

Cross Gender Supervision: Law and Liability

Prof. Brenda V. Smith

National Institute of Corrections/ American University,
Washington College of Law
November 8, 2007

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Ground Rules

- Will discuss the state of the law as we understand it
- Please feel free to point us to other cases
- Think about how this relates to your current policy and practice
- Make sure to pay close attention to the cases in your circuit

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Geographic Boundaries
of United States Courts of Appeals and United States District Courts



Cross-Gender Supervision Claims

- Challenges arise in a variety of ways
 - Inmates
 - Staff
 - Union

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Themes of the Cases

- Very fact specific
- Who is doing the search or supervision
- Who is being searched or supervised
- What is the nature of the search
- What is the nature of the supervision

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Seven Basic Questions

- Do prisoners retain privacy rights in prison?
- Do prisoners have a right to be free from unreasonable searches in prisons, jails or in community corrections?
- Is there a reason to treat male prisoners differently from female prisoners?
- Do women have a greater expectation of privacy than men?

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Seven Basic Questions

- Are there important governmental objectives served by providing women inmates with greater privacy rights than men?
- What are the rights of employees?
- What are the institutional concerns?

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Legal Bases

- 42 U.S.C. §1983
- First Amendment
- Fourth Amendment
- Fourteenth Amendment
- Eighth Amendment
- Title VII

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42 U.S.C. 1983

- Doesn't create any constitutional rights
- Creates a federal cause of action for the vindication of rights found elsewhere
- Key elements:
 - deprived of a right secured by the constitution or law of U.S.
 - deprivation by a person acting under color of state law

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Balancing Test

- **Turner v. Safley, 482 U.S. 78 (1987)**
 - Is the prison policy related to some legitimate penological necessity?
 - Is there a valid rational connection between prison policy and the legitimate governmental interest asserted to justify it

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Balancing Test

- existence of alternative means for inmates to exercise constitutional right
- impact of accommodation of constitutional rights on other inmates and staff and on allocation of prison resources
- absence of ready alternatives evidence reasonableness of regulation

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Inmate Challenges

- Men generally lose
- Women often win

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First Amendment

- Cross gender supervision does not violate religious beliefs
 - Madyun v. Franzen 704 F.2d 954 (7th Cir. 1983)
 - Thompson v. Stansberry, 2002 WL 1362453 (Tex. App. 2002)
 - finding that cross-gender strip search did not violate male inmate's First Amendment rights

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Fourth Amendment

- Bell v. Wolfish, 441 U.S. 520 (1979)
 - visual body cavity searches of pretrial detainees by staff of the same gender permissible
- What matters in these cases:
 - The scope of the intrusion
 - The manner in which it was conducted
 - The justification for the intrusion
 - The place in which it is conducted

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Fourth Amendment

- Hudson v. Palmer, 468 U.S. 517 (1984)
 - Inmates have no expectation of privacy in their cells.

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Fourth Amendment- Privacy

- Cross gender supervision violates right to be free from unreasonable search and seizures
 - random viewing of male inmates by female staff performing routine duties okay if observation is inadvertent, casual and restricted or emergency
 - (1st, 4th, 6th, 7th, 9th)

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Fourth Amendment- Privacy

- See e.g.
 - Hickman v. Jackson, 2005 U.S. Dist. Lexis 44007 (E.D. Va.);
 - Roden v. Sowders, 84 Fed. Appx. 611 (6th Cir. 2003);
 - Johnson v. Phelan, 69 F.3d 183 (7th Cir. 1994);
 - Laing v. Guisto, 92 Fed. Appx. 422 (9th Cir. 2004);

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But. . . .

- Visual body cavity searches of male inmates during non-emergency may not be okay
 - Cookish v. Powell, 945 F.2d 441 (1st Cir. 1991)
 - Cromwell v. Dalhberg, 963 F.2d 912 (6th Cir. 1992)

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But See

- **Wilson v. City of Kalamazoo, 127 F.Supp.2d 855 (W.D. Mich. 2000)**
 - Fourth Amendment privacy rights violated where plaintiffs where denied all means of shielding their private body parts from viewing of others for at least six hours
- **Somers v. Thurman, 109 F.3d 614 (9th Cir. 1997)**
 - Harassment by female staff during strip search violates 8th Amendment

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And.....

- **Pat downs that do not include the male genital area are okay**
 - Smith v. Fairman (7th Cir. 1982); but see
 - Timm v. Gunter 917 F.2d 1093 (9th Cir. 1990)

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14th Amendment – Equal Protection

- **You don't permit cross gender searches and supervision of women but you do of men**
 - Oliver v. Scott, 276 F.3d 736 (5th Cir. 2002);
 - Timm v. Gunter 917 F.2d 1093 (9th Cir. 1990)
- Men and women not similarly situated with regard to differences in security concerns, number and age or prisoners, kinds of crimes committed, frequency of incidents involving violence and contraband

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Cross Gender Supervision Challenges by Female Inmates

- Far more successful by and large than with men
 - societal norms
 - able to articulate harm
 - documented (?) past histories of physical and sexual abuse
 - perception of male correctional staff

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Important Cases

- **Forts v. Ward, 621 F.2d 1210 (2nd Cir. 1980)**
 - balanced employment rights of male staff and female inmates by allowing men on nighttime shifts but required prison to provide appropriate clothing for women
 - important consideration was impact on female staff members who would have been bumped from daytime shifts in order to accommodate policy
 - came via union challenge related to implementation of new policy

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Important Cases

- **Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993)**
 - change in policy occasioned by grievance filed by female staff who did not want to do routine suspicionless searches
 - new tough warden who wanted random searches and more of them
 - scared that female staff would sue, went to gender neutral policy

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Jordan v. Gardner

- Received warning from psychologists on staff prior to instituting policy
- Told that because of women's history of past physical and sexual abuse would cause harm
- Implemented policy 7/5/89
- Intrusive search involving kneading and squeezing

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Jordan v. Gardner

- Legal challenges
 - First Amendment
 - Fourth Amendment
 - Eighth Amendment

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What the Court Did

- Ignored First Amendment
- Ignored Fourth Amendment
- Based decision on 8th Amendment

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What Jordan Stands for...

- In certain circumstances cross-gender supervision can violate Eighth Amendment
- Must lay sufficient factual predicate for finding of emotional harm
- Limited to situation in particular Washington state facility

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But See...

- Rice v. King County, 234 F.3d 549 (9th Cir. 2000)
 - Male inmate
 - Female staff did rough search of genital area
 - Alleged past history of sexual trauma
 - No 8th Amendment violation
 - Prison had no reason to know of history

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Colman v. Vasquez, 142 F. Supp.2d 226 (2d. Cir. 2001)

- Facts
 - Female inmate
 - Incarcerated at FCI Danbury
 - In special unit for victims of sexual abuse -- the Bridge Program
 - Random pat searches by male staff
 - Sexual advances by staff member
 - Complaint to psychiatrist who informed a Lt.
 - No response by administration
 - Sexual assault in 1997

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Colman v. Vasquez

- Procedural Posture
 - Motion to dismiss on basis of qualified immunity
- Standard of Review
 - Whether taking plaintiff's allegations to be true, plaintiff has stated a cause of action
- Legal Claims
 - 1st, 4th, and 8th Amendments

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Colman v. Vasquez

- Eighth Amendment
 - Analyze under 8th rather than 4th Amendment because of allegation of extreme emotional distress, *Jordan v. Gardner*
 - Sees case as like *Jordan* because of previous knowledge of institution about trauma history of inmate

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Colman v. Vasquez

- Fourth Amendment
 - Recognizes split in judicial opinions on privacy rights of male and female inmates
 - Gives weight to factual situation – female inmate in sexual abuse trauma unit
 - Must look at nature of search, circumstances of inmate and penological justification for policy at issue
 - Left open that supervision could violate 4th Amendment
 - Limits to motion to dismiss

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Community Corrections Case

- Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992)
 - Male parole officer observing female parolee urinate for urinalysis violates parolee's fourth amendment rights, distinguishes Grummett

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Prison Officials Attempts at Same Gender Supervision

- Relevant Considerations
 - Employee Rights
 - Inmate Privacy
 - Institutional Security
 - Inmate Rehabilitation
 - Institutional Interests

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Two Different Lines of Analysis

- Turner v. Safley
- Dothard v. Rawlinson, 433 U.S. 321 (1977)
 - Gender found to be BFOQ for direct supervision positions in Alabama maximum security prison, but struck down height, weight and strength requirements

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Balancing Test– Turner v. Safley, 482 U.S. 78 (1987)

- Is the prison policy related to some legitimate penological necessity?
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- Existence of alternative means for inmates to exercise constitutional right
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Standard for BFOQ

- Factual basis for believing that all or substantially all women or men would be unable to perform safely and efficiently the duties of the job involved.

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Turner Cases

- **Tharp v. Iowa DOC, 68 F.3d 223 (8th Cir. 1995)**
 - Male employees sued for their exclusion from posts in female housing unit. No violation of Title VII
- **Torres v. Wisconsin DOC, 859 F.2d 1523 (7th Cir. 1986)**
 - Male correctional officers at maximum security women's prison challenged their exclusion from posts in the living units. Upheld prison's decision

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Dothard Cases

- Gunther v. Iowa State Men's Reformatory, 462 F.Supp. 952 (8th Cir. 1979)
 - Gender is not BFOQ for positions in men's reformatory beyond a certain position
- See also,
 - Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981);
 - Griffin v. Michigan DOC, 654 F.Supp.690 (E.D. Mich. 1982)
 - (all cases recognizing women's' right to work in male institutions)

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Other Important Cases

- Everson v. State of Michigan Department of Corrections 391F.3d 737 (6TH Cir. 2004)
 - Court upheld BFOQ for certain positions in women's housing unit
- Tipler v. Douglas County, 482 F.3d 1023 (8th Cir. 2007)
 - Gender based staffing policy of county jail does not violate Title VII or 14th Amendment Equal Protection Clause

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Other Important Cases

- Westchester County Corrections v. County of Westchester, 346 F. Supp. 2d 527(S.D. N.Y. 2004)
 - gender restriction on transportation posts did not constitute an adverse employment action under Title VII because the reassignments were temporary
 - defendants failed to establish a valid BFOQ defense based on gender because they failed to establish that all or substantially all male correction officers posed a risk of inappropriate sexual conduct with female inmates to justify a complete ban

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Jail Case- State Constitution

- Rucker v. City of Kettering, Ohio, 84 F.Supp.2d 917 (S.D. Ohio 2000)

- gender was not BFOQ to work in male jail facility
- but Ohio law was bar to Ms. Rucker's employment [same gender supervision]
- city five-day holding facility
- "civilian jailer"
- small facility, five employees

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Four Cases -- Juveniles

- Philadelphia v. Penn. Human Relations Comm'n, 300 A.2d 97 (1973)

- Holding that gender is a legitimate BFOQ at youth facilities, males to supervise males and females to supervise females

- Long v. California State Personnel Board, 41 Cal. App.3d 1000, 116 Cal. Rptr. 562 (1974)

- female excluded from chaplain's job at youth training center for males

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Four Cases -- Juveniles

- In the Matter of Juvenile Detention Officer Union County, 837 A.2d 1101 (N.J. Super. A.D. 2003)

- Creation of 8 male juvenile detention officer positions upheld

- Henry v. Milwaukee County, 2007 U.S. Dist. Lexis 39690 (E.D. Wis.)

- Gender is a BFOQ which requires that only male juvenile correctional officers work the 3rd shift in male juvenile units

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What These Cases Stand For

- Juvenile detainees have greater expectation of privacy than adults
- Younger age of juveniles makes them more vulnerable – both girls and boys
- Views cross gender searches and viewing of juveniles naked by staff of opposite sex as traumatic and likely to cause "permanent irreparable harm"

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What These Cases Stand For

- May be able to legitimately exclude staff of opposite gender from wide range positions with youth
- BFOQ's for youth upheld

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Cross Gender Practices in Sexual Abuse Litigation

- Two recent cases where cross-gender supervision was not challenged directly but figured prominently in 8th Amendment challenges by female inmates.

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Cash v. County of Erie, 2007 WL 2027844 (W.D. N.Y. July 11, 2007)

- Vickie Cash sexually assaulted by correctional officer in 2002 while in segregation in Erie County holding center
- Officer Hamilton hired in 1989
- Working alone on unit
- Suspended w/o pay 1/2003
- Pleads to 3rd degree rape

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Cash v. County of Erie

- Sues
 - Former sheriff in official and individual capacity
 - County
 - Sheriff Department
 - Offending officer
- Posture – cross motions for summary judgment

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Cash v. County of Erie

- Result
 - Sheriff Department out as administration arm of county
 - County still in
 - Sheriff still in
 - Officer still in

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Cash v. County of Erie

- Reasoning
 - Deputy was working alone in the Alpha segregation area of the Holding Center, where the female inmates were housed
 - No female deputies or matrons on duty
 - No policy in place to prevent male deputies from walking in on female inmates unannounced, at any time
 - Undersheriff and Superintendent of the Holding Center, when deposed, said that it was appropriate for male deputies to observe women inmates in various stages of undress, or using the toilet

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Cash v. County of Erie

- Reasoning
 - Sheriff testified that he was aware of complaints made by other female inmates about sexual abuse of assault
 - Could not recall taking steps to address it
 - Range of assaults less than 1000 not more than 20

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Cash v. County of Erie

- Reasoning
 - Reasonable jury could find
 - County had policy and practice that allowed male officers to have access to female inmates w/o presence of female staff and other inmates
 - Prison officials, including sheriff had knowledge of practice
 - Prison officials knew of past complaints and took no corrective action

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Cash v. County of Erie

- Cash's cross motion for summary judgment denied
 - No indication if other sexual harassment complaints made prior to 12/2002 when incident occurred
 - No indication whether other incidents were investigated

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Heckenlaible v. VA Peninsula Regional Jail Authority, 2007 WL 1732385 (E.D.Va.)

- Mentally ill inmate sues former jailer and jail authority
- Motion for summary judgment (MSJ) denied in part and granted in part

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Facts about Officer
 - Hired in 2001
 - Passed criminal background check
 - Nothing to suggest that he posed a risk

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- **Facts about Inmate**
 - Pre-trial detainee
 - Under influence of drugs and alcohol at time of arrest
 - Epileptic
 - Past history of self harm
 - Infected with lice
 - Placed in medical unit – for lice

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- **Operational issues**
 - Steele supervised the medical unit where Heckenlaible was housed – ALONE
 - Two spot checks during beginning of 12 hour shift
 - Inmates encouraged to shower by medical
 - Steele supervised Heckenlaible in the shower
 - Heckenlaible noticed him watching her while she showered

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- **Convergence**
 - Steele did cell search later that night
 - Forced Heckenlaible to have oral sex with him
 - Heckenlaible cleaned herself off with a towel which she kept under the bed
 - Heckenlaible cried herself to sleep

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Investigation and Prosecution
 - Heckenlaible reports to Jail Authority supervisory staff the next day
 - They place Steele on administrative leave
 - They recover towel – determine that there is semen
 - Steele is fired for sex with inmate and refusal to cooperate in investigation

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Investigation and Prosecution
 - Steele convicted of carnal knowledge of an inmate in 2004—a class 6 felony
 - Still locked up at time of the writing of the opinion

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Precautionary measures of agency
 - Policy prohibiting abuse of inmates
 - Policy prohibiting sex with inmates
 - Policy that prohibited search of female inmate by male staff unless accompanied by female staff, except in emergency

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- History of agency
 - No complaints against Steele
 - No complaints of sexual abuse of inmates

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Claims against Jail Authority and Steele
 - Assault and battery
 - Intentional infliction of emotional distress
 - Negligent hiring
 - Negligent retention
 - Negligence in having Steele be only one supervising women

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Claims against Steele
 - 42 U.S.C. §1983
 - 14th Amendment substantive due process right to bodily integrity

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Court's ruling
 - Jail Authority could be liable under theory of respondeat superior for Steele's actions

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Distinguishes from cases where acts of employee were incidental to employment
- In this case
 - "employee's wrongful conduct is 'related to the nature of the employment'"

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Heckenlaible v. Virginia Peninsula Regional Jail Authority

- MSJ denied
 - Intentional infliction of emotional distress
 - Assault and battery
 - Negligence
 - Substantive due process claim
- MSJ granted
 - Negligent hiring
 - Negligent retention

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What Does This Mean

- You can do a lot of things right and still end up in court
- Must push ahead on those areas of vulnerability
- Cross gender supervision is clearly an area of vulnerability operationally

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Discussion for Web Chat

- Make sure to write down your questions
- Think about other areas for research and discussion
- Think about tools that might be useful in addressing this issue

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