

The Failure of the Bona Fide Occupational Qualification in Cross-Gender Prison Guard Cases: A Problem beyond Equal Employment Opportunity

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Knowing the theory of gender that a court is using to understand and assess the issues in a case is vital to ensuring that women are afforded their full rights under the law. Unfortunately, courts often do not explicitly state what understanding of gender is informing their decisions. An exception is found in employment law: specifically, the bona fide occupational qualification (BFOQ) exception to Title VII of the Civil Rights Act, which allows employers to engage in sex-based discrimination in those instances in which the sex of the employee is a reasonably necessary qualification for the job. In these cases, because the court must analyze how “manness” or “womanness” impacts one’s qualification to hold certain kinds of employment, the court must articulate its understanding of gender. This paper examines two BFOQ cases in the cross-gender prison guard context, those cases in which an individual of one sex seeks to guard inmates of the opposite sex. In these cases the courts created a theory of gender that posits men and women as different in kind. The theory developed in this line of cases is an attack on Title VII protections and a potential barrier to women’s equality under the law.

INTRODUCTION

Knowing the theory of gender that a court is using to understand and assess the issues in a case is vital to ensuring that women are afforded their full rights under the law. Courts often do not explicitly state what understanding of gender is informing their decisions. This omission is particularly troubling as the theory developed in the cases discussed in this article actually operates to ensure the continued elusiveness of gender equality under the law.

All sex-exclusionary bona fide occupational qualification (BFOQ) cases ask the court to assess whether the “womanness”/“manness” of an individual disqualifies her/him from effectively carrying out the duties of a given job or category of jobs. But what is “woman” or “man” in the legal context of equal opportunity employment? Analyzing the application of the BFOQ in the specific power context of female guard/male prisoner and male guard/female prisoner reveals that, in at least some cases, courts are creating their own theories of gender to assist them in answering the questions posed by a sex-exclusionary BFOQ defense.¹ This article reviews sex-exclusionary BFOQ cases in the cross-gender prison guard context (males guards guarding female inmates or female guards guarding male inmates) to expose the theory of gender underlying these cases.²

In the first section of this paper, I will discuss the BFOQ: a limited account of its legislative history, the test that is to be applied in such cases, and some examples of how it has been applied historically. In section II, I will review the general setting of the two cases that are the focus of this paper, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (6th Cir. 2004). In section III, I will analyze the Supreme Court’s application of the BFOQ in *Dothard v. Rawlinson* to uncover the Court’s created theory of gender. I will then trace how this theory has been used and expanded by the Sixth Circuit Court of Appeals in *Everson v. Michigan Department of Corrections*. In section IV, I will discuss how this particular approach to gender is stifling efforts to gain legal equality for women.

I. THE BONA FIDE OCCUPATIONAL QUALIFICATION

The American legal system’s approach to equality is one of negative freedom, meaning that equality is attained, legally speaking, via the removal of barriers (like things are treated alike under the law and hence have access to the same legal rights). Title VII of the Civil Rights Act of 1964 is a prime example of this approach to equality. The law seeks to remove barriers to employment or fair treatment once employed among similarly situated employees regardless of race, color, sex, religion, or national origin. Although what constitutes “similarly situated employees” is often hotly debated in lawsuits alleging discrimination, the point remains that for the purposes of Title VII, race, color, sex, religion, and national origin do not constitute differences that justify different treatment or different (lesser) rights under the law.

Enter the BFOQ. This exception to Title VII allows employers to lawfully discriminate against employees or potential employees on the basis of 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” 42 U.S.C. § 2000e-2(e) (1991). Congress provided little evidence of what was intended by this somewhat cryptic limitation on the right of persons to equal treatment in employment settings. See *Wilson v. Sw. Airlines*, 517 F. Supp. 292, 297 (N.D. Tex. 1981).

Remarks from the floor of the House and examples of the appropriate application of the exception found in the Senate's Interpretative Memorandum to Title VII indicate that the limitation was intended to apply in cases in which the employment of a particular individual impinged on the personal preference of the customer (for example, an elderly woman could insist on only females as her nurses/attendants) or when the "authenticity" (a loaded term) of the employee was an important element of employment (for example, hiring a chef of French nationality to work in a French restaurant or a person of a particular religion to sell religious items related to that religion). *Id.* at 297–98. Though members of Congress may have supported the notion of employment discrimination based on customer preference, after passage of the bill, the Equal Employment Opportunity Commission (EEOC) in its regulations and public comments has steadfastly rejected customer preference as a legitimate limitation on equal employment rights. 29 C.F.R. § 1604.2 (Oct. 6, 2011). While the dispute between the apparent legislative intent of Congress and the practice of the EEOC on the scope of the BFOQ persists, the courts generally have recognized four different approaches or methods an employer may use in structuring a BFOQ argument: safety; personal privacy; authenticity; and customer preference, which is allowed in the limited situation when failure to recognize customer preference would defeat the entire business. *See, e.g., Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1200 (N.D. Tex. 1983) (allowing a helicopter transit company to refuse to hire helicopter pilots to fly into Mecca unless they were Muslim, upon proof that customers in Saudi Arabia would not use the service otherwise). These four approaches to a BFOQ argument are not hard and fast divisions. Rather, the approaches often bleed into one another. In the *Kern* case, for instance, the customer preference argument doubled as a safety argument as "non-Moslems flying into Mecca, are, if caught, beheaded" under Saudi Arabian law. *Id.*

A customer preference argument also can merge with an authenticity argument. For example, in the *Wilson* case, which involved flight attendants and ticket agents, the employer argued explicitly to exclude men as a category from employment, asserting female sexuality was a required job duty that substantially all men could not perform to the requisite level of proficiency (authenticity), and that "attracting and entertaining male passengers" was the essence of the business. *See Wilson*, 517 F. Supp. at 302.³ Further, the employer argued, male passengers expect female service (that is, again, a customer preference approach). *Id.* Similarly, the Playboy Club argued authenticity to support appearance standards for its Bunnies in a case before the New York State Human Rights Appeals Board. *Weber v. Playboy Club*, Case No. CSF-22619-70, Appeal No. 774 (1971) available at <http://njlegallib.rutgers.edu/misc/aromi.pdf> (last visited July 1, 2011). In this case, a wrongful termination case, Playboy succeeded in asserting a business necessity for employment standards that required termination of Playboy Bunnies who had "lost Bunny Image (either through aging or an *uncorrectable* appearance problem)." *Id.* at *11. The New York State Human Rights Appeals Board hearing the case stated "[a]lthough the issue is not stressed, it is to be noted in passing that the restriction to females only of the eligibility for employment as a Bunny constitutes a bona fide occupational qualification." *Id.*

at *12. The board went on to note that “Respondents maintain that their business would be destroyed were they required to abandon the Bunny Image. This is doubtless the fact...” *Id.*

Due to the way that the concepts of “authenticity” and “customer preference” merge into each other, it is at times difficult to parse under which theory an employer is making its argument. Still, regardless of how the argument is framed, the burdens that an employer must meet to succeed on the BFOQ affirmative defense remain the same. The employer must succeed on both parts of a two-pronged test: (a) having a factual basis for believing that substantially all members of a given sex (national origin or religion) are unable to perform the duties of the job safely and efficiently; and (b) proving that the discriminatory practice is necessary for the primary function of the business.

Structuring the argument in the context of sex discrimination, the first prong of the BFOQ test requires an employer to demonstrate that “the particular job under consideration requires[s] that the worker be of one sex only.” *Wilson*, 517 F. Supp. at 299 (citing *Weeks v. So. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) and *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971)). To succeed on this element of the BFOQ test, an employer must prove that it “had 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.” *Id.*

This first prong of the BFOQ test, then, is a skills-based assessment that places the burden on the employer to prove the duties of the job, that is, what level of proficiency is needed to perform those duties safely and efficiently, and that substantially all members of the category of individual to be excluded fail to perform the duties of the job to the requisite level of proficiency. *Weeks v. So. Bell Tel. & Tel. Co.*, 408 F.2d 228, 234 (5th Cir. 1969). The employer is barred from resort to stereotypes but instead must demonstrate that the notion of the inability of a category of workers (in our discussion, women) to perform the duties of the job is based in fact. *Id.* See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). It is this skills-based assessment that protects individuals from pernicious stereotypes and prejudices, which would unfairly limit their employment options or rights once employed.

An employer who succeeds on the first prong of the BFOQ test is further required to prove that its admittedly discriminatory hiring practice is a requirement “reasonably necessary to the normal operation of that particular business or enterprise.” *Weeks*, 408 F.2d at 232 (citing 42 U.S.C §2000e-2(e)(1)). This standard requires the application of a business necessity test such that “discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.” *Diaz*, 442 F.2d at 388.

A prime example of this second prong of the BFOQ test is the *Wilson v. Southwest Airlines* case, discussed briefly above, in which Southwest Airlines asserted that its company identity and marketing as the “love airline” justified an employment requirement that all public contact positions (flight attendants and ticket agents) be filled only by women. *Wilson*, 517 F. Supp. at 293. Analyzing the essence of the employer’s business, the court found that “Southwest is not a business where vicarious

sex entertainment is the primary service provided. Accordingly, the ability of the airline to perform its primary business function, the transportation of passengers, would not be jeopardized by hiring males." *Id.* at 302.

Following *Wilson*, the application of the business essence test to support employment discrimination on the basis of sex has resulted in a series of decisions holding a females-only hiring policy to be a legitimate expression of the BFOQ for the positions "providing primarily sex-oriented services." *Id.* at 300-02. For example, the Playboy Club successfully asserted the BFOQ affirmative defense in support of hiring only women as Playboy Bunnies upon the argument that female sexuality was the "dominant purpose of the job." *Id.* at 300 (citing *Weber v. Playboy Club*, Appeal No. 774, Case No. CFS 22619-70 (New York Human Rights Appeal Board, 1971)). Hooters of America, Inc. made a similar argument in defending its practice of hiring only women for its "Hooters Girls" positions. See Hooters, About Hooters, available at <http://www.hooters.com/About.aspx> (last visited June 3, 2010) ("the element of female sex appeal is prevalent in the restaurants ... being female is reasonably necessary to the performance of the Hooters Girl job duties ...").

Putting aside the implicit argument that women are uniquely qualified under the law to provide sexual titillation services, it is important to remember that the BFOQ places specific burdens on an employer asserting this right to discriminate in employment decisions (structured as an affirmative defense). Those burdens include proof of the duties of the job in question, proof of the level of proficiency needed to perform those duties safely, proof based in fact that substantially all members of the category to be excluded cannot perform the job duties with the requisite level of proficiency and safety, and proof that the discriminatory hiring practice goes to the essence of the employer's business. The failure of an employer to prove any one element of the BFOQ test should defeat the affirmative defense, rendering the employer's discriminatory hiring practice unlawful. However, as will be shown in the discussion of the cases below, courts, at times, fail to hold employers to the specific burdens of proof required by the BFOQ test. Instead, by jettisoning fact-based elements of the BFOQ test, the courts discussed in this paper became mired in the meaning of "man" and "woman," and "substantially all members of the category," ultimately relying on precisely the pernicious stereotypes that the BFOQ was designed to eliminate.

II. SETTING OF *DOTHARD V. RAWLINSON* AND *EVERSON V.* MICHIGAN DEPARTMENT OF CORRECTIONS

The analysis of the application of the BFOQ test in this paper arises from two cases decided over twenty-five years apart by different courts and different judges. Despite the quarter century that separates the cases, the context of the cases is distressingly similar. The prison systems at issue in both *Dothard* and *Everson* were operating in violation of the constitutional rights of the inmates. Violence and sexual violence against inmates were rampant in these institutions. See *Pugh v. Locke*, 406 F. Supp. 318, 329-30 (M.D. Ala. 1976), *Everson*, 391 F.3d at 741-42. Thus, in context, the

question of equal opportunity employment and the correct application of the BFOQ is related to an effort at reforming these prisons to at least provide a minimum level of safety for the inmates. Getting the equal employment opportunity question right, then, was part and parcel of these prison systems' larger plans to address other constitutional rights violations within the prisons.

The year before the Supreme Court decided *Dothard*, a federal district court judge held that the conditions in the male prisons administered by the Alabama Board of Corrections (ABOC) violated the constitutional rights of the prisoners held therein. *Pugh*, 406 F. Supp. at 325. Investigations into the conditions at the prisons revealed that prisoners were living in filth and degradation. "Windows [were] broken and unscreened, creating a serious problem with mosquitoes and flies." *Id.* at 323. Inmates were forced to sleep on "filthy cotton mattresses [that] led to the spread of contagious diseases and body lice." *Id.* Overcrowding was so severe that many inmates were living in dormitory-style arrangements with bunks pushed so close together that there was no walking space between them. *Id.* at 322–23. Other inmates slept on mattresses placed on the floors in hallways and even in the restroom facilities by the urinals. *Id.* One facility, housing over 200 men, was found to have only one functioning toilet. *Id.* at 323. "A United States public health officer ... found these facilities wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors." *Id.* at 323–24.

Not only were the facilities administered by ABOC unsafe from a sanitation perspective, they were also plagued by almost unfettered inmate-on-inmate violence. *Pugh*, 406 F. Supp. at 324. This violence came about partially because ABOC engaged in no screening or assessment of inmates with regard to level of security needed to house them or the mental health services needed to treat them. Rather, inmates were assigned to facilities and to particular units or dormitories based on available space. *Id.* Failure to assess incoming inmates meant that 10% of the general mingled inmate population was psychotic (needing to be confined to special facilities for the criminally insane) and another 60% were disturbed enough to require treatment. *Id.*

The failure to assess inmates was further exacerbated by severe understaffing at ABOC facilities. Testimony by the former prison commissioner revealed that large institutions in the ABOC system needed a minimum of 692 guards to ensure a safe and controlled environment. *Id.* at 325. However, at these same facilities, ABOC employed only 383 guards. *Id.*

In short, overcrowding, dilapidated facilities, failure to assess inmates, and understaffing combined to create "rampant violence and [a] jungle atmosphere" at ABOC prison facilities. *Id.* The court found that

violent inmates are not isolated from those who are young, passive, or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft, and assault are everyday occurrences among the general inmate population. *Pugh*, 406 F. Supp. at 324.

Testimony was also presented to illustrate the problem of young inmates being attacked and stronger inmates “offering” younger inmates to others for sexual abuse. *Id.* at 325. Based on these horrific conditions, in *Pugh v. Locke* the court found that the conditions in ABOC facilities constituted “cruel and unusual punishment” of the inmates. *Id.* at 329.

Twenty years later, in 1997, the Department of Justice filed suit against the state of Michigan alleging that the female prison facilities administered by the Michigan Department of Corrections (MDOC; the facilities at issue in *Everson*) violated the constitutional rights the inmates. *Everson v. Mich. Dep’t Corr.*, 222 F. Supp. 2d 864, 871 (E.D. Mich. 2002). Outside independent reviews of MDOC’s female prisons reported rampant sexual abuse of female prisoners, predominantly but not exclusively at the hands of male prison guards. *Everson*, 391 F.3d at 741. Between 1994 and 2000, male prison staff perpetrated about 91% of the cases of sexual abuse of female inmates in Michigan. *Everson*, 391 F.3d at 755. In 1997 and 1998, 50% of all convictions of male prison staff nationwide for criminal sexual conduct against women prisoners were of Michigan staff. *Everson*, 391 F.3d at 742. Sexual abuse by prison guards was also apparently well known and accepted by the MDOC administration. A 1996 investigation by Human Rights Watch determined that “rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are continuing and serious problems within the women’s prisons in Michigan [and] have been tolerated over the years at both the institutional and departmental levels” *Everson*, 391 F.3d at 741.

That the subjugation of women through sexual violence was a part of MDOC’s operating procedure is made even clearer by the evidence that at some facilities the rape and sexual abuse of inmates necessarily involved, at the very least, an aggressor guard and a voyeur guard. For example, at the Wayne facility “one officer works the ‘A’ wing, one officer works the ‘B’ wing, and one officer works at a desk, where he or she watches the other two officers as they make their rounds.” *Everson*, 391 F.3d at 741. This workplace configuration, where the interactions of security guards with inmates is observed by a third party, suggests that sexual misconduct was well known, observed, and accepted within the ranks of prison guards and guard supervisors.

Raking over the disturbing details of the failures of these two prison systems is not an appeal to prurient interests. Rather, placing the analysis of the application of the BFOQ in these two cases in their complete context highlights the difficulty that the courts had in separating the employment issue from other constitutional violations that needed immediate remedy, as well as the political issues that underscored the institutional policy-making that created terrible prison settings. The settings of the cases, and the way in which the courts flesh out the BFOQ analysis in each, reveal that the courts were struggling with competing stereotypes and assumptions: the nature of incarcerated men vs. the nature of the larger category of men, as well as how women, as a category, interact with and affect both of the other categories. With this in mind, I now turn to the analysis of how the Supreme Court understands the nature of woman and the incarcerated man and how the Sixth Circuit Court of Appeals expanded this understanding to create a category of rational man that is different in kind from the category of woman.

III. A THEORY OF GENDER

In *Dothard* the Supreme Court created a theoretical framework, a theory of gender, positing that the mere presence of the female body incites men who have been denied consensual heterosexual sex (that is, incarcerated men) to rape. For the Court in *Dothard*, womanhood was defined by the reaction that the female body—her biology—caused in incarcerated men. Twenty-five years later, this understanding of the nature of women and incarcerated men was expanded. In *Everson*, the Sixth Circuit Court of Appeals, taking as precedent the Supreme Court's theory of gender created in *Dothard*, determined that women's nature of inciting rape induced not only incarcerated men to rape but, in fact, any man who possessed a proclivity for sexually abusive conduct if "forced" to see a woman in a state of undress.

As will be discussed further, this court-created theory of gender collapses female gender into biology while reinforcing the notion of man as at least possessing the potential of a rational mind that can govern the drives and impulses of his body. Whereas women are completely embodied and defined by the uncontrollable effect that their bodies could have on male bodies, only some men are similarly defined by biology. Paradoxically, under this theory, those men who are incarcerated or who possess a proclivity to commit sex crimes experience a lack of agency similar to women's. They too are at the mercy of bodies that react, without control, to other bodies. By focusing on the hidden proclivity of some men to rape, the Court of Appeals casts committing sex crimes as an infirmity, a failure of male rationality. Womanhood, meanwhile, is nothing more than a catalyst for male sexual desire that some, flawed, men cannot withstand. The court sees the rational man as the norm, and drafts women and flawed men as something lesser: incomplete men who lack higher mental functions and thus are mired in the animal natures of their bodies. As will be discussed below, this court-created theory of gender, which acts in some contexts as a legally binding determination of what it means to be a woman or a man, was developed as a result of the Supreme Court's abandonment of the BFOQ test.

WOMAN AS RAPE-INCITING

Understanding how the Supreme Court abandoned the BFOQ test is vital to understanding the theory of gender that the Court ultimately created. To recap, in 1976 in *Dothard v. Rawlinson*, the United States Supreme Court was asked to examine claims that the employment policies of the ABOC were unlawful on disparate impact grounds (restrictive height and weight requirements) and disparate treatment grounds (exclusion of women from holding certain positions). ABOC asserted the BFOQ affirmative defense to the disparate treatment claim (in support of its policies that only males could hold certain correctional counseling positions within its male facilities). In analyzing ABOC's BFOQ defense, the Supreme Court took a series of unexpected steps. First, the Supreme Court dramatically truncated the first prong of BFOQ test, eliminating two-thirds of the elements of the test. Second, the Court, in focusing

strictly on one element of the BFOQ test, started its inquiry into the nature of women through a series of unsupported assertions about the nature of incarcerated men. The result of the Court's abandonment of the BFOQ test was a holding that women are lawfully disqualified from the categories of employment in question because of the effect that their basic essence (rape incitement) has on incarcerated men. Because womanhood, understood strictly as the relationship of the female body to the sexual desires of incarcerated men, would pose a danger to both the woman and her male guard coworkers, the Court determined that women were lawfully excluded from prison guard positions in the ABOC-operated male facilities.

As the Supreme Court began its assessment of ABOC's affirmative defense to disparate treatment of women in its employment practices, the Supreme Court started by laying out the BFOQ test. The Court used the wording of the bona fide occupational qualification exception constructed by the Fifth Circuit Court of Appeals in *Weeks v. Southern Bell Telephone & Telegraph Co.* This construction of the Title VII exception states that

an employer could rely on the bfoq exception only by proving that he had 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. *Dothard*, 433 U.S. at 333.

As previously discussed, to succeed on this first prong of a BFOQ argument, an employer bears the burden of proving:

- (a) the duties of the job involved,
- (b) the level of proficiency at those duties necessary to perform them safely and efficiently, and
- (c) that substantially all women would be unable to perform the job duties to the requisite standard of proficiency and safety.

Further, in demonstrating element (c), the employer is required to demonstrate that it has relied upon factual information to prove that substantially all women could not perform the job—and not merely relied upon “romantic paternalism” or archaic notions of women and appropriate roles for them. *Dothard*, 433 U.S. at 335.

From the outset it would seem that ABOC failed in its burden of proof for both parts (a) and (b) of the BFOQ exception. ABOC failed to adequately describe the position of correctional counselor or to outline the actual duties of the position. When hearing the case, the district court was able to determine only that “correctional counselors are persons who are commonly referred to as prison guards. Their duties primarily involve security rather than counseling.” *Id.* at 327, FN8.

The inappropriateness of such a vague notion of the required job duties is made clearer if applied to other types of jobs. For example, one could say that a construction worker must be proficient in the job duty of constructing; or a lawyer must be proficient in lawyering; or as here, a prison guard must be proficient in guarding/

securing. None of these constructions of a job duty is sufficient for a BFOQ exception because none of the duty descriptions are specific enough to provide information about the types of skills, let alone the level of skill proficiency, required to perform them safely and efficiently.

An employer unable to meet the threshold requirement of describing the duties of the job would seem doomed in asserting a BFOQ disqualifying all women from certain employment. In fact, the Supreme Court determined that ABOC had failed to provide an adequate description of the correctional counselor/prison guard duties when it invalidated Alabama's height and weight restrictions as violating Title VII. In the disparate impact section of the case, the Court upheld the lower court's decision that height and weight requirements, which exclude 41.13% of women from correctional positions, are untenable in the face of the ABOC's "fail[ure] to offer evidence of any kind in specific justification of the statutory standards." *Dothard*, 433 U.S. at 331.

The Court acknowledged the failure of ABOC to present evidence in support of job duties or qualifications for prison guards in its discussion of the disparate impact case. However, in its analysis of the BFOQ portion of the case, the Court ignored that the BFOQ defense requires in part the same showing of required job duties as the rebuttal of a disparate impact case. Instead, the Supreme Court determined that an employer could make a factual showing of women's unsuitability for entire categories of jobs in the absence of information about the job duties or skills needed to perform those jobs. In its BFOQ analysis, the Court glossed over the first two elements of the first prong of the BFOQ test to focus entirely on whether there is a factual reason to disqualify women from the prison guard position. No reference is made to specific job duties or needed proficiency at those duties aside from the vague reference to the duty "to maintain prison security." *Id.* at 336.

While eliminating two-thirds of the required elements of the first prong of BFOQ exception test, the Court did acknowledge that it is impermissible to disqualify women from categories of employment based on nothing more than stereotypes about the proper role and function of women, *id.* at 333–34. The Court, then, engaged in a sleight of hand. Instead of basing its decision on impermissible stereotypes about women, the Court made "factual" determinations about the nature of incarcerated men and masculinity.

First, the Court argued that men convicted of rape would target female prison guards for further acts of rape. "There is a basis *in fact* for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison." *Id.* at 335. It is important to remember that this is part of the Court's factual analysis of women's ability to perform as prison guards, yet no facts regarding women are raised. Rather, the Court's factual analysis focuses on the likely recidivism of male rapists.

Further, no facts or statistics are presented to support the contention that all or a majority of the sex offenders in Alabama prisons are there for sexually assaulting adult women. If the argument is one of recidivism (those who have sexually assaulted women in the past will do so again), there logically needs to be some evidence that the sex offenders in question targeted adult women. Sex-offender pedophiles or those

who targeted men, based on the Court's own thin recidivism argument, would seemingly be as unlikely to attempt rape of a female prison guard as any other man without a history of raping women.

That there are flaws in this line of argumentation merely underscores the fact that the argument is pretextual. Ultimately, the Court determines that it is not rapists who rape, but incarcerated men who rape. "[I]nmates, deprived of a normal heterosexual environment, would assault women guards." *Dothard*, 433 U.S. at 335. "[T]here are few visible deterrents to inmate assaults on women custodians." *Id.* at 336. The Supreme Court, then, argued that men deprived of consensual heterosexual sex and in the absence of visible deterrents will rape women.

Here, the Court's argument completely reduced womanhood to the supposed effect of the female body on the actions of incarcerated men. The Court constructed a vision of gender that utilizes a derivative notion of the female. Women are defined entirely by the relationship of their bodies to men's sexual desires, desires that are enforced by violence. The Court declared, as a matter of fact, that men need heterosexual sexual contact, and when denied it consensually (here due to incarceration), they will take it by force. *Id.* at 335. Men take sex. Women are rape-able. Male rape of women is normal.

That women are rape-able, however, is not sufficient to disqualify them from working as prison guards. There is nothing inherent in a woman's capacity to be the victim of a sex crime that would indicate that she cannot perform the job duties of a correctional counselor to the requisite standard of proficiency and safety as required to defeat a BFOQ. The implication necessary to make the Supreme Court's argument valid is that women are not merely rape-able but rape-inducing. It is the presence of a woman that induces the male inmate to rape. "[I]nmates would assault a woman because she was a woman." *Dothard*, 433 U.S. at 336. There is no male agency in this description of the norm of male rape of women. The woman's mere presence, the requirement of the male inmate to be confronted with the female essence of rape-ability, causes these men to rape. Woman incites rape.

There is no female agency in this account either. Woman doesn't have to do anything to incite incarcerated men to rape. There is nothing woman can do to prevent inciting incarcerated men to rape. The inducement to rape in that situation is what womanhood is. "The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.*

In short, according to the Court, womanhood, understood as the incitement of uncontrollable male sexual desire, may be sufficient to justify denying women equal employment opportunity.

THE FLAWED MAN

In 2004, the Sixth Circuit Court of Appeals, considering another BFOQ argument in the prison employment context, explicitly accepted as legal precedent the Supreme

Court's understanding of woman as creating an incitement to rape in incarcerated men. The Circuit Court then expanded the category of men that womanhood incites to rape: from incarcerated men to potentially any man. Basing its understanding of men who commit sex crimes on latent-infirmities language from age-discrimination cases, the court views men as potentially carrying a latent trait that prevents them from withstanding woman's incitement to rape. This flawed man, like woman, is unable to control the reactions and actions of his body.

After a series of highly publicized allegations and litigation concerning guard sexual abuse of female inmates, the MDOC changed course in its employment policies, limiting corrections officer positions in the housing units of female prisons to women-only positions. The male guards who held those jobs challenged the new policies in court, asserting a disparate treatment claim. The MDOC defended asserting the BFOQ. In district court, the male corrections officers won. *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 804 (E.D. Mich. 2002). The district court found that "[t]here has simply been no showing that there is reasonable cause to find that all, or substantially all, males are not able to perform safely and efficiently the duties of a CO [correction officer] and RUO [residential unit officer] in the housing units in the female prisons." *Id.* at 895. MDOC appealed to the Sixth Circuit Court of Appeals.

Because male prison guards had worked in CO and RUO positions in the housing units of women's prisons for years prior to MDOC's change in policy, the Sixth Circuit Court of Appeals did not address the first component of the BFOQ test, the duties of the job involved. Instead, the Court focused on the second and third components of the first prong of the BFOQ exception. As noted previously, these elements have been variously described as a finding that "substantially all [members of one gender] would be unable to perform safely and efficiently the duties of the job involved," *id.* at 748 (citing *Int'l Union v. Johnson Controls*, 499 U.S. 187, 207 (1991)), or that "it is impossible or highly impractical to determine on an individual basis the fitness for employment of members of one gender," *Everson*, 391 F.3d at 748–49 (citing *Harris v. Pan Am. World Airways Inc.*, 649 F.2d 670, 676 (9th Cir. 1980)). It is important to note once again that this determination of the impracticability of finding individual members of one gender fit for particular employment is, ostensibly, a factual assessment and must not be based on stereotypes. *Dothard*, 433 U.S. at 334. The *Everson* court had to determine if, as a matter of fact, the very gender of the individual disqualified men from employment in the housing units of female prisons.

The *Everson* court's first step in making its factual assessment of whether it is "impractical to determine on an individual basis the fitness for employment" of men as COs and RUOs in Michigan's female correctional facilities was to follow the theory of gender set out in *Dothard* as precedent. *Everson*, 391 F.3d at 755. In fact, the *Everson* court specifically cited the following language from *Dothard*:

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 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 responsibility. *Id.* at 755 (citing *Dothard*, 433 U.S. at 336).

Here the *Everson* court explicitly accepted the construction of gender as laid out by the Supreme Court in the *Dothard* case as relevant legal precedent. But should it? Remember that in *Dothard*, the Supreme Court created an understanding of womanhood by comparing an undifferentiated category that it labeled "woman" to the very narrow category of incarcerated men. This notion of woman was entirely derivative. The category of woman was meaningful only in the reaction that it caused in incarcerated men. Remove incarcerated men, and the Supreme Court in *Dothard* was silent as to the nature of woman.

For the *Dothard* theory of womanhood to apply to the *Everson* facts, the Court of Appeals must take a second step. The Sixth Circuit Court of Appeals takes a contingent notion of womanhood from *Dothard* as precedent and then makes the notion unconditional. It does this by determining that some quantity of men who are not incarcerated are induced to rape when in the presence of womanhood. Specifically, the *Everson* court found that

some male officers possess a trait precluding safe and efficient job performance—a proclivity for sexually abusive conduct—that cannot be ascertained by means other than knowledge of the officer's gender, and thus gender [is] a legitimate proxy for a safety-related job qualification. *Everson*, 391 F.3d at 755.

The combination of the *Dothard* notion of woman with the *Everson* notion of man creates a womanhood (the nature to induce rape) that is fixed, no longer contingent, and completely embodied. In *Dothard*, womanhood was defined, only when in the presence of incarcerated men (or men denied a "natural heterosexual outlet"), by the relationship of the female body to the reactions it produced in incarcerated male bodies. Here, womanhood is always reduced to the body: a body that constantly acts as an emitter sending out inducements to rape. With the Sixth Circuit, all men hear the message and any one of them may, if they possess the proclivity, violently take sex that was consensually denied.

In terms of the BFOQ, the *Everson* situation is the flip side of *Dothard*. In *Dothard* women's exclusion from employment was not solely based on their potential to be victims of sex crimes. Similarly, men in *Everson* are not excluded from employment simply because any one of them might commit a sex crime. There is nothing inherent in a man's potential to engage in criminal conduct that would indicate that he cannot perform the job duties of a prison guard to the requisite standard of proficiency and safety as required to defeat a BFOQ. To reach this conclusion, the Court took a further step. The *Everson* court construed abstention from engaging in sexually abusive conduct—that is, abstaining from criminal activity—as a job skill. This is particularly interesting. Clean criminal records are required for certain positions, but this requirement is typically framed as a job prerequisite. You must show that you

have not engaged in prohibited conduct in the past to be eligible for the position. Further, many workplaces have employment policies that prohibit certain conduct. These policies, however, are proscriptive. They can be invoked after an incident that violates the policy has occurred. Here, the Court of Appeals has determined that job eligibility is based on demonstrating that you are sufficiently skilled in not committing future conduct. How do you prove that you won't do something?

This reasoning was clearly a surprise to MDOC, which, proceeding under the traditional requirements of a BFOQ safety argument, presented expert testimony to prove that hiring men to work in the housing units was factually unsafe. *Everson v. Mich. Dep't Corr.*, 222 F. Supp. 2d at 882. In an attempt to meet its explicit burden under the BFOQ, MDOC presented the long history of MDOC's problems with sexual abuse of prisoners in Michigan's female prison facilities. This argument was somewhat circular. Evidence presented demonstrated that MDOC condoned the sexual abuse of female inmates by prison guards for years. *Everson*, 391 F.3d at 741. Having created a work environment that at the very least tolerated, if not encouraged, the commission of sex crimes, MDOC now argued that the culture of sexual violence against inmates that they had institutionalized was evidence that male employees could not refrain from engaging in the tolerated practice of victimizing the inmates. *See id.* at 754–55.

This argument is even more specious when it is realized that MDOC failed to engage in basic screening of applicants for prison guard positions, which could detect if male applicants had previously engaged in criminal conduct. *Id.* at 742. Use of criminal history and psychological testing for prospective law enforcement or other safety sensitive positions are generally lawful, and were a required component of MDOC's settlement of previous lawsuits regarding conditions in its women's facilities, *Everson*, 391 F.3d at 742.⁴ MDOC's complete failure to screen job candidates for criminal background or psychological fitness (and hence its failure to comply with terms of the settlement of the prior court case) does not logically equate to the impossibility of such screening. These sorts of tests help reduce the likelihood that employees with specific, state-sanctioned power (police officers, prison guards, and so on) will engage in misconduct by assessing psychological stability, by forecasting future behavior.

The Sixth Circuit Court of Appeals rejected testing as a means of forecasting future behavior as insufficient. *Everson*, 391 F.3d at 756. However, the Court's construction of abstention from the commission of a sex crime as a job duty meant that the employees in the case must point to some test that they and prospective employees could take to demonstrate that they would not engage in rape—not merely that it was unlikely that they would do so. Rebuttal of the BFOQ affirmative defense requires that employees be able to perform the necessary job duties with the requisite level of proficiency and efficiency. *Dothard*, 433 U.S. at 323–26. If abstaining from sexual abuse of female inmates is a job skill, then the male claimants had to point to some assessment that could determine conclusively whether they would engage in future criminal conduct or concede the Court's argument that such an assessment was impracticable. Ultimately, the Court found that pre-employment screening and

psychological testing, “[g]iven its speculative value ... does not qualify as a reasonable alternative to gender-specific assignments.” *Everson*, 391 F.3d at 756. Instead, the Court determined that abstention from sexually abusing the prisoners was a job duty and that no test could determine if a male could perform this duty with the required level of proficiency and safety.

This determination by the Court ignored the evidence that 10% of the acts of sexual violence against female inmates were actually perpetrated by female guards. *Id.* at 755. Using the Court’s own argument that the proclivity for engaging in sexually abusive misconduct is unascertainable, the fact that this trait is possessed by both sexes poses something of a problem in terms of employment in the housing units of Michigan’s female prison facilities. If both men and women, as categories, must be excluded from working as prison guards in the housing units of female prisons because there is no way to know which guards will sexually abuse the prisoners, then the state of Michigan will find itself in a conundrum. A BFOQ analysis, which disqualifies all humans from employment, suggests that some aspect of the analysis has gone awry.

Even restricting this analysis to men, the court cannot truly mean that as a matter of employment law, the impossibility of determining which male may commit a sex crime at work in the future disqualifies all men from working as prison guards in female prison facilities. If this were the case, any employer should be able to assert a legitimate BFOQ disqualifying men from all prison guard positions within female facilities and not just those jobs in the housing unit. For that matter, if men can be excluded from employment based on the potential to commit rape in the future, then an employer should be able to assert a BFOQ disqualifying males from any position in which a male employee might come into contact with women.

At first blush, the construction of gender in *Everson* would seem to support just such an argument. The *Everson* court’s notion of the impracticability of determining which man will commit a sex crime extends *Dothard*’s construction of rape normality. Rape is no longer restricted to men “deprived of a normal heterosexual environment.” The male prison guards in *Everson* are free men, not inmates. However, according to the *Everson* court, gender alone, the mere fact of being a man, renders it impossible to determine if a male will engage in sexual violence against women and thus all men are excluded from the prison guard positions in question. *Id.* at 755. Thus, *Everson* extends the notion of male rape normality to include all men.

The *Everson* court’s support of the notion of rape normality, however, is not sufficient to understand the limited holding of the case. *Everson* does not hold that men cannot serve as prison guards in a female prison but rather that men cannot serve as prison guards in the *housing unit* of a female prison. *Id.* at 761. That men may commit sex crimes, then, is not sufficient to disqualify men from working as prison guards in the housing units of female prisons.

Having determined that maleness is a legitimate indicator of a proclivity for the commission of a sex crime, the *Everson* court narrowed its gender analysis by arguing that the CU and RUO positions—the housing unit positions—are unique in the prison setting because they put male officers in contact with naked female bodies. The Court holds that there is therefore a uniqueness to the housing unit work

environment for male employees by an analysis of women inmates' feelings about their bodies. "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Id.* at 757 (citing *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)). The Court further found that "most people have a special sense of privacy in their genitals" and that state prisoners, while having a diminished right to privacy, retain the right not to be "forced unnecessarily to expose their bodies to guards of the opposite sex." *Everson*, 391 F.3d at 757.

Through this discussion, the court placed a qualifier on its holding that maleness (or manhood) is a proxy for engaging in sexual abuse of women. It is not that men, in the absence of visible deterrents, rape women, as was the case in *Dothard*. The *Everson* court held that some men in the absence of visible deterrents and when confronted with the naked female body rape women. The court conceives of the "proclivity of sexually abusive conduct" as latent, a hidden infirmity that when revealed will have catastrophic results.

This notion of latent infirmity is derived from cases that apply the BFOQ defense in age-discrimination cases. For example, in *Usery v. Tamiami Trail Tours Inc.*, 531 F.2d 224 (5th Cir. 1976), the Court held that an employer could support an age-exclusionary BFOQ by presenting expert testimony that "certain physiological and psychological changes that accompany the aging process decrease the person's ability to drive safely and ... even the most refined examinations cannot detect all of these changes." *Id.* at 237. Similarly, in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), the Supreme Court found that an "employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical to deal with older employees on an individualized basis.'" *Id.* at 414.

The *Everson* court transfers the analysis of the BFOQ from the age context and determines that, analogously, "gender was a 'legitimate proxy' for a safety related job qualification." *Everson*, 391 F.3d at 755. To be clear, what the court has done is determine that physical and psychological changes that are part of the aging process are analogous to male commission of sex crimes against women. Ultimately, the *Everson* court creates a theory of gender in which men who are denied consensual heterosexual sex (that is, those who are incarcerated) or those who possess the latent trait for the sexual abuse of women are flawed men, men with an infirmity who do not fully exhibit manhood.

This latent infirmity, this flaw, is exposed when a susceptible man is exposed to the nude female body. The Court, extremely concerned about the forced exposure of the female body, seems to conflate, in the prison context, which party is being "forced." Ultimately, the forced exposure that MDOC sought to protect against and that the Court upheld is the "forced" exposure of male guards to the naked female inmate body and whatever negative consequences that that may involve for the men. *Everson*, 391 F.3d at 754. The Court noted the testimony of a correctional consultant that "staff may feel reluctant, particularly male staff, to view females in a state of

undress, in the use of toilet facilities, in dressing, and other kinds of situations, they may reluctantly, not pursue vigorously their supervision requirements because of the natural reluctance to not do that.” *Id.*

It is this reluctance of men to be forced to witness the naked female body and its powers to incite rape and thus reveal the flaw in their manhood that the Court ultimately found excluded men from CO and RUO positions in the housing units of MDOC women’s facilities. “[A] basis in fact exists ... that allegations of sexual abuse engender hesitancy in male officers and mistrust between inmates and guards, and thus the ‘very manhood’ of male COs and RUOs undermines their capacity to provide security.” *Id.* at 755.

According to the Court, then, true manhood involves at least the ability to survey the naked female body without compelled reaction. Following this, the Court seems to suggest that men have an awareness of their potential to be flawed, not fully actualized men—men who could not gaze upon womanhood without a compulsion to commit a sex crime. Manhood in this conception thus also incorporates a desire to protect itself from the potential unmaning that womanhood represents. Ultimately, it is this agency, this conscious desire to withstand womanhood (a consciousness that is absent in womanhood) that the Court sees as the true essence of manhood. It is this aspect of manhood, the desire to protect itself against the unmaning that results in sexual abuse, that the Court finds renders men unqualified for the job. The desire to protect their manhood from the unwanted incitement of womanhood created a hesitancy that precluded men from carrying out the duties of prison guard in the female housing unit with the necessary level of proficiency and safety.

In *Dothard* then, the Supreme Court of the United States created a theory of gender that holds that womanhood is defined by an essence that incites men, denied heterosexual outlet, to rape women. Twenty-five years later, the Sixth Circuit Court of Appeals expanded this understanding of gender. The expanded notion of gender adopts the Supreme Court’s definition of womanhood and expands the category of men affected by womanhood to include not just incarcerated men, but potentially any man with an innate proclivity to be so affected.

A PROBLEM BEYOND EQUAL EMPLOYMENT

Before talking about what this theory of gender does and how it operates, it’s important to flesh out one thing that it is not. This particular structuring of gender theory, while very bad, does not pit differing feminist issues against one another. The issue in the *Everson* case was not a question of whether the women in Michigan’s correctional facilities needed and deserved immediate relief from an unacceptable and unconscionable atmosphere of sexual torture. As the Sixth Circuit Court of Appeals noted, “no amount of sexual abuse is acceptable” *Everson*, 391 F.3d at 756. However, because of the appalling conditions for women in the MDOC system, some feminists have posited that *Everson* creates an inherent conflict for feminists, pitting the desire for women’s equal employment opportunities, on the one hand, against women’s

rights to be free from sexual coercion and violence, on the other. Ashlie Case, Case Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & Feminism 309 (2005).

This position is something of a false start. The American legal system's approach to equality is one of negative freedom, a removal of barriers such that like things are treated like. In the cases flowing from *Dothard*, like *Everson*, which hold that women are uniquely and specially qualified for certain prison guard positions in women's prisons, there is no impediment to women holding those prison guard jobs; rather, the limitation in those cases is on men. Men, because of their manhood, are disqualified from certain employment. Thus, far from pitting groups of feminists against one another, cases such as *Everson* create a conflict between men's rights to equality of employment opportunity and women's rights to freedom from sexual coercion and violence. Even this realization, however, is in some sense missing the point.

The real consequence in *Everson* is that the Sixth Circuit Court of Appeals, building on a more limited idea developed by the Supreme Court, has created a unified theory of gender that finds women and men not only different but unequal. Only men have the potential to be rational agents. Only men are self-aware actors. Manhood, even as it expresses itself in flawed men—those with a latent proclivity for sexually abusing women—is fearful of womanhood and the potential unmaning loss of rationality that woman represents. Womanhood, however, is merely a sexualized body, unaware of and unable to control the effect that that body has on men. The Court did not indicate whether women possess rationality, because under the court's theory, that characteristic doesn't matter to womanhood. In this construction of gender all that matters is how men react to women, that is, the constant potential that manhood will be undermined by woman. Woman can destroy man. Man can only attack the female body and thus underscore the ability of woman to elicit uncontrollable action in the flawed man. Manhood then is constantly in jeopardy. The court in *Everson* seemingly acts to shore it up.

If *Everson* were one outlier case, in which a Circuit Court of Appeals just got it wrong, it would still be important to discuss this particular construction of gender. However, this construction is not a new construction of gender but a variation on a theme. It's the flip side of protecting women from men's vulgarity: protecting men from women's sensuality. When pushed on why women shouldn't serve in combat, this fear of woman's sex appears either as diverting focus from our male (legitimate?) combat troops or as an additional vulnerability that somehow only female soldiers would face when captured by the other. It's the "she asked for it" defense to rape because by definition a woman is always asking for it.

The suggestion is not that the Sixth Circuit Court of Appeals is somehow special in its approach to gender. Rather, this particular construction of gender is prevalent in our culture. It's easy to see it in a case like *Everson* because the BFOQ exception to equal employment requires an explanation of the basis on which the exception is founded. Here, with the BFOQ test, one can see more clearly that this theory explicitly posits men and women as different and therefore unequal. The BFOQ, however, should not be the exception that swallows the rule. Each and every time this

construction of gender appears, it must be challenged and its blatant anti-woman stance revealed.

Again, even if *Everson* were one outlier case, it still deserves vigorous discussion to ensure that the abandonment of the actual BFOQ test is not repeated, that Title VII is not under attack by a rejection of its very statement of purpose.

Everson, however, is not one outlier case. Its significance is in the way it unmasks this prevalent theory of gender that runs through American case law, making it easy to see, because of the way the court is using it, in the BFOQ and cross-gender prison guard context. In fact, *Everson* isn't even the only prison-guard case to use the particular theory of gender that it lays out. In 2009, a district court in Nevada determined that prison officials had allowed guard sexual abuse of female prisoners at the Southern Nevada Women's Correctional Facility (SNWCF). *Breiner v. Nev. Dep't Corr.*, No. 2:05-cv-01412-KJD-RJJ, 2009 WL 367501, *5 (D. Nev. Feb. 9, 2009).⁵ Despite evidence of extreme malfeasance on the part of prison administrators, the court in *Breiner*, like that in *Dothard* and *Everson*, put the blame for sexual misconduct squarely on gender. *Id.* at *5-6. Quoting *Everson*, the *Breiner* court determined that the abuse of women by male guards at SNWCF indicated that "some male officers possess a trait precluding safe and efficient job performance ... a proclivity for sexually abusive conduct... that cannot be ascertained by means other than the knowledge of the officer's gender." *Id.* at *6. Rather than addressing the employment policies, supervision problems, and so on that in part created and condoned an unsafe prison, the court in *Breiner*, like that in *Dothard* and *Everson* before it, falls back on gender stereotypes to explain and "address" the issue of sexual abuse.

The construction of gender that allows for male rationality but not female rationality is an attack on Title VII and on women's attempts to gain equality under the law because this understanding of gender posits men and women not as simply different in degree but different in kind. There is no issue of relevant sameness such that men and women would be entitled to the same rights under the law. Women are different from, and a threat to, men. Although the cases discussed in this article have limited their scope of application of essential gender difference to the support of a separate-spheres construction in some prison facilities, the implication of this theory is immense. This notion and its underlying components (the excuse of latent male proclivity for sexual abuse, hetero-normativity, abstention from the commission of a sex crime as job skill, and female lack of agency) must be rejected to move the cause for women and women's equality under the law forward.

NOTES

The opinions and ideas expressed in this article are those of the author, and do not necessarily reflect the viewpoint of the Equal Employment Opportunity Commission or of the United States.

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1. Throughout this paper I use variations on the phrase “court-created theories of gender.” I use this phrase as an allusion to the concept of judicial notice. In litigation, courts are typically limited with regard to the “facts” that they can consider to those that were presented by the parties to the litigation. A court may take “judicial notice,” acceptance of the truth of facts without evidence presented by a party to establish the fact, when the truth of the fact is “not subject to reasonable dispute.” Federal Rule of Evidence 201. In the cases discussed in this paper, the courts arguably accepted as true “facts” about gender for which no party to the litigation presented evidence (or a party presented only opinion testimony) and that are definitely disputed. In a loose sense, the courts “created” theories of gender by bringing them into existence in a particular legal context.

2. The argument in this paper is not that any particular judge or panel of judges operated with an articulated theory of gender, which they applied to the facts in the cases discussed in this paper. Nor is the argument that any given court used the facts in the case before it as a means to develop and express a unique theory of gender. However, a judge, like any other human in our culture, does have an implicit understanding about gender that, when the case calls for such a determination, will impact the legal analysis of a case. In this sense, the judges in question here are not explicitly theorizing gender, but are nonetheless implicitly both employing and deploying theories of gender.

3. Notice that the employer, without explicitly laying out the argument, has asserted that “attracting and entertaining male passengers” requires an *authentic* woman, thus making assumptions about the heterosexuality of their male passengers and that substantially all men could not attract or entertain other men. Even assuming the heterosexuality of the male passengers, if the airline was not providing sex services what difference would it make if the entertainment were authentically female?

4. See *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (refusal to hire applicants into safety-sensitive positions or to terminate employees in those positions who had a history of participation in methadone treatment plans—and thus a history of heroin use—found not to violate Title VII); *Koch v. Stanard*, No. 90-c-5431, 1991 WL 36714 (*Affirmed Koch v. Standard*, 962 F.2d 605, 607 (7th Cir. 1992)(police officer applicants disqualified on basis of psychological examination results failed to demonstrate a denial of due process).

5. In 2010, this case was overturned by the Ninth Circuit Court of Appeals. *Breiner v. Nev. Dep’t of Corr.*, 610 F.3d 1202 (9th Cir. 2010). Initially, the Court seems to completely repudiate the very gender construction that was used in *Dothard*, *Everson*, and *Breiner*. “Disturbingly, in suggesting that all men are inherently apt to sexually abuse, or condone sexual abuse, of female inmates, NDOC relies on entirely specious gender stereotypes that have no place in a workplace governed by Title VII.” *Breiner*, 610 F.3d at 1215. This would seem to be a strong statement against the pernicious and tenacious sex stereotypes discussed in this case. Unfortunately, the Ninth Circuit Court of Appeals ultimately concludes that “[r]estricting employment opportunity on the basis of gender can be

justified by the need to counter uncontrollably violent inmate behavior, as in *Dothard*.” *Breiner*, 610 F.3d at 1216. Here, the Court fails to recognize that the “uncontrollable violent inmate behavior” that the Supreme Court sought to counter in *Dothard* was, according to the Supreme Court, *caused* by the gender category of woman. While castigating the district court for utilizing specious gender stereotypes, the Ninth Circuit Court of Appeals has done little to challenge the stereotype and instead offered employers the “correct” argument to use if they seek to justify the application of such stereotypes in their employment policies.

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