecessary observation or touching by guards of the opposite sex.[133] The government's reason for infringing upon the prisoner's right to privacy has been based on the justification that guards must be offered equal job opportunity as mandated by Title VII of the Civil Rights Act of 1964.[134] Ironically, inmate privacy rights have evolved from the same act which protects job opportunities for opposite-sexed guards in the prisons.[135]

In addition, the right to privacy for prisoners, upon which the right to be free from sexual harassment is based, has evolved as a defense against claims by female guards who seek equal access to employment in male institutions.[136] Institutional secur-

130. *Id.* at 1246-47.

131. *See supra* notes 93-109 and accompanying text.

132. *Id. See also* Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981). One of the defenses the prison can raise when charged with conducting a search in contravention of the fourth amendment is that the prisoner gave consent to the search. At least one court in dissent has recognized that consent cannot be the product of a threat that the search will be done in the presence of males if a woman prisoner does not consent to the search. Patently any consent under these circumstances is the product of coercion. Such a manipulation of a prisoner's right is not necessary for institutional security. United States v. Lilly, 576 F.2d at 1248 (Thornberry, J., dissenting).

133. 514 F. Supp. at 203-04.

134. 42 U.S.C. § 2000e-2(a)(i) (1976) provides in relevant part: "(a) [i]t shall be an unlawful employment practice for an employer - (1) to fail to or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . ."

135. *See infra* notes 136, 137, 141.

136. *See, e.g.*, Meith v. Dothart, 418 F. Supp. 1169 (N.D. Ala. 1976), *rev'd sub nom.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (upheld an Alabama corrections regulation which permitted the state personnel department to exclude women from working as

ity[137] and privacy[138] have been used as a basis to limit female guards equal job opportunities. In *Dothard v. Rawlinson*,[139] the Supreme Court denied a woman employment in an Alabama maximum security institution for fear that she would be raped by an inmate. Appellants' argument was based in part on the inmates' right to privacy.[140]

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guards in male maximum security prisons on the basis of institutional security and privacy); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769, 781-82 (S.D. Ohio 1981) (rejected the existence of privacy rights as a defense to Title VII charge); Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980) (administrative remedies available to adjust any infringement on male inmate's privacy rights in order to allow equal employment for female guards); Iowa Dept. of Soc. Serv. v. Iowa Merit Emp. Dept., 261 N.W. 2d 161, 165 (Iowa 1977) (placing female guard in a capacity where she would conduct pat or strip searches on male inmates violated the inmates' constitutional right to privacy); Long v. California State Personnel Board, 41 Cal. App. 3d 1003, 116 Cal. Rptr. 562 (1977) (because of adverse effects females may have on wards, being a male is a bona fide occupational qualification (BFOQ) for being a chaplain in the facility); Reynolds v. Wise, 375 F. Supp. 145, 151 (N.D. 1974) (selective work responsibilities among correctional officers is reasonable to ensure privacy of inmates and does not discriminate against women).

137. Institutional security was the decisive factor in *Dothard*, 433 U.S. 321, 336. The likelihood that incarcerated offenders would assault and rape women guards was seen as a threat to prison security. Thus, being male was a BFOQ to be a prison guard as permitted by § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1976). Under Title VII sex may be a bona fide criterion but only in very limited circumstances. *See* Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228 (5th Cir. 1969) (employer must prove that he had reasonable cause to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job in order for sex to qualify as a BFOQ). The ruling in *Dothard* was the first enunciation by the court that each woman could not decide for herself whether to risk the potential consequence of taking a contact position within a prison. 433 U.S. at 336.

Institutional security and privacy rights were also major factors in Long v. California State Personnel Board, 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974), where the court looked at the consequences of no gender based discrimination in hiring a chaplain for a boys' correctional facility. The court found that hiring a female chaplain would necessarily involve a loss of privacy rights for the boys since she would have a lot of contact with them; therefore, they couldn't be informal in their living quarters. Since she could not physically control them, she could be physically or sexually attacked by them. Therefore, she could not take the position of chaplain. Because a woman's security is not a bona fide reason for sex based discrimination, *id.* at 1013, the court looked to the interest of the state and prison administration. They found that the state interest was rehabilitation, and if a boy/man raped a female chaplain, he was not being rehabilitated. The court also did not view the duty of an employer to refrain from discrimination based upon sex as requiring him to alter his facility or incur any costs just to suit the sex of the person involved. *Id.* at 1015.

138. *See* Hudson v. Goodlander, 494 F. Supp. 890, 893 (D. Md. 1980) (male inmate's privacy rights violated by the assignment of female guards to posts where they could view him entirely in the nude); Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1973).

139. 433 U.S. 321.

140. *Id.* at 346 n.5 (Marshall, J., dissenting).

In his dissenting opinion, Justice Marshall stated:

> It is strange indeed to hear state officials who for years have been violating the most basic principles of human decency in the operation of their prisons suddenly become concerned about inmate privacy. It is stranger still that these same officials allow women guards in contact positions in a number of non maximum security institutions, but strive to protect inmates' privacy in the prisons where personal freedom is most severely restricted. I have no doubt on this record that appellants' professed concern is nothing more than blatant discrimination.[141]

The absurdity of the argument that women would be raped in men's prisons is apparent when "the proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities . . . but to take swift and sure punitive action against the inmate offenders."[142] Further, this desire to protect women from rape does not extend to women's prisons, where the chances of rape by male guards occurring within prison walls are far greater. The greatest irony is that at no time has a male guard brought a Title VII suit to assert his right to work in a women's institution. It appears that any advances in equal job opportunities for women guards or prisoners' rights in general are merely the result of decisions ensuring males equal job opportunities.

The right to privacy and dignity in prison has also evolved from the assertion by both male[143] and female[144] prisoners that they have a right to avoid unwanted intrusions by guards of the opposite sex. When the prisoner asserts his or her right of privacy, the state then asserts the provisions of Title VII as a defense. In *Forts v. Ward*,[145] the court granted initial injunction,

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141. *Id. See generally* Comment, *Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoners' Privacy Rights*, 65 IOWA L. REV. 428 (1980); Note, *Balancing Inmates' Right to Privacy with Equal Employment for Prison Guards*, 4 WOMEN'S RIGHTS L. REP. 243 (Summer 1978).

142. 433 U.S. at 346 (Marshall, J., dissenting).

143. *See, e.g.*, Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982); Bowling v. Enomoto, 514 F. Supp. 201 (N.D. Cal. 1981); Hudson v. Goodlander, 494 F. Supp. 890 (D. Md. 1980); Sterling v. Cupp, 625 P.2d 123 (Or. 1981).

144. *See supra* notes 93-109 and accompanying text.

145. 434 F. Supp. 946 (S.D.N.Y. 1977).

reasoning that the strictures of Title VII do not mandate opportunities to "Peeping Toms". The court stated that since a prison must have continual staff surveillance even the most considerate male guard cannot avoid invading an inmate's privacy.[146] The initial injunction, which banned males from all areas of the prison where the privacy of the women could be invaded, was the broadest order in the entire *Forts* litigation. When the district court's decision was modified[147] and men were allowed to guard the sleeping area at night, the appellate court gave greater weight to the right to equal employment. The court held the inmate's privacy interest while sleeping was not sufficient to impair employment rights for male guards, provided the prisoners were given suitable sleepware.[148] Therefore, on a hot, airless night, an inmate must wear a heavy "Dr. Denton pajama"—or other suitable sleepwear—if she does not want to be viewed in the nude.[149] The court made it clear that any interest in privacy and dignity that the inmates have is carved out of the interest in job opportunity.

The majority of cases, however, have balanced the individual's right to employment, without regard to his or her sex, against the inmate's right to privacy and have created selective work responsibilities among correctional officers.[150] In *Forts*, the male guards were enjoined from the living and infirmary areas.[151] The court then articulated administrative steps,[152] cre-

146. *Id.* at 949.
147. 621 F.2d at 1217.
148. *Id.*
149. *Id.* at n.11.
150. *See* Forts v. Ward, 471 F. Supp. at 1095; *Gunther*, 462 F. Supp. at 952, 957; *Harden*, 520 F. Supp. at 781.
151. 471 F. Supp. at 1102.
152. *Id.* at 1097.

> A directive was eventually promulgated entitled GUIDELINES FOR ASSIGNMENT OF MALE AND FEMALE CORRECTION OFFICERS. The stated purpose of the directive was to:
> 1. Maximize full employment opportunities regardless of sex.
> 2. Minimize intrusion on individual privacy.
> 3. Establish guidelines to accomplish both of the above stated goals.
> The directive established various guidelines which reveal the State's obvious awareness of the problems, and its concern for the appropriate resolution:
> 1. Security staff members of the opposite sex to the inmate population are not to be permanently assigned to shower areas

ated by the prison, which would assure both the inmate's right of privacy and the government's interest in security.

However, the balancing approach implemented at Bedford Hills is proving to be inadequate;[153] thus, other remedies for sexual harassment of women prisoners must be developed. The right to bodily privacy and dignity of female prisoners must be taken seriously. "We must probe more deeply for the real causes—otherwise we continue blindly and blandly to place bandaids on cancerous sores."[154]

V. CONCLUSION

Women incarcerated in American prisons face a punishment beyond that imposed by the courts. They are systematically degraded by being forced to endure invasions of their personal dignity and autonomy. They are coerced into sexual relationships with male guards, viewed in the nude, and sometimes raped and sexually abused by them. Some facilities have set up guidelines but those remedies do not effectively protect the prisoners;[155] they merely cover-up a deeply rooted social problem. Removing males from women's prisons is not "the" answer. Such action

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> where one has to work in open view of showering inmates.
> 2. Escort duty outside of a facility shall be performed only by officers of the same sex as the inmates to be escorted.
> 3. At least one officer of the same sex as the inmate population at a facility must be assigned to each housing block.
> 4. No assignment is to be made requiring an officer to conduct strip frisks of inmates of the opposite sex.
> * * * * * * *
> 7. Unless emergency conditions dictate otherwise, correction officers of the opposite sex shall announce their presence in housing areas to avoid unnecessarily invading the privacy of inmates of the opposite sex.
> However, Guideline 7, for valid security reasons, is not always honored.

Id. See also Dawson v. Kenrick, 527 F. Supp. at 1317 (after finding an invasion of female inmate's privacy because male guards could peer into the women's cells at any time and view the prisoners, the court ordered defendants to submit a plan (like the one in *Forts*) to accommodate the prisoner's right to privacy).

153. One guard at Bedford Hills, the institution involved in *Forts*, was recently indicted for rape and official misconduct and another pled guilty to official misconduct. Inmates at other institutions continue to complain of sexual abuse by male guards. *See supra* notes 7, 11, and 116.

154. BURKHART, *supra* note 7, at 144.

155. *See* Appendix A *infra*, for state established guidelines regarding male guards in women's prisons.

will not eliminate the sexism and paternalism in women's prisons that is characteristic of American society in general, but the analysis of the harassment in prisons due to their presence provides a theoretical base from which a remedy may spring.[156]

There exists a right to bodily privacy. This right protects women prisoners from sexual harassment. The right to privacy lays the foundation for prisoners to assert control over their sexual integrity and dignity in prison. There is no justification for any diminution of that right. A prison may formulate rules and regulations necessary to the safe and efficient operation of the prison, but those objectives should never outweigh a prisoner's right to be free from sexual degradation.

*Laurie A. Hanson**

156. Letter from Dr. Jan Mickish to Laurie Hanson (Sept. 17, 1982).

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APPENDIX A

CONTACT INC., WOMEN OFFENDER SURVEY (1982) (unpublished survey).

FEMALE CORRECTIONAL FACILITY/STATE	TYPE OF HOUSING	PERCENTAGE OF MALE CO'S	SPECIAL TRAINING RESTRICTIONS OF MALE CO'S
Alaska: Ketchikan Correctional Ctr.	Women only and Co-ed	0%	Male officers may not be on duty without a female officer present; males may not search females.
ALASKA: Fairbanks	Women only	86%	None
ALASKA: State Correctional Ctr.	Both sexes: separate/not co-correctional	12%	Body searches done by female officers, if done by male officer, female must be present. Same sex supervision.
ARIZONA: Center for Women	Women only	70-72%	Men cannot do strip searches or obtain urine specimen.
ARKANSAS: Women's Unit	Women only	N/A	N/A
CALIFORNIA: Correctional Institution for Women	Women only	40%	Male C.O.s cannot conduct skin searches, transporting, urinalysis, and showers.
COLORADO: Women's Correctional Facility	Women only	3%	Transporting and shaking down. Training for all CO's is co-ed.
CONNECTICUT: Correctional Institution	Women only	23%	Cannot transport offgrounds without female staff; cannot pat/strip search; cannot staff full shift in living unit without female staff.
FLORIDA: Correctional Institution	Women only	20%	Male officers are not allowed in dorms or other areas where female offenders live without female CO's.
IDAHO: North Idaho Correctional Institution.	Female compound separate: school is co-ed.	50%	Very little contact inside female compound.
INDIANA: Women's Prison	Women only	12.5%	Males are used for security in the yard and for escort duty. Never alone in a housing unit.
IOWA: Women's Reformatory	Women only	15%	There must be one female CO on duty at the same time as the male CO
ILLINOIS: Dwight Correctional Ctr.	Women only	---	Male officers may not shakedown inmates. Also should not get self in "one on one" situation.
KANSAS: Correctional Institution at Lansing	Co-correctional	42%	Orientation training; annual 2-week training covers this topic
KENTUCKY: Correctional Institution for Women	Women only	20%	Males do not search or work in living areas.
LOUISIANA: Correctional Institute for women	Women only	7%	Male security officers are utilized at the control centers, the outer perimeter and to aid in disturbances.
MARYLAND: Correctional Institution for Women	Women only	10%	A male officer cannot transport a female (one on one), and male officers have limited assignments in living areas.
MAINE: Correctional Center	Co-correctional	90%	No restrictions; a training program being developed.
MASSACHUSETTS: Correctional Inst.	Women only	20%	Males do not work without female on housing unit.

MICHIGAN: Huron Valley Women's Facility	Women only	9%	None
MINNESOTA: Correctional Facility	Women	Have 1 male	Proper ways of handling self with women, and currently there is a policy to not have opposite sex in living units.
MISSOURI: Chillicothe Correctional Center	Co-correctional	20%	None
NEBRASKA: Center for Women	Women only	14%	Male officers are not assigned to work in the living units and cannot perform any type of searches on inmates or female visitors. There are no restrictions as to males becoming involved in physical restraint situations.
NEW MEXICO: Radium Springs Center for Women	Women only	23%	Must do all jobs same as female COs except for personal searches and long distance transport.
NEW YORK: Albion Correctional Facility	Women only & co-correctional	73%	Males must announce their presence in housing areas. Same sex officer must conduct strip frisks and accompany on outside trips.
NEW YORK: Bedford Hills Correctional Facility	Women only	33%	No body searches by males and no males alone in living areas.
NORTH CAROLINA: Correctional Center	Women only	25%	Males are never alone with a resident, and don't conduct searches or man a dorm.
NORTH DAKOTA: Penitentiary	Segregated Not co-ed	None	N/A
OHIO: Reformatory for Women	Women only	30%	Male CO's never permitted in sleeping areas without an inmate-may assist as to restraining.
OKLAHOMA: Mabel Bassett Correctional Center	Women only	30%	Male CO's will announce themselves before entering a dorm area.
OREGON: Women's Correctional Center	Women only	---	No male CO's allowed. Male personnel must announce presence in living units. Cannot observe inmates in undressed state unless for a bona fide emergency; male staff not allowed to shake down females unless in emergency.
PENNSYLVANIA: State Correctional Institution	Women only	25%	Males are not assigned to female housing units, may not escort females by themselves, and are not to place hands on inmates.
SOUTH DAKOTA: Women's Correctional Facility	Women only	0	The Penitentiary has received an OK for a bona fide occupational qualification for females only in the women's facility.
TENNESSEE: Prison for Women	Women only	35%	Searching restrictions
TEXAS: Department of Corrections	Women only	29%	Primarily men work pickets and outside; no men are allowed in sleeping quarters.
UTAH: Women's facility	Women only	0	N/A
VERMONT: Chittenden Community Correctional Center	Co-correctional	90%	Must be accompanied by female officer at all times in female areas.
VIRGINIA: Correctional Center for Women	Women only	20%	Living quarters are not staffed by males.

WASHINGTON: Purdy Treatment Center	Women only	50%	Pat searches conducted by female staff when possible.
WISCONSIN: Taycheedah Correctional Inst.	Women only	33%	Men are not permitted involvement in routine personal searches, bathroom supervision, etc.
WYOMING: Women's Center	Women only	0	Provide special traning for male officers in areas of transport, floor responsibilities.
PUERTO RICO: Industrial School for Women	Women only	50%	Males receive training and attend seminars.
FEDERAL INSTITUTIONS			
CALIFORNIA, PLEASANTON FCI		66%	Have both male and female CO's; utilize female officers for strip searches of female inmates.
ILLINOIS, CHICAGO FCI		---	For escorting officers, one male to a group of women, never one to one. Strip searches by women only.
LEXINGTON, KENTUCKY FCI	Co-correctional	68%	---
WEST VIRGINIA, ALDERSON FCI		52%	Male CO's are not routinely permitted to pat or strip search female inmates.