Developed by Brenda V. Smith under NIC Cooperative Agreement 07S22GJ03

Cross Gender Supervision: Law and Liability
Prof. Brenda V. Smith
National Institute of Corrections/ American University, Washington College of Law
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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

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

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Cross-Gender Supervision Claims

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

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

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?
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?

Legal Bases

- First Amendment
- Fourth Amendment
- Fourteenth Amendment
- Eighth Amendment
- Title VII

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
Balancing Test

  - 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

- 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

Inmate Challenges

- Men generally lose
- Women often win
First Amendment

- Cross gender supervision does not violate religious beliefs
  - Madyun v. Franzen 704 F.2d 954 (7th Cir. 1983)
    - finding that cross-gender strip search did not violate male inmate’s First Amendment rights

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

  - Inmates have no expectation of privacy in their cells.
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)

See e.g.
- 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);

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)
**But See ……**

  - 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

**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)

**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
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

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

- Jordan v. Gardner, 986 F.d 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
**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

**Jordan v. Gardner**

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

**What the Court Did**

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

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

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
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

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

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
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

Prison Officials Attempts at Same Gender Supervision

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

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
Balancing Test—

- 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?
- 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

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.

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
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);
  - (all cases recognizing women's right to work in male institutions)

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

Other Important Cases

  - 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
Jail Case - State Constitution

  - 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

Four Cases -- Juveniles

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

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

Four Cases -- Juveniles

  - Creation of 8 male juvenile detention officer positions upheld

- Henry v. Milwaukee County, 2007 U.S. Dist. Lexis 399690 (E.D. Wis.)
  - Gender is a BFOQ which requires that only male juvenile correctional officers work the 3rd shift in male juvenile units
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"

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

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.
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

Cash v. County of Erie

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

Cash v. County of Erie

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

- 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

- 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
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

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

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
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

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

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
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

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

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
Heckenlaible v. Virginia Peninsula Regional Jail Authority

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

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

Heckenlaible v. Virginia Peninsula Regional Jail Authority

- Claims against Steele
  - 14th Amendment substantive due process right to bodily integrity
Heckenlaible v. Virginia Peninsula Regional Jail Authority

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

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’”

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
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

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