THE BONA FIDE BODY: TITLE VII'S LAST BASTION OF INTENTIONAL SEX DISCRIMINATION+

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Under a classic view of antidiscrimination law, employers cannot intentionally discriminate on the basis of sex.[1] This guarantee of a workplace free of discrimination arises out of both the Equal Protection Clause[2] and, even more directly, Title VII of the Civil Rights Act of 1964.[3] A closer look, however, reveals that, in some circumstances, Title VII actually permits blatant, explicit sex discrimination. For example, under Title VII, a hospital can categorically exclude men from obstetrics-gynecological ("ob-gyn") nursing positions. How can this be the case? Despite its general prohibition of employment discrimination on the basis of sex, Title VII carves out an exception for sex-specific hiring practices justified because of a so-called "bona fide occupational qualification," or "BFOQ." If an employer can demonstrate that simply being a woman or a man is an essential part of the job, the BFOQ provision immunizes that employer from liability under Title VII.

In the years immediately following the passage of Title VII, employers tried to utilize the BFOQ exception to preserve discriminatory policies that made it more difficult for women and men to take non-traditional jobs. Employers would suggest that women were not strong enough to perform physically intensive work, such as telephone repair.[4] Men, on the other hand, were characterized as not soothing or sexy enough

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[1] There is an extensive literature discussing the difference between "sex" as a biological concept and "gender" as a social construction. This Article, however, has a slightly different focus, and works from the assumption that the drafters of Title VII believed that the category "sex" classifies biologically distinct groups of people.

[2] U.S. Const. amend. XIV.

[3] 42 U.S.C. § 2000e (1964).

[4] *See* Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

to hold certain service jobs, such as flight attendants.[5] Courts have generally rejected these explanations as merely perpetuating the stereotypes that prevent men and women from breaking out of traditional sex-identified roles.

Courts have shown tremendous resistance, however, to the idea that we can or should throw away all "common sense" notions about the natural differences between men and women.[6] As a result, many courts continue to accept the BFOQ justification in a residual cluster of sex discrimination cases involving prison guards, medical attendants, and bathroom custodians. While seemingly unrelated, these positions share a common element in that they involve the potential or actual observation of the (naked) body. When faced with these cases, courts have validated sex-specific hiring practices out of a desire to protect privacy and prevent physical or psychic harms to third parties. In prison guard cases, where equal employment claims and privacy interests have clashed most acutely, some judges decide that job applicants' right to equal employment opportunities outweighs prisoners' diminished expectation of privacy. In other instances, courts find that sex-discriminatory employment practices are necessary components of prison policies to promote security and rehabilitation. In the hospital and janitor cases, by contrast, courts regularly accept employers' arguments that they must implement sex-specific hiring practices in order to respect the privacy interests of their clientele.

This Article argues that courts' continued willingness to recognize BFOQs in these cases stems from their reliance on problematic sex-linked stereotypes and heteronormative premises, all of which threaten to enervate the transformative promise of Title VII. The normative assumptions that courts bring to their analysis reflect their ambivalence regarding and, in some instances, outright resistance to the implementation of a regime of total sex equality. Furthermore, their touting of BFOQs as a panacea for sexual abuse and dignitary harms not only betrays the spirit of Title VII but also allows a broad range of abuses to go unaddressed.

Part I offers a limited overview of Title VII BFOQ jurisprudence, first by outlining what have come to be known as the seminal BFOQ cases and then by discussing the Supreme Court's main BFOQ decision, Dothard v. Rawlinson.[7] With this foundation in place, Part II presents the four primary justifications that lower courts have offered when accepting BFOQ defenses in prison, hospital, and bathroom cases: the threat of physical and sexual assault, the dignitary harm caused by cross-sex observation, the erosion of civilized norms of modesty, and the frustration of rehabilitative

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[5] *See* Diaz v. Pan-American Airlines, 442 F.2d 385 (5th Cir. 1971); Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981).

[6] *See infra* Part II.B for discussion regarding the notion of natural or biological differences between the sexes.

[7] *See* 433 U.S. 321 (1977).

goals. This Part also identifies the normative bases underlying these arguments and assesses the accuracy and propriety of these assumptions. Part III then proposes that the BFOQ exception should be limited further, if not eliminated altogether, in order to maximize the potential of Title VII's antidiscrimination mandate. Specifically, in the non-incarcerated world, sex-based BFOQs should play no role, and individuals should be forced to absorb the costs of their taste for discrimination. With regard to prisons, however, in the absence of other meaningful safeguards, BFOQs may in fact be the only way to prevent the sexual abuse of female prisoners by male guards.

Through this Article, I hope to demonstrate the extent to which BFOQs are fundamentally inconsistent with the mandate that all individuals be judged on the basis of their own merit, rather than on overbroad generalizations about the capabilities of their sex. In the vast majority of cases, the notion that an individual's sex, independent of any other characteristic, could render someone unfit or unqualified to perform a job cannot withstand scrutiny. Consequently, the BFOQ exception to Title VII should be drastically limited. As we become more comfortable with new norms of sex equality, simple observation by a member of the opposite sex will no longer feel inherently violative, and our understanding of what it means to be treated with dignity will evolve accordingly. As long as courts permit employers to utilize BFOQs based solely on views about sex constrained by tradition, the goal of equal employment opportunity will remain elusive.

I. TITLE VII AND THE BONA FIDE OCCUPATIONAL QUALIFICATION[8]

Title VII of the Civil Rights Act of 1964 is the primary federal statutory provision addressing discrimination on the basis of sex in the workplace.[9] Sex, however, was only added to the list of protected categories

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[8] Earlier drafts of this section were prepared with the assistance of Hunter & Eskridge, Sexuality, Gender & the Law, Chap. 10, § 2 (1997).

[9] 42 U.S.C. § 2000e (1964). Title VII reads in relevant part:

> It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or to 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
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex or national origin.

in a last-ditch effort to defeat the legislation.[10] As a result, commentators and judges have had little legislative history upon which to rely when offering their interpretation of the "purposes" of the sex provision of Title VII. A commentator writing at the time of the Civil Rights Act's passage noted that the House Judiciary Committee held no hearing on the amendment prior to the vote and that the House debate on the amendment covered a mere nine pages of the Congressional Record.[11]

Unlike racial discrimination, which is prohibited without exception,[12] sex discrimination is permitted in certain limited circumstances where only one sex is considered "suitable" for a job because of its exclusive possession of some trait or characteristic that is a bona fide occupational qualification for the position. The BFOQ provision reads:

> Notwithstanding any other provision of this subchapter ... it shall not be an unlawful 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.[13]

The Interpretive Memorandum of Title VII ("Memorandum") submitted by the Senate Floor Managers of the Civil Rights Bill referred to the BFOQ as a "limited exception" to the prohibition against discrimination, conferring upon employers a "limited right to discriminate."[14] The Memorandum

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[10] *See* Charles Whalen & Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115-16 (1985); Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 23-25 (1995); Francis Vaas, Title VII: Legislative History, 7 B.C. Indus. & Com. L. Rev. 431, 441-42 (1966).

[11] *See* Vaas, *supra* note 10, at 442.

[12] Notwithstanding clear indications of legislative intent to the contrary, see Vaas, *supra* note 10, at 438 n.28, a few courts seem to have carved out an implicit race-BFOQ under extremely limited circumstances. For example, Judge Wisdom, in the course of striking down racially discriminatory staffing policies for black patrol officers, suggested that race might be a BFOQ for certain assignments: "For example, the undercover infiltration of an all-Negro criminal organization or plainclothes work in an area where a white man could not pass without notice. Special assignments might also be justified during brief periods of unusually high racial tension." Baker v. City of St. Petersburg, 400 F.2d 294, 301 n.10 (5th Cir. 1968). *See also* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (holding that black lieutenants were needed in a boot camp prison program where 70% of the inmates were black, in order to lend legitimacy to the program of severe discipline). For purposes of this Article, however, I will focus only on the sex-BFOQ.

[13] 42 U.S.C. § 2000e-2(e) (1964). The BFOQ provision is technically a defense to Title VII liability. Throughout this paper, however, I will use the terms "BFOQ" and "BFOQ defense" interchangeably.

[14] 110 Cong. Rec. 7212, 7213 (1964).

offered as examples of legitimate discrimination "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of a particular religious group for a salesman of that religion...."[15] With regard to sex discrimination, the BFOQ exception was meant to accommodate those rare jobs that absolutely required employees to possess some unique sex-specific trait.[16]

The Equal Employment Opportunity Commission ("EEOC") regulations offer a substantially similar explanation regarding the scope of the BFOQ provision.[17] The regulations call for a narrow interpretation of the BFOQ exception[18] and the rejection of purported BFOQs that are based on nothing more than stereotypical views about the capabilities of men and women.[19] They also explicitly reject customer preferences as a basis for the

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[15] *Id.*

[16] A relatively non-controversial example that is often cited would be a BFOQ permitting the exclusive hiring of women for the position of wet nurse.

[17] *See* 29 C.F.R. § 1604.2 (2002). Although the authoritative weight of EEOC regulations has been a hotly disputed issue, the Supreme Court has not yet decided to weigh in on the debate. *See, e.g.,* Toyota Motor Mfg., Ky., Inc. v. Williams, 122 S. Ct. 681, 689 (2002) (noting that "[t]he persuasive authority of the EEOC regulations is less clear" but finding that "[b]ecause both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due"). For an example of the heated debate about the weight that should be accorded to EEOC regulations regarding the permissibility of English-only laws at the workplace, compare Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) and Guttierez v. Mun. Court of Southeast Judicial Dist., Los Angeles County, 861 F.2d 1187 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing *en banc*) with Garcia v. Spun Steak Co., 13 F.3d 296 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing *en banc*) and Guttierez v. Mun. Court of Southeast Judicial Dist., Los Angeles County, 838 F.2d 1031 (9th Cir. 1988).

[18] *See* 29 C.F.R. § 1604.2(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.").

[19] The regulations state:

> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
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> (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.

recognition of a BFOQ.[20] While suggesting that a sex-discriminatory practice justified in the name of "genuineness" or "authenticity" might qualify under the BFOQ provision, the regulations generally offer a more limited universe of examples for BFOQ-justified discrimination than the Memorandum.[21]

A. Strong Women and Soothing Men—Title VII and the Debunking of Sex Stereotypes

The courts have rebuffed most attempts by employers to justify sex discrimination under the BFOQ provision. In Weeks v. Southern Bell Telephone & Telegraph Co., the Fifth Circuit announced that, in order to utilize a BFOQ defense, an employer must demonstrate that he has a "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[22] The court denounced employers' reliance on "class stereotypes" to deny women who were otherwise perfectly capable of performing the duties involved the opportunity to obtain desirable positions. According to the court, the BFOQ exception should be construed very narrowly in order to implement Title VII's guarantee of equality and to eliminate the paternalistic attitudes that have kept women locked in their golden cages:

> 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 nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

Id.

[20] *See id.* § 1604.2(a)(1)(iii) ("The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section" does not justify a BFOQ.).

[21] *See id.* § 1604.2(a)(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."). Considering the fact that cross-sex representation in theater dates back to Shakespearean times, however, one could easily question the assumption that sex would necessarily enhance genuineness. Lady Chablis (from "Midnight in the Garden of Good and Evil"), Jaye Davidson (from "The Crying Game"), and RuPaul might also beg to differ.

[22] 408 F.2d 228, 235 (5th Cir. 1969).

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.[23]

Two years later, in Diaz v. Pan-American Airlines, the Fifth Circuit rejected an airline's contention that only women were qualified for the position of in-flight cabin attendant because they were innately better suited to perform the "non-mechanical" functions of the job, such as soothing nervous customers.[24] Relying on Weeks, the court insisted that those responsibilities were not reasonably necessary to the normal operation of Pan Am's business because, while the customers might prefer female flight attendants, those preferences did not outweigh the nondiscrimination directive of Title VII.[25]

In another noteworthy customer preferences case, Southwest Airlines argued that sex was a BFOQ because of its particular marketing strategy of selling "love" in the air. Judge Patrick Higginbotham acknowledged that Southwest Airlines' marketing ploy—using only attractive female airline employees and basing its planes out of Dallas's Love Field—had been adopted as a tactic of economic survival in order to attract customers.[26] Nevertheless, he concluded that this advertising

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[23] *Id.* at 236.

[24] 442 F.2d 385, 388 (5th Cir. 1971). The Fifth Circuit summarized the findings of the trial court regarding "non-mechanical functions" as follows:

> [The trial court found that t]he performance of female attendants was better in the sense that they were superior in such non-mechanical aspects of the job as "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations." The trial court also found that Pan Am's passengers overwhelmingly preferred to be served by female stewardesses. Moreover, on the basis of the expert testimony of a psychiatrist, the court found that an airplane cabin represents a unique environment in which an air carrier is required to take account of the special psychological needs of its passengers. These psychological needs are better attended to by females.

[25] *See id.* at 389 (holding that customer preferences could only justify a BFOQ when something specific about the sex of the flight attendant rendered the company unable "to perform the primary function or service it offers").

[26] *See* Wilson v. Southwest Airlines, 517 F. Supp. 292, 294 (N.D. Tex. 1981). For an explanation of Southwest Airlines' precarious financial position, see *id.* at 293-94.

campaign did not transform the essence of Southwest's business, which remained the transportation of passengers. As Higginbotham explained, Weeks and Diaz offered courts faced with a BFOQ defense a two-pronged test, which asked first whether one or more of a particular job's requirements could really only be fulfilled by workers of one sex; and if so, then asked whether the "requirement" was necessary in light of the "essence" of the employer's business.[27] Unlike the job of a Playboy bunny, the court noted, where a female-only BFOQ would promote the essence of the business—i.e., the heterosexual titillation of male consumers—airline attendants are not hired to help an airline sell sexual gratification.[28] Rather, the responsibilities of a flight attendant pertain to the airline's essential service—transportation—and could therefore be performed by individuals of either sex. Accordingly, in the absence of some other showing as to why one sex was incapable of performing the responsibilities of a flight attendant, no sex-based restriction should apply.[29] In dicta, the court noted that a BFOQ would be more appropriate in other scenarios, such as "where the preference is based upon a desire for sexual privacy ... including disrobing, sleeping, or performing bodily functions in the presence of the opposite sex...."[30]

B. The Dangers of "Womanhood"—Dothard v. Rawlinson

Judge Higginbotham accurately predicted that BFOQs would continue to be prominent in cases involving assertions of privacy. It is perhaps somewhat counterintuitive then that the foundational Supreme Court case addressing BFOQs emanated from the prison context—the

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[27] *See id.* at 299.

[28] *See id.* at 301 (citing St. Cross v. Playboy Club, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights Appeal Bd. 1971) (dicta); Weber v. Playboy Club, Appeal No. 774, Case No. CFS 22619-70 (N.Y. Human Rights Appeal Bd. 1971) (dicta)).

[29] The court did make note of a case that stood as an exception to this rule, Fernandez v. Wynn Oil Co., 20 Fair Empl. Prac. Cas. 1162 (C.D. Cal. 1979). In Fernandez, the employer successfully argued that the cultural norms of his Latin American and Southeast Asian customers would create virtually insurmountable obstacles for a woman in the position of international marketing director. As Higginbotham explained, the Fernandez court had characterized this case as unusual in that the customer preferences were so rigid that satisfying them could be considered a business necessity. A BFOQ was therefore necessary because the hiring of a woman "would have totally subverted any business [defendant] hoped to accomplish in those areas of the world." Wilson, 517 F. Supp. at 302. Higginbotham noted, however, that the Fernandez court severely limited its holding to the unique facts of that case and cautioned that "'customer preferences should not be bootstrapped to the level of business necessity.'" *Id.* at 302 n.24 (quoting Fernandez). Customer preference only justified the use of a sex-based BFOQ "where no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficiency problems." *Id.*

[30] Wilson, 517 F. Supp. at 301 n.23.

sphere where privacy interests are afforded the least protection. Because prisons share attributes in common with hospitals, such as confinement and observation, and employ strict sex-segregation strategies, as do public bathrooms, it is not necessarily surprising that the sex-based BFOQ doctrine locates its jurisprudential origins in the prison setting.

The seminal Supreme Court case on the BFOQ question involved a claim of sex discrimination brought by a female applicant for the position of correctional counselor—the functional equivalent of a prison guard—in the Alabama state penitentiary system.[31] Specifically, the plaintiff, Dianne Rawlinson, challenged the minimum height (5 feet 2 inches) and weight (120 pounds) requirements for the job, which had the combined effect of rendering 99.76% of the male applicants but only 58.87% of the female applicants eligible for consideration.[32] The district court agreed that the requirements were imprecise means to test for desired qualities in prison guards and noted that the height and weight cut-offs did not even measure for strength. Rather, "[t]he crude rule of thumb provided by height and weight levels impermissibly restrict[ed] qualified individuals without giving them an opportunity to demonstrate their merit," and impermissibly discriminated against female applicants.[33]

E.C. Dothard, the Director of the Department of Public Safety, claimed that the requirements were designed to protect women from the particularly harsh conditions in the all-male penitentiary.[34] Due to the extreme conditions in the Alabama system, he insisted that the presence of women in a confined environment "where there are no heterosexual outlets would unnecessarily arouse and possibly even incite the inmates."[35] Finally, Dothard alleged that the presence of female guards in an environment where showers and toilet facilities were communal would violate prisoners' privacy rights.[36]

The district court concurred with Dothard's characterization of the abysmal state of affairs in the Alabama all-male penitentiaries, noting that

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[31] The case began with another lead plaintiff, Brenda Mieth, who sought employment as a state trooper. *See* Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala. 1976) (*per curiam*). The district court found that the height and weight requirement for the job of state trooper was not rationally related to any legitimate state interest, and struck down the provision as a violation of the Equal Protection Clause. *See id.* at 1182. The state did not appeal from this ruling, and only contested the district court's finding that the height and weight requirements for the correctional counselors were invalid under the Civil Rights Act. *See* Dothard v. Rawlinson, 433 U.S. 321, 324 n.4 (1977).

[32] *See* Mieth, 418 F. Supp. at 1179.

[33] *Id.* at 1183.

[34] *Id.* at 1184.

[35] *Id.*

[36] *Id.*

the Eighth Circuit had upheld a ruling[37] that found the conditions in these facilities "so bad as to be shocking to the conscience of reasonably civilized people."[38] As a result, "the rampant violence and jungle atmosphere" that marked these penal institutions came as "no surprise" to the district court.[39] Nevertheless, the court refused to consent to sex-discriminatory hiring practices on the basis of these facts alone. First, the court noted the presence of females in other contact positions at minimum security institutions within the Alabama prison system. Second, with regard to the privacy rights of prisoners, the court cited with approval the testimony of corrections officials from other states, all of whom testified that the female guards did not infringe on inmates' privacy rights any more than male guards and that female guards were able to perform exactly the same duties as male guards, with the exception of strip searches. The court noted that these experts shared the view that the presence of women in all-male prisons "contribute[d] to the normalization of the prison environment which has an advantageous psychological effect upon the prisoners."[40] The court also referred to a policy statement issued by the Federal Bureau of Prisons, which asserted that the use of a sex-integrated staff promoted the goal of normalization for correctional facilities.[41] Ultimately, the district court concluded that the potential conflict between the female applicants' right to non-discriminatory treatment in employment and the male inmates' right to privacy could be avoided by selective assignment of work responsibilities rather than through discriminatory hiring practices.[42]

On appeal, the Supreme Court took a very different approach to the case. While acknowledging that the BFOQ exception is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex," Justice Stewart was strongly influenced by the dramatic level of violence in the prison.[43] Under these conditions, the height and weight regulations could not be understood merely as an "exercise in romantic paternalism."[44] Because the essence of the job of a prison guard was maintaining security, the Court insisted that more was at stake than simply

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[37] James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd.*, 442 F.2d 304 (8th Cir. 1971). Although Alabama is now in the Eleventh Circuit, at the time of James, Alabama was part of the Eighth Circuit.

[38] Mieth v. Dothard, 418 F. Supp. at 1174 (quoting James, 406 F. Supp. at 329).

[39] *Id.* (quoting James, 406 F. Supp. at 325).

[40] *Id.* at 1184.

[41] *See id.* (quoting Federal Prison System, Police Statement No. 3713.7, dated Jan. 7, 1976).

[42] *Id.* at 1185.

[43] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

[44] *Id.* at 335.

the rights of individual women to assess for themselves the risks associated with assuming a contact position in a maximum security prison.

Justice Stewart located the site of the problem in Dianne Rawlinson's "womanhood." The Court accepted Dothard's prediction that the inmates, deprived of a "normal heterosexual environment, would assault women because they were women,"[45] especially in light of the fact that sexual offenders were not segregated from the general prison population. The court cited two examples of assaults on women in an Alabama prison as proof.[46] The female guards, however, were not the only people whose safety would be jeopardized:

> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibilities.[47]

In closing, Justice Stewart suggested that the Court's holding should be limited to the unique and egregious facts presented by the Alabama prisons and noted that women guards had been and could be used "effectively and beneficially" in a prison under normal conditions where dangerous offenders were segregated from the general population.[48] In Alabama, however, the Court would sanction a sex-based BFOQ for the position of correctional counselor in the state's maximum security prison.[49]

Rawlinson serves as the cornerstone for a complicated structure of case law regarding the use of the BFOQ defense in prisons and other contexts of confinement. Because the language in Rawlinson heavily emphasized the unique circumstances of that case, however, later decisions have applied Rawlinson inconsistently. Notably, the Supreme Court refused to consider Dothard's assertion that prisoners' privacy interests needed protection. The omission can perhaps be explained by assuming that the

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 336.

[48] *Id.* at 336. Justice Stewart noted that the State of California had filed an amicus brief attesting to its success in using women guards in all-male penitentiaries. *See id.* at 336 n.23.

[49] Although the issue in this case was technically a height and weight requirement, both the district court and the Supreme Court understood the question to be whether or not the prison could employ a sex-based BFOQ when hiring correctional counselors. *See id.* at 336-37 ("On the basis of that evidence, we conclude that the District Court was in error in ruling that being male is not a bona fide occupational qualification for the job of correctional counselor in a 'contact' position in an Alabama male maximum-security penitentiary.").

Court was skeptical about the sincerity of the state's alleged interest in inmate privacy in light of the fact that it had been operating a penal system under conditions that were found to be in violation of the Eighth Amendment. Nevertheless, the Court's decision to evade the privacy issue has resulted in a range of opinions regarding the proper balance between equal employment opportunities and privacy interests.

II. ASSESSING THE JUDICIAL JUSTIFICATIONS FOR BONA FIDE OCCUPATIONAL QUALIFICATIONS

Whereas the BFOQ has ceased to be a viable defense with regard to most discriminatory employment practices, BFOQs have retained their legitimacy in a specific subset of cases. In particular, disputes about the breadth of the BFOQ exception have arisen in cases involving not only prisons, but also other arenas where the possibility of cross-sex observation exists, namely hospitals and bathrooms. Specifically, lower courts have been called upon to assess the propriety of sex-specific hiring practices for jobs whose essential functions include the potential for observation of a naked body, such as psychiatric ward attendants, ob-gyn nurses, nursing home orderlies, and bathroom janitors. In adjudicating Title VII claims and BFOQ defenses, lower courts have consistently framed the issues at stake as implicating four primary concerns. First, courts have emphasized the likelihood of physical and sexual assault due to the tensions and temptations prevalent in environments of confinement. Second, courts have suggested that cross-sex observation harms the dignity of the individual observed. Third, courts have insisted that sexual modesty is the mark of a civilized society, meaning that deviations from these norms of privacy regarding the naked body result in the erosion of important values of Western civilization. Finally, where an employer's business is rehabilitation, courts have assumed that sex-segregation is a necessary component of any effective program of rehabilitation.

In addition to identifying the four primary rationales that courts have used to accept BFOQs, this section attempts to expose the normative assumptions underlying these justifications. Judges' views on sex and sexuality undoubtedly inform their understanding of which cross-sex encounters shall result in physical and psychic harm. A careful reading of their language reveals courts' reliance on rigid notions of sex differences, notwithstanding the explicit instruction in previous Title VII cases that people be judged on the basis of their individual characteristics, rather than according to generalized assumptions about the groups to which they belong. Yet, in many cases, courts further entrench these traditional presumptions about sex by grounding their analysis in terms of nature or biology. The naked body has become the lasting symbol of "true" and innocuous sexual difference, and freedom from the "harm" of cross-sex

observation has become the rallying cry for those who are determined to preserve sex-specific employment practices.

A. Physical and Sexual Assault

In many cases, courts have insisted that, when men and women interact in environments of confinement, physical—and especially sexual—assault is likely to ensue. The Supreme Court in Rawlinson explicitly stated that female guards would be at grave risk because the male prisoners had been deprived of a "normal heterosexual environment."[50] Lower courts have likewise considered the risk of sexual assault so grave as to warrant the abandonment of Title VII's prohibition against sex discrimination. In these cases, women—whether they are guards, prisoners, or patients—are reduced to the status of potential victims, while men, on the other hand, are classified categorically as potential sexual aggressors.

1. Women Are Too Weak for the Job

The first permutation of this argument relies on the "fact" that women are naturally weaker than men and therefore are more vulnerable to attack by prisoners. Although some jurists have suggested that the presence of women in the prison setting may actually change its inherently violent nature,[51] many courts accept as axiomatic the argument that hiring female guards jeopardizes the physical safety of other (i.e., male) guards in the prison and the stability of the institution as a whole.[52] This determination, whether tacit or explicit, stems from the belief that most women are physically frail or, at a minimum, that women are always weaker than their male counterparts. Courts portray men, on the other hand, as either physically dominating disciplinarians (guards) or animalistic predators (prisoners). These jurists assume as a matter of "common sense" that women would not be able to "bring the authority of the institution to bear directly on the person of each inmate."[53] Courts characterize female guards as neither equipped to shield weaker inmates from aggressors nor capable of protecting prisoners from hurting themselves.[54] Even when analyzing

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[50] Rawlinson, 433 U.S. at 335.

[51] *See, e.g.*, Bagley v. Watson, 579 F. Supp. 1099, 1100-02 (D. Or. 1983).

[52] *See* Rawlinson, 433 U.S. at 336.

[53] Iowa Dep't of Soc. Servs., Iowa Men's Reformatory v. Iowa Merit Employment Dep't, 261 N.W.2d 161, 164, 167 (Iowa 1988).

[54] St. John's Home for Children v. W. Va. Human Rights Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988) (finding that male-only BFOQ was necessary for child care

what role, if any, sex should play in the hiring of a prison chaplain, one court suggested that "it is indisputable that a male chaplain would generally be better able to prevent an escape (or an attempt to escape) or control a quarrel or fight among wards than a woman."[55]

While such concerns about prison security are certainly legitimate, blanket assertions about the inability of women to perform their duties epitomize the sex stereotypes that Title VII clearly prohibits from consideration. Such generalized statements about a category of people (i.e., women) completely ignore the fact that not all men may be capable of performing these difficult and "unromantic" jobs. To be sure, male guards who oppose changes in employment practices that would allow women on prison security staffs have invoked war stories about "women who 'froze,' women who ran away from dangerous situations, and women who were merely 'in the way.'"[56] Scholars, however, have difficulty drawing conclusions from these anecdotes (even accepting them at face value) because "it is also true that some proportion of male guards are either afraid or ineffective in such emergencies."[57] As one commentator noted, "very few male guards would voluntarily go 'one on one' with a prisoner."[58] Therefore, even if an isolated woman might be at heightened risk of assault, female guards would be part of a unit, all of whom would work together to ensure the safety of every member of the squad.

These arguments about women's ability to serve as guards also inaccurately equate raw physical strength with effectiveness as a prison guard, which is itself an imprecise, although very common, characterization of the role and responsibilities of a corrections officer. Guards are loathe to use physical force against inmates because it destabilizes the prison environment and creates rebellious prisoners.[59] Whether male or female, guards use a variety of techniques to enforce the rules on a daily basis, and usually do not rely on more direct exercises of power out of fear that prisoners, who vastly outnumber and could easily overpower the guards, would retaliate.[60] Male guards who immediately respond to unruly prisoners

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professionals working with boys because "[s]upervising violent, aggressive, male adolescents involves protecting the weaker members of the patient community from the stronger ones; furthermore it also involves protecting suicidal patients from themselves").

[55] Long v. Cal. State Pers. Bd., 41 Cal. App. 3d 1000, 1014 (Ct. App. 1974).

[56] Lynn E. Zimmer, Women Guarding Men 166 (1986). *See also* Joycelyn M. Pollock, Sex and Supervision: Guarding Male and Female Inmates 88-91 (1986).

[57] Zimmer, *supra* note 56, at 167.

[58] *Id.*

[59] John H. Hepburn, Prison Guards as Agents of Social Control, *in* The American Prison: Issues in Research and Policy 199 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989).

[60] *See id.* at 194-95; Zimmer, *supra* note 56, at 166.

with physical strength may actually exacerbate rather than defuse the crisis situation. Women's willingness to consider non-violent responses may be one reason that attacks on female guards are frequently less violent than those on male guards.[61]

Justice Marshall acknowledged this fact in his dissent in Rawlinson.[62] In light of the "barbaric and inhumane" conditions in the Alabama prisons, Marshall insisted that the safety of any prison official, male or female, would be jeopardized. In those circumstances, brute strength is never a guard's primary line of defense against prison violence:

> [A]ny prison guard is constantly subject to the threat of attack by inmates, and "invisible" deterrents are the guard's only real protection. No prison guard relies primarily on his or her ability to ward off an inmate attack to maintain order. Guards are typically unarmed and sheer numbers of inmates could overcome the normal complement. Rather, like all other law enforcement officers, prison guards must rely primarily on the moral authority of their office and the threat of future punishment for miscreants.[63]

Marshall emphasized that all well-trained guards, male and female, have the tools of "common sense, fairness and emotional stability" at their disposal.[64] Furthermore, he found no reason to believe that women are inherently less strict disciplinarians, or that their purported leniency, when

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[61] *See* Bagley v. Watson, 579 F. Supp. 1099, 1101 (D. Or. 1983).

[62] Dothard v. Rawlinson, 433 U.S. 321, 340-47 (1977) (Marshall, J., dissenting). Other courts have adopted Marshall's view, noting that even if women are *generally* weaker than men, Title VII's purpose was to ensure that applicants for a specific position be viewed on the basis of their individual attributes and not disqualified outright merely based on their membership in a particular group. As one court noted,

> The majority of factors ... advance[d] as making the jail inherently unsafe for women make the jail equally unsafe for men. Male guards at the jail have been verbally abused, physically assaulted, taken hostage and defiled by inmates. Jail officials cannot make the determination that the inherent dangers of the job are acceptable for men to risk but too hazardous for women.... There is no evidence that a properly trained female guard would respond any less swiftly or effectively in an emergency than a male guard, would be able to protect herself or others, or would carry out her duty of maintaining jail security with any less vigor or ability than her male counterparts.

Hardin v. Stynchcombe, 691 F.2d 1364, 1367 (11th Cir. 1982).

[63] Rawlinson, 433 U.S. at 342-43.

[64] *Id.* at 342 (quoting Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *rev'd in part*, 438 U.S. 781 (1978)).

coupled with women's alleged inferior physical strength, would jeopardize prison security. Noting the lack of serious security breaches in other Alabama prisons where women served as guards, he dismissed the prison officials' conjectures as grounded only in biased views of women's abilities.[65] Marshall clearly believed that courts' acceptance of BFOQs in prisons, based on perceptions that women will not be able to "hold their own" in high-risk environments, contradicts the most basic principles underlying the mandate of Title VII by suggesting that the risks present in the prison setting are more dangerous for qualified women than for qualified men.

Even in non-penal environments, courts have suggested that violence will erupt when men and women encounter one another in arenas that are "supposed" to be segregated by sex. For example, one court speculated that male employees would be so annoyed by the inconvenience of having to wait to use the bathroom while a female custodian finished cleaning that "[e]ven in non-urgent situations, some tenants and visitors would refuse to adhere to the washroom cleaning schedule, which could lead to belligerent confrontations."[66] As a result, the court ruled that the company was entitled to assign only men to clean male bathrooms, meaning that the female applicant's sex disqualified her from consideration for the only available position. Courts' predictions about violent bathroom encounters clearly stem from the notion that men cannot prevent themselves from behaving in an inappropriate way when a woman appears in an environment that is normally sex-segregated. Not only are these characterizations somewhat histrionic, but, contrary to Title VII, they also reinforce rather than question stereotypes about how men and women act.

2. Only Women Are Sexually Vulnerable

Courts also rely on the biological fact that "it is women who are generally raped, not men" to justify their acceptance of BFOQs.[67] Instead of characterizing sexual assault as an undesirable breakdown in security, courts seem to accept these violent outbursts as the "natural" response of confined men.[68] Whenever men are "deprived of normal sexual

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[65] Justice Marshall pointed to the trial testimony where prison officials referred to the "psychic make-up" of males and females, and their belief that rural male inmates would, as a historical matter, feel inherently superior to female guards. *See* Rawlinson, 433 U.S. at 343-44 & n.2.

[66] Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410, 1419 (N.D. Ill. 1984).

[67] Long v. Cal. State Pers. Bd., 41 Cal. App. 3d 1000, 1000 (Ct. App. 1974).

[68] *See id.* at 1011 n.6 (noting "[a]nyone who maintains that women in general ... working alone and at night within a facility which occupies one-quarter mile square of space and is populated solely by male criminal offenders between the ages of 18 and 23 years of age are not in danger of sexual attack is not using his good sense"); *see id.* at 1012 (noting

experiences,"[69] courts apparently find it reasonable to assume that the men will attempt to rape the first available female. Yet, an exploration of the bases for this dire prediction exposes a number of problematic assumptions. First, this argument presumes that assaults by male inmates against female guards stem solely from an impulse to satisfy unfulfilled sexual needs rather than from a desire to exert power and control in and over an environment that comprehensively deprives them of autonomy. If power rather than desire is even a partial motivating factor, however, there is no basis to assume that, under the right circumstances, male prisoners would not also rape male guards. But even if rape were understood solely as the result of sexual attraction, courts must assume away homosexuality in order to render females uniquely vulnerable in male prisons. As most estimates suggest that the vast majority of the population is heterosexual, such assumptions may be justified. To the extent that these assumptions actually mask practices of same-sex abuse, however, BFOQs cannot legitimately be characterized as a panacea for sexual assault.

Although there are few (if any) reports that discuss the number of incidents where male prisoners rape male guards, the prevalence of rape among male prisoners suggests that the possibility of male-on-male sexual violence between prisoners and guards cannot be dismissed out of hand. Reports estimate that anywhere between 14% and 22% of male inmates are victims of sexual assault while incarcerated.[70] As one commentator has noted, "Though the dynamics of the violence may vary from prison to prison, male rape is very clearly a central element in the hierarchy of power between inmates—those with more power rape those with less power."[71] To the extent that rape is used to establish a pecking order in prisons, a female guard might not actually be any more at risk for rape than a male guard who fails to project a sufficient air of authority. In fact, it would be hard to determine whether rape against a female guard or sodomy against a male guard would be a greater act of defiance by prisoners. With this knowledge,

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that it would "expect too much" to think that male wards could avoid "temptation of this sort").

[69] Iowa Dep't of Soc. Servs., Iowa Men's Reformatory v. Iowa Merit Employment Dep't, 261 N.W.2d 161, 161 (Iowa 1988). As in Rawlinson, the prison in Iowa Merit did not segregate prisoners who had been convicted of sex crimes or those with a demonstrated propensity toward violence.

[70] *See* Stephen Donaldson, Rape of Incarcerated Americans (7th ed. 1995), *at* http://www.spr.org/en/doc_01_stats.html (last visited Feb. 21, 2003). The 14% figure is extrapolated from a 1979-80 survey conducted by Wayne Wooden and Jay Parker, in Men Behind Bars (1982). The 22% estimate emanates from a study conducted by Cindy Struckman-Johnson, reported in the Journal of Sex Research 33:1 (1996). *See* Donaldson, *supra*. *See also* Tamar Lewin, Little Sympathy or Remedy for Inmates Who Are Raped, N.Y. Times, Apr. 15, 2001, §1, at 1.

[71] Michael Scarce, Male on Male Rape: The Hidden Toll of Stigma and Shame, 37-38 (1997).

courts cannot simply assume that women are somehow uniquely vulnerable to sexual assault in prisons.

Policies that focus solely on the protection of women reinscribe their status as victim while simultaneously nullifying the experiences of men who have suffered sexual assault. For example, after rejecting the argument of male prisoners that cross-sex searches were impermissible,[72] the Ninth Circuit accepted the exact same claim when raised by female prisoners, and justified its differential treatment of men and women by citing women's unique historical experiences of sexual assault.[73] Yet, as the statistics on prison rape demonstrate, incarcerated men may in fact be more "like" incarcerated women with regard to their vulnerability and sensitivity to risk of sexual assault in the prison context than the Ninth Circuit's analysis would suggest. Although no one would dispute that many women have been sexually assaulted, women do not have a monopoly on sexual victimization. Yet, to the extent that courts even acknowledge the existence of male survivors of sexual abuse, they ignore the possibility that these men might find searches by male guards equally traumatizing. Therefore, despite the fact that BFOQ proponents frequently tout abuse prevention as one of the benefits of sex discriminatory policies, the definition of "abuse" frequently fails to comprehend the multifaceted ways in which sexual abuse permeates society.

Furthermore, the court's emphasis on women's "unique" vulnerability with regard to rape implies that the rape of a female guard would be worse than other kinds of breakdowns in security. The societal consensus that rape is qualitatively worse than other types of assault may in fact contribute to the victim's enhanced sense of violation.[74] Nevertheless, this does not necessarily mean that a sexual assault on a guard would be more disruptive to prison security than any other types of assault. As one court acknowledged, "as far as impact on prison discipline is concerned, an assault is an assault. A sexual assault would only be more destructive if of its very nature it led to major disruption."[75] In the particular case before it, however, that court found "no evidence to support that possibility."[76]

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[72] Grummet v. Rushen, 779 F.2d 491 (9th Cir. 1985).

[73] Jordan v. Rushen, 986 F.2d 1521, 1526, n.5 (9th Cir. 1993) (*en banc*).

[74] While some theorists, such as Michel Foucault, have suggested that "there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex," many scholars are unwilling to concede this point. *See, e.g.*, Katherine M. Franke, Putting Sex to Work, 75 Denv. U. L. Rev. 1139, 1142 (1998) (quoting Michel Foucault, Politics, Philosophy, Culture: Interviews and Other Writing, 1977-1984 200 (Lawrence D. Kritzman ed., & Alan Sheridan et al. trans., 1988)).

[75] Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 957 (N.D. Iowa 1979).

[76] *Id.*

In his dissent in Rawlinson, Justice Marshall took umbrage at the suggestion that female guards' "very womanhood" would lead to increased violence and sexual assault.[77] He rejected this assertion as "perpetuat[ing] one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects."[78] No evidence in the record had supported this prediction, and Justice Marshall accused the court of relying on unconsciously biased notions of "common sense" and "innate recognition."[79] Such intuitive reasoning relies on the same notions of "romantic paternalism" that had been expressly forbidden in prior cases such as Weeks.[80] He insisted that the likelihood of female guards being attacked solely because they were women was impossible to separate from the likelihood of their being attacked *because they were guards.*[81] Empirical studies have since corroborated this claim, suggesting that "the problems they experience with inmates are inherent to the job rather than related to their female status."[82] Other reports have even indicated that attacks on female guards are less brutal than those on male guards, further undermining this justification for BFOQs.[83]

Other courts have been willing to condone the use of BFOQs as a prophylactic strategy. In some cases, the BFOQ has been justified as a way to reduce the risk of sexual misconduct between male guards and female inmates;[84] in others, the BFOQ allegedly serves the dual purpose of protecting the clients (e.g., prisoners, patients) from sexual abuse and protecting employees from false allegations of abuse.[85] Courts have been particularly concerned about sexual assault in prison and psychiatric hospital settings, probably in recognition of the drastic power disparities present in those environments. Reports about abuse in these institutions certainly suggest that courts have cause to be concerned. There are numerous reasons, however, why guards abuse their authority, many of

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[77] *See* Dothard v. Rawlinson, 433 U.S. 321, 345 (1977) (Marshall, J., dissenting).

[78] *Id.*

[79] *Id.*

[80] Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969). *See also supra* notes 22-25 and accompanying text.

[81] Rawlinson, 433 U.S. at 346.

[82] *See* Zimmer, *supra* note 56, at 103. A female guard described an incident where an inmate picked up a pool ball and smashed it into the wall, and pointed out that "[h]e wasn't mad at *me* for anything; I just happened to be in the way.... The biggest danger in this job is being in the way of an inmate who is mad or frustrated." *Id.*

[83] *See* Bagley v. Watson, 579 F. Supp. 1099, 1101 (D. Or. 1983).

[84] *See, e.g.*, Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998).

[85] Jennings v. New York State Office of Mental Health, 786 F. Supp. 376, 386 n.14 (S.D.N.Y. 1992), *aff'd*, 977 F.2d 731 (2d Cir. 1992) (*per curiam*).

which have nothing to do with the sex of the individual. For example, individuals who come from communities with marginal political influence may actually seek out jobs that allow them to exercise authority over people who cannot otherwise defend themselves. But rather than looking at the full range of factors that might suggest a propensity to abuse authority, BFOQs instead focus exclusively on the sex of the job applicant.

Hospital employers have also been able to justify BFOQs by raising the specter of sexual assault and by insisting that the cost of monitoring interactions between male nurses and female patients would be overly burdensome.[86] In many instances, however, male nurses could actually be paired with one of the growing number of female doctors, thus eliminating concerns about adequate supervision. Furthermore, many institutions would benefit from heightened surveillance policies for both male and female nurses, in light of the increasing number of cases where nurses have harmed or even killed patients due to negligent treatment or worse, such as intentional overmedication.[87]

Although the prevention of sexual assault and other unwanted sexual contact is undoubtedly an admirable goal, the adoption of BFOQs as the sole strategy to eliminate abuse runs the risk of inextricably linking women to sexual victimhood and men to sexual aggression, without necessarily addressing the root causes of abuse, which often have nothing to do with sexual attraction.

B. Dignitary Harms

While courts have generally discussed physical and sexual assault as something men do to women, they have also identified a dignitary harm—suffered by both men and women—resulting from observation by an individual of the opposite sex.[88] Courts have frequently couched this harm

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[86] *See, e.g.*, EEOC v. Mercy Health Ctr., 29 Fair Empl. Prac. Cas. 159 (W.D. Okla. 1982) at *3; Backus v. Baptist Med. Ctr., 520 F. Supp. 1191 (E.D. Ark. 1981).

[87] *See, e.g.*, Marlise Simons, Verdict Delayed for Dutch Nurse Charged with Killing 13, N.Y. Times, Oct. 8, 2002, at A6; Former Nurse Faces Death Penalty in Missouri: Man Pleads Not Guilty to Killing Patients, Wash. Post, July 23, 2002, at A2; Mark Spencer, Ex-Nurse Faces Death Penalty for Killing 4 Patients at Veterans Hospital, Hartford Courant, Mar. 15, 2001, at A1.

[88] Part of the educational mission of the intersex movement has been to call into question the assumption that there are two sexes, which are the biological opposites of each other. *See* Cheryl Chase, Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism, 4:2 GLQ 189, 190 (1998) ("Though the male/female binary is constructed as natural and presumed to be immutable, the phenomenon of intersexuality offers clear evidence to the contrary and furnishes an opportunity to deploy 'nature' strategically to disrupt heteronormative systems of sex, gender and sexuality."). In most BFOQ cases, however, courts have assumed that only two biological sexes—pure forms of "woman" and "man"—are in play. Therefore, I will use the language of "opposite sex" where necessary to understand the reasoning of the court, but have adopted "different sex" in

in the language of psychological distress and anxiety, but they have also framed the dignitary harm in more general terms. The passion with which courts denounce cross-sex observation when affirming BFOQ policies suggests how adamantly courts believe that it is their responsibility to safeguard against these dignitary harms.

In the prison context, courts have struggled to define the line between abrogations of privacy that are necessary to ensure security and those that are simply too degrading to countenance. Courts recognize that some observation of the nude (or partially nude) body will be necessary in penal institutions, but simultaneously acknowledge that inmates will experience these practices as violative of their dignity.[89] Whereas intimate searches by someone of the same sex is an indignity that a prisoner will have to bear, many judges believe that cross-sex searches constitute an unacceptable assault on the "final bastion of privacy."[90] Observation by someone of the opposite sex, one court suggested, will result in "injured self-esteem, humiliation and embarrassment,"[91] and therefore cannot be allowed. In these cases, as opposed to those in the previous section, courts focus on protecting female prisoners from male guards rather than on protecting female guards from male prisoners. Notwithstanding this difference, the end result—judicial sanction of explicit sex discrimination in employment—is the same.

Because courts consider cross-sex observation to be an especially egregious practice to inflict upon prisoners, courts have been receptive to sex-discriminatory policies that will eliminate that possibility. Policies designed to shield women from observation by men are given particular deference. Prison officials have justified proposals offering heightened protection for women's privacy by emphasizing that female inmates are less dangerous, and therefore can be managed with less rigorous supervision.[92] In other cases, courts rationalize their heightened protection for female prisoners by portraying all men as peeping toms who will leer at a naked

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other places throughout this article to keep open the debate about rigid biological dichotomies with regard to sex.

[89] *In re* Long, 127 Cal. Rptr. 732, 736 (Ct. App. 1976); *see also* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's clothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").

[90] Sterling v. Cupp, 625 P.2d 123, 132 (Or. 1981) (*en banc*).

[91] *In re* Long, 127 Cal. Rptr. at 735.

[92] Timm v. Gunter, 917 F.2d 1093, 1103 (8th Cir. 1990) (finding no problem with the unequal accommodation of the privacy interests of female prisoners versus the male prisoners, noting that different security concerns and levels of violence justified the differential treatment).

female body whenever given the chance.[93] Finally, judges invoke the prevalence of sexual abuse among female prisoners to affirm policies prohibiting cross-sex searches on the grounds women would suffer irreparable psychic harm, including anxiety, depression, and suicidal tendencies from being "man-handled."[94]

Courts also take a particular interest in shielding children from cross-sex observation. In their view, children who are wards of the state need special protection from "unnatural" interactions between the sexes, lest they be scarred for life. In particular, courts insist that subjecting girls to searches by male supervisors may result in "not only a temporary traumatic condition, but also permanent irreparable harm to her psyche."[95] Boys must also be shielded from cross-sex observation, courts have ruled, but for somewhat different reasons: "To have a woman supervisor observe daily showers of boys at a time in life when sex is a mysterious and often troubling force is to risk a permanent emotional impairment under the guise of equality."[96]

In contrast to the cases involving women and children, courts express far greater ambivalence about the severity of the harm caused by cross-sex observation when adult male prisoners are involved. Some judges operate from the premise that the observation of male inmates by female guards is just as offensive as male-on-female viewing.[97] Others, however, doubt whether most male prisoners are even troubled by cross-sex observation at all.[98] Some suggest that, due to the number of prisoners that a guard must supervise, no guard could observe any one prisoner long enough to invade his privacy while showering or going to the bathroom.[99] These courts simply admonish prisoners who would rather not be seen naked to

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[93] *See, e.g.*, Forts v. Ward, 471 F. Supp. 1095, 1101 n.22 (S.D.N.Y. 1979) (observing that the court felt it somewhat "inappropriate" to allow male guards to "peer in" upon the female inmates while they slept), *aff'd in part and rev'd in part*, 621 F.2d 1210 (2nd Cir. 1980).

[94] *See* Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (*en banc*). This argument was also raised in the Torres litigation, discussed *infra* Part II.D.

[95] City of Philadelphia v. Pa. Human Relations Comm'n, 300 A.2d 97, 102 (Pa. Commw. Ct. 1973).

[96] *Id.* at 102-03. It is particularly interesting that the court would characterize sex as a "mysterious and often troubling force" for these boys, in light of the fact that some of the juvenile inmates were under state supervision because they had committed violent sexual assaults.

[97] *See, e.g.*, Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994); Sterling v. Cupp, 625 P.2d 123 (Or. 1981) (*en banc*).

[98] *See, e.g.*, Timm v. Gunter, 917 F.2d 1093, 1100 n.9 (8th Cir. 1990) (noting that few male inmates actually objected to cross-sex searches); Johnson v. Phelan, 69 F.3d 144, 148 (7th Cir. 1995).

[99] Timm, 917 F.2d at 1101.

cover themselves with a towel or position their body while showering so as to minimize invasions on their privacy.[100] Women prisoners, however, are not expected to engage in "extensive artificial procedures," such as wearing nightgowns specifically designed to protect their modesty while sleeping, in order to preserve "minimal human dignity."[101]

Whereas some courts have been skeptical of the importance of so-called dignitary harms that occur in penal institutions, virtually all judges accept arguments calling for the protection of the dignitary interests of non-incarcerated individuals in hospitals and bathroom facilities. In the hospital context, some courts suggest that, if forced to suffer through an encounter of cross-sex observation, an individual's physical health and well-being may be jeopardized. For example, in upholding a BFOQ policy that prevented men from working as childbirth ob-gyn nurses, a court based its decision on three grounds: customer preference, customer privacy, and medical necessity. Because the hospital at issue had a large percentage of high risk births and potentially life-threatening deliveries, the court permitted the exclusionary hiring policy in order to avoid "medically undesired tension" and to ensure that "the birth experience not only be positive but also be without stress."[102] The court dismissed the fact that, depending on what transpired during labor and delivery, other (possibly male) medical personnel might be present in the delivery room, including anesthesiologists, cardiologists, internists, or pediatricians because, in the court's opinion, these individuals had limited contact with the mother and did not perform tasks of an "intimate" nature.[103]

Courts generally find instances of female nurses observing male patients less troublesome. This is probably due, at least in part, to the tradition of women serving as nurses. Some jobs, however, involve tasks considered so intimate that courts will accept an employer's argument that sex is a BFOQ. For example, in a hospital-BFOQ case, male orderlies and female nurses' assistants performed virtually the same duties, many of which included the manipulation of patients' genitalia. The court validated a hospital's discriminatory layoff policy, however, on the grounds that the hospital needed to ensure that there was a sufficient number of male orderlies on staff in order to perform catherizations—a task that women were precluded from performing pursuant to hospital policy—so as to avoid any embarrassment of male patients.[104]

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[100] *Id.* at 1102.

[101] Forts v. Ward, 471 F. Supp. 1095, 1101 (S.D.N.Y. 1979).

[102] EEOC v. Mercy Health Ctr., 29 Fair Empl. Prac. Cas. 159 (W.D. Okla. 1982) at *3 (citing Backus v. Baptist Med. Ctr., 510 F. Supp. 1191, 1194 (E.D. Ark. 1981)).

[103] EEOC, 29 Fair Empl. Prac. Cas. at *4.

[104] Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 936 (S.D. Miss. 1987).

While courts will invariably permit employers to adopt BFOQs for jobs involving cross-sex touching, physical contact is not necessary to justify a BFOQ. Particularly in a non-penal setting, the mere prospect of observation frequently convinces a judge to sanction a BFOQ. Noting the likelihood of "adverse psychological harm caused by embarrassment or degradation from being observed by members of the opposite sex while dressing, bathing, and/or toileting or other private activities," one court accepted the use of a BFOQ for state health service workers in order to maintain a particular ratio of male staff to male patients.[105] The court accepted the state's argument that the policy was necessary "to preserv[e] the dignity, autonomy and individuality" of the patients.[106] Likewise, in janitor staffing disputes, courts have expressed concern that unexpected encounters between the sexes in the bathroom may cause emotional and dignitary harm to innocent parties. In one case, the court noted that "even the least intrusive alternative"—where the attendant would knock on the washroom door to determine whether or not it was in use—"would still cause stress to tenants and guests," because one could never be sure "if the attendant would, nevertheless, enter the washroom, not realizing [it] was in use."[107] A policy allowing women to clean the men's room would result in an "extreme" invasion of privacy and, as one court suggested, would have a negative effect on the prestige of the building where such practices were allowed.[108] In another case, a school defended its decision to prevent a seventy-four year old male custodian from being assigned to clean the bathroom in a female dormitory by noting that a "peeping incident" had caused heightened concern about the presence of unescorted males in the dormitories.[109] The school also suggested that the closing of bathrooms to allow male custodians to clean had "led to inconveniences and embarrassing situations that infringed [the female students'] privacy."[110]

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[105] Gibson v. W. Va. Dep't of Health and Human Res., Div. of Health, 452 S.E.2d 463, 466 n.7 (W. Va. 1994).

[106] *Id.* The court also relied heavily on its previous BFOQ determination in St. John's Home for Children v. W. Va. Human Rights Comm'n, 375 S.E.2d 769 (W. Va. 1988).

[107] Norwood v. Dale Maint. Sys., 590 F. Supp. 1410, 1422 (N.D. Ill. 1984). *See also* Brooks v. ACF Indus., 537 F. Supp. 1122 (S.D. W. Va. 1982) (holding that no reasonable scheme could be implemented that would allow a female janitor to clean male bathrooms).

[108] Norwood, 590 F. Supp. at 1416-17.

[109] *See* Hernandez v. Univ. of St. Thomas, 793 F. Supp. 214, 218 (D. Minn. 1992).

[110] *Id.* The court discredited this argument, however, in light of the fact that the University had operated its dormitories with male custodians for over five years without incident. *See id.* Similarly, other courts have placed great significance on the fact that male guards had served in female prisons without incident. *See, e.g.*, Edwards v. Dep't of Corr., 615 F. Supp. 804, 809 (M.D. Ala. 1985); Percy v. Allen, 449 A.2d 337, 341 (Me. 1982).

The court ultimately ruled against the male custodian, finding it to be a matter of "common sense ... that the majority of people would not want a person of the opposite sex cleaning the bathroom while in use."[111]

The dignity rationale is the most pervasive, and, for many, the most persuasive justification for the acceptance of BFOQs. Throughout history, forcing people to remove their clothes has been a common method of humiliation. Immediately upon entering the Nazi concentration camps, for example, prisoners were frequently forced to strip naked. Because of the visceral reaction such practices elicit, arguments invoking the dignity interests of those wishing to shield their naked body from the view of others carry tremendous force. Consequently, they also pose a significant challenge to those challenging sex-specific hiring practices justified on these grounds. In this context, however, the dignity argument emphasizes the unique and supposedly more egregious harms caused by cross-sex observation, without acknowledging the humiliation that results simply from being forced to stand naked before a stranger. Yet, this view is subject to critique on two distinct fronts. First, courts presume the naturalness of the biological differences that define what parts of the body should be protected from view. Second, courts underestimate the extent to which observation and surveillance are their own manifestations of power, regardless of the sex of the participants. Both of these critiques render the dignity rationale suspect.

1. (Women's) Modesty Deserves Protection

The vigilance with which courts protect bodies, and particularly women's bodies, from cross-sex observation demonstrates the extent to which courts ascribe without hesitation to the view that there are natural and biological differences between men and women. Yet, by deciding which "parts" should be understood as "private," courts actually create and reinforce the "natural" lines of demarcation between "men" and "women." As Monique Wittig explained, the extent to which society has given cultural and sexual meaning to particular parts of the anatomy is a reflection of the ways in which "men" and "women" have been classified along heterosexual and reproductive lines:

> [S]ex is taken as an "immediate given," a "sensible given," "physical features," belonging to a natural order. But what we believe to be a physical and direct perception is only a sophisticated and mythic construction, an "imaginary formation," which reinterprets physical features (in themselves as neutral as

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[111] Paul Gustafson, Man Denied Job Cleaning Women's Dorm Bathroom, Star-Tribune Newspaper of the Twin Cities Minneapolis-St. Paul, Dec. 31, 1992, at 2B.

> any others but marked by the social system) through the network of relationships in which they are perceived.[112]

It is no accident that women's biological differences or "private parts" correspond to those areas of their bodies related to reproduction. The very fact that certain body parts are named and that significance is attached to specific particular biological variations demonstrate the extent to which societal norms rely on the presumption of heterosexuality and female reproductivity. Once these normative assumptions are revealed, it becomes clear that sex should be understood as a political category rather than the mere catch-all phrase by which "natural" or biological differences are merely recognized.[113] Michel Foucault acknowledges the fallacy of the idea that "sex" is a naturally occurring category by commenting that "the notion of 'sex' made it possible to group together, in an *artificial* unity, anatomical elements, biological functions, conducts, sensations, and pleasures, and it enabled one to make use of this *fictitious* unity as a causal principle...."[114] In the face of these challenges to the notion that there is such a thing as "sex," Judith Butler has suggested that it may be altogether futile to build an identitarian movement around "women" when it is unclear "whether that femaleness is really external to the cultural norms by which it is repressed."[115] One need not abandon the category of "women" as a meaningful concept altogether, however, to recognize that paternalistic laws, rather than the laws of nature, have "sanction[ed] and require[d] the female body to be characterized primarily in terms of its reproductive function."[116] In other words, our understanding of which parts of the body

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[112] Monique Wittig, One Is Not Born a Woman, *in* The Straight Mind and Other Essays 9, 11-12 (1992).

[113] Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 92-93 (1990) [hereinafter "Gender Trouble"] ("If we accept Foucault's framework, we are compelled to redescribe the maternal libidinal economy as a product of a historically specific organization of sexuality.... Indeed, the clearly paternal law that sanctions and requires the female body to be characterized primarily in terms of its reproductive function is inscribed on that body as the law of its natural necessity."). Although a comprehensive analysis of the growing transgender caselaw is beyond the scope of this article, the palpable discomfort courts experience when trying to align legal, social, and biological categories of sex in cases involving transgender people highlights the artificiality of these categories. *See generally* Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity, 34 Harv. C.R.-C.L. L. Rev. 329 (1999).

[114] 1 Michel Foucault, The History of Sexuality, 154 (Vintage 1980) (emphasis added).

[115] Gender Trouble, *supra* note 113, at 93.

[116] *Id.* at 92-93. Although Butler has questioned the premise that biology precedes the socially constructed unit "gender," even she has acknowledged that, in some sense, bodies matter. *See generally* Judith Butler, Bodies that Matter (1993). Yet even though the category of "women" is descriptively imprecise and perhaps altogether incoherent, Butler notes that the term women may be better understood as a political signifier, which can serve

are private and worthy of protection from view—breasts versus feet—cannot be divorced from this system of heterosexuality and reproduction.[117]

To the extent that these differences seem real to the people involved, policies prohibiting cross-sex observation may not seem problematic. Anyone interested in debunking traditional views of and paternalistic attitude towards women, however, should question why courts have been so eager to defend women's modesty while, at the same time, dismissing identical concerns raised by men as frivolous. Judge Easterbrook, for example, dismissed the notion that male prisoners are subjected to a cruel invasion of privacy when viewed by female guards, noting that male athletes who encounter female journalists in the locker room after a game suffer no injury to their psyche.[118] The majority of courts agree that the harm suffered by women as a result of cross-sex observation is significantly worse than any harm suffered by men. Yet, in doing so, courts actually reinforce the boundaries of sexual modesty that women are compelled to respect.[119]

A recent prosecution in Rochester, New York, captures this phenomenon. After years of marching topless to protest a statute that allowed men but not women (with some exceptions, including breast-feeding mothers) to take off their shirts in public, a group of women in Rochester were finally prosecuted by the local district attorney in 1986. At their trial, the women argued that the statute violated the state and federal

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as a "rallying point, site of phantasmic investment and expectation." *Id.* at 189. Such an understanding of the significance of "sex" complements this paper nicely, as this Article is designed primarily to undermine the notion that "sex" has a static, essential meaning that courts can claim only to be acknowledging, thus absolving them of any responsibility to explore the relationship between the meaning of "sex" and other operations of power.

[117] *See* Gender Trouble, *supra* note 113, at 114 ("That penis, vagina, breasts, and so forth, are *named* sexual parts is both a restriction of the erogenous body to those parts and a fragmentation of the body as a whole. Indeed, the 'unity' imposed upon the body by the category of sex is a 'disunity,' a fragmentation and compartmentalization, and a reduction of erotogeneity.") (emphasis in original). *See also* Louise M. Antony, Back to Androgyny: What Bathrooms Can Teach Us About Equality, 9 J. Contemp. Legal Issues 1, 8 (1998) ("sexism has little to do with the rationality or fairness of taking one's biological sex into account in particular cases, and much more to do with the 'social realities' against which biological sex is made significant").

[118] *See* Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995). Female reporters had to fight, however, to gain access to locker rooms. *See* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978).

[119] A recent example of such social policing of women's modesty demonstrates the dual standard regarding the covering of body parts. As any fan of the sport knows, male soccer players routinely take off their shirts and wave them over their heads in celebration of even inconsequential goals. In contrast, Brandi Chastain was publicly rebuked when she did (almost) the exact same thing—taking off her jersey, and running around in celebration wearing only her sports bra—after scoring the game-winning goal in the 1999 World Cup. For an excellent essay discussing the public outcry regarding Chastain's celebration, see Libby S. Adler, A Short Essay on the Baring of Breasts, 23 Harv. Women's L.J. 219 (2000).

equal protection clauses. Although the charges against the women were ultimately dismissed, the New York Court of Appeals avoided the constitutional issue by ruling that the statute was not intended to prohibit the women's political protest.[120] Justice Titone, however, insisted that the issue of the statute's constitutionality could not be avoided, and addressed it on the merits. Titone began by noting that, while protecting public sensibilities is generally a legitimate basis for legislating, "it is a tenuous basis for justifying a legislative classification that is based on gender, race or any other grouping that is associated with a history of social prejudice."[121] He noted further that "the concept of 'public sensibility' itself, when used in these contexts, may be nothing more than a reflection of commonly held preconceptions and biases."[122] Titone accepted the women's position that the difference in treatment between female and male breasts had no basis in biology,[123] and that any prurient interest uniquely aroused by the exposure of female breasts was itself a "suspect cultural artifact rooted in centuries of prejudice and bias toward women."[124] Titone observed that, in other parts of the world, women going topless on the beach is "unremarkable," and cited statutes from various jurisdictions to buttress his argument that the definition of "private parts" is culturally contingent.[125] Finding that the state's interest in protecting public sensibilities did not rise to the level of an exceedingly persuasive justification, Titone would have found the statute unconstitutional.[126]

While Titone's view has not been adopted widely, and has even been mocked publicly by some commentators,[127] his discussion recognizes that biological "differences" and the meaning ascribed to those differences

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[120] People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992) (holding that statute prohibiting public exposure of breasts did not apply to defendants because statute was originally enacted to discourage topless waitressing).

[121] *Id.* at 236 (Titone, J., concurring).

[122] *Id.*

[123] *Id.* ("from an anatomical perspective, the female breast is no more or less a sexual organ than is the male equivalent").

[124] *Id.* at 237.

[125] *Id.*

[126] *Id.*

[127] *See, e.g.*, Alan M. Dershowitz, Cover Up!, Newsday, July 29, 1992, at 38. *But see* Torres v. Wis. Dep't of Health & Human Servs., 838 F.2d 944, 950 (7th Cir. 1988) (noting that courts should ask whether it is "significant that preferences for privacy from members of the opposite sex may be entirely culturally created, and that by recognizing such preferences the courts may encourage sex differences at the expense of equality in employment" when assessing a BFOQ). *See infra* Part II.D for a more extensive discussion of the Torres litigation.

are far less "natural" than has heretofore been acknowledged.[128] While some judges will admit that one's feeling of violation or indignity upon being observed by someone of the opposite sex is contingent on social and individual norms, and informed by both psychology and "changing social expectations about relations between the sexes,"[129] they have also found as a matter of judicial notice that individuals suffer such dignitary harm.[130] By accepting without question the idea that there are parts of the body that are and should remain private, courts deny their role in creating the concept of the "natural differences" that they purport merely to respect.

2. Cross-Sex Observation Is Especially Harmful

Even assuming that certain body parts are "private" and should be protected from unwanted viewing by a stranger, one still must question the premise that cross-sex observation is inherently more degrading. Since the 19th Century, Western prisons and hospitals have become increasingly permeated by surveillance and observation.[131] Likewise, in modern penological and medical institutions, observation continues to function as an exercise of power.[132] Understood this way, the harm of observation stems from the subordinating effect of observation itself, not from the sex of the observer.

Using Jeremy Bentham's Panopticon as a primary theoretical model, Foucault emphasizes the way in which human subjects became the objects of observation. With regard to prisons, Foucault demonstrates a shift in the dominant mode of power from spectacle—the theatrical and spectacular displays of physical punishment—to surveillance—a subtly

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[128] Wittig would maintain that the meaning attached to any difference given cultural significance (e.g., in genitalia) operates to reinforce heterosexuality and the conscription of women into roles of reproduction. *See* Monique Wittig, *supra* note 112. *See also* Gender Trouble, *supra* note 113 (discussing Wittig's views of the social construction of biological "difference").

[129] Sterling v. Cupp, 625 P.2d 123, 132 (Or. 1981) (*en banc*).

[130] Although some expert testimony had been presented about the harm suffered by some inmates due to the cross-sex searches, the court found this premise to be "within the range of judicial knowledge without the need for evidence." *Id.*

[131] *See* Michel Foucault, Discipline & Punish: The Birth of the Prison (Alan Sheridan trans., 1977) (1975) [hereinafter "Discipline & Punish"]; Michel Foucault, The Birth of the Clinic: An Archaeology of Medical Perception (Tavistock Publications, Ltd. 1973) (1963) [hereinafter "Birth of the Clinic"].

[132] The American model of corrections incorporates this penal philosophy of surveillance as a mechanism of social control. In one of the earliest works about maximum security incarceration, Graham Sykes noted that "24 hour surveillance of the custodians represents the ultimate watchfulness and, presumably, noncompliance on the part of the inmates need not go long unchecked." Graham M. Sykes, The Society of Captives: A Study of the Maximum Security Prison 41 (1958).

coercive and efficient exercise of power over the mind. In the Panopticon, a structure in which prison cells circle a central observation tower such that prisoners are constantly visible, prisoners internalize the idea of constant observation and, consequently, the gaze of the observer. In this way, prisoners begin to regulate their own behavior and become the instruments of their own subjection. As Foucault wrote, "[h]e who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection."[133] A system of power based on surveillance works more efficiently than one based on spectacle because it operates without any need for the institution of extrinsic forms of control.

The theoretical structure works without the need for constant observation. The major effect of the Panopticon is

> to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it.[134]

Therefore, the key lies not in actually operating a system of constant observation, but rather in convincing the prisoner that a guard could be watching at any moment, so that he begins to regulate himself. Accordingly, prisoners are taken out of the hidden cavern of the dungeon and housed instead in a prison cell that is open and exposed to view. By maintaining an environment in which a prisoner is constantly aware of the possibility of observation, this theory of discipline resituates the site of punishment from the body of a prisoner to the mind. Its effectiveness is perhaps demonstrated best by the fact that the panoptical model of observation is still commonly used in most American jails and prisons.[135]

Similarly, Foucault reveals how the system of medical diagnosis was founded on the practice of observation—on the "medical gaze."[136] As Foucault explains, medical observation was not always marked with the

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[133] Discipline & Punish, *supra* note 131, at 200.

[134] *Id.* at 202.

[135] Neal Shover & Werner J. Einstadter, Analyzing American Corrections 88 (1988) ("Most cells, like cages, are open to view, affording no privacy and allowing no respite from the ever-present surveillance that the 18th Century British jurist Jeremy Bentham considered the ultimate achievement of imprisonment and which is perhaps the ultimate manifestation of total domination over inmates.").

[136] *See* The Birth of the Clinic, *supra* note 131, at 107.

professionalism that current commentators attribute to the doctor-patient relationship.[137] Rather, those who sought medical services in the hospitals were the poorest of society who could not afford private, in-home care.[138] In the pursuit of scientific knowledge, doctors took advantage of the opportunities presented by incapacitated, disease-ridden patients, because "[t]he domain of the hospital was an ambiguous one: theoretically free ... [but] open to the indifference of experiment."[139] Foucault characterizes this unwilling display of the body for the purposes of medical observation and knowledge gathering as its own particular exercise of violence.[140] Just as the penological model involves a physical structure designed to maximize the potential for observation, "the hospital building was gradually organized as an instrument of medical action; it was to allow a better observation of patients, and therefore a better calibration of their treatment."[141] Guards surveyed the prisoners in ritualized practices; likewise, medical examination took on its own peculiar rituals.[142] To the extent that the observer exercised power over the observed, the various forms of examination "manifest[ed] the subjection of those who are perceived as objects and the objectification of those who are subjected."[143]

Particularly noteworthy about these Foucaultian models is the irrelevance of *who* is observing the prisoner or the patient. The threat even more than the practice of observation permeates the prison experience; similarly, observation is the hallmark of the clinical environment. In fact, the structure of the prison itself sufficiently subjugates the prisoner so as to render it almost irrelevant whether or not *anyone* is actually observing the

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[137] *See, e.g.*, Jennings v. New York State Office of Mental Health, 786 F. Supp. 376, 387 (S.D.N.Y. 1992), *aff'd*, 977 F.2d 731 (2d Cir. 1992) (*per curiam*) (suggesting that privacy interests were not implicated by encounters with medical staff because "nurses and psychiatrists are trained medical personnel who are presumed to be objective when viewing the human body by virtue of their training").

[138] *See* Birth of the Clinic, *supra* note 131, at 83.

[139] *Id.* at 83-84.

[140] *See id.* at 84 ("But to look in order to know, to show in order to teach, is not this a tacit form of violence, all the more abusive for its silence, upon a sick body that demands to be comforted, not displayed.").

[141] Discipline & Punish, *supra* note 131, at 172.

[142] *See id.* at 185 ("One of the essential conditions for the epistemological 'thaw' of medicine at the end of the eighteenth century was the organization of the hospital as an 'examining apparatus.' The ritual of the visit was its most obvious form.").

[143] *Id.* at 184-85. While Foucault draws his examples from history, one should not assume that the phenomena he describes are mere relics of the past. According to a recent report by Amnesty International, female prisoners are frequently subjected to unnecessary pelvic exams and other intrusive procedures. The women are afraid to complain, however, out of fear that doing so might jeopardize their ability to receive emergency medical care in the future. *See* Amnesty Int'l, United States of America - The Findings of a Visit to Valley State Prison for Women, California 3 (April 1999) [hereinafter "Amnesty Report"].

prisoner. While prison administrators must convey the impression that the purported surveillance is not a complete myth, the prison through its structures and operation can operate a system that disallows prisoner privacy whether or not the inmate is actually being observed: "Power has its principle not so much in a person as in an arrangement whose internal mechanisms produce the relation in which individuals are caught up.... Consequently it does not matter who exercises power."[144] The power over prisoners operates independent of the person who exercises it, and certainly independent of the *sex* of the person who exercises it.[145]

If Wittig and Butler are correct that there is nothing "natural" about the purported differences between the sexes, then courts are actually creating and enforcing a particular vision of female modesty under the auspices of respecting privacy. Furthermore, if Foucault's theory of observation is right, then the notion that dignitary harm stems from the sex of the observer rather than from the practice of observation itself becomes less tenable. While the goal of treating people with dignity is certainly an admirable one, reliance on BFOQs to eliminate dignitary harms is an overly reductive strategy.

C. Norms of (Western) Civilization

Whereas the first two justifications focus attention on the actual participants involved in these cross-sex observation encounters, a third argument in favor of BFOQs suggests that nothing less than fundamental principles of Western civilization are at stake in this debate. According to these judges, the notion that men and women could view each other in the nude without any discomfort or feelings of impropriety deviates so far from traditional core values of modesty and civility that Title VII could never have been meant to sanction such practices.

Many jurists unapologetically assert that the aversion to cross-sex observation is a manifestation of the values that serve as the foundation of

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[144] Discipline & Punish, *supra* note 131, at 200.

[145] For this reason, I choose not to incorporate the literature of the "male gaze." *See generally* Laura Mulvey, Visual Pleasure and Narrative Cinema, Screen 16:3, Autumn 1975, at 6. My point is that the gaze itself is neither male nor female, but rather should be understood as a form of power that can be exercised by male and female guards or medical attendants alike. Those who insist on calling it the "male gaze" perpetuate four distinct, and, in my opinion, harmful visions of the world: (1) assuming that all demonstrations of power are male; (2) suggesting that abusive forms of observation are natural to men, which strips them of responsibility for their abuses; (3) overlooking the extent to which women perpetrate dignitary harms against men and women over whom they have power; and (4) stripping women of the agency either to control the gaze or to be the subject, rather than the object of it. I am certainly not the first to present this critique of Mulvey's work. This footnote, however, is designed to explain a strategic decision with regard to the analysis in this Article, rather than to engage in a comprehensive debate about the concept of the "male gaze."

society. In their view, the nudity taboo reflects "a deeply held social moral and emotional bias pervading Western culture."[146] As one judge explained:

> It is perfectly clear that men and women, from the beginning of recorded history have had an innate need for privacy in certain areas of living. Virtually all societies, even those which have had little requirement for clothing for adults and none for children, have rules for the concealing of female genitals. And while societies such as the Samoan have ... no privacy and no sense of shame, the norm in today's western world is to have enclosed toilet facilities in the home and segregated toilet facilities in public places which children are early taught to use. Even small children in the western world are expected to clothe themselves and keep their private parts covered. These society rules become mandatory as one approaches adult status. The fact that a need for privacy is the product of social conditioning makes it no less embarrassing or occasions no less feeling of shame when the privacy is invaded.[147]

Rather than a mark of progress, abandonment of the nudity taboo to these judges amounts to a return to the state of nature and primitivism. Accordingly, they have described the practice of cross-sex observation as dehumanizing,[148] and have drawn comparisons to the treatment of concentration camp detainees.[149] Simply stated, "one of the clearest forms of degradation in Western Society is to strip a person of his clothes," particularly in the presence of a person of the opposite sex.[150]

Courts suggest that the decision to respect prisoners' assumed preference for same-sex observation represents a floor of decency below which a civilized society should not be permitted to fall. When state prison officials challenged a labor arbitrator's pronouncement requiring the institution to make all prison guard shift assignments without regard to the

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[146] *In re* Long, 127 Cal. Rptr. 732, 736 (Ct. App. 1976).

[147] Forts v. Ward, 471 F. Supp. 1095, 1098 (S.D.N.Y. 1978).

[148] Johnson v. Phelan, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, J., concurring in part and dissenting in part) ("Animals have no right to wear clothing. Why prisoners, if they are no better than animals? There is no answer, if the premise is accepted. But it should be rejected, and if it is rejected, and the duty of a society that would like to think of itself as civilized to treat its prisoners humanely therefore acknowledged, then I think that the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex-bathroom movement.").

[149] Commonwealth Dep't of Corr., State Corr. Inst. at Muncy v. AFSCME, Council 13, 515 A.2d 1000, 1003 (Pa. 1986) [hereinafter "Council 13"]. As mentioned previously, such images are frequently invoked by proponents of the dignity argument, discussed *supra* Section II.B.

[150] Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (citing 3 Privacy Law and Practice ¶ 25.02 [1] (George B. Trubow ed., 1991)).

sex of the guard, the court reversed the decision because it ignored the responsibility of a public agency "to deal with its inmate population effectively, efficiently and humanely."[151] The court insisted that the prison recognize "that minimal degree of personal privacy which the common opinion of civilized communities recognizes to be the entitlement of every person."[152]

Other judges have linked the nudity taboo to the Judeo-Christian traditions prevalent in American society. Judge Posner has suggested that the taboo against being seen nude by strangers "is strongest among professing Christians, because of the historical antipathy of the Church to nudity."[153] In a case addressing the issue of whether a BFOQ could justify a policy preventing a male janitor from cleaning women's dormitory restrooms, the court insisted that "the same-sex custodial policy was central to the university's mission ... [and] noted that [the school's] lack of coed dormitories is rooted in a traditional Catholic value system which can be traced back to the university's beginning."[154]

Some judges, and Judge Posner in particular, have suggested that the imposition of cross-sex observation is the project of "radical feminists" who regard sex as nothing more than a social construction, a dichotomy perpetuated by patriarchs.[155] Posner's defense of traditional notions of sexual modesty from attack by perceived extremists resembles Edmund Burke's criticism of the French Revolutionaries, who wanted to discard all remnants of prior institutions in the name of their new ideals. Just as Burke rebuked those who invoked high theoretical principles rather than engaging the realities of a particular situation,[156] Posner has likewise denigrated

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[151] Council 13, 515 A.2d at 1003. *See also* Rider v. Pennsylvania, 850 F.2d 982, 987-95 (3d Cir. 1988) (holding that Commonwealth Court determination in Council 13 litigation was a judgment on the merits entitled to preclusive effect in later Title VII action in federal court).

[152] Council 13, 515 A.2d at 1003.

[153] Johnson, 69 F.3d at 152 (Posner, J., concurring in part and dissenting in part). In some of these cases, prisoners also raised First Amendment Free Exercise claims, alleging that their religious beliefs prohibited them from being seen nude by a non-spousal member of the opposite sex. *See, e.g.*, Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983); Johnson v. Pa. Bureau of Corr., 661 F. Supp. 425 (W.D. Pa. 1987); Sam'i v. Mintzes, 554 F. Supp. 416 (E.D. Mich. 1983); Forts v. Ward, 471 F. Supp. 1095 (S.D.N.Y. 1977), *aff'd in part and rev'd in part*, 621 F.2d 1210 (2d Cir. 1980).

[154] Paul Gustafson, *supra* note 111, at 2B. The judge also cited the difficulties in scheduling time when a male custodian could clean a heavily-used female bathroom. *See* Nation Briefly: Wire Reports, Fort Worth Star-Telegram, Dec. 31, 1992, at 4.

[155] Johnson, 69 F.3d at 152 (Posner, J., concurring in part and dissenting in part).

[156] As Anthony Kronman, a modern-day Burkean, explains:

> Those who approach the problems of political life in the prudential spirit Burke recommends give great (though not

feminists for engaging in a program of "progressive social engineering," and for belittling the harms resulting from their radical programs as necessary evils or as mere "way stations on the road to sexual equality."[157]

Some courts have recognized that the views of "civilized society" regarding cross-sex observation continue to evolve. In one case, a court recognized that not all plant workers objected to having to use the bathroom while a female janitor was present, and noted that some of the younger males "indicated that they had no such objection—this perhaps a commentary on the not altogether incipient changes in the American ethos pertaining to nudity and the like in recent years."[158] Yet, the so-called "immodest American," who is comfortable with the prospect of cross-sex observation is still considered an aberration. Only "in exotic places such as California" have traditional values of modesty fallen to the wayside.[159]

Another cluster of jurists have acknowledged the cultural contingency of the nudity taboo, but have refused to believe that Title VII was designed to change the culture that created the taboo. In a case involving the staffing of health care workers, a court rejected the argument that the sex of the medical professional observing a patient's naked body was irrelevant, suggesting that it was both an unrealistic view of human mores and contrary to the law of privacy.[160] While noting that the patient's discomfort is culturally produced rather than a manifestation of the "natural

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> uncritical) deference to established routines and existing institutions.... By contrast, those who see these same problems in a philosophical light refuse to acknowledge the contingencies that count so heavily in the judgments of the prudential politician. They insist instead that politics requires a more abstract approach which disregards past practice and the distinctions among historically evolved regimes.

Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029, 1055-56 (1990). *See also* Alexander Bickel, The Morality of Consent 22-23 (1975) ("You cannot start from scratch, [Burke] maintained, and expect to produce anything but a continual round of chaos and tyranny, until you return to the remnants of what you sought to destroy.... In order to survive, be coherent and stable, and answer to men's wants, a civil society had to rest on a foundation of moral values.... Theories were not fit to live with, and any attempt to impose them would breed conflict, not responsive government enjoying the consent of the governed."). For an excellent description of the differences between Burkean conservatives and utilitarian conservatives, see Chapter 8 of Marc Kelman & Gillian Lester's book, Jumping the Queue: An Inquiry into the Legal Theory Treatment of Students with Learning Disabilities (1998).

[157] Johnson, 69 F.3d at 151.

[158] Brooks v. ACF Indus., 537 F. Supp. 1122, 1128 n.20 (S.D. W. Va. 1982). Despite this acknowledgment, the court still ruled against the female janitor.

[159] Johnson, 69 F.3d at 148.

[160] Local 567 AFSCME v. Mich. Council 25, 635 F. Supp. 1010, 1013 (E.D. Mich. 1986).

order of things," the court held that "there is no reason why cultural attitudes cannot be protected."[161] The court rejected the proposition that Title VII was designed to transform precisely these types of cultural norms by stating conclusorily that "the purpose of the sex provisions [of Title VII] is to eliminate sex discrimination in employment not to make over the accepted mores and personal sensitivities of the American people."[162]

Courts have also used BFOQs to preserve employment practices that, in their view, Congress never intended to disturb. For example, due to the obstacles historically facing women who wanted to become doctors, many female patients had no other option than to accept care from male physicians. Courts have refused to construe this fact, which itself was a byproduct of discrimination, as a waiver of privacy interests. In other words, the fact that, after the passage of Title VII, women were entitled to become doctors did not necessarily mean that men were entitled to be nurses:

> [I]t is no answer to say that the necessity for prudery to give way to medical necessity has always been recognized even in Victorian times, so far as doctors are concerned. The reason, of course, is that the patient knows and accepts the fact of this necessity: if all female patients demanded female surgeons, obstetricians, gynecologists, and the like, a lot of them would go untreated.[163]

Although appropriately recognizing the role history plays in influencing individuals' conception of privacy, the court's conclusion nevertheless remains suspect. By relying upon historical practices to justify BFOQs, courts simultaneously immunize long-standing practices that entrench sex stereotypes from criticism (i.e., female patients must accept the necessity of being seen by male doctors) and prevent individuals from taking positions that were traditionally held by members of the opposite sex (i.e., men becoming nurses), both of which impede the reexamination of socially constructed norms like privacy.

Burkean justifications based in tradition and the status quo are precisely what foundational BFOQ cases would rule out. By opening up jobs that have historically been gendered male or female, Title VII has a pivotal role to play in the transformation of societal norms. Rather than allowing this evolution to happen, however, courts have used the BFOQ exception to preserve societal views about the "proper" ways for the sexes

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[161] *Id.* at 1014 n.7.

[162] *Id.* at 1014 (citing Larson, Employment Discrimination—Sex, § 14.30, 4-8 (3d ed. 1980)).

[163] Backus v. Baptist Med. Ctr., 520 F. Supp. 1191, 1194-95 (E.D. Ark. 1981) (citing Larson, *supra* note 162, at § 14.30, 4-8).

to interact. As a result, these Burkean justifications for BFOQs are particularly difficult to reconcile with Title VII, a statute that demands skepticism of, rather than deference to, the status quo.

D. Rehabilitation and Normalization

Although the debate about the purposes of the criminal justice system continues,[164] the rehabilitation rationale continues to play a prominent role in the justification of sex-based BFOQs in prisons. Corrections officials and youth facility administrators have often suggested that it is critical to "normalize" the environment their inmates inhabit, and to provide role models to facilitate the recovery and rehabilitation of those incarcerated. In youth facilities, courts have suggested that young men and women need advisors and mentors of their own sex in order to be reintegrated successfully into society. As the criminal justice system attempts to develop new strategies to deal with an exponentially increasing number of female inmates, courts have been willing to let states experiment with rehabilitation programs in their women's prisons. Advocates of the rehabilitation model of corrections are undoubtedly encouraged by this trend. An analysis of their opinions suggests, however, that many courts accept rehabilitation arguments for BFOQs because they provide an "objective" justification that allows courts to follow their otherwise subjective instincts against sex integration.

In order to accept BFOQs on the basis of promoting "normalization," courts have had to develop a particular notion of what qualifies as "normal." Some courts have insisted that sex integration of the prison environment will complement the goal of normalization and create a healthy environment full of rehabilitative potential.[165] After all, society at large does not generally operate on a sex-segregated basis. For proponents of sex-specific hiring practices, on the other hand, "normalization" requires that certain jobs remain sex-specific even if, as a necessary side effect, all other components of life become artificially segregated as well.

For example, a California appeals court held that a youth facility could not simultaneously claim that its goal was "normalization" and staff its operations in a way that would require cross-sex observation.[166] Noting

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[164] *See generally* Matthew A. Pauley, The Jurisprudence of Crime and Punishment from Plato to Hegel, 39 Am. J. Juris. 97 (1994); Nigel Walker, Why Punish? (1991); John Irwin, Prisons in Turmoil 89-122 (1980).

[165] Griffin v. Mich. Dep't of Corr., 654 F. Supp. 690, 704 (E.D. Mich. 1982) (arguing that complying with the mandate of equal employment opportunity was "in complete harmony with the so-called 'normalization' or 'stabilizing or softening' theories of penology").

[166] *In re* Long, 127 Cal. Rptr. 732 (Ct. App. 1976).

that young men usually do not engage in intimate activities like bathing or going to the toilet "in the maternal presence," the court found that the Youth Facility's mission of normalization was directly in conflict with the practice of cross-sex observation.[167] Rather than "normalizing" the environment, the court suggested that such a policy would violate the common norms of privacy present in the larger society. Two years earlier, the same court had ruled that a woman could not serve as a chaplain in the facility, because if a male inmate sexually assaulted her, the rehabilitative mission of the facility would be jeopardized.[168] Not only would the public suffer from "losing the rehabilitation of a young man,"[169] but the future of the entire ward would be jeopardized if one inmate committed the assault.[170] This rhetorical move—coupling the rehabilitation rationale with the characterization of males as sexual aggressors and females as sexual victims—provides an excellent example of how courts can cloak impermissible stereotypes about members of a particular sex in the sheep's clothing of rehabilitation.

In a psychiatric hospital case, the court rejected the sex discrimination claims of a woman who had been reassigned to the night shift, which entailed more housekeeping and less patient-interactive responsibilities, in accordance with the hospital's sex-specific staffing policy.[171] The hospital had argued that "role-modeling" was integral to the "essence" of its business of treating and rehabilitating emotionally disturbed adolescents, and that the patients, some of whom had been sexually abused, would be more likely to confide in staff members of a particular sex based on the sex of their abusers. The court initially responded positively to the plaintiff's argument that qualified health care professionals are able to care for patients of *either* sex, a position that had "some surface appeal" to the judges.[172] Ultimately, however, the court ruled that the "vitality of [the hospital's] business operation" required the use of a sex-based BFOQ.[173] The court seemed particularly influenced by the fact that the institution's mission was to treat children and adolescents who had been sexually abused, and claimed that the outcome might have been different if the institution served a different clientele, such as mentally retarded patients,

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[167] *Id.* at 737.

[168] Long v. Cal. State Pers. Bd., 41 Cal. App. 3d 1000 (Ct. App. 1974).

[169] *Id.* at 1014.

[170] *See id.* at 1009 ("Anything which interferes with [the male inmates'] rehabilitation, whether it be a result of their own conduct or that of others, is to be considered of tremendous import.... Anything which tends to interfere with or impede or frustrate this [rehabilitative] objective of the institution, must be considered as being adverse to the interest of the public.").

[171] Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3d Cir. 1996).

[172] *Id.* at 134.

[173] *Id.*

where sex-specific staffing would be less appropriate.[174] By coupling the rationales of sexual victimhood and rehabilitation, the court could justify its rejection of arguments for equality without explicitly stating that anything about the applicant's sex rendered her inherently unfit for the job. The result in the end, however, was still the same.

A series of cases emanating from women's prisons have brought the rehabilitation justification for BFOQs to the forefront. Perhaps the most famous of these cases is Torres v. Wisconsin Department of Health and Social Services.[175] After a reorganization of the state's correctional facilities, Wisconsin designated certain positions at the women's prison as female-only. The Department of Health and Social Services (DHSS) admitted that the new program was not adopted in response to allegations of abuse by male guards, but rather as an attempt to balance seniority concerns against the need to keep enough female guards on hand to perform the tasks limited exclusively to women because of inmate privacy concerns. When this policy was challenged in court by male guards, DHSS presented three reasons to justify the BFOQ: the preservation of prison security, the protection of female prisoners' privacy interests, and the promotion of prisoner rehabilitation.[176]

The court of appeals initially rejected all of DHSS's argument and noted that, with regard to the state's rehabilitation rationale, there was no empirical evidence to support its theory that the rehabilitation of female prisoners would be enhanced by the new policy. In fact, the prison's superintendent testified that there had been no change in the recidivism rate in the eight years that the plan had been in effect.[177] Judge Cudahy, writing for the court, refused to give the state a blank check to "experiment" with new techniques at the expense of equal employment opportunity.[178] On reconsideration, however, the Seventh Circuit, sitting *en banc*, rejected Cudahy's requirement of empirical support and showed far greater deference to the "professional judgment" of the superintendent in assessing how best to achieve the "essence" of the prison's "business"—"the rehabilitation of females incarcerated in a maximum security institution."[179] While cautioning against the use of "culturally induced proclivities" in assessing "our tolerance for distinctions" between men and women, the court indicated that a recognition of the "perplexing sociological problems"

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[174] *See id.*

[175] 838 F.2d 944 (7th Cir. 1988) [hereinafter "Torres I"]; *rev'd en banc*, 859 F.2d 1523 (7th Cir. 1988) (*en banc*) [hereinafter "Torres II"].

[176] Torres I, 838 F.2d at 949.

[177] *See id.* at 954.

[178] *See id.* at 954 n.7.

[179] Torres II, 859 F.2d at 1530.

facing the criminal justice system called for a greater tolerance of prison officials' need "to innovate and experiment."[180] As a result, the court characterized this case as involving more than just a conflict between prison guards' employment interests and prisoners' privacy rights. Rather, the achievement of fundamental penological objectives were also at stake. Because only female guards could assist the prison achieve its goal of rehabilitation, male guards were inherently unqualified for the positions at issue in the litigation.[181] Accordingly, the BFOQ "experiment" was left intact.

Numerous other courts have relied on the "rehabilitation of women" rationale in upholding sex discriminatory hiring practices. The rehabilitation rationale, also called "role-modeling," is frequently paired with arguments about protecting female prisoners' privacy.[182] The Ninth Circuit refused to disturb a prison policy to hire only female guards that had been justified on the grounds of security, prisoner rehabilitation, and morale. Relying on Torres II, the court deferred to the prison superintendent's determination 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 had been physically and sexually abused by males."[183]

This rehabilitation/role model rationale is reminiscent of the arguments in favor of single-sex education for women. Just as prison officials have insisted that an all-female staff would positively impact its rehabilitative mission, many proponents of all-female education have touted the benefits of enhanced self-esteem and independent thinking that accrue to women who become accustomed to seeing women in positions of authority.[184] According to its advocates, single-sex education ensures that females are not shortchanged when opportunities are made available,

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[180] *Id.* at 1528, 1529.

[181] *See id.* at 1530.

[182] *See* Tharp v. Iowa Dep't of Corr., 68 F.3d 223, 224 (8th Cir. 1995). In accepting the BFOQ in this case, the court added a third benefit—advancing the interests of female employees, a remedial practice sanctioned (at least in limited circumstances) by the Supreme Court in Johnson v. Transportation Agency. 480 U.S. 616 (1987). In a footnote, Circuit Judge Loken noted that the Eighth Circuit had previously forbidden the use of a BFOQ to deny women employment opportunities in male prisons. *See* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980). The Eighth Circuit interpreted Transportation Agency and its denial of certiorari in Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990), *cert. denied,* 501 U.S. 1209 (1991), as "teach[ing] that a minimal restriction promoting penological interests, inmate privacy and the employment opportunities of a protected class does not violate Title VII." Tharp, 68 F.3d at 226 n.4.

[183] Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998).

[184] *See, e.g.,* Cornelius Riordan, Girls and Boys in School: Together or Separate? 49 (1990).

whether in college-credit academic programs or extracurricular activities.[185] The Supreme Court has never addressed the issue of whether sex-specific practices can be justified on the grounds of role-modeling. In fact, when the Court struck down the single-sex program at the Virginia Military Institute, it specifically reserved the question of whether or not state-sponsored same-sex education could ever be pass constitutional muster.[186] Consequently, the status of the role-model rationale is equally uncertain.

In light of the fact that the rehabilitation rationale has been used to justify everything from drug treatment to shock "therapy,"[187] courts' adoption of this argument should be viewed with skepticism. Likewise, the courts' characterization of women as uniquely amenable to rehabilitative efforts should not be accepted without question. These recent attempts to justify special protocols for female prisoners follow in the long tradition of different standards for male and female inmates.[188] Prior to the 1870s, society viewed the female criminal as "the archetype of the Dark Lady, a woman of uncommon strength, seductive power, and evil inclination."[189] As a result of reform efforts in the late nineteenth century, however, correctional officials reconceptualized female prisoners as immature or developmentally-impaired adults. In many ways, female prisoners continue to be viewed as children, who simply need care and instruction on how to perform their "correct" role in society.[190] In fact, researchers have identified a tendency among workers in women's correctional facilities to refer to

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[185] Title IX marked a significant achievement in the quest for gender equality in education. *See* 20 U.S.C. § 1681(a) (2002). However, Title IX has not been the panacea that some might have hoped it would be. *See, e.g.,* Stanley v. Univ. of S. Cal., 178 F.3d 1069 (9th Cir. 1999).

[186] *See* United States v. Virginia, 518 U.S. 515, 533 n.7 (1996).

[187] *See, e.g.,* Edward L. Rubin, The Inevitability of Rehabilitation, 19 Law & Ineq. 343, 367 (2001).

[188] For a historical view of the treatment of incarcerated women, see Nicole Hahn Rafter, Partial Justice: Women, Prisons and Social Control (1985). *See also* Rebecca Jurado, The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards, 7 Am. U. J. Gender Soc. Pol'y & L. 1, 8-19 (1999); Human Rights Watch Women's Rights Project, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons 22 (1996) [hereinafter "All Too Familiar"].

[189] *See* Shover & Einstadter, *supra* note 135, at 97 (quoting Rafter, *supra* note 188).

[190] *See id.* at 98; Pollock, *supra* note 56, at 9, 47 ("Women prisoners are construed as less harmful and in need of guidance....") (quoting J. Griffith et al., Women Prisoners' Multidimensional Locus of Control, 8:3 Crim. Just. & Behavior 386 (1982)); "Men seem to be treated like bad guys and women seem to be treated like kids." Pollock, *supra* note 56, at 50. These observations are certainly not groundbreaking, and there is a vast literature regarding the historical difference in the treatment of male and female prisoners, and the progressive era reform movements concerning women's prisons.

their inmates as "girls."[191] Other commentators have suggested that the infantilization of female prisoners can explain many of the problems facing the women's prison system, including the imposition of higher moral standards and increased dependency among female inmates.[192]

Some advocates have lobbied for an alternative understanding of female criminality and consequently a different model for female corrections by relying on empirical evidence about the female prison population. Studies suggest that different factors motivate female criminals and point out that violent crime by women is frequently directed at lovers or family members.[193] For many of these women, rehabilitation efforts would focus on teaching them how to engage in healthy, non-violent relationships with men, and the incorporation of male guards who are committed to this goal could play an invaluable role in the rehabilitative process. Most courts, however, have simply accepted prison officials' arguments that the presence of male guards would inherently thwart rehabilitative efforts.

In many of the cases authorizing BFOQs, courts linked women's heightened potential for rehabilitation with their histories of victimization. While it is true that, relatively speaking, a larger percentage of female prisoners have suffered physical or sexual abuse than have male prisoners,[194] the phenomenon of prior abuse is by no means unique to women.[195] Justice Department reports indicate that 5% of male state inmates have experienced some form of prior sexual abuse, and an even greater percentage (13%) has suffered physical abuse. Furthermore, just as feminist

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[191] *See* Pollock, *supra* note 56, at 47 (citing I. Moyer, Prison "Girls": A Study of Staff Controls of Women in Prison, paper presented at Amer. Soc. of Criminology Conference, Washington D.C., 1981).

[192] *See id.* (quoting Nicole Hahn Rafter, Prisons for Women, 1790-1980, in 5 Crime and Justice 148 (M. Tonry & N. Morris eds., 1983)).

[193] In its report on women in prisons, the Department of Justice attempted to differentiate the female state prison population from its male counterpart. According to its study, women are substantially more likely to be serving time for a drug offense and less likely to have been sentenced for a violent crime. Among those convicted for violent crimes, women were twice as likely as men to have committed the offense against someone close to them (36% for women vs. 16% for men) and less likely to commit a crime against a stranger (35% for women and 51% for men). *See* Tracy L. Snell, United States Dep't of Justice, Women in Prison: Survey of State Prison Inmates (March 1994). Approximately one out of every eleven women confined in a state prison facility was interviewed, and the study did not analyze the federal prison population.

[194] According to a Justice Department study, four out of every ten female inmates have experienced physical and/or sexual abuse prior to incarceration. *See* Snell, *supra* note 193, at 3. Other reports have called the Justice Department's numbers "conservative" and have estimated that anywhere between 40% and 88% of female inmates have been victims of domestic violence and sexual or physical abuse (either as children or as adults) prior to incarceration. *See* All Too Familiar, *supra* note 188, at 19.

[195] *See* Caroline Wolf Harlow, U.S. Dep't of Justice, Prior Abuse Reported by Inmates and Probationers 2 (April 1999); *see also* Snell, *supra* note 193, at 3.

scholars and groups frequently suggest that the "official numbers" underestimate the amount of actual abuse that has occurred,[196] the statistics about past sexual assault upon males should be examined with skepticism. The Justice Department acknowledges that its data may be distorted by respondents who "may be unwilling to admit that sensitive events occurred, may be reluctant to report abuse to others, may distrust interviewers or surveys, may forget or may purposefully misrepresent."[197] Considering the stigma that is still associated with same-sex encounters, it is certainly plausible that male prisoners may also be underreporting past incidents of sexual abuse. Therefore, BFOQs grounded in women's "unique" propensity for rehabilitation because of their prior experiences with abuse rest on somewhat shaky empirical ground.

One must also pause to consider whether "special" treatment for female prisoners actually lives up to its promise or whether it merely perpetuates infantilizing practices from an earlier era. For example, in many cases, the women's facilities have been placed in isolated rural regions to "shield inmates from the corrupting influences of the city."[198] As noted earlier, female institutions tend to have more disciplinary rules for inmates, and the rules are often petty.[199] Because the guard to inmate ratio is lower in women's institutions, female prisoners are under far more intense supervision than men.[200] As a result, in some penal systems, women receive almost five times as many citations for disciplinary violations as do male prisoners, a practice that negatively impacts their eligibility for early release programs.[201] Furthermore, notwithstanding these benevolent arguments about rehabilitating women, many female institutions still offer far fewer vocational programs than male facilities.[202]

The historically paternalistic treatment of female prisoners renders suspect the invocation of the rehabilitation rationale as a justification for avoiding the antidiscrimination mandate of Title VII in the context of the

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[196] *See* All Too Familiar, *supra* note 188, at 19 n.18.

[197] Harlow, *supra* note 195, at 2.

[198] Rafter, *supra* note 188, at xxviii.

[199] *See* All Too Familiar, *supra* note 188, at 23.

[200] *See* Pollock, *supra* note 56, at 9, 20.

[201] *See* Dorothy Spektorov McClellan, Disparity in the Discipline of Male and Female Inmates in Texas Prisons, 5 Women & Crim. Just. 76 (1994).

[202] *See* Women Prisoners of the Dist. of Columbia Dep't of Corrs. v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996) (comparing the difference in programming between the male and female prison facilities to the difference in curricular offerings at Harvard University and Smith College). *See also* Pollock, *supra* note 56, at 20-21 ("It is difficult for states to provide adequate religious, medical and other specialized institutionalized services to small groups of female prisoners.") (citing L. Bowker, Women Crime and the Criminal Justice System 229 (1978)).

criminal justice system. Policies focusing solely on the "special" needs of women prisoners frequently mask other abuses within the penal system that are common to all prisoners, thus inhibiting progress toward a more comprehensive vision of dignity for prisoners. Furthermore, efforts to rehabilitate prisoners who were victims of abuse should not be directed exclusively at women. Operating from such a premise further entrenches the notion that only women are victims of sexual assault. Therefore, BFOQs justified by the rehabilitation rationale not only limit employment opportunities, but also erase from view the broad range of experiences of individuals ostensibly being rehabilitated.

III. UNLEASHING THE POWER OF TITLE VII

The four justifications offered by courts that have accepted BFOQs all suffer from empirical difficulties and questionable theoretical assumptions. With this analysis in mind, the question then becomes how one should think about Title VII in order to achieve the goal of equality between the sexes. With regard to BFOQs specifically, how do we strip a set of biological traits of their preemptive power and address the concerns of privacy or, more importantly, of *dignity* in a meaningful way?

In order to reconceive long-standing and historically constrained views about appropriate interactions between the sexes, the BFOQ exception should be severely limited and the presumption of equality should be most aggressively pursued in the arenas where individuals are best positioned to negotiate and bargain about how to meet evolving privacy expectations—namely, the non-incarcerated world. Rather than relying on the shorthand of biological sex to justify discriminatory practices, we need to articulate the values at stake in these cases with greater precision and use Title VII's mandate of equal employment opportunity to guide the conversation.

BFOQ jurisprudence as currently conceived neither promotes equality nor preserves dignity. The cases reveal that judges have been much more amenable to gender-norm experimentation in environments most tainted by power differentials and inequality—namely prisons and jails—with the effect of transforming prison inmates into gender guinea pigs. Judge Posner has expressed dismay at the willingness of courts to subject prisoners to social experiments that would not be required of the general (i.e., non-incarcerated) population. He accuses some jurists of viewing prison inmates as "members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect."[203] In Posner's view, this attitude contributes to the courts' lack of sensitivity to allegations of dehumanizing treatment, resulting in the lack of any "inhibitions about using prisoners as the subject of experiments, such as the experiment of

[203] *See* Johnson v. Phelan, 69 F.3d 144, 152 (7th Cir. 1995).

seeing whether the sexes can be made interchangeable" by "parading ... male inmates in front of female guards or ... female inmates in front of male guards," as though they were merely animals in a kennel.[204] Therefore, in Posner's view, the current state of the law merely reflects society's belief that prison and jail inmates are "scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them."[205] As an overwhelming percentage of prison inmates are people of color, Posner's accusations should also trouble those concerned about racial as well as sexual equality.[206]

In order to make sex equality feel more like progress and less like punishment, the first efforts toward demystifying purported sex differences should be concentrated in non-incarcerated environments. Unlike prisoners, individuals in general society are much better equipped to negotiate their surroundings and adjust their behavior to accommodate their particular tastes and preferences. For this reason, courts should vigorously enforce Title VII in the non-incarcerated settings of bathrooms and hospitals, and should refuse to recognize BFOQs simply to accommodate customers' views about privacy, which are inseparable from historical notions about sex.

An example of an alternative model guided by these principles is the Professional Nurses Registry ("PNR"), discussed in Wilson v. Sibley Memorial Hospital.[207] Nurses registered with the PNR were assigned on a first-come, first-serve basis. If a request specified a nurse of a particular sex, race, religion, or national origin, the PNR informed the inquiring individual or hospital that the request would not be honored and that the call would not be accepted. An individual could "reject" a nurse sent by the PNR for no reason and request another assignment, but would be required to pay the nurse for the services that would have been provided had he or she not been rejected. In that sense, the court explained, "an individual may discriminate, but he must pay for the services that would otherwise have

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[204] *Id.*

[205] *Id.* Posner cited the current prison and jail population at 1.5 million, but noted that the number of people who have ever been inmates, many of whom had not yet been or were never convicted of a crime, was significantly higher. *See id.* at 151.

[206] *See* Snell, *supra* note 193, at 2 (reporting that approximately 65% of male and female prisoners come from communities of color). *See also* Attica: The Official Report of the New York State Special Commission on Attica 78-79 (1972) [hereinafter "Attica"] (discussing indifference of guards to abuses perpetrated against black prisoners); Leo Carroll, Race, Ethnicity and the Social Order of the Prison, *in* The Pains of Imprisonment 184 (Robert Johnson & Hans Toch eds., 1982) (noting that, at the time of the 1971 Attica riot, there were only two minority employees on a staff of over 500, supervising a prison that was 63.5% black and 9.5% Puerto Rican) (citing Attica, *supra*, at 490).

[207] 340 F. Supp. 686 (D.C. 1972), *rev'd on other grounds*, 488 F.2d 1338 (D.C. Cir. 1973).

been rendered."[208] In other words, the consumer rather than the employee must bear the costs associated with discriminatory preferences.

Whereas the PNR forced individuals to pay for their discriminatory tastes[209] with money, other proposals could exact a non-monetary tariff, such as time. For example, as group health care becomes more common, individuals are frequently less able to specify exactly who their health care provider will be. If HMOs were not permitted to hire their doctors and nurses in a sex-specific way—which they should not be, according to Title VII—then the burden and cost of discrimination would be shifted to the patient with particular and unyielding preferences. Patients must often accept health services from the first available practitioner. If they are dissatisfied with the care giver assigned, however, they can suffer the inconvenience of the delay, and in some instances the additional cost, associated with matching their preference. Women who prefer female gynecologists frequently have to wait additional weeks or even months to schedule an appointment. For many women, however, convenience of scheduling is more important than the sex of the health care provider. In other words, acts of discrimination that are currently cost-free may no longer seem worth the expense when individuals have to pay to discriminate.[210]

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[208] Wilson, 340 F. Supp. at 688. Verne Wilson, a male nurse and a member of the Professional Nurses Registry, sued when the hospital refused to allow him to treat female patients. The court found in favor of Verne, insisting that the hospital "accomplished on the floor of the hospital what neither the hospital nor the patient could obtain by phone from the Registry"—that is, the ability to reject a nurse without paying him. Wilson, 340 F. Supp. at 688. The court insisted that the hospital should not be allowed to circumvent the safeguards that PNR had established to prevent exactly this type of discrimination, and found the hospital guilty of a Title VII violation, granting summary judgment *sua sponte* in favor of Wilson. *See id.* On appeal, the D.C. Circuit found that while Wilson had stated a claim under Title VII, the district court was in error when it granted summary judgment for the plaintiff and denied the hospital the opportunity to deny the allegations of the complaint. *See* 488 F.2d 1338 (D.C. Cir. 1973).

[209] Gary Becker first introduced the concept of a "taste for discrimination." *See* Gary Becker, The Economics of Discrimination 11, 153-54 (2d ed. 1971) (suggesting that "individuals are assumed to act as if they have 'tastes for discrimination,' and these tastes are the most important immediate cause of actual discrimination"); *see also* William M. Landes, The Economics of Fair Employment Laws, 76 J. of Pol. Econ. 507, 509 n.5 (1968) (crediting Becker with developing the concept of a taste for discrimination).

[210] Richard Epstein has argued forcefully against antidiscrimination laws on a similar ground, insisting that discriminatory tastes are inherently more expensive, such that the market will penalize those who act in an economically irrational (i.e., discriminatory) manner. *See* Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 269-392 (1992). On the other hand, discriminatory hiring practices are rational in the market sense of the term when they accommodate customer preferences. Therefore, the market will never place incentives on eliminating some forms of employment discrimination. Under my analysis, antidiscrimination laws work with market forces to prohibit discrimination that the market does not currently penalize on its own. By prohibiting employers from discriminating, it becomes more expensive for customers to exercise their

With regard to the issue of opposite-sex encounters in bathrooms, one cannot help but recognize that norms have already begun to change, despite courts' stalwart defense of sex-discriminatory hiring practices. Unisex bathrooms are fairly common in Europe, and they are beginning to appear in the United States—further proof that these norms can change. But even though same-sex bathrooms are still the norm in this country, the practice of segregating bathroom facilities has come under scrutiny in recent years. While some justify the sex-segregation of bathrooms on the grounds that it prevents sexual assault, others have responded by pointing out that segregation actually makes it easier for would-be attacker to identify victims.[211] In fact, many parents already bring their children of either sex into the bathroom they are using for safety reasons. Other advocates of single-sex bathrooms insist that sex-segregation preserves privacy. But housing all of the toilets in single-occupancy stalls would equally satisfy this goal. Therefore, as one scholar has suggested, the ongoing segregation of bathrooms seems to be driven by a desire to maintain "that sense of mystery or forbiddenness about the other sex's sexuality which is fostered by the general prohibition upon public nudity and the unashamed viewing of genitalia."[212]

Even assuming that men's and women's restrooms will remain the standard in the United States for years to come, individuals who are particularly sensitive to performing these bodily functions in "private"—if such a thing is possible in a public restroom—will be able to satisfy this preference by allotting themselves additional time for their bathroom break, so as to prevent emergencies in the event that the facilities are being cleaned by someone of the opposite sex at that particular moment. Even though some individuals may need to adjust their behavior under this regime,[213] mere inconvenience does not trump the countervailing command of equal employment opportunity. College students, for example, are becoming more accustomed to custodians of either sex servicing communal bathrooms, and may not suffer any inconvenience at all under a sex-blind system for hiring janitors.

None of these proposals will lead to the transformation of sex norms overnight. Non-incarcerated people will still have numerous opportunities to avoid cross-sex encounters that make them feel uncomfortable or disturb their notions about how men and women "should"

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discriminatory tastes. The market forces can work in tandem with, rather than as a substitute for, antidiscrimination laws.

[211] *See* Antony, *supra* note 117, at 5.

[212] *Id.* at 5 (quoting Richard Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L. Rev. 581 (1977)).

[213] Such individuals also include employers who dictate bathroom policies for their workers.

act. Nevertheless, curtailing our use of the BFOQ in these settings will speed up the evolutionary process by making it more costly to indulge one's discriminatory tastes.

The question of what to do in the prisons, however, remains. In an ideal world, the pursuit of equal employment opportunity would not come at the expense of prisoner safety and dignity because guards would operate according to norms of professionalism and abuses would be prosecuted.[214] The notion that the rape of female prisoners can be eliminated solely by invoking norms of "professionalism," however, seems reckless, or at least naive. Consequently, any proposal to eliminate BFOQs in women's prisons will undoubtedly dissatisfy those who believe that rape prevention policies should not be sacrificed simply to promote some abstract notion of formal equality.

This Article does not purport to hold the key to ending the rape of women in prison. One cannot deny that one way to guarantee that men do not rape women in prison would be to remove all male guards from female facilities. However, we should not let the BFOQ debate obscure the fact that prisons are marked by numerous types of physical and dignitary violations, many of which will not be resolved solely through the use of the BFOQ.

For one thing, female guards are just as capable of abusing power as men. In Bonitz v. Fair, for example, female prisoners sued for violations of their constitutional rights in connection with abusive body cavity searches.[215] The *female* officers conducted searches outside the presence of medical personnel, and "in a [non]hygienic manner," despite clear regulations prohibiting such practices.[216] Apparently, the female officers conducted multiple body cavity searches of prisoners' noses, mouths, anuses, and vaginas without changing gloves. One female prisoner, who was menstruating at the time, was forced to endure the search while blood trickled down her leg. Moreover, it is not clear that this case is necessarily an aberration. For example, in the wake of the terrorist attacks in the United States, accusations of abuse by male *and female* airport security officials are on the rise.[217]

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[214] *See* Bagley v. Watson, 579 F. Supp. 1099, 1104 n.4 (D. Or. 1983) (insisting that the way to deal with abuses by either unprofessional guards or disruptive prisoners is "not to limit the employment opportunities of all the female correctional officers, but to take swift and sure punitive action against the male inmate offenders and to terminate the employment of the female correctional officers").

[215] 804 F.2d 164 (1st Cir. 1986).

[216] *Id.* at 169.

[217] *See, e.g.*, Kitty Bean Yancey, Passengers Uneasy with Pat-Downs: Air Travelers Dread Searches that Get Too Intimate – and Embarrassing, U.S.A. Today, Dec. 14, 2001, at A1 (recounting tales of abusive treatment by male and female airport security personnel).

The real obstacle to guaranteeing prisoner safety stems from the unwillingness of those charged with protecting prisoners to take allegations of abuse seriously. For example, a whistle blower revealed that male guards in the Boston correctional system were apparently having sex with female inmates under conditions of ambiguous consent or were trading drugs for sex.[218] These events in the Suffolk and Nashua Street jails spawned multiple lawsuits, including one brought by female prisoners who were impregnated by male prison guards,[219] and others who claimed that they were subjected to unprotected sex.[220] While some might cite this case to lobby for the wholesale removal of male guards from female institutions, the answer might not be that simple. First, a female guard had in fact reported these abuses to her superiors and had publicly complained about the ongoing sexual interaction between guards and prisoners, *but was ignored.*[221] In fact, after she lodged her complaints, one of the offending officers was allegedly allowed to harass her with impunity.[222] Although many were quick to denounce the state policies that permitted the use of male guards in female prisons,[223] other critics noted that, at the time of these offenses, Massachusetts was one of eleven states that had not criminalized improper contact between guards and inmates.[224] Therefore, this case seems to

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[218] *See, e.g.*, Andrea Estes, FBI Probes Sex and Violence at Both Suffolk County Jails, Boston Herald, Oct. 28, 1999, at 28.

[219] *See* Joanna Massey, DNA Tests Ordered for 2 Suffolk Jail Guards, Boston Globe, Jul. 23, 1999, at B4; Joanna Massey, 3 Guards Fired on Charges of Having Sex with Inmates, Boston Globe, Aug. 28, 1999, at B3; Francie Latour, 4 Nashua Facility Workers Are Fired, Boston Globe, Dec. 30, 1999, at B1 [hereinafter "4 Nashua Workers"]; Jack Meyers, Inmate Saying She Had Sex with Guard Is Pregnant, Boston Herald, July 23, 1999, at 23; Jack Meyers, Four Guards Barred from Jail in Light of Inmate's Sex Claims, Boston Herald, July 7, 1999, at 12.

[220] *See* Francie Latour, 4th Guard Fired in Prison Scandal: New Allegation: Drugs in Exchange for Sex, Boston Globe, Oct. 19, 1999, at B1 [hereinafter "4th Guard"]; Francie Latour, Suffolk Sheriff Shifts Command After Sex Charge, Boston Globe, Oct. 20, 1999, at B1 [hereinafter "Suffolk Sheriff"]; Probe of Jail Abuses Widens, State Net Capitol Journal-Massachusetts, Oct. 20, 1999, available in LEXIS, [hereinafter "Probe"].

[221] *See* Probe, *supra* note 220, at 323.

[222] *See* 4th Guard, *supra* note 220. Felix filed a discrimination and harassment claim for the abuse she received from Officer Richard Powers and her superiors after she discovered Powers's love letters to an inmate. *See also id.*

[223] Suffolk Sheriff, *supra* note 220. After the allegations were made public, Suffolk County Sheriff Richard J. Rouse appointed a woman, Alice Ertha, to head the female units of the South Bay facility.

[224] *See id.* The legislature has since made any sexual contact between guards and inmates a crime punishable by five years in prison, a $10,000 fine, or both. *See id.; see also* 4 Nashua Workers, *supra* note 219. Massachusetts's lack of explicit prohibitions on sexual conduct between guards and individuals in custody was by no means unusual. As of 1996, only slightly more than half of the states had such laws, and six of those states (and the

indicate that abuses resulted not only from the presence of male guards but also from the failure of any effective internal policing mechanism to prevent abuse.[225]

One proposal for preventing prison rape, as well as other types of abuses, would suggest that the answer lies in more observation in these institutions rather than less. While our prisons and jails are designed to facilitate the observation and control of inmates, the conduct of prison guards is rarely subjected to scrutiny. Whether situated in upstate New York or on the farm at Angola, our prisons are purposefully kept out of sight and physically and psychologically separated from the rest of society. Therefore, in one sense, we have preserved the hidden caverns of the dungeon. To the extent that we are worried about prison guards abusing their authority—whether by raping prisoners, beating them, or engaging in other types of dignity-stripping conduct—but are skeptical about our ability to prevent these abuses, a program of heightened surveillance that subjects prison guards as well as prisoners to the threat of constant observation may be the best way to make them police themselves.

Such a proposal is not particularly radical, and has been adopted in other situations where abusive behavior has been identified. For example, after the New Jersey state police were accused of conducting racially discriminatory traffic stops, video cameras were placed in the squad cars in an effort to stem abuses.[226] Likewise, criminal justice reformers have argued that all interrogations and confessions should be videotaped to ensure that police do not use coercive tactics to secure a waiver of a defendant's constitutional rights.[227] Why, then, could we not also institute a system in prisons that enables us to observe the observers? Inmates already live under a regime in which they are made to believe that their every move is being watched. Therefore, implementing such a system of heightened surveillance would probably not drastically change the day-to-day existence of prisoners in any significant way. Prison guards, on the other hand, who were not already disposed to act in a professional manner would now have the additional incentive to behave properly out of fear that their conduct would

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District of Columbia) had only enacted their laws within the last two years. *See* All Too Familiar, *supra* note 188, at 39-41 & nn.99-102.

[225] *See also* Ford v. City of Boston, 154 F. Supp. 2d 123 (D. Mass. 2001) (class action where city of Boston is being sued for its policy of subjecting all new female inmates to strip searches and body cavity searches because all women were being processed through the maximum security facility).

[226] *See* John McAlpin, New Law Requires Troopers Go Public; Video Tampering Will Be Prosecuted, The Record, Bergen County, Aug. 25, 2001, at A3 (noting that under new law, "officers who tamper with video cameras that record motor vehicle stops will be prosecuted").

[227] *See, e.g.*, Wayne T. Westling, Something Is Rotten in the Interrogation Room: Let's Try Video Oversight, 34 J. Marshall L. Rev. 537 (2001).

be caught on videotape. In a truly ironic twist, the panoptical model used to control prisoners could now also be used to protect them.

Ultimately, in light of society's unwillingness to dedicate scarce public resources towards tackling the problem of abuse in prisons, BFOQs may be the only way to protect female prisoners from sexual abuse by male guards. No one should assume, however, that such a policy will necessarily eliminate the broad range of atrocities that are currently perpetrated against both male and female prisoners. In the meantime, moreover, Title VII's vision of equality will be sidetracked in exchange for very limited returns.

CONCLUSION

Courts have used the "natural" language of biology in order to allow real (or simply assumed) customer preferences—for that is ultimately what they are—to trump claims to equal employment opportunity regardless of sex. This same language about the "naturalness" of the races resulted in laws that prevented African-Americans and whites from mingling socially[228] or genetically.[229] Rather than acquiescing to these deeply entrenched and seemingly unquestionable truths about the "differences" between men and women, we should demand a transformation in our cultural practices so that individuals of different sexes can conduct business or provide services in a manner that does not result in feelings of violation or degradation. Insisting that cross-sex interactions inherently inflict dignitary harm naturalizes attitudes about sexual predation and victimization under the guise of accommodating privacy. So long as cross-sex observation is equated with violation, women and men will continue to be limited by predetermined roles of social interaction and involvement in both the marketplace and the community at large. Perhaps more importantly, physical harm and dignitary violations will continue to go unaddressed as the reality of same-sex abuse is ignored.

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[228] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[229] *See* Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).