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# CONSTITUTIONAL LAW—CROSS- GENDER PAT SEARCHES: THE BATTLE BETWEEN INMATES AND CORRECTIONS OFFICERS ENTERS THE COURTROOM

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CONSTITUTIONAL LAW—CROSS-GENDER PAT SEARCHES:  
THE BATTLE BETWEEN INMATES AND CORRECTIONS OFFICERS EN-  
TERS THE COURTROOM

INTRODUCTION

These pat-downs were delivered by both male and female guards and ran the gamut from perfunctory to full-out inappropriate.

Most of the male guards made a great show of performing the absolute minimal frisk necessary, skimming their fingertips along your arms, legs, and waist in such a way that said “Not touching! Not touching! Not really touching!” They didn’t want any suggestion of impropriety raised against them. But a handful of the male guards apparently felt no fear about grabbing whatever they wanted. They were allowed to touch the lower edge of our bras, to make sure we weren’t smuggling goodies in there—but were they really allowed to squeeze our breasts? . . . Other male COs were brazen, like the short, red-faced young bigmouth who asked me loudly and repeatedly, “Where are the weapons of mass destruction?” while he fondled my ass and I gritted my teeth.<sup>1</sup>

Society is constantly evolving, adapting to the standards and sensitivities of the current population. This evolution has been marked with a number of great strides, many of which we take for granted today. Women, for instance, assume they will not be discriminated against in employment decisions; not too long ago that right would have appeared anything but certain.<sup>2</sup> Prisoners’ rights have also changed substantially since the days when the prohibition on cruel and unusual punishment was understood solely as a prohibition on barbarous methods of punishment.<sup>3</sup> Unfortunately, as societal standards evolve, there are conflicts. This Note addresses one such conflict: the use of cross-gender pat searches in United States prisons pits prisoners’ rights—including constitutional rights such as

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1. PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN’S PRISON* 236 (2010).

2. See *infra* notes 137-180 and accompanying text detailing the fight of female guards in gaining access to careers in corrections, including the effect of Title VII in making corrections careers available to women.

3. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

the right to privacy, freedom from cruel and unusual punishment, and others—against the right of employees to be free from gender-based discrimination as guaranteed by Title VII of the Civil Rights Act of 1964.<sup>4</sup>

A pat search, sometimes referred to as a pat frisk, is a clothed body search in which a correctional officer feels a prisoner's clothed body.<sup>5</sup> Pat searches are an integral component of prison security, allowing the prison to detect and control contraband.<sup>6</sup> One prison training manual, describing a pat search of a female inmate, instructed a guard

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4. 42 U.S.C. § 2000e-2(a) (2006). While this Note discusses the issue in terms of cross-gender pat searches, the conflict itself is not so limited. This conflict will arise wherever prisoner privacy rights are at odds with employment determinations.

The modern sensitivity to the significance of gender in American life and law has made it inevitable that cases will arise where gender-based legal contentions conflict. This case arises in a context where that conflict can be expected to recur with some frequency: privacy rights versus employment rights. Members of one sex assert a privacy right not to have their unclothed bodies viewed by members of the opposite sex. At the same time, members of one sex assert an employment right not to be discriminated against in job opportunities because of their gender.

*Forts v. Ward*, 621 F.2d 1210, 1211-12 (2d Cir. 1980).

5. U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT NUMBER 5521.05, SEARCHES OF HOUSING UNITS, INMATES, AND INMATE WORK AREAS § 552.11(a), at 2 (1997); *see* STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, DIRECTIVE NO. 4910, CONTROL OF & SEARCH FOR CONTRABAND § III(B)(1), at 2 (2001) (describing a “pat frisk” as “a search by hand of an inmate’s person and his or her clothes while the inmate is clothed, except that the inmate shall be required to remove coat, hat, and shoes”).

6. *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (“It is undisputed that pat searches, both on a routine basis and prior to unannounced ‘cell shakedowns,’ are essential to maintaining proper prison security.”); *Madyun v. Franzen*, 704 F.2d 954, 960 (7th Cir. 1983). While an argument may be made that pat searches are of decreasing importance as new technologies in security take their place, this argument is non-essential to the conclusion reached in this Note; as such the author has chosen to concede the importance of pat-searches throughout.

The Federal Bureau of Prisons divides contraband into two categories, hard contraband and nuisance contraband. U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT NUMBER 5580.07, PERSONAL PROPERTY, INMATE § 553.12[b], at 10 (2005). “[H]ard contraband [is] any item which poses a serious threat to the security of an institution[.] . . . includ[ing] weapons, intoxicants, and currency (where prohibited).” *Id.* “[N]uisance contraband” is anything not hard contraband, which is not currently authorized or which poses “a threat to security or its condition or excessive quantities of it present a health, fire, or housekeeping hazard.” *Id.* at 11. Examples of nuisance contraband include “excessive accumulation of commissary, newspapers, letters, or magazines which cannot be stored neatly and safely in the designated area; [as well as] food items which are spoiled or retained beyond the point of safe consumption.” *Id.*

to “[u]se a flat hand and pushing motion across the [inmate’s] crotch area.” The guard must “[p]ush inward and upward when searching the crotch and upper thighs of the inmate.” All seams in the leg and the crotch area are to be “squeeze[ed] and knead[ed].” Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be “flattened.”<sup>7</sup>

A cross-gender pat search is, as the name implies, a pat search performed by a prison staff member of the opposite sex.<sup>8</sup> Because of the inherently personal nature of having a member of the opposite sex feeling a prisoners’ body, numerous challenges have arisen to this practice within the last few decades.<sup>9</sup>

In June 2009, the National Prison Rape Elimination Act (PREA) Commission brought this issue to the forefront with the issuance of proposed standards meant to eliminate rape and sexual abuse in prisons.<sup>10</sup> The Commission, recognizing the increased op-

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7. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (alterations in original) (citations omitted).

8. Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 229, 259-62 (2003). A 2001 Federal Bureau of Prisons training video instructs officers on how to perform cross-gender pat searches. DVD: Federal Bureau of Prisons Presents Pat Search Procedures (Department of Justice: Federal Bureau of Prisons 2001) (on file with author). First the video depicts a male officer searching a female inmate. *Id.* To search the inmate’s breast area, the officer stands at her side. *Id.* With one hand guarding his crotch area, the officer places his other hand vertically along the inmate’s breast bone with the back of his hand facing towards her breast. *Id.* He then runs his hand down circling under the breast and upwards towards the armpit area applying sufficient “pressure to detect any contraband.” *Id.* To search the groin area the officer stands to the side of the inmate, and, with her arm raised, he places his “palm flat on the lower abdomen with the fingers aligned with the zipper.” *Id.* The officer’s other hand is placed flat, palm facing inwards, “below the waistband on the buttocks.” *Id.* In a continuous, circular sweeping motion the officer “run[s] both hands from the starting point to the ankle area, “with special” attention paid to “seams, waistbands, zippers and buttons.” *Id.*

A cross-gender pat search of a man is done principally while standing facing the inmates back with his arms raised. *Id.* The corrections officer searches the chest and abdomen areas by standing behind the inmate and reaching her arms around and feeling down his front. *Id.* To further search the lower abdomen, groin, and shoe areas, the officer moves to a position “slightly to the side [and rear] of the inmate.” *Id.* The officer places her “palm flat, . . . one hand directly below the waistband with fingers aligned with the zipper [and] [t]he other hand, palm flat, directly below the waistband on the buttocks.” *Id.* She then uses a continuous circular sweeping motion down to the foot, “pay[ing] special attention to the inmate’s lower abdomen and groin.” *Id.*

9. Smith, *supra* note 8, at 259-62.

10. NATIONAL PRISON RAPE ELIMINATION COMM., REPORT 1 (June 2009) [hereinafter PREA REPORT]. The Commission was formed as a result of the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15606 (2006). “The Commission . . . carr[ie]d out a comprehensive legal and factual study of the penalogical, physical, mental, medical, so-

portunity for sexual assault during cross-gender supervision, called for the cessation of non-emergency cross-gender pat searches.<sup>11</sup> The PREA Commission's proposed standards went to the Attorney General for consideration in enacting final Prison Rape Elimination Act standards.<sup>12</sup>

The PREA Commission is not the only group to recognize a need for change in this area. The American Bar Association (ABA) recently adopted a new edition of its Standards on the Treatment of Prisoners.<sup>13</sup> One new standard limits cross-gender pat searches to emergency situations.<sup>14</sup> In a memorandum to the ABA Criminal Justice Council and interested parties explaining the rationale for the proposed (now adopted) changes, Professor Margo Schlanger noted that "cross-gender searches have grave implications for the privacy interests of prisoners, and allow access to prisoners' bodies in ways that can be abused."<sup>15</sup>

On February 3, 2011, the Department of Justice (DOJ) promulgated its own set of proposed Prison Rape Elimination Act standards.<sup>16</sup> The DOJ standard on cross-gender supervision allows

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cial, and economic impacts of prison rape in the United States." *Id.* § 15606(d)(1). Based on its findings, the Commission released a report with "recommended national standards for reducing prison rape"; "recommended protocols for preserving evidence and treating victims of prison rape; and" a "summary of all materials relied on by the Commission" when preparing its report. *Id.* § 15606(d)(3)(B).

11. PREA REPORT, *supra* note 10, at 62-63. "Except in the case of emergency or other extraordinary or unforeseen circumstances, the facility restricts nonmedical staff from viewing inmates of the opposite gender who are nude or performing bodily functions and similarly restricts cross-gender pat-down searches." NATIONAL PRISON RAPE ELIMINATION COMM., STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS PP-4, at 11 (June 2009).

12. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6,248, 6,249 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt 115) ("Pursuant to PREA, the final rule adopting national standards 'shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission.'" (quoting 42 U.S.C. at 15607(a)(2))).

13. ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD) TREATMENT OF PRISONERS (2010), <http://www.abanet.org/crimjust/standards/treatmentprisoners.html>.

14. *Id.* at #23-7.9(b) ("Except in exigent situations, a search of a prisoner's body, including a pat-down search or a visual search of the prisoner's private bodily areas, should be conducted by correctional staff of the same gender as the prisoner.").

15. Memorandum from Margo Schlanger, Rep., Task Force on Treatment of Prisoners, to American Bar Association Criminal Justice Section 28 (June 12, 2009) (on file with author). Professor Schlanger also noted that "[t]he PREA Commission invested substantial time into documenting the resulting problems, and developing solutions. This proposed Standard matches the pending PREA standards on this point." *Id.*

16. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. at 6,248. Upon receipt of the PREA Commission's proposed standards "[t]he

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cross-gender pat searches in most circumstances.<sup>17</sup> In justifying its decision not to adopt the PREA Commission's proposal prohibiting cross-gender pat searches the DOJ expressed "concern[ ] about the high cost of imposing such a general requirement, and the concomitant effect on employment opportunities for women."<sup>18</sup> Furthermore, it noted that "many agencies expressed concern that the necessary adjustments to their workforce could violate Federal or State equal employment laws."<sup>19</sup> The commentary period on the DOJ standards will end in early April, at which time further revisions may be made before a final set of standards become law for detention facilities around the country.<sup>20</sup>

In light of the determination by influential groups, including the PREA Commission<sup>21</sup> and the ABA,<sup>22</sup> that cross-gender pat searches be limited to emergency circumstances, why has this policy not been abolished? As the DOJ's proposed Prison Rape Elimination Act standards reflect, the answer lies largely in the effect a prohibition could have on prison employment practices, particularly for women working in men's prisons.<sup>23</sup> Pat searches are a principle

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Attorney General established a PREA Working Group, chaired by the Office of the Deputy Attorney General, to review each of the Commission's proposed standards and to help him prepare a draft final rule." *Id.* at 6,249.

17. *See id.* at 6278. There is an exemption available, however, for those inmates who can show that they have suffered from prior cross-gender sexual victimization while incarcerated. *Id.* ("[T]he agency shall implement procedures to exempt from non-emergency cross-gender pat-down searches those inmates who have suffered documented prior cross-gender sexual abuse while incarcerated."). The proposed standards also provide that an "agency shall train security staff in how to conduct cross-gender pat-down searches . . . in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs." *Id.* As will be discussed in greater detail later in this note, neither of these provisions are sufficient to address the numerous concerns resulting from cross-gender pat searches. *See supra* notes 85-94 (discussing a case where the Ninth Circuit found a violation of the Eighth Amendment because of the effects cross-gender pat searches can have on women who were sexually victimized *prior* to incarceration); *supra* note 275 (discussing why cross-gender pat searches can lead to Constitutional violations even when performed professionally).

18. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. at 6,253.

19. *Id.*

20. *Id.* at 6248. Final standards adopted by the Attorney General will be promulgated to the states within ninety days of publication and will be immediately applicable to the Federal Bureau of Prisons. 42 U.S.C. § 15607 (2006). Any state that does not comply with the final national standards risks will have its federal funding cut by 5%. *Id.* § 15607(c)(2).

21. *Supra* note 11 and accompanying text.

22. *Supra* notes 15-17.

23. *Supra* notes 20-22 and accompanying text; *see* Rebecca Jurado, *The Essence of Her Womanhood: Defining The Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U.J. GENDER SOC. POL'Y & L. 1, 39 (1999)

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means of detecting contraband.<sup>24</sup> Disallowing cross-gender pat searches would arguably prevent guards of one gender from effectively performing their job. “If a state is required to hire women as guards in its male prisons, it reasonably seems to follow that it must be allowed to utilize female guards to the fullest extent possible.”<sup>25</sup>

This Note considers the conflicting interests presented by prisoners in not being subjected to cross-gender pat searches and by corrections officers in not being discriminated against in employment opportunities. Ultimately, this Note argues that an inmate’s rights, including Constitutional rights under the Fourth and Eighth Amendments, take precedence, and therefore, cross-gender pat searches should only be performed during emergencies. There are solutions, however, that respect inmate rights while preserving employment opportunities for both male and female correctional staff. To the extent possible, these solutions must be pursued prior to implementation of a bona fide occupational qualification, thereby preserving the rights of both prisoners and corrections officers.

In Part I, this Note discusses various prisoners’ rights implicated by the use of cross-gender pat searches. In Part II, this Note turns to the rights of corrections officers in light of Title VII. Part III examines the conflicting rights and reaches the conclusion that inmate rights take precedence, and therefore, non-emergency cross-gender pat searches should be prohibited. Finally, Part IV analyzes the viability of prior solutions and briefly suggests various policies that may be implemented, given a prohibition on non-emergency cross-gender pat searches, to protect employment opportunities.

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(“When male prisoners have asserted their right to bodily privacy, the rights of the male prisoners have lost to the employment rights of female guards.”); Teresa A. Miller, *Keeping the Government’s Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 880-81 (2001) (“In balancing the penological objectives of prison officials against the privacy interest of prisoners, courts have generally held that the expectation of privacy for male prisoners is low and that the penological objective of eliminating discrimination against women in staff pursuant to Title VII mandate is high.”).

24. See U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5500.12 CORRECTIONAL SERVICES PROCEDURES MANUAL § 208(3), at 10 (2003); U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5521.05 SEARCHES OF HOUSING UNITS, INMATES, AND INMATE WORK AREAS § 552.11(a), at 2 (1997) (stating that “[s]taff may conduct a pat search of an inmate on a routine or random basis to control contraband”); cf. *id.* § 552.11(b), at 3 (requiring a reasonable belief of contraband, or a good opportunity to conceal contraband before performing a visual (strip) search).

25. *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982).

## I. PRISONERS: WHAT'S THE BIG DEAL?

Cross-gender pat searches have been subjected to challenges by prisoners on a number of grounds, many of which involve rights guaranteed by the Constitution of the United States. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”<sup>26</sup> As a result, “[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”<sup>27</sup> Inmate claims are not limited to constitutional rights, however. These claims may be based on federal statutes or state constitutions. Prohibiting cross-gender pat searches may also be justified based on a desire to avoid sexual assault by prison staff.

### A. *Constitutional Claims Subject to the Turner v. Safley Reasonableness Test*

Constitutional claims brought by prisoners can be divided into two categories. The first category, including the majority of constitutional claims, are those claims that are subject to a four-factor “reasonableness” test set forth by the Supreme Court in *Turner v. Safley*.<sup>28</sup>

In *Turner*, the Court struck the Eighth Circuit’s use of a strict scrutiny standard in examining inmate constitutional rights.<sup>29</sup> The Court held that the use of a strict scrutiny test “would seriously hamper the [prison administration’s] ability to anticipate security problems and to adopt innovative solutions to the intractable problems” facing them.<sup>30</sup>

Instead, the Court applied an analysis that determines whether a prison regulation “is reasonably related to legitimate penological interests.”<sup>31</sup> In evaluating the reasonableness of a prison regulation, the Court established a four-factor balancing test: (1) whether

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26. *Turner v. Safley*, 482 U.S. 78, 84 (1987). A prisoner retains, for instance, the right to be free from discrimination under the Equal Protection Clause. *Id.*

27. *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)).

28. *See Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (recognizing that the Supreme Court has applied the standard in *Turner* to “‘all circumstances in which the needs of prison administration implicate constitutional rights’” (quoting *Washington v. Harper*, 494 U.S. 210, 224 (1990))). This four-factor test will heretofore be referred to as the “*Turner* test.”

29. *Turner*, 482 U.S. at 81. In *Turner*, inmates challenged the constitutionality of two prison practices: one limiting the ability of inmates to send mail to inmates in other institutions, and the other limiting the ability of two inmates to marry. *Id.*

30. *Id.* at 89.

31. *Id.*

there is “a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest”; (2) “whether there are alternative means of exercising the right that remain open to prison inmates”; (3) “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”; and (4) the existence of any “ready alternatives” as an indicator of the reasonableness of the regulation.<sup>32</sup>

### 1. First Amendment Challenges

The First Amendment of the Constitution guarantees, among other rights, the free exercise of religion.<sup>33</sup> The First Amendment limits not only those burdens imposed by the federal government, but also those imposed by the states through the Fourteenth Amendment.<sup>34</sup> As a result, “reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments.”<sup>35</sup> In fact, religion is often encouraged for prisoners because of its potential rehabilitative effects.<sup>36</sup>

Because of the importance that Congress placed on religion for inmates, it enacted the Religious Freedom Restoration Act (RFRA), and later, the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>37</sup> These federal statutes require the government to meet a much higher compelling government interest standard as opposed to the *Turner* reasonableness standard when enacting policies that infringe on an inmate’s religious freedoms.<sup>38</sup> As a result, those inmates who have a First Amendment claim would do better to bring a claim under either RFRA or RLUIPA. Since courts do not decide a constitutional issue when a case can be

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32. *Id.* at 89-90.

33. U.S. CONST. amend. I.

34. *Cruz v. Beto*, 405 U.S. 319, 322 (1972), *superseded by statute*, 42 U.S.C. § 2000bb-1, *as recognized in* *Allah v. Menei*, 84 F. Supp. 1056 (E.D. Pa. 1994).

35. *Madyun v. Franzen*, 704 F.2d 954, 958 (7th Cir. 1983) (quoting *Cruz*, 405 U.S. at 322 n.2) (internal quotation marks omitted).

36. See Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 510-11 (2005) (citing hearing testimony that “[r]eligious observance by prisoners . . . cut recidivism rates by two-thirds”). See generally *Cruz*, 405 U.S. at 319-20 (noting that the prison in question encouraged participation in certain religions, even awarding points of good merit to prisoners who attended religious services).

37. See *infra* notes 107-128 and accompanying text for a discussion of religious challenges to cross-gender pat searches under RFRA and RLUIPA.

38. See *infra* note 109 and accompanying text.

decided on a statutory basis,<sup>39</sup> while an inmate may have a claim that cross-gender pat searches violate his or her First Amendment rights, this issue is unlikely to be decided—making religiously based First Amendment challenges to cross-gender pat searches a largely academic matter.<sup>40</sup>

## 2. Fourth Amendment Challenges

The Fourth Amendment of the United States Constitution protects citizens from “unreasonable searches and seizures,”<sup>41</sup> making it an obvious choice for those inmates looking to challenge cross-gender pat searches.<sup>42</sup> These claims also offer the clearest legiti-

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39. *Forde v. Baird*, 720 F. Supp. 2d 170, 182 (D. Conn. 2010) (“Because courts generally do not reach constitutional issues if a case can be resolved on statutory grounds, and because the Court finds a violation of RFRA, it need not reach the constitutional question of whether FCI Danbury’s policy violates the First Amendment.”). Conversely, if the court did not find a violation of RFRA, using a compelling government interest test, it would not have found a violation of the *Turner* reasonableness standard under the First Amendment either.

40. This statement should not be read to suggest, however, that cross-gender pat searches do not violate the First Amendment. Rather, all that is meant is that the courts are unlikely to decide this issue while RFRA and RLUIPA are ready alternatives.

In a Connecticut District Court summary judgment decision, regarding whether cross-gender pat searches violated a Muslim inmate’s religious freedoms under both RFRA and the First Amendment, the district court did not grant summary judgment on the First Amendment issue. *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 180-81 (D. Conn. 2009). Instead, the district court found that there were remaining issues of material fact regarding whether a rational relationship existed between the asserted penological interests of security and employment and cross-gender pat searches. *Id.* The court found compelling that FCI Danbury had provided a blanket exemption to cross-gender pat searches in the past “with little or no impact on employment.” *Id.* The court further stated that FCI Danbury had “provided no evidence that exempting even the small group of other observant Muslim women would disrupt prison policy.” *Id.* Finally, there had been no evidence produced to show that other Muslim women had the same sincerely held religious belief against cross-gender pat searches, and therefore there had been no basis for a finding that exempting Ms. Forde would have a widespread effect on prison security. *Id.* Because of the remaining factual uncertainties, the court held that FCI Danbury had “not adequately demonstrated that the challenged practice furthers a legitimate penological objective.” *Id.*

41. U.S. CONST. amend. IV.

42. *See Jordan v. Gardner*, 986 F.2d 1521, 1541 (9th Cir. 1993) (Reinhardt, J., concurring) (stating that, in his opinion, the Fourth Amendment was the appropriate basis on which to decide the case because “[t]here can be no doubt that the question whether the particular type of search involved here is constitutional implicates the fourth amendment”); *Smith v. Fairman*, 678 F.2d 52, 53 (7th Cir. 1982) (finding that a constitutional protection from cross-gender pat searches “would likely be found, if at all, in the Fourth Amendment guarantee of freedom from unreasonable searches or the more general right of personal privacy which has been recognized as implicit in that Amendment”).

mate penological interest for prisons, however, because of the necessary relinquishment of certain privacy rights by inmates upon entering incarceration.<sup>43</sup> The determination of whether a cross-gender pat search violates an inmate’s Fourth Amendment right to privacy can turn on factors including the scope of the pat search<sup>44</sup> and the gender of the inmate.<sup>45</sup>

In *Timm v. Gunter*, the Eighth Circuit applied the *Turner* test to a claim by male inmates that cross-gender pat searches violated their Fourth Amendment right to privacy.<sup>46</sup> The prison asserted a legitimate penological interest in fulfilling the requirements of Title VII.<sup>47</sup> The court stated that “[t]he administrators at [the Nebraska State Penitentiary] must weigh the rights of the prisoners, the equal employment rights of both the female guards and the male guards, and the institutional need for internal security.”<sup>48</sup>

While pat searches are necessary in maintaining prison security,<sup>49</sup> the appropriate question is whether a pat search performed by a member of the *opposite sex* is unreasonable.<sup>50</sup> The Eighth Circuit found probative that all employees “are trained to perform pat searches in a professional manner,” and that most inmates do not object to cross-gender pat searches.<sup>51</sup> Based on these factors, the court concluded that the privacy rights of some inmates “must give

43. *Smith*, 678 F.2d at 54 (referring to privacy rights as “[o]ne of the most important rights which is necessarily limited as a result of one’s incarceration”).

44. *See generally Smith*, 678 F.2d 52. In *Smith* a male inmate claimed that being forced to submit to cross-gender pat searches violated his constitutional rights. *Id.* at 53. The Seventh Circuit recognized that submitting to a pat search can “be a humiliating and degrading experience” and that having it performed by a member of the opposite sex could exacerbate the feelings of degradation. *Id.* The court further recognized that despite “the right of one sex not to be discriminated against in job opportunities within the prison because of their gender . . . inmates do have some right to avoid unwanted intrusions by persons of the opposite sex.” *Id.* at 55. The Seventh Circuit held, however, that *Smith*’s right to privacy had not been violated because the pat searches in question did not involve the anal or genital areas. *Id.* In reaching its conclusion, the Seventh Circuit distinguished *Smith* from *Sterling v. Cupp*, where an inmate had successfully argued that cross-gender pat searches involving the genitalia violated his rights under the Oregon State Constitution. *Id.* at 55; *see Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981).

45. *See infra* notes 46-67 and accompanying text, examining both a male inmate’s Fourth Amendment claim and a female inmate’s Fourth Amendment claim. R

46. *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990).

47. *Id.* at 1098.

48. *Id.* at 1099.

49. *See supra* note 6. R

50. *Timm*, 917 F.2d at 1100. The fact that pat searches are important does not necessarily lead to the conclusion that *cross-gender* pat searches are also necessary. *See infra* notes 117-118 and accompanying text. R

51. *Timm*, 917 F.2d at 1100.

way to the use of [cross-gender] pat searches” because the prison’s interests in equal employment rights and security are more important.<sup>52</sup>

The Eighth Circuit acknowledged that there is not an alternative way for prisoners to practice their constitutional privacy rights.<sup>53</sup> The court found that accommodation of the rights would have more than a *de minimis* effect on prison resources, and would be a great burden on both the guards and on prison resources as a whole.<sup>54</sup> The court concluded that a prison administrator could choose to accommodate an inmate’s request for privacy, but that there is no constitutional requirement that he do so.<sup>55</sup>

A different conclusion entirely was reached in *Colman v. Vasquez*, a suit involving a female inmate’s claim that cross-gender pat searches violated her Fourth Amendment privacy rights.<sup>56</sup> Ms. Colman was incarcerated at the Federal Correctional Institution (FCI) in Danbury, where she was placed in a special unit for victims of sexual assault.<sup>57</sup> While in the sexual trauma unit she was forced to submit to pat searches by male guards.<sup>58</sup> During one pat search, Ms. Colman alleged that Corrections Officer Vasquez made inappropriate advances of a sexual nature.<sup>59</sup> Despite the fact that Ms. Colman alerted several FCI Danbury staff to the inappropriate behavior, the harassment continued for several months, ending in March of 1997 with a physical assault.<sup>60</sup>

Ms. Colman brought suit alleging that the cross-gender pat searches violated her Fourth Amendment right to be free from unreasonable searches.<sup>61</sup> The United States District Court of Connecticut stated that Ms. Colman retained “some limited Fourth Amendment right to bodily privacy.”<sup>62</sup> The Connecticut District Court distinguished Ms. Colman’s case from prior cross-gender pat search cases on two grounds: first, the court noted that none of the

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* For a further discussion on the role of prison administrators’ discretion in balancing these competing interests, see *infra* notes 285-299 and accompanying text.

56. *Colman v. Vasquez*, 142 F. Supp. 2d 226, 226 (D. Conn. 2001).

57. *Id.* at 229.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 230. Ms. Colman also alleged a violation of her Eighth Amendment right to be free from cruel and unusual punishment, violation of the Violence Against Women Act, 42 U.S.C. § 13981, and various state tort claims. *Id.* at 228-30.

62. *Id.* at 231.

other cases had been decided solely on the pleadings; second, and more importantly, the court distinguished this case because it involved a female inmate who had been placed in a special unit for victims of sexual trauma.<sup>63</sup>

Female inmates' privacy rights have been viewed by a number of courts as being "qualitatively different than the same rights asserted by male inmates."<sup>64</sup> In *Colman*, the Connecticut District Court found that the genders of Ms. Colman and Corrections Officer Vasquez were relevant to determining whether Ms. Colman's privacy rights had been violated.<sup>65</sup> The court justified a gender-based determination because "'women experience unwanted intimate touching by men differently from men subject to comparable touching by women.'"<sup>66</sup> The court ruled that judgment should not be granted on the pleadings because to do so "would require a finding that all types of pat searches are generically lawful, without inquiry into the nature of the search, the circumstances of the inmates, or the penological justifications for the particular policy at issue."<sup>67</sup>

### 3. Fourteenth Amendment Challenges

Many states have already decided not to use cross-gender pat searches in female institutions.<sup>68</sup> Part of the rationale behind this decision may be the perception that men and women experience unwanted touching differently.<sup>69</sup> Distinguishing between male and female inmates based on gender alone serves as the basis for a claim of discrimination under the Fourteenth Amendment.<sup>70</sup>

In *Madyun v. Franzen*, the Seventh Circuit acknowledged that the Department of Corrections treated inmates differently based on gender,<sup>71</sup> subjecting male inmates to cross-gender pat searches, but

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63. *Id.*

64. *Id.* at 232.

65. *Id.*

66. *Id.* (quoting *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993)).

67. *Id.* at 232.

68. *See infra* Table 1. Three states and the District of Columbia prohibit cross-gender pat searches in female institutions, another twenty-five states allow cross-gender pat searches of female inmates only in emergency circumstances. *See infra* Table 1.

69. *See supra* note 66 and accompanying text.

70. *See Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983) ("The Fourteenth Amendment requires that any gender-based distinction drawn by the state 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976))).

71. *Id.* at 962.

exempting female inmates.<sup>72</sup> The Seventh Circuit held, however, that “the state’s justification for the disparity is as manifest as the disparity in treatment itself.”<sup>73</sup>

The justification the Seventh Circuit found compelling was not based on the gender of the inmate, but rather, was based on the gender of the corrections officer.<sup>74</sup> The Seventh Circuit held that the gender distinction served an important role in equalizing job opportunities for women in corrections.<sup>75</sup> It would not have been feasible for the prison to hire women if they could not perform pat searches; therefore, cross-gender pat searching male inmates protects female employment opportunities.<sup>76</sup> There was no need for a similar pat search policy for female inmates as there had been “no indication that males have suffered a lack of opportunity to serve as prison guards because they are precluded from frisk searching female inmates.”<sup>77</sup>

#### B. *Constitutional Claims Not Subject to Turner v. Safley—The Eighth Amendment*

The Supreme Court has stated that the *Turner* test, which provides a deferential level of review to actions by prison administrators,<sup>78</sup> is applicable whenever “the needs of prison administration implicate constitutional rights.”<sup>79</sup> The Ninth Circuit has held, however, that the *Turner* test was meant only to apply to those rights that are shared by all citizens, inmates, and non-inmates alike, and not to Eighth Amendment claims.<sup>80</sup> The decision in *Turner* involved rights that “may necessarily be limited due to the unique circumstances of imprisonment.”<sup>81</sup> The Eighth Amendment is unique in that it “do[es] not conflict with incarceration”; instead it applies only to incarcerated persons, ensuring that they are not sub-

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See supra* notes 28-32 and accompanying text.

79. *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993).

80. *Id.*

81. *Id.* An example is where constitutional rights to privacy are asserted. *Id.* There is a “legitimate [and necessary] penological interest[ ]” in monitoring inmates, therefore privacy is a right that necessarily conflicts with the unique circumstances of imprisonment. *Id.* at 1530, 1535; *see Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979) (upholding cell shake-down and visual body cavity searches as not violating constitutional rights to privacy because maintaining institutional security is an essential goal).

jected to “cruel and unusual punishments.”<sup>82</sup> To show a violation of the Eighth Amendment, an inmate must establish that “there is an infliction of pain, and . . . that [the] infliction [of pain] is unnecessary and wanton.”<sup>83</sup>

*Jordan v. Gardner* is one of the most startling examples of an Eighth Amendment claim resulting from cross-gender pat searches.<sup>84</sup> *Jordan* involved an all-female institution where approximately 85% of the inmates reported a history of sexual assault to prison counselors “including rapes, molestations, beatings, and slavery.”<sup>85</sup> In 1989, a new superintendent instituted cross-gender pat searches for two reasons: to improve prison security, and to avoid “an eventual lawsuit by the female guards.”<sup>86</sup> Prior to implementation of the cross-gender pat searches, prison psychologists warned the superintendent that these “searches could cause severe emotional distress in some inmates”; despite the warnings, the policy was implemented on July 5, 1989.<sup>87</sup>

The policy remained in effect for only one day because of the extreme reactions of some inmates.<sup>88</sup> One inmate “had to have her fingers pried loose from bars she had grabbed during the search, and she vomited after returning to her cell block.”<sup>89</sup> In issuing a permanent injunction against these searches, the district court had over 1,000 pages of trial testimony transcripts, 300 court documents,

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82. *Jordan*, 986 F.2d at 1530-31. The *Jordan* court also notes that “the Supreme Court has never applied *Turner* to an Eighth Amendment case.” *Id.* at 1530.

83. *Id.* at 1525 (internal quotation marks omitted).

84. *Id.* at 1521; see also *Colman v. Vasquez*, 142 F. Supp. 2d 226, 234 (D. Conn. 2001) (involving a claim brought by an inmate assigned to the sexual trauma unit at FCI Danbury where the court found that “some aspects of [the inmate’s] claim resonate under the Eighth Amendment . . . to the extent the searches are alleged to have caused extreme emotional distress due to her circumstances as a sexually traumatized woman”). The inmate in *Colman* also brought a Fourth Amendment claim. *Supra* notes 56-67 and accompanying text.

85. *Jordan*, 986 F.2d at 1523, 1525. While the 85% reported in this case is very high, the prominence of women who have histories of abuse, both physical and sexual, is startling. In a 1999 survey by the Bureau of Justice Statistics, 57.2% of female state prison inmates had been abused prior to incarceration, of those 46.5% had been physically abused and 39% had been sexually abused. CAROLINE WOLF HARLOW, U.S. DEP’T. OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 2, Table 1 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/parip.pdf>.

86. *Jordan*, 986 F.2d at 1523.

87. *Id.*

88. *Id.*

89. *Id.* This same inmate later settled a lawsuit arising from this incident against the guard and prison officials for \$1,000, with an additional \$10,000 in attorneys’ fees. *Id.* at 1523 n.2.

videotapes, six days of live testimony, and fifty-six exhibits.<sup>90</sup> In affirming the judgment of the trial court, the Ninth Circuit included in its opinion summaries of inmate testimony regarding histories of sexual abuse.<sup>91</sup>

In determining whether there was pain, the Ninth Circuit looked both at the fact that many of the inmates had histories of sexual or physical abuse, and at the fact “that physical, emotional, and psychological differences between men and women ‘may well cause women, and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women.’”<sup>92</sup> Findings supported the idea that there was a high risk of great harm, including emotional pain and suffering and severe psychological injury *even* where the searches were conducted properly.<sup>93</sup> Specifically, the court was worried about feelings of re-victimization that could result from “unwilling submission to bodily contact with the breasts and genitals.”<sup>94</sup> The Ninth Circuit concluded that “[t]he record . . . support[ed] the postulate that women experience unwanted intimate touching by men differently from men subject to comparable

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90. *Id.* at 1523-24.

91. *Id.* at 1525. These testimonies included an inmate whose “husband beat her, strangled her, and ran over her with a truck”; an inmate who “was frequently strapped or handcuffed to a bed” while being beaten or raped by her half-brother; another inmate who had been impregnated by her uncle at the age of sixteen who then attempted an impromptu abortion with a broom handle; and yet another inmate who had been raped, starved, and beaten by various men in her life. *Id.*

92. *Id.* (quoting Findings of Fact & Conclusions of Law at 3, *Jordan v. Gardner*, No. C89-339TB (W.D.Wash. Feb. 28, 1990)).

93. *Id.*

94. *Id.* at 1526. Even the proper performance of these pat searches was such that the district court refused to call them “pat searches.” Judge Reinhardt in his concurring opinion stated:

While some modifications to the procedure may have occurred, the descriptions by the prison personnel and inmates, the training material, and a videotape viewed by this court reveal that the searches involve nothing so delicate or so tentative as “patting.” Rather, the searches are intimate and deeply invasive.

*Id.* at 1533 (Reinhardt, J., concurring). For a description of the pat searches in this case, see *supra* note 7 and accompanying text.

The DOJ proposed standard on cross-gender supervision would provide a limited exemption for those inmates who could show documented evidence of cross-gender sexual assault while incarcerated. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6,248, 6,289 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115). This standard, while a good first step, does not prevent feelings of re-victimization for any of the women reporting instances of sexual abuse prior to incarceration. See *supra* note 85.

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touching by women”; therefore, “the cross-gender clothed body search policy constituted ‘infliction of pain.’”<sup>95</sup>

The Ninth Circuit then examined the prison’s justifications for the policy to determine whether the infliction of pain had been “unnecessary and wanton.”<sup>96</sup> The court found that the cross-gender pat searches were not essential to prison security because there was no evidence showing that security had been impaired since the preliminary injunctive relief had been implemented.<sup>97</sup>

While employment concerns had been a sufficient legitimate governmental concern in prior cases involving constitutional claims,<sup>98</sup> they were not here.<sup>99</sup> The court distinguished Eighth Amendment claims, stating that “[i]t appears that none of the Eighth Amendment cases decided by the Supreme Court, this circuit, or any other court of appeals has upheld a pain-inflicting measure simply because prison officials implemented the policy to ‘address’ a legitimate governmental interest.”<sup>100</sup> Since there was not a government interest sufficient to sustain the use of cross-gender pat searches, they were “unnecessary.”<sup>101</sup>

The Ninth Circuit then found that the superintendent exercised wantonness in that he had been deliberately indifferent to the pain being caused to the inmates.<sup>102</sup> The court acknowledged that he had been concerned about a potential lawsuit from the union, but, “[t]he wish to avoid a lawsuit from an employees’ union . . . does

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95. *Jordan*, 986 F.2d at 1526; *see also* *Colman v. Vasquez*, 142 F. Supp. 2d 226, 236 (D. Conn. 2001). In *Colman*, the court held that cross-gender pat searches of women in the sexual trauma unit may meet the “deliberately indifferent” standard found in conditions of confinement cases and therefore dismissal on the pleadings was inappropriate. *Id.* at 235-37. At the same time, the court acknowledged that Ms. Colman would need to show “extreme emotional distress” “[b]ecause routine discomfort is ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Id.* at 236 (quoting *Sims v. Artuz*, 230 F.3d 14, 20 (2d Cir. 2000)).

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

97. *Id.* at 1526-27.

98. *See* *Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983) (holding that employment concerns justify making gender based distinctions in deciding a male inmate’s Fourteenth Amendment claim); *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 181 (D. Conn. 2009) (holding that avoiding employment problems is a legitimate penological interest in response to an inmate’s First Amendment claim); *see also infra* Part II (discussing employment concerns further).

99. *Jordan*, 986 F.2d at 1527.

100. *Id.* It is interesting to compare the language, stating that a legitimate governmental interest is not sufficient with the first factor of the *Turner* standard, which looks specifically for a rational relation to a legitimate governmental interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

101. *Jordan*, 986 F.2d at 1527.

102. *Id.* at 1528-29.

not provide a justification for inflicting pain of a constitutional magnitude.”<sup>103</sup> That the superintendent had instituted the policy for a good reason, to avoid a lawsuit, was not sufficient justification to avoid being labeled as having acted wantonly.<sup>104</sup> The court held that he neglected his responsibility to “afford sufficient weight to the constitutional rights of individuals,”<sup>105</sup> resulting in “a lack of proper concern for the serious infringement of a countervailing constitutional interest.”<sup>106</sup>

### C. Federal Claims Not Based on the Constitution

Inmate claims against cross-gender pat searches can originate from sources other than the Constitution. An inmate who has a claim under the First Amendment Free Exercise Clause, for instance, may also have a claim under either RFRA<sup>107</sup> or RLUIPA.<sup>108</sup> Both RFRA and RLUIPA require any substantial burden placed on the exercise of religion to be justified by a compelling government interest implemented in the least restrictive manner.<sup>109</sup>

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103. *Id.* at 1529.

104. *Id.*

105. *Id.* The court held that “[i]f a prison administrator decides to ignore grave suffering because of irrelevant or unimportant concerns, that administrator demonstrates a deliberate indifference to the harm being done and to the constitutional principle at stake.” *Id.* This holding, referring to potential employment discrimination litigation as an “irrelevant or unimportant concern” is only seen in this case, and may well be a result of the unique facts presented. *See id.*

106. *Id.* at 1530.

107. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2006).

108. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (2006). If an inmate is in a state institution, as opposed to a federal institution, they may not bring a claim under RFRA, which has been struck down by the Supreme Court as unconstitutional when applied to the states. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that RFRA, as applied to the states, exceeded congressional authority to enact legislation under Section five of the Fourteenth Amendment); *see also* *Forde v. Baird*, 720 F. Supp. 2d 170, 175 (D. Conn. 2010) (“Although the Supreme Court held that Congress exceeded its authority in making RFRA applicable against state and local governments, the Court also confirmed RFRA’s validity as applied to actions of the federal government.” (citation omitted)). RLUIPA, however, has not been found unconstitutional, and unlike RFRA, it explicitly references protections for institutionalized persons. 42 U.S.C. § 2000cc-1.

109. 42 U.S.C. § 2000cc-1; 42 U.S.C. § 2000bb-1. RLUIPA states that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc-1.

Under either RFRA or RLUIPA, “[a] substantial burden exists where the state ‘puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.’”<sup>110</sup> A RFRA or RLUIPA claim allows an inmate to avoid the stringent *Turner* standards that apply to a First Amendment claim.

In *Forde v. Baird*, Forde, an observant Sunni Muslim, brought a claim that FCI Danbury’s cross-gender pat search policy violated her religious rights under RFRA.<sup>111</sup> FCI Danbury alleged that the practice did not place a substantial burden on Forde’s religious freedoms because submission to cross-gender pat searches is involuntary, and she was therefore not *permitting* a man outside her family to touch her.<sup>112</sup> The district court rejected this argument.<sup>113</sup> Forde produced evidence that cross-gender pat searches violated her sincerely held religious beliefs, and “[t]he opinions of the . . . [prison’s] religious authorities cannot trump the plaintiff’s sincere and religious belief.”<sup>114</sup> In response, the prison “allege[d] two compelling governmental interests . . . (1) maintaining the safety and security of the facility and (2) avoiding staffing and employment problems.”<sup>115</sup>

Regarding FCI Danbury’s interest in safety and security, the district court referred to the argument as “a strawman” in that it “focuse[d] on the *pat search* component of cross-gender pat searches, rather than the *cross-gender* component of those searches.”<sup>116</sup> FCI Danbury did not satisfy its burden of proving that pat searches of Forde by *male officers* served security interests, it merely argued that pat searches generally serve a compelling governmental interest.<sup>117</sup>

Indeed, Forde presented evidence showing that there may be penological *disadvantages* to cross-gender pat searches due to the possibility of falsified reports of sexual harassment lodged against

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110. *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 177 (D. Conn. 2009) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996)).

111. *Forde v. Baird*, 720 F. Supp. 2d 170, 171-72 (D. Conn. 2010). Ms. Forde’s claim was brought under RFRA because she was housed at an institution run by the Federal Bureau of Prisons. *Id.* at 172-76. Ms. Forde also brought her claim under the First Amendment. *See supra* note 40.

112. *Forde*, 720 F. Supp. 2d at 176.

113. *Id.* (“To conclude that Forde is mistaken regarding whether her religious beliefs are offended by cross-gender pat searches—and therefore hold that her free exercise rights have not been substantially burdened—would contravene clear precedent.”).

114. *Id.* at 177 (quoting *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003)).

115. *Id.* at 177-78.

116. *Id.* at 178.

117. *Id.*

male correctional officers by female inmates and the possibility that male officers would pat search female inmates less thoroughly to avoid such false claims—an assertion that [FCI Danbury] contested, though failed to disprove.<sup>118</sup>

The district court then held that FCI Danbury had “not present[ed] persuasive evidence that . . . staffing and employment issues present a compelling governmental interest.”<sup>119</sup> Specifically it had “offered no evidence that granting Forde an exemption from non-emergency cross-gender pat searches would lead FCI Danbury to violate Title VII at all.”<sup>120</sup>

Even assuming that FCI Danbury had managed to provide evidence supporting either its security or staffing concerns, it had not shown that “cross-gender pat searches of Forde [were] the least restrictive means of accomplishing those goals.”<sup>121</sup> “Because the burden rests with the government, it is insufficient for [FCI Danbury] to simply say that something cannot be done without exploring alternatives.”<sup>122</sup> FCI Danbury failed to present any evidence at trial that it had considered alternative means of accommodating Forde’s religious freedom.<sup>123</sup> Furthermore, FCI Danbury “failed to present any evidence as to why many state penal institutions forbid non-emergency cross-gender pat searches, but [it] is incapable of doing

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118. *Id.* Cross-gender pat searches increase the potential for allegations of sexual assault. *See infra* notes 133-139 and accompanying text. An allegation of sexual assault interferes with prison security because “[c]ompromised personnel . . . have been found to have provided contraband to prisoners, accepted bribes, lied to federal investigators, and committed other serious crimes as a result of their sexual involvement with federal prisoners.” U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, THE DEPARTMENT OF JUSTICE’S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES: SEPTEMBER 2009, i (2009) [hereinafter STAFF SEXUAL ABUSE], available at <http://www.justice.gov/oig/reports/plus/e0904.pdf>. Second, fearing an allegation of sexual assault, corrections officers may be more timid when performing a cross-gender pat search and therefore the pat search itself may not be as effective. *See* *Everson v. Mich. Dep’t of Corrections*, 391 F.3d 737, 745, 754 n. 24 (6th Cir. 2006) (three correctional experts testified that male staff might be particularly hesitant to perform supervisory duties of female inmates because of a “natural reluctance” resulting in a failure to “conduct the security searches and procedures necessary” to control contraband in female inmate living areas). *Contra* BOOZ ALLEN HAMILTON, PRISON RAPE ELIMINATION ACT (PREA) COST IMPACT ANALYSIS 14 (2010), available at <http://www.ojp.usdoj.gov/programs/pdfs/preacostimpactanalysis.pdf> (“There was a common sentiment that pat downs were equally effective by either gender and potentially equally abused by either gender.”).

119. *Forde*, 720 F. Supp. 2d at 179.

120. *Id.*

121. *Id.* at 180.

122. *Id.*

123. *Id.*

the same.”<sup>124</sup> While prison administrators are given due deference in light of their expertise, FCI Danbury could not “simply claim that the safety or security . . . [would] be negatively impacted . . . without showing evidence of how the facility would be negatively impacted.”<sup>125</sup>

Regarding FCI Danbury’s employment concerns, the district court found compelling that “the vast majority of pat searches occur at predictable times and places,” presumably making it easy to implement a plan accommodating Forde’s religious freedoms.<sup>126</sup> In response to FCI Danbury’s concern that gender-based shift assignments would violate either Title VII or the union contract the court stated that “gender-based assignment of shifts, even where it prevents correctional officers from selecting preferred assignments, is a ‘minimal restriction’ that can be tolerated.”<sup>127</sup> Because FCI Danbury had not met its burden to show that cross-gender pat searching Forde was the least restrictive alternative for fulfilling a compelling government interest, the court ordered the prison “to grant [Forde] an individual exemption to the policy of non-emergency cross-gender pat searches.”<sup>128</sup>

#### D. *Decreasing the Possibility for Sexual Assault*

Each of the potential inmate claims discussed heretofore result from the existence of the cross-gender pat search in and of itself, and would exist regardless of whether the pat search was performed professionally. The use of cross-gender pat searches, however, also increases the risk of sexual assault by corrections staff against inmates.<sup>129</sup> In 2003, Congress passed the Prison Rape Elimination

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124. *Id.*

125. *Id.*

126. *Id.* at 181.

127. *Id.* (citing *Tipler v. Douglas Cnty.*, 482 F.3d 1023, 1027 (8th Cir. 2007); *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998); *Jordan v. Gardner*, 986 F.2d 1521, 1539 (9th Cir. 1993) (Reinhardt, J. concurring)). “[E]ven if male employment rights at FCI Danbury might collide with Forde’s free exercise rights, those employment rights would not necessarily prevail.” *Id.* at 182. Where employment concerns collide with constitutional rights, resolution “requires a careful inquiry as to whether the competing interests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other.” *Id.* (quoting *Forts v. Ward*, 621 F.2d 1210, 1212 (2d Cir. 1980)); see *infra* notes 285-300 (discussing the role of compromise in reconciling inmates’ rights to be free from cross-gender pat searches and correctional staff employment rights).

128. *Forde*, 720 F. Supp. 2d at 182-83.

129. PREA REPORT, *supra* note 10, at 6-7 (explaining that while physical searches, such as pat searches, are necessary “[t]he potential for abuse is heightened . . . when staff of the opposite gender conduct them”).

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Act (PREA) “to protect incarcerated individuals from sexual abuse.”<sup>130</sup> Congress found that rape within prisons can have a number of consequences, not the least of which is a potential violation of the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>131</sup> Statistics revealed in a 2009 study on staff sexual abuse of federal inmates demonstrate the dangers inherent in allowing cross-gender pat searches.<sup>132</sup>

The information gathered in the report indicates that there were more cross-gender allegations of sexually abusive behavior than there were same-gender allegations.<sup>133</sup> Of these, the number of allegations against female staff by male inmates exceeded the number involving male staff with female inmates.<sup>134</sup> This was true, despite the fact that only 26.5% of the staff was female.<sup>135</sup>

130. *Id.* at 1. Purposes of the act include “establish[ing] a zero-tolerance standard for the incidence of prison rape in prisons in the United States,” and “mak[ing] the prevention of prison rape a top priority in each prison system.” 42 U.S.C. § 15602 (2006).

131. 42 U.S.C. § 15601. In a 2009 report, the U.S. Department of Justice found that:

Staff sexual abuse of prisoners has severe consequences for victims, undermines the safety and security of prisons, and in some cases leads to other crimes. Prisoners who are victims of staff sexual abuse may suffer physical pain, fear, humiliation, degradation, and desperation, and this harm can last beyond the victims’ incarceration.

STAFF SEXUAL ABUSE, *supra* note 118, at i.

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Furthermore, the OIG report raises the concern that female prisoners, who are more likely to have histories of sexual abuse, can suffer even greater traumatization when subjected to “further abuse inflicted by correctional staff while in [federal] custody,” a concern that mirrors discussions above in regards to the Fourth and Eighth Amendments. *Id.*; *see supra* notes 63-66, 84-95 and accompanying text.

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132. STAFF SEXUAL ABUSE, *supra* note 118. This study was based on data gathered pertaining to fiscal years 2001-2008. *Id.*

133. *Id.* at 30. Of the 1556 total allegations of sexual abuse, 62% were cross-gender. *Id.* Allegations of sexual assault were broken into two categories, sexual abuse, which involves criminal activity, and sexual misconduct, which is relegated to relatively minor incidences such as “indecent language, gestures, or sexually oriented visual surveillance.” *Id.* at 19. Sexual abuse was broken down into three categories, aggravated sexual abuse, sexual abuse of a ward, and abusive sexual contact. *Id.* at 23. Aggravated sexual abuse is “engaging in a sexual act with an inmate by threat or force,” sexual abuse of a ward is “engaging in a sexual act with an inmate.” *Id.*

In total there were 1585 allegations of inappropriate sexual behavior by staff towards inmates, and of these, 65% (1,028) alleged sexual abuse. *Id.* at 20. The number of allegations included in this statistic more than doubled between 2001 and 2008, meaning that the rate of increase in allegations of staff sexual assault was greater than either the growth of the inmate or staff population. *Id.* at 19.

134. *Id.* The percentage of allegations involving female staff members and male inmates was 53%, while the percentage of allegations involving male staff members and female inmates was only 47%. *Id.*

135. *Id.*

Between 2001 and 2008, there were eighty-six accusations of abusive sexual contact, a category of sexually abusive behavior, by male staff against female inmates, and seventy accusations of abusive sexual contact by female staff against male inmates.<sup>136</sup> Bureau of Prison (BOP) officials “believe[ ] that male staff members were most often accused of sexual misconduct stemming from pat searches.”<sup>137</sup>

If the BOP’s belief is accurate, then correct reporting would reveal a much higher number of incidents of cross-gender abusive sexual contact, much of it a result of pat searches.<sup>138</sup> Therefore, cross-gender pat searches expose federal inmates to an increased risk of criminal sexual assault, implicating the Eighth Amendment, and threatening not only the health and safety of inmates but also the security of prison facilities.<sup>139</sup>

II. EMPLOYEES: WHAT’S THE BIG DEAL?<sup>140</sup>

Women have traditionally met resistance when attempting to secure employment within prison facilities, especially those classified as maximum security housing male inmates.<sup>141</sup> While numbers

136. *Id.* at 26, 28. While men were subject to more total allegations of abusive cross-gender sexual contact, female employees were subject to allegations at a much higher rate than their representation in the BOP workforce. *Id.* at 28. The percentage of female staff members was only 26.5%, yet they accounted for 45% of the total allegations of abusive cross-gender sexual contact. *Id.* This discrepancy appears again in statistics including all variations of sexual abuse. “Approximately 6 percent of all female staff members were the subjects of allegations . . . predominantly of cross-gender offenses . . .” *Id.* at 28-29. Only four percent of male staff was accused of sexual abuse. *Id.* at 29.

137. *Id.* at 26. Because pat searches involve touching, these incidences should be properly classified in the criminal category of abusive sexual contact rather than the non-criminal category of sexual misconduct. *Id.* Sexual misconduct only includes non-physical incidents such as obscene gestures. *See supra* note 136. “[T]he high number of abusive sexual contact allegations provides some support for the BOP’s perception.” STAFF SEXUAL ABUSE, *supra* note 118, at 26.

138. *See supra* note 137 and accompanying text.

139. *See supra* note 131 and accompanying text.

140. This portion of the Note largely will focus on the difficulties of women seeking employment, rather than men. This is because, traditionally, men have not had the same difficulties as women in finding corrections employment. *See supra* notes 50, 130-131 and accompanying text.

141. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 337 (1977) (upholding the use of gender-based bona fide occupational qualification prohibiting women from working in contact positions in a male maximum security prison); SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LAW AND CRIMINAL JUSTICE OCCUPATIONS* 164 (1996) (“Researchers have anticipated that the greatest resistance to women [corrections officers] would occur in maximum security prisons.”). On July 31, 2009 the Federal Bureau of Prisons reported that only 17.57% of the staff in

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of women working in corrections have grown since the late 1970's, they still represent a relatively small percentage of corrections staff as compared to their presence in the total workforce.<sup>142</sup> In order to understand the importance of protecting female jobs within male prisons, it is essential to understand the history of women in corrections, the effect that Title VII has had on their employment, and their current presence in prisons today.

#### A. *Women in Corrections Before Title VII*

In the United States, women worked in corrections as early as 1793, when Mary Weed became known for her humane treatment of both male and female inmates at the Walnut Street Jail.<sup>143</sup> Women like Ms. Weed were a rarity prior to 1861, when more women began to enter correctional work.<sup>144</sup>

The first significant movement of women into corrections occurred between 1860 and 1900.<sup>145</sup> Small groups of women reformers entered prisons in order to improve conditions for female inmates, whom they felt were “morally superior to men.”<sup>146</sup> The reformers demanded separate prisons for women, which would be run by women and would offer “homelike atmospheres of rehabilitation.”<sup>147</sup>

Prior to this effort, women had been housed in joint facilities with male prisoners.<sup>148</sup> The creation of women's prisons in the 1900s led to work opportunities for women corrections staff in the late nineteenth and early twentieth centuries.<sup>149</sup> Women became

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its male high security prisons were female. Compare this number with 23.6% female at medium security prisons, 25.06% at low security prisons, and 34.16% at minimum security prisons. FEDERAL BUREAU OF PRISONS, STAFF DEMOGRAPHIC CHARACTERISTICS—ALL STAFF (2009) (on file with author). Reports relating to each Federal Bureau of Prisons institution were provided to the author on September 18, 2009 in response to an August 26, 2009 Freedom of Information Act request. The reports were then compiled in order to calculate these statistics.

142. MARTIN & JURIK, *supra* note 141, at 157.

143. *Id.* at 158.

144. *Id.*

145. *Id.*

146. *Id.* These religious reformers' actions were based on a feeling of a “shared [ ] common bond of innate, womanly spirit.” *Id.*

147. *Id.*

148. *Id.* at 158-59.

149. *Id.* at 159.

administrators and jail matrons of both women's and juvenile facilities by emphasizing stereotypical "womanly qualities."<sup>150</sup>

Unfortunately, prison success was often due to adopting the "warehouse-like character of men's prisons."<sup>151</sup> As women's prisons began to more closely resemble men's prisons, they were increasingly run by men.<sup>152</sup> Meanwhile, in the 1930s and 1940s, women were allowed to volunteer as clerical staff in male prisons, but were given no opportunity to supervise the inmates.<sup>153</sup>

#### B. *Civil Rights Movements and the Implementation of Title VII*

"The Civil Rights Act of 1964 (Title VII) was enacted to eradicate employment discrimination and compensate victims of discrimination."<sup>154</sup> Through Title VII, Congress intended to "'remov[e] . . . artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s].'"<sup>155</sup> Title VII meant that men could work in women's prisons and that women could work in men's prisons, although opportunities were still limited.<sup>156</sup>

The first Title VII employment challenge relating to prison cross-gender supervision to reach the Supreme Court occurred more than ten years after the enactment of Title VII.<sup>157</sup> In *Dothard v. Rawlinson*, Ms. Rawlinson sought employment as a "correctional counselor" with the Alabama Board of Corrections.<sup>158</sup> Her application was rejected because she failed to meet a statutory weight requirement of 120 lbs.<sup>159</sup> Rawlinson filed a class action suit alleging that she had been denied employment opportunities because of her gender in contravention of Title VII.<sup>160</sup>

While the case was pending, the Alabama Board of Corrections adopted a Regulation requiring that corrections officers in

150. *Id.* Valued womanly characteristics included "inherently emotional and sympathetic natures." *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 159-60.

154. Smith, *supra* note 8, at 268; see 42 U.S.C. § 2000e (2006).

155. *Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

156. Jurado, *supra* note 23, at 23.

157. Smith, *supra* note 8, at 269.

158. *Dothard*, 433 U.S. at 323.

159. *Id.* The statute also required a minimum height of 5'2". *Id.* at 323-24.

160. *Id.* at 324. Ms. Rawlinson also claimed that the use of height and weight requirements was a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.*

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“contact positions” with inmates at maximum security penitentiaries be the same gender as the inmate.<sup>161</sup> The new regulation made it so that women could only compete for approximately 25% of the corrections officers’ jobs available within the Alabama prison system.<sup>162</sup> Rawlinson amended her complaint to include challenges to this new regulation as violating both Title VII and Equal Protection.<sup>163</sup>

The Court found that the height and weight requirements disqualified “41.13% of the female population.”<sup>164</sup> The same restrictions would “exclud[e] less than 1% of the male population.”<sup>165</sup> Based on these statistics, the Court found that Rawlinson had sufficiently demonstrated that the requirements, while facially neutral, had a disproportionate discriminatory effect.<sup>166</sup>

The burden shifted to Alabama to show that the height and weight “‘requirement[s] [had] a manifest relationship to the employment’” as a correctional officer.<sup>167</sup> Alabama claimed that the weight and height requirements bear “a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance.”<sup>168</sup> The Court was unconvinced, stating that if strength is a bona fide job-related quality, then Alabama should adopt a test which measures strength.<sup>169</sup> As a result of its failure to show manifest relationship between weight and height and job performance in the face of disproportionate discriminatory effect, Alabama had violated Title VII.<sup>170</sup>

The Court then turned to the gender-based regulation to determine whether it violated Title VII.<sup>171</sup> Unlike the height and weight requirements, the new regulation facially discriminated against applicants based on gender.<sup>172</sup> Alabama claimed that the regulation was a bona-fide occupational qualification (BFOQ).<sup>173</sup> A BFOQ

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161. *Id.* at 324-25.

162. *Id.* at 327-28.

163. *Id.* at 325-26.

164. *Id.* at 329-30.

165. *Id.* at 330.

166. *Id.* at 329, 331.

167. *Id.* at 329.

168. *Id.* at 331.

169. *Id.* at 332. A strength measuring test would not violate Title VII because it would “‘measure[] the person for the job and not the person in the abstract.’” *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 333.

permits gender-based discrimination where that qualification is “reasonably necessary to the normal operation of that particular business or enterprise.”<sup>174</sup> The BFOQ exception is “only the narrowest of exceptions to the general rule requiring equality of employment opportunities.”<sup>175</sup> BFOQ’s are not allowed to be used by employers “to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.”<sup>176</sup> Therefore, generally “the argument that a particular job is too dangerous for women” would not create a BFOQ.<sup>177</sup> In this case, however, the Court upheld the use of a gender-based BFOQ.<sup>178</sup>

The Court found that the circumstances of the Alabama maximum security penitentiaries were unique.<sup>179</sup> The prisons had already been found unconstitutionally dangerous.<sup>180</sup> Furthermore, twenty percent of the male prisoners were sex offenders.<sup>181</sup> The sex offenders were scattered throughout the various prison dormitories.<sup>182</sup> Because of the level of danger involved, in conjunction with the number of sex offenders, the Court held that “[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the” security of the penitentiary as a whole.<sup>183</sup> As a result “[t]he employee’s very womanhood would . . . directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility.”<sup>184</sup>

Despite the negative outcome of *Dothard*, women were able to make their way into corrections positions.<sup>185</sup> Generally, courts

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174. *Id.* (quoting 42 U.S.C. § 2000e-2(e) (2006)).

175. *Id.*

176. *Id.*

177. *Id.* at 335. “[T]he purpose of Title VII [is] to allow the individual woman to make that choice for herself.” *Id.*

178. *Id.* at 336-37.

179. *Id.* at 334.

180. *Id.* (“[A] Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by ‘rampant violence’ and a ‘jungle atmosphere’ are constitutionally intolerable.” (quoting *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976))).

181. *Id.* at 335.

182. *Id.*

183. *Id.* at 336. Because the essence of a correction officer’s job is to maintain security, a threat to security of the institution as a whole based on gender can create a BFOQ. *Id.* at 335. The reasoning behind the BFOQ is not paternalistic protection of women, but rather that there is “[m]ore . . . at stake in this case . . . than an individual woman’s decision to weigh and accept the risks of employment.” *Id.*

184. *Id.* at 336.

185. *Jurado*, *supra* note 23, at 27.

failed to find the same unique set of circumstances that made the Alabama prisons so dangerous and therefore justified a BFOQ.<sup>186</sup>

### C. *Women Working in Prisons Now*

Legal problems, however, are not the only issue faced by women attempting to find employment in male prisons. Even now, women continue to battle issues including paternalism, sexual harassment, and gender stereotypes regarding their ability to do a classically masculine job.<sup>187</sup> There is also a perception that male inmates will be resistant to female officers.<sup>188</sup> Studies have shown, however, that staff resistance to women corrections officers is greater than inmate resistance;<sup>189</sup> inmates are generally receptive to women.<sup>190</sup> These lingering issues may explain why women continue to be under utilized in the field of corrections, comprising only about 26% of the workforce for the Federal Bureau of Prisons (BOP).<sup>191</sup>

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186. *Id.*

187. See MARTIN & JURIK, *supra* note 141, at 168-79 (stating that traditional conceptions of female incompetence, including perceptions of women as “little sisters” who accept male protection or “seductresses,” reinforces the feeling of “working-class masculinity,” which may be threatened by strong, competent, female correctional officers); Richard H. Rison, *Women as High-Security Officers: Gender-Neutral Employment in High-Security Prisons*, 3 FED. PRISONS J. 19, 20 (1994) (discussing “myths about women in the workplace” including that they do not want to be promoted, that advancement is precluded by family life, and that women do not have the necessary skills for advancement).

188. U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, *WOMEN AS CORRECTIONAL OFFICERS IN MEN’S MAXIMUM SECURITY FACILITIES: A SURVEY OF THE FIFTY STATES* 3 (1991), available at [www.nicic.org/pubs/1991/009504.pdf](http://www.nicic.org/pubs/1991/009504.pdf).

189. *Id.* at 3 (noting that staff resistance from male corrections officers often came from a perception “that women need protection and wouldn’t perform well in emergencies”). During the survey, Kentucky noted that their “paranoia” regarding assaults on female staff turned out to be groundless. *Id.* at 14.

The State of Connecticut recently settled a case involving fourteen female corrections officers for \$2.5 million; the women alleged that “they were subject to sexually demeaning remarks by mail [sic] prison guards and even recruited as prostitutes.” Thomas B. Scheffey, *Female Prison Guards Settle for \$2.5 Million*, CONN. L. TRIB., Jan. 11, 2010, at 14. Sexually demeaning comments made in front of inmates placed female guards “at risk of attack.” *Id.* Male guards would also interrupt walk-talkie transmissions from female guards, thereby “making it difficult or impossible to call for help or extricate themselves from dangerous situations.” *Id.*

190. U.S. DEPARTMENT OF JUSTICE, *supra* note 188, at 3; MARTIN & JURIK, *supra* note 141, at 168-179. Inmates may be resistant either for privacy concerns or because they are hesitant to take orders from a woman. *Id.*

191. Women comprised approximately 46.3% of the total work force in 1998 and were projected to comprise 48% by 2015. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, MONTHLY LAB. REV. 1, 10 (Dec.

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This underutilization comes despite recognition that women have a positive impact on conditions within prisons. Prisons have reported that female corrections officers may have a calming influence on male inmates.<sup>192</sup> Furthermore, female staff tend to have a normalizing effect, better preparing inmates to face the outside world.<sup>193</sup> Some states noted an improved ability to staff prisons because of a greater pool of applicants.<sup>194</sup> Finally, unusual benefits such as “fewer grievances . . . , [that] women’s presence has made male officers more attentive to assignments . . . , and [that] women are more observant and attentive than male officers,” were noted.<sup>195</sup> Interestingly, several systems noted that women bring a new, less confrontational, perspective to problem-solving.<sup>196</sup>

Currently, there are 8,623 women working for the Federal BOP.<sup>197</sup> Of those, 6,385 (74%) work in entirely male prisons, comprising 24.4% of the workforce.<sup>198</sup> Another 1,497 female staff work

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1999) available at <http://www.bls.gov/opub/mlr/1999/12/art1full.pdf>. Even the 26% female workforce is a vast improvement for the BOP, however. In 1988, twenty-four years after Title VII was enacted, only 7% of the BOP’s workforce were women. MARTIN & JURIK, *supra* note 141, at 164.

192. U.S. DEPARTMENT OF JUSTICE, *supra* note 188, at 4. The following states referenced the calming effect of women on male inmates: Alaska (“not[ing] that inmates control their behavior and maintain better hygiene when women are present”), Colorado (noting that the presence of women “tends to defuse a critical incident rather than escalate one”), Hawaii (noting that women have an “ability to diffuse tensions and tone down the harshness and violence of the facility environment”), Idaho (noting that “inmates are said to be calmer and to deal with women staff on a different level than they do men”), Illinois (noting that female presence “improves male inmates’ temperament and mannerisms” leading to a reduction of “‘macho’ behavior”), Indiana, Kansas (noting that inmates are now “easier to handle and better behaved”), Minnesota, Montana (referring to “their calming effect on inmates” as the “main benefit” of women corrections officers), Nevada, New Mexico, North Dakota, Oklahoma (citing women’s ability “to keep [a] lid on hostile situations”), Oregon (acknowledging both the calming effect, and an improvement in inmates’ personal appearances), Pennsylvania, Rhode Island, Tennessee (noting that women “are given more respect and inmates are quieter and better-behaved around them”), Washington (noting “reduced levels of violence, less need for confrontation to enforce rules, cleaner cell blocks, [and] inmates’ hygiene improved”), and Wyoming. *Id.* at 6-34.

193. *Id.* at 4.

194. *Id.*

195. *Id.* Idaho, in particular, noted that the number of grievances had dropped from between seventy to eighty per month to a high of about fifteen. *Id.* at 10.

196. *Id.* at 16. Illinois noted that inmates benefit from observing women use “their brains rather than brawn” during conflict resolution. *Id.* at 11. Similarly Kentucky noted that women have taught both inmates and male staff better, healthier conflict resolution skills. *Id.* at 14.

197. See *infra* Tables 2, 3 & 4.

198. See *infra* Table 4.

in mixed gender facilities.<sup>199</sup> Only 8.5% (741) of the women working for the BOP work in an entirely female institution.<sup>200</sup> This makes sense given that women comprise 26% of the workforce but only 7% of the inmate population.<sup>201</sup> While there are 108 male and mixed gender institutions in the BOP, there are only seven female institutions.<sup>202</sup>

Men also work in cross-gender supervisory positions. Currently there are 958 men working in the BOP's seven entirely female facilities.<sup>203</sup> Within those facilities, men comprise approximately 56% of the workforce.<sup>204</sup> FCI Waseca has the highest percentage of male staffing at approximately 70%, while FCI Alderson has the lowest at approximately 41%.<sup>205</sup>

### III. COMPARING RIGHTS: DOES ONE SET TAKE PRECEDENCE?

This section of the Note examines the conflict between inmate rights implicated by cross-gender pat searches and employment rights in light of both preexisting case law and current empirical evidence. Ultimately, the conclusion is reached that inmates' constitutional rights take precedence over the employment rights of corrections staff, and therefore the use of non-emergency cross-gender pat searches should be abolished.<sup>206</sup>

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199. See *infra* Table 3.

200. See *infra* Table 2.

201. U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2007 BUREAU OF PRISONS STAFF: EVERYDAY HEROES 52 (2007). The statistic for the percentage of female inmates is as of 2007. *Id.*

202. See *infra* Tables 2, 3 & 4.

203. See *infra* Table 2.

204. See *infra* Table 2.

205. See *infra* Table 2.

206. While this Note focuses on the legal rights of both inmates and employees, as well as the responsibilities of the various correctional institutions, it is important to recognize that there is a financial aspect to this debate. Based on a study of the cost impact of the PREA Commission standards, the "Limits to Cross-Gender Viewing and Searches" standard is expected to have the highest on-going cost impact. See BOOZ ALLEN HAMILTON, *supra* note 118, at 14. "The underlying cause of this impact is attributed solely to the prohibition of cross-gender pat down searches within the standard." *Id.* This standard also had one of the lowest levels of pre-existing compliance. *Id.* One "environmental driver" supporting cross-gender pat searches is cited as "local or state laws that mandate equal opportunity employment, which create a barrier to removing cross-gender pat down searches." *Id.* at 15. Overall, compliance with the standard is estimated at over \$21 million in upfront costs and around \$90 million in on-going costs annually. *Id.* at 11.

A. *Men Working in Women’s Prisons*

The case for ending cross-gender pat searches is more compelling for female inmates.<sup>207</sup> The reasons behind this discrepancy are two-fold. First, society has been more willing to recognize and respect female inmates’ constitutional rights;<sup>208</sup> second, the threat of employment discrimination against men in corrections is not perceived as being as dire because men do not have an established history of employment discrimination.<sup>209</sup>

When women have challenged cross-gender pat searches under the Fourth and Eighth Amendments their rights have been upheld.<sup>210</sup> One reason to uphold a female inmates’ challenge, as opposed to a male’s, is that women are recognized as “‘experience[ing] unwanted intimate touching by men differently from men subject to comparable touching by women.’”<sup>211</sup> The Eighth Amendment provides a further advantage for inmates seeking to challenge cross-gender pat searches because it is uninhibited by the *Turner* test’s reasonableness standard.<sup>212</sup>

*Jordan v. Gardner* is one example where female inmates succeeded in challenging cross-gender pat searches.<sup>213</sup> *Jordan* can be interpreted as an anomaly in light of the uniquely compelling circumstances presented by that case (84% of the inmates had histories of sexual assault).<sup>214</sup> Current nationwide statistics for female prisoners with a history of sexual assault are similarly compelling.

207. Schlanger, *supra* note 15, at 5 (stating that because of the greater impact on female job employment, the lesser extent of histories of sexual assault, and lower frequencies of sexual victimization by correctional staff, “a prohibition on non-emergency pat-downs . . . is less urgent for male prisoners”).

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208. See *Jordan v. Gardner*, 986 F.2d 1521, 1534 (9th Cir. 1993); *Colman v. Vasquez*, 142 F. Supp. 2d 226, 232 (D. Conn. 2001) (holding that female inmates’ privacy rights are “qualitatively different” than men’s privacy rights).

209. See *Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983).

210. See *Jordan*, 986 F.2d at 1522-23; *Colman*, 142 F. Supp. 2d at 230, 235 (D. Conn. 2001). Men making similar claims are often not successful. See *Smith v. Fairman*, 678 F.2d 52, 53 (7th Cir. 1982) (holding that cross-gender pat searches “clearly fall] ] short of the kind of shocking, barbarious [sic] treatment proscribed by the Eighth Amendment,” and further concluding that they do not violate the Fourth Amendment either); *supra* notes 46-55 and accompanying text.

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211. *Colman*, 142 F. Supp. 2d at 232 (quoting *Jordan*, 986 F.2d at 1526). This Note does not directly address whether the assertion that women experience unwanted touching from the opposite gender differently than men is valid. For a discussion on the interaction between gender stereotypes and the challenges to cross-gender supervision see *Jurado*, *supra* note 23, at 39-53; *Smith*, *supra* note 8, at 276-83.

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212. See *supra* notes 31, 82-83 and accompanying text.

213. *Jordan*, 986 F.2d at 1525.

214. *Id.*

In 1999, 39% of female state prison inmates reported sexual abuse prior to incarceration.<sup>215</sup> Inmates who are sexually victimized while incarcerated would, presumably, increase the percentage of women incarcerated who have suffered sexual victimization above 39%. In a survey conducted for the Prison Rape Elimination Act (PREA) Commission, 5% of women reported being sexually assaulted within the previous twelve months (compared with 3% of men).<sup>216</sup> These statistics show that over a third of female state inmates subjected to cross-gender pat searches could face the feelings of re-victimization that the Ninth Circuit in *Jordan* held constituted cruel and unusual punishment.<sup>217</sup>

While Fourth and Eighth Amendment challenges result from the act of the cross-gender pat search in and of itself, there is also a concern that cross-gender pat searches expose female inmates to greater instances of sexual assault. This concern was addressed by the PREA Commission’s standard prohibiting cross-gender pat searches.<sup>218</sup> The PREA Commission found that “searches carried out by staff of the opposite gender heighten the potential for abuse.”<sup>219</sup>

The PREA Commission’s findings were corroborated by the findings of the Department of Justice in its study of staff sexual abuse.<sup>220</sup> “BOP officials believe[ ] that male staff . . . were most often accused of sexual misconduct [relating to] pat searches.”<sup>221</sup> Furthermore, cross-gender pat searches heighten the risk for sexual assault beyond solely abusive sexual contact or sexual misconduct. In *Colman v. Vasquez*, a cross-gender pat search started with abusive sexual contact, and escalated, over the course of months, to rape.<sup>222</sup> Between 2001 and 2008, there were 234 allegations of either sexual abuse or aggravated sexual abuse against male staff towards female inmates.<sup>223</sup> It is impossible to determine how many of these may have been initiated with a cross-gender pat search.

215. HARLOW, *supra* note 85, at 1. Only 5.8% of male state prison inmates made the same claim. *Id.*

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216. PREA REPORT, *supra* note 10, at 41.

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217. *See supra* note 94 and accompanying text.

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218. PREA REPORT, *supra* note 10, at 62.

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219. *Id.*

220. *See supra* notes 132-137 and accompanying text.

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221. STAFF SEXUAL ABUSE, *supra* note 118, at 26.

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222. *Colman v. Vasquez*, 142 F. Supp. 2d 226, 226 (D. Conn. 2001) (involving an inmate subjected to several months of sexual harassment that had started with a cross-gender pat search where the officer made inappropriate advances and “culminat[ed] in a physical assault”).

223. STAFF SEXUAL ABUSE, *supra* note 118, at 26.

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There are also indications of strong societal movement toward the prohibition of cross-gender pat searches in female institutions.<sup>224</sup> Twenty-five states have voluntarily limited cross-gender pat searches of female inmates to emergency circumstances only.<sup>225</sup> An additional three states (and Washington, D.C.) completely prohibit cross-gender pat searches on females.<sup>226</sup> Of the remaining states, only eleven (and the Federal Bureau of Prisons) generally allow cross-gender pat searches.<sup>227</sup> This trend is not only indicative of societal views on women and cross-gender pat searches, but on the feasibility of limiting these dangerous pat searches in women's prisons. This showing of feasibility strengthens other cross-gender pat search challenges. In *Forde v. Zickefoose*, a federal district court questioned whether cross-gender pat searches were the least restrictive means to fulfill security and employment concerns given the prevalence of states that do not use them.<sup>228</sup>

Balanced against the female inmate's rights enumerated above, is a male corrections officer's right to be free from employment discrimination. Male corrections officers do not have the same history of discrimination in employment that women do; therefore, the legitimate penological interest of equalizing job opportunities is not as compelling.<sup>229</sup> Current employment statistics support that men

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224. While this Note addresses this issue by focusing on societal movements and changes in the law within the United States, a compelling argument can be made on the basis of international law. The United Nation's Standard Minimum Rules for the Treatment of Prisoners suggest a complete ban of cross-gender supervision for female inmates. UNITED NATIONS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS Rule 53(3), at 8 (1977), available at <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf> ("Women prisoners shall be attended and supervised only by women officers."); see AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, <http://www.amnestyusa.org/document.php?id=D0F5C2222D1AABEA8025690000692FC4&lang=e> (last visited Jan. 23, 2011).

225. See *infra* Table 1.

226. See *infra* Table 1; AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN, POLICIES, PROCEDURES AND PRACTICES OF GUARDING WOMEN, <http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/key-findings-policies-procedures-and-practices-of-guarding-women/page.do?id=1108299> (last visited Jan. 23, 2011) [hereinafter ABUSE OF WOMEN IN CUSTODY].

227. See *infra* Table 1; ABUSE OF WOMEN IN CUSTODY, *supra* note 226.

228. *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 178 (D. Conn. 2009). Using this same reasoning, a male inmate's claim is not as strong because states have not similarly chosen to forego cross-gender pat searches in male prisons.

229. *Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983); see *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 226 (8th Cir. 1995) (stating that the court will uphold "a . . . reasonable gender-based job assignment policy, particularly a policy that is favorable to

do not have difficulty securing employment in corrections. As of July 2009, there were 24,766 men working with the Federal BOP, and of those, only 958 men (3%) worked at a facility housing solely female inmates.<sup>230</sup> As a result, even if all positions involving cross-gender pat searches were abolished through a BFOQ, only a very small percentage of men in corrections would be affected.

Women have strong claims against cross-gender pat searches under the Fourth and Eighth Amendments. A ban on cross-gender pat searches in female facilities reflects a societal movement towards respecting a woman's right to privacy, as seen by the number of states who voluntarily prohibit the practice.<sup>231</sup> The very fact that so many states choose not to use cross-gender pat searches supports the viability of prohibiting them. A prohibition on non-emergency cross-gender pat searches is in line with the stated goals of the Prison Rape Elimination Act, which is to reduce incidents of sexual assault to zero.<sup>232</sup> When the numerous, drastic implications of cross-gender pat searches are weighed against the relatively minimal potential effect on employment for male correctional staff, the better conclusion is that the only conclusion that can be reached is that cross-gender pat searches of female inmates should be prohibited.

#### B. *Women Working in Men's Prisons*

When looking at prior legal precedent, male inmates do not have as persuasive an argument as their female counterparts. Unlike women, men have rarely succeeded in challenging cross-gender pat searches under either the Fourth or Eighth Amendments.<sup>233</sup> Courts claim that most male inmates do not object to cross-gender pat searches in order to undermine the privacy claims of those who

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the protected class of women employees," so long as the restrictions on other, presumably male, employees is minimal).

230. See *infra* Table 2, 3, & 4.

231. See *infra* Table 1.

232. See *supra* note 130 and accompanying text.

233. See *Timm v. Gunter*, 917 F.2d 1093, 1093 (8th Cir. 1990); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982); *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983). While a male inmate's privacy rights were respected in *Sterling v. Cupp*, that case involved especially invasive pat searches, which involved anal and genital contact. *Sterling v. Cupp*, 625 P.2d 123, 131-32 (Or. 1981). The holding in *Sterling* was quickly undermined by *Bagley v. Watson*, which held that women's Title VII rights take precedence over the inmates' state constitutional rights because of the supremacy clause. *Bagley*, 579 F. Supp. at 1105.

do.<sup>234</sup> In *Smith v. Fairman*, the Seventh Circuit acknowledged that pat searches can “be . . . humiliating and degrading,” and cross-gender pat searches only more so, but it still held that the humiliation involved falls short of violating the Eighth Amendment.<sup>235</sup> The court in *Timm v. Gunter*, justified upholding cross-gender pat searches by citing the fact that women are trained to perform pat searches “professionally.”<sup>236</sup> In so holding, the Eighth Circuit failed to acknowledge that often potential constitutional violations arise from the gender of the corrections officer itself, irrespective of whether the pat search is performed “professionally.”

Statistics show, however, that cross-gender pat searches are often not performed professionally.<sup>237</sup> There is a higher prevalence of allegations of abusive cross-gender sexual contact from female staff than their male counterparts.<sup>238</sup> The purpose of the Prison Rape Elimination Act is to “protect incarcerated individuals from sexual abuse.”<sup>239</sup> “In order to detect, prevent, reduce, and punish prison rape, and to protect inmates’ constitutional rights, the legal system must acknowledge that female staff can and do perpetrate sexual misconduct in prisons.”<sup>240</sup> Furthermore, protecting male inmates from sexual assault is imperative, given the negative and long-lasting effects of staff sexual assault on not only the inmate, but on society as a whole.<sup>241</sup> This rationale led the PREA Commis-

234. *Timm*, 917 F.2d at 1100 (“The District Court found that at [Nebraska State Penitentiary] most inmates do not reject opposite-sex pat searches with ‘great frequency.’”); *Bagley*, 579 F. Supp. at 1104 (“The facts presented to this court show . . . that only a minority of male inmates suffer an invasion of their perceived personal privacy interests by the presence of female guards.”).

235. *Smith*, 678 F.2d at 53.

236. *Timm*, 917 F.2d at 1100.

237. See *supra* notes 133-138. See generally Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 288-94 (2008) (arguing that gender stereotypes portraying men as the sexual aggressors and women as passive participants have allowed women to “become ‘nearly invisible as sexual criminal[s]’ to the criminal justice system” (quoting Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L. J. 357, 384 (2006) (alterations in original))).

238. See *supra* notes 134-135 and accompanying text.

239. See STAFF SEXUAL ABUSE, *supra* note 118, at 1.

240. Teichner, *supra* note 237, at 297.

241. See PREA REPORT, *supra* note 10, at 44-48.

[F]ailure by lawmakers and the courts to adequately respond to staff sexual misconduct will have severe consequences for inmates and the prison system in general. Allowing staff sexual misconduct to persist behind prison walls can, for instance, jeopardize prison security, create an environment lacking in “mutual respect” between staff and inmates, endanger the public health, and violate inmates’ constitutional rights.

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sion to call for the cessation of cross-gender pat searches in non-emergency situations for both male and female inmates.<sup>242</sup>

Balanced against male inmates' rights are the Title VII employment rights of female officers, analyzed in light of the history of discrimination found in the field of corrections. "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."<sup>243</sup>

Not only does the history of discrimination substantiate the need to allow women to work in male prisons, there is also the very real effect that a gender-based BFOQ would have on female corrections officers throughout the country. Unlike men, of whom only a very small percentage work in an all female institution, 74% of women employed as corrections officers by the Federal Bureau of Prisons (BOP) work in institutions entirely populated by male inmates.<sup>244</sup> In a worst-case scenario, if no women are permitted to work in men's prisons, 6,385 women would lose their jobs in the BOP alone.<sup>245</sup>

Despite the potential employment consequences, a male inmates' right to be free from sexual assault should take precedence over employment rights. Congress recognized the importance of preventing sexual assault through implementation of a zero-tolerance policy in the Prison Rape Elimination Act.<sup>246</sup> Being sexually assaulted "is simply 'not part of the penalty that criminal offenders pay for their offenses against society.'"<sup>247</sup> Because cross-gender pat searches increase the likelihood of sexual assault, their use is inherently inconsistent with a zero-tolerance policy. Therefore, cross-gender pat searches should not be performed on male inmates in a non-emergency situation.

#### IV. SOLUTIONS

The conclusion has been reached that both male and female inmates' rights should take precedence; therefore, there should be a

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Teichner, *supra* note 237, at 297-98 (citations omitted).

242. *Id.* at 62-63.

243. *Madyun v. Franzen*, 704 F.2d 954, 962 (7th Cir. 1983) (per curiam) (citations omitted) (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977)).

244. *See infra* Tables 2, 3 & 4.

245. *See infra* Table 3.

246. 42 U.S.C. § 15602 (2006).

247. PREA REPORT, *supra* note 10, at 35 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)).

nationwide prohibition on cross-gender pat searches. This conclusion does not necessarily mean that employment rights should be disregarded. The right of women to be free from employment discrimination, allowing them to work in male prisons, has resulted from decades of continual effort.<sup>248</sup> This effort has been directed not only towards overcoming legal hurdles, but also towards overcoming gender-based stereotypes held by prisoners, co-workers, and supervisors.<sup>249</sup> Employing women in male prisons benefits inmates as well as male co-workers.<sup>250</sup> Women have been credited with having calming and normalizing effects on prisoners, encouraging practices such as non-confrontational problem solving, and causing an increase in overall diligence.<sup>251</sup> Furthermore, an elimination of women in men’s prisons would lead to unemployment for approximately 7,000 women in the Federal Bureau of Prisons alone.<sup>252</sup>

This Part looks at solutions found in the case law, analyzing whether the solution is appropriate in light of inmate and employee rights. Initially, this section examines, and dismisses, the use of BFOQs to protect inmates’ rights from cross-gender pat searches. Then, this Note looks at the idea of compromise to accommodate both sets of rights, and in particular at a variety of practical solutions that could be implemented to protect both inmates and corrections officers’ rights. No one solution will fully address the problem in every institution. So long as potential solutions exist respecting both sets of rights prison administrators must attempt to implement corrective policies before subjugating employment rights to inmate privacy rights.

A. *The Bona-Fide Occupational Qualification (BFOQ)*

Bona-fide occupational qualifications (BFOQs) are an exception to Title VII’s prohibition on discriminatory hiring practices.<sup>253</sup> BFOQs allow an employer to discriminate based on gender where gender is integral to job performance.<sup>254</sup> BFOQs are meant to be

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248. See *supra* notes 141-153 and accompanying text. R  
249. See *supra* notes 187-190 and accompanying text. R  
250. See *supra* notes 190-196 and accompanying text. R  
251. See *supra* notes 188, 192-196 and accompanying text. R  
252. See *infra* Tables 3 & 4.  
253. See *supra* note 174 and accompanying text. R  
254. *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 747-48 (6th Cir. 2004).

an extremely narrow exception, providing relief from Title VII in only the most compelling circumstances.<sup>255</sup>

In order to ensure narrow interpretations for BFOQs, courts have created several formulations. One formulation states that “an employer could rely on the BFOQ exception only by proving ‘that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.’”<sup>256</sup>

To create a BFOQ, an employer must first show that it is reasonably necessary to the operation of the business, rather than “merely reasonable or convenient.”<sup>257</sup> To meet this standard, substantially all, if not all, members of the discriminated gender would need to be unable to perform the job so that making the determination on an individual basis would be either “impossible or highly impractical.”<sup>258</sup> Furthermore, the determination that members of one sex would be unable to perform the job must have a factual basis; an employer may not rely on stereotypical differences or myths.<sup>259</sup> A real difference between the sexes is one not based on “culturally induced proclivities.”<sup>260</sup> To that end, an employer must ask “whether . . . the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily.”<sup>261</sup>

“[I]n order to qualify as a BFOQ, a job qualification must relate to the essence, or to the central mission of the employer’s busi-

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255. *Dothard v. Rawlinson*, 433 U.S. 321, 333, 334 (1977); *Everson*, 391 F.3d at 748; *Torres v. Wisc. Dep’t of Health & Social Servs.*, 859 F.2d 1523, 1527 (7th Cir. 1988). Compelling circumstances are necessary to justify a BFOQ because

employment discrimination . . . is “one of the most deplorable forms of discrimination known to our society, for it deals with not just an individual’s sharing in the ‘outer benefits’ of being an American citizen, but rather the ability to provide decently for one’s family in a job or profession for which he qualifies or chooses.”

*Id.* at 1526-27 (quoting *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 (11th Cir. 1982)).

256. *Torres*, 859 F.2d at 1527 (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971)). Another formulation states that “discrimination based on sex is valid only when the *essence* of the business operation would be undermined” by not hiring members of one sex exclusively. *Id.* (emphasis added).

257. *Everson*, 391 F.3d at 748.

258. *Id.*

259. *Torres*, 859 F.2d at 1527. The *Torres* court noted, however, that “there are real as well as fictional differences between men and women.” *Id.* (citing *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (9th Cir. 1978)).

260. *Id.* at 1528 (quoting *Torres v. Wisconsin Dep’t of Health & Human Servs.*, 639 F. Supp. 271, 278 (E.D. Wis. 1986)).

261. *Id.*

ness.”<sup>262</sup> Furthermore, prisons must be examined individually to determine the necessities of the specific environment.<sup>263</sup> Finally, the employer carries the heavy burden of establishing that there were no reasonable alternatives to the creation of a BFOQ.<sup>264</sup>

Even where courts have been willing to recognize an inmate’s right to privacy, they have been hesitant to create a BFOQ. In *Forts v. Ward*, the Second Circuit suggested that prisoner privacy rights may be sufficient to overcome the guards’ interest in equal job opportunities, but still refused to recognize a gender-based BFOQ for positions in female inmates’ sleeping chambers.<sup>265</sup> The Second Circuit instead placed the onus on inmates to protect their own privacy by wearing one-piece pajamas (referred to by the district court as “a two-legged bag”) which could be “uncomfortably warm.”<sup>266</sup>

An exception has occurred where prison administrators have voluntarily instituted a BFOQ based on a reasonable determination that it is necessary to protect prisoner rights.<sup>267</sup> Courts give decisions of prison administrators deference, which allows them to deal with the myriad problems facing them on a daily basis.<sup>268</sup> When the

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262. *Everson*, 391 F.3d at 749.

263. *Torres*, 859 F.2d at 1529.

264. *Everson*, 391 F.3d at 737, 749.

265. *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980). The court stated that they did “not minimize in any way the significance of the privacy interests of the inmates . . . . We do not elevate the employment rights of the guards above any protectible [sic] privacy rights of the inmates.” *Id.*

266. *Id.* “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.” *Id.*

267. See *Torres*, 859 F.2d at 1532-33 (upholding BFOQ created to promote “inmate rehabilitation and security”); *Everson*, 391 F.3d at 748-49 (holding that the employer in this case had established the BFOQ defense as well as listing the requirements that must be met in order to establish such a defense). In *Everson* the Sixth Circuit upheld the creation of a BFOQ that had been implemented in response to several lawsuits resulting from sexual assault of inmates. *Id.* at 751, 759.

268. See *Everson*, 391 F.3d at 750 (“Because of the unusual responsibilities entrusted to them, the redoubtable challenges they face, and the unique resources they possess, the decisions of prison administrators are entitled to a degree of deference, even in the Title VII context.”); *Torres*, 859 F.2d at 1529 (recognizing that “[u]nless prison administrators try new approaches, the ‘intractable problems’ will remain and the lot of the incarcerated individual will not improve”). The Sixth Circuit in *Everson* held that a substantial degree of deference is allowed where the decision is “the product of a reasoned decision making process, based on available information and experience.” *Everson*, 391 F.3d at 750 (quoting *Torres*, 859 F.2d at 1532) (internal quotation marks omitted). It justified this deference because prison administrators “must grapple with the ‘perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime and to

BFOQ is supported by administrators it may be upheld even where the implicated prisoner rights do not rise to a constitutional level.<sup>269</sup>

In order to prevent cross-gender pat searches a prison administrator may implement a gender-based BFOQ for all contact positions within the prison.<sup>270</sup> Prohibiting as many as 25% of correctional staff in male prisons,<sup>271</sup> and 56% in female prisons,<sup>272</sup> from performing pat searches would arguably undermine safety and security throughout. In *Smith v. Fairman*, the Seventh Circuit stated that if a prison is going to be required to hire female officers, it must be allowed to utilize them to the fullest extent.<sup>273</sup> Imaginably, the converse is true as well, barring the ability to fully utilize female officers, a prison should be allowed not to hire them.

Creating a gender-based BFOQ for contact positions involving performance of cross-gender pat searches is legally justifiable under the standard articulated in *Dothard v. Rawlinson*. *Dothard* requires that the very womanhood (or manhood) of the officer undermine his or her ability to do the job.<sup>274</sup> Many of the Constitutional claims arise from the incidence of the *cross-gender* pat search itself; they bear no relation to the ability of the corrections officer to perform the search professionally.<sup>275</sup> Therefore, it is the very womanhood (or manhood) which interferes with performance of the job.

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return imprisoned persons to society with an improved chance of being useful law-abiding citizens.” *Id.* (quoting *Torres*, 859 F.2d at 1529). In order to fulfill this role, a prison administrator must be allowed to “innovate and experiment” with new approaches. *Id.* (quoting *Torres*, 859 F.2d at 1529).

269. *Everson*, 391 F.3d at 759 (“Regardless of whether its current conditions violate the constitutional rights of its inmates, a prison may invoke the BFOQ defense to justify measures taken to enhance inmate privacy.” (emphasis added)).

270. Opponents of prohibiting cross-gender pat searches urge that a BFOQ would be necessary, thereby directly pitting employment rights against the inmates’ rights. See *Jordan v. Gardner*, 986 F.2d 1521, 1529 (9th Cir. 1993) (rejecting prison’s argument that cross-gender pat searches were necessary to avoid a discrimination-based lawsuit by the union); *Madyun v. Franzen*, 704 F.2d 954, 962-63 (7th Cir. 1983) (upholding disparate treatment between male and female inmates based on legitimate penological interest in providing employment opportunities for women); *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 178 (D. Conn. 2009) (stating that the court is sympathetic to the prison’s Title VII concerns).

271. See *infra* Table 4.

272. See *infra* Table 2.

273. *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982).

274. See *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).

275. For example, the inmates in *Jordan v. Gardner* were susceptible to feelings of re-victimization solely because it was a man performing the pat search. See *Jordan*, 986 F.2d at 1525. The inmates’ feelings arose from their past experiences with men, not from the corrections officers themselves. *Id.* at 1525-26. Similarly, in *Forde v. Zickefoose*, it was the gender (the manhood) of the officer that offended Forde’s religious

In women’s prisons, the creation of a BFOQ for contact positions may not be feasible as a practical matter. In the Federal Bureau of Prisons, for instance, female officers comprise less than half of the current staff in womens’ correctional institutions.<sup>276</sup> Therefore, in the BOP, there is simply an insufficient number of female staff available to cover all contact positions.<sup>277</sup> Without a BFOQ, female staff may be required to perform more pat searches, because male staff will no longer be performing them. Staff disgruntlement, however, is neither a basis for violating inmates’ constitutional rights, nor is it a basis for employment discrimination.<sup>278</sup>

In men’s prisons, the creation of a BFOQ for all contact positions, while potentially feasible, has a number of negative side effects. Most clearly, there are approximately 7,000 women who would likely lose their job in the Federal BOP alone.<sup>279</sup> Inmates and male staff would suffer as well because women have been

beliefs, not a stereotypical perception of a man’s ability to professionally perform a pat search. *See Forde*, 612 F. Supp. 2d at 174.

The DOJ’s proposed standard on cross-gender supervision would require that agencies train their staff to perform cross-gender pat searches professionally and respectfully. National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6,248, 6,253 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt 115). Unfortunately, this standard fails to address any of the circumstances under which a cross-gender pat search can lead to a constitutional violation even where the search itself is done in a professional manner.

276. *See infra* Table 2.

277. *See infra* Table 2 (showing that women comprise only 43.6% of the staff at entirely female institutions). The argument may be made that it is in light of the relatively small number of female staff that cross-gender pat searches are necessary. This argument is undermined, however, by the fact that so many states have already limited cross-gender pat searches to emergencies. *See infra* Table 1.

278. Nor should staff disgruntlement entitle prison administrators to disregard employment rights.

“Minor adjustments of staff schedules and job responsibilities do not constitute the type of administrative burden that justifies overriding constitutional rights. . . . The adjustments pointed to by the prison officials [that barring male guards from conducting suspicionless searches would require some adjustments of staff schedules and job responsibilities] are *de minimis* indeed.”

*Forde v. Baird*, 720 F. Supp. 2d 170, 181 (D. Conn. 2010) (quoting *Jordan*, 986 F.2d at 1539 (Reinhardt, J., concurring)); *see infra* notes 296-299 and accompanying text.

279. *See infra* Tables 3 & 4. During a study to determine the costs associated with implementing the PREA Commission standards, the departments of correction in both Indiana and Massachusetts claimed that ending cross-gender pat searches would force them to lay off female staff. *See BOOZ ALLEN HAMILTON, supra* note 118, at 15. Indiana claimed it would need to eliminate 639 female officers at a one-time cost of \$14,985,000. *Id.* Massachusetts claimed it would need to eliminate 69 female officers at a cost of \$1,8974,000. *Id.* Based on the study it is unclear whether these positions assume implementation of a BFOQ or whether they would be necessary given one of the suggested solutions below.

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found to have a number of positive effects both for the inmates and for their fellow co-workers.<sup>280</sup> Since men already comprise greater than 75% of the staff in the all male prisons within the BOP,<sup>281</sup> exempting the remaining 25% from performance of pat searches would not impose the same level of administrative difficulty seen in female prisons. While the male staff may be required to perform additional pat searches, because women would no longer be performing them, appealing staff is not a justifiable basis for employment discrimination.<sup>282</sup>

Furthermore, as argued below, the conflict is not one between inmates' rights and employment but rather is one between employment rights and administrative convenience.<sup>283</sup> If a prison can successfully implement an alternative solution, even an administratively inconvenient one, it must. Employment rights may not be subjugated to administrative convenience.<sup>284</sup>

Given the stringent guidelines necessary to qualify for the narrow BFOQ exception to Title VII, the practical reasons against using a BFOQ, and that other solutions are available, a BFOQ is not the appropriate solution to end cross-gender pat searches.

B. *The Role of Compromise in Weighing Inmate and Employee Rights*

While courts have recognized that inmates' privacy rights and correction officers' employment rights can come into conflict,<sup>285</sup> they often require a prison system to demonstrate an inability to reconcile these rights before subjugating one to the other.<sup>286</sup>

280. See *supra* notes 192-196.

281. See *infra* Table 4.

282. See *supra* note 278.

283. See *infra* notes 296-297 and accompanying text.

284. See *infra* notes 296-297 and accompanying text.

285. See *supra* note 4; *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) ("While recognizing the right of one sex not to be discriminated against in job opportunities within the prison because of their gender, [other courts] have also concluded that inmates do have some right to avoid unwanted intrusions by persons of the opposite sex."); *Berl v. County of Westchester*, 84 Civ. 8505, 1986 WL 746, at \*3 (S.D.N.Y. Jan. 9, 1986) ("However, on the facts before me equal job opportunity must in some measure give way to the right of privacy." (emphasis added)).

286. See *Hardin v. Stynchcomb*, 691 F.2d 1364, 1372 n.21 (11th Cir. 1982) ("A number of courts have recognized the possibility of avoiding a clash between privacy and employment rights by use of selective job assignments."); *Smith*, 678 F.2d at 55 ("The resulting conflict between these two interests has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards."); *Forts v. Ward*, 621 F.2d 1210, 1212 (2d Cir. 1980) ("Resolution of such cases requires a careful inquiry as to whether the competing inter-

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In *Edwards v. Department of Corrections*, an Alabama Federal District Court analyzed the ability of the Department of Corrections (DOC) to compromise between privacy rights and employment rights relating to the performance of, among other things, cross-gender pat searches.<sup>287</sup> The DOC denied Officer Edwards a permanent position as shift commander at the Julia Tutwiler Prison for Women, asserting that the position had a female gender-based BFOQ despite the fact that Officer Edwards had temporarily held the position at the Tutwiler prison twice before, for a total of eleven months.<sup>288</sup>

The Department asserted that Edwards could not perform the job because, while his principle duty would be to supervise other corrections officers, he could be called upon to physically search inmates.<sup>289</sup> Edwards was able to provide evidence, however, that he “rarely if ever had to search female inmates while serving as acting shift commander.”<sup>290</sup> Instead of searching inmates himself, “he was able to summon a female officer to perform” the search.<sup>291</sup>

Because the Department failed to provide evidence “that the nature of the prison’s operation preclude[d] rearranging job responsibilities in a way that would eliminate the clash between the privacy interests of inmates and the employment opportunities of

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ests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other.”); *Forde v. Baird*, 720 F. Supp. 2d 170, 179-80 (D. Conn. 2010).

287. *Edwards v. Dep’t of Corr.*, 615 F. Supp. 804, 808 (M.D. Ala. 1985).

288. *Id.* at 808-09. Edwards had not been the only man to hold this position, a prior male officer had acted as shift supervisor. *Id.* at 809.

289. *Id.* The Department also asserted that, even without the discriminatory policy, Edwards would not have been chosen for promotion. *Id.* at 807. Had the Department been able to prove that was the case Edwards would not have been able to show an adverse employment decision resulting from gender. *Id.* at 806.

The requirement that a discriminatory practice result in an adverse employment decision seems minor, but has made a difference in several prison Title VII cases. *See* *Tharp v. Iowa Dep’t of Corr.*, 68 F.3d 223, 225 (8th Cir. 1995) (upholding a policy where only female Residential Advisors are assigned to the women’s unit because it was a “minimal restriction that did not deprive plaintiffs of employment opportunities or otherwise adversely affect their employment status” (citation omitted) (internal quotation marks omitted)); *Tipler v. Douglas County*, No. 8:04CV470, 2006 WL 1314328, at \*13 (D. Neb. May 11, 2006) (upholding a gender-based shift change because while undesirable and inconvenient for the plaintiff, it did “not constitute an adverse employment action”).

290. *Edwards*, 615 F. Supp. at 809.

291. *Id.* The male officer who had previously held the position had not searched inmates either. *Id.*

officers as shift commanders,” they violated Title VII by refusing to promote Edwards based on his gender.<sup>292</sup>

Similarly, in *Gunther v. Iowa State Men’s Reformatory*, a district court in Iowa held that a prison had to compromise job responsibilities to protect employment rights.<sup>293</sup> Ms. Gunther applied for a position as a Correction Officer Level II (COII), which she was denied on the basis of gender.<sup>294</sup> Iowa asserted that the COII position required contact with inmates, which was not feasible for a woman on a number of grounds, including inmate privacy rights.<sup>295</sup>

The court, rather than interpreting this as a conflict between inmate privacy rights and employment rights, interpreted the issue as a conflict between administrative convenience and employment rights.<sup>296</sup> It was within the power of the prison to adjust the COII responsibilities for Ms. Gunther to include only those that would not implicate other concerns, such as inmate privacy concerns.<sup>297</sup> The government responded that to adjust assignments for women COII positions “would be economically and administratively unsound and unfair to male co-workers who perform the gamut of COII duties.”<sup>298</sup> The court held, however, that “[n]one of these reasons, alone or aggregated, is grounds for denying women their right not to be discriminated against in employment opportunity.”<sup>299</sup>

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292. *Id.* at 810.

293. *Gunther v. Iowa State Men’s Reformatory*, 462 F. Supp. 952, 958 (N.D. Iowa 1979).

294. *Id.* at 954.

295. *Id.* at 955. The prison stated “women in contact positions . . . would: (1) violate prisoners’ privacy rights; (2) jeopardize prison security and rehabilitative programs; (3) put the guards, both male and female, in increased danger; and (4) lead to major disciplinary problems.” *Id.* The prison also asserted that “fashioning a rotation to avoid placing them in dangerous areas or in areas where inmate privacy must be maintained would be unfair to male officers and would create serious administrative problems.” *Id.*

296. *Id.* at 957. In response to the government’s claim that its concern was for inmate privacy rights, the court stated that “[p]rivacy is certainly to be respected but the essence of the facility is not a function of having all personnel available to work in all areas.” *Id.*

297. *Id.* “Any inconvenience in scheduling *cannot* outweigh plaintiff’s rights.” *Id.* (emphasis added).

298. *Id.*

299. *Id.*

[I]f complaints of fellow workers were grounds for a [BFOQ], Title VII could be gutted by the gripes of entrenched employees. Clearly job assignment adjustments within the facility in the past have not undermined its essential goals or functions. While there may be a valid reason to limit certain of the functions of female correction officers, there is no legal reason to cut them off

There are several practical solutions that may be implemented, short of a BFOQ, which protect both inmates' rights to be free from cross-gender pat searches and employment rights. While none of these solutions is guaranteed to work in every institution, the availability of several potential solutions demonstrates the feasibility implementing processes that protect both sets of rights. When weighing the feasibility of any given solution, an administrator should remember that administrative inconveniences do not excuse the violation of either employment or inmate rights.<sup>300</sup>

### 1. Gender Specific Tasks<sup>301</sup>

The first solution is to make performance of a pat search a gender specific task. Rather than requiring all corrections staff in a certain position to do pat searches, a prison may make the performance of pat searches specific to the gender of the prisoner. Many prisons, even those that currently allow cross-gender pat searches, already use gender-specific tasks for performance of strip searches.<sup>302</sup> Under this solution, performance of pat searches is not related to a specific job and thus should not be a bar to promotion.<sup>303</sup> Therefore, a prison can ensure that neither men nor women are discriminated against in job opportunities.

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completely from COII classification and the opportunities that classification offers.

*Id.* In regards to prison concerns relating to scheduling the court stated that “[b]alancing the federal right not to be discriminated against in employment against the administrative inconvenience of functional scheduling dictates institutional adjustments which will not substantially affect the efficient operation of the facility or undermine its essential functions. Administrative inconvenience *cannot* justify discrimination.” *Id.* (emphasis added).

300. *Id.* at 957.

301. Cases that suggest the use of gender-specific tasks include *Edwards v. Dep't of Corr.*, 615 F. Supp. 804, 809 (M.D. Ala. 1985) (striking BFOQ for shift commander position because plaintiff could summon a female officer to perform pat searches); *Gunther*, 462 F. Supp. at 957 (referencing the “substantial number of jobs within the facility that can be performed by a qualified female COII”).

302. U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT NUMBER 5521.05, SEARCHES OF HOUSING UNITS, INMATES, AND INMATE WORK AREAS § 552.11, at 3 (1997) (“Staff of the same sex as the inmate shall make the search, except where circumstances are such that delay would mean the likely loss of contraband.”); see *Forde v. Baird*, 720 F. Supp. 2d 170, 179 (D.Conn. 2010) (“[T]he fact that [FCI Danbury] already prohibits routine visual searches by male staff suggests that gender-based staff movements is eminently possible.”).

303. Warden Donna Zickefoose testified that any member of the staff at FCI Danbury can perform a pat search. Transcript of Bench Trial Volume 2 at 171, *Forde v. Baird*, 720 F. Supp. 2d 170 (D. Conn. 2010) (No. 3:03CV1424). While any staff member *can* perform the search, they are most often done by corrections officers. *Id.*

While easy to explain, this solution does impose potential administrative difficulties. At FCI Danbury, a federal female institution, only one-third of corrections staff are women.<sup>304</sup> As a result, two-thirds of the staff would not be able to perform what is generally recognized as an essential component of prison security.<sup>305</sup> This hurdle is not, however, insurmountable. To the extent that there are certain areas or times within a prison where pat searches are more likely to occur,<sup>306</sup> it is easy for prison administrators to ensure that there is a woman stationed nearby to accommodate that need. This solution would require female staff to perform more pat searches than they currently do; the complaints of staff, however, do not justify violation of constitutional rights.<sup>307</sup>

## 2. Gender Conscious Scheduling

A related solution involves gender-conscious scheduling. Under this solution, the schedule would be modified to ensure that a certain number of women (or men) were working within the prison during each shift. The schedule would not assign specific positions based on gender. Nor would the scheduling be based on gender alone, so long as sufficient female (or male) staff were assigned to each shift. For many BOP male institutions this should not be a problem because 75% of the staff is the same gender as the inmates.<sup>308</sup>

The potential does arise for an employee subject to gender-conscious scheduling to bring a discrimination suit. In *Tipler v. Douglas County*, an officer brought a claim based on being moved to a less desirable shift as a result of her gender.<sup>309</sup> The district court in Nebraska dismissed her claim, holding that a change in shift, while undesirable and inconvenient, did not constitute an “adverse employment action.”<sup>310</sup> Without an adverse employment de-

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304. See *infra* Table 2.

305. See *infra* Table 2; *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990).

306. The District Court of Connecticut in *Forde v. Baird* noted that “like visual searches, the vast majority of pat searches occur at predictable times and places,” thus making it “especially puzzling” that FCI Danbury would assert that accommodating Forde’s religious right to same-sex pat searches would implicate staffing issues. *Forde*, 720 F. Supp. 2d at 181.

307. *Gunther v. Iowa State Men’s Reformatory*, 462 F. Supp. 952, 957 (N.D. Iowa 1979).

308. See *infra* Table 4.

309. *Tipler v. Douglas County*, No. 8:04CV470, 2006 WL 1314328, at \*1 (D. Neb. May 11, 2006).

310. *Id.* at \*13.

cision, there had been no violation of Title VII; her employment rights had not been violated.<sup>311</sup>

Prison administrators can minimize the amount of gender-conscious scheduling necessary by providing their staff with radios or some other communication device.<sup>312</sup> Then, if a female officer is available anywhere on the compound she can be contacted quickly to come and perform the pat search.<sup>313</sup> This strategy should be feasible, given that there is no Federal prison where same-gender staff constitutes less than 30% of the total staff.<sup>314</sup>

### 3. Same-Gender Rover Positions

Prison administrators may have a legitimate concern that calling for a same-gender officer for performance of a pat search may weaken security. The officers called for would need to choose between finding a replacement for their own post before attending to the pat search and leaving the post unoccupied. While the officer tries to find a replacement, someone would need to watch the inmate selected for the pat search and would therefore also be unable to continue performing his or her job responsibilities. “[T]he precision operation of a prison facility does not allow for such on-the-fly staffing adjustments.”<sup>315</sup> To address this concern, the institutions could hire one or two additional officers per shift whose job it is to perform pat searches.

This solution has several potential problems. First, these positions would need to be gender-based BFOQs to ensure that the officers assigned would be able to perform same-sex pat searches. It stands to reason, however, that one or two gender specific posts per

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311. *Id.*; see also *Jordan v. Gardner*, 986 F.2d 1521, 1527 (9th Cir. 1993) (“At trial, the prison officials’ own witnesses testified that not a single bid had been refused, promotion denied, nor guard replaced as a result of the ban on routine cross-gender clothed body searches.”); *Forde*, 720 F. Supp. 2d at 181 (“[G]ender-based assignment of shifts, even where it prevents correctional officers from selecting preferred assignments, is a ‘minimal restriction’ that can be tolerated.” (citations omitted)).

312. Edda Cantor, a correctional expert offered by the government in the *Forde v. Baird* case, testified that she had observed that most of the staff at FCI Danbury carried radios, and that, in fact, female staff could be summoned to perform strip searches via radio. Transcript of Bench Trial Volume 2 at 76-77, *Forde v. Baird*, 720 F. Supp. 2d 170 (D. Conn. 2010) (No. 3:03CV1424).

313. “Forde presented expert testimony that, in many circumstances, the summoning of a female correctional officer to conduct a pat search in a non-emergency situation could involve nothing more than an immaterial minute or two delay.” *Forde*, 720 F. Supp. 2d at 174.

314. See *infra* Table 2.

315. *Forde*, 720 F. Supp. 2d at 174.

shift are preferable to a blanket rule requiring all contact positions to be same-gender. Furthermore, the feasibility of such assignments is apparent in that the Federal Bureau of Prisons already does not allow cross-gender strip searches,<sup>316</sup> searches which occur in specific locations and thus require that the staff assigned to those locations be same-gender.

Second, these additional positions may be expensive. The Missouri Department of Corrections estimated additional annual costs of over \$18.3 million to “provide three additional posts per institution and supervision to provide on-call same gender pat search capability.”<sup>317</sup> To limit additional costs, institutions could make the decision to have these additional officers only on during those predictable times when pat searches are more likely to occur. Beyond that, many facilities will already have rover positions, therefore the institution would not need to hire new staff—rather it would merely need to change a few existing positions to BFOQs.

#### 4. Allow Inmates to Request Same-Gender Pat Searches<sup>318</sup>

The final solution, while not ideal, reflects both a concern for the potentially significant adverse employment effects against women working in male prisons, and the fact that most male inmates do not object to cross-gender pat searches.<sup>319</sup> Prison administrators would provide each inmate the opportunity to request same-sex pat searches; if an inmate requests a same-sex pat search, the prison would accommodate that request, designating the inmate as subject only to same-sex pat searches through application of a sticker to the inmate’s ID.<sup>320</sup>

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316. See U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT NUMBER 5521.05, SEARCHES OF HOUSING UNITS, INMATES, AND INMATE WORK AREAS § 552.11(b)(2), at 2-3 (1997) (requiring that staff of the same gender perform a visual search; defined as a search of “all body surfaces and body cavities”).

317. See BOOZ ALLEN HAMILTON, *supra* note 118, at 15.

318. A similar approach was suggested in *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 183 (D. Conn. 2009). Ms. Forde had requested an individual exemption from cross-gender pat searches in relation to her Muslim faith. *Id.* at 175-76. Another inmate at FCI Danbury had already been given an individual exemption “with little or no impact on employment.” *Id.* at 181.

319. See *supra* note 234 and accompanying text.

320. New York marks identification cards with the letters “CGPFE” to indicate when a female inmate has been given a cross-gender pat search (frisk) exemption. STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, DIRECTIVE NO. 4910, CONTROL OF & SEARCH FOR CONTRABAND, § III(B)(3)(b)(2), at 3 (2001). If an inmate has an exemption, a male officer may not search her in non-emergency circumstances. *Id.*

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Allowing an inmate to opt out of cross-gender pat searches protects an inmate's constitutional rights, regardless of whether those rights originate from religion, privacy and dignity, or feelings of re-victimization. Unfortunately, this solution provides only limited protection for inmates who are, in the course of a pat search, subjected to sexual assault. An inmate who alleged sexual assault would be able to opt out of future cross-gender pat searches. This solution is not ideal because, as recognized by PREA, there should be a zero-tolerance policy towards sexual assault; the occurrence of even one assault is too many.

Furthermore, the ability to opt out of cross-gender pat searches places a certain amount of autonomy with the inmate, an autonomy which would not be implicated by a policy either allowing or disallowing cross-gender pat searches for all inmates. An inmate would be able to opt out of cross-gender pat searches where performance of a cross-gender pat search would not violate any constitutional right—in other words, he or she might abuse the process to exercise control over his or her environment.<sup>321</sup> If, however, the other option would be to create a BFOQ and thereby discriminate in employment based on gender, the risk of inmate autonomy on this one issue does not seem as grave.

#### CONCLUSION

Pat searches are an essential component of prison security, helping to control the flow of contraband within the prison.<sup>322</sup> *Cross-gender* pat searches, however, expose inmates to the potential violation of a number of constitutionally protected rights, including those under the First, Fourth, Eighth, and Fourteenth Amendments. Other rights may also be violated, including rights found in the Religious Land Use and Institutionalized Persons Act, as well as rights guaranteed by individual state constitutions. Cross-gender pat searches also expose inmates to heightened risk of sexual assault by corrections staff. Sexual assault, in turn, affects more than just the prisoner; it can undermine prison security as a whole.

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321. While not directly addressed in this Note, allowing inmate autonomy in determining whether or not to request a same-sex pat search may also be beneficial in instances involving transgender inmates. See MURRAY D. SCHEEL & CLAIRE EUSTACE, MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS BY SAN FRANCISCO COUNTY JAIL I(c), at 4 (2002) (suggesting that “[a]ll searches of the transgender inmate’s person will be done by two officers of the gender requested by the transgender inmate”), available at [www.transgenderlaw.org/resources/sfprisonguidelines.doc](http://www.transgenderlaw.org/resources/sfprisonguidelines.doc).

322. See *supra* notes 5-6 and accompanying text.

Because of these problems, the use of non-emergency cross-gender pat searches must be abolished. The Prison Rape Elimination Act Commission and the American Bar Association have both already reached this conclusion.<sup>323</sup> That does not mean, however, that employment rights should be disregarded. While opponents of prohibiting cross-gender pat searches claim that the inevitable result is a high cost in terms of women's employment opportunities,<sup>324</sup> that is not in fact the case. There are a number of practical solutions that may be implemented by prisons to protect employment rights without performing cross-gender pat searches. Solutions include creation of gender-specific tasks, using gender-conscious scheduling, or allowing inmates to opt out of cross-gender pat searches, thus protecting their own constitutional rights. While administratively inconvenient, these solutions must be pursued prior to engaging in employment discrimination. By pursuing a practical solution other than a BFOQ, both inmate and employment rights can be protected.

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323. See *supra* notes 10-15 and accompanying text.

324. See *supra* notes 18-19 and accompanying text.

\* J.D., Western New England University School of Law, 2011; Senior Articles Editor, *Western New England Law Review*, Volume 33. I am grateful to my colleagues on the *Western New England Law Review* for their hard work during the editorial process. I am also grateful to Professor Giovanna Shay, Western New England University School of Law, Professor Brett Dignam, Columbia Law School, and Attorney Deborah LaBelle, Law Offices of Deborah LaBelle, for their experience, insight, and guidance. Finally, a very large thank you to my husband, Sean; my parents Steve and Laura; and my siblings Paula, Seanna, Chelsea, and Cassidy; each of whom listened to me discuss the topics within my Note ad nauseum.

TABLE 1  
RESULTS OF AMNESTY INTERNATIONAL SURVEY ON CROSS-  
GENDER PAT SEARCHES ON FEMALE INMATES STATE PAT-  
DOWN PRACTICES

State	Allow Cross-Gender Pat Searches	Comments
Alabama	Yes	limit occurrence
Alaska	Yes	emergency only
Arizona	Yes	emergency only
Arkansas	Yes	emergency only
California	Yes	generally allowed
Colorado	Yes	emergency only***
Connecticut	Yes	generally allowed
Delaware	Yes	emergency only
Florida	Yes	emergency only
Georgia	Yes	limit occurrence
Hawaii	Yes	limit occurrence
Idaho	Yes	emergency only***
Illinois	Yes	emergency only
Indiana	Yes	generally allowed
Iowa	Yes	limit occurrence
Kansas	Yes	generally allowed
Maine	Yes	emergency only
Massachusetts	Yes	emergency only
Michigan	Yes	emergency only
Minnesota	No	Prohibited!
Mississippi	Yes	emergency only
Missouri	Yes	limit occurrence
Montana	Yes	emergency only
Nebraska	Yes	generally allowed
Nevada	Yes	emergency only
New Hampshire	Yes	emergency only
New Jersey	Yes	generally allowed
New Mexico	No	Prohibited!
New York	Yes	limit occurrence
North Carolina	Yes	generally allowed
North Dakota	Yes	generally allowed
Ohio	Yes	generally allowed
Oklahoma	Yes	emergency only
Oregon	Yes	emergency only***
Pennsylvania	Yes	generally allowed
Rhode Island	Yes	emergency only
South Carolina	Yes	limit occurrence

State	Allow Cross-Gender Pat Searches	Comments
South Dakota	No	Prohibited!
Tennessee	Yes	limit occurrence
Texas	Yes	emergency only
Utah	Yes	emergency only***
Vermont	Yes	emergency only***
Virginia	Yes	emergency only***
Washington	Yes	emergency only***
Washington, DC	No	Prohibited!
West Virginia	Yes	emergency only
Wisconsin	Yes	emergency only
Wyoming	Yes	generally allowed

\*\*\* These states were not included in the Amnesty International Article, statistics were instead obtained from Sandra Norman-Eady & George Coppolo, Cross-Gender Body Searches in Correctional Institutions (Mar. 12, 2001), available at <http://www.cga.ct.gov/2001/rpt/2001-r-0321.htm>.

Amnesty International, Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women, Policies, Procedures and Practices of Guarding Women (2006), <http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/key-findings-policies-procedures-and-practices-of-guarding-women/page.do?id=1108299> (last visited Jan. 23, 2011).

TABLE 2  
 PERCENTAGE OF MALE VS. FEMALE STAFF - FEMALE INSTITUTIONS (AS OF JULY 2009)

Facility	Inmate Gender	Security Level	# Inmates	Male Staff	%	Female Staff	%	Total Staff
Waseca FCI	Female	Low	790	146	69.52%	64	30.48%	210
Carswell FMC	Female	Low	1,469	190	46.80%	216	53.20%	406
Danbury FCI	Female	Low	1,135	166	66.67%	83	33.33%	249
Dublin FCI	Female (small male)	Low	1,155	144	58.06%	104	41.94%	248
Tallahassee FCI	Female (small male)	Low	1,157	183	63.99%	103	36.01%	286
Alderson FPC	Female	Minimum	1,096	69	41.32%	98	58.68%	167
Bryan FPC	Female	Minimum	916	60	45.11%	73	54.89%	133
			<u>7,718</u>	<u>958</u>	<u>56.39%</u>	<u>741</u>	<u>43.61%</u>	<u>1,699</u>

Federal Bureau of Prisons, Staff Demographic Characteristics — All Staff (2009) (on file with author); Federal Bureau of Prisons, Federal Prison Facilities (2009), <http://www.bop.gov/DataSource/execute/dsFacilityLoc>. Reports for each institution were provided by the Federal Bureau of Prisons to the author on September 18, 2009. The author compiled the tables based on information from the reports and facility information found at the Bureau of Prisons website.

CROSS-GENDER PAT SEARCHES

TABLE 3  
 PERCENTAGE OF MALE VS. FEMALE STAFF - MIXED GENDER INSTITUTIONS (AS OF JULY 2009)

Facility	Inmate Gender	Security Level	# Inmates	Male Staff	%	Female Staff	%	Total Staff
Brooklyn MDC	Mixed	Adm	2,549	352	71.11%	143	28.89%	495
Chicago MCC	Mixed	Adm	667	148	72.20%	57	27.80%	205
Guaynabo MDC	Mixed	Adm	1,373	207	82.47%	44	17.53%	251
Honolulu FDC	Mixed	Adm	635	144	73.47%	52	26.53%	196
Houston FDC	Mixed	Adm	679	154	69.37%	68	30.63%	222
Los Angeles MDC	Mixed	Adm	1,031	172	70.20%	73	29.80%	245
New York MCC	Mixed	Adm	847	176	71.54%	70	28.46%	246
Oklahoma City FTC	Mixed	Adm	1,511	228	81.14%	53	18.86%	281
Philadelphia FDC	Mixed	Adm	1,140	176	67.69%	84	32.31%	260
San Diego MCC	Mixed	Adm	1,080	169	77.17%	50	22.83%	219
Miami FCI	Mixed	Low	1,118	188	71.21%	76	28.79%	264
Seatac FDC	Mixed	Low	921	176	72.73%	66	27.27%	242
Coleman Low FCI	Mixed - Female camp	Low	2,058	203	69.76%	88	30.24%	291
Lexington FMC	Mixed - Female camp	Low	1,500	317	65.90%	164	34.10%	481
Tucson FCI	Mixed	Medium	711	132	70.59%	55	29.41%	187
Marianna FCI	Mixed - Female camp	Medium	1,112	243	72.97%	90	27.03%	333
Pekin FCI	Mixed - Female camp	Medium	1,257	208	75.36%	68	24.64%	276
Hazelton USP	Mixed	High	2,040	389	78.27%	108	21.73%	497
Victorville USP	Mixed - Female camp	High	1,460	248	73.81%	88	26.19%	336
			<u>23,689</u>	<u>4,030</u>	<u>72.91%</u>	<u>1,497</u>	<u>27.09%</u>	<u>5,527</u>

Federal Bureau of Prisons, Staff Demographic Characteristics — All Staff (2009) (on file with author); Federal Bureau of Prisons, Federal Prison Facilities (2009), <http://www.bop.gov/DataSource/execute/dsFacilityLoc>; Federal Bureau of Prisons, Institutions Housing Female Offenders, [http://www.bop.gov/locations/female\\_facilities.jsp](http://www.bop.gov/locations/female_facilities.jsp) (last visited Mar. 11, 2011). Reports for each institution were provided by the Federal Bureau of Prisons to the author on September 18, 2009. The author compiled the tables based on information from the reports and facility information found at the Bureau of Prisons website.

TABLE 4  
 PERCENTAGE OF MALE VS. FEMALE STAFF - MALE INSTITUTIONS (AS OF JULY 2009)

Facility	Inmate Gender	Security Level	# Inmates	Male Staff	%	Female Staff	%	Total Staff
Butner FMC	Male	Adm	971	266	54.29%	224	45.71%	490
Devens FMC	Male	Adm	1,129	326	72.44%	124	27.56%	450
Miami FDC	Male	Adm	1,553	189	69.49%	83	30.51%	272
Oakdale FDC	Male	Adm	907	5	100.00%	-	0.00%	5
Rochester FMC	Male	Adm	990	223	52.47%	202	47.53%	425
Springfield USMCFP	Male	Adm	1,177	380	62.19%	231	37.81%	611
Duluth FPC	Male	Minimum	903	61	66.30%	31	33.70%	92
Montgomery FPC	Male	Minimum	897	72	63.72%	41	36.28%	113
Morgantown FCI	Male	Minimum	1,069	112	70.89%	46	29.11%	158
Pensacola FPC	Male	Minimum	723	58	62.37%	35	37.63%	93
Yankton FPC	Male	Minimum	786	69	63.30%	40	36.70%	109
Allenwood Low FCI	Male	Low	1,427	165	71.10%	49	22.90%	214
Ashland FCI	Male	Low	1,283	235	84.84%	42	15.16%	277
Bastrop FCI	Male	Low	1,257	185	75.20%	61	24.80%	246
Big Spring FCI	Male	Low	1,547	192	77.42%	56	22.58%	248
Beaumont Low FCI	Male	Low	1,949	150	68.18%	70	31.82%	220
Butner Low FCI	Male	Low	1,374	213	66.77%	106	33.23%	319
Elkton FCI	Male	Low	2,460	268	77.91%	76	22.09%	344
Englewood FCI	Male	Low	947	240	80.00%	60	20.00%	300
Forrest City FCI	Male	Low	2,011	195	67.24%	95	32.76%	290
Fort Dix FCI	Male	Low	4,262	463	77.95%	131	22.05%	594
Fort Worth FCI	Male	Low	1,756	190	69.34%	84	30.66%	274
La Tuna FCI	Male	Low	1,467	247	76.23%	77	23.77%	324
Lompoc FCI	Male	Low	1,440	137	73.26%	50	26.74%	187
Loretto FCI	Male	Low	1,296	186	80.52%	45	19.48%	231
Milan FCI	Male	Low	1,537	252	82.89%	52	17.11%	304
Oakdale FCI	Male	Low	1,396	333	74.00%	117	26.00%	450
Petersburg FCI	Male	Low	1,296	201	72.30%	77	27.70%	278
Safford FCI	Male	Low	1,332	135	75.00%	45	25.00%	180
Seagoville FCI	Male	Low	1,795	217	74.57%	74	25.43%	291

2011]

CROSS-GENDER PAT SEARCHES

621

Facility	Inmate Gender	Security Level	# Inmates	Male Staff	%	Female Staff	%	Total Staff
Sandstone FCI	Male	Low	1,327	188	78.99%	50	21.01%	238
Texarkana FCI	Male	Low	1,386	200	75.19%	66	24.81%	266
Terminal Island FCI	Male	Low	1,088	204	72.60%	77	27.40%	281
Yazoo City FCI	Male	Low	1,920	106	57.30%	79	42.70%	185
Allenwood Medium FCI	Male	Medium	1,376	235	80.76%	56	19.24%	291
Atlanta USP	Male	Medium	1,971	387	81.30%	89	18.70%	476
Beckley FCI	Male	Medium	1,876	265	79.10%	70	20.90%	335
Bennettsville FCI	Male	Medium	1,724	208	67.31%	101	32.69%	309
Beaumont Medium FCI	Male	Medium	1,671	157	74.06%	55	25.94%	212
Beaumont USP	Male	Medium	1,406	199	71.73%	57	22.27%	256
Butner Medium II FCI	Male	Medium	1,558	134	74.44%	46	25.56%	180
Butner Medium I FCI	Male	Medium	728	225	71.66%	89	28.34%	314
Coleman Medium FCI	Male	Medium	1,671	155	72.09%	60	27.91%	215
Cumberland FCI	Male	Medium	1,275	223	79.36%	58	20.64%	281
Edgefield FCI	Male	Medium	1,742	232	71.60%	92	28.40%	324
El Reno FCI	Male	Medium	1,196	274	83.79%	53	16.21%	327
Estill FCI	Male	Medium	1,236	187	68.00%	88	32.00%	275
Fairton FCI	Male	Medium	1,397	239	77.35%	70	22.65%	309
Florence FCI	Male	Medium	1,213	207	78.71%	56	21.29%	263
Forrest City Medium FCI	Male	Medium	1,736	179	66.30%	91	33.70%	270
Gilmer FCI	Male	Medium	1,682	233	80.34%	57	19.66%	290
Greenville FCI	Male	Medium	1,246	197	70.36%	83	29.64%	280
Herlong FCI	Male	Medium	929	213	75.53%	69	24.47%	282
Jesup FCI	Male	Medium	1,715	268	78.36%	74	21.64%	342
Lompoc USP	Male	Medium	1,561	255	81.99%	56	18.01%	311
Leavenworth USP	Male	Medium	1,882	313	85.75%	52	14.25%	365
Manchester FCI	Male	Medium	1,241	232	76.82%	70	23.18%	302
Marion USP	Male	Medium	942	250	82.51%	53	17.49%	303
McKean FCI	Male	Medium	1,310	236	83.10%	48	16.90%	284
Memphis FCI	Male	Medium	1,384	214	70.63%	89	29.37%	303
Otisville FCI	Male	Medium	1,058	225	78.67%	61	21.33%	286
Oxford FCI	Male	Medium	1,117	238	83.80%	46	16.20%	284
Petersburg Medium FCI	Male	Medium	1,945	173	64.07%	97	35.93%	270
Phoenix FCI	Male	Medium	940	227	76.69%	69	23.31%	296

Facility	Inmate Gender	Security Level	# Inmates	Male Staff	%	Female Staff	%	Total Staff
Pollock Medium FCI	Male	Medium	446	108	69.68%	47	30.32%	155
Ray Brook FCI	Male	Medium	1,236	184	77.31%	54	22.69%	238
Shuykill FCI	Male	Medium	1,319	235	79.66%	60	20.34%	295
Sheridan FCI	Male	Medium	1,391	271	84.69%	49	15.31%	320
Talladega FCI	Male	Medium	921	217	73.81%	77	26.19%	294
Terre Haute FCI	Male	Medium	1,330	489	81.36%	112	18.64%	601
Three Rivers FCI	Male	Medium	1,016	215	82.06%	47	17.94%	262
Victorville Medium I FCI	Male	Medium	1,271	241	71.30%	97	28.70%	338
Victorville Medium II FCI	Male	Medium	1,300	157	68.56%	72	31.44%	229
Williamsburg FCI	Male	Medium	1,749	198	67.12%	97	32.88%	295
Yazoo City Medium FCI	Male	Medium	1,536	235	67.14%	115	32.86%	350
Allenwood USP	Male	High	1,153	286	84.37%	53	15.63%	339
Atwater USP	Male	High	1,239	284	83.78%	55	16.22%	339
Big Sandy USP	Male	High	1,416	293	82.30%	63	17.70%	356
Canaan USP	Male	High	1,297	304	83.75%	59	16.25%	363
Coleman II USP	Male	High	1,557	201	78.21%	56	21.79%	257
Coleman I USP	Male	High	1,503	215	80.52%	52	19.48%	267
Florence Admax USP	Male	High	456	279	80.64%	67	19.36%	346
Florence High USP	Male	High	971	285	84.82%	51	15.18%	336
Lee USP	Male	High	1,490	292	80.66%	70	19.34%	362
Lewisburg USP	Male	High	942	425	87.63%	60	12.37%	485
McCreary USP	Male	High	1,566	285	80.97%	67	19.03%	352
Pollock USP	Male	High	1,380	333	81.82%	74	18.18%	407
Tucson USP	Male	High	955	236	80.27%	58	19.73%	294
Terre Haute USP	Male	High	1,643	67	75.28%	22	24.72%	89
			<u>122,469</u>	<u>19,778</u>	<u>75.60%</u>	<u>6,385</u>	<u>24.40%</u>	<u>26,163</u>

Federal Bureau of Prisons, Staff Demographic Characteristics – All Staff (2009) (on file with author); Federal Bureau of Prisons, Federal Prison Facilities (2009), <http://www.bop.gov/DataSource/execute/dsFacilityLoc>. Reports for each institution were provided by the Federal Bureau of Prisons to the author on September 18, 2009. The author compiled the tables based on information from the reports and facility information found at the Bureau of Prisons website.