TITLE VII'S LIMITS: INVESTIGATING COURTS' TREATMENT OF THE SEX-BASED BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

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Abstract

Gender-based discrimination in employment is presumptively illegal. However, employers can discriminate on the basis of gender if they prove to a court that "sex" is a bona fide occupational qualification ("BFOQ") "reasonably necessary to the normal operation of that particular business or enterprise." Some positions that warrant gender-based BFOQs include prison guards, nurses, actors, and even servers at Hooters. As a concession to gender discrimination, however, the BFOQ defense presents critical questions for the scope of gender equality in the twenty-first century more broadly. What kinds of gendered differences should the state endorse? What BFOQs are unavoidable? In this paper, I seek to answer these questions and more by investigating how modern courts treat cases involving BFOQs. I ultimately argue that the current BFOQ doctrinal landscape creates a problematic status quo bias that enshrines outdated notions of gender in the law and prevents our collective conceptions of gender's meaning from evolving.

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Introduction

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex.[1] In excluding consideration of gender from all aspects of employment,[2] Title VII aspires to a more gender-equal world of employment. In accordance with Title VII's aspirations, courts have expanded the law's applicability in recent years: along with banning outright exclusion of women from the workplace, the law prohibits discrimination on the basis of sexual orientation[3] as well as sexual harassment at work.[4] This gradual expansion of Title VII's applicability reflects its equality aspirations.

Despite its potential to remove inequality from the workplace, Title VII contains an important exception: employers may discriminate on the basis of sex if it is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[5] As a complete defense to a finding of discrimination against an employer, the bona fide occupational qualification ("BFOQ") carve-out threatens to undermine Title VII's equality promise. Recognizing that a broad BFOQ would nullify Title VII's discrimination prohibition, courts have consistently demanded that

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[1] In relevant part, Title VII declares "[i]t shall be an unlawful employment practice for an employer . . . 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." 42 U.S.C. § 2000e-2(a).

[2] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) ("[G]ender must be irrelevant to employment decisions.").

[3] *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020). In *Bostock*, for the first time, the Supreme Court recognized that Title VII's prohibition on discrimination "because of . . . sex" applied to sexual orientation. *Id.* at 1731.

[4] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (recognizing for the first time that "terms, conditions, or privileges of employment," within the text of Title VII, encompassed as a cognizable harm a hostile work environment created by sexual harassment); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (holding that same-sex sexual harassment in the workplace could give rise to a Title VII claim). Title VII also prohibits gender stereotyping in employment decisions as part of its prohibition on discrimination because of sex. *Price Waterhouse*, 490 U.S. at 251 ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting City of L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707, n.13 (1978))).

[5] 42 U.S.C. § 2000e-2(e).

BFOQ exceptions be construed narrowly.[6] Nonetheless, BFOQs theoretically allow employers to discriminate without liability.

The BFOQ defense raises critical gender equality questions. For instance, courts universally prescribe that gender stereotyping cannot justify a lawful BFOQ.[7] However, distinguishing between gender-stereotyping BFOQs[8] and permissible BFOQs (those that rely on factual or sufficiently narrow generalizations) is often difficult or impossible. What kinds of "real differences" in gender does and should the state endorse?[9] Who should decide those questions and how? How can Title VII's anti-discrimination demand and the BFOQ carve-out coexist?[10]

These issues have real stakes. Discrimination carries dignitary harms, and gender-based employment can result in unequal workplace opportunities. Furthermore, the BFOQ fundamentally sees gender as binary and often makes heteronormative assumptions. As our understandings of gender evolve, the BFOQ threatens to lag employment law behind social reality.

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[6] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 333–34 (1977) (declaring the BFOQ to be "only the narrowest of exceptions"); Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly."); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971) ("[W]e feel . . . that it would be totally anomalous to [construe the BFOQ] in a manner that would, in effect, permit the exception to swallow the rule."); Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) ("Construed that broadly, the [BFOQ] exception will swallow the rule.").

[7] *See, e.g.*, *Dothard*, 433 U.S. at 334–35 ("[T]he federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.").

[8] For purposes of this paper, I define gender stereotyping as overly broad generalizations about differences between individuals of different genders.

[9] "Real differences" describes the concept in American sex-discrimination jurisprudence that allows for "biologically rationalized sex discrimination." Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 Yale L.J. 1065, 1071–72 (2023). Real differences "include pregnancy and birth, body parts (like breasts), strength and stature, violence, athletic ability, parental bonding, parental identification, and some parental responsibilities, both before and after a child is born. If a law treats women and men differently because of those differences, it is usually upheld on the ground that biology is real, as opposed to being a stereotype or a manifestation of bigotry." *Id.*

[10] For instance, one BFOQ of frequent interest is that of the infamous "Hooters" restaurant chain. Hooters hires primarily women for its waitstaff positions. Hooters argues that it should be able to exclude men because being a woman is a bona fide occupational qualification for the position of a "Hooters Girl," as sex appeal is part of its business. *See* Latuga v. Hooters, No. 93 C 7709, 1996 WL 164427, at *3, 9 (N.D. Ill. Mar. 29, 1996) (certifying a class action lawsuit against Hooters for gender discrimination); *see also Join the Ranks of the World-Famous Hooters Girls*, Hooters https://www.hooters.com/hooters-girls/ [https://perma.cc/WD9G-GG3U]. It appears that no court has ruled authoritatively on whether or not Hooters qualifies for a BFOQ, although in 1997 Hooters settled a lawsuit filed by men denied employment. *Hooters Settles Suit by Men Denied Jobs*, N.Y. Times (Oct. 1, 1997); *See* Kimberly Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 Calif. L. Rev. 147, 204 (2004) (discussing the merits of Hooters's BFOQ defense). *See generally* Ayesha Battacharya & Shruti Mishra, *Appearance Based Hiring: The 'Bona Fide Occupational Qualification' Carveout, Exploring Hooters of America and* Air India v. Nargesh Meerza, 24 Geo. J. Gender & L. 35 (2022) (discussing the Hooters case).

Other authors have tackled these questions. For instance, some have noted that lawful BFOQs are often based in gender stereotyping.[11] Others argue that privacy-based BFOQs are disguised customer preference.[12] Building on these works, I seek to highlight how courts determine what is a valid gender-based BFOQ, a task with which I argue courts struggle. I make the case that the current BFOQ doctrine invites a problematic status quo bias and that legislative guidance is necessary to implement Title VII's anti-discrimination mandate.

Importantly, a BFOQ is an affirmative defense to a finding of discrimination on the basis of sex[13] in violation of Title VII.[14] This means that a BFOQ defense becomes relevant only upon a finding of discrimination (often taking the form of disparate treatment),[15] which is a high bar.[16] However, once that bar has been reached, a BFOQ showing is the employer's burden.[17] Most BFOQ cases proceed from official policies that mandate gender-based hiring or staffing.[18]

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[11] *See, e.g.*, Katie Manley, Note, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 Duke J. Gender L. & Pol'y 169, 176–82 (2009); Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion to Intentional Sex Discrimination*, 12 Colum. J. Gender & L. 77, 77–78 (2003); Suzanne Wilhelm, *Perpetuating Stereotypical Views of Women: The Bona Fide Occupational Qualification*, 28 Women's Rts. L. Rep. 73, 75 (2007).

[12] *See* Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 Yale L.J. 1257, 1259 (2003); Deborah Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 Fordham L. Rev. 327, 332–33 (1985); *but see* Rachel Cantor, Comment, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. Chi. Legal F. 493, 515–516 (1999).

[13] A note on terminology is warranted. While gender equality jurisprudence and legislation use the term "sex," I find "gender" is a more appropriate term because "sex" evokes a biological dichotomy, whereas gender is more flexible. *See* Carolyn M. Mazure, *What Do We Mean By Sex and Gender?* Yale Sch. of Med. (Sept. 19, 2021), https://medicine.yale.edu/news-article/what-do-we-mean-by-sex-and-gender/ [https://perma.cc/6D44-E2ZE]. As such, in this paper I use "gender," unless I am quoting or describing a legal dynamic that requires a direct evocation using "sex."

[14] Stephen F. Befort, *BFOQ Revisited:* Johnson Controls *Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 Ohio St. L.J. 5, 10 (1991).

[15] "Disparate treatment" is the practice "of intentionally dealing with persons differently" on account of gender. *Disparate Treatment*, Black's Law Dictionary (11th ed. 2019). Disparate treatment discrimination is often understood in contrast to "disparate impact" discrimination, which describes facially neutral practices that nonetheless discriminate on the basis of gender. *See Disparate Impact*, Black's Law Dictionary (11th ed. 2019).

[16] *See generally* Int'l Union v. Johnson Controls, 499 U.S. 187, 197–200 (1991) (finding disparate treatment before proceeding to BFOQ analysis). *See also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (proceeding to BFOQ after employer admitted discrimination); Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 293 (N.D. Tex. 1981) (same); Million v. Warren County, 440 F. Supp. 3d 859, 869 (S.D. Ohio 2020) (finding facially discriminatory policy "evidence of discrimination that violates Title VII's prohibition against disparate treatment"); DeVooght v. City of Warren, No. 20-CV-10812, 2020 WL 6708845, at *4 (E.D. Mich. Nov. 16, 2020) (same).

[17] *See Affirmative Defense*, Black's Law Dictionary (11th ed. 2019); *See also* Befort, *supra* note 14, at 10 (explaining how the affirmative defense concept applies to bona fide occupational qualifications).

[18] *But see infra* Section II.E.2.

In general, when employers assert a BFOQ defense to discrimination claims, courts require employers to show a combination of the following: (1) hiring individuals of one gender relates to the "essence" or "central mission" of the employer's business; (2) the BFOQ relates to an employee's ability to do the job or "job-related skills and aptitudes;" (3) the employer has a "basis in fact" for its determination that gender discrimination is "reasonably necessary," or "all or nearly all [members of one sex] lack the qualification;" or (4) the employer has no reasonable alternatives to gender discrimination.

These factors lack clarity. How can an employer demonstrate the "essence" of their business if stereotyping and customer preference considerations are impermissible? What would constitute a "basis in fact" to support a BFOQ? Predictably, courts struggle to consistently implement these factors and draw the line between impermissible and permissible BFOQs. Instead, courts operationalize the doctrine by relying on common sense, requiring empirical evidence to support a BFOQ, or—in the common case of a prison citing a BFOQ defense—deferring to prison administrators.[19] In yet other cases, courts venture outside the bounds of the BFOQ doctrine by allowing customer preference, technically an impermissible factor in BFOQ analyses, to creep in.[20] Further, courts manipulate burden-shifting regimes—placing additional burdens on plaintiffs, even though the BFOQ is the defendant's burden.[21]

This landscape is an ineffective and undesirable mechanism of gender construction because it invites a status quo bias, enshrining outdated generalizations about gendered behavior and capability in employment discrimination doctrine. First, using "common sense," customer preference, and deference to justify BFOQs allow individuals' status quo notions of gender to seep into employment discrimination law. Second, burden-shifting mechanisms that weigh on plaintiffs are biased toward the status quo because they require a plaintiff to justify why an employer should change its policies, instead of requiring the employer to change their policies, absent some special justification. Additional legislative guidance—clarifying the BFOQ exception's language to specify positions that might qualify for a BFOQ defense and how courts should analyze BFOQs—may help courts parse through precisely what the BFOQ allows.

This piece proceeds in four parts. Part I outlines relevant Title VII and BFOQ history to showcase Title VII's vision for employment law and how that vision began to be diminished by the BFOQ in its early years. Part II discusses the various factors judges tend to rely on when determining whether an employer is entitled to the BFOQ, highlighting courts' reliance on "common sense," deference, and empirics in some cases and burden-shifting and customer preference in others. In Part III, I critique this landscape, arguing that it creates a status quo bias that conflicts with Title VII's

[19] *See infra* Sections II.A, II.B, and II.C.
[20] *See infra* Section II.D.
[21] *See infra* Section II.E.

basic mandate. In Part IV, I offer legislative action as a potential solution to this unpredictable and problematic landscape for effectuating gender equality in the workplace.

I. The BFOQ Defense's Early Years

To contextualize the modern BFOQ, I outline in this section how interpretations of the BFOQ defense in Title VII's early years demonstrate that the public, courts, and the Equal Employment Opportunity Commission (hereinafter "EEOC") were unwilling to implement, and sometimes hostile to, Title VII's promise of substantive equality.[22] And, in the first case considering a BFOQ, the U.S. Supreme Court failed to engage rigorously with the issues posed, instead allowing generalizations to justify gender discrimination in employment.[23]

A. The Public

In the midst of Title VII's passage, the public was hostile toward Title VII's gender equality mandate. In particular, newspaper articles surrounding Title VII's passage in 1965 showcased the "bunny problem": "[a]n extreme example of what might happen under the new Federal law banning discrimination in employment on the basis of race, color, sex or national origin – that is, a male applying for a job as a 'bunny' in a Playboy club."[24] To these concerned authors, complete gender equality in the workplace would lead to an "absurd" result: male strippers.[25]

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[22] Interestingly, many scholars and courts alike characterize the prohibition on gender discrimination in employment as entering Title VII by accident, or as an attempt to "derail" the law. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–64 (noting the dearth of legislative history around Title VII's inclusion of "sex"); Manley, *supra* note 11, at 171 (incorporating the "sabotage" theory of the inclusion of "sex" in Title VII). This so-called "conventional wisdom" both contributes to and reflects misgivings about Title VII's gender equality mandate. And it is beginning to be challenged. *See generally* Rachel Osterman, Comment, *Origins of a Myth; Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 Yale J.L. & Feminism 410 (2016) (explaining the "accident theory" of the inclusion of "sex" in Title VII, as well as its history, uses, and flaws).

[23] *See infra* Section I.C.

[24] John Herberts, *For Instance, Can She Pitch for the Mets?*, N.Y. Times (Aug. 20, 1965). *See generally* Brief of Historians as Amici Curiae in Support of Employees, *Bostock v. Clayton County*, 590 U.S. 644 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915044 (providing an account of Title VII's public perception in its early years).

[25] Importantly, however, these concerns were not universal; one letter to the editor responded to the *New York Times*'s discussion of the "bunny problem" imploring the paper: "[w]e need factual, unbiased treatment of the story of discrimination against the woman worker in man's world of work." *Discrimination Faced by Women Workers*, N.Y. Times (Sept. 3, 1965).

B. The EEOC

Today, the EEOC's guidelines largely mirror court doctrine, reasserting that the BFOQ exception "should be interpreted narrowly"[26] and "comparative employment characteristics of women in general," "stereotyped characterizations of the sexes," or employer, coworker, or customer preferences will not suffice to support a BFOQ.[27] The EEOC, however, was not always so critical of employment discrimination. Remarkably, one year after the landmark civil rights law was passed, the EEOC suggested that Title VII be narrowed in practice. Of import to the EEOC was the reality, indeed one Congress intended the law to change, that "[a]n overly literal interpretation of the prohibition might disrupt longstanding employment practices."[28] The EEOC thus set out to "temper the bare language of [Title VII] with common sense and a sympathetic understanding of the position and needs of women workers."[29] Notably, the EEOC was and is the federal government's primary enforcement agency of federal employment regulations. For the EEOC to be wary of enacting Title VII's "bare language" suggests a broader climate of hostility to gender equality in the workplace.

C. The Courts

Courts, too, were unwilling to enact Title VII's substantive promise. A few early BFOQ cases importantly laid out BFOQ doctrine that still governs today. These cases illustrate the primary difficulties inherent in BFOQ line-drawing that ultimately induce courts to use gender-based generalizations as a crutch to classify employees.

Flight attendant positions were some of the earliest-litigated BFOQs. Fairly easily, courts quickly determined these positions would not qualify.[30] Claims that women were better at the "non-mechanical aspects of the job," such as "providing reassurance to anxious passengers, giving courteous personalized service, and, in general, making flights as pleasurable as possible" would not suffice, primarily because these "non-mechanical" aspects of the job were not "reasonably necessary" to an airline's business.[31] For example, in *Wilson v. Southwest Airlines*, the Northern District of Texas concluded that

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[26] 29 C.F.R. § 1604.2.

[27] *Id.*

[28] Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926, 14,927 (Dec. 2, 1965).

[29] As examples, the EEOC mentioned "minimum wages, premium pay for overtime, rest periods or physical facilities." Guidelines on Discrimination Because of Sex, 30 Fed. Reg. at 14,927. Evidently, the Commission did not see how its own declaration that employers should not base hiring decisions on "stereotyped characterizations of the sexes" conflicted with its endorsement of these state-mandated protections for women. *Id.*

[30] *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971); Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981).

[31] *Diaz*, 442 F.2d at 387–88.

Southwest Airlines could not justify its exclusion of men from flight attendant positions simply by asserting that "its attractive female flight attendants and ticket agents personif[ied] the airline's sexy image and fulfill[ed] its public promise to take passengers skyward with 'love.'"[32] In this way, flight attendant positions are a paradigmatic example of what is *not* a BFOQ.

However, in the same case, the court nonetheless perpetuated limiting views of Title VII's prohibition on gender discrimination, noting that Title VII should not be taken needlessly to "silly extremes":

> This case has serious underpinnings, but it also has disquieting strains. These strains, and they were only that, warn that in our quest for non-racist, non-sexist goals, the demand for equal rights can be pushed to silly extremes. The rule of law in this country is so firmly embedded in our ethical regimen that little can stand up to its force except literalistic insistence upon one's rights. And such inability to absorb the minor indignities suffered daily by us all without running to court may stop it dead in its tracks. We do not have such a case here only warning signs rumbling from the facts.[33]

While plaintiff Gregory Wilson had presented to the court something more than a "minor indignity," the court suggested that his challenge indicated that some plaintiffs may in the future "run[] to court" to vindicate rights to be free from discrimination that the court would deem "silly extremes."[34] Hence, the court expressed some hostility to Title VII's substantive demands and portended the line-drawing difficulties to come: What are the "silly extremes" of claims for gender-equal employment?

Dothard v. Rawlinson[35] illustrates these difficulties. In this 1977 landmark decision, the U.S. Supreme Court upheld an Alabama law explicitly excluding women from certain prison guard positions. In doing so, the Court laid out the doctrine that continues to define BFOQ cases while also failing to satisfactorily address the significant competing interests at stake in BFOQ cases, instead relying on gender stereotyping as a crutch.

Dothard began when the Southern Poverty Law Center ("SPLC") brought a case on behalf of Kim Rawlinson and Brenda Mieth.[36] Brenda Mieth was denied employment as an Alabama state trooper because she was a woman;[37] similarly, Kim Rawlinson was rejected for a position as an Alabama correctional counselor because she did not meet the position's minimum weight requirement.[38] The SPLC challenged the minimum height

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[32] *Sw. Airlines*, 517 F. Supp. at 293.
[33] *Id.* at 304–05.
[34] *Id.*
[35] 433 U.S. 321 (1977).
[36] Gillian Thomas, Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work 32–37 (2016).
[37] *Id.* at 32.
[38] *Id.* at 36.

and weight requirements as carrying a disparate impact on the basis of sex.[39] Alabama subsequently released a new regulation—Regulation 204—that barred women from working in "contact positions"[40] and set criteria for designating certain "contact positions" and "positions requiring continual close physical proximity to inmates" as gender-specific.[41]

The Court determined that the regulation "explicitly discriminate[d] against women on the basis of their sex."[42] In defense, Alabama argued that the Regulation's discrimination on the basis of gender qualified for the BFOQ exception to Title VII liability.[43]

In determining whether being a man was a BFOQ to work in Alabama's prison guard positions, the U.S. Supreme Court imported the legal tests from the Fifth Circuit's decisions in *Weeks v. Southern Bell Telephone and Telegraph Co.*[44] and *Diaz v. Pan American World Airways*,[45] which required an employer to show that "the essence of the business operation would be undermined by not hiring members of one sex exclusively" and that the employer had "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," respectively.[46] The Court, critically, noted that Alabama's BFOQ defense would fail if it was based on "stereotyped characterizations of the sexes."[47]

The district court found Alabama had done what is expressly forbidden: Regulation 204 was based on impermissible stereotype-based assumptions[48] and there "[was] no evidence in the record that a woman cannot perform the duties of a patrol officer."[49] The U.S. Supreme Court, however, disagreed. As to essence, the Court took particular notice of the danger inherent to Alabama's penitentiaries, characterizing them as "peculiarly inhospitable . . . for human

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[39] *Id.* at 40.

[40] *Id.* at 41.

[41] Under Regulation 204, in identifying which "Correctional Counselor I" positions should be designated male-only, Wardens and Directors could evaluate the following factors with respect to each individual position: "A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution. B. That the position would require contact with the inmates of the opposite sex without the presence of others. C. That the position would require patrolling dormitories, restrooms, or showers while in use, frequently, during the day or night. D. That the position would require search of inmates of the opposite sex on a regular basis. E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm." Dothard v. Rawlinson, 433 U.S. 321, 325 n.6 (1977).

[42] *Id.* at 332. Of significance to the Court was the fact that Regulation 204 "exclude[d] women from consideration for approximately 75% of the available correctional counselor jobs in the Alabama prison system." *Id.* at 332 n.16.

[43] *Id.* at 332–37.

[44] 408 F.2d 228 (5th Cir. 1969).

[45] 442 F.2d 385 (5th Cir. 1971).

[46] *Dothard*, 433 U.S. at 333 (quoting *Diaz*, 442 F.2d at 388; *Weeks*, 408 F.2d at 235).

[47] *Id.* at 333–34.

[48] *Id.* at 334. In particular, the district court concluded that the regulation was premised on an assumption that women needed "protection," noting that there "[was] no evidence in the record that a woman cannot perform the duties of a patrol officer." Mieth v. Dothard, 418 F. Supp. 1169, 1180–1181 (M.D. Ala. 1976), *rev'd*, 433 U.S. 321 (1977).

[49] *Mieth*, 418 F. Supp. at 1180–81.

beings of whatever sex" and a "jungle atmosphere" of "rampant violence."[50] In this environment, being a woman correctional counselor threatened the very "essence" of the job—for the Court, prison security—because the presence of women counselors would lead inmates, many of whom were "aggressive" and indeed former sex offenders, to assault the guards.[51] A woman guard's ability to do the job, then, "could be directly reduced by her womanhood."[52]

Further, the Court determined that this reasoning had a "basis in fact," as required by *Weeks*,[53] hypothesizing that, because inmates were "deprived of a *normal heterosexual environment*," they would "assault women guards *because they were women*."[54] The Court, however, failed to cite any factual basis for this hypothesis; it simply provided evidence from the record of two incidents of attacks on women at Alabama prisons (one against a clerical worker and another against a visitor).[55] Nonetheless, the Court concluded that "[t]he employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility,"[56] allowing the restriction to survive under Title VII.

Dothard makes for a deeply unsatisfying basis for BFOQ doctrine. Instead of engaging rigorously with the important and challenging problems the case presented—such as how prisons can adequately protect their guards against assault, how to maintain safety in prisons, and if it is possible to do so without stereotyping on the basis of gender—the Court fell back on gender generalizations. It declined to follow the District Court's decision and determined, without a factual basis, that women guards "would pose a real threat . . . to the basic control of the penitentiary and protection of its inmates."[57] Strikingly absent from the Court's opinion is any discussion of the risk of assault that men might face as Alabama prison guards. If the Court were taking the "basis in fact" requirement of the BFOQ analysis seriously, we might expect to see a rigorous comparison of sexual assault rates among female and male prison guards, or some engagement with Justice Thurgood Marshall's suggestions, in dissent, that an inmate may assault a guard not because they are a woman, but instead because they are a *guard*.[58] Or, the

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[50] *Dothard*, 433 U.S. at 334.

[51] *Id.* at 335–36 (citing expert testimony).

[52] *Id.* at 335.

[53] The Court reasoned: "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.

[54] *Id.* (emphases added).

[55] *Id.* at 335 n.22.

[56] *Id.* at 336.

[57] *Id.*

[58] Dissenting as to the majority's application of the BFOQ exception, Justice Marshall urged the majority to take a more nuanced perspective. He argued that the majority wrongly assumed that women guards would be assaulted because of their gender, assuming that what prison guards use to prevent inmate attacks is both gender and physical strength. Citing expert opinions from the trial court, he reasoned "[n]o prison guard relies primarily on his or her ability to ward off an inmate attack to maintain order. . . . Rather, like all other law enforcement officers, prison guards must rely primarily on the moral authority of their

Court might have also engaged with the "barbaric and inhumane" conditions in Alabama's prisons.[59] Instead, the Court allowed Alabama to use gender stereotyping. Notwithstanding its shortcomings, however, *Dothard* laid out the legal framework under which BFOQ disputes are governed today.

Taken as a whole, the BFOQ's development illustrates our country's collective hesitance toward gender equality. Indeed, the BFOQ's existence suggests gender differences can have an impact in the workplace. Consider, for example, the fact that Congress included a BFOQ exception for discrimination on the basis of gender in Title VII, but not for race.[60] That is, racial discrimination is never permitted; gender discrimination sometimes is. Thus, to Congress, and indeed to our society, gender differences are more real than racial differences, which are agreed to be nonexistent.

II. The BFOQ's Doctrinal Landscape

Part I outlines the BFOQ's early history, as well as the seminal case of *Dothard v. Rawlinson*. In this section, I seek to illuminate how doctrine evolved thereafter. Different jurisdictions assert varying doctrinal requirements employers must meet to establish a BFOQ, but they largely focus on the same themes. The BFOQ defense requires an employer to show that the BFOQ (1) relates to the "essence"[61] of the employer's business, (2) relates to an employee's ability to do the job or "job-related skills and aptitudes,"[62] and (3) the employer has a "basis in fact"[63] for its determination that gender discrimination is "reasonably necessary" or that "all or nearly all [members of one sex] lack the qualification."[64] Some courts also require employers to show they have no reasonable alternatives to gender discrimination,[65] which can include a consideration of the practicability of individualized testing.[66]

While the doctrinal requirements for a court to find a valid BFOQ may seem clear, when put in practice, they are difficult to implement. For instance,

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office and the threat of future punishment for miscreants." *Id.* at 343 (Marshall, J., dissenting in part) (citing *Mieth*, 418 F. Supp. 1169).

[59] To Marshall, the majority ignored that the bona fide occupational qualification only applies to the *normal* operation of a particular business, and the Alabama state penitentiaries at issue were far from normal. *Id.* at 342 (Marshall, J., dissenting).

[60] *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-1982-2, CM-625 Bona Fide Occupational Qualifications (1982) [hereinafter CM-625 Bona Fide Occupational Qualifications] ("[T]he employer may use the BFOQ exception to justify restricting the job in question to members of a particular sex, religion, or national origin (but never to members of a particular race.").

[61] *See, e.g.*, *Dothard*, at 333; Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971). Some courts use "central mission" in place of "essence." *See e.g.*, Everson v. Mich. Dep't of Corr., 391 F.3d 737, 749 (6th Cir. 2004).

[62] Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991).

[63] *See Everson*, 391 F.3d at 748–49.

[64] Breiner v. Nev. Dep't of Corr., 610 F.2d 1202, 1210 (9th Cir. 2010).

[65] *See Everson,* 391 F.3d at 749.

[66] *See Breiner*, 610 F.3d at 1210 (stating that individualized testing refers to screening employees on the basis of criteria other than gender before employing them).

neither the text of Title VII nor these tests firmly establish how a court is to determine the "essence" of a business or when there is a "basis in fact" that nearly all individuals of one gender are incapable of performing a job. Determining whether these requirements have been met without relying on stereotyping or customer preference is challenging for courts. Perhaps not surprisingly, then, judges try to operationalize the BFOQ's factors. In doing so, they rely on common sense, deference to prison administrators, and empirical or objective evidence in BFOQ cases.[67] Sometimes, judges go outside of the bounds of prescribed factors by relying on customer preference or increasing plaintiffs' burden to sustain a case of discrimination.[68]

A. Judicial Intuition and Common Sense

When faced with difficult BFOQs, in an effort to operationalize "essence" and "basis in fact," courts often fall back on their—or employers'—intuition and "common sense." They do not always do so subtly; in some instances, reliance on "common sense" has become almost part of the doctrine. While these cases are not easy, they illustrate both the difficulty of drawing the line between permissible and impermissible BFOQs and that common sense is a dangerous factor on which courts nonetheless rely to determine valid BFOQs.

Dothard v. Rawlinson again exemplifies an early instance of judicial reliance on common sense. Instead of engaging rigorously with the "barbaric and inhumane" conditions and the reality of sexual assault in the Alabama penitentiary, the court allowed Alabama to simply exclude women from correctional officer positions. For the Court, male inmates were inevitable sexual predators when "deprived" of the so-called "normal heterosexual environment."[69] Women were inevitable victims "because they were women"[70] and their "very womanhood would thus directly undermine [their] capacity to provide the security that is the essence of a correctional counselor's responsibility."[71] Critically, this reasoning exhibits reliance on biased intuition and common sense because the record lacked significant factual support for these generalized assertions.[72]

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[67] What kind of empirical evidence would support a BFOQ is difficult to conceptualize. In some instances, the evidence consists of a record of sexual assaults in prisons. However, in most cases, when courts actually require facts to support that "all or substantially all" members of one gender cannot perform the job, a BFOQ will not be granted. *See infra* Section II.C.1.

[68] *See infra* Parts II.D & II.E. Crucially, "essence," "basis in fact," and lack of reasonable alternatives bleed together in practice. However, in large part, courts use "common sense" to evaluate "essence" and "basis in fact," and deference and empirics to evaluate "basis in fact."

[69] Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

[70] *Id.* at 335–36 (emphasis added).

[71] *Id.* at 336.

[72] The Court simply provided evidence from the record of *two* incidents of attacks on women at Alabama prisons (one against a clerical worker and another against a visitor). *Id.* at 335 n.22.

Reliance on common sense did not end with *Dothard*: far from it. Especially in prison cases, courts cite *Dothard* for the proposition that common sense is the ultimate source of authority in justifying a BFOQ.[73] For instance, in *Torres v. Wisconsin Department of Health and Social Services*,[74] the Seventh Circuit noted that the Supreme Court's conclusions about the likelihood of and reason for assault in the *Dothard* institutions was "not based on objective, empirical evidence, but instead on a common-sense understanding of penal conditions."[75] Relying on *Dothard*, then, while the district court had denied the defendant-employer's summary judgment motion on the grounds that the employer had failed to present "objective evidence" that the presence of male guards would deter female inmates' rehabilitation,[76] the Seventh Circuit granted summary judgment to the employer (here, a prison) because defendant-employer's "efforts ought to be evaluated on the basis of the totality of the circumstances as contained in the entire record."[77]

Common sense is on display yet again in other cases involving penological institutions. For instance, in *Everson v. Michigan Department of Corrections*,[78] the Sixth Circuit determined that the trial court erred in granting summary judgment for plaintiffs alleging gender discrimination in employment at the Michigan Department of Corrections because the trial court scrutinized the Department too much. The Sixth Circuit chastised the district court for requiring an individualized assessment from the Department and asserted that objective evidence was not required; instead, common sense was allowed and should be used.[79] And, in *Jones v. Henryville Correctional Facility*,[80] the Southern District of Indiana likewise granted summary judgment to a correctional facility on its BFOQ defense to gender discrimination because "[a] common-sense understanding of the penal conditions at Henryville includes the possibility of a non-emergency strip search on any given shift."[81]

Courts also rely on common sense rationales when justifying BFOQs for "rehabilitation." Professor Stephen F. Befort describes the "rehabilitation" BFOQ as follows:

> The theoretical basis for a role-model BFOQ is that a single-sex employment policy is necessary to the success of the employer's business mission because of the psychological needs of the clientele. This defense is asserted most frequently with respect

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[73] *See, e.g.*, Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1528 (7th Cir. 1988); Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d. Cir. 1996); Everson v. Mich. Dep't of Corr., 391 F.3d 737, 760 (6th Cir. 2004).

[74] 859 F. 2d 1523 (7th Cir. 1988).

[75] *Id.* at 1531.

[76] Torres v. Wis. Dep't of Health & Soc. Servs., 639 F. Supp. 271, 280 (E.D. Wis. 1986).

[77] *Torres*, 859 F.2d at 1532.

[78] 391 F.3d 737 (6th Cir. 2004).

[79] *Id.* at 759–60.

[80] 220 F. Supp. 3d 923 (S.D. Ind. 2016).

[81] *Henryville*, 220 F. Supp. at 929. The court in *Henryville* cited *Torres* for the proposition that common sense is relevant. *Id* (citing *Torres*, 859 F.2d at 1531).

> to positions involved in the training or rehabilitation of minors or vulnerable adults.[82]

As an example, in *City of Philadelphia v. Pennsylvania Human Relations Commission*,[83] a Pennsylvania state court allowed reliance on "common sense" to absolve the defendant-employer of its obligation to provide "cold, empirical facts."[84] There, a BFOQ existed for supervisors at a youth detention center in part because "[i]t is common sense that a young girl with a sexual or emotional problem will usually approach someone of her own sex . . . seeking comfort and answers."[85] And, relying on *Dothard*, *Torres*, and *City of Philadelphia*, the court in *Healey v. Southwood Psychiatric Hospital*[86] determined that a psychiatric hospital's facially-discriminatory staffing policy could be justified as a gender-based BFOQ as it was required for the business's "therapeutic mission."[87] In doing so, the court in *Healey* imported those cases' reliance on "common sense."[88] This opinion pays strikingly little attention to the case's facts and the employer's evidence, despite the summary judgment posture and the BFOQ's high bar.[89]

No doubt, much of what judges argue is "common sense" is quite convincing. That is, it may well be appropriate to allow prisons to staff on a

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[82] Befort, *supra* note 14, at 20–21.

[83] 300 A.2d 97 (Pa. Commw. Ct. 1973).

[84] *City of Philadelphia*, 300 A.2d at 103.

[85] *Id.*

[86] 78 F.3d 128 (3d Cir. 1996).

[87] *Healey*, 78 F.3d at 132–33 (citing Dothard v. Rawlinson, 433 U.S. 321, 332, 335 (1977); Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1531–32 (7th Cir. 1988); *City of Philadelphia*, 300 A.2d at 103).

[88] *See id.* (citing *Dothard*, 433 U.S. at 322, 335; *Torres*, 859 F.2d at 1531–32; *City of Philadelphia*, 300 A.2d at 103).

[89] Importantly, while distinct in theory, the three "prongs" of the BFOQ defense bleed together in practice: that is, the "essence," "basis in fact," and "alternatives" inquiries often overlap. *See, e.g.*, Jones v. Henryville Corr. Facility, 220 F. Supp. 3d 923, 929 (S.D. Ind. 2016) (deferring to defendant-employer's "business judgment" as to lack of reasonable alternatives, where "business judgment" is typically reserved for "basis in fact"); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1353 (D. Del. 1978) (conflating essence and "basis in fact": "[s]ince it is clear that a substantial portion of the female guests will not consent to such care, it follows that the sex of the nurse's aides at the Home is crucial to successful job performance. In this sense the hiring of male nurse's aides would directly undermine the essence of the Home's business and its belief to that effect in 1973 had a factual basis."). But the determination of a business's "essence" is critical. Professor Kimberly Yuracko has systematically analyzed courts' determinations of business essences in gender-based BFOQ cases to determine how courts distinguish between permissible and impermissible BFOQs. Yuracko, *supra* note 10, at 149. She proposes four possible theories of "essences"—"(1) inherent theory, (2) shared meaning theory, (3) employer-defined theory, and (4) customer-defined theory"—but concludes that none of them fully explain how courts in practice determine a business's essence in BFOQ cases. *Id.* at 160–61, 175. Instead, Yuracko proposes that courts decide essences in part based on "concerns about the effects sex discrimination will have on the job opportunities of the excluded sex." *Id.* at 176. In other words, courts rely on their own ideas about Title VII's meaning: equality of opportunity. *Id.* at 179–180 (citing Equal Emp. Opportunity Comm'n v. Hi 40 Corp., 953 F. Supp. 301, 304 (W.D. Mo. 1996); Hardin v. Stynchcomb, 691 F.2d 1364, 1367–74 (11th Cir. 1982); Norwood v. Dale Maint. Sys., 590 F. Supp. 1410, 1415–23 (N.D. Ill. 1984)).

gendered basis when there is a real concern for women's safety or for the rehabilitation of and role-modeling for detained youth. Courts are uncomfortable with forcing employers to behave differently, and I think many would agree that a BFOQ may be appropriate in these circumstances. The danger with "common sense," however, is its flexible nature and lack of rigor can lead to biased holdings; "common sense" may often be indistinguishable from stereotyped generalizations.[90] BFOQ doctrine, then, invites courts to determine what gender means without clear backing.

B. Deference

Another strategy courts use in operationalizing "basis in fact" for a BFOQ is deference to employers in determining BFOQs. As with "common sense," courts do not hide this factor. Instead, in several circuits, deference has become part of the doctrine.[91] While not strictly limited to prison BFOQ cases,[92] due to the unique nature of prison administrators' responsibilities[93]

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[90] The danger of stereotyped generalizations is particularly evident when considering employer's more frivolous BFOQ defenses: a more rigorous BFOQ would prevent employers from being able to frivolously declare, for example, that they cannot employ pregnant women as sushi servers or dental assistants. *See* Everts v. Sushi Brokers LLC, 247 F. Supp. 3d 1075, 1081–1082 (D. Ariz. 2017) (granting summary judgment for plaintiff, where defendant-employer provided no evidence in support of its argument that it pregnancy status was a "legitimate proxy" for ability to be a server at a sushi restaurant because a server must "carry heavy plates in close proximity to sharp sushi knives in a crowded area where [they] may get bumped or fall," and visibly pregnant women were therefore unqualified); Brown v. Metro. Dental Assocs., No. 21-cv-851 (CM), 2023 WL 5154415, at *6 (S.D.N.Y. Aug. 10, 2023).

[91] *See, e.g.*, *Torres*, 859 F.2d at 1531 (citing *Dothard*, 433 U.S. at 334–35, for authority that BFOQ appraisals are based on "a limited degree of judicial deference to prison administrators"); Robino v. Iranon, 145 F.3d 1109, 1110 (9th Cir. 1998) (explaining "professional judgment is entitled to deference"); Breiner v. Nev. Dep't of Corr., 610 F.3d 1202, 1216 (9th Cir. 2010) (stating that "professional judgment of prison administrators is entitled to deference"); Teamsters Loc. Union No. 117 v. Wash. Dep't of Corr., 789 F.3d 979, 988 (9th Cir. 2015) ("Judgments by prison administrators that are the product of a reasoned decision-making process, based on available information and expertise, are entitled to some deference." (quoting *Breiner*, 610 F.2d at 1212 n.6)); Ambat v. City & County of San Francisco, 757 F.3d 1017, 1025–26 (9th Cir. 2014) (same); Everson v. Mich. Dep't of Corr., 391 F.3d 737, 750 (6th Cir. 2004) (stating that "reasoned decisions of prison officials are entitled to deference" (citing *Robino*, 145 F.3d at 1110–11; *Torres*, 859 F.2d at 1532; Tharp v. Iowa Dep't of Corr., 68 F.3d 223, 226 (8th Cir. 1995))).

[92] *See, e.g.*, Wade v. Napolitano, No. 3–07–0892, 2009 WL 9071049, at *8 (M.D. Tenn. Mar. 24, 2009) (applying *Everson* deference to evaluate a gender-based bona fide occupational qualification for Transportation Security Officers) (citing *Everson*, 391 F.3d at 760); Brooks v. ACF Indus., 537 F. Supp. 1122, 1132 (S.D.W. Va. 1982) (deferring to employer's judgment that changing its policies regarding staffing of janitorial staff in bathrooms at a railroad car manufacturing plant was too inconvenient and would constitute hardship).

[93] *Everson*, 391 F.3d at 750 ("Because of the unusual responsibilities entrusted to them, the redoubtable challenges they face, and the unique resources they possess, the decisions of prison administrators are entitled to a degree of deference, even in the Title VII context."); *see also* Strozier v. Warren County, No. 1:17-cv-817, 2020 WL 3867316, at *5 (S.D. Ohio July 9, 2020) ("[T]he BFOQ analysis is different in the prison setting . . . the BFOQ showing that [defendant] must make is less demanding than it would

deference is most prominent there.[94] Deference should be limited as a BFOQ factor.

Deference as a BFOQ factor is closely related to the reality of sexual violence in prisons. When deferring to prison officials, courts are motivated, at least in part, by a concern that detained women need women guards to be protected from sexual assault. Indeed, Congress passed the Prison Rape Elimination Act ("PREA") in 2003 to combat rampant prison rape by providing for analysis of incidents.[95] The Department of Justice's PREA regulations suggest certain BFOQs may be appropriate, particularly as they include strict guidelines for cross-gender searches.[96] In these extraordinarily difficult cases, courts have resolved largely to defer to the judgment of prison officials.

Some cases demonstrate the implications of using deference in BFOQ cases. In *Everson v. Michigan Department of Corrections*,[97] the Sixth Circuit evaluated the response of the Michigan Department of Corrections to a group of women's allegations of severe "sexual misconduct, sexual harassment, violation of privacy rights, and retaliation by corrections officers" after a settlement between the Department and the U.S. Department of Justice.[98] The Department's response was to make being a woman a BFOQ for approximately 250 Correctional Officer and Residential Unit Officer positions at all-women prisons.[99] The district court found that the Department had not presented sufficient evidence that "all or substantially all" men would be able to perform these officers' duties, in part on the basis of plaintiffs' credible expert testimony; "reasonable alternatives" to gender-based staffing existed; and, importantly, because the Department's decision "reflected neither reasoned decision making nor professional judgment, but rather the consequence of a belief of one person, not a correctional professional, in a transitory position of authority," it forfeited deference.[100] While district courts are usually afforded

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be for other employers that adopt policies that expressly rely on gender in making employment decisions.").

[94] Courts defer to prison administrators in other contexts, including in regulating universal constitutional rights as applied to prisoners. *See* Turner v. Safley, 482 U.S. 78, 89–94 (1987) (laying out test for when a regulation that impinges prisoners' universal constitutional rights may be sustained and striking down regulation that constrained prisoners' rights to marry); *see also* Overton v. Bazzetta, 539 U.S. 126, 126–27 (2003) (applying the deference test from *Turner* to uphold visitation regulation over constitutional challenge) (citing *Turner*, 482 U.S. at 89–91).

[95] Congress found that "experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison." 34. U.S.C. 303 § 30301(2).

[96] *See* 28 C.F.R. § 115.

[97] 391 F.3d 737 (6th Cir. 2004).

[98] *Id.* at 741–47.

[99] *Id.* at 739–40.

[100] Everson v. Mich. Dep't of Corr., 222 F. Supp. 2d 864, 894–95, 898 (E.D. Mich. 2002).

deference on findings of fact on appeal,[101] the Sixth Circuit here reversed, arguing that the trial court did not defer to the Department of Corrections *enough*.[102]

In *Torres*, likewise, the Seventh Circuit concluded that the district court did not defer to prison administrators' judgment enough, reversing a post-trial judgment by the district court that defendants failed to present sufficient evidence justifying a BFOQ on the rationale of security, rehabilitation, or inmate privacy.[103] And, in *Robino v. Iranon*,[104] the Ninth Circuit deferred to a "specially appointed task force" who had conducted an "extensive survey" to comply with an EEOC settlement in response to allegations of sexual misconduct against inmates by correctional officers.[105] For the Ninth Circuit, because the intrusion on officers' employment opportunities was minimal, it was "unnecessary to decide whether gender [was] a BFOQ for the few positions affected."[106] Nonetheless, the Court did so anyway, simply determining that the policy was good enough because of its "minimal" harm and the defendants' efforts to comply with an EEOC settlement.[107] Finally, in *Jones v. Henryville Correctional Facility*,[108] the Southern District of Indiana deferred to one lieutenant's decision to deny a female correctional officer's request to transfer from a night shift to a day shift because "it was a 'male position.'"[109] Deference was afforded not because of any "reasoned decision-making process" (as the Indiana court noted would be required by *Torres*), but only because the lieutenant was a prison administrator. In addition, the court deferred to the lieutenant's judgment not only for a "basis in fact" that the BFOQ was necessary to the facility's operation, but also that there were no reasonable alternatives to the BFOQ.[110]

While rare, it is certainly possible for courts to defer prison administrators and other involved professionals after requiring a more rigorous decision-making process. *Teamsters Local Union No. 117 v. Washington Department of Corrections*[111] is one such example. There, in another challenge to a prison

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[101] *See Everson*, 391 F.3d at 762 (Gilman, J., dissenting) ("[T]he factual findings of the district court following a bench trial are also entitled to substantial deference.").

[102] *Id.* at 751 ("The MDOC was not obligated to follow any particular protocols in order to earn deference, and the district court applied too exacting a standard in dismissing the MDOC's deliberations as inadequate. In effect, the district court circumvented the rule of deference by second-guessing the procedures employed by the MDOC.").

[103] Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1531–33 (7th Cir. 1988); Torres v. Wis. Dep't of Health & Soc. Servs., 639 F. Supp. 271, 278–82 (E.D. Wis. 1986).

[104] 145 F.3d 1109 (9th Cir. 1998).

[105] *Id.* at 1110–11.

[106] *Id.* at 1110. For a discussion of this curious "de minimis" theory of gender discrimination, *see infra* Section II.E.2.

[107] *See Robino*, 145 F.3d at 1110.

[108] 220 F. Supp. 3d 923 (S.D. Ind. 2016).

[109] *Id.* at 926, 929.

[110] *Id.* at 929. The district court granted summary judgment to defendant Henryville. *Id.* at 930.

[111] 789 F.3d 979 (9th Cir. 2015).

BFOQ, the Ninth Circuit noted that gender-based staffing was initiated after a prisoner class action commenced and the Department of Corrections "hired experts, consulted with other states, reviewed relevant caselaw, documented scores of sexual misconduct allegations and investigated many more, and sought advice from the Human Rights Commission . . . the state did not view sex-based staffing as a panacea, instead proposing a package of reforms that included measures such as psychological testing, sex-awareness training, and security cameras."[112]

But undeserved deference is the norm. And deference is particularly problematic when understood in relation to the experience of LGTBQ+ people in prison. While purporting to protect detained individuals, PREA regulations have been ineffective particularly at protecting LGBTQ+ people who are detained;[113] PREA might even be weaponized against them.[114] The failure of PREA and prison officials to protect LGBTQ+ people from sexual violence first suggests deference in this area should be limited. Interestingly, it also suggests that prison decision-makers over-rely on binary conceptions of gender in both housing and staffing. The Title VII sex-based BFOQ is fundamentally based in gender as a binary. While some may be appropriate, then, it seems nonetheless that BFOQs, defined by deference to prison administrators, should not be the lodestar for protecting those detained.

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[112] *Id.* at 988.

[113] One 2022 survey by Lambda Legal of roughly 2500 individuals who were LGBTQ+ or living with HIV found that 21.4 percent of participants who spent time in prison were sexually assaulted there, and 54 percent experienced sexual harassment there. Somjen Frazer et al., Lambda Legal, Protected and Served? 2022 Community Survey of LGBTQ+ People Living with HIV's Experiences with the Criminal Legal System 49–50 (2023). Moreover, the study found that transgender, gender-nonconforming, and nonbinary individuals experienced higher rates of sexual contact and assault in detention than did cisgender individuals. *Id.* at 52. *See also* Richard Saenz, *A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prisons*, Crim. Just., Winter 2024, at 3, 3 (explaining the targeted violence inflicted on LGBTQ+ individuals in detention); Carla Aveledo, *Ten Years Later, PREA Does Not Live Up to Its Goal: Amending the Statute to Reduce Discriminatory Violence Against Transgender Statute to Reduce Discriminatory Violence Against Transgender Prisoners*, 27 Roger Williams L. Rev. 89, 100-03, 107 (2022) (discussing where PREA falls short, particularly when it comes to protecting transgender prisoners, including its case-by-case approach to housing assignments for transgender individuals and its lack of an individual cause of action). There are some provisions in PREA that are equipped to protect LGBTQ+ detained individuals. In particular, PREA imposes strict regulations on the use of protective custody, because "protective custody in jails, prisons and juvenile detention centers is often synonymous with isolation or solitary confinement so that individuals subject to it are frequently harmed or 'punished' as a result of their vulnerable status." Am. C.L. Union, End the Abuse: Protecting LGBTI Prisoners from Sexual Assault 5. PREA also requires individualized assessments for housing placements and prohibits searches assessing only genital status. *See id.* at 3–4; *see also* Saenz, *Crisis Behind Bars*, at 13 (discussing PREA's potential to protect transgender people in prisons).

[114] *See* Am. C.L. Union, *supra* note 113, at 5–6.

C Empirics

Another way judges operationalize the BFOQ's doctrinal factors is by asking employers to produce empirical evidence to support their claim for an affirmative defense. This requirement typically is part of the "basis in fact" prong, which aims to prevent employers from basing gender-based employment on generalizations, stereotypes,[115] and/or their "culturally induced proclivities."[116] In theory, this standard is high: data must show not that *most* men or women simply cannot do the job, but that "all or substantially all" individuals of one gender cannot do a job. Taken seriously, this standard effectively outlaws all BFOQs; it is difficult to conceive of "facts" that do not reflect customer preference or stereotyped generalizations. Indeed, the court in *Griffin v. Michigan Department of Corrections* illustrated this difficulty, when it declined to grant a prison official BFOQ because defendants' argument "[was] based on stereotypical sexual characterization that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing by a member of one's own sex."[117] But what evidence would suggest this statement is fact if "preference" cannot be used as a basis?

In many cases, courts require defendant-employers to cite empirical or objective evidence to justify gender-based discrimination, taking "basis in fact" at its word. Predictably, this standard often results in the denial of the employer's BFOQ defense, especially when defendant-employers request that their BFOQ defense be granted via summary judgment. Nonetheless, cases in which courts take "basis in fact" seriously illuminate the limits of the BFOQ defense. Yet in other cases, intuition and "common sense" (which are incredibly difficult, if not impossible, to separate from stereotyped generalizations), customer preference, practical limitations, or a combination of these, are likely doing the work.

1. *"Basis in Fact" Not Met*

Where courts require objective evidence, they often find defendant-employers have not met their burdens to establish a BFOQ. As such, the cases in which courts find that the defendant-employer has not sustained its burden to present factual evidence abound, ranging from early BFOQ cases that lay

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[115] *See, e.g.*, CM-625 Bona Fide Occupational Qualifications, *supra* note 60 (explaining the Commission's view of what a BFOQ requires: "[a] successful application of the BFOQ exception depends on evidence showing that only the employed sex possesses the necessary characteristic. The BFOQ exception fails if the 'characteristic' is in reality a stereotypical assumption about the excluded sex.").

[116] Torres v. Wis. Dep't of Health & Soc. Servs., 639 F. Supp. 271, 278 (E.D. Wis. 1986).

[117] Griffin v. Mich. Dep't of Corr., 654 F. Supp. 690, 701 (E.D. Mich. 1982).

out long-standing doctrine[118] to recent prison BFOQ cases[119] and everything in between.[120]

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[118] *See, e.g.*, Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235–36 (5th Cir. 1969) (finding 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" not met where defendant-employer "introduced no evidence concerning the lifting abilities of women," but "would have [the court] 'assume' . . . on the basis of a 'stereotyped characterization' that few or no women can safely lift 30 pounds, while all men are treated as if they can"); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388–89 (5th Cir. 1971) (same, where employer attempted to exclude men from flight attendant positions, because the court determined that defendant-employer's evidence only supported that women's abilities were "merely tangential" to the business); Cheatwood v. S. Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 758–60 (M.D. Ala. 1969) (determining basis in fact not met where, in "battle of experts," plaintiff's expert fully rebutted employer's expert's evidence by showing that between twenty-five and fifty percent of women could perform the job duties in question ("lifting weights")); Long v. Sapp, 502 F.2d 34, 40 (5th Cir. 1974) (finding basis in fact not met where "[n]o evidence ha[d] been adduced except that of the coworkers, all men, who, at best, *doubted* that any woman could do the work involved"); Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 300 (N.D. Tex. 1981) (finding no factual basis where employer conceded that men could perform "basic, mechanical functions required of flight attendants" but argued women were required "to attract male customers who prefer female attendants and ticket agents, and to preserve the authenticity and genuineness of Southwest's unique, female corporate personality").

[119] *See, e.g.*, Ambat v. City & County of San Francisco, 757 F.3d 1017, 1028–29 (9th Cir. 2014) (statistics of sexual misconduct alone not sufficient factual basis to "prove that all or substantially all male deputies are likely to perpetrate sexual misconduct. To suggest that all or most male deputies pose such a threat would amount to 'the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII.'" (quoting *Breiner*, 610 F.3d at 1211)); *Breiner*, 610 F.3d at 1213 (prison administrator's testimony that male correctional supervisors failed to prevent sexual abuse not sufficient to "conclude that men as a class were incapable of adequately supervising front line staff in female prisons"); Henry v. Milwaukee County, 539 F.3d 573, 581 (7th Cir. 2008) (finding defendant-employer failed to meet its burden where there was no evidence of a "single instance of staff-on-inmate sexual assault" at the facility); Roman v. County of Monroe, 426 F. Supp. 3d 439, 446 (E.D. Mich. 2019) (denying defendant-employer's motion for summary judgment where "a jury could conclude that Monroe County does not have a basis in fact for believing that shifts of at least three women in the main jail are reasonably necessary"); Kasprzycki v. Mich. Dep't of Corr., No. 17-cv-11220, 2019 WL 3425259, at *5 (E.D. Mich. July 30, 2019) (denying defendant-employer's summary judgment where "defendants ha[d] not put forth any argument as to why the evidence in this case establishes a BFOQ defense"); Dillon v. Miss. Dep't of Corr., No. 3:12cv333–DPJ–FKB, 2013 WL 3712432, at *4 (S.D. Miss. July 12, 2013) (finding a "factual basis" for policy forbidding women from operating one-person offices at Department of Corrections not met where defendant did not "show[] that the male inmate population . . . [was] sufficiently greater than its female counterpart" nor "why females would be unable to perform the duties of a one person office").

[120] *See, e.g.*, McMahon v. World Vision, Inc., No. C21-0920JLR, 2023 WL 8237111, at *14–15 (W.D. Wash. Nov. 28, 2023) (finding defendant-employer requesting sexual orientation-based BFOQ for customer service position failed to meet burden that "all or substantially all persons in a same-sex marriage would be unable to efficiently perform the duties of the position, such that hiring them would undermine defendant's operations" where "[n]othing in the record indicate[d] that being in a same-sex marriage affects one's ability to place and field donor calls, converse with donors, pray with donors, update donor information, upsell World Vision programs, or participate in devotions and chapel") (internal citations omitted)); Olsen v. Marriott Int'l, 75 F. Supp. 2d 1052, 1070 (D. Ariz. 1999) (finding that where defendant argued it was entitled to a BFOQ defense for sex-based staffing of massage therapists, combined withthe "basis in fact" inquiry with a privacy

2. *"Basis in Fact" Met*

The clearest way for courts to find "basis in fact" met is to require objective evidence. While the cases in which courts require objective evidence and defendants meet that burden are few and far between, they exist. Illuminating these situations is helpful for understanding what a BFOQ based in fact can look like.

One such case is *Nowacki v. Department of Corrections*.[121] There, a Michigan appellate court upheld a verdict in favor of the Michigan Department of Corrections after a challenger argued that the organization's gender-based staffing policies exceeded those required by a prior settlement agreement with the Department of Justice regarding allegations of sexual abuse in Michigan prisons.[122] The appellate court found that the Department of Corrections had met its "basis in fact" burden because it had cited to sexual assault allegations that arose from the relevant positions.[123] In *Teamsters,* against a union's challenge to a prison's gender-based staffing policies, the Ninth Circuit granted summary judgment to defendant-employer because, instead of "rest[ing] on assumptions[,] it provided objective legal and operational justifications for why only women can perform particular job functions."[124] For the court, a "basis in fact" was supported by how "[the Washington Department of Corrections] ha[d] substantiated dozens of instances of sexual abuse implicating every job category at issue in th[at] lawsuit."[125]

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interest inquiry, genuine issues of fact remained as to whether there was a factual basis that massages at Marriott "entail[ed] intrusion into bodily privacy" to support a BFOQ); Everts v. Sushi Brokers LLC, 247 F. Supp. 3d 1075, 1081–82 (D. Ariz. 2017) (granting summary judgment for plaintiff, where defendant-employer provided no evidence in support of its argument that pregnancy status was a "legitimate proxy" for ability to be a server at a sushi restaurant because a server must "carry heavy plates in close proximity to sharp sushi knives in a crowded area where [they] may get bumped or fall," and visibly pregnant women were therefore unqualified); Pugsley v. Police Dep't of Boston, 472 Mass. 367, 374–75 (2015) ("[S]tatistical disparities between the number of female . . . police officers and the number of female suspects and female victims that come into contact with law enforcement . . . without more, will generally be insufficient to support a BFOQ."); Equal Emp. Opportunity Comm'n v. Hi 40 Corp., 953 F. Supp. 301, 305–06 (W.D. Mo. 1996) (finding in plaintiff's favor in the face of defendant's argument that their weight loss center could only hire women because there was "no showing that the ability to accurately take measurements of customers and counsel them on the best ways to lose weight are talents uniquely possessed by women," nor that "employing male counselors would pose any safety risk to customers or make the taking of measurements and counseling of customers unduly inefficient").

[121] No. 361201, 2023 WL 6170172 (Mich. App. Sept. 21, 2023).

[122] *Id.* at *1.

[123] *Id.* at *16. Note this reasoning suggests the court was looking for a "basis in fact" for why it believed sexual assault would be *reduced* with a BFOQ. It does not suggest, however, that the court wanted the employer to show why "all or substantially all" men could not do the job. For a more precise reading of the "basis in fact" standard in this context, *see Ambat*, 757 F.3d at 1028–29.

[124] Teamsters Loc. Union No. 117 v. Wash. Dep't of Corr., 789 F.3d 979, 991 (9th Cir. 2015).

[125] *Id.* at 991 n.5.

But courts also declare "basis in fact" met without such basis. For example, several aforementioned cases also state that the defendant-employer had met the "basis in fact" prong, but either do not require objective evidence for a "basis in fact"[126] or allow "basis in fact" to be justified by customer preference.[127] Yet in other cases, courts find "basis in fact" if state law or policy binds employers.[128] However, because the BFOQ is a federal law, this reasoning is circular. That is, state law may bind an employer, but that law can nonetheless violate Title VII if not supported by valid BFOQ defense.[129] Ultimately, "basis in fact" is a promising avenue for BFOQ doctrine because

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[126] *See, e.g.*, Everson v. Mich. Dep't of Corr., 391 F.3d 737, 748–49, 76 (6th Cir. 2004) (finding a "basis in fact" is required to establish a BFOQ, and this can be established by a showing that "all or substantially all [members of one gender] would be unable to perform safely and efficiently the duties of the job involved; that it is impossible or highly impractical to determine on an individualized basis the fitness for employment of members of one gender, or that the very womanhood or very manhood of the employee undermines his capacity to perform a job satisfactorily," these "appraisals need not be based on objective, empirical evidence" (internal citations omitted)); *see also* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1527–28, 1531 (7th Cir. 1988) (stating that a defendant seeking a BFOQ needs a "factual basis for believing . . . that all or substantially all men would be unable to perform safely and efficiently the duties of the job involved," and "a BFOQ may not be based on 'stereotyped characterizations of the sexes'" and should not reflect "culturally induced proclivities;" "there is no general requirement that the necessity of a BFOQ be established by [objective, empirical evidence]" (internal citations omitted)); City of Philadelphia v. Pa. Hum. Rels. Comm'n, 300 A.2d 97, 103–04 (Pa. Commw. Ct. 1973) (finding a BFOQ despite the fact that "the [defendant] did not produce an abundance of evidence in support of its application for a BFOQ" and the EEOC guidelines declare 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" is required, because "common sense" supported that "the sexual characteristics of the employee are crucial to the successful performance of the job" (internal citations omitted)).

[127] *See, e.g.*, Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1351–52 (D. Del. 1978) (holding that to prove a BFOQ an employer must prove a "factual basis" but that that basis could be supported by a belief that "female guests would not consent to having their personal needs attended to by a male"); Backus v. Baptist Med. Ctr., 510 F. Supp. 1191, 1196 (E.D. Ark. 1981) (finding defendant created a "factual basis" to support a BFOQ by presenting testimony from hospital employees about their beliefs that patients would object to male nurses), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982); Equal Emp. Opportunity Comm'n. v. Mercy Health Ctr., No. 80–1374–W, 1982 WL 3108, at *5 (W.D. Okla. Feb. 2, 1982) ("[T]here is a factual basis for determining that the employment of male nurses in the labor and delivery area would cause medically undesired tension.").

[128] *See, e.g.*, Strozier v. Warren County, No. 1:17-cv-817, 2020 WL 3867316, at *5–6 (S.D. Ohio July 9, 2020) (finding employer had "met the first BFOQ prong" that it "had a basis in fact for its belief that gender discrimination is reasonably necessary" in part because "requiring that the officers and inmates involved in a strip search are all the same gender is reasonably necessary to protect the privacy of the inmate, and is in fact required by [Ohio] law"); *see also* Million v. Warren County, 440 F. Supp. 3d 859, 872 (same); *see also* Ferrara v. City of Yonkers, 2015 WL 2414542, at *4 (S.D.N.Y. May 21, 2015) (relying on New York laws that mandate gender-based prison staffing to uphold a BFOQ); DeVooght v. City of Warren, No. 20-CV-10812, 2020 WL 6708845, at *5 (E.D. Mich. Nov. 16, 2020) (finding "basis in fact" met because the "police force [was] made up of very few female officers, and [there was] a requirement that female prisoners be searched by a female").

[129] *See* Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971) (while defendant-employer argued it was entitled to a male-only BFOQ for an agent-telegrapher position because, without it, it would violate California labor laws restricting how much women can

it suggests more rigorous reasoning from defendants. In practice, however, courts often return to intuition, common sense, and customer preference.

D Customer Preference

In other instances, courts venture outside the bounds of the prescribed BFOQ factors. For example, simple customer preference cannot justify a BFOQ[130] but often sneaks in the door. Indeed, what else is the "essence" of a profit-seeking business besides adhering to the preferences of their customers?[131] Like the cases in which courts base their decisions on "common sense" and intuition, customer preference factoring into a BFOQ decision often occurs when courts attempt to draw difficult lines between strong competing interests.

Customer preference most frequently hides behind privacy interests.[132] For instance, in *Fesel v. Masonic Home of Delaware, Inc.*,[133] the District of Delaware approved a residential retirement home's exclusion of men from nursing positions as a BFOQ chiefly because many female residents would object to care by male nurses.[134] This conclusion was based on testimony from the home's assistant superintendent and director of nursing services—who testified that she believed "the female guests would not accept personal care from male nurse's aides"—as well as affidavits signed by residents to the same effect.[135] While the court justified its reliance on this argument as "personal privacy interests," it undoubtedly reflects a customer preference.[136] Indeed, the court noted as such[137] but concluded it could nonetheless justify a BFOQ on these interests because the employer demonstrated a "factual basis for believing that the employment of a male nurse's aide would directly

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lift at work, the court held that "th[o]se state law limitations upon female labor run contrary to the general objectives of Title VII . . . and are . . . supplanted by Title VII").

[130] *See* 29 C.F.R. § 1604.2(a)(1)(iii). Crucially, customer preference can justify a "genuineness" BFOQ, such as one for an actor. 29 C.F.R. § 1604.2(a)(2).

[131] Importantly, Yuracko has highlighted this same dynamic as explaining how courts determine businesses' "essences." Yuracko, *supra* note 10, at 191–96. Defining the phenomenon as "customer-focused perfectionism," Yuracko argues courts in gender-based BFOQ cases "prioritize[] customer preferences based upon a belief about their importance or centrality to the holders' sense of self and self-worth." *Id.* at 191.

[132] Indeed, some cases characterize privacy BFOQs as an exception to the general prohibition against customer preference-based BFOQs. *See, e.g.*, Equal Emp. Opportunity Comm'n v. Mercy Health Ctr., 1982 WL 3108, at *5 (W.D. Okla. Feb. 2, 1982) ("Courts have recognized that customer preference may give rise to a bona fide occupational qualification for one sex where the preference is based upon a desire for sexual privacy." (internal citations omitted)).

[133] 447 F. Supp. 1346 (D. Del. 1978).

[134] *Id.* at 1354.

[135] *Id.* at 1352.

[136] *Id.*

[137] *Id.* ("As plaintiff stresses, the attitudes of the nonconsenting female guests at the Home are undoubtedly attributable to their upbringing and to sexual stereotyping of the past. . . . [T]hese attitudes may be characterized as 'customer preference' . . . .").

undermine the essence of its business operation because (1) many of the female guests would not consent to intimate personal care by males, and (2) . . . the [employer] could not hire a male nurse's aide for any shift in such a manner that there would always be at least one female on duty to attend to the personal care needs of those female guests objecting to male care."[138] In justifying facial gender discrimination based on these, indeed legitimate, privacy interests, the court gave credence to customer-preference BFOQs.

The Eastern District of Arkansas relied on customer preference in the same way in *Backus v. Baptist Medical Center*,[139] justifying a female-only BFOQ for obstetrics and gynecology delivery nurses based on customer privacy interests. As in *Fesel*, the court relied primarily on the defendant's contention, based on nurses' testimony, "that the majority of women patients will object to intimate contact with a member of the opposite sex."[140] Further, this would result in an "economic injury" to defendant-employer because "[o]nce a patient becomes dissatisfied with a service that the defendant offers, it is probable that the patient will seek future medical care elsewhere."[141] And, like in *Fesel*, the court endeavored to distinguish its allowance of this customer preference by suggesting personal privacy interests are different from other kinds of preferences,[142] causing men's "very sex itself . . . [to] make[] all male nurses unacceptable."[143]

Other cases exhibit the same dynamic. In *EEOC v. Mercy Health Center*,[144] the Western District of Oklahoma upheld a policy against hiring

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[138] *Id.* at 1354.

[139] 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982).

[140] *Backus*, 510 F. Supp. at 1193.

[141] *Id.*

[142] The court distinguished: "[G]iving respect to deep-seated feeling of personal privacy involving one's own genital area is quite a different matter from catering to the desire of some male airline passenger to have . . . an attractive stewardess." *Id.* at 1194. Importantly, the court imported dicta from *York v. Story*, a pre-Title VII case finding liability for male police officers who took and distributed nude photographs of a woman who had come to them to file a complaint of sexual assault: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Id.* at 1193 (quoting York v. Story, 324 F.2d 450, 455 (9th Cir. 1963)). *Backus* is not the only court to import *York*'s fairly inflammatory language (strengthened by its offensive facts) to justify a privacy-preference BFOQ. *See, e.g.*, Brooks v. ACF Indus., 537 F. Supp. 1122, 1131 (S.D. W. Va. 1982); Iowa Dep't of Soc. Servs. v. Iowa Merit Emp. Dep't, 261 N.W.2d 161, 165 (Iowa 1977); Forts v. Ward, 434 F. Supp. 946, 949 (S.D.N.Y. 1977), *rev'd*, 566 F.2d 849 (2d Cir. 1977).

[143] *Backus*, 510 F. Supp. at 1195. Other authors have critiqued and analyzed *Fesel* and *Backus* in depth. For example, Katie Manley characterizes *Backus* and *Fesel* as accepting "stereotypical sexual characterization[s]." Manley, *supra* note 11, at 188–89. Professor Suzanne Wilhelm argues the court in *Fesel* "espous[ed] . . . a stereotypical view of women as the 'gentle sex.'" Wilhelm, *supra* note 11, at 80. Perhaps most authoritatively, Kapczynski argues that these cases are illegitimate. For Professor Amy Kapczynski, the problem with these privacy cases' "concessions to customer preference" is that "[t]hey exactly reproduce the prejudices that generate gendered stratification and hierarchy in the work force in the first place." Kapczynski, *supra* note 12, at 1264.

[144] 1982 WL 3108 (W.D. Okla. Feb. 2, 1982).

male labor and delivery staff to avoid "medically undesired tension."[145] The court based its conclusion on survey data, which indicated that a majority of mothers would object to male nurses in labor and delivery.[146] Further, the Southern District of Mississippi in *Jones v. Hinds General Hospital*[147] determined that being a man was a BFOQ for orderlies based on testimony by a hospital administrator, nurses, and a doctor stating that "a significant number of male patients" would object to female nurses.[148] Gender-based work assignments for Transportation Security Administration airport agents, whose job duties include patting down passengers, are another example of BFOQs justified by customer preference via privacy interests.[149]

Without a doubt, these cases are extraordinarily difficult. On one hand, Title VII forbids gender discrimination in employment. On the other hand, while technically allowing BFOQs based on customer preference, these cases deal with serious privacy interests. And customer safety may be part of the "essence" of the business, so they may well be BFOQs. However, courts' attempt to draw these lines are often extremely inconsistent and—like in the case of common sense—lack rigor.

E. Procedure and Burden-Shifting

Finally, courts sometimes go outside the bounds of prescribed BFOQ doctrine by manipulating burden shifting. Strictly speaking, and as discussed above, the BFOQ is an affirmative defense to a finding of gender discrimination under Title VII, meaning that the defendant-employer carries the burden to show it.[150] Yet, in some cases, courts find an employer entitled to the BFOQ defense not because they have provided the court with sufficient evidence, but because the plaintiff's case is lacking. Two categories of plaintiff-focused burden shifting are evident in the landscape of modern BFOQs: (1) requiring a plaintiff to show the existence of reasonable alternatives to the BFOQ and (2) requiring a plaintiff to show *more* harm *than* facial gender discrimination.

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[145] *Id.* at *5.

[146] *Id.* at *3. Interestingly, the court also noted that a higher proportion of fathers surveyed than mothers surveyed objected to employing men in labor and delivery. *Id.*

[147] 666 F. Supp. 933 (S.D. Miss. 1987).

[148] *Id.* at 936.

[149] *See* Zula T. v. J.E.H. Johnson, E.E.O.C. DOC 0120142146, 2016 WL 4492231, at *5 (Aug. 16, 2016) (finding BFOQ for Transportation Security Officers. In *Zula T.*, the parties did not dispute that the "essence of the business" (security) "would be undermined if the employer did not employ a sufficient number of male and female screeners" (the sole issue was the availability of an alternative). Nonetheless, even though not at issue in the case, it is hardly negotiable that sex-based pat-downs are a customer preference, albeit a privacy-based preference). *See also* Wade v. Napolitano, No. 3–07–0892, 2009 WL 9071049, at *1 (M.D. Tenn. Mar. 24, 2009) (granting employer's summary judgment motion as to TSA screening position BFOQ).

[150] *See Affirmative Defense*, Black's Law Dictionary (11th ed. 2019); *see also* Befort, *supra* note 14, at 10 (explaining how the affirmative defense concept applies to bona fide occupational qualifications).

These each can tip the scale in favor of finding a valid BFOQ and are thus worth interrogating.

1. *Reasonable Alternatives*

The perhaps less offensive version of plaintiff-focused burden shifting is the burden to show reasonable alternatives. Notably, not every court includes the "reasonable alternatives" prong in the BFOQ inquiry; indeed, it is not mentioned in either of the gender-based BFOQ cases that have reached the Supreme Court.[151] Further, courts do not apply this uniformly: in some instances, to show a *lack* of reasonable alternatives is part-and-parcel of a defendant-employer's BFOQ burden.[152] In others, however, showing that reasonable alternatives exist falls on plaintiffs.

Some cases are illustrative. Consider, for example, *Strozier v. Warren County*.[153] There, a corrections officer challenged Warren County's gender-based staffing policies at prisons, including "female-only overtime."[154] The officer presented five plausible alternatives to BFOQs:

> (1) allowing one of three female sergeants on a shift to count towards the two-female minimum; (2) keeping female inmates in one of three holding cells until another female CO arrives on her shift to complete a strip search or until a sworn female officer with strip-search training arrives to observe the search; (3) purchasing a body scanner to avoid the need for strip searches; (4) installing video equipment whereby one female CO could conduct the search and a second CO (either male or female) could monitor the search from the control room, and (5) allowing male COs to work as C-Pod rovers and eliminating the need for two female COs to perform strip searches.[155]

It is curious that the plaintiff in this case presented these alternatives; in the Sixth Circuit, the defendant has the burden of doing so.[156] Nonetheless, the

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[151] *See* Dothard v. Rawlinson, 433 U.S. 321, 332–37 (1977) (asserting no cut-and-dry standard, but clearly considering "essence" and the relationship between gender and an employee's ability to do the job); Int'l Union v. Johnson Controls, 499 U.S. 187, 188–89 (1991) (same).

[152] *See, e.g.*, Everson v. Mich. Dep't of Corr., 391 F.3d 737, 749 (6th Cir. 2004) ("[T]his court imposes on employers asserting a BFOQ defense the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex."); *see also* DeVooght v. City of Warren, No. 20-CV-10812, 2020 WL 6708845, at *8 (E.D. Mich. Nov. 16, 2020) ("It is defendant's burden to establish that no reasonable alternatives exist.").

[153] Strozier v. Warren County, No. 1:17-cv-817, 2020 WL 3867316 (S.D. Ohio July 9, 2020).

[154] The officer-plaintiff limited her opposition to defendant-employer's summary judgment motion to the existence of reasonable alternatives. *Strozier*, 2020 WL 3867316, at *2, *6.

[155] *Id.* at *7.

[156] *See Everson*, 391 F.3d at 749 ("[T]his court imposes on employers asserting a BFOQ defense the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex.").

court evaluated each of the plaintiff's proposed alternatives, considering deposition testimony, precedent, facts in the record, and defendant-employer's arguments before concluding that her alternatives were not persuasive.[157] Ultimately, the court granted summary judgment to Warren County because "Strozier ha[d] failed to create a genuine dispute as to the existence of any reasonable alternatives."[158]

A similar dynamic is evident in cases involving gender-based bathroom janitorial staffing. In *Brooks v. ACF Industries*,[159] the Southern District of West Virginia found, after trial, that being a man was a BFOQ for "bathhouse" ("bath-toilet-locker-room") janitorial staff positions at a railroad car manufacturing plant. While men worked in women's facilities at the plant and would "absent[] [themselves]" when women used the restrooms, Brooks was prevented from working in the plant's men's facilities due to being a woman.[160] Brooks suggested male bathhouse users undress elsewhere, more walls be installed inside the bathhouses to increase users' privacy, and that she be permitted to work on a night shift when bathhouses were unused.[161] For the court, however, these alternatives would constitute "hardship" for male bathhouse users or would be ineffective due to the plant's seniority scheme.[162]

Contrast *Brooks* with *Norwood v. Dale Maintenance Systems*.[163] The outcomes of these cases are effectively the same, with the court finding in *Norwood* that being a man is a BFOQ for office building men's bathroom janitorial roles.[164] The courts' analyses, however, were different: in *Norwood*, the Northern District of Illinois required that the *defendant* "prove that no reasonable alternatives exist to its gender-based hiring policy."[165] At trial, defendant-employer presented four alternatives to its gender-based staffing policy that it had considered: (1) "[d]ay servicing," (2) allowing "opposite sex servicing," (3) closing the washroom during servicing, and (4) instructing opposite-gender bathroom attendants to leave while in use.[166] The defendant-employer then explained why each was unreasonable, considering bathroom users' privacy interests, employee productivity, costs, security, economic desirability

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[157] *Strozier*, 2020 WL 3867316, at *7–9.

[158] *Id.* at *9. The same court did the same thing in *Million v. Warren County*, granting summary judgment in favor of defendant-employer because the plaintiff there "failed to create a genuine dispute as to the existence of any reasonable alternatives to the Jail's female-only overtime policy at issue." 440 F. Supp. 3d 859, 874 (S.D. Ohio 2020).

[159] 537 F. Supp. 1122 (S.D.W. Va. 1982).

[160] *Id.* at 1125.

[161] *Id.* at 1132.

[162] *Id.*

[163] 590 F. Supp. 1410 (N. D. Ill. 1984).

[164] *Id*. at 1412, 1423.

[165] *Id.* at 1415–16.

[166] *Id.* at 1417.

of the office building, and efficiency.[167] The plaintiff then offered arguments rebutting those of defendant.[168]

This difference in who should bear the burden to show reasonable alternatives or a lack thereof may seem innocuous. Indeed, at trial, we might assume the relevant arguments would be hashed out in the same way regardless of the order of the burdens of proof.[169] But the consequences of these differences are illuminated at summary judgment. Designed to screen out cases lacking genuine issues of material fact, summary judgment asks courts to evaluate whether each party has presented enough evidence to go to trial.[170] The movant bears the burden of showing a lack of material facts.[171] If this burden is met, the plaintiff "need only present evidence from which a jury might return a verdict in his favor."[172]

Applied to a Title VII case in which a defendant-employer presents a BFOQ defense, an employer moving for summary judgment on that issue "bears the heavy burden of showing that there are no genuine issues of material fact as to whether . . . [employees of a certain gender] are actually unfit" for the job at issue.[173] The burden is a high one.[174] If the issue is the existence of reasonable alternatives and the defendant-employer bears the burden, an employer would be required to show that reasonable alternatives cannot possibly exist to prevail at summary judgment.[175] On the other hand, if in such a case the plaintiff bore the initial burden, an employer could prevail on summary judgment if the plaintiff did not provide "reasonable alternatives" to gender-based staffing or if the employer could discount reasonable alternatives presented by the plaintiff as "unreasonable." As defendant-employers are logically more equipped to consider the feasibility of alternative operating strategies for their businesses, it seems likely that they could rebut many plaintiff-presented alternatives without ever needing to propose more realistic alternatives.

This posture is problematic for two reasons. First, defendant-employers' understanding of their own business makes it most appropriate to have them explain to the court why no other set-up would work for their company. Not only that: The BFOQ is also meant to be a narrow exception. When a court

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[167] *Id.*

[168] *See id.* at 1418–23.

[169] *Compare Brooks*, 537 F. Supp. at 1132, *with Norwood*, 590 F. Supp. at 1418–23 (at trial, each party presented arguments regarding the reasonable alternatives).

[170] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[171] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); *see also Celotex*, 477 U.S. at 323.

[172] *Anderson*, 477 U.S. at 257.

[173] Ambat v. City & County of San Francisco, 757 F.3d 1017, 1031 (9th Cir. 2014).

[174] *See id.* (noting BFOQ summary judgment is "difficult" because the employer "must show that there are no genuine disputes that would prevent it from satisfying [the BFOQ inquiry] as a matter of law").

[175] *See id*; *see also* Anderson v. Mayorkas, No. 8:22-cv-2941-VMC-CPT, 2024 WL 3443903, at *11 (M.D. Fla. July 17, 2024) (denying summary judgment for defendants' BFOQ defense for Customs and Border Protection Officers because defendant had not eliminated "factual disputes" about the viability of alternative policies).

accepts an employer's BFOQ defense, it excuses them for a policy that would *otherwise violate Title VII.* The burden should be on defendants to prove that they deserve this narrow exception. Placing the burden of proving reasonable alternatives on plaintiffs expands the exception, thereby threatening to limit Title VII.[176]

2. *"De Minimis" Discrimination*

Courts also over-burden plaintiffs at the initial stage of a Title VII discrimination case. As discussed above,[177] the BFOQ is an affirmative defense that only applies upon a plaintiff showing a Title VII violation, which requires a policy to fail a "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different."[178] As a result, employment policies that treat men and women differently are facially discriminatory constitute a prima facie violations of Title VII.[179] That is, according to U.S. Supreme Court precedent, a plaintiff need only point to a facially discriminatory policy to shift the burden of proof to the employer to prove that a BFOQ applies.[180]

Some courts, however, apply a different standard, only finding a prima facie case of Title VII discrimination if the injury from the discrimination is not "de minimis," a practice "[w]holly inconsistent with settled Title VII law"[181] and over-burdensome on plaintiffs.

For example, in *Tharp v. Iowa Department of Corrections*,[182] the Eighth Circuit upheld the Iowa Department of Corrections' gender-based

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[176] *See* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1533 (7th Cir. 1988) (Easterbrook, J., dissenting) ("But the burden here, a heavy one, was on the [employer] to show that gender discrimination was necessary, not on the guards to show that gender neutrality was harmless.").

[177] *See supra* notes 14–18 and accompanying text.

[178] City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (internal citation omitted); *see also* Bostock v. Clayton County, 590 U.S. 644, 658 (2020) ("So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.").

[179] Int'l Union v. Johnson Controls, 499 U.S. 187, 197–202 (1991).

[180] *Id.* at 200 (placing the BFOQ burden on the employer after plaintiff pointed to her employer's policy that "[did] not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different'" (citing *Manhart*, 435 U.S. at 711), and noting that "[f]or the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law" (citing EEOC Policy Guidance on United Auto Workers v. Johnson Controls, Inc., 51 EPD P39,359 (7th Cir. 1989), Appendix to Petition for Writ of Certiorari, *Int'l Union*, No. 89-1215, 1990 U.S. S. Ct. Briefs LEXIS 1134, at *198 (Jan. 29, 1990)); *see also, e.g.*, Million v. Warren County, 440 F. Supp. 3d 859, 869 (S.D. Ohio 2020) ("[W]hen an employer makes open and explicit use of gender a relevant characteristic for job-related purposes, as is the case here, disparate treatment is effectively 'admitted' by the employer.").

[181] *Int'l Union*, 499 U.S. at 200.

[182] 68 F.3d 223 (8th Cir. 1995).

staffing policy because it was only a "minimal restriction" on the plaintiffs,[183] eliminating the need to assess whether a valid BFOQ existed for the roles at issue. Adhering to *Tharp*, in *Robino v. Iranon*,[184] the Ninth Circuit determined that a correctional center's policy of assigning only women to certain posts "limit[ed] eligibility for such a small number of positions (six out of forty-one) that it impose[d] such a *de minimus* (sic) restriction on the male [officers'] employment opportunities that it is unnecessary to decide whether gender is a BFOQ for the few positions affected."[185] So too in *Tipler v. Douglas County*:[186] relying on *Tharp*, the Eighth Circuit determined that a correctional center's gender-based staffing assignments did not violate Title VII, not because a BFOQ defense was warranted but because "[a]ny restriction on [plaintiff's] employment was minimal."[187]

This framework conflicts with Title VII. As is clear from *Bostock v. Clayton County*, Title VII protects an individual right to not be treated differently on the basis of gender in employment;[188] any workplace policy that treats individual workers differently on the basis of gender is a statutory violation requiring a defense.[189]

Apart from being a simply erroneous interpretation of Title VII and legal doctrine, courts deeming discrimination "de minimis" if they determine the discrimination imposes only a "minimal restriction" or is outweighed by other interests[190] allows gender discrimination to persist. That is, an injury-balancing focused vision of Title VII suggests that gender *can* be relevant in employment decisions if a judge or jury thinks a plaintiff's injury is undeserving of a legal remedy. As the U.S. Supreme Court has consistently declared, Congress meant to "strike at the entire spectrum of disparate treatment of men and women in employment"[191] with Title VII. Allowing employers to rely on

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[183] *Id.* at 224. In addition, the Eighth Circuit in *Tharp* imported a balancing test at the prima facie stage of the Title VII inquiry, considering at this stage "the prison employer's penological interests, the prison employees' employment interests, and the prison inmates' privacy interests." *Id.* at 225. This balancing collapses the doctrine and imposes an improper burden on plaintiff, making it more appropriate for the BFOQ defense stage if at all.

[184] 145 F.3d 1109 (9th Cir. 1998).

[185] *Id.* at 1110.

[186] 482 F.3d 1023 (8th Cir. 2007).

[187] *Id.* at 1027; *see also* Peccia v. Dep't of Corr. & Rehab., No. 2:18-cv-03049 JAM AC, 2021 WL 3563489, at *7 (E.D. Cal. Aug. 12, 2021) (finding gender-based shift assignments did not constitute an "adverse action" triggering Title VII liability).

[188] *See* Bostock v. Clayton County, 590 U.S. 644, 658–59 (2020); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (forbidding gender stereotyping in employment decisions and reasoning that "Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. [A]n employer may not take gender into account.").

[189] *Bostock*, 590 U.S. at 660 ("If changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred."). In April 2024, the Supreme Court reaffirmed this vision of Title VII, finding a shift change was discrimination in the "terms or conditions" of employment. Muldrow v. City of St. Louis, 601 U.S. 346, 354–55, 359–60 (2024).

[190] *See* Tharp v. Iowa Dep't of Corr., 68 F.3d 223, 224 (8th Cir. 1995).

[191] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal citations omitted).

gender in employment decisions, albeit minor ones, allows disparate gender treatment to continue.

III. The BFOQ and Gender Construction: Critique

Part II summarizes the BFOQ's doctrinal landscape. I argue that, because the BFOQ's stated doctrinal factors are unclear, courts and judges operationalize the permitted factors with other factors, including common sense, deference, and empirical evidence. I also make the case that judges use customer preference and manipulate burden-shifting in making these decisions, departing from the BFOQ's explicit doctrine.

In this section, I offer a critique of this landscape. I first set the stage with an overview of discrimination's dignitary and tangible harms. I then argue that the BFOQ's doctrine threatens Title VII because it enshrines the status quo of gender discrimination in the workplace. As such, it conflicts with Title VII's basic mandate. First, using "common sense," customer preference, and deference to justify BFOQs allows individuals' notions of gender to seep into employment discrimination law. This creates a status quo bias because individual notions of gender can often reflect the status quo, rather than being dynamic and forward-looking.[192] Deference to prison employers similarly creates a status quo bias because it often allows efficiency rationales to justify employment discrimination. Finally, mechanisms that over-burden plaintiffs carry a status quo bias because they require a plaintiff to justify why an employer must change its policies, instead of requiring the employer to change their policies absent a special justification, which would more accurately reflect Title VII's aspirational mandate.

A. Discrimination's Harms

Before considering the shortcomings of the judge-made doctrinal landscape that governs whether employers can legally discriminate on the basis of

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[192] For example, a 2022 Pew Research Center survey on U.S. adults found that sixty percent of those surveyed believed "gender is determined by sex at birth." Kim Parker et al., Pew Rsch. Ctr., Americans' Complex Views on Gender Identity and Transgender Issues, Pew Research Center 4 (2022). The same poll found "more than four-in-ten Americans say societal views on gender identity are changing too quickly." *Id.* In addition, a 2017 Pew Research Center study found that thirty-seven percent of those surveyed believed men and women are "different" when it comes to "the things they are good at in the workplace." Kim Parker et al., Pew Rsch. Ctr., On Gender Differences, No Consensus on Nature vs. Nurture 7 (2017). Forty-seven percent of that pool said those differences were biological. *Id.* Nonetheless, the same study found that fifty percent of those surveyed believed the U.S. has not gone far enough toward achieving gender equality, with the remaining pool saying we have done enough or have gone too far. Juliana Menasce Horowitz et al., Pew Rsch. Ctr., Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality 3 (2017). Results varied significantly, however, by educational attainment and political party affiliation. *Id.*

gender in employment, it is worth considering who BFOQs may harm and how. Because, by definition, a valid BFOQ is legal discrimination, it comes with all the familiar harms of discrimination, often termed dignitary harms. BFOQs also result in unequal workplace opportunities, doled out by gender. Courts, legislators, the public, and scholars alike should therefore be particularly concerned with ensuring the BFOQ exception to Title VII remains narrow.[193]

1. *Dignitary Harms*

Dignitary harm, a modern tort law concept, can be defined as "a harm that injures personality interests rather than one's physical well-being."[194] Professor Rosa Ehrenreich articulates its rationale:

> [A]ll individuals share in "personhood," are autonomous and unique, and are entitled to be treated with respect. Actions that would humiliate, torment, threaten, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person are actions that can be said to injure an individual's dignitary interests and, if sufficiently severe, can give rise to causes of action in tort.[195]

Applied to discrimination, dignitary harm recognizes that discrimination *itself*—that is, being treated differently as a result of belonging to a protected class alone—is harmful.[196] The U.S. Supreme Court takes dignitary harm seriously, recognizing that the "fundamental object" of Title II of the Civil Rights Act of 1964, which forbids race discrimination in public accommodations, "was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[197] Likewise, dignitary harm supported

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[193] Certainly, discrimination may carry some benefits, as well. The first is that an overly formalist view of discrimination may lead to a prohibition on affirmative action. *See generally* Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that race-based affirmative action in college admissions violates the Fourteenth Amendment's Equal Protection guarantee). Discrimination may also carry an economic rationale. *See, e.g.*, Cantor, *supra* note 12, at 515–16 (arguing that sex-based BFOQs should be justified based on an economic analysis that inquires as to whether sex "defines the market in which the defendant competes"). *See generally* Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992) (arguing employment discrimination laws unduly restrain employers and employees' freedom to contract). But note that some have criticized Professor Epstein's case against discrimination law. *E.g.*, J. Hoult Verkerke, *Free to Search*, 105 Harv. L. Rev. 2080 , 2082, 2096–97 (1992).

[194] Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 Geo. L.J. 1, 22 (1999) (internal citations omitted).

[195] *Id.* at 22.

[196] *See* Heckler v. Matthews, 465 U.S. 728, 739–40 (1984) ("Rather, as [the Supreme Court has] repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." (internal citations omitted)).

[197] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

rulings protecting LGBTQ+ fundamental rights.[198] Some scholars argue it should underscore Title VII's protection against sexual harassment as well.[199]

Discrimination on the basis of gender in employment similarly results in dignitary harm. The U.S. Supreme Court has declared that gender discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."[200] This concern should apply, for instance, to gender-based public accommodation discrimination, workplace sexual harassment, hiring, and staffing policies alike. Because gender discrimination in employment imposes dignitary harm, we should be particularly concerned about keeping the BFOQ defense narrow.[201]

2. *Unequal Workplace Opportunities*

In addition to dignitary harm, gender-based staffing distributes workplace opportunities unequally on the basis of gender, restricting access to promotions[202] and overtime hours.[203] When plaintiffs argue against an employer's BFOQ defense, often they articulate these very harms.

In particular, some plaintiffs in BFOQ cases cite unequal opportunities for shift transfers as a harm stemming from the BFOQ. For example, in *Zula T. v. J.E.H. Johnson*,[204] a transportation security officer was "denied the opportunity to bid on a baggage inspection assignment" because she was "needed

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[198] *See generally* Steve Sanders, *Dignity and Social Meaning:* Obergefell*,* Windsor*, and* Lawrence *as Constitutional Dialogue*, 97 Fordham L. Rev. 2069 (2019) (exploring the dignitary interests evident in *Obergefell v. Hodges*, 576 U.S. 644 (2015), *United States v. Windsor*, 570 U.S. 744 (2013) and *Lawrence v. Texas*, 539 U.S. 558 (2003)); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 Yale L.J. 3076, 3082–88 (2014) (explaining dignity in *United States v. Windsor*, 570 U.S. 744 (2013) and *Lawrence v. Texas*, 530 U.S. 558 (2003)).

[199] *See, e.g.*, Ehrenreich, *supra* note 194, at 27–30; *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 509–10 (1997).

[200] Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

[201] *See supra* notes 196–200 and accompanying text. Whether only invalid BFOQs or valid BFOQs alike impose dignitary harms is an interesting question. On one hand, if dignitary harm only results from discrimination that is "based on archaic and overbroad assumptions about the relative needs and capacities of the sexes," it would stand to reason that BFOQs not based on stereotyping would not impose dignitary harm, and only *invalid* BFOQs would. *Roberts*, 468 U.S. at 625; *see* Peter Brandon Bayer, *Debunking Equal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent, and Kantian Dignity Theory*, 89 St. John's L. Rev. 401, 439 (2015) (arguing that valid BFOQs do not create a dignitary harm because "[t]here is nothing untoward in requiring that individuals be capable of accomplishing the jobs for which they seek employment"). On the other hand, if dignitary harm is about recognizing felt stigma, or in the cases in which BFOQs are valid because they are necessary despite their reliance on stereotypes, even *valid* BFOQs would impose dignitary harms.

[202] *See, e.g.*, Ambat v. City & County of San Francisco, 693 F. Supp. 2d 1130, 1134 (N.D. Cal. 2010), *rev'd*, 757 F.3d 1017 (9th Cir. 2014); Henry v. Milwaukee County, 539 F.2d 573, 577–78 (7th Cir. 2008).

[203] *See, e.g.*, Jennings v. N.Y. State Off. of Mental Health, 786 F. Supp. 376, 379 (S.D.N.Y. 1992).

[204] E.E.O.C. DOC 0120142146, 2016 WL 4492231 (Aug. 16, 2016).

for female screening and pat down services," a BFOQ.[205] In *Kasprzycki v. Michigan Department of Corrections*,[206] the Eastern District of Michigan noted that an EEOC report found that the "broad application of the BFOQ has a negative impact on female officers' ability to transfer to other correctional facilities."[207] So too in *Roman v. County of Monroe*,[208] in which plaintiffs alleged gender-based prison staffing required women to work at more stressful prison facilities, forbidding them from transferring to "more favorable work assignments."[209]

Plaintiffs in other cases allege other concrete harms. In *Ambat v. City and County of San Francisco*,[210] for example, the plaintiffs alleged that they not only "received less favorable assignments," but also lost overtime, lost promotional opportunities, and were subject to an increased risk of stress due to gender-based staffing.[211] In *EEOC v. New Prime, Inc.*,[212] due to a gender-based training policy for truck drivers, female applicants were placed on a "female waiting list," which could carry a wait time of longer than a year. There was no "male waiting list."[213] Similarly, in *Crews v. City of Ithaca*,[214] the plaintiff argued that a gender-based prison BFOQ "protect[ed] male officers from allegations of improper contact with female prisoners but d[id] not provide the same protection to her as a homosexual female."[215]

B. Status Quo Bias in BFOQ Doctrine

Judge-made factors used to determine the validity of BFOQs also create a status quo bias in BFOQ cases that slows down progress toward gender equality.

Start from the following premise: Title VII declares a broad right to be free from discrimination on the basis of gender at work.[216] It "evinces a[] [congressional] intent to strike at the entire spectrum of disparate treatment of men and women in employment."[217] Taking Title VII's mandate against gender-based discrimination in the workplace seriously, the Supreme Court

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[205] *Id.* at *1. In 2024, the Supreme Court endorsed the idea that shift changes constitute a violation of Title VII as discrimination in the terms and conditions of employment. Muldrow v. City of St. Louis, 601 U.S. 346 (2024).

[206] Kasprzycki v. Mich. Dep't of Corr., No. 17-cv-11220, 2019 WL 3425259 (E.D. Mich. July 30, 2019).

[207] *Id.* at *1.

[208] 426 F. Supp. 3d 439 (E.D. Mich. 2019).

[209] *Id.* at 441.

[210] 693 F. Supp. 2d 1130 (N.D. Cal. 2010), *rev'd*, 757 F.3d 1017 (9th Cir. 2014).

[211] *Id. at* 1134.

[212] 42 F. Supp. 3d 1201 (W.D. Mo. 2014).

[213] *Id*. at 1206.

[214] Crews v. City of Ithaca, No. 3:17-CV-213 (MAD/ML), 2021 WL 257120 (N.D.N.Y. Jan. 26, 2021).

[215] *Id.* at *2. Not only does *Crews* illustrate a (perhaps unexpected) harm created by a BFOQ; it also illuminates how the BFOQ's fundamentally heteronormative, gender-as-binary basis fails to address the problems it purports to solve.

[216] *See generally* Bayer, *supra* note 201, at 429–37 (explaining Title VII's "[e]xtraordinarily [e]xpansive [b]readth").

[217] Meritor Sav. Bank, FSB. v. Vinson, 477 U.S. 57, 64 (1986).

has steadily expanded Title VII's breadth, noting that it applies "beyond the principal evils" Congress had in mind when passing the law to cover "reasonably comparable evils."[218] Thus, Title VII protects against not only disparate treatment on the basis of gender, but also sexual harassment[219] (including in-group harassment[220]), as well as discrimination on the basis of sexual orientation and gender identity.[221]

Further, Title VII is aspirational. Forbidding practices and procedures that "operate to 'freeze' the status quo of prior discriminatory employment practices,"[222] Title VII envisions a society in which gender has no role in employment.[223] As societal understandings of the meanings of biological sex, gender, and gender identity evolve and transform, the meaning of gender having *no role* must change, too.

Yet, the BFOQ's doctrinal landscape enshrines the status quo of gender discrimination in the workplace. First, common sense rationales for BFOQs carry a status quo bias that conflicts with Title VII. At first blush, it might seem appropriate that what gender-based job qualifications are "bona fide" is a question of common sense because there is little else we can draw on to determine what counts as "bona fide." But allowing common sense conceptions of gender and its role to justify otherwise illegal employment discrimination threatens to swallow Title VII wholesale. It allows courts to declare, for instance, that, by "common sense," being a man is a proxy for one's likelihood of committing sexual violence[224] and that girls prefer women as role-models

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[218] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1988).

[219] *See Vinson*, 477 U.S. at 73.

[220] *See Oncale*, 523 U.S. at 82.

[221] *See* Bostock v. Clayton County, 590 U.S. 644, 680 (2020). Indeed, denying that to hold sexual orientation and gender identity protected by Title VII was akin to finding an elephant in a mousehole, the Court in *Bostock* argued that Title VII is not a "mousehole" at all: "Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them . . . This elephant has never hidden in a mousehole; it has been standing before us all along." *Id.*

[222] Griggs v. Duke Power Co., 410 U.S. 424, 430 (1971).

[223] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 242 (1989) ("[G]ender must be irrelevant to employment decisions . . . an employer may not take gender into account."). Indeed, in his remarks before signing the Act, President Lyndon B. Johnson explained the law's mandate: "It does say only the limit to a [wo]man's hope for happiness, and for the future of h[er] children, shall be h[er] own ability." *See* Lyndon B. Johnson, *Radio and Television Remarks Upon Signing the Civil Rights Bill* (July 2, 1964), https://www.senate.gov/artandhistory/history/resources/pdf/JohnsonSpeechJuly21964.pdf [https://perma.cc/UK9V-V29H] [hereinafter *Remarks Upon Signing the Civil Rights Bill*].

[224] Everson v. Mich. Dep't of Corr., 391 F.3d 737, 755 (6th Cir. 2004) ("[S]ome male officers possess a trait precluding safe and efficient job performance—a proclivity for sexually abusive conduct—that cannot be ascertained by means other than knowledge of the officer's gender, and thus gender was a 'legitimate proxy' for the safety-related job qualification."); *see also* Dothard v. Rawlinson, 433 U.S. 321, 335–36 (1977) ("A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual

over men.[225] Undoubtedly, this reliance on "common sense" steps over the line from factually grounded BFOQs to those based on stereotypes, which are common despite being expressly forbidden.[226]

Similarly, deferring to prison officials on BFOQ questions enshrines status quo gender discrimination and, as such, takes the teeth out of Title VII. In the same way that "common sense" and customer preference BFOQ rationales preserve employers', judges', experts', juries', and customers' intuitions of gender, deference to prison officials on BFOQs allows these officials to determine gender's meaning. Unsurprisingly, such deference carries a status quo bias: the status quo of prohibitions on cross-gender prison security is justified with privacy and safety concerns, based on a *Dothard* idea that men are prone to commit sexual violence.[227] Allowing this view to permeate Title VII doctrine prevents our conceptions of gender and privacy (and why sexual assault pervades prisons) from evolving.[228]

Likewise, customer preference rationales for BFOQs carry a status quo bias, which is perhaps why these rationales are technically forbidden. When Title VII was enacted, a customer preference for employees to fulfill stereotypical gender roles was prevalent;[229] even the EEOC was hesitant to implement Title VII's basic mandate.[230] Congress intended Title VII to combat this reality. When courts rely on customer preference to justify BFOQs, the customer's preference presumably is taken as found, regardless of whether it relies on stereotypes or assumptions that Title VII aims to prevent.[231] Customer

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environment, would assault women guards because they were women. In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians."). Importantly, other cases get their support for use of common sense from this very passage in *Dothard*, reasoning that "[t]hese appraisals were not based on objective, empirical evidence, but instead on a common-sense understanding of penal conditions, and, implicitly, on a limited degree of judicial deference to prison administrators." Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530 (7th Cir. 1988); *see also* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d. Cir. 1996)) ("[A]ppraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used." (citing *Dothard*, 433 U.S. at 335)).

[225] City of Philadelphia v. Pa. Hum. Rels. Comm'n, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973) ("It is common sense that a young girl with a sexual or emotional problem will usually approach someone of her own sex, possibly her mother, seeking comfort and answers."); *see also Healey*, 78 F.3d at 133–34 (echoing the same kinds of arguments).

[226] 29 C.F.R. § 1604.2.

[227] *See Dothard*, 433 U.S. at 335–36; *see also supra* Part I.C for a discussion of *Dothard*'s shortcomings.

[228] *See* Bayer, *supra* note 201, at 411–12 ("Title VII's protection of individual dignity cannot depend on the personal preferences and predilections of employers, employees, job applicants, or the judges who review the allegedly discriminatory employment policies.").

[229] *See supra* Section I.A.

[230] *See supra* Section I.B.

[231] *See Remarks Upon Signing the Civil Rights Bill*; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 242 (1989) ("[G]ender must be irrelevant to employment decisions . . . an employer may not take gender into account.").

preference BFOQs then allow the status quo to permeate BFOQ inquiries,[232] allowing customers' potentially biased preferences to threaten individual rights. This danger is classic in fights for rights. But preferences must concede to rights as they evolve; and as rights expand, often "preferences" do too.

Mechanisms that over-burden plaintiffs further contribute to enshrining gender status quos in employment discrimination. This mechanism is fairly simple: if an employer is only required to change its gender-based policies if an employee shows there is a reasonable alternative, the status quo does not violate Title VII until a plaintiff presents an alternative deemed "reasonable." Instead, under Title VII's broad anti-discrimination mandate, an employer's gender-based policies should *presumptively* violate Title VII until they demonstrate why they deserve an exception.

Courts determining that facial, gender-based discrimination does not presumptively violate Title VII requires even less discussion. Title VII reflects an individual right to be free from gender-based discrimination at work, no matter how minimal the discrimination.[233] Yet some courts take it upon themselves to assess the injury,[234] allowing judges to make individual determinations of what constitutes "reasonable" and "unreasonable" gender-based discrimination. Judges likely assess what employees should feel aggrieved about based on personal and traditional legal conceptions about gender in employment. Laden with status quo biases, then, long-standing BFOQ doctrine threatens to shrink Title VII's aspirational promise.

Not only do these BFOQ factors enshrine gender status quos in the workplace, but they also threaten to enshrine gender status quos in our society writ large. For many people, work provides not only livelihood but also meaning and purpose. Job opportunities, especially for women, shape educational possibilities, earning potential, and their children's pursuits. Indeed, Title VII recognized as much. The status quo gender concepts that judges, lawyers, juries, employers, and customers enshrine in the world of employment can seep into other worlds. Thus, we should be careful both about the BFOQ's scope and about who determines it.

On the other hand, reliance on empirical and objective evidence could shake status quo bias out of BFOQ doctrine. Perhaps this possibility is why this standard is increasingly required[235] and, why, when taken seriously, it results in very few BFOQs.[236] Empirical evidence does not enshrine the status quo because it reflects current realities instead of past; it draws on more

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[232] *See generally* Calloway, *supra* note 12, at 348–62 (explaining how privacy BFOQs carry a status quo bias).

[233] *See Remarks Upon Signing the Civil Rights Bill*; *see also Price Waterhouse*, 490 U.S. at 240, 242 ("[G]ender must be irrelevant to employment decisions . . . an employer may not take gender into account."); Bayer, *supra* note 200, at 435–37 (explaining why Title VII protects and individual right that applies to the "[f]ull [p]anoply of [e]mployment").

[234] *See supra* Section II.E.2.

[235] *See* sources cited *supra* note 119 (collecting recent cases that require empirical evidence to support a BFOQ).

[236] *See supra* Section II.C.1.

modern science about gender, instead of individuals' notions about gender. Title VII's wide reach and insurance of individual civil rights indicates that employers presenting serious facts to be exempt from its mandate is not only appropriate, but necessary.

IV. Recommendation

Legislative action is needed to rectify the Title VII gender-based BFOQ landscape. First, courts predictably have a nearly impossible job determining what makes a gender-based qualification "bona fide," or "reasonably necessary to the normal operation of that particular business or enterprise."[237] While purporting to prohibit customer preference and stereotypes from justifying BFOQs, courts seem to not know how to handle the BFOQ inquiry. They permit customer preference when it relates to privacy and allow common sense to enter the arena. They over-burden plaintiffs and disagree as to what constitutes discrimination. As a result, BFOQs not only lack uniformity and predictability; they threaten Title VII's very existence.

Legislative action can fill this gap. Although abolishing the BFOQ exemption is initially palatable as an assertion of gender equality, there are strong reasons to keep it in some form. Chief among them is prisoners' privacy rights. Eliminating the BFOQ would also outlaw gender-based casting calls, as well as some of the more palatable (though still debatable) BFOQs I have outlined in this paper, such as gender-based nursing homes or youth facility staffing. Ultimately, without other reforms to reduce sexual violence in prison and changes in cultural norms more broadly, some form of the BFOQ exemption should be retained.

More realistically, Title VII's BFOQ exception should be narrowed and updated. Congress could list a limited number of occupations in which a BFOQ could be justified upon sufficient showing, such as an entertainment-based BFOQ (i.e., for a casting call) or a safety-based BFOQ. Ideally, Congress should additionally re-affirm the necessity of empirical evidence to support a BFOQ and clarify the nature of this evidence.

These updates to Title VII would achieve several helpful objectives. First, they would give courts more guidance in interpreting BFOQ cases. Limiting the exact job positions that could justify a BFOQ would decrease the number of cases for judges to decide. Likewise, requiring empirics would force judges to invalidate BFOQs based on customer preference and stereotypes even under the guise of "common sense" and privacy. Second, these legislative changes would guide employers and employees by affirmatively outlining permissible and impermissible discrimination. Employers would not be able to frivolously declare, for example, that they cannot employ pregnant

[237] 42 U.S.C. § 2000e-2(e).

women as sushi servers[238] or dental assistants.[239] As arbitration agreements, class action waivers, and resource imbalances prevent many Title VII lawsuits from being brought,[240] clarification from Congress may increase justice across the board. Employers and judges would know more clearly what qualifies for a BFOQ, so litigants would less often have to resort to lawsuits, and in the case of a lawsuit, outcomes would be more consistent.

Updating the BFOQ exemption would reaffirm a congressional commitment to Title VII's basic mandate. Congress can echo what has been true since 1964: gender has no place in employment. As society's understanding of gender evolves, so too should Title VII.

Conclusion

This piece examined the doctrinal landscape of the modern gender-based BFOQ exception to Title VII, highlighting difficult cases and how courts handle them. It argued that current judge-made doctrine surrounding the validity of BFOQs prevents our conceptions of gender from evolving, rendering it insufficient, and recommended legislative action to clarify the BFOQ.

True, this article primarily showcased legal issues. But law reflects and constructs both culture and social behavior. And, employment law particularly shapes individuals' lives in radical ways. As such, the story of the BFOQ exemption implicates the larger political and social project of true gender equality.

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[238] *See* Everts v. Sushi Brokers LLC, 247 F. Supp. 3d 1075, 1081–82 (D. Ariz. 2017) (granting summary judgment for plaintiff because defendant-employer provided no evidence in support of its argument that it pregnancy status was a "legitimate proxy" for ability to be a server at a sushi restaurant because a server must "carry heavy plates in close proximity to sharp sushi knives in a crowded area where [they] may get bumped or fall," and visibly pregnant women were therefore unqualified).

[239] *See* Brown v. Metro. Dental Assocs., No. 21-cv-851 (CM), 2023 WL 5154415, at *6 (S.D.N.Y. Aug. 10, 2023).

[240] The U.S. Supreme Court has upheld class action waivers and arbitration agreements as valid employment contract provisions. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (striking down California's law that declared arbitration agreements disallowing class-wide procedures unconscionable as preempted by the Federal Arbitration Act); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20–22 (1991) (finding arbitration agreement in employment contract applied to age discrimination claims, notwithstanding the applicability of the Age Discrimination in Employment Act). "But the claim-suppressive effects of forced arbitration have eliminated up to ninety-eight percent of all employment claims and virtually insulated employers from liability altogether." Note, *The Enforcement Opportunity: From Mass Arbitration to Mass Organizing*, 136 Harv. L. Rev 1652, 1652 (2023).