

THE ESSENCE OF HER WOMANHOOD: DEFINING THE PRIVACY RIGHTS OF WOMEN PRISONERS AND THE EMPLOYMENT RIGHTS OF WOMEN GUARDS

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*I sense the great weight of the society
 pressing down on the little box of room I lie in
 alone forgotten
 like my sisters in prison.
 If you hear me
 consider
 how the bomb of human dignity
 could be planted outside your cell
 how its explosion could shake
 the foundations of our jail
 and might burst open the door that separates you
 how we might struggle together to be free.*

Erikca Huggins (*Untitled*, in WALL TAPPINGS: AN ANTHOLOGY OF WRITINGS BY WOMEN PRISONERS, 298 (Judith A. Scheffler ed., 1986)).

I. INTRODUCTION

The history of the correctional system in America reflects the adoption and perpetuation of traditional and stereotyped gender roles for both prisoners and guards by both prison administrators and the federal courts.¹ According to correctional philosophy, female prisoners are to be “corrected” to their proper roles as mothers, wives, and daughters.² Similarly, female guards were first allowed in prisons only to serve as caretakers and role models for their female charges. This philosophy limited the opportunities of women. Ultimately, reliance on stereotypes motivated courts to fashion more job opportunities for female guards and to afford female prisoners more privacy rights.³ The stereotypes reduce the

1. The discussion in this article is limited to the federal courts’ interpretations of prisoners’ rights under the Constitution’s minimum standard for state granted statutory and constitutional rights. The term prisoner is used instead of inmate as I believe that the origin of inmate makes it an appropriate label only for persons institutionalized primarily for treatment purposes.

2. See NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS 1800-1935, 26 (1985) (describing academic, vocational, and religious training undertaken to reform women prisoners).

3. See *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (upholding women’s equal employment opportunities in the prison); *Gunther v. Iowa State Men’s Reformatory*, 612 F.2d 1079, 1087 (8th Cir. 1980) (holding that broadly construed job classifications discriminate impermissibly by prohibiting the advancement of female corrections officers); *Bagley v. Watson*, 579 F. Supp. 1099, 1105 (D. Or. 1983) (holding that female guards’ right to equal employment

image of women to conflicting perceptions of womanhood – they are either potential victims of sexual assault or asexual nurturers.

Advocates of both female prisoners and female prison guards seek to eliminate the imposition of stereotypes that limit their opportunities within the correctional system.⁴ Advocacy on behalf of female prisoners and female guards has developed along parallel courses. Both courses question the limited roles that the correctional system assigns to women.⁵ The course of these histories are parallel in that female guards successfully use the equality theory to gain access to the leadership and career building assignments formerly available only to men.⁶ At the same time, reliance on equality theory provides female prisoners with access to the types of programs and services previously available only within men's prisons.⁷

To ensure the equal employment rights of female guards, prisons have implemented cross-gender employment policies that allow

opportunities supercedes male inmates' right to be free from unnecessary rigor); *Griffin v. Michigan Dep't of Corrections*, 654 F. Supp. 690, 703 (E.D. Mich. 1982) (ruling that gender is not a bona fide occupational qualification for corrections officers and employment practices and policies requiring gender qualifications are discriminatory). For cases where women prisoners were granted greater privacy rights than their male counterparts, see *Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993) (holding that cross-gender clothed body searches at women's prisons constitute cruel and unusual punishment in violation of the Eighth Amendment); *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (finding that women inmates are entitled to protection from the view of male prison guards while undressing).

4. See Rosemary M. Kennedy, *The Treatment of Women Prisoners After the VMI Decision: Application of a New "Heightened Scrutiny,"* 6 AM. U.J. GENDER & L. 65, 68 (1997) (arguing that gender stereotypes mandate gender segregation which results in substandard women's corrections facilities that are unconstitutional); see also Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 71 (1997) (noting that gender stereotypes restrain women's participation in the employment world).

5. See Baldwin, *supra* note 4, at 71.

6. Equality theory provides that equally qualified persons should receive equal consideration regardless of gender. In the employment context, female guards relied upon Title VII to obtain equal employment opportunities. See *infra* Part III (discussing how female guards relied upon Title VII to obtain equal employment opportunities).

7. See *West v. Virginia Dep't of Corrections*, 847 F. Supp. 402, 404 (W.D. Va. 1994) (stating that the boot camp program excluded women); *Casey v. Lewis*, 834 F. Supp. 1477, 1551 (D. Ariz. 1993) (stating that male prisoners in mental health facilities were offered more substantive training and education programs than their female counterparts); *McCoy v. Nevada Dep't of Prisons*, 776 F. Supp. 521, 524 (D. Nev. 1991) (stating that male prisoners had access to a wider variety of educational and recreational programs than female prisoners); *Canterino v. Wilson*, 546 F. Supp. 174, 211-12 (W.D. Ky. 1982), *vacated in part*, 869 F.2d 948 (6th Cir. 1989) (discussing disparities in the quality of vocational school courses in men's and women's prisons, including the exclusion of women prisoners from certain sectors of "on the job" training programs and work release programs); *Glover v. Johnson*, 478 F. Supp. 1075, 1086 (E.D. Mich. 1979) (stating that female prisoners had access to training in five broad occupational areas while male counterparts had access to 20 different vocational programs); see also Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women's Prisons*, 5 TEMP. POL. & CIV. RTS. L. REV. 1, 3 (1995) (discussing an overview of programs and services).

women to guard male prisoners and men to guard female prisoners.⁸ The development of cross-gender employment policies, however, cannot be fully explained by the equality theory.⁹ Correctional authorities seek, and the judiciary places, limitations on employment opportunities despite the equal qualifications of female and male guards. Specifically, the privacy rights of prisoners were instrumental in limiting the implementation of complete cross-gender or gender neutral employment policies.¹⁰

The development and current state of employment rights and expectations of privacy in the correctional setting are better understood by examining the courts' deployment of traditional gender roles and traits. In the case of women's employment, the courts have ultimately held that gender cannot matter because women are professionals and can perform their duties without invading the privacy rights of their male charges.¹¹ In the case of female prisoners' expectation of privacy, the courts have held that gender and gender differences must matter because the courts imbue women with a sense of modesty and a greater need for privacy than men.¹² What emerges from a comparison of the parallel histories of

8. See *Dothard v. Rawlison*, 433 U.S. 321, 334 (1977) (marking the beginning of the gender integration of correctional staff); see also *infra* Part III (discussing the impact of *Dothard*); *Forts v. Ward*, 621 F.2d 1210, 1215 (2d Cir. 1980) (discussing the first challenge by female prisoners to the assignment of male guards to women's facilities). For challenges by male prisoners of the cross-gender policies, see *Grummett v. Rushen*, 779 F.2d 491, 492 (9th Cir. 1985) (challenging the types of assignments given to female corrections officers which allow them to view male inmates in states of undress); *Bagley v. Watson*, 579 F. Supp. 1099, 1102 (D. Or. 1983) (holding that female guards' right to equal employment opportunities supercedes male inmates right to be free from unnecessary rigor).

9. Although courts have ruled that precluding women from working as prison guards violates Title VII, in many cases, the same courts have approved limitations on female guards' activities to protect male inmates' privacy. One example includes rescheduling women's shifts. For a discussion of this see *infra* Part IV.

10. See *Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993) (holding that female prisoners have a privacy interest in being viewed in a state of undress by male prison guards).

11. See *Gunther*, 612 F.2d at 1079 (holding that the female prison guard would not abuse her functional duty assignment); *Bagley*, 579 F. Supp. at 1099 (standing for the proposition that the mores against being viewed by the opposite sex will change as women become further integrated in the professional world); *Griffin*, 654 F. Supp. at 690 (ruling that gender is not a bona fide occupational qualification for corrections officers and employment practices and policies requiring gender qualifications are discriminatory); see also *Grummett*, 779 F.2d at 491 (holding that routine pat down searches by female guards, which included a male prisoner's groin area did not violate the prisoner's right to privacy in part because female guards conducted themselves professionally).

12. See *Jordan*, 986 F.2d at 1524-27 (finding that the facts of the case support the postulate that women experience unwanted touching by the opposite sex differently than men); *Torres v. Wisconsin Dep't of Health and Soc. Servs.*, 838 F.2d 944 (7th Cir.), *rev'd in part* 859 F.2d 1523 (7th Cir. 1988) (suggesting that to protect female prisoners' privacy, prisons could provide them with appropriate sleepwear and allow them to cover their windows while dressing or using the toilet); *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980) (allowing female prisoners' to cover the window of their cells for privacy for 15 minute intervals); see also *infra* Part IV (discussing the

these women is a convergence between the roles assigned by the judiciary to women as guards and women as prisoners. In both instances, the courts return to the stereotype that at her essence, in her rightful role, a woman is a mother or a wife, and in the particular circumstance in which she finds herself, she is either to provide nurturing or be protected.¹³ As a result, female guards are afforded more employment opportunities because their mere presence can calm the aggressive nature of male prisoners.¹⁴ Similarly, female prisoners are afforded a higher expectation of privacy because they are, after all, women and therefore are modest and vulnerable.¹⁵ In both instances, the courts support the rights of women by adopting gender stereotypes of both the women and the men within the correctional system.¹⁶

The purpose of this Article is to explore the reliance on gender to promote the employment opportunities of women and to establish a woman's greater expectation of privacy within the correctional system. Part II provides a general overview of the correctional system and the impact of gender on penological and employment philosophies. Part III examines *Dothard v. Rawlinson*,¹⁷ the landmark case which marked the gender integration of the correctional workforce and which provides the first insight into both the judicial and correctional view of the gender role of women. Part IV follows the development of the outer parameters of cross-gender employment rights as well as the parameters of a prisoner's expectation of privacy. Part IV also documents the courts' reliance on gender stereotypes in defining the employment rights of guards and the privacy rights of prisoners. Initially, the stereotype of a woman as a victim of sexual assault restricted the employment rights of women.¹⁸ Over time, the stereotype of a woman as nurturer or

courts' recognition of greater expectation of privacy by women prisoners).

13. See *supra* note 12 and accompanying text.

14. See *Griffin*, 654 F. Supp. at 704 (noting that the presence of female guards in correctional facilities will "make for a healthier and more rehabilitative atmosphere for the inmates").

15. See generally *Jordan*, 986 F.2d at 1521 (holding that cross-gender clothed body searches at women's prisons constitute cruel and unusual punishment in violation of the Eighth Amendment); *Forts*, 621 F.2d at 1210 (holding that female prisoners are entitled to protection from the view of male prison guards while in a state of partial or full undress).

16. See *Forts*, 621 F.2d at 1210 (affording women a degree of privacy from view of male guards); *Gunther*, 612 F.2d at 1089 (holding that male prisoners may be seen in various states of undress by female guards without violating their right to privacy). See also *infra* Parts IV & V (discussing the parameters of these rights).

17. 433 U.S. 321 (1977).

18. See *Dothard*, 433 U.S. at 336 (noting the risk of sexual assault of female guards in prisons).

asexual mother was juxtaposed against the macho stereotype of men such that, at that intersection, the employment rights of women are deemed of greater state interest than the privacy rights of men.¹⁹ Part V discusses the courts' failure to apply the explicit standard they had developed for the expectations of privacy for male prisoners when faced with an intrusive search of female prisoners by male guards. The courts' failure to apply its previously established cross-gender search standards results from their vision of the essential nature of women as wife, mother or daughter.²⁰ This vision allows the courts to manipulate gender stereotypes to the benefit of female prisoners although correctional and societal images of female prisoners do not afford them the degree of respect that the courts' image imparts. The Article concludes that while women in prison are afforded more opportunities because of the courts' adherence to gendered stereotypes, the basis for these benefits should not lie in gender differences or traits. Rather, employment should be based upon equal qualifications. Where additional qualifications such as a "normalizing effect" are beneficial in the correctional setting, they should be required and taught regardless of gender. Similarly, the courts' reliance on the fact that women are the victims of rape, as well as its reliance on the societal notion that any touching of a woman is sexual misconduct, are disheartening bases upon which to establish a greater expectation of privacy in women. All persons, whether in custody or free, are entitled to an expectation of bodily integrity regardless of gender.²¹

II. GENDER ROLES WITHIN THE CORRECTIONAL SYSTEM

In its two hundred-year history, the American prison system has, except for brief periods, segregated women from men, in its employment and incarceration policies.²² Within each correctional

19. See *Grummett*, 779 F.2d at 495 (holding that male prisoners did not demonstrate that restricted observation of showering prisoners by female guards was so degrading as to require intervention by the court); *Gunther*, 612 F.2d at 1079 (holding that broadly construed job classifications discriminate impermissibly by prohibiting the advancement of female corrections officers); *Bagley*, 579 F. Supp at 1105 (holding that female guards' rights to equal employment opportunities supercede male prisoners' rights to be free from unnecessary vigor under Oregon's constitution); *Griffin*, 654 F. Supp. at 703 (holding that male prisoners do not have a constitutional right not to be seen naked by correctional officers of the opposite sex).

20. See discussion *infra* Part V.

21. See *Vacco v. Quill*, 521 U.S. 793, 801 (1997) (recognizing a well established right to bodily integrity in cases involving unwanted medical treatment); see also *Hovater v. Robinson*, 1 F.3d 1063, 1065 (10th Cir. 1993) (holding that a constitutional right to be secure in her bodily integrity includes protection from rape).

22. See RAFTER, *supra* note 2, at 10 (discussing three stages in history during which male and female prisoners were segregated). Females were originally housed in separate cells within