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ESSAY

A REASONABLE WOMAN'S VERSION OF CRUEL AND UNUSUAL PUNISHMENT: CROSS-GENDER, CLOTHED-BODY SEARCHES OF WOMEN PRISONERS

Lisa Krim*

INTRODUCTION

Life in prison is not a pleasant experience. It is not meant to be. People are incarcerated and deprived of their freedom because they have violated certain rules of society. Incarceration in the overcrowded prisons in the United States today inevitably requires innumerable intrusions on inmates' privacy and comfort. However, the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution sets a limit on the suffering in prison that we, as a society, will permit inmates to endure.¹

Courts in several circuits have recognized very limited privacy rights to prisoners to be free from unnecessary searches of their private body parts, particularly by guards of the opposite sex, or to have their naked bodies exposed unnecessarily to

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

guards of the opposite sex.² In the context of searches, this limited privacy right has meant that male prisoners must submit to "frisk" searches by female guards, but these searches cannot include the genitals.³

In 1989, a new policy at the Washington Corrections Center for Women (WCCW), a Washington State women's correctional facility, tested the outer boundaries of Eighth Amendment doctrine. When Eldon Vail, the first male superintendent, arrived at WCCW he implemented a new policy allowing male guards to randomly conduct clothed-body searches of the women inmates. The searches were said to be necessary to implement unpredictable patterns of searching inmates in an effort to control contraband in the prison.⁴ The way the cross-gender searches were carried out stripped the women of personal dignity and subjected them to an intolerable level of suffering.⁵ Superintendent Vail's training material for the new policy instructed the guards to:

2. See *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980) (holding that privacy rights of women inmates did not extend to protection against being viewed by male guards while sleeping so long as suitable sleepwear was provided and they were permitted to cover their cell windows while changing); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980) (holding that prison must rearrange guard duties for a woman guard in a male prison to limit the invasions of the inmates' privacy); *Bowling v. Enomoto*, 514 F. Supp. 201 (N.D. Calif. 1981) (holding that male prisoners have a right to be free from unrestricted observation of their genitals and bodily functions by female guards under normal circumstances).

3. See *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983); *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981). Interestingly, one court upheld state prison regulations which permitted male prisoners to be frisked (excluding genital areas) by male or female guards but only allowed female guards to frisk female inmates. *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), *cert. denied*, 464 U.S. 996 (1983).

4. Consolidated Brief of Defendants/Appellants at 37, *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992) (Nos. 90-35307/90-35552), *vacated and superseded by*, 986 F.2d 1521 (9th Cir. 1993) (en banc). Larry Kincheloe, the Director of Divisions of Prisons and Superintendent Vail's supervisor, testified in the federal district court: "I felt the control of contraband was necessary for the security of that institution and that without the cross-gender searches that could not be accomplished." *Id.* The contraband included deadly weapons, alcohol, drugs, heroin, cocaine, hypodermic needles, and even egg salad sandwiches and guitar strings. 986 F.2d at 1548 (Trott, J., dissenting). In this context, contraband is anything a prisoner has in her possession in violation of the rules of the prison.

5. Brief of Plaintiffs/Appellees at 5-6, *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992) (Nos. 90-35307/90-35552), *vacated and superseded by*, 986 F.2d 1521 (9th Cir. 1993) (en banc). The prison had always had a policy of "routine" searches conducted by female guards at fixed checkpoints. The new policy created a system of "random" searches by both male and female guards that could be conducted without cause or suspicion and without advance notice anywhere in the general prison area or in any part of the women's cells. The random search policy called for guards to

'[u]se a flat hand and pushing motion across the [inmate's] crotch area . . . [p]ush inward and upward when searching the crotch and upper thighs of the inmate.' . . . All seams in the leg and the crotch areas are to be 'squeez[ed] and knead[ed].' Using the back of the hand, the guard also [was] to search the breast areas in a sweeping motion, so that the breasts will be 'flattened.'⁶

Each search was to be conducted in the presence of an additional staff member who served as an "observer."⁷ These searches were implemented on the morning of July 5, 1989, and several inmates were searched by male guards with either a female or male staff member watching.⁸ That same day, the women inmates filed a *pro se* complaint in federal court. Since that day, the searches have been enjoined by the courts.

The courts halted these searches by applying the Supreme Court's Eighth Amendment conditions of confinement doctrine. In the context of prison conditions, the Eighth Amendment inquiry embodies both an objective or "reasonableness" inquiry and a subjective inquiry that focuses on the actual specific intent of the prison official administering or instituting the policy. The Supreme Court currently holds conditions of confinement unconstitutional if they are both objectively cruel (*i.e.*, was the deprivation sufficiently serious?) and subjectively cruel from the perspective of the corrections official (*i.e.*, did the officials act with a sufficiently culpable state of mind?).⁹ The subjective test

search a minimum of ten inmates per shift during the day and swing shifts. *Jordan*, 986 F.2d at 1532-33 (Reinhardt, J., concurring).

6. *Jordan*, 986 F.2d at 1523 (citing WCCW, Pat-Down Searches of Female Inmates (n.d.)).

7. Brief of Plaintiffs/Appellees at 7, *Jordan* (Nos. 90-35307/90-35552). According to Superintendent Vail, the observer was present to provide a "calming influence on the whole process" and to "provide another source of information should allegations occur" as to staff misconduct. *Jordan*, 986 F.2d at 1552 (Trott, J., dissenting).

8. *Id.* at 7-8.

9. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The phrase "cruel and unusual punishment" has been interpreted as a unit and used to limit both the methods of punishment permitted and the degree or proportionality of punishment allowed. LARRY C. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 159 (1975).

Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."

is an individualized inquiry into the state of mind of the guard inflicting the harm or the prison official instituting a harmful policy in the case at issue.¹⁰ The objective test is a more general inquiry, comparing the conditions of confinement at issue to all conditions of confinement.¹¹ Using "contemporary standards of decency," a court must determine whether the particular conditions are so cruel as to exceed a societal sense of the acceptable level of punishment.¹² There is no generally accepted judicial methodology for determining what is "objectively cruel" in the conditions of confinement context.¹³ Unlike negligence cases, where it is well understood that the factfinder makes reference to the "reasonable person" in assessing conduct,¹⁴ there is no such generally accepted construction in the Eighth Amendment prison conditions context, which seems to call for some such standard.

This Essay will argue that a gender-specific standard of what constitutes cruel and unusual punishment should be adopted to give guidance to courts facing challenges to prison conditions that involve searches or other policies that implicate the sexuality of the inmates and the abuse of power by guards.¹⁵ Part I will describe *Jordan v. Gardner* and show how the Ninth Circuit, in determining whether cross-gender, clothed-body searches constituted an objectively cruel and unusual condition of confinement, implicitly applied a gender-specific analysis by considering the pain inflicted by the searches from the perspective of the female

Trop v. Dulles, 356 U.S. 86, 101 n.32 (1958) (citations omitted).

10. *See infra* pp. 98-101.

11. *Id.*

12. *Id.*

13. The closest the Court has come to instructions on determining when conditions are objectively cruel was in *Rhodes v. Chapman*, 452 U.S. 337, 364, 366 (1981). There, the Court said the test was not to be a purely subjective evaluation by the judges but was to be "informed by objective factors to the maximum possible extent." *Id.*, 452 U.S. at 346 (citing *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)). The Court did not explain how those objective factors were to be evaluated, nor did it create any standard against which those objective factors could be compared.

14. *See, e.g.*, *Stone v. New York, Chicago & St. Louis R.R. Co.*, 344 U.S. 407, 409 (1953) (applying reasonable person standard to claim under Federal Employers' Liability Act); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949) (same).

15. For example, policies that isolate a female inmate and a male guard away from the rest of the prison population could be problematic in application and require gender-specific evaluation. Some work assignments in the prison or transportation of women outside the prison might present such situations when the potential for abuse of female inmates by male guards is particularly high. Also, any policies allowing male guards to monitor women in showers, while they change, sleep, or receive medical care should be evaluated using a gender-specific standard.

inmates. Part II will review the Supreme Court cases that established the Eighth Amendment doctrine governing conditions of confinement. It will show how the Court created a two-pronged test for cruel and unusual punishment, specific to the context of Eighth Amendment challenges to conditions of confinement, that includes both objective and subjective inquiries.¹⁶ It also will discuss ways in which the objective test requires interpretation, content, and a clear standard. Part III will show that the standard for “objectively” cruel and unusual punishment should include a gender-specific inquiry. Gender should be considered because men and women have different perceptions and experiences with regard to sexuality and abuse, which may trigger the cruel and unusual punishment clause protections under different prison conditions. The standard should focus on gender to ensure that no one in the prison system, regardless of gender, is treated in a way that is cruel and unusual.¹⁷ Finally, Part IV will show why the “reasonable woman,” and not some other legal construct or approach, such as a reasonable person or a case-by-case approach, is the best tool for establishing the limits of cruel and unusual conditions of confinement.

I. JORDAN V. GARDNER

The women inmates of WCCW in *Jordan v. Gardner* challenged the policy of cross-gender, clothed-body searches for violating the Eighth Amendment’s protection against cruel and unusual punishment. Faced with this constitutional challenge, the District Court, and then the Ninth Circuit, had to decide if the cross-gender, clothed-body searches constituted an “objectively” cruel and unusual condition of confinement.

Sharon Hanson was one of the inmates searched by a male guard the morning the cross-gender, clothed-body search policy

16. The two-pronged inquiry includes both objective and subjective inquiries.

17. In recommending a gender-specific standard, this Essay is limited to discussion of the Eighth Amendment. In *Jordan*, the Ninth Circuit also considered the challenges the inmates made to cross-gender, clothed-body searches under the Fourth Amendment and the First Amendment. Some prison conditions cases do not consider the Eighth Amendment and consider only “right to privacy” issues or other theories. The choice of theory applied seems somewhat arbitrary. Whatever may be said about these other constitutional provisions, the Supreme Court decisions interpreting the Eighth Amendment invite a gender-specific inquiry in the conditions of confinement context. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Whitley v. Albers*, 475 U.S. 312 (1986); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Hudson v. McMillian*, 503 U.S. 1 (1992).

was instituted at WCCW. A male cook observed the search, which occurred as Ms. Hanson left her job in the prison kitchen. Ms. Hanson had a long history of sexual abuse by men, and she protested the guard's order to submit to his search. Ms. Hanson testified that when her pleas failed and

[his] hands neared her breasts, . . . she looked away and stared into an inmate friend's eyes. . . . she had 'really hoped she [would] be a tough criminal . . . and slug him. . . . Instead, [it was] like I was up here in a corner somewhere watching, and I remember thinking, what an awful thing they are doing to that lady.'¹⁸

Ms. Hanson vividly recalled the guard "cupping" her breast and rubbing one of her buttocks.¹⁹ After the search, Ms. Hanson's hands had to be pried loose from the bars to which she had clung during the search. She returned to her cellblock and vomited.²⁰ An inmate friend of Ms. Hanson's, who spoke to her in the hours and days after the search, said she cried and became hysterical when thinking about the search.²¹

That same morning, soon after Ms. Hanson was searched, the women inmates filed a *pro se* complaint in the United States District Court for the Western District of Washington and requested a preliminary injunction. They were granted a temporary restraining order after a telephone hearing. They were then granted a preliminary injunction halting the cross-gender searches and certified as a class.²² After a bench trial, which included six days of live testimony, eight written and videotaped depositions, and fifty-six exhibits,²³ the District Court held that the cross-gender searches at WCCW violated the women inmates' First, Fourth, and Eighth Amendment rights.²⁴ Although

18. Brief for Plaintiffs/Appellees at 8, *Jordan* (Nos. 90-35307/90-35552) (citing the testimony of Sharon Hanson in the federal district court). Ms. Hanson, in what was likely a dissociative reaction, used the word "lady" to refer to herself. *Id.*

19. *Id.*

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

21. Brief of Plaintiffs/Appellees at 9, *Jordan* (Nos. 90-35307/90-35552).

22. *Id.* at 9-10.

23. *Id.* at 10.

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

The part of the First Amendment pertinent in *Jordan* provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

The pertinent part of the Fourth Amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

a panel of the Ninth Circuit reversed the District Court on appeal,²⁵ the Ninth Circuit sitting en banc held that the search policy constituted cruel and unusual punishment under the Eighth Amendment.²⁶ It was the cross-gender nature of the searches that was challenged and ultimately struck down. Today, pursuant to this ruling, only female guards conduct the clothed-body searches at WCCW.²⁷

The District Court's findings of fact describe the effects of instituting a policy of intrusive cross-gender, clothed-body searches on the approximately 270 women incarcerated in Washington State's only prison for women:²⁸

1. [T]he searches would necessarily involve touching of and around the breast and genital areas

2. The level of training, qualifications and testing of the corrections officers at [WCCW] provide no assurance that there will not be inappropriate incidents involved in this type of search activity.

3. However these searches are conducted, human sexuality cannot be removed from these kinds of intimate contacts.

4. There are cultural taboos in our society which prohibit men from touching women's breast and genital areas without consent.

5. Many of the women inmates at [WCCW] have been sexually and/or physically abused by men.

6. There are differences between men and women, which are not only physical, but also emotional and psychological, and which 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 searches by women.

. . .

8. There is a high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates from these searches, even if properly conducted. That can be predicted, although it is not a thing that can be

25. *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992), *vacated and superseded by*, 986 F.2d 1521 (9th Cir. 1993).

26. *Jordan*, 986 F.2d at 1531. Four of the judges refused to reach the Fourth and First Amendment claims and based their decision purely on Eighth Amendment grounds. Three other judges concurred in the result and in the Eighth Amendment holding, making the Eighth Amendment decision a majority decision, but these judges wrote two separate concurring opinions in which they argued that there was also a violation under the Fourth Amendment. It appears that no petition for certiorari was filed with the Supreme Court by either side and the permanent injunction granted by the District Court remains in place.

27. Brief for Plaintiffs/Appellees at 9, *Jordan* (Nos. 90-35307/90-35552).

28. *Id.* at 3.

predicted person by person. Others may be hurt to a lesser degree, and some not at all.²⁹

When the District Judge made these conclusions, the staff of 90 corrections officers and sergeants at WCCW was approximately 52% male and 48% female.³⁰ The District Court permanently enjoined WCCW from allowing male guards to conduct clothed-body searches of female inmates that included touching of or around the breast and genital areas except in emergency situations. Further, the District Court suggested thirteen alternatives to cross-gender searches which would achieve the legitimate security goals of the prison officials.³¹

In its conclusions of law, the District Court held that the cross-gender searches violated the First, Fourth, and Eighth Amendment rights of the inmates as applied to the states through the Fourteenth Amendment.³² The District Court concluded that "under the laws of the State of Washington and other states, . . . some areas of the human body have more privacy rights attached to them than do other parts. The standards of decency in society also recognize a right to privacy in the intimate parts of a human body."³³ After making these conclusions, the District Court turned to the Fourth Amendment claim. The

29. *Jordan v. Gardner*, No. C89-339TB, slip op. at 2-3 (W.D. Wash. Feb. 28, 1990), *rev'd*, 953 F.2d 1137 (9th Cir. 1992), *vacated and superseded by*, 986 F.2d 1521 (9th Cir. 1993) (en banc).

30. Brief for Plaintiffs/Appellees at 3, *Jordan* (Nos. 90-35307/90-35552).

31. *Jordan v. Gardner*, No. C89-339TB, slip op. at 5-6, 13-14 (W.D. Wash. Feb. 28, 1990). As alternatives to the cross gender searches, the District Court suggested the following:

[a]djusting corrections officers' scheduling; adjusting corrections officers' job responsibilities; adjusting corrections officers' duties to equalize work load; adjusting collective bargaining agreement; permitting male officers to decide whom to search and having a female do the search; limiting the necessity for an observer; adjusting upward the number of random and routine searches; seeking bona fide occupational qualifications for certain correction officer positions; using more magnetometers; hiring more staff; keeping inmate population levels reasonable; changing the physical structure and/or layout of the prison; building more women's prisons.

Id. at 4-5.

32. *Id.* at 12. The inmates complained that the cross-gender search policy interfered with some inmates' religious beliefs which prohibit intimate touching except between spouses. *Id.* at 4. Because the focus of this Essay is the Eighth Amendment and because the First Amendment grounds were reversed by the Ninth Circuit, further discussion of how unreasonable cross-gender, clothed-body searches encroach upon the right to free exercise of religion is beyond the scope of this Essay.

33. *Id.* at 9.

District Court relied on *Turner v. Safley*³⁴ and held that the cross-gender, clothed-body searches were unreasonable and thus violated the Fourth Amendment. The District Court also held that the cross-gender searches constituted “the infliction of pain without penological justification, and cruel and unusual punishment in violation of the Eighth Amendment.”³⁵ The District Court did not confront the issue of a gender-specific standard for cruel and unusual punishment.

A panel of the Ninth Circuit reversed the District Court on all three grounds.³⁶ Upon *de novo* review, the panel first used the four-part *Turner v. Safley* test to reverse the First Amendment holding. It agreed with the District Court that there was a valid, rational connection between the prison regulation and the legitimate government interest offered to justify it.³⁷ The panel also agreed that the search policy had an impact upon the entire prison, not just upon those who complained that their First Amendment rights were being violated.³⁸ However, the panel disagreed with the District Court on the other two *Turner* factors. The panel held the policy constitutional because there were

34. 482 U.S. 78 (1987). *Turner* established a four-part balancing test to determine when prison regulations that impinge on inmates’ constitutional rights are valid. The Court held that searches of prison mail were constitutional and did not violate the First Amendment rights of the inmates but marriage regulations unconstitutionally impinged on the inmates’ constitutional right to marry. Under the *Turner* test, the four factors to be considered are (1) whether there is a valid rational connection between the prison regulation and a neutral legitimate government interest put forward to justify it; (2) whether there are alternative means for the inmates to exercise the asserted constitutional right; (3) the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and prison resources generally; and (4) whether there is a ready alternative to the challenged prison policy that will fully accommodate the prisoner’s rights at no cost to valid penological interest. *Id.* at 89-91. The District Court in *Jordan* found that there was a rational connection and the accommodation would impact the entire prison, but it held the policy unconstitutional because there were no alternative means for the inmates to practice their religion and there was an easy alternative to the cross-gender searches because there were already female guards who could conduct them. *Jordan v. Gardner*, No. C89-339TB, slip op. at 12 (W.D. Wash. Feb. 28, 1990).

35. *Jordan v. Gardner*, No. C89-339TB, slip op. at 12 (W.D. Wash. Feb. 28, 1990).

36. 953 F.2d 1137 (9th Cir. 1992), *superseded and vacated by*, 986 F.2d 1521 (9th Cir. 1993). Chief Judge Wallace, Judge O’Scannlain, and District Court Judge James M. Burns (sitting by designation) were on the panel. Chief Judge Wallace wrote the opinion. Judge O’Scannlain concurred in the analysis of the First and Fourth Amendment claims, but dissented from the analysis and conclusions on the Eighth Amendment issue.

37. *Id.* at 1139-40.

38. *Id.*

alternative means for the prisoners to exercise their religious rights and there was no ready alternative to the search policy.³⁹

The panel then held that the Fourth Amendment was not violated, relying on *Grummett v. Rushen*, an earlier Ninth Circuit cross-gender search case.⁴⁰ The Ninth Circuit panel analogized the brief, professional approach used to conduct the cross-gender searches in both cases and emphasized the need to avoid excessive officer reassignment throughout the prison.⁴¹

With respect to the Eighth Amendment, the panel deferred to the prison authorities who made the decision to implement the search policy.⁴² The panel then held that the searches were not "so totally without penological justification that [they] resulted in the gratuitous infliction of suffering."⁴³

The Ninth Circuit granted an en banc rehearing of the case and vacated the panel decision.⁴⁴ A majority of the judges affirmed the District Court's Eighth Amendment finding, but only a plurality agreed on the Fourth Amendment grounds.⁴⁵ Judge O'Scannlain, writing for four judges, refused to reach the inmates' First and Fourth Amendment grounds after concluding that the cross-gender searches were unconstitutional under the Eighth Amendment. According to O'Scannlain, the inmates were asserting privacy interests in freedom from cross-gender searches, but the right of privacy had not yet been held to reach this kind of prison search case.⁴⁶ In fact, in O'Scannlain's view, the precedents in cases addressing privacy for men in prison have created only a very narrow privacy interest.⁴⁷

39. *Id.*

40. 779 F.2d 491 (9th Cir. 1985). The "pat down" searches in *Grummett* did not involve any intimate contact with the inmates' bodies. *Id.* at 496. The inmates were fully clothed and the searches were brief. *Id.*

41. *Jordan*, 953 F.2d at 1141-42.

42. *Id.* at 1142-43.

43. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

44. *Jordan v. Gardner*, 968 F.2d 984 (9th Cir. 1992) (granting rehearing en banc). The panel decision was officially vacated and superseded by the en banc decision. Because the Ninth Circuit is so large, eleven circuit judges sit for en banc rehearsings. The en banc panel consisted of eleven members of the Ninth Circuit including Chief Judge Wallace who wrote the three-member panel opinion and Judge O'Scannlain who dissented from the three-member panel decision. The other nine judges were Judges Poole, Canby, Reinhardt, Hall, Wiggins, Noonan, Leavy, Trott, and Kleinfeld.

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

46. *Id.* at 1524-25.

47. *Id.* at 1525-26.

In contrast, O'Scannlain argued that the protection for prisoners guaranteed by the Eighth Amendment's cruel and unusual punishment clause is more clearly established.⁴⁸ After reviewing the District Court's findings on the histories of sexual abuse suffered by the women inmates of WCCW, the psychological differences between men and women that may cause abused women to react very differently to the searches than do men, and the high probability of great harm, including severe psychological injury and emotional pain and suffering, Judge O'Scannlain concluded that "the constitutional standard for a finding of 'pain' ha[d] been met in this case."⁴⁹ This statement shows that the psychological effect on the inmates as women was embedded in the evaluation of cruel and unusual punishment.

Judge O'Scannlain distinguished *Jordan* from *Grummett v. Rushen*,⁵⁰ after concluding that the evidence showed the searches in *Grummett* caused only momentary discomfort.⁵¹ He was clearly persuaded that women experience the clothed-body search intimate touching differently from men. Judge O'Scannlain concluded that it is proper to consider this gender difference in evaluating the objective part of the women's claim — whether the searches constituted an "infliction of pain":⁵²

We are satisfied that the constitutional standard for a finding of "pain" has been met in this case. In most of our other search cases, the court has not been presented with evidence pointing to more than momentary discomfort caused by the search procedures. . . . Nothing in *Grummett* indicates that the men had particular vulnerabilities that would cause the cross-gender clothed-body searches to exacerbate symptoms of pre-existing mental conditions. Indeed, in contrast to this case, nothing in *Grummett* indicates that the male prisoners had experienced or would be likely to experience any psychological trauma as a result of the searches.

The record in this case supports the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women.⁵³

In describing how women experienced the searches differently, Judge O'Scannlain cited *Ellison v. Brady*,⁵⁴ a sexual har-

48. *Id.*

49. *Id.* at 1525-26.

50. 779 F.2d 491 (9th Cir. 1985).

51. 986 F.2d at 1526.

52. *Id.*

53. *Id.*

54. 924 F.2d 872 (9th Cir. 1991).

assment case in which the Ninth Circuit held that sexual harassment was to be established by using a "reasonable woman" standard. The court in *Ellison* concluded that the different standard was justified

because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that women may perceive.⁵⁵

Judge O'Scannlain also noted that 85% of the women inmates at WCCW reported a history of sexual abuse to prison counselors. It is not clear if the decision in *Jordan* depended upon this high percentage and whether the result would have been different if only 15% of the women inmates reported being victims of prior sexual abuse. Judge O'Scannlain did not use a gender-specific test nor a "reasonable woman" standard; however, a gender-specific concern was apparent in his analysis.⁵⁶

Judge O'Scannlain's arguments and conclusion that the cross-gender searches violated the Eighth Amendment were joined by Judges Reinhardt and Canby in a separate concurrence by Judge Reinhardt,⁵⁷ who would have also found a Fourth Amendment violation of the inmates' "right of privacy and dignity in their persons."⁵⁸ Judge O'Scannlain's Eighth Amendment

55. *Id.* at 879.

56. As for the subjective element of the Eighth Amendment claim, after Judge O'Scannlain determined the searches were "unnecessary" to achieve prison security or equal employment of the women guards, he decided that the searches were also "wanton" under the "deliberate indifference" standard that is appropriate for conditions of confinement challenges. *Jordan*, 986 F.2d at 1526-28. When Superintendent Vail first took over as prison administrator, the female officers were conducting all of the routine clothed body searches. Their union filed a grievance against this policy because the women guards had to do more work than the men. *Id.* at 1553 (Trott, J., dissenting). Vail apparently wanted to avoid any additional strife with the guards' union so he implemented the cross-gender random search policy, despite the fact that it was not required for security purposes, and that he was urged by his own staff not to institute it because of the potential for psychological trauma to the inmates. *Id.* at 1528-29. Judge O'Scannlain found that Vail displayed deliberate indifference when he instituted the policy. *Id.* at 1528-30.

57. *Id.* at 1532.

58. *Id.* at 1534 n.7. Judge Reinhardt reached this conclusion by applying the *Turner v. Safley* balancing test, as did the District Court.

The most important part of Judge Reinhardt's concurrence, however, is that he, like Judge O'Scannlain, made an inquiry that was informed by gender into the harm inflicted upon the women when he concluded that the searches were unreasonable under the Fourth Amendment. Judge Reinhardt, too, cites to *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), and argues that these searches harm all women as women:

conclusion was also joined by Judge Noonan in another separate concurrence,⁵⁹ creating a majority only on the Eighth Amendment grounds for the decision.

The *Jordan* opinions imply a gender-specific analysis to the extent that the opinions emphasize the importance of gender in the court's decision making. The *Jordan* court considered the effect of the searches on the inmates as women.⁶⁰ In the future,

[E]ven the inmates who did not experience the degradation that [the inmate plaintiffs and witnesses] recounted would suffer substantial harm if subjected to cross-gender searches. The intrusive, probing searches at issue here permit men in positions of ultimate authority to flatten the breasts of women who are powerless and totally subject to their control, to knead the seams of their clothing at their inner thighs, and to thrust their hands inward and upward into their crotches. Such conduct is offensive in the extreme to all women, regardless of their prior sexual history.

Jordan, 986 F.2d at 1540.

A common-sense understanding of the different experiences of men and women in this society, leads to the inescapable conclusion that invasive searches of the bodies of female prisoners by male prison guards are harmful both because they constitute and reinforce gender subordination, and because they offend our basic values and our concepts of human dignity.

Jordan, 986 F.2d at 1540 (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)).

59. *Jordan*, 986 F.2d at 1543. Judge Noonan most vividly invoked the importance of gender in evaluating cruel and unusual punishment. In his concurring opinion, he argued that:

Naked genitalia of one gender cannot be routinely inspected by guards of the other gender. Indecency of this kind is beyond our expectation as a society and beyond what the Constitution countenances. The plain fact is that the searches at issue here are not essentially different. . . . The indecent is not necessarily cruel, but when indecency is inflicted by men on powerless women it has the sexual character that manifests the sadistic. It is cruel.

Id.

60. The Ninth Circuit could have found other ways to distinguish *Jordan* from *Grummett*. It could have found that the search in *Jordan* was more intrusive than the cross-gender search upheld in *Grummett*, and thus avoided the need to make distinctions based on gender. The court's choice to invoke gender (however diffidently) as a means of distinguishing *Grummett* appropriately reflects reality. When men search women's most private body parts, they impose both power and sexuality upon the women. When women search men, they do not impose the same level of power because our society today is still one in which men, as a rule, have power and women do not. Because both power and sexuality are implicated when men search women, there is great danger for abuse. The fear of this abuse, and the actual abuse, both can constitute cruel and unusual punishment. Because of the fear and danger in searches of women by men, these searches trigger the protections of the Eighth Amendment when searches of men by women do not. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983). Catharine MacKinnon makes arguments connecting sexual-

courts should explicitly, and not just implicitly, recognize the direction of the Ninth Circuit and develop the doctrine using a gender-specific analysis to determine when punishment becomes "objectively" cruel and unusual.

II. EIGHTH AMENDMENT DOCTRINE

The Eighth Amendment, like many other parts of the Constitution, contains very broad terms that must be given context and meaning by judicial interpretation. Courts interpreting the Eighth Amendment have shown tremendous flexibility. This section will show, first, the manner in which cruel and unusual punishment doctrine was broadened to include more than specific torture methods. Second, this section will discuss the history of how the concept of cruel and unusual punishment was applied to conditions of confinement to prevent incarceration from becoming a cruel and unusual experience.⁶¹ Third, this section will show how, in the context of conditions of confinement, the test for cruel and unusual punishment has come to include both objective and subjective components.

The drafters of the Eighth Amendment were primarily concerned with preventing "torture" and "barbar(ous)" methods of punishment.⁶² Beginning in the 1900s, however, the Court held that physical torture was not the only punishment which could violate the Eighth Amendment.⁶³ For example, in *Trop v. Dulles*,⁶⁴ the Court held that it was cruel and unusual to divest an army deserter of his citizenship.⁶⁵ The Court decided that "the total destruction of the individual's status in organized society"⁶⁶ was "more primitive than torture" because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dig-

ity and the subordination of women that suggest the kind of argument I make here in the context of prisons.

61. The conditions of confinement cases under the Eighth Amendment are distinct from Eighth Amendment cases which consider the constitutionality of different types of punishment. For example, the Eighth Amendment has been used to challenge the death penalty as cruel and unusual punishment, regardless of the way in which it is carried out. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

62. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). For the history of the constitutional prohibition against cruel and unusual punishments, see *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976), and Anthony F. Granucci, "Nor Cruel and Unusual Punishment Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969).

63. See, e.g., *Gregg*, 428 U.S. at 171-73.

64. 356 U.S. 86 (1958).

65. *Id.* at 99-102.

66. *Id.* at 101.

nity of man.”⁶⁷ The Court also noted that in interpreting the Eighth Amendment, courts must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁸ However, “common standards of decency,” the phrase that came to stand for the *Trop* framework, requires further comment. Courts need some measure of what constitutes an appropriate, objective standard of decency in order to judge when punishment is cruel and unusual. It is insufficient to allow “common standards of decency” to become the “judge’s standards of decency” because the results are unpredictable and may be based on individual judges’ biases rather than on a fair standard.

Until *Estelle v. Gamble*⁶⁹ in 1976, the Eighth Amendment was applied only to punishments that were part of the prisoner’s sentence.⁷⁰ *Estelle* extended the Eighth Amendment to prohibit cruel and unusual treatment in post-incarceration deprivation. The Supreme Court in *Estelle* concluded that punishment violates the Eighth Amendment if it is incompatible with “evolving standards of decency” or if it “involve[s] the unnecessary and wanton infliction of pain.”⁷¹ Failure to survive either the “objective” inquiry into evolving standards of decency, or the “subjective” inquiry into whether the prison officials’ intent is wanton, constitutes an Eighth Amendment violation.⁷² In *Estelle*, the Court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’ ”⁷³

67. *Id.* at 100.

68. *Id.* at 101.

69. 429 U.S. 97 (1976).

70. *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting). See L. Allan Parrott, Jr., Casenote, *Hudson v. McMillian and Prisoners’ Rights in the 1990s: Is the Supreme Court Now More Responsive to “Contemporary Standards of Decency”?*, 27 U. RICH. L. REV. 151, 152 n.17 (1992).

71. *Estelle*, 429 U.S. at 102-03. In other words, even after a prisoner is incarcerated in a certain facility for a certain amount of time, the Eighth Amendment protects against further acts that constitute cruelty, such as deprivation of medical care.

72. The court did not use the terms “objective” and “subjective” to identify these tests in *Estelle*, but I use the terms here because the Court later uses these labels to describe the tests articulated in *Estelle*. See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

73. 429 U.S. at 104. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666-68 (1962).

Soon after the *Estelle* decision, *Hutto v. Finney*⁷⁴ and *Rhodes v. Chapman*⁷⁵ established that conditions of confinement, and not just specific acts of mistreatment, are subject to Eighth Amendment limitations. In *Hutto*, the Court held that certain conditions in isolation cells could be cruel and unusual punishment when the conditions were considered "as a whole."⁷⁶ Similarly, in *Rhodes*, the Court considered the practice of "double celling" inmates within the context of the whole environment (including prison security, prison population growth, and limited prison resources).⁷⁷ Although the Court ultimately concluded that the double celling did not create cruel and unusual conditions of confinement, it applied the "common standards of decency" test from *Trop v. Dulles*. The Court also noted that this test may not be a purely subjective evaluation by judges; rather, judges should be "informed by objective factors to the maximum possible extent."⁷⁸

In *Rhodes* and *Hutto*, the Court further defined the meaning of "objective" cruelty, yet it continued to use open-ended phrases that failed to provide a clear standard. Justice Brennan, writing a concurring opinion in *Rhodes*, noted that in determining when conditions have become cruel and unusual, the "touchstone is the effect on the imprisoned."⁷⁹ The vagueness of the Court's remarks offers very limited guidance. As with "common standards of decency," consideration of the "effects on the prisoner" is only useful when there is a standard against which those effects are to be measured. Many questions remain. For instance, which prisoner(s) should courts look to — the plaintiff(s) in the case or more general prisoners? Does the gender, race, or personal history of the prisoner matter? Only a standard that answers these questions provides the necessary guidance for determining when conditions of confinement become cruel and unusual.

Notwithstanding Justice Brennan's suggestion that the evaluation of cruel and unusual punishment should focus on the effect on the inmate, the Court did not consistently incorporate this inquiry into its cruel and unusual punishment analysis. In

74. 437 U.S. 678 (1978).

75. 452 U.S. 337 (1981).

76. *Hutto*, 437 U.S. at 687.

77. *Rhodes*, 452 U.S. at 347-48.

78. *Id.* at 346-47 (citing *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)).

79. *Id.* at 364, 366 (Brennan, J., concurring) (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D.N.H. 1977)).

1986, in *Whitley v. Albers*,⁸⁰ the Eighth Amendment doctrine was tailored specifically for application to prison disturbances. Justice O'Connor's majority decision focused on the state of mind of the guard and held that there was an Eighth Amendment violation under the subjective "unnecessary and wanton" inquiry.⁸¹ The Court held that in a prison disturbance, because the safety concerns for inmates and guards are extremely pressing, the infliction of pain violates the Eighth Amendment only when the guard acts "maliciously or sadistically."

In contrast, when an inmate claims inadequate medical treatment, as in *Estelle*, the infliction of pain violates the Eighth Amendment if any prison official acts with "deliberate indifference."⁸² Thus, in a riot context, defendant prison officials must avoid "malice and sadism," while in a conditions of confinement context, the defendants must avoid "deliberate indifference." This different standard is warranted because, in the context of *Estelle*, the "State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."⁸³ Instead of a fixed meaning, "wanton" intent is to be determined with "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged."⁸⁴ The Court's willingness to tailor the subjective test to different prison situations suggests that the "objective" test might also be susceptible to similar tailoring.⁸⁵

The prior cases set the stage for the recognition in *Wilson v. Seiter*⁸⁶ that the Eighth Amendment test for cruel and unusual punishment in conditions of confinement has both a subjective and an objective component, even if both components are not

80. 475 U.S. 312 (1986). Gerald Albers, an inmate at the Oregon State Penitentiary, was shot in the leg by a guard while prison guards were attempting to subdue a prison riot in which a prison guard was taken hostage.

81. *Id.* at 319. ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.*)

82. *Id.* at 320-21.

83. *Id.* at 320.

84. *Id.*

85. For example, the objective test might be tailored for different prison situations or different prison populations.

86. 501 U.S. 294 (1991).

emphasized in every case.⁸⁷ While *Rhodes* turned on the objective inquiry and *Whitley* focused on the subjective component, *Wilson* acknowledged that failing either test constitutes an Eighth Amendment violation.

In *Wilson*, Pearly L. Wilson alleged cruel and unusual conditions of confinement.⁸⁸ Justice Scalia's majority opinion instructed the lower courts to apply the *Estelle* "deliberate indifference" test to the officials' subjective intent.⁸⁹ The Supreme Court also asserted that the "wantonness" of the conduct under this test was not to be determined by "its effect upon the prisoner," but instead depended upon the state of mind of the prison official.⁹⁰ Thus, if the effects on the prisoner are ever

87. In reviewing its prior holdings, the Court explained that both the subjective and objective tests, though not used in every case, still must be satisfied:

Our holding in *Rhodes* turned on the objective component of an Eighth Amendment prison claim (was the deprivation sufficiently serious?), and we did not consider the subjective component (did the officials act with a sufficiently culpable state of mind?). That *Rhodes* had not eliminated the subjective component was made clear by our next relevant case, [*Whitley*].

Id. at 298.

88. *Id.* at 296.

89. *Id.* at 302-06.

90. *Id.* at 299, 302.

We do not agree with respondents' suggestion that the 'wantonness' of conduct depends upon its effect upon the prisoner. *Whitley* teaches that, assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, . . . whether it can be characterized as 'wanton' depends upon the constraints facing the official.

Id. at 303 (citations omitted).

Justices White, Marshall, Blackmun, and Stevens concurred only in the judgment in *Wilson*. *Id.* at 306 (White, J., concurring). The point of contention is the application of the subjective standard. Justice White argued that the subjective standard not only is a departure from the conditions of confinement precedents but also is virtually "impossible to apply in many cases." *Id.* at 310. He argued that Eighth Amendment challenges to conditions of confinement, like challenges to punishment authorized by statute or given by a judge as part of the prisoner's sentence, are to be examined only by the objective severity of the punishment. *Id.* at 309-10. He further argued that the subjective intent of the prison officials should only be an issue in cases that involve specific cases of mistreatment of particular individuals, as in *Estelle* and *Whitley*. When the claim is that conditions of confinement are cruel and unusual, the claim typically attacks a system or policy. Justice White points out:

Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.

to be considered, they will have to be considered as part of the objective test.

Since *Wilson*, the Court has not considered any cases that challenge conditions of confinement as cruel and unusual punishment. In 1992, the Court decided *Hudson v. McMillian*,⁹¹ a prison disturbance case.⁹² The Court held in *Hudson* that, to sustain an Eighth Amendment challenge, no serious harm need result from the excessive use of force by guards in quelling a prison disturbance.⁹³ This ruling greatly minimized the role of the objective test in challenges to cruel and unusual punishment during prison disturbances because it will virtually always be possible for a prisoner to show that he or she suffered enough harm.⁹⁴ In doing so, the Court repeated its commitment to the stringent standard of “malicious and sadistic” conduct for the subjective test.⁹⁵ Despite the elimination of the serious harm requirements, with respect to prison disturbances, the Court gave no indication

Id. at 310. Despite this persuasive argument, the *Wilson* majority two-pronged approach remains intact for challenges to conditions of confinement.

91. 503 U.S. 1 (1992). Keith Hudson was a prisoner in a Louisiana state penitentiary. He got into an argument with a guard and two guards subdued him, putting him in handcuffs and shackles. As the two guards were taking him to a secured cell, Hudson testified, they held him down and punched and kicked his mouth, eyes, chest, stomach, and back. He also testified that the supervisor on duty watched the beatings and told the officers “not to have too much fun.” Hudson suffered minor bruises, his face swelled, his teeth were loosened, and his partial dental plate was broken. *Id.* at 4.

92. *Id.* at 6-10.

93. *Id.*

94. *Id.* at 7-10. Essentially, the Court stated that in the context of excessive force (as distinct from conditions of confinement), if prison officials fail the subjective test for cruel and unusual punishment in that they “maliciously and sadistically use[d] force to cause harm,” they always fail the objective test because “contemporary standards of decency,” which determine if the punishment is objectively cruel, are always violated. The Court states, “[t]his is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.” *Id.* at 10.

For extensive discussions of the impact of *Hudson*, see Diana L. Nelson, Note, *Hudson v. McMillian: The Evolving Standard of Eighth Amendment Application to the Use of Excessive Force Against Prison Inmates*, 71 N.C. L. REV. 1814 (1993); Daniel L. Mohs, Note, *Hudson v. McMillian: Opening and Closing the Door to Eighth Amendment Excessive Force Claims*, 37 St. Louis U. L.J. 465 (1993); Parrott, *supra* note 70.

95. Justices Stevens and Blackmun each wrote concurring opinions, but they rejected the use of the “malicious and sadistic” standard in every excessive force context. 503 U.S. at 12-14. Justice Thomas dissented in an opinion joined by Justice Scalia and argued in favor of retaining the “serious harm” requirement. *Id.* at 17.

that such a change should apply to the objective test for conditions of confinement cases.⁹⁶

In a concurring opinion, Justice Blackmun strongly supported the rejection of the serious harm requirement.⁹⁷ Only elimination of the requirement that "serious harm" be shown could protect prisoners whose wounds were serious but not visible.⁹⁸ According to Justice Blackmun, this protection is particularly critical because the Eighth Amendment protects against the cruel and unusual infliction of psychological harm.⁹⁹ This opinion suggests that a standard for objectively cruel and unusual punishment, if it is to be retained in the conditions of confinement cases, must allow consideration of psychological harm. A standard that ignores psychological harm will not protect against all forms of cruel and unusual punishment. Rather, the psychological harm should be incorporated into the objective standard. In doing so, the perspective of the prisoners would be of paramount importance because the only evidence of the psychological pain they have suffered is their description of the pain as they perceive it.

A standard for objectively cruel and unusual punishment would allow for consistent, fair assessment of prison conditions. However, neither the Cruel and Unusual Punishment Clause nor the cases give sufficient content to this inquiry. The Supreme Court does not indicate what standard should be used to determine when conditions become objectively cruel. The Court should fashion a standard that suits the kinds of inquiries it has deemed important, such as a fair assessment of the "common standards of decency." In this assessment, the Court should consider the effect on the prisoners, including psychological harm.¹⁰⁰ Each one of these inquiries would better protect prisoners if the inquiry embodied a gender-specific standard when applied to

96. It is important to note that the district court decision in *Jordan*, discussed above, occurred before both *Wilson* and *Hudson*. Thus, the court did not have the guidance offered by the latter cases when it evaluated the WCCW prisoners' Eighth Amendment claim. The Ninth Circuit, on the other hand, had both of these cases at its disposal.

97. 503 U.S. at 14.

98. *Id.* at 16.

99. *Id.* While Justice Blackmun recognized that the infliction of psychological pain was not at issue in *Hudson*, he argued: "'Pain' in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes." *Id.*

100. *See supra* notes 69, 80 and accompanying text.

cruel and unusual punishment in conditions of confinement, such as the cross-gender searches in *Jordan v. Gardner*.¹⁰¹

III. A GENDER-SPECIFIC STANDARD OF CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment is supposed to protect all prisoners, regardless of gender, from cruel and unusual punishment in conditions of confinement. If one accepts the basic assumption that the cognitive perceptions of men and women sometimes differ and recognizes the fact that the experience of incarceration is different for men and women, the importance of building gender into the standard for the objective part of the test for cruel and unusual punishment in conditions of confinement becomes clear. Without recognizing these differences, the test is not truly "objective." In fact, an inquiry that fails to account for the differences between the sexes turns out, in our society, to be based on male experiences and to thus lose its objectivity.¹⁰² Without building into the standard the perceptions of both men and women, the standard is tailored for when a man perceives that conditions of confinement such as cross-gender searches have become cruel, without regard to when a woman perceives that the treatment has crossed the line.¹⁰³ In cases involving sexuality and power, this male-oriented test for cruel and unusual punishment may not satisfy either "common standards of decency" or

101. 986 F.2d 1521 (9th Cir. 1993) (en banc).

102. See SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* 134-37 (1991); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1437 (1992).

103. Feminist legal scholars refer to this elimination of women's experiences while keeping the experiences of men in supposedly neutral standards as "masculine jurisprudence." Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). As Christine Littleton explains:

Regardless of whether the human described by jurisprudence and inscribed in the legal system is a creature of nature or culture, the content of this conception of "human" bears little resemblance to women. Our lives are not described by it, our concerns are unaddressed or trivialized by it, and our attributes are ignored or undervalued by it. Indeed, when the legal system sets out to describe us specifically ("women," rather than "human beings") the discontinuity and distortion between our experience and their description becomes even more apparent.

Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 32.

properly measure the psychological harm effect on a woman prisoner.

A. *Differing Perceptions*

Evidence of how women's perceptions can differ from men's perceptions can be found in sexual harassment law.¹⁰⁴ Examples from this area are instructive in creating a gender-specific standard for cruel and unusual punishment in several ways. We give consideration to women's perceptions in sexual harassment for the same reasons we should give consideration to women's perceptions in the area of cruel and unusual prison conditions. Psychological harm to prisoners under certain conditions of confinement, like psychological harm to workers subjected to harassment, can be gender-specific. The fact that courts have at least contemplated adopting gender-specific standards in sexual harassment law suggests that the same could be done in determining the "common standards of decency."

When the Ninth Circuit adopted the "reasonable woman" standard for sexual harassment in *Ellison v. Brady*,¹⁰⁵ the court explained that the severity and pervasiveness of sexual harassment is to be evaluated from the victim's perspective, and the standard is to be tailored for the different perspectives of men and women.¹⁰⁶ The court opted for this approach over a sex-blind, but male-biased, reasonable person standard because that standard would merely reinforce harassment that is currently common practice.¹⁰⁷ While recognizing that not all women share the same viewpoints or experiences, the court reasoned that women are disproportionately the victims of sexual violence, so women see an "underlying threat of violence" in sexual conduct that most men do not perceive.¹⁰⁸

104. However, sexual harassment law is relatively new. The Court continues to define the cause of action, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), and commentators continue to debate the appropriate standards for evaluating alleged sexual harassment. See, e.g., Susan D. Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451 (1992); Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411 (1992).

105. 924 F.2d 872 (9th Cir. 1991).

106. *Id.* at 878.

107. *Id.*

108. *Id.* at 879. For a discussion of more evidence of the different perceptions of women and men in the context of sexual harassment see Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1293-95 (1992).

These same divergent perceptions of sexuality and violence apply in the context of conditions of confinement in prison. Body searches of prisoners are a part of life in all prisons, and thus are part of the "conditions of confinement" in prison. Manual searches of intimate body parts are intrusive and degrading to prisoners in any context, but they are particularly degrading when conducted by guards of the opposite sex.¹⁰⁹ However, when a male guard searches a woman inmate's body, or watches her change clothing or use the toilet, different undertones of potential abuse exist compared to when a female guard intrudes on a male inmate's privacy in the same ways. Women inmates not only experience the degradation of having the most intimate parts of their bodies exposed or explored, but also experience the fear that male guards will abuse their power in the situation and rape or sexually abuse them.¹¹⁰ This fear of rape is doubly painful because the search itself and the fear of future rape or sexual abuse resurrects the pain many female inmates have suffered in

109. Courts have recognized very limited privacy rights to prisoners to be free from unnecessary searches of their private body parts, particularly by guards of the opposite sex, or to have their naked bodies exposed unnecessarily to guards of the opposite sex. See *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980) (holding privacy rights of women inmates did not extend to protection against being viewed by male guards while sleeping so long as suitable sleepwear was provided and they were permitted to cover their cell windows while changing); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980) (prison must rearrange guard duties for a woman guard in a male prison to limit the invasions of the inmates' privacy); *Bowling v. Enomoto*, 514 F. Supp. 201 (N.D. Ca. 1981) (male prisoners have a right to be free from unrestricted observation of their genitals and bodily functions by female guards under normal circumstances). In the context of searches, this limited privacy right has meant that male prisoners must submit to "frisk" searches by female guards but these searches cannot include the genitals. See *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983); *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981). Interestingly, one court held that state prison regulations which permitted male prisoners to be frisked (excluding genital areas) by male or female guards but only allowed female guards to frisk female inmates were not unconstitutional. *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), *cert. denied*, 464 U.S. 996 (1983).

110. This fear of abuse is based on widespread instances of sexual abuse in women's prisons. For example, nearly two hundred women alleged that they were raped by prison guards in a Georgia prison over a thirteen-year period. Eric Harrison, *Nearly 200 Women Have Told of Being Raped, Abused in a Georgia Prison Scandal So Broad Even Officials Say It's a 13-Year Nightmare*, L.A. TIMES, Dec. 30, 1992, at E1. Likewise, women in prison in Hawaii and Indiana have come forward with stories of rape. Michael Meyer, *Coercing Sex Behind Bars*, NEWSWEEK, Nov. 9, 1992, at 76; Linda G. Caleca, *Charges of Sexual Abuse in the Women's Prison*, UNITED PRESS INT'L, July 23, 1981 (Thursday, AM cycle, Domestic News Section).

past rapes or sexual abuse.¹¹¹ The pervasive fear of sexual abuse that occurs in women's prisons is a form of cruel and unusual punishment that women inmates experience during intrusive searches or exposure of their bodies to male guards; male inmates do not share a similar experience when searched by female guards.¹¹²

There are two responses to this argument. First, one could argue that the danger of such abuse is always present in female prisons with male guards, even without body searches or exposure of women inmates' bodies. This potential for abuse, however, is no excuse for creating more situations in which the risk of abuse will be exploited, particularly where the risks will likely go unnoticed and unpunished.¹¹³ When a search requires that male guards touch women's most intimate body parts, the woman inmate will have tremendous difficulty proving to another guard that a "flat hand," the appropriate procedure, became a "grab." Who will believe her? The increased danger of abuse, along with the difficulty of proving it afterwards, provide sufficient reasons to invoke an Eighth Amendment objection to the cross-gender, clothed-body search policy in women's prisons.

Second, one could argue that male inmates are also subject to abuse at the hands of female guards. The response to this argument is simply that the experiences of male inmates with female guards do not demonstrate that this is a real danger.¹¹⁴

111. See Lynn Smith, *Majority of State's Women Inmates Abused as Children*, L.A. TIMES, Mar. 19, 1992, at B5.

112. Male inmates also fear rape in prison, but typically they are raped by other inmates, not guards. For a discussion of homosexual rapes in men's prisons, see Richard G. Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFF. L. REV. 669, 710-15 (1972).

113. For example, in conducting a search at WCCW (as described in *Jordan v. Gardner*), proper procedure was for the male guard to use a "flat hand" to search the woman's breasts. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (citing WCCW, Pat-Down Searches of Female Inmates (n.d.)). However, inmate Sharon Hanson testified that she remembered the male guard's hand "cupping" her breast. Brief of Plaintiffs/Appellees at 8, *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992) (Nos. 90-35307/90-35552), *vacated and superseded by*, 986 F.2d 1521 (9th Cir. 1993) (en banc). A woman in prison in Hawaii also described how guards abuse searches. She said while she was frisked, guards would grab her breasts and crotch. Meyer, *supra* note 110, at 76.

114. Men face the danger of sexual abuse in prison mostly at the hands of other men, not at the hands of their female guards. See Singer, *supra* note 112, at 710-15. Furthermore, when women first asserted their rights to jobs as guards in men's prisons, the concern expressed by the courts was whether the women guards would be

Thus, as with sexual harassment, a gender-specific standard will be most important when prison conditions create a danger arising from the interaction of power and sexuality in the relationship between the inmates and the guards.¹¹⁵ When men and women relate, power and sexuality interact. In confined situations, such as a workplace or a prison, the interaction between power and sexuality can become even more potent. Sex can become a term in negotiations over treatment. While in the workplace, the quid pro quo is "sex for promotions" or "sex for keeping your job," the exchange in prison is "sex for drugs or extra phone calls" or "sex for staying out of solitary confinement."¹¹⁶ Policies such as cross-gender, clothed-body searches give male guards the power and opportunity to demand sex. "Common standards of decency" now require us to recognize that men and women's different perceptions of sexuality are part of these sexual negotiations. We, as a society, should not tolerate the abuse of power or sex in these contexts, and a gender-specific Eighth Amendment standard of cruel and unusual punishment should be a tool in preventing such abuse. Harm to women, specifically psychological harm suffered when men abuse power to obtain sex, should be measured by how women perceive the harm in both the sexual harassment context and the prison conditions of confinement context.

B. *Women's Experience in Incarceration*

In addition to the different perceptions men and women have of sexuality and abuse, which shape their experiences of certain conditions of confinement, the empirical facts of women's incarceration also support the use of a gender-specific standard for some conditions of confinement. Understanding the context of incarceration is critical to evaluating how painful a policy such

safe from attack by the male prisoners. See *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).

115. For instance, while a gender-specific standard is critical when we ask if cross-gender searches create cruel and unusual conditions of confinement, it is unnecessary when we ask if access to recreation or quality of food in prisons create cruel and unusual conditions of confinement because these situations do not create the same potential for the abuse of power through sexuality as do body searches.

116. [B]ecause of the powerlessness of the woman inmate, and the fact that she may feel she has nothing but her sex to bargain with in order to gain needed or desired freedoms or privileges, one can hardly characterize the woman as able to give full and free consent even if she agrees to the interaction.

JOCELYN M. POLLOCK-BYRNE, *WOMEN, PRISON, & CRIME* 86 (1990).

as cross-gender, clothed-body searches can be for the inmates involved. Eighth Amendment challenges to conditions of confinement must consider the conditions "as a whole,"¹¹⁷ and in women's prisons, that "whole" includes the ways in which incarceration is different for men and women. Ignoring the differences creates an incomplete understanding of the "effects on the prisoners." Significant among the differences are that: (1) women are often placed in female-only prisons with different conditions of confinement than are found at male prisons; (2) the profile of the average woman prisoner is significantly different from that of the average male prisoner; and (3) women as a group both experience and cope with incarceration differently than do men as a group.

1. Women's Prisons

As of June 30, 1991, segregated adult women's correctional facilities existed in all but eight states.¹¹⁸ There were 67 institutions for women as compared to 624 for men.¹¹⁹ The women in these facilities and in the few co-correctional facilities, which house both men and women, represented only 5.7% of the total prisoner population in the United States.¹²⁰ Because the population of women was so small, few states had more than one or two women's facilities. For example, WCCW is the only women's correctional facility in Washington.¹²¹

The small population of women inmates and the dearth of facilities have significant effects on the women's experience. First, all women are housed together, regardless of the severity of

117. *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

118. AMERICAN CORRECTIONAL ASSOCIATION, *DIRECTORY, JUVENILE & ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES & PAROLING AUTHORITIES*, xxii (1992) [hereinafter *DIRECTORY*]. The first women's prison opened in 1873 as a result of a progressive movement toward reform in prisons that sought to protect women and remake them into "ladies." Charlene Snow, *Women in Prison*, 14 *CLEARINGHOUSE REV.* 1065, 1065 (1981); POLLOCK-BYRNE, *supra* note 116, at 3. Gradually that goal has disappeared and, although many women's prisons are still housed in what appear to be cottages on green campuses, they are not the idyllic places they appear to be. *Id.* at 2. For a history of women's prisons see ESTELLE B. FREEDMAN, *THEIR SISTER'S KEEPERS* (1981).

119. *DIRECTORY*, *supra* note 118, at xxii. There were 33 co-correctional state prisons. *Id.*

120. *WOMEN PRISONERS: A FORGOTTEN POPULATION* 7 (Beverly R. Fletcher et al. eds., 1993) [hereinafter *WOMEN PRISONERS*].

121. Brief of Plaintiffs/Appellees at 3, *Jordan v. Gardner*, 953 F.2d 1137 (9th Cir. 1992) (Nos. 90-35307/90-35552), *vacated and superseded by*, 986 F.2d 1521 (9th Cir. 1993) (en banc).

their crimes. This typically means that women who are high security risks are incarcerated along with women who would be eligible for minimum security prisons, if such facilities existed for women.¹²² Because men's prisons are divided into maximum, medium, and minimum security facilities, men will not be incarcerated by default in a facility that is more restrictive than what is called for by their crimes.¹²³ Prison authorities assume that the only way to handle the diverse population in women's prisons is to use maximum security methods on all of the women.¹²⁴ This directly affects the conditions of confinement. Assuming high security risk prisoners are more likely to try to conceal contraband, a prison administrator dealing with a diverse population will have more justification for implementing a policy of cross-gender, clothed-body searches. A prison may have a more compelling need for a policy of random, highly-intrusive searches conducted by all guards in a facility if the inmate population includes high security risk inmates. In contrast, if a women's prison were a minimum security prison, it would be harder to justify allowing all guards to search the inmates. In a minimum security context, the lower likelihood of concealed contraband could make it easier to schedule the guards so that a female guard is always available to conduct an intrusive search, obviating the need to implement cross-gender, clothed-body searches.

The small number of women's facilities leads to other problems, including decreased access to parole or custody hearings, health care, rehabilitation work programs, and other community corrections programs.¹²⁵ Although these inequities can be addressed and have often been the subject of lawsuits for the same or at least equivalent treatment,¹²⁶ it is much harder to address the problems of mixed security prisons while maintaining a

122. POLLOCK-BYRNE, *supra* note 116, at 2.

123. SNOW, *supra* note 118, at 1066; see Rosemary Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1193-94 (1985).

124. Although women's prisons do not usually have high walls and barbed-wire fences, they have extremely high surveillance by staff and highly routinized procedures to prevent escapes. See JOCELYN M. POLLOCK, *SEX AND SUPERVISION: GUARDING MALE AND FEMALE INMATES* 19-21 (1986).

125. See SNOW, *supra* note 118, at 1066.

126. See, e.g., *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) (class action suit challenging educational and vocational training disparities between male and female prisoners); *Barefield v. Leach*, No. 10282 (D.N.M. 1974) (individual inmates challenging the unequal operation of educational and vocational programs, the physical conditions, and the enforcement of prison regulations in a women's facility as compared to men's facilities).

segregated prison system.¹²⁷ Until the problems of mixed security prisons are addressed, the simple fact that there are very few women in the prison system as a whole means that women will experience the conditions of confinement differently from men.¹²⁸ However, concerns that are specific to women, such as the high incidence of sexual abuse at the hands of male guards, may not receive the necessary attention from state prison authorities because the state has limited resources and may feel constrained to direct them at problems that affect the larger male population. Making the Eighth Amendment standard for conditions of confinement gender-specific will not change these pressures on prison authorities. However, such a standard might draw more attention to violations of the Eighth Amendment that women prisoners experience, thus forcing prison authorities to deal with the most egregious violations.

2. Women Prisoners

The physical and logistical differences in the experiences of incarcerated women are only part of the story. The women themselves make up the other part of the story.

The American Correctional Association published a profile of a typical female prisoner in 1990.¹²⁹ She is a woman of color

127. Commentators have argued that women would be better off if all prisons were "co-correctional," housing both men and women. See Herbert, *supra* note 123. However, because there has been very little movement toward this alternative, this Essay confines the discussion to proposals and suggestions within a sex-segregated system.

Prisons are sex-segregated only with regard to the inmates. There are issues related to cross-gender searching because male guards work in women's prisons and vice versa. There are relatively few female guards working in prisons. As of June 30, 1991, there were only 27,606 female correctional officers in state prisons for adults as compared to 135,366 male correctional officers. DIRECTORY, *supra* note 118, at xlv-xlv. Out of 987 superintendents/wardens in state prisons, 847 were men, 140 were women, and 74 women were administrators in male prisons while 29 men were administrators in women's prisons. *Id.* at xlvi.

128. In a survey of male and female corrections officers in Oklahoma, even the officers expressed how the differences in the physical aspects of incarceration affected the perception of female versus male inmates:

[G]ender-related differences in the inmates' perceptions of the institutional experience would be important. We recall that the total prison experience is alleged to be more problematic for women than for men. Living situations, orders, separation from family — everything combines to make the experience more traumatic [according to surveys of corrections officers].

POLLOCK, *supra* note 124, at 121.

129. WOMEN PRISONERS, *supra* note 120, at 15-17.

between the ages of twenty-five and twenty-nine and has never been married. She has one to three children who are usually left with family while she is incarcerated. She grew up in a single-family home, and between the ages of five and fourteen, she was the victim of sexual abuse, usually by a male member of her immediate family. She is often a drug or alcohol abuser without a high school education, although she may have had vocational training. She has been arrested two to nine times since age fifteen and she was most frequently arrested for property crimes and violent crimes. Typically, she was driven to crime by economic pressure, to feed a drug habit or because she simply used poor judgment.¹³⁰

In contrast to the male prison population, women prisoners have typically not been involved in organized crime, crime involving high losses of property, or crimes that endangered large numbers of people.¹³¹ The average female inmate is slightly better educated than the average male inmate.¹³² Furthermore, a male prisoner is more likely to leave a wife at home to take care of his children and keep his family intact while he is in prison.¹³³ Thus, upon being paroled, he has a better chance than his female counterpart of having a life waiting for him that will help him reintegrate into society.

Although these are merely generalizations about the "average" female prisoner as compared to the "average" male prisoner, they can inform any consideration about how women inmates might perceive their conditions of confinement. In particular, a woman's perception of a cross-gender search may be very different from a man's perception of a cross-gender search if she has experienced sexual abuse at the hands of men. Although not every woman prisoner has experienced such sexual abuse, and each woman experiences abuse in her own way, sexual abuse is a factor that shapes many women's experiences in prison. Consequently, it cannot be ignored in creating a standard to determine when women are experiencing conditions that constitute cruel and unusual punishment.

130. See also Consuelo Marshall, Plenary Session, *200 Years of the Penitentiary: Criminal, Social and Economic Justice*, 34 *How. L.J.* 512, 513-14 (1991).

131. RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* 78 (1991).

132. Marshall, *supra* note 130, at 513.

133. SIMON & LANDIS, *supra* note 131, at 89.

Prison policies that ignore the reality of sexual abuse and rape are not objective and fail to protect all prisoners. More sexual crimes are committed by men against women than vice versa.¹³⁴ Furthermore, there has been a history of abuse of women prisoners by male guards that is unparalleled in the experiences of male prisoners with female guards.¹³⁵ Prison policies should consider the impact of a policy on the large number of women who have been abused, and institute a policy that protects all women prisoners from cross-gender, clothed-body searches, regardless of their individual histories of abuse.

3. Women Prisoners' Coping Mechanisms

Because women's prisons are different from men's prisons, and because women bring their own perceptions to the prison experience, women's experiences in coping with the deprivations of prison life are also different. One study found that women's perceptions toward the criminal justice system and criminal justice personnel are very different from men's perceptions.¹³⁶ Women expressed more negative attitudes toward criminal justice personnel.¹³⁷ In explaining these results, Edna Erez suggests that different expectations, and not different experiences or harsher treatment, may account for the women's different attitudes.¹³⁸ Female prisoners are said to hold traditional attitudes about sex roles.¹³⁹ If this is the case, these attitudes will influence how they perceive a cross-gender body search.¹⁴⁰ For example, if a woman prisoner believes her sexuality is something precious, to be saved for her husband or intimate partner, she will be doubly violated by a cross-gender search. Not only is she deprived of her dignity, but she is also deprived of her sexuality and "sullied" or "dirtied" in a way that a same-sex search would not have done.

Studies have also found that some women cope with the demeaning and degrading aspects of prison life, such as the dan-

134. *Ellison v. Brady*, 924 F.2d 872, 879 n.10 (9th Cir. 1991).

135. See Laurie A. Hanson, Note, *Women Prisoners: Freedom From Sexual Harassment — A Constitutional Analysis*, 13 *GOLDEN GATE U. L. REV.* 667, 672, 685 (1993). See also Singer, *supra* note 112.

136. Edna Erez, *The Myth of the New Female Offender: Some Evidence From Attitudes Toward Law and Justice*, 16 *J. CRIM. JUST.* 499, 506-07 (1988).

137. *Id.*

138. *Id.*

139. *Id.*

140. However, I have come across no data comparing the sex-role attitudes of women in prison with women on the outside.

ger of physical attack, the loss of privacy, and the loss of heterosexual sexual activity, by creating "play-families."¹⁴¹ These "play-families" show how the power structure within women's prisons may be very different from the power structure within men's prisons where gangs are the most common social grouping.¹⁴² It seems that the women's coping mechanisms sometimes have less to do with asserting power within the prison than do men's gangs.¹⁴³ A gang may assert power with the threat of violence to other inmates and to guards in a way that the "play-families" do not seem tailored to do. The fact that the women inmates do not assert power through their inmate groupings may well make it easier for guards in women's prisons to break rules and to assert their power over the inmates and abuse them. A guard who does his own version of a cross-gender search for his own sexual pleasure probably has less to fear from a "play-family" than he does from a prison gang.

The physical and psychological facts of women's experiences in incarceration put women prisoners at much greater risk of abuse than male prisoners. Women also suffer greater fear of sexual abuse or rape from prison personnel than do male prisoners. Any evaluation of when conditions of confinement, particularly cross-gender, clothed-body searches, become cruel and unusual punishment, demands a gender-specific approach to account for these gender-specific dangers.

141. Women prisoners' "play-families" are extended families with women playing roles such as mother, father, grandmother, or uncle. These families sometimes include homosexual inmate couples and sometimes do not. Katherine S. Van Wormer, *Social Functions of Prison Families: The Female Solution*, 9 J. PSYCHIATRY & L. 181, 189-90 (1981). The families help women, especially those who are new to prison, deal with the constant pressures of prison life. Doris L. MacKenzie et al., *Long Term Incarceration of Female Offenders: Prison Adjustment and Coping*, 16 CRIM. JUST. & BEHAV. 223, 235 (1989).

142. "Play-families" are unknown to male prisons where gangs are the most common social grouping. POLLOCK-BYRNE, *supra* note 116, at 135: "The social organization of men's prisons is shaped primarily by the gang structures and other groupings male inmates create. In most prisons today, gangs are very powerful and control drugs, other types of contraband, and practically everything else." *Id.*

143. Van Wormer, *supra* note 141 at 187-90. See ROSE GIALLOMBARDO, *THE SOCIAL WORLD OF IMPRISONED GIRLS* (1974); DAVID A. WARD & GENE G. KASSEBAUM, *WOMEN'S PRISON* (1965).

IV. APPLYING THE "REASONABLE WOMAN" STANDARD TO CRUEL AND UNUSUAL PUNISHMENT

With women and men relating in the prison setting, various types of policies will surely arise that could benefit from a clearly articulated, gender-specific standard for determining when conditions of confinement become cruel and unusual. The *Jordan* court's inquiry suggests how to apply a gender-specific cruel and unusual punishment standard to cross-gender, clothed-body searches. In addition, in medical care cases, situations may arise, such as in the provision of gynecological care or psychological care for rape survivors, when a gender-specific standard for cruel and unusual punishment is necessary to determine if enough care has been given to avoid violating limits on cruel and unusual punishment.¹⁴⁴ A "reasonable woman" standard should be used to evaluate policies that affect conditions of confinement that implicate both sexuality and power. If adopted, this standard will incorporate the kind of flexibility and sensitivity that is demanded by "common standards of decency" and will consider the effect of punishment on the prisoner, while retaining an objective measure of cruel and unusual punishment in conditions of confinement.¹⁴⁵

A standard such as the "reasonable woman" standard is also essential because of the possibility that the *Jordan* case turned on its own compelling facts. It is unclear how the courts that considered *Jordan* would have ruled if a lower percentage of the women in WCCW had histories of abuse. Other circuits and state courts may have to face cross-gender, clothed-body search policies in prisons. If the Eighth Amendment standard for cruel and unusual searches were to depend upon the particular incidence of abuse, these courts would face intolerable evidentiary problems, perhaps requiring psychological evaluations of every prisoner. The arguments supporting a "reasonable woman" standard do not depend on the incidence of histories of abuse in the prison. Establishing a standard that does not require such a fact-specific inquiry will help to provide consistency in these decisions.

144. The deprivation of medical care was subjected to Eighth Amendment analysis in *Estelle v. Gamble*, 429 U.S. 97 (1976).

145. Of course, in conditions of confinement cases, both the objective and subjective prongs of the test for cruel and unusual punishment must be satisfied. *See supra* pp. 101-03. My focus, however, is on a standard for the objective prong.

A. *“Reasonable Woman” Standard*

The overarching question for courts to ask when facing a claim of cruel and unusual conditions of confinement should be: “Would a reasonable woman find that the particular conditions of confinement — the search or the invasion of privacy — violate common standards of human decency?” The gender-specificity in the inquiry should ensure that if the conditions are more painful when experienced by women than when experienced by men, the court will focus on the gender-specific harm. The “reasonable woman” standard should create this heightened inquiry without radically changing the current Eighth Amendment inquiry into “objectively” cruel and unusual conditions of confinement.

First, the inquiry remains objective because the extremely over- or under-sensitive individual inmate would not be considered a “reasonable” woman. Lawsuits challenging conditions of confinement in prisons are frequently brought as class-action suits, so the “objective” inquiry is usually built into the evaluation of the conditions. Rarely does a case arise where only one inmate is complaining, because the conditions of confinement typically affect many, if not all, of the prisoners. Second, the inquiry remains flexible for emergency situations because, in emergencies, a “reasonable woman” standard would incorporate the need to allow the balance between prison security and inmate privacy to shift to favor prison security and safety. Thus, just as the subjective test for cruel and unusual punishment is sensitive to the context during which the alleged punishment occurred — prison disturbances vs. ordinary conditions of confinement — the objective test with a “reasonable woman” standard for cruel and unusual punishment will also be sufficiently sensitive to the context.

“Common standards of decency” become embodied in the “reasonable woman,” as do the different perceptions of women prisoners as compared to men. The specific reading of a “reasonable woman” into “common standards of decency” is useful because, like the “reasonable man” or “reasonable person” standards used in the context of negligence or sexual harassment, “common standards of decency” sounds like a gender-neutral standard. It therefore runs the risk of being read and applied without considering how the perceptions or experiences of wo-

men may differ from those of men.¹⁴⁶ Focusing on gender is a way to ensure that the standards of decency applied are truly “common” to both men and women in the given case. For conditions such as food quality in the prison, or access to legal services and recreation, applying “common standards of decency” as a “reasonable man” or a “reasonable woman” will achieve the same results. However, in prison searches and other prison policies where sexuality and the potential for abuse coincide, sometimes decent treatment requires some adjustment based on gender. Applying a “reasonable woman” standard to “common standards of decency” will identify these cases.

One criticism of a “reasonable woman” standard is that women will be essentialized, and race or class differences among women will be ignored. In the context of incarceration, however, invasions into one’s bodily privacy or abuses by guards are cruel to any woman. Because treatment of women inmates is determined, at least officially, by their crimes, and not by class or race,¹⁴⁷ applying a “reasonable woman” standard to prison policies may not pose as many stereotyping problems in the prison context as it does in other contexts.

B. *Other Possible Standards*

The current law uses an objective test to determine when conditions of confinement become cruel and unusual punishment without articulating how to determine what is “objectively cruel.” While this Essay advocates incorporating a reasonable woman standard into the test for cruel and unusual conditions of confinement, alternative standards might be adopted.

1. Reasonable person

One alternative to a “reasonable woman” standard, probably preferred by “equal treatment” advocates, is to use a gender-neutral “reasonable person” standard.¹⁴⁸ A “reasonable person” standard is appealing because it avoids codifying a standard that

146. “Given that existing legal standards generally exclude women’s experiences, a new standard that centers on and values women’s experiences is needed. To ensure that women’s lives are adequately recognized, [the “reasonable woman” standard] accordingly recognizes that women and men may need different treatment.” Cahn, *supra* note 102, at 1415.

147. However, the crimes the women committed may well have been partially determined by their race and class status.

148. For examples of how this debate between advocates of “different treatment” and “equal treatment” plays out in feminist literature, see Frances Olsen, *From False*

differentiates between men and women. It is possible to argue that, by using a "special" standard for women, the legal system will exacerbate discrimination against women and perpetuate the stereotype that women need protection. Equal treatment advocates may be concerned about codifying gender-specific standards because such standards might be used against women when women ask for equal treatment.

For example, historically, women's prisons have had fewer services, less access to law libraries, work programs, vocational training, and community programs.¹⁴⁹ It would be dangerous if courts could turn the "reasonable woman" standard against women and permit these differences in services merely because the standard permits different treatment of men and women.

Perhaps one response to this concern lies in an equal protection analysis.¹⁵⁰ One could argue that the "reasonable woman" standard should only be invoked when sexuality is implicated in the conditions of confinement. There is good reason to believe that women and men are differently situated with respect to their perceptions of sexuality and abuse in prison policies even though they are similarly situated with respect to other aspects of incarceration. Women experience both a greater likelihood of being sexually abused by male guards and, thus, a greater fear of such abuse.¹⁵¹ Differential protection from this abuse would actually provide equal protection whereas differential provision of other conditions of confinement, such as legal services or food, would violate equal protection.

The "reasonable woman" standard is not intended to give women special treatment in prison. It is merely intended to bring into focus any differences between men and women in prison that truly constitute cruel and unusual punishment for only men or only women. Conditions of confinement can then be adjusted, when necessary, so as never to be cruel and unusual to inmates of

Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895, 84 MICH. L. REV. 1518, 1518 n.2 (1986).

149. See Snow, *supra* note 118, at 1066.

150. For an analysis of the equal protection problems raised by women's prisons concluding that the only solution is to desegregate the prison populations, see Herbert, *supra* note 123. Herbert argues that the differences between male and female prisoners, because of their incarceration in different institutions or because of the particular characteristics associated with female crime, can be traced to official discrimination and do not make men and women differently situated with respect to incarceration. *Id.* at 1189.

151. See *supra* pp. 109-15.

either sex. The "reasonable woman" standard should ensure that the perceptions of the inmates, regardless of their gender, are part of the evaluation of cruel and unusual punishment.

2. Purely fact-specific approach

Using a purely fact-specific approach¹⁵² would mean that for each case, a court would evaluate the particular prisoner's needs in confinement and would measure the alleged deprivation against this standard. For example, if an inmate claimed the searches constituted cruel and unusual punishment when conducted on her, the court would have to explore her history of abuse, who abused her, the likelihood that she will be a security risk if she is not searched, and so on. Such a fact-specific approach would likely be the most accurate way to evaluate the harm inflicted on an inmate by a prison policy. The practical problems with such a case-by-case approach, however, outweigh the benefits gained in accuracy. Not only would it be a huge burden on the courts to administer such an approach, but it might tempt courts to use their own versions of what constitutes cruel and unusual punishment. No longer would the inquiry be "objective." Furthermore, such an approach makes little sense in the context of a class action suit.

The "reasonable woman" standard seems to provide a balance between the need for an "objective" standard and the need to have an approach that is context-sensitive. The standard by its definition is flexible enough to allow a balance between prison security and prisoner dignity because it embodies a reasonableness standard. It is further compatible with arguments for context-specific standards. According to Professor Frances Olsen, "Women should not have to claim to be just like men to get decent treatment, nor should they have to focus on *their* differences from men to justify themselves whenever they demand a policy different from the present treatment afforded to men."¹⁵³ A "reasonable woman" standard for cruel and unusual punishment focuses on women's differences from men, but only in the specific context of the prison conditions and more specifically in the context of conditions that implicate sexuality. These differences, in addition to the awareness of the context of the prisons for wo-

152. I call this an "approach" because there really is no standard for "objectively" cruel and unusual punishment if the cases are each examined individually on their facts.

153. Olsen, *supra* note 148, at 1541.

men, only heighten the need for a more complete standard. Using a "reasonable woman" standard makes it more complete and context-specific without sacrificing the objective aspect of the test.

CONCLUSION

It is easy to want to forget about the women in prison in the United States. In some cases, they have committed crimes and express no remorse for the suffering they have caused. But regardless of the pain they have caused, our society should not allow certain types of pain to be inflicted upon them in return. The Eighth Amendment protects these women when the punishment becomes cruel and unusual. The challenge for our society is deciding when that line has been crossed.

The Supreme Court has explained that the line between acceptable punishment and cruel and unusual punishment is crossed when the prison conditions of confinement are "objectively" cruel and when the prison officials inflict pain in a "subjectively" cruel state of mind. In developing the objective prong, the Court has told us that the standard must be flexible enough to incorporate "common standards of decency" given the context of the punishment and suggested that the "touchstone" must be the effect on the prisoner. Yet, the Court has failed to articulate a standard to be used in deciding that a particular practice, such as a cross-gender, clothed-body search, has crossed the line.

This Essay proposes the use of the "reasonable woman" standard as part of the objective test of cruel and unusual punishment in conditions of confinement cases. A gender-specific standard focuses a court's inquiry on differences in the perceptions of men and women in incarceration which arise, for example, when sexuality and abuse interact in the prison context. The "reasonable woman" standard provides the required flexibility with regard to "common standards of decency." The standard preserves an objective approach while incorporating an understanding of the context in which the punishment is inflicted. While the "reasonable woman" standard is not a perfect legal tool, it certainly offers much needed protection to the women prisoners who have no other legal recourse.

