“Still again, history discloses the fact that woman has always been dependent on man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present”. State v. Muller, 208 U.S. 412, 421 (1908) (limiting women’s workdays to 10 hours in certain occupations).

INTRODUCTION

Discrimination against women is not new. Women have been the target of unequal measures for a very long time. Early in U.S. history, a married woman could not sue or be sued, inherit, enter into contracts, make wills or keep her own property. Until the 20th Century, women could not vote. So, it is no surprise that women have been—and still are--subject to inequality in the workplace. What makes discrimination against women unique among groups targeted for discriminatory employment practices is that unlike other groups who are discriminated against out of hatred, women have been subject to discrimination ostensibly for their own protection. Often described as the “gentle sex” or the “weaker sex”, women have been protected first by their fathers and later by their husbands. Another rationale for discriminating against women is their perceived role as seductive sexual objects from which men need protection. These bases for gender discrimination have found expression in the laws of the United States and in such great cases as Rostker v. Golberg, excluding women from the draft, and Dothard v. Rawlinson, excluding women from contact positions in a maximum security male penitentiary. As a result of the institutionalization of these social mores, women still suffer great inequality, especially in the workplace.

To combat this inequity, federal laws have been enacted to promote equal treatment of women in terms of employment, pay and other workplace conditions. Title VII is the main federal law that prohibits discrimination against women in the workplace. But Title VII also sets up a defense for employers when they have a factual basis for believing that women (or men, in fairness) cannot perform the requirements of the job. This defense is commonly known as the bona fide occupational qualification or BFOQ defense, and it has been frustrating attempts by women to achieve equality in the workplace.

The BFOQ defense will justify gender as a job requirement if the job in question cannot be satisfactorily performed by members of the excluded sex. While this definition appears to allow gender discrimination when it perhaps should, that is when the unwanted sex would be unable to perform the job as in the case of an actor or actress where gender may be required for genuineness, the BFOQ defense has morphed through jurisprudence to justify gender discrimination where either sex could perform the job equally well but privacy interests of third parties of one sex make it more psychologically comfortable that the job be performed by persons of that same sex, or where third parties like customers or patients need protection. These forms of the BFOQ are generally known as the privacy based BFOQ and the safety BFOQ, respectively.

There are two areas of employment in which bodily privacy and safety have justified overt gender discrimination against women by courts finding that gender is a BFOQ: nursing staff and prison guards. These two areas have also spawned recent scholarly debate as to the need for the BFOQ to protect women from sexual attack and bodily exposure. Following a brief overview of Title VII and the BFOQ provision, this paper examines court opinions involving prison guards and nurses where the courts have found that the BFOQ justifies gender discrimination to show that these courts openly and systematically rely upon the archaic stereotypes of women as seductive sexual objects and/or weak human beings in upholding the BFOQ. The continuing expression of these stereotypes in legal precedent leads to counsel and parties raising the same stereotypical arguments in each new case that comes before the courts. I argue that by legitimizing these stereotypes the courts are perpetuating gender discrimination to the detriment of women. By excluding both men and women from employment in these sectors, creating a “separate but equal” workforce where women continue to serve in lower paying and less prestigious positions, the courts are maintaining a system in which women continue to be denied the means to gain power in our society. It is indeed ironic that this system is exalted as being for the good of women.

TITLE VII AND THE BFOQ DEFENSE IN GENDER BASED DISCRIMINATION

Title VII of the Civil Rights Act of 1964 prohibits sex-based classifications in hiring and discharge decisions, in terms and conditions of employment, and in other employment decisions that adversely affect the status of an employee. The word “sex” was not included in the original text of Title VII. That classification was added on the floor by amendment one day before the House of Representatives passed the Civil Rights Act. Some commentators contend that the proposal to add
gender was a political tactic intended to defeat the Act.\textsuperscript{16} There was very little relevant debate over the amendment, and therefore, there is little legislative history to guide courts in their interpretation of the provision. Early on, however, the courts signaled their intention to read the statute as a whole, and concluded that “one of Congress’ main goals was to provide equal access to the job market for both men and women”.\textsuperscript{17}

Under Title VII, two theories of liability are available for individuals bringing sex discrimination claims: disparate impact and disparate treatment. Generally, under either theory, the plaintiff is required to establish a prima facie case of discrimination.\textsuperscript{18} Depending upon the theory of liability, however, different defenses may be offered by the defendant employer. In a disparate impact case, the appropriate defense is “business necessity” with the idea being that the employer must rely on the challenged requirement to further a legitimate business goal. In a disparate treatment case, on the other hand, the defendant employer’s affirmative defense is that its policy or practice is based on a \emph{bona fide} occupational qualification (BFOQ).\textsuperscript{19} Unlike the business necessity defense, which was created by the judiciary, the BFOQ defense enjoys its root in the statutory language of Title VII.\textsuperscript{20} Basically, the BFOQ defense requires the employer to establish that membership in the protected class is itself a requirement for satisfactory performance of the job.

Section 703(e), the BFOQ provision of Title VII, states:

\begin{quote}
...Notwithstanding any other provision of this of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .
\end{quote}

The EEOC guidelines on the BFOQ defense in sex discrimination cases state that "the Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly."\textsuperscript{21} A portion of these guidelines has been approved by the Supreme Court.\textsuperscript{22} Due to the narrow interpretation given the BFOQ defense, the defendant employer asserting the defense should bear a heavy burden.\textsuperscript{23}

Accepting this view, the Supreme Court in \textit{Dothard v. Rawlinson}, noted “the virtually uniform view…that § 703 (e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities.”\textsuperscript{24} The Court noted: “[W]hatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes….\textsuperscript{25}” Despite these encouraging words, the Court went on to deliver an opinion that has sparked controversy for decades. The Court held that Alabama was justified in prohibiting women prison guards from contact positions in its maximum security male institutions.\textsuperscript{26}

\textbf{DOTHARD ESTABLISHES THE SAFETY BFOQ—WOMEN ARE EXCLUDED FROM EMPLOYMENT AS GUARDS AT A MAXIMUM SECURITY MALE PENITENTIARY}

The prohibition of women from assignment to contact positions in maximum security institutions is a facially discriminatory regulation. It discriminates against women on the basis of their sex. Quoting Section 703 (e), the Court stated that to validate such a requirement, it would have to be shown that sex was a reasonably necessary requirement for the normal operation of a penal institution.\textsuperscript{27} Thus, the defendants had to assert that being male was a \emph{bona fide} occupational qualification for that particular job.

The defendants’ arguments centered on the especially dangerous conditions in Alabama’s maximum security institutions. Defendants contended that prison security would be jeopardized if women were employed as guards in maximum security institutions. The Court was persuaded that the defendants had met their burden:

The essence of a correctional counselor’s job is to maintain prison security. A woman’s relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women. In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.\textsuperscript{28}

Thus, according to the Supreme Court in \textit{Dothard}, women can be excluded from contact positions in a maximum security male penitentiary because, by their very nature, they are irresistibly seductive and will be attacked by the prisoners, resulting in a dangerous lack of prison security.

Justices Marshall and Brennan dissented as to the majority’s opinion on the BFOQ defense set forth by Alabama. In their view, any prison guard is susceptible to attacks by inmates:

If male guards face an impossible situation, it is difficult to see how women could make the problem worse, unless one relies on precisely the type of generalized bias against women that the Court agrees Title VII was intended to outlaw. For example, much of the testimony of appellants’ witnesses ignores individual differences among members of each sex and reads like "ancient canards about the proper role of women." \textit{Phillips v. Martin Marietta Corp.}, 400 U.S., at 545. The witnesses claimed that women guards are not strict disciplinarians; that they are physically less
capable of protecting themselves and subduing unruly inmates; that inmates take advantage of them as they did their mothers, while male guards are strong father figures who easily maintain discipline, and so on. Yet the record shows that the presence of women guards has not led to a single incident amounting to a serious breach of security in any Alabama institution.\(^{30}\)

The dissent pointed out that the majority’s opinion revealed the “real disqualifying factor” for the plaintiff was her “very womanhood.”\(^{31}\) The dissenting opinion explained:

In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women - that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has..., upon closer inspection, been revealed as a cage." \(^{32}\) Cal. 3d 1, 20, 485 P. 2d 529, 541 (1971). It is particularly ironic that the case is erected here in response to feared misbehavior by imprisoned criminals.\(^{32}\)

In reaching this startling decision, the Dothard Court did not acknowledge that it had expanded the BFOQ defense to cover situations in which the safety of third parties may be implicated. Nonetheless, later courts would seize the opportunity to uphold airline policies excluding pregnant women from positions as flight attendants due to concerns for passenger safety.\(^{33}\)

**THE PRIVACY BASED BFOQ DEFENSE IS DEVELOPED BY THE COURTS TO JUSTIFY SEX DISCRIMINATION WHERE THIRD PARTY PRIVACY RIGHTS ARE IMPLICATED BY THE RELEVANT JOB DUTIES**

The Supreme Court has never considered the privacy based BFOQ defense, even though privacy cases had emerged as early as 1971.\(^{34}\) In his dissenting opinion in the much celebrated case of \(UAW v. Johnson Controls, Inc.\), Justice White emphasized the task oriented nature of the majority’s decision and noted that privacy considerations may be precluded by the majority’s opinion since privacy concerns “do not relate directly to an employee’s physical ability to perform the duties of the job.”\(^{35}\) In a footnote to the opinion, however, the Court specifically rejected Justice White’s contention, stating:

Justice White predicts that our reaffirmation of the narrowness of the BFOQ defense will preclude considerations of privacy as a basis for sex-based discrimination. (Citations omitted). We have never addressed privacy-based sex discrimination and shall not do so here because the sex-based discrimination at issue today does not involve the privacy interests of Johnson Controls' customers. Nothing in our discussion of the "essence of the business test," however, suggests that sex could not constitute a BFOQ when privacy interests are implicated.\(^{36}\)

Thus, although the Supreme Court has never expressly authorized the use of the privacy BFOQ as a justification for gender discrimination, neither has the Court rejected the defense. The lower courts have responded by developing the defense in a host of cases involving nursing staff, prison guards, mental health assistants, janitors, and health club employees.\(^{37}\) The justification for allowing gender discrimination in these positions rests on the premise that they all involve situations where the human body may be exposed to varying degrees, or where the employees may witness individuals engaged in intimate bodily functions. Oft-cited and eloquently stated, the court in \(York v. Story\), which was not a BFOQ case, sets forth the accepted rationale:

We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.\(^{38}\)

At first blush, this rationale is laudable, although many of the job categories in which the BFOQ defense has been successful have not actually involved employees viewing naked bodies. In these employment cases, the BFOQ appears to be based on illegitimate customer preference.\(^{39}\) In two employment contexts, however, prison guards and nursing staff, employees do see and often touch the naked body. If the privacy BFOQ is justifiable at all, it seems that it would be so in these circumstances.

It is noteworthy that the cases involving nurses and prison guards have been the subject of recent scholarly attention. Although some authors would disallow the privacy BFOQ even in these cases where it is arguably most justified, others argue in favor of the privacy BFOQ in these situations.\(^{40}\) Those who argue for the BFOQ, say that it is needed to protect women. Women having babies have their genitalia exposed and need privacy. Women prisoners are subject to sexual abuse by male guards and need to be protected. Authors arguing against any use of the privacy BFOQ contend that it perpetuates the view that women are “vulnerable to sexualized attack, and…essentially and necessarily modest in a way that resonates with tendencies to proptize women and deny them sexual agency.”\(^{41}\)

The privacy cases that have upheld gender discrimination in employment as prison guards and nursing staff always have as their purported goal the betterment of women. In the nursing cases, the courts are persuaded that the female sex is very sensitive to bodily exposure and must be shielded from the sight of unselected individuals of the opposite sex. In prison guard cases, which are brought by both men and women, the courts are trying to protect female prisoners from invasion of their bodily privacy when men seek jobs in women’s penal institutions, and when women seek jobs in male institutions, the
courts try to protect the woman’s right to work where she pleases. Unless there are special circumstances involved, as there were in *Dothard* for example, the courts are genuinely interested in advancing the interests of women.\textsuperscript{42}

An examination of these cases reveals that although the courts said they were trying to help women, the rationales upon which they all relied are based on the traditional stereotypes of women as seductive sexual objects and/or weak human beings. It is important to recognize that these stereotypes justified the exclusion of women from the workplace earlier in history, which led to the current position of women in society. Although women have made gains in employment opportunities, “[p]overty remains skewed by gender, women still face barriers to full equality, and women of all classes struggle with integrating work and home.”\textsuperscript{43} Women lack power today because they have historically been denied the means to achieve it. Early laws prohibited married women from owning property and making contracts, two rights deemed indispensable to achieving power in a capitalist society.\textsuperscript{44} And now, court decisions resting upon the gender specific BFOQ still for the purpose of protecting women, keep jobs segregated by sex where women continue to be employed in lower paying, less prestigious positions.

I turn now to an examination of the courts’ opinions, which reveals the disjuncture between the courts’ purported reasons for why the BFOQ is necessary and the openly stated use of discriminatory stereotypes as rationale for treating women differently than men. I pose the question: How can the use of degrading stereotypes as justification for discriminating against both men and women under the guise of aiding women in their quest for equality, ever result in furthering that cause?

### GENDER IS A BFOQ FOR NURSING STAFF BECAUSE NURSES RENDER INTIMATE SERVICE AND FREQUENTLY VIEW THE NAKED BODIES OF THEIR PATIENTS

One of the most-cited BFOQ cases is *Fesel v. Masonic Home of Delaware, Inc.*\textsuperscript{45} In this early case, Frederick Fesel, a male nursing student, was rejected for a nurse’s aide position in a small retirement home because of a policy against hiring male nurse’s aides. He sued alleging sex discrimination in violation of Title VII. At the time Fesel sought employment at the retirement home, it had thirty guests, of whom twenty-two were female. The home contended that employment of a male nurse’s aide would undermine the essence its business operation because its female guests would not consent to having a male attend to their personal needs.\textsuperscript{46} The home introduced affidavits that it prepared for its female guests to sign stating that the guest would not consent to a male nurse’s aide and that she would leave if the home employed men. Nine guests signed the affidavits, and children of guests testified that they would consider removing their mothers if male nurse’s aides were employed. In addition, the Director of Nursing Services testified that she believed that female guests would not accept care from male aides.\textsuperscript{47} The court was persuaded:

Since it is clear that a substantial portion of the female guests will not consent to such care, it follows that the sex of the nurse's aides at the Home is crucial to successful job performance. In this sense the hiring of male nurse's aides would directly undermine the essence of the Home's business and its belief to that effect in 1973 had a factual basis.\textsuperscript{48}

The court went on to consider whether the home could selectively assign job duties so that a male nurse’s aide could be hired, but not have to perform personal services for female residents. The court determined that because the home was small, it could not have a male aide on any shift and also have at least one female aide available at the same time to perform personal services for female residents.\textsuperscript{49} Consequently, the defendant employer was successful in establishing the privacy BFOQ.

When reading the *Fesel* opinion, one is struck by the court’s acceptance of the evidence showing that only women cared about bodily privacy at the retirement home. The court addressed this aspect of the case in a footnote: “The question of the preferences of the male guests at the Home was not explored at trial. However, since the male guests do presently accept care from female nurse’s aides, there does not appear to be any problem of nonconsenting male guests.”\textsuperscript{50} In response to Fesel’s contention that the wishes of the female residents at the home were nothing more than impermissible customer preference, the court expressly recognized that “the attitudes of the nonconsenting female guests at the Home are undoubtedly attributable to their upbringing and to sexual stereotyping of the past.” Nevertheless, according to the court, because of the intimate services provided, the female guests had a privacy right which would allow them to reject intimate care by a man.

In *Fesel*, the court relied on an idea about bodily privacy, which the court accepted as something only women care about and further admitted that women care about because of socialization and sexual stereotyping, to protect female modesty at the retirement home. The court undoubtedly believed that it was helping women; protecting their bodily privacy from exposure to the opposite sex. But the court was clearly and unmistakably relying on sexual stereotyping of the past to allow gender discrimination in this case.

Another early nursing case reveals the same reasoning. In *Backus v. Baptist Medical Center*,\textsuperscript{51} Gregory Backus, a male nurse was who applied for a position in the hospital’s OB-GYN department, was rejected because of a female only policy for those positions.\textsuperscript{52} When Backus sued under Title VII, the hospital asserted a privacy based BFOQ defense, which the court upheld, stating:

…obstetrics is a unique section of the hospital. An obstetrical patient constantly has her genitalia exposed. There are few duties which a registered nurse can perform in relation to an obstetrical patient which are not sensitive or
intimate. Among the duties performed by the nurse in the labor room are the following: checking the cervix for dilation, shaving the perineum, giving an enema, assisting in the expulsion of the enema and sterilizing the vaginal area. In the recovery room the nurse checks the patient for bleeding, gives massages to the uterus, and changes perineal pads.  

The Backus court was persuaded that women need protection of their bodily privacy in the OB-GYN department. But Backus goes further; it also protects women from sexual abuse. Backus argued that scheduling could obviate the need for the hospital’s discriminatory employment policy. In response, the hospital contended that if male nurses were in the OB-GYN department, there would be charges of molestation, which would require a chaperone be assigned for each male nurse. The court held that because chaperones would result in costly duplicative staffing, the discriminatory staffing policy was unavoidable. 

The Backus decision reveals the underlying rationales of the womanly trait for modesty and the vision of women as seductive sexual objects irresistible to men. When Backus argued that these rationales were inappropriate in this case because male doctors routinely viewed the women patient’s naked in the OB-GYN department, the court replied that while women choose their doctors, they do not choose their nurses. Furthermore, the court noted that if women were to reject male doctors in the OB-GYN department, many would go without service. Thus, the court viewed the presence of male doctors in OB-GYN as a matter of necessity due to the reality of there being few women doctors available, not as an indication that women would accept male nurses since they accept male doctors.

These days, large numbers of women doctors are pursuing OB-GYN careers, displacing male doctors who once dominated the field. Backus has been the subject of recent scholarly attention due to the phenomenon of male doctors not being hired to do OB-GYN work. There are many reasons that a woman would choose a female gynecologist over a male, just as there are many reasons that a woman would choose a female general practitioner or pediatrician. Recognizing that modesty may be among these reasons, it is by no means the sole reason. Moreover, that a woman may choose a female doctor does not necessarily mean that she will reject a male nurse. This kind of thinking misses the point, however. The real question is whether women should be encouraged to reject male nurses (and male gynecologists) by the courts’ reliance on stereotypical notions about their modesty and sexual attractiveness.

The courts’ opinions in Fesel and Backus reveal a protectionist attitude toward women. It is significant that both cases espouse only a female concern for bodily privacy. That men do not care so much about bodily privacy is not surprising. Men are not supposed to be modest. Men are sexually aggressive. As the hospital points out in Backus, naked women in the sight of men ends up in charges of molestation. A woman, on the other hand, must be modest, lest it be thought that she desires sex and is thus unchaste.

There is one case that deserves mention because it appears to protect male bodily privacy as opposed to female bodily privacy. In Jones v. Hinds General Hospital, Pamela Jones was laid off pursuant to a plan to reduce the workforce. At the time of her layoff, the hospital employed seven male orderlies, none of whom were considered for layoff, despite the fact that some had less seniority than Jones. The orderlies performed the same duties as nurse assistants, including bathing patients, assisting patients in bathing, prepping for surgery and administering enemas, except that male nurse aides and male orderlies were permitted to perform catheterization on male patients, but not female patients. Female nurse aides were not permitted to perform catheterizations at all. The discriminatory lay off plan was precipitated by the abundance of female nurses who were available to perform catheterizations on female patients, whereas few male nurses were available for male patients.

In defense to Jones’ lawsuit, the hospital raised the privacy BFOQ defense, asserting that it needed at least one male orderly in the hospital at all times to perform intimate procedures on its male patients: “Various functions performed by nurse assistants or orderlies entail the manipulation or exposure of patients’ genitalia or other private areas of their bodies. To preserve its male patients’ interests in privacy and dignity, defendant asserts it was necessary to retain all orderlies who were on the staff at the time of the layoff.” The court held that the hospital was justified in its discriminatory lay off policy. 

Jones, unlike Fesel and Backus, proceeds from the perspective that men too have privacy concerns. Jones can be distinguished, however, in that unlike Fesel and Backus, when males were not available to perform catheterizations on male patients, female nurses could do so. As the court notes:

All of these witnesses admitted that there are occasions on which certain intimate procedures are performed on male patients by female nurses, such as catheterization (sic) or prepping of private parts, and by nurse assistants, such as bathing and giving enemas. However, if in the opinion of the head nurse the patient would object, or if the patient himself does in fact object, the procedure is that a male orderly, if available, be called to perform the procedure in question. Where a male orderly is simply not available, including emergency situations, procedures such as catheterization (sic) are performed by female nurses. But every effort is made to accommodate the needs of each male patient, and to respect his interest in privacy and dignity.

The absence of abuse rationale is also noteworthy in the Jones case. Recall that the hospital in Backus based part of its argument on the possibility of charges of molestation. The fact that no one brought up the possibility of abuse and/or molestation in Jones is due, I believe, to the gender of the patient. Naked men do not need protection from women. Only naked women need protection from men.

Finally, the evidence put forth in Jones also differs from the evidence generally considered necessary to support a privacy based BFOQ for nursing staff. The Jones court did not require evidence that individual male patients would object to
catheterization by women. The evidence tendered was indirect testimony by doctors and nurses that they believed that male patients would object and hearsay evidence that patients had objected. In Slivka v. Camden-Clark Memorial Hospital62, the hospital’s female-only in the OB-GYN department BFOQ argument was rejected by the court for the reason that only indirect evidence that female patients would object to male nurses was proffered. The court found such evidence insufficient to establish that the hospital had a factual basis for believing that male nurses could not satisfactorily perform in the OB-GYN department. Thus, upon scrutiny, the Jones opinion does as much to perpetuate the notion that women must be treated differently as do Fesel and Backus.

MALE GENDER IS A NOT A BFOQ WHEN WOMEN WANT TO BE PRISON GUARDS IN MALE INSTITUTIONS; BUT FEMALE GENDER IS A BFOQ WHEN MEN WANT TO BE PRISON GUARDS IN FEMALE PRISONS

Turning now to consider the cases brought by prison guards, I begin by pointing out that cases in the prison context are brought by both men and women. When women want to be prison guards in male prisons, the courts hold that male gender is not a BFOQ for those positions. But when men want to serve in female prisons, the opposite is true: female gender is a BFOQ for positions in female prisons. These opinions are the most damaging to women; the judges do not appear to even notice that they are casting women in the role of seductress and at the very same time, trying to protect their purity. These cases are transparent judicial statements of blatant discrimination.

Gunther v. Iowa State Men’s Reformatory63 was decided three years after the Supreme Court rendered its infamous Dothard opinion holding that women could be denied guard positions in maximum security male institutions when their very womanhood would threaten prison security.64 Cynthia Gunther was denied special training in riot control and self-defense available to men and required for advancement to the highest level of correctional guard in the Iowa prison system.65 Relying on Dothard, prison administrators contended that male gender was a BFOQ for promotion to this level to maintain prison security. The court distinguished Dothard, stating that the Iowa system did not present the unique circumstances that the Supreme Court found to exist in Alabama and held that Gunther was entitled to the promotion. As a backup argument, the prison pointed out that Gunther’s new duties would place her in a position to view male prisoners naked and would thus violate prisoner privacy. The court rejected the privacy argument, finding that the institution was adept at readjusting work schedules for male guards without undermining its goals, and could, therefore, schedule men and women guards at the institution so as to avoid violating prisoner privacy. The court concluded that overt discriminatory treatment of women guards was not justified by the BFOQ.66

Just two years later, Jennie Griffin would also gain the right to work in sensitive areas of a male prison.57 The Michigan prison system had policy that excluded all women from the residential units in male correctional facilities. The defendants argued that the discriminatory policy was justified by concerns for safety and inmate privacy. Rejecting the defendants’ BFOQ defense, the court again distinguished Dothard, stating that the Supreme Court’s opinion in Dothard was limited to the “jungle-like maximum security environment in Alabama.”66 Turning to the privacy BFOQ defense, the court held that inmates do not have a constitutional right to privacy that would protect them from being viewed naked by correctional officers of the opposite sex:

In the case at bar, any contention by Defendants that they are entitled to the Title VII BFOQ exception on the basis of the inmates' right to privacy argument is without merit. Inmates do not possess any protected right under the Constitution against being viewed while naked by correctional officers of the opposite sex. The entire basis of the argument rests on assumptions and stereotypical sexual characteristics which have been expressly prohibited by Title VII, Dothard, supra, and other Supreme Court decisions that refute principals of sexual stereotyping.69

The court surveyed cases in which a privacy BFOQ had been upheld in the prison setting, but found those cases distinguishable. In Iowa Department of Social Services v. Iowa Merit Employment Department,70 the Iowa Supreme Court noted that "there would be a constitutional violation of inmates’ rights if the guards were women." However, that opinion was based on two state court decisions that were decided on facts that are peculiar to youth detention facilities.72 The Griffin court stated:

In the context of youth detention facilities, state courts have been understandably more zealous to protect the privacy rights of young people who have been detained. The state courts have been concerned not only with the need for bodily privacy, but also with the psychological effect on the children who may feel embarrassed, awkward and degraded by having members of the opposite sex observe them.73

The court went on to distinguish a New York Supreme Court decision finding that sex was a BFOQ for a position as a corrections officer in a women’s institution.74 There, the challenge “was directed only at the BFOQ clause that was contained in the State Civil Service Statute. They never addressed the issue of whether a BFOQ was justified under Title VII.”75 The Griffin court concluded that discrimination on the basis of sex in the prison setting violated Title VII.

Gunther and Griffin are examples of how courts respond to Title VII claims by women prison guards. Note that the courts in both cases distinguished Dothard, temporarily ending the application of the safety BFOQ in the prison setting. On the issue of prisoner privacy, the Gunther court avoided having to deal directly with the question of inmate privacy rights by seizing the opportunity to rule on the basis of reassignment.76 Harden v. Dayton Human Rehabilitation Center77 was
decided the same way on basically the same grounds the following year. Where non-discriminatory reassignment is available as a means to avoid a clash between male prisoner privacy and female rights to employment, women plaintiffs always win.

Unlike Gunther, Griffin squarely held that prisoners do not have privacy rights that could justify a male BFOQ. The court rejected the privacy BFOQ expressly stating that “it is based on stereotypical sexual characterization that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing by a member of one’s own sex.” This contention, according to the court, could withstand scrutiny.

Hence, either because reassignment would alleviate privacy concerns or because prisoners had no privacy interests, the privacy BFOQ did not justify the exclusion of women from positions in the prison where they would view male prisoners naked. The next wave of privacy BFOQ cases in the prison context were brought by male guards seeking positions in the women’s facilities. In these cases, the privacy rights of women prisoners were considered by the courts. Note that all of these cases upheld the privacy BFOQ when it is used to keep men from viewing women prisoners naked.

In Torres v. Wisconsin Department of Health and Social Services, the superintendent of the only women’s maximum security institution in Wisconsin determined that rehabilitation of women inmates would be enhanced by employing only female correctional officers in the living quarters. Male officers who were reassigned due to the policy brought a Title VII claim alleging gender discrimination. The superintendent asserted a privacy based BFOQ as justification for the overt sex discrimination on three bases: security, privacy, and rehabilitation. The trial court found for the plaintiffs, rejecting the contention that men could not perform the job duties at the women’s facility. The court found that the defendants had offered no objective evidence to establish that they had a factual basis for believing that men could not perform the security and rehabilitation duties in a satisfactory manner. As to privacy, the court held that prison inmates have only a limited right to privacy that did not justify a BFOQ.

The appeals court affirmed the lower court’s findings on security and inmate privacy. However, the court reversed as to the need for a privacy based BFOQ to further the institution’s rehabilitation goal. The appeals court determined that the essence of a maximum security prison was rehabilitation. The court went on to address the trial court’s finding that the totality of the circumstances should be considered.

In Torres, the court held that prison inmates have only a limited right to privacy that did not justify a BFOQ. The court reversed as to the need for a privacy based BFOQ to further the institution’s rehabilitation goal. The appeals court determined that the essence of a maximum security prison was rehabilitation. The court went on to address the trial court’s finding that the totality of the circumstances should be considered.

The Torres case is particularly noteworthy (1) because it holds that objective evidence is not required to make the “factual basis” showing that is required to assert a privacy based BFOQ defense, and (2) because it expressly rests on the differences between men and women. Concerning the first point, the opinion certainly eases the burden on the defendant in privacy BFOQ cases. Basically, the court said that since the defendants did not have any objective evidence that the presence of men in the women’s institution undermined rehabilitation, none was needed.

On the second point, noting the differences between men and women, the court stated:

[There are real as well as fictional differences between men and women. Id. For instance, the Supreme Court has never hesitated to recognize sex-based differences, particularly in cases involving physiology, marriage, child-birth, or sexuality. See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469, 67 L. Ed. 2d 437, 101 S. Ct. 1200 (1981) ("This Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."). id. at 481 (Blackmun, J., concurring) ("The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist."). See generally Parham v. Hughes, 441 U.S. 347, 354, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979) (opinion of Stewart, J.) ("In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity."); Schlesinger v. Ballard, 419 U.S. 498, 508, 42 L. Ed. 2d 610, 95 S. Ct. 572 (1975) ("The different treatment of men and women . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.") (emphasis in original)). This same principle has been recognized in the Title VII area. See, e.g., Backus v. Baptist Medical Center, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981), vacated because of mootness, 671 F.2d 1100 (8th Cir. 1982) (recognizing the need to have female registered nurses care for obstetrical patients).

The court then emphasized that the female-only rule was based, in part, on the fact that many of the inmates in the women’s institution had been “physically and sexually abused by males.”

The rationale of the majority opinion is based on the stereotypical view that women differ from men in that they are modest, and that womanly modesty needs to be fostered and protected by the courts. In dissent, Judge Cudahy criticized the majority for allowing the state to rely on “what could best be characterized as a ‘feminist’ theory of rehabilitation…[in which] men are at the root of many of these female inmates’ difficulties in social adjustment. The presence of men allegedly
creates tension and stress in the living areas and men must therefore give up their jobs in those areas.”

The dissent by Judge Cudahy points out the irony in this thinking: that the female-only rule is a feminist rule that the court thinks will benefit women.

Also dissenting, Judge Easterbrook echoed this sentiment, further stating:

Women’s prisons throughout the nation employ male guards; other prisons in Wisconsin do; four other courts of appeals have held that unless prisons entail grave risks of violence to members of one sex only, as in Dothard, sex is not a bona fide occupational qualification.  …

Do the male guards hinder rehabilitation of the female prisoners? Maybe, but the expert testimony in the case conflicts, which mirrors the conflict in society at large about rehabilitation.  We ought not take it as indisputable that women are different from men and use that premise to justify sex differences in employment.  

The next pair of cases to come before the courts were Tharp v. Iowa Department of Corrections94 and Robino v. Director of the Women’s Community Correctional Center (WCCC)95. Both cases were brought by male guards, and both cases were decided largely on the basis that the discriminatory job assignment policy in question was a minimal restriction on the male guards’ employment opportunities. The Tharp court applied a balancing test to determine that Title VII was not violated, expressly noting that a “prison employer’s reasonable gender-based job assignment policy, particularly a policy that is favorable to the protected class of women employees, will be upheld if it imposes only a ‘minimal restriction’ on other employees.”

Robino involved a policy of assigning only women to six of the posts at the institution, all of which were residential positions requiring the officer to observe the female inmates in the toilets and showers. WCCC asserted that this sex-based policy was necessary to protect the privacy of the female inmates. Since only six of forty-one positions at WCCC were designated female-only, the court found the restriction on employment opportunities for men at WCCC was too insignificant to warrant consideration.

The Robino court did not base its holding on the BFOQ. Nevertheless, “[a]ssuming arguendo that plaintiffs raise a colorable Title VII claim,” the court concluded that gender would constitute a privacy based BFOQ for the six women-only posts.98 The court found that “a person's interest in not being viewed unclothed by members of the opposite sex survives incarceration,”99 and that the WCCC policy was adopted to protect female inmates and to prevent allegations of sexual misconduct by male guards. The court stated: “The state’s legitimate penological interests outweigh whatever interest the male ACOs may have in standing the watches of their choice.”100 The following quote from Torres is included in the Robino opinion: "the superintendent . . . made a professional judgment that giving women prisoners a living environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation" especially in light of the warden's finding that "a high percentage of female inmates has been physically and sexually abused by males.”

Everson v. Michigan Department of Corrections102 is the most recent of the successful privacy BFOQ cases. Decided in 2004 by the Sixth Circuit Court of Appeals, this case has sparked recent debate about whether women prisoners have special interests in privacy such that male guards can be excluded from employment in women’s penal facilities.103 Everson was brought by both male and female guards to challenge an employment policy that barred men from the housing units in Michigan women’s correctional facilities.104 During several years preceding the adoption of the female-only policy, there had been numerous complaints of sexual abuse and harassment by female prisoners in Michigan. Studies and investigations revealed that Michigan had a particularly severe abuse problem in its women’s facilities.105 Because of the problem, Michigan had agreed to institute a wide range of safeguards that were expected to cut down on the incidence of sexual abuse.

Following a bench trial, the district court held for the plaintiffs. The court found that the state had failed to prove that the female BFOQ was justified. In particular, the district court held that the practice nationwide was to employ male guards in female institutions, that Michigan prisons were not unique, and that there were alternatives to wholesale exclusion which would obviate the need for this discriminatory employment policy.

On appeal, the district court was reversed. Relying on Dothard, the appeals court found that the safety BFOQ was warranted to protect female inmates from sexual abuse and to improve security in the prison, stating:

As the data cited above shows, some male officers possess a trait precluding safe and efficient job performance—a proclivity for sexually abusive conduct—that cannot be ascertained by means other than knowledge of the officer’s gender, and thus, gender was ‘a legitimate proxy’ for a safety-related job qualification.107

The court also found that privacy would justify the discriminatory policy. Citing Torres, Tharp, and Robino, the appeals court noted that courts have upheld the exclusion of male guards from female prisons to safeguard female privacy concerns.108 The court found that similarly, the Michigan female-only policy would advance female privacy interests:

The housing unit serves as inmates ‘home,’ the place where they ‘let their hair down’ and perform the most intimate functions like ‘like showering, using the toilet, dressing, even sleeping.’ (citations omitted).

The MDOC has instituted ‘privacy screens’ to address the most severe invasions of privacy, but these measures are not failsafe….prurient male officers have ample opportunity to gaze upon inmates in a state of undress.109

Thus, as recently as 2004, the Everson court relied on the very same stereotypical view of women as weak and in need of protection, on the one hand, and as seductive sexual objects who by their very womanhood would provoke assault, on the other.
CONCLUSION

When courts allow the gender BFOQ to justify sex discrimination, they say that they are doing it to benefit women. Either they are safeguarding female privacy as in the nursing cases and several of the prison cases, or they are keeping women safe from sexual assault. They are also using the BFOQ to promote job opportunities for women, as the BFOQ is usually applied against men, and in favor of women—at least in the job categories surveyed in this paper. These benefits to women have led commentators to conclude that the BFOQ in the OB-GYN department and in the prison cases should be allowed.

In the nursing area, the argument for the BFOQ is that women’s bodily privacy should trump male nurse’s rights to employment in the OB-GYN department. In the prison context, the argument is that sexual assault on women cannot be tolerated at any price. The argument against the BFOQ in both cases is that differential treatment of men and women—even when it is ostensibly beneficial to women—reinforces the stereotypical notion of women that has traditionally justified exclusion from women in employment. In this sense, even when it benefits the women in the context of the lawsuit by providing greater employment opportunities, it is symbolically degrading. Furthermore, opponents of the BFOQ contend that every movement to gain rights comes at some cost. Often the cost is disproportionately borne by some members of the group, as in the case of women prisoners subject to a greater likelihood of sexual assault by male guards if male guards are allowed in female prisons.

In this paper, I set out to show that even though courts say they are allowing the BFOQ to benefit women, they are actually relying upon detrimental stereotyping about women as justification for their decisions. They are safeguarding privacy because women are different from men in that they are modest in ways men are not. Indeed, men do not usually care whether males or females provide intimate services for them. Men are entitled to sexual agency; women have traditionally been denied the right to engage in unimpeded sexual activity. Woman who desire sex are unchaste; men who desire sex are just being men. Men are also inclined—by trait, we are told—to engage in sexually abusive behavior; women by their very womanhood, are sexually provocative and bring out the worst in men. Women are the weaker sex and must be protected.

That the courts rely on these stereotypes is perhaps not surprising. But that they openly, and without apology, say these things in their opinions is another matter entirely. Courts have authority and they can set policy with their words. When they uphold discriminatory employment policies by relying on archaic notions about the difference between the sexes, they are perpetuating these ideas. The cases reveal an alarming trend by courts to use sexual stereotyping to justify sex discrimination in employment. Though couched in terms of benefiting women, this trend fosters the view that women are weak and must be protected, and/or they are seductive sexual objects and must be kept separate from men. Neither view is complimentary to women. Still worse, the use of the BFOQ in these situations keeps the door to equal employment swinging in both directions. Today it may benefit women by giving them preference in these job categories; it could, however, just as easily swing the other way. In any event, it does more damage than good. It fosters an unfavorable view of women, one that all members of society, including women, continue to believe.

Footnotes

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1 Blackstone’s Commentaries (St. George Tucker ed. 1803). See, for example, Bradwell v. The State, 83 U.S. 130 (1872) (excluding women from the practice of law, in which Justice Bradley, concurring, stated: “It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband’s consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.
2 It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the
noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.” *Id.* at 141-42).

3 The 19th Amendment to the United States Constitution was ratified on August 18, 1920.


5 Bradwell v. The State, 83 U.S. 130 (1872).

6 Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) (holding it unconstitutional to exclude women law students from employment as pages in the South Carolina Senate). In its enlightened opinion, the Court stated: “It rests upon the implied premise, which we think false, that "on the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to political influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva -- and either way, she loses."” *Id.* at 231-32 (quoting Johnson and Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U.L.REV. 675, 704-5 (1971)).


11 It may well be the case that sex should never be a BFOQ to justify discrimination; in that scenario, some businesses would cease to exist if their success depended upon overt discrimination.


13 While there are other job categories in which the BFOQ has been raised by employers in defense of facially discriminatory employment practices preferring one sex over the other, such as mental health assistants, janitors, youth center workers, health club employees and massage therapists, those jobs are distinguishable in that they do not generally involve the actual viewing of the naked body as part of the job description. They are also distinguishable in other ways which limit their usefulness to this study in that courts do not talk the same way about their rationale for finding a gender BFOQ justified.


15 In section 703(a), the statute provides:

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


17 Vicki Lens, *supra* note 3, at 507 (citing ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 26, 43 (2001)).

18 The prima facie case differs depending upon whether the plaintiff is asserting disparate treatment or disparate impact. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) and Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) are seminal cases establishing the prima facie case in disparate treatment and disparate impact cases respectively, and should be consulted for greater specificity.


20 See Grant v. General Motors Corp., 908 F.2d 1303, 1307 (6th Cir. 1990)("overt discrimination and the statutorily-defined BFOQ defense must be analytically distinguished from Griggs-type disparate impact and the accompanying judicially-created business necessity defense").


22 The relevant EEOC Guidelines are reprinted here in their entirety:
"1604.2 Sex as a bona fide occupational qualification.
"(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels -- 'Men's jobs' and 'Women's jobs' -- tend to deny employment opportunities unnecessarily to one sex or the other.
"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
"(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
"(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
"(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.
"(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.
"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e. g., an actor or actress.
"(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e. g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.
"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." 29 C.F.R. §1604.2 (1972).
23 Dothard v. Rawlinson, 433 U.S. 321,334 & n.19 (1977) (“The EEOC issued guidelines on sex discrimination in 1965 reflecting its position that ‘the bona fide occupational qualification as to sex should be interpreted narrowly.’ 29 CFR § 1604.2(a). It has adhered to that principle consistently, and its construction of the statute can accordingly be given weight.” (Citations omitted)).
24 See, e.g., Weeks, 408 F.2d at 235.
25 Dothard, 433 U.S. at 334. The Court cited with approval the Fifth Circuit’s opinion in Diaz, 442 F.2d at 387, which held, "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." Diaz involved a man who was refused employment as a flight attendant. The airlines contended that women were better suited to the flight attendant position due to their better ability to attend to the special psychological needs of air passengers. The airline also submitted evidence tending to show that its “passengers overwhelmingly preferred to be served by female stewardesses.” In holding for the plaintiff, the court stated that the essence of the airline business is safe transportation of passengers; the court rejected any notion that employing a man for the position of flight attendant would jeopardize the airline’s ability to provide safe transportation.
26 Id. at 333. See also Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (unlawful to reject women with pre-school age children for employment in which men with pre-school age children are accepted).
27 Dothard involved a claim by a woman that she was denied employment as a prison guard in Alabama on the basis of two discriminatory Alabama regulations: one set a 120 pound minimum weight requirement and the other prohibited the assignment of women as guards in “contact positions” to maximum security institutions. The physical requirement was facially neutral, but had a disparate impact on women. The Court rejected the defendant’s contention that the requirement was job-related to strength, noting that if strength is a bona fide job requirement, a simple test could be devised that would better measure strength. While the Court’s entire opinion merits discussion, for purposes of this paper, it is the Court’s opinion on the second requirement (directly prohibiting women from certain positions in the prison system), which is insightful.
28 Dothard, 433 U.S. at 333.
29 Id. at 335-36.
30 Id. at 343-44.
31 Id. at 345 (quoting the majority opinion at page 336).
32 Id.
as they mainly rest on considerations of efficiency.

...our notion that women must be chaste. There are a few janitorial cases denying women positions where they would clean on their behalf. I contend that these objections are remnants of our socialization, and that they are particularly entwined with... classification is not based on bodily privacy, but instead, a preference by members of one sex to be cared for by individuals of their same sex. Notably, in these cases, the individual patients do not object to care by either sex; the objections are made by women who believe that people of their own sex are more likely to be caring. A case... 361 (4th Cir. 1979).

...on the OB-GYN ward, but the courts upholding a privacy BFOQ note that there may be occasions when an assistant will have to escort a patient to the shower or restroom, or have to restrain a patient while a nurse baths him or her. Plaintiffs argue that these are not true privacy cases, but instead involve illegal customer preference, since the discriminatory

...Johnson Controls, the Court considered whether a fetal protection policy which prohibited women of child bearing age, but not men, from employment in the manufacture of batteries, could be validated by a BFOQ analysis. Johnson Controls argued that the fetal protection policy fell within the "so-called safety exception to the BFOQ." Citing Dothard, the Court stated that danger to a woman herself does not justify gender discrimination. The Court distinguished Dothard, because there, "more was at stake than the 'individual woman's decision to weigh and accept the risks of employment.' [The Court] found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman." Whereas third party safety went to the "core" of the job in Dothard, the fetal protection policy, protected unconceived fetuses of female employees, which were 'neither customers nor third parties whose safety is essential to the business of battery manufacturing." Id. at 202. Indeed, the Court found that the essence of Johnson Controls’ business is making batteries, something that women can do as efficiently as anyone else. Johnson Controls could not establish a BFOQ on these facts. 36Id. at 206, n.4.

...There is one privacy BFOQ case involving a masseur. The court refused to sanction gender discrimination in the massage setting. The opinion is interesting though, because the employer raises the spectre of abuse as a justification for excluding masseurs for its almost exclusively female clientele. Olson v. Marriott International, Inc., 75 F. Supp.2d 1052 (D. Ariz. 1999) (rejecting employer’s argument that because its customers may object, men could be excluded from massage therapist position).

...York v. Story, 324 F.2d 450, 455 (1963), cert. denied, 376 U.S. 939 (1964) (action to recover damages where police officers took and distributed photographs of assault victim in the nude).

...The cases brought by mental health assistants do not have the same opportunity to view the naked body as would a nurse on the OB-GYN ward, but the courts upholding a privacy BFOQ note that there may be occasions when an assistant will have to escort a patient to the shower or restroom, or have to restrain a patient while a nurse baths him or her. Plaintiffss argue that these are not true privacy cases, but instead involve illegal customer preference, since the discriminatory classification is not based on bodily privacy, but instead, a preference by members of one sex to be cared for by individuals of their same sex. Notably, in these cases, the individual patients do not object to care by either sex; the objections are made on their behalf. I contend that these objections are remnants of our socialization, and that they are particularly entwined with our notion that women must be chaste. There are a few janitorial cases denying women positions where they would clean men's restrooms and bath houses, appearing to protect male bodily privacy, but they are distinguishable for differing reasons, as they mainly rest on considerations of efficiency.

...Supra note 11.

...Kapczynski, supra note 11, at 1262.

...The most recent of the BFOQ cases in the prison setting is Everson v. Michigan Department of Corrections, 391 F.3d 737 (6th Cir. 2004), cert. denied, 126 S.Ct. 364 (2005). The Everson court was trying to protect women prisoners from sexual abuse by male guards. The case is actually a hybrid: the court employs both the safety BFOQ and the privacy BFOQ to exclude male guards from the women’s facilities in Michigan.

...Vicki Lens, supra note 3, at 517.

...Indeed, these two economic rights are protected by the United States Constitution, Article I § 10, Amendments V and XIV. 44Id. at 1346.

...Id. at 1352.

...Id.

...Id.

...Id. at 1354.

...Id. at 1353, n.5.

...510 F. Supp. 1191 (E.D. Ark. 1981), vacated as moot, 671 F.2d 1100 (8th Cir. 1982).

...Id. at 1192. The hospital "did not employ male R.N.'s [registered nurses] in the OB-GYN positions because of the concern of our female patients for privacy and personal dignity which make it impossible for a male employee to perform the duties of this position effectively."

...Id. at 1193.

...Id. at 1197-98.

...For a thorough treatment of patient choice in the OB-GYN department, see Waldman, supra note 11.

...Waldman, supra note 11, at 392 (quoting the “sentiments of one frustrated male OB-GYN who stated that, ‘I’ve learned that they’re not looking for me if the ad says they need an ob-gyn in an all-female practice… I don’t see how it’s different from an ad saying “physician wanted to join all-Caucasion practice”.’”)
57 Kapczynski, supra note 11.
59 Id. at 934.
60 Id. at 935.
61 Id. at 936.
62 S Ct of Appeals of West VA. Find it.
63 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980).
64 Dothard, 433 U.S. at 335-36.
65 Gunther, 612 F.2d at 1081.
66 Id. at 1087.
68 Id. at 701.
69 Id. at 703.
70 261 N.W.2d 161, 165 (Iowa 1977).
71 Griffin, 654 F.Supp. at 703.
75 Id.
76 Nevertheless, the Gunther trial court did take the opportunity to state its view that “mores as to being viewed naked by the opposite sex under certain circumstances are bound to change as women become further integrated in the occupational and professional world. The traditional rule that only male guards may view male inmates under these circumstances may derive from just the type of stereotypical value system condemned by Title VII.” 462 F. Supp. 952, 956 n. 4 (N.D. Iowa 1979).
78 Griffin, 654 F. Supp. at 701.
79 For an early treatment of this issue, see Mary Ann Farkas & Kathryn R. L. Rand, Female Correctional Officers and Prisoner Privacy, 80 MARQ. L. REV. 995 (1997).
80 859 F.2d 1523 (7th Cir. 1988).
81 Id. at 1524.
82 Id. at 1526.
83 Id. at 1531.
84 Id. at 1526.
85 Id at 1528. Accord Forts v. Ward, 621 F.2d 1210 (2nd Cir. 1980) (rejecting a claim by female prisoners that employing male guards in the living units violated their rights to privacy).
86 Id. at 1532.
87 Id. at 1531-33.
88 Id. at 1532.
89 Id. at 1531.
90 Id. at 1527-28.
91 Id. at 1530.
92 Id. at 1533 (Cudahy, J., dissenting).
93 Id. at 1536 (Easterbrook, J., dissenting).
95 145 F.3d 1109 (9th Cir. 1998).
96 Tharp, 68 F.3d at 226.
97 Id. at 1110 (citing Tharp, 68 F.3d at 226).
98 Id. at 1110-11.
99 Id. (citing Grummett v. Rushen, 779 F.2d 491, 494 (9th Cir. 1985)).
100 Id.
101 Id. (quoting Torres, 859 F.2d at 1530).
102 391 F.3d 737.
103 Case, supra note 11.
104 Everson, 391 F.3d at 739.
105 Id. at 741-46.
Waldman, *supra* note 11.
Case, *supra* note 11.
Kapczynski, *supra* note 11.

While *Everson* and *Dothard* expressed this notion openly, it was implicit in the courts’ opinions in *Backus* and *Slivka*. 