THE BFOQ DEFENSE: TITLE VII'S CONCESSION TO GENDER DISCRIMINATION

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees when making employment decisions.[1] Nevertheless, when employers do partake in discriminatory decision-making, they are offered the statutory defense of the bona fide occupational qualification (BFOQ). The BFOQ defense allows employers to intentionally discriminate based on gender by adopting an otherwise facially discriminatory employment practice if reasonably necessary to the normal operation of the business.[2] While the Supreme Court has held that this defense should be interpreted narrowly, it is still available if employers are able to prove that all or substantially all of the members of one gender cannot successfully perform the job duties essential to fulfill the employer's primary business function.[3] If an employer is successful in offering the defense, gender discrimination is legally permitted. Thus, by utilizing the BFOQ defense, employers are permitted to partake in the exact discriminatory practices that Title VII directly seeks to forbid. Accordingly, Title VII seems to acknowledge that under certain circumstances discrimination really is acceptable. However, a deeper examination of these circumstances invites the question: Should the BFOQ exception still exist?

Because permitting discrimination under Title VII seems fundamentally contrary to the anti-discrimination purpose of the statute, this article questions whether the BFOQ defense is consistent with the aims of Title VII or whether, in actuality, the defense undermines the Act's effectiveness by providing a loophole for employers to participate in the discriminatory practices Title VII seeks to forbid. In the end, this article considers four differing viewpoints on the BFOQ defense: (1) the BFOQ defense should be broadened to represent the needs of society and the practices that some courts already permit; (2) the defense should remain as is because it appropriately balances customer and

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1. 42 U.S.C. § 2000e-2(a) (2000).
2. 42 U.S.C. § 2000e-2(e)(1) (2000).
3. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

employer rights against employee rights; (3) the defense is necessary in very limited circumstances, but the exception should be narrowed to permit discrimination only in the utmost imperative circumstances; and (4) the BFOQ defense is inconsistent with the aims of Title VII and should no longer be permitted.

Although the BFOQ exception is permitted for both religion and national origin, it is most commonly and most controversially utilized in gender discrimination suits.[4] Therefore, this note will focus solely on the defense as applied to gender discrimination cases. Part I begins by providing general information on the BFOQ defense, including a discussion of the BFOQ framework and the history of the defense. Part II examines the successful and unsuccessful use of the defense, exploring when employers' motives have achieved or failed to meet the BFOQ requirements. Part III discusses the inconsistencies that have occurred in the application of this defense. Because the BFOQ is available in gender discrimination, but not in race discrimination, Part IV looks to the reasons Congress provided a gender BFOQ. In response, Part V posits on the actual and perceived differences between men and women and considers if any significant differences exist that validate Title VII's authorization of gender discrimination. Part VI then questions whether the defense to gender discrimination should still be available. Arguments both for and against the BFOQ defense are presented, with special thought paid to the question of whether the defense is actually consistent with Title VII. Finally, this article concludes that the defense, though unquestionably problematic in theory and application, is a necessary component for the workability of Title VII.

II. BACKGROUND OF THE BFOQ DEFENSE

A. Jurisprudence

The BFOQ defense is a statutory defense available under Section 703 of Title VII of the Civil Rights Act of 1964.[5] Title VII is the primary federal statute providing protection against workplace discrimination, mandating:

> It 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.[6]

The Act covers a wide range of employment discrimination claims, including those based on hiring, firing, promotion, and conditions or benefits of employment.[7] Title VII was enacted in 1964 to "prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination

4. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 285–86 (student ed. 1988).
5. § 2000e-2(e).
6. § 2000e-2(a)(1).
7. *Id.*

on the basis of race, religion, sex, or national origin."[8] The bona fide occupational qualification defense in Title VII allows intentional discrimination in some circumstances, stating:

> Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[9]

Although the defense is available for gender, religion, and national origin-based hiring, it is not available in race discrimination cases.[10] This suggests that Title VII's framers believed that racial discrimination was somehow different than discrimination based upon gender; a belief that it was more valuable or important to protect against racial discrimination.

The legislative history of the BFOQ defense is limited, sometimes causing courts to struggle with its interpretation.[11] The lack of legislative history is partially due to the fact that sex discrimination, the main type of case to utilize the BFOQ, was not originally included in the statutory language of Title VII.[12] Instead, Title VII was originally enacted to prevent race, color, origin, and religious discrimination in employment.[13] In a last minute attempt to defeat the legislation, a House Representative who opposed the bill proposed that the bill be broadened to include sex in the list of protected categories.[14] The House Judiciary Committee did not hold a hearing on the amendment to add gender discrimination to Title VII and little discussion of the addition ensued.[15] This effort to thwart the passage of Title VII was unsuccessful, and the bill passed with the inclusion of sex as a protected category.[16] As a result, the legislative history of the sex discrimination portion of Title VII and the BFOQ defense is nearly nonexistent. Even the Supreme Court has recognized this limitation, stating, "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[17]

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8. Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976).

9. § 2000e-2(e)(1).

10. *Id*.

11. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–64 (1986) (explaining that there is little legislative history available on the BFOQ defense); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 297 (N.D. Tex. 1981) (stating that "Congress provided sparse evidence of its intent when enacting the BFOQ exception to Title VII.").

12. *Meritor Sav. Bank*, 477 U.S. at 63–64.

13. *Id.*

14. *See* W. PEPPER & F. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT: AN ANALYSIS AND GUIDE FOR PRACTITIONER AND STUDENT 18 (1981) (discussing the fact that the addition of "sex" to the list of prohibited classification was added in an attempt to prevent the bill). *See also* Willingham v. Macon Tel. Publ'g. Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (explaining that the amendment adding "sex" to the list was a last minute attempt to sabotage the bill).

15. *See Wilson*, 517 F. Supp. at 297 n.12.

16. *Id*. at 297.

17. *Meritor*, 477 U.S. at 64.

Nevertheless, the Interpretive Memorandum of Title VII, submitted by the Senate Floor Managers of the Civil Rights Bill, does provide some limited information on the BFOQ.[18] The Interpretive Memorandum refers to the BFOQ as a "limited exception" to the prohibition against discrimination and explains that employers are given a "limited right to discriminate . . . where the reason for the discrimination is a bona fide occupational qualification."[19] This Memorandum further detailed some examples of BFOQs that would entail legal discrimination, including "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of a particular religious group for a salesman of the religion. . . ."[20] While this memo provides some instruction on appropriate BFOQ exceptions, it does not provide the in-depth understanding necessary to identify the appropriate circumstances in which the defense may be used.

Although the EEOC guidelines are also not extensive, they have been crucial in the courts' understanding of the defense since the statute itself offers little guidance. The EEOC guidelines echo Title VII's directive that "the [BFOQ] exception as to sex should be interpreted narrowly."[21] The guidelines further explain that employers many not refuse to hire employees based on stereotyped characterizations or customer preferences.[22] The compliance manual lists only one area in which a BFOQ is allowable: when necessary for the purpose of authenticity or genuineness.[23] Nevertheless, EEOC discussion letters explain that other motives, including the psychological needs of clients or customers, are acceptable BFOQ objectives.[24]

Although the EEOC guidelines provide guidance to courts interpreting the BFOQ provision, they are not controlling precedent. In *General Electric Co. v Gilbert*, the Supreme Court considered how much deference to give the EEOC's guidelines, explaining that:

> [T]he rulings, interpretations and opinions of the [EEOC] under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.[25]

The court went on to find two crucial factors in determining whether a court should defer to EEOC guidelines: (1) whether the guideline in question is a contemporaneous interpretation of Title VII, and (2) whether the guideline is consistent or inconsistent with the position that the EEOC held at an earlier date,

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18. *Wilson*, 517 F. Supp. at 297 (citing 110 CONG. REC. 7212, 7213 (1964)).
19. *Id*. (quoting 110 CONG. REC. 7212, 7213 (1964)).
20. *Id*.
21. 29 C.F.R. § 1604.2(a) (2008).
22. § 1604.2(a)(1)(ii)-(iii).
23. § 1604.2(a)(2).
24. *See* EEOC Informal Discussion Letter, Aug. 22, 2005 (available at http://www.eeoc.gov/foia/letters/2005/titlevii_bfoq_psychotherapy.html); *see also* EEOC Informal Discussion Letter, March 2, 2002 (available at http://www.eeoc.gov/foia/letters/2002/titlevii_bfoq.html).
25. 429 U.S. 125, 141–42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

closer to the enactment of Title VII.[26] These factors suggest that courts should defer to EEOC's BFOQ guidelines because: (1) the guidelines have been consistent, not changing since their promulgation,[27] and (2) they were promulgated very close in time to the enactment of Title VII (the same year, in fact). Thus, courts can place great weight on the EEOC's guidelines when deciding BFOQ cases.

B. Framework

A plaintiff may bring a Title VII claim by asserting a violation based on disparate treatment or disparate impact. Under a disparate treatment claim, an individual argues that he or she was treated differently as a result of his or her race, color, religion, sex, or national origin. Under this theory, proof of the employer's discriminatory motive is essential.[28] Alternatively, under a claim of disparate impact, the employment practice appears neutral on its face, but impacts a protected group more harshly.[29] Because the practice is facially neutral, no proof of discriminatory motive is required. The BFOQ defense is utilized only when an employer admits to discriminatory practices and, therefore, should only be raised as a defense to disparate treatment charges.

To establish the prima facie case for disparate treatment, a plaintiff must show that: (1) he is a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.[30] Once a plaintiff establishes a prima facie case, the burden shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for the employee's rejection.[31] An employer may state a variety of legitimate, non-discriminatory reasons, provided that they are not pretext.[32] Moreover, the employer's justifications do not have to be good reasons, so long as they are non-discriminatory.[33] It is sufficient if the defendant raises a genuine issue of material fact as to whether it discriminated against the plaintiff.[34] According to the Supreme Court in *Texas Department of Community Affairs v. Burdine*, the employer must only "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[35] The plaintiff retains the burden of persuasion and may succeed "either directly by persuading the court

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26. *Id*. at 142.
27. Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 299 n.15 (N.D. Tex. 1981).
28. McDonnell Douglas v. Green, 411 U.S. 792, 803–05 (1973).
29. Connecticut v. Teal, 457 U.S. 440, 446 (1982).
30. *McDonnell Douglass*, 411 U.S at 802. This basic prima facie case framework is modified to fit other employment actions, including promotion, firing, and unequal conditions or privileges of employment.
31. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
32. *Id*.
33. *Id*. at 257–58.
34. *Id*.
35. *Id*. at 257.

that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's offered explanation is unworthy of credence."[36] The plaintiff's successfully established prima facie case, joined with sufficient evidence that the employer's proffered justification was false, permits the trier of fact to conclude that unlawful discrimination occurred.[37]

If a plaintiff is successful in making out her prima facie case, an employer then has the opportunity to raise the BFOQ as an affirmative defense. Here, the burden of proof falls upon the employer and is difficult to meet.[38] Both the Supreme Court and the EEOC guidelines explain that the BFOQ exception to sex discrimination should be interpreted narrowly;[39] a BFOQ can be established only when "sex discrimination is 'reasonably necessary' to the 'normal operations' of the 'particular' business."[40]

C. The BFOQ Multi-Part Test

The requirements for establishing a BFOQ have evolved over time into a multi-part test, guided by Supreme Court cases and the BFOQ rules established within the Age Discrimination Employment Act.[41] Courts considering a BFOQ defense analyze the claim under the "all or substantially all" test and the "essence of business" test.[42] Additionally, courts often consider whether any reasonable alternatives exist to forgo discriminatory practices.[43]

Initially, courts constructing a BFOQ standard required that an employer prove that "all or substantially all women" would be unable to fulfill the requisite job duties. For example, in *Weeks v. Southern Bell Telephone & Telegraph Co.*, an employer excluded women from positions requiring employees to lift more than thirty pounds.[44] This practice was rejected because the employer could not show that almost all women could not lift thirty pounds.[45] The Fifth Circuit Court of Appeals explained that "to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[46] The "all or substantially all" test often comes into dispute when employers attempt to exclude females based on physical ability, privacy concerns, or where pregnancy poses safety risks. This test presents a

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36. *Id*. at 256.

37. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

38. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 248 (1989) (explaining that "[w]hen an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment").

39. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991); 29 C.F.R. § 1604.2(a) (2008).

40. *Johnson Controls*, 499 U.S. at 201.

41. 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 404 (4th ed., 2007).

42. *Id*. at 405.

43. *Id*.

44. 408 F.2d 228, 232–34 (5th Cir. 1969).

45. *Id*. at 235–36.

46. *Id* at 235.

large hurdle for employers and is only met if it can be shown that gender is an "absolute bar to job performance or if virtually all members of one sex are unable to perform and testing for individual capabilities is not feasible."[47] This "all or substantially all" test makes up one prong of the three part test commonly employed today.

Two years after establishing the "all or substantially all" test, the Fifth Circuit Court of Appeals formulated another test, commonly called the "essence of the business" test, to determine whether a BFOQ was properly established.[48] In *Diaz v. Pan American World Airways, Inc.*, Pan Am maintained a policy of exclusively hiring females for its flight attendant positions.[49] The essence of the business test was established with the court's finding that "[d]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[50] Although the court acknowledged that females may be better suited to fulfill the required duties of the position, this was not enough to fulfill the essence of the business test:

> The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as . . . their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.[51]

Consequently, job qualifications cannot be based on customer, coworker, or employer preference. Furthermore, an employer's decrease in profits is not adequate to support a BFOQ defense.[52] In light of these restrictions, the essence of the business test is considerably difficult to meet. An employer must prove that gender is absolutely essential to the business' primary function and that members of the opposite gender could not successfully perform the duties that constitute the employer's essence of the business.

For many years, the "all or substantially all" and the "essence of the business" tests were utilized as separate and competing BFOQ tests. However, in 1977, in *Dothard v. Rawlinson*, the Supreme Court gave express approval to both standards.[53] After the Supreme Court authorized the use of both analyses, courts began to employ the "all or substantially all" and the "essence of the business" concurrently. The two tests are easily employed in tandem because they focus on two different considerations. The "essence of the business" test considers whether the employee's desired trait is essential for the business to

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47. Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 16 (1991).

48. *See* LINDEMANN & GROSSMAN, *supra* note 41, at 409.

49. 442 F.2d 385 (5th Cir. 1971).

50. *Id*. at 388.

51. *Id*.

52. *See*, *e.g.*, Wilson v. Southwest Airlines, 517 F. Supp. 292, 302 n.25 (N.D. Tex. 1981).

53. 433 U.S. 321, 333 (1977).

run successfully, while the "all or substantially all" test focuses on whether a class-based ban is the only feasible method of revealing those unable to perform the job.

Often, courts require a third prerequisite, mandating that defendants also show that no reasonable, less discriminatory alternative exists, especially in cases where privacy is at issue.[54] For instance, in *Hardin v. Stynchcomb*, the Eleventh Circuit Court of Appeals disallowed the sheriff's department's policy of rejecting female applicants for the deputy sheriff position.[55] There, the sheriff's department argued that sex was a bona fide occupational qualification for the job because the available positions were in the male section of the jail.[56] In rejecting the BFOQ defense, the court explained that the defendant had not met its burden of proving that it "could not rearrange job responsibilities in a way that would eliminate the clash between the privacy interests of the inmates and the employment opportunities of female deputy sheriffs."[57]

III. EMPLOYER USE OF THE BFOQ DEFENSE

Employers attempt to evoke the BFOQ defense in a variety of contexts. However, given that the BFOQ exception is intended to be extremely narrow, employers' efforts are typically rejected. The defense is generally only successful in three main contexts: privacy, safety, and authenticity. While employers may, at times, legally engage in discriminatory hiring practices as a result of these three concerns, almost any other motive will be refuted. Though gendered hiring regularly occurs based on stereotypes, customer preference, and the promotion of sex appeal within businesses that don't primarily sell sex, employers have been largely unsuccessful in justifying discriminatory hiring stemming from these motives. The following assessment of successful and unsuccessful uses of the defense allows an examination of the defense's legitimacy and assists in explaining whether its tolerance of discriminatory practices should remain unchanged, be expanded, or restricted.

A. Successful BFOQ Contexts

1. *Privacy*

Employers are often successful in offering BFOQ defenses based on legitimate privacy concerns. Although the Supreme Court has never heard a BFOQ privacy case, it has suggested that such a justification may be one of the few acceptable BFOQ motives.[58] Courts of appeal and lower courts regularly

54. *See* LINDEMANN & GROSSMAN, *supra* note 41, at 412.

55. 691 F.2d 1364 (11th Cir. 1982).

56. *Id*. at 1366.

57. *Id*. at 1370–74.

58. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 206 n.4 (1991) (noting that "[n]othing in our discussion of the 'essence of business test,' however, suggests that sex could not constitute a BFOQ when privacy interests are implicated").

recognize this defense when based upon the privacy concerns of third parties.[59] Courts differ in their determinations of what privacy interests are legitimate, but most successful claims are premised upon concerns for bodily privacy when dealing with fully or partially unclothed patients or customers. A subset of cases based upon the needs of patients when receiving psychological or role-modeling services are often considered to fall under the privacy exception. The primary factor in privacy cases is whether the protection of the privacy interests is essential to the employer's primary business.[60]

An employer arguing a BFOQ defense based on privacy must generally establish three elements: "(1) it has a factual basis for believing that employees of a particular sex are necessary in order to protect the privacy interests of third parties involved; (2) the asserted privacy interest is entitled to protection under the law; and (3) there is no reasonable alternative to protect those privacy interests other than a sex-based policy."[61] In analyzing the third prong of the test, courts will question whether employers can rearrange job assignments to prevent privacy problems.[62] If such alterations are possible, a BFOQ defense is more likely to be denied.

Privacy defenses have been upheld in instances where employers require custodians to be the same sex as those in the facility being cleaned, nurses and care providers in hospitals and nursing homes to be of the same sex as patients being assisted, and labor and delivery nurses to be female.[63] Courts are often lenient in permitting BFOQs in health care situations.[64] In *Fesel v. Masonic Home of Delaware, Inc.*, for example, a court considered sex-based hiring permissible, finding that being a woman was a legitimate BFOQ for an orderly since the patients would not consent to male workers bathing them or providing any other intimate-contact services.[65]

Though privacy-based BFOQ cases often arise in prison settings, the defense is much more likely to be denied in that environment, in part because of the lower value courts place on the privacy rights of prisoners. Nonetheless, courts may still require that prisons rearrange job responsibilities or alter the environment in order to provide privacy to prisoners during intrusive situations. For example, in *Forts v. Ward*, female prisoners complained of privacy concerns resulting from the staffing of male guards in female housing units when "inmates were involuntarily exposed to view while partially or completely

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59. *See* Jillian B. Berman, *Comment, Defining the "Essence of the Business:" An Analysis of Title VII's Privacy BFOQ after Johnson Controls*, 67 U. CHI. L. REV. 749, 752–53 (2000).

60. LINDEMANN & GROSSMAN, *supra* note 42 at 421.

61. *Id.* at 418.

62. *See*, *e.g.*, Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d. 1052 (D. Ariz. 1999) (finding that being a female was not a BFOQ for a massage therapist position because of the reasonable alternative that clients could choose the sex of their therapist).

63. *See generally* Berman, *supra* note 59.

64. *Id*. *See also* Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d. 1334 (3d Cir. 1979); Backus v. Baptist Med. Ctr., 510 F. Supp. 1191 (E.D. Ark. 1981); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933 (S.D. Miss. 1987); EEOC v. Mercy Health Ctr., No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 12256 (W.D. Okla. Feb. 2, 1982).

65. 447 F. Supp. at 1353–54.

unclothed."[66] While the court rejected the inmate's BFOQ argument, it nonetheless ordered the prison to install shower screens and provide sleeping garments for inmates.[67]

Both courts and the EEOC have recognized the validity of employers' use of a BFOQ defense, falling under the privacy exception, when based upon role modeling or counseling. Although the EEOC recognizes that "the psychological needs of an employer's clients or customers can make sex a BFOQ," it places significant burdens on employers to argue the defense.[68] In order for an employer to defend based upon the BFOQ, the EEOC mandates "medical evidence from the employer that the employer's clients have psychosocial need for a same-sex role model," provided by a doctor, psychiatrist, or psychologist.[69]

Some courts, however, have been quite lenient in this area, allowing employers to succeed with a BFOQ defense without any scientific proof or psychological testimony of its necessity.[70] For instance, in *Healey v. Southwood Psychiatric Hospital*, a female child-care specialist brought a sex discrimination suit against her employer for assigning her the night shift because she was a female.[71] The hospital in turn argued that it was necessary to have a female on shift to care for the sexually abused female patients.[72] The Third Circuit agreed, finding that role modeling was an important part of the position and that workers of the same gender as the patients made better role models.[73] The court found it important that the essence of Southwood's business was "to treat emotionally disturbed and sexually abused adolescents and children."[74] Additionally, the court explained that the hospital was justified in gender-based hiring because "children who have been sexually abused will disclose their problems more easily to a member of a certain sex, depending on their sex and the sex of the abuser."[75] Another example of the role modeling defense is illustrated in *City of Philadelphia v. Pennsylvania Human Relations Commission*.[76] There, the City of Philadelphia partook in discriminatory hiring practices by restricting supervision of juvenile detainees to employees of the same sex as the detainees.[77] The court found that objective, empirical evidence was not necessary to prove a BFOQ and that common sense evidence would suffice ; "[a] common sense [belief] that a young girl with a sexual or emotional problem will

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66. 621 F.2d 1210, 1213 (2d Cir. 1980).

67. *Id*. at 1216–17.

68. EEOC Compl. Man. (BNA) § 625.8(a)(2), at 625:0017 (April 1982).

69. *Id*. *See also* EEOC Dec. LA 68-4-538E, 2 Fair. Empl. Prac. Cases (BNA) 537, 537–38 (1969) (stating that a gender BFOQ was not valid when the disputed job position involved only minimal interaction between the employee and the supervised children, since the "children's presumed need for association with a 'male-image' would not be satisfied by the incumbency of a male at the supervisory position at issue herein").

70. *See*, *e.g.*, Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346, 1352 (D. Del. 1978).

71. 78 F.3d 128, 130 (3d Cir. 1996).

72. *Id*. at 132–33.

73. *Id*. at 134.

74. *Id*. at 132.

75. *Id*. at 133.

76. 300 A.2d 97 (Pa. Commw. Ct. 1973).

77. *Id*. at 98–99.

usually approach someone of her own sex . . . seeking comfort and answers" was sufficient to establish a BFOQ. [78] In justifying this decision, the court further explained, "to expect a female or male supervisor to gain the confidence of troubled youths of the opposite sex in order to be able to alleviate emotional and sexual problems is to expect the impossible."[79]

As previously discussed, BFOQ defenses are not normally available when based upon the privacy concerns of prison inmates. However, if the concerns for privacy are based on rehabilitation needs, courts are more likely to permit a BFOQ defense. For example, in *Torres v. Wisconsin Department of Health & Social Services*, male correctional officers brought suit against the prison for hiring only women to work in the women's maximum security prison's living units.[80] Though the Seventh Circuit Court of Appeals found that the prisons' justifications of prison security and inmate privacy did not qualify as proper BFOQ defenses, they affirmed that the motive of inmate rehabilitation did.[81] The court found that the essence of the prison's business was to rehabilitate its prisoners.[82] Because a high percentage of the female inmates had been physically and sexually abused by men, "the presence of unrelated males in living spaces where intimate bodily functions take place [was] a cause of stress to females."[83] What's more, the Seventh Circuit rejected a requirement of empirical evidence, finding instead that deference to the professional judgment of the superintendent was of higher importance.[84] Though the case was remanded to the district court to determine if the rehabilitation rationale was a proper BFOQ, the court of appeals sent a strong message that several other courts have since followed.[85] Thus, within the prison context, privacy needs based upon successful rehabilitation hold greater weight than those based on privacy alone.

2. *Safety*

Defenses founded on reasonable safety concerns are also permitted by courts in rare circumstances. Employers citing a genuine need to protect the safety of those other than an affected employee are generally successful in establishing a BFOQ.[86] However, courts have universally rejected discriminatory employment practices when based solely on the safety of the employee, given

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78. *Id*. at 103 (explaining that the Pennsylvania Human Relations Committee could not "expect the City to produce cold, empirical facts").

79. *Id*.

80. 859 F. 2d 1523, 1524 (7th Cir. 1988).

81. *Id*. at 1529–30.

82. *Id*. at 1530.

83. *Id*. at 1531.

84. *Id.* at 1532 (finding it an unfair and unrealistic burden to require the defendants to produce objective evidence, from empirical studies or otherwise).

85. *See*, *e.g.*, Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998).

86. *See*, *e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984); Harriss v. Pan Am. World Airways, 649 F.2d 670 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980).

that Title VII vests individuals with the power to take on unsafe tasks.[87] Furthermore, a BFOQ based on the safety of third parties is not proper unless the safety is "indispensable to the particular business at issue."[88] For example, in *Dothard v. Rawlinson*, the Supreme Court allowed a safety-based BFOQ after finding that the essence of a correction officer's job was to maintain prison security.[89] Although the Court recognized that "the BFOQ exception [is] in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex," it nevertheless upheld the defense due the "peculiarly inhospitable" environment of the prison, characterized by a "jungle atmosphere" and "rampant violence."[90]

The upholding of a gender BFOQ based on safety is quite rare, however, because there are few situations in which an employer can prove that the hiring of women is actually unsafe. The only other cases, outside of *Dothard*, where employers have successfully evoked safety BFOQ defenses have been due to pregnant women's reduced capabilities. In several cases airline policies prohibiting pregnant flight attendants from working have been upheld because of the safety concerns created for passengers if pregnant flight attendants could not properly perform their roles in emergency situations.[91]

One important area of concern within safety-based BFOQ cases involves discriminatory hiring in an effort to protect the safety of unborn children. Although this is undoubtedly an important interest to protect, courts reject BFOQ defenses based on fetal safety concerns because "unconceived fetuses of . . . female employees . . . are neither customers nor third parties whose safety is essential to the business . . . ."[92] For example, in *International Union v. Johnson Controls*, a class of female employees sued their employer because of its fetal-protection policy that excluded fertile woman from positions found to expose unconceived fetuses to harm.[93] The fetal-protection policy, in reality, created a near blanket prohibition against the placement of women in many positions, since the employer considered a woman of any age or status fertile, unless medical documentation provided otherwise.[94] In rejecting *Johnson Controls'* BFOQ defense, the Supreme Court noted the discrimination present in this policy, given that "[f]ertile men, but not fertile women, [were] given a choice as

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87. *See*, *e.g.*, Crane v. Vision Quest Nat'l, No. 98-4797, 2000 U.S. Dist. LEXIS 12357 (E.D. Pa. 2000); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) (stating, "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.").

88. Int'l Union v. Johnson Controls, 499 U.S. 187, 203 (1991).

89. *Dothard*, 433 U.S. at 335.

90. *Id*. at 334–35.

91. *See*, *e.g.*, Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984); Harriss v. Pan Am. World Airways, 649 F.2d 670 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980); Condit v. United Air Lines, Inc., 558 F. 2d 1176 (4th Cir. 1977).

92. *Johnson Controls*, 499 U.S. at 203.

93. *Id*. at 192.

94. *Id*.

to whether they wish[ed] to risk their reproductive health for a particular job."[95] Thus, an employer is prohibited from "discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job."[96] Accordingly, gender-based hiring attributed to fetal safety concerns will only be upheld under the BFOQ defense if an employer can prove that there is a safety risk for someone other than the employee or employee's unconceived fetus. This value judgment suggests that courts consider non-discriminatory hiring to be of the significant importance, or at least of a higher priority than safety concerns for future children.

3. *Authenticity*

In circumstances where gender-based hiring is necessary for the purpose of authenticity or genuineness, the courts and the EEOC expressly permit sex-based BFOQs.[97] For example, the EEOC guidelines explicitly permit an employer to make a hiring decision based upon gender when selecting an actor or actress for the authenticity of the production.[98] Here, an employer must still pass the three BFOQ tests: (1) that all or substantially all members of the opposite gender are unable to perform in the role; (2) that the essence of the business would be undermined without the sex-based hiring decisions; and (3) that no reasonable alternative to the discriminatory hiring exists. This argument may be successful when hiring performers, actors, or other entertainers for gender-based roles, and could even be accepted for sexual entertainment roles where the selling of sex is not the essence of the employer's business.[99] Nevertheless, this allowance is restrictive and is not meant to shelter those using authenticity as a guise for hiring to cater to customer preference or to sell sex appeal in non-sex based businesses. For instance, in an action against Joe's Stone Crab restaurant, the EEOC filed suit against Joe's, alleging that it discriminated against women applicants in its hiring practices.[100] Shortly before this suit was filed, all 108 food servers were male.[101] Joe's argued that its hiring practices were not intended to discriminate against women, but instead were employed to create an "Old World" ambience modeled after the highest-quality restaurants in Europe.[102] In rejecting the defense, the Eleventh Circuit Court of Appeals found that if the male-only hiring practice was a form of intentional sex discrimination, as the district court found on remand, it would not be protected under the authenticity exceptions of the BFOQ defense.[103] Thus, only in circumstances

95. *Id*. at 197.

96. *Id*. at 206.

97. 29 C.F.R. § 1604.2(a)(2) (2008). *See, e.g.*, Button v. Rockefeller, 351 N.Y.S. 2d 488 (N.Y. Sup. Ct. 1973)(finding that gender-based hiring was necessary for undercover detective assignments); Util. Workers v. S. Cal. Edison, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970).

98. § 1604.2(a)(2).

99. *See* Ann C. McGinley, *Babes and Beefcakes: Exclusive Hiring Arrangement and Sexy Dress Codes,* 14 DUKE J. GENDER L. & POL'Y 257, 269.

100. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000).

101. *Id*. at 1267.

102. *Id*. at 1270 (explaining that the district court had found that Joe's "sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu").

103. *Id*. at 1282–85; E.E.O.C. v. Joe's Stone Crab, Inc., 136 F. Supp. 2d 1311, 1313 (2001).

where discriminatory hiring practices are needed for legitimate and genuine authenticity concerns will a BFOQ defense likely be upheld.

B. Unsuccessful BFOQ Arguments

Although circumstances falling within the three areas of privacy, safety, and authenticity allow employers to make discriminatory hiring decisions, courts overwhelmingly find other employer motives to be illegitimate. Commonly prohibited motivations for gender-based hiring include stereotypes, customer preference, and the promoting of sex appeal in businesses that do not primarily sell sex appeal. While these motives may exist individually, it is not uncommon for them to act in concert within a single scenario. For example, employers often choose to hire men based upon the stereotype that they are stronger, as well as to suit customer preferences (since customers also make preference decisions based upon the same stereotypes that employers operate under). Similarly, an employer hoping to hire females to promote their sex appeal would, in reality, likely be doing so because of his belief that the majority of customers would prefer women employees. While this note discusses stereotypes, customer preference, and the promotion of sex appeal as distinct issues, it is clear from the subsequent examples that these motives often work in tandem to produce discriminatory hiring practices.

1. *Stereotypes*

Employer defenses of discriminatory hiring practices blatantly based upon stereotypes will almost always be rejected. Permitting a sex-based defense founded upon stereotypes would blatantly conflict with Title VII's purpose "to overcome stereotyped thinking about the job abilities of the sexes."[104] Courts have also cited concerns over stereotypes based on paternalistic beliefs that women should be protected from dangerous and stressful work environments:

> Title VII rejects [] this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.[105]

The EEOC guidelines also prohibit stereotypes as valid BFOQs, stating that "[t]he refusal to hire an individual based on stereotyped characterizations of the sexes" will not merit a BFOQ exception.[106]

Several noteworthy BFOQ cases address the forbiddance of stereotype BFOQ defenses. In *Weeks v. Southern Bell Telephone & Telegraph Co.*, Southern Bell argued that its exclusion of women from positions requiring employees to lift

104. Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 301 n.21 (N.D. Tex. 1981).
105. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969).
106. 29 C.F.R. § 1604.2(a)(1)(ii) (2008).

more than thirty pounds was protected under the BFOQ defense.[107] There, the court explained that an employer must demonstrate that he has a "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[108] In rejecting Southern Bell's BFOQ claim, the court stated:

> Southern Bell has clearly not met that burden here. They introduced no evidence concerning the lifting abilities of women. Rather, they would have us "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. . . . What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.[109]

Thus, an employer's BFOQ claims must be premised on facts, not commonly held gender stereotypes. In *Diaz v. Pan American World Airways*, Pan American was charged with sex discrimination for its employment policy of hiring only women as in-flight cabin attendants.[110] Pan-American's BFOQ argument for its gender-based hiring was twofold, citing both customer preference and the stereotyped belief that women were innately better "in the sense that they were *superior* in such non-mechanical aspects of the job as 'providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible. . . .'"[111] Though the court "recognize[d] that the public's expectation of finding one sex in a particular role may cause some initial difficulty," such stereotyped views of gender roles were not found to be a valid basis for the BFOQ defense.[112] Accordingly, courts hold that employers may not evoke the BFOQ defense when it is premised on stereotyped thinking.

2. *Customer Preference*

Courts also normally reject BFOQ defenses based solely on customer preference, explaining that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."[113] Although customers often prefer that employers hire employees of one gender over the other, these preferences alone are typically insufficient to establish a BFOQ.[114] The EEOC guidelines echo this sentiment, stating that "the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers" will not merit a BFOQ exception.[115] In one of the most well known BFOQ cases, Southwest

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107. 408 F.2d at 235–36.
108. *Id*. at 235.
109. *Id*. at 236.
110. 442 F.2d 385 (5th Cir. 1971).
111. *Id*. at 387.
112. *Id*. at 389.
113. *Id*. at 389.
114. *Id*. *But see infra* Section III.
115. 29 C.F.R. § 1604.2(a)(1) (2008).

Airlines was charged with gender discriminatory hiring practices for hiring only females for flight attendant and ticketing agent positions.[116] Southwest argued that it should be permitted to "discriminate against males because 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.'"[117] Southwest offered further proof that the company's success was highly dependent upon its marketing strategy of selling "love" through the services of its attractive female employees.[118] While the court acknowledged that Southwest's marketing strategy of providing customers with "eye candy" might be preferred by passengers, it found the BFOQ defense invalid because selling love or sex appeal was not Southwest's primary business.[119] Southwest's defense was further rejected because a man could perform the requisite job duties of a flight attendant or ticket agent.[120] Accordingly, the Court explained, "sex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool or to better ensure profitability."[121]

This prohibition against BFOQ defenses based upon customer preference is well established. Consequently, it is rare for employers to argue BFOQs based upon customer preference without blanketing their motivations with another purpose. Nevertheless, in Part III, this note addresses the fact that courts do not always apply this rule consistently, since some courts have permitted BFOQ defenses based on customer preference.

3. *The Selling of Sex Appeal in Businesses that Do Not Primarily Sell Sex*

Another common motive for discriminatory hiring occurs when employers wish to hire employees on account of their sex appeal. Employers often realize that staffing their businesses with sexy employees attracts additional customers and increases business. This tactic is more often aimed at male customers through the hiring of attractive female employees. However, even if a company uses sex to market services or products, that alone is not enough to permit a BFOQ defense. This motive was certainly at play when the court rejected Southwest Airlines' BFOQ defense. Southwest hired female employees in an effort to increase sales through the promotion of its "love" image.[122] There, Southwest's image and advertising were permeated by sex.[123] Their television commercials focused on attractive female flight attendants assisting male passengers with a voice-over guaranteeing "in-flight love."[124] The airline served "love bites" (almonds) and "love-potions" (cocktails) and used a "quickie

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116. Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981).

117. *Id*. at 293.

118. *Id*. at 295.

119. *Id*. at 302.

120. *Id*. (stating, "[T]he ability of the airline to perform its primary business function, the transportation of passengers, would not be jeopardized by hiring males.").

121. *Id*. at 303.

122. *See generally id.*

123. *Id*. at 294 n.4. (stating that "Unabashed allusions to love and sex pervade all aspects of Southwest's public image.").

124. *Id*.

machine" (ticketing machine) to provide "instant gratification" (quick service).[125] Even though Southwest utilized sex as its primary method of advertising, and a significant portion of their success resulted from the sex appeal of the employees, this still was not enough to allow a BFOQ because Southwest was not in the business of selling sex.[126]

Though businesses that do not primarily sell sex are prohibited from making sexually discriminatory hiring decisions, businesses whose "essence" is the actual selling of sex are permitted to hire based upon gender. According to the court in *Wilson v. Southwest Airline Co.*, a BFOQ defense based upon sex appeal is permitted where "vicarious sex entertainment is the primary service provided" and "female sexuality [is] reasonably necessary to perform the dominate purpose of the job which is forthrightly to titillate and entice male customers."[127] Thus, a strip club that hires only women to perform as exotic dancers or a gentleman's club employing only females as topless waitresses can still shield discrimination suits by employing the BFOQ defense. Considering that the defense is quite attainable when a business's main service is the selling of sexual entertainment, opponents of the BFOQ often focus upon its frequent use in sexually denigrating situations, especially highlighting the resulting subordination of women.[128]

The determination of whether sexual entertainment is the primary product or service of a business is challenging, however, because many businesses teeter on this edge, offering services that are laced with sex appeal. An often cited example of this practice is Hooters' policy of hiring only female waitresses.[129] Hooters is a favored eating establishment for male clientele precisely because of its scantily clad female servers. Hooters unquestionably draws larger crowds, earns higher profits, and achieves increased popularity as a result of the sexual promotion of its waitresses.[130] While the female servers may be preferred by the majority of customers and thus increase business, Hooters primary business is the serving of food and beverages to customers, not the serving of sex appeal. Although there has never been a court decision on the merits of Hooters' hiring practices, the company was sued in 1994 for its gender discriminatory hiring.[131] Hooters raised the BFOQ exception as a defense, but eventually entered into a 3.75 million dollar settlement that permitted the company to continue excluding

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125. *Id*.

126. *Id*. at 302.

127. *Id*. at 301.

128. *See*, *e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection,* 61 N.Y.U.L. REV. 1003, 1027(1986) ("The statutory model of equal protection is riddled with exceptions that perpetuate women's subordination, the most egregious of which is that sex-specific employment discrimination claims under Title VII can be defended with arguments of "bona fide occupational qualification.").

129. *See*, *e.g.*, Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination,* 92 CAL. L. REV. 147, 204 (2004); Rachel L. Cantor, *Comment: Consumer Preference for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493, 493–94 (1999).

130. *See* About Hooters, http://www.hooters.com/About.aspx (last visited Nov. 20, 2008) ("The 'nearly world famous' Hooters Girls are the cornerstone of the Hooters concept.").

131. Latuga v. Hooters, Inc., No. 93 C 7709, 1994 WL 113079 (N.D. Ill. Apr. 1, 1994) (dismissed on procedural grounds).

men from its server positions, but mandated the creation of gender neutral positions for bartenders and hosts.[132] If taken to court, it is unlikely that Hooters could successfully defend its hiring practices based upon the BFOQ, considering that its primary business is not the selling of sexual entertainment.

IV. INCONSISTENCIES WITHIN BFOQ CASE LAW

Although some believe the BFOQ's regulations are straight forward, in application, the BFOQ is riddled with inconsistencies. Unsurprisingly, courts have allowed their own values and beliefs to infiltrate their decisions. This is problematic, given that some courts' rulings are jurisprudentially inconsistent and some cases directly contradict each other. Most inconsistencies can be found within the privacy BFOQ exception, likely because popularly held privacy beliefs often conflict with Title VII's forbiddance of gender-based hiring. Although it is not unordinary to see such variations within an area so heavily influenced by personal beliefs and stereotypes, for some, these discrepancies undermine the value of the statute. Accordingly, some scholars argue that these inconsistencies demonstrate a serious application problem, and use this to bolster their arguments that the BFOQ exception should be completely eliminated or significantly reduced.[133] For others, however, these inconsistencies actually illustrate the need for the BFOQ defense, as many of the cases below illustrate a strong need for gender-based hiring.[134] Finally, some maintain that these inconsistencies prove the need for an expansion of the BFOQ defense, especially since many of the discrepancies found in the cases below result from courts' attempts to circumvent the statute due to their strongly held beliefs that gender-based hiring is imperative, at least within the privacy field.[135] Those arguing for an expansion of the defense explain that the statute should be modified to represent the needs of employers and consumers and the practices that courts actually permit.[136] Thus, it is important to recognize the discrepancies present in the case law.

A. Privacy BFOQ Contradictions

Although courts regularly uphold BFOQ defenses based upon privacy, some scholars argue that privacy motives are little more than customer

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132. *See* Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment: Can It Support A Hostile Work Environment Claim Brought By A Nude Dancer?*, 24 N.Y.U. REV L. & SOC. CHANGE 271, 293 n.122 (1998).

133. *See generally* Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003); Jillian B. Berman, Comment, *Defining the "Essence of the Business": An Analysis of Title VII's Privacy BFOQ after Johnson Controls*, 67 U. CHI. L. REV. 749 (1999); Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327 (1985); Elsa M. Shartsis, Comment, *Privacy as Rationale for the Sex-Based BFOQ*, 1985 DET. C.L. REV. 865 (1985).

134. Ashlie E. Case, Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309 (2005).

135. Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357 (2004).

136. *Id*. at 391.

preference and stereotype motives in disguise.[137] In reality, almost anytime that an employer is arguing for the privacy of its clientele, the concern is based upon the privacy preferences of its customers.[138] Moreover, these privacy preferences are often founded upon stereotyped assumptions of the sexes. This is problematic, however, given that customer preferences and stereotypes have been expressly denied as valid BFOQ motives.

1. *Privacy BFOQ Cases are Inconsistent with Non-Privacy BFOQ Cases*

The confusion over the privacy BFOQ begins with the initial problem that court decisions allowing privacy BFOQs do not seem to square with non-privacy BFOQ cases. Courts have been explicitly clear that customer preference and stereotype motives do not permit BFOQ defenses.[139] Most notable are the widely cited airline cases, previously discussed, where airlines' attempts to hire women based upon customer preferences were rejected, even after providing proof that gender-based hiring contributed to the success of their businesses.[140] In *Diaz v. Pan-American World Airways, Inc.*, for example, the airline introduced evidence of a survey finding that "79% of the passengers surveyed, male and female, prefer[ed] being served by a female stewardess to a male steward," along with expert psychological evidence explaining passengers' preference for female flight attendants.[141] Although the Fifth Circuit agreed that customers might prefer female flight attendants, Pan-American's defense was nevertheless rejected.[142] Some courts have come down even stronger against these motives. For example, in *Fernandez v. Wynn Oil Co.*, the employer failed to promote a female employee to the position of vice-president of Internal Operations because the position required interaction with Latin American clients, who would respond negatively to a woman in the position.[143] Although the case was decided upon other grounds, the court stated, in dicta, that sex was not a BFOQ for the position.[144] In deciding this, the court wholly disagreed with the lower court's finding that a BFOQ is permitted if "no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious . . . efficacy problems."[145] The court instead found that even in this situation, customer preferences based on sexual stereotypes could not justify discrimination."[146] In light of these cases and many other non-privacy BFOQ cases, it is clearly established that customer preferences and stereotypes do not permit a BFOQ.

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137. *See, e.g.*, Yuracko, *supra* note 129; Cantor, *supra* note 129, at 502–03.

138. *See* Cantor, *supra* note 129, at 502–03.

139. *See supra* Part II(B).

140. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981).

141. 311 F. Supp. 559, 565–66 (S.D. Fla. 1970).

142. *Diaz*, 442 F.2d at 389.

143. 653 F.2d 1273, 1274–75 (9th Cir. 1981).

144. *Id*. at 1276–77.

145. *Id*.

146. *Id*. at 1277.

2. *Courts Deciding Privacy BFOQ Cases Require Conflicting Levels and Types of Proof*

When courts have upheld privacy-based BFOQs, they have been inconsistent in their requirements of both the type and the level of proof necessary to establish the defense. While several courts have allowed customer preference and stereotype motives in privacy cases, others have not. Some courts have permitted a privacy BFOQ when an employer has shown that clients would not consent to services provided by a member of the opposite sex, but other courts have required employers to show that customers would stop utilizing their services altogether. Alternatively, other courts have found that even in privacy situations, no amount of proof will overcome the prohibition against customer preference and stereotype BFOQs. What's more, although some courts have required employers to present statistical evidence of their customers' demands, other courts have not. Such discrepancies are disconcerting both for employers hoping to utilize the defense and for those questioning its validity.

A comparison of cases illustrates the inconsistencies described above. In *Backus v. Baptist Medical Center*, a court permitted a BFOQ for the position of obstetrical nurse partly based upon the evidence of a doctor testifying that one half of her patients and more than one half of her clients' husbands would object to treatment by a male nurse.[147] Similarly, in *Fesel v. Masonic Home of Delaware, Inc.*, the court found a nursing home's sex-based hiring of women permissible since many of the female patients would not consent to male workers providing intimate-contact services, and some stated they would leave the home if male nurses or aides were hired.[148] Although not all of the female residents were polled, the court found the Assistant Superintendent's testimony sufficient that "it was her belief that the female guests would not accept personal care from male nurse's aides."[149] Clearly, customer preference was accepted as a legitimate motive for the gender-based hiring in both cases. Nevertheless, *Griffin v. Michigan Department of Corrections* illustrates a striking contrast.[150] In *Griffin*, the court quickly rejected a prison's gender-based hiring policy prohibiting women from working within residential units.[151] The court found that the policy was illegally "based on a 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,"[152] and this was "just the type of stereotypical value system condemned by Title VII."[153] Although the privacy rights of prisoners are less than those of the general public, the statements of the court directly contradict *Backus* and *Fesel*. In both *Backus* and *Fesel* the courts did expressly what the *Griffin* court forbid; they each accepted the stereotypical sexual characterization that a nurse of the

147. 510 F. Supp. 1191, 1196 (E.D. Ark. 1981).
148. 447 F. Supp. 1346, 1352–54 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).
149. *Id*. at 1352.
150. 654 F. Supp. 690 (E.D. Mich. 1982).
151. *Id*. at 705.
152. *Id*. at 701.
153. *Id*. at 702.

opposite sex viewing a nude patient was intrinsically more odious than the viewing by a member of one's own sex.[154] Adding further inconsistency, in *Slivka v. Camden-Clark Memorial Hospital*, the West Virginia State Supreme Court ruled against a hospital attempting to utilize a privacy-based BFOQ.[155] In that case, the hospital had a policy of hiring only female obstetrics nurses.[156] In defense of its policy the hospital provided evidence that "80 [percent] of patients objected to having a male nurse[,]" and male physicians requested female nurses as chaperones in their rounds.[157] Even with this evidence, the court struck down the policy citing a lack of information.[158] While the hospital's BFOQ defense was not found sufficient, the court explained that there could be situations in which privacy interests would trump those of equal opportunity employment.[159] The inconsistent holdings of *Backus*, *Fesel*, *Griffin*, and *Slivka* make privacy-based BFOQ requirements even more unclear.

Courts are also inconsistent in the type of proof necessary to uphold a BFOQ defense, with some requiring direct statistical proof of the BFOQ necessity, and others completely ignoring this requirement. Non-privacy cases have required that employers have "a factual basis for believing, that all or substantially all [men or women] would be unable to perform safely and efficiently the duties of the job involved."[160] However, in *Fesel*, the court found that the Assistant Superintendent's personal belief that women patients would not consent to cross-sex care was sufficient.[161] Similarly, in *Torres v. Wisconsin Department of Health & Social Services*, the court granted a BFOQ defense based on rehabilitation without any showing of empirical evidence, finding that the "professional judgment" of the superintendent was of higher importance.[162] Evidently, the same proof that some courts accept as sufficient to permit a BFOQs, others reject as insufficient.

Although courts are unquestionably inconsistent in their application of the privacy BFOQ, the extent of the privacy breach seems to weigh heavily in their decisions. When privacy breaches are minimal, courts are much less likely to grant BFOQ defenses. For example, in *EEOC v. HI 40 Corp.*, an employer maintained a policy of hiring only females for weight loss counselor positions.[163] HI 40 Corporation argued that some customers believed having their body

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154. *See generally* Backus v. Baptist Medical Center, 510 F. Supp. 1191 (E.D. Ark 1981); Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

155. Slivka v. Camden-Clark Mem'l Hosp., 594 S.E.2d 616 (W. Va. 2004).

156. *Id*. at 617–18.

157. *Id*. at 623.

158. *Id*. at 623–24.

159. *Id*. at 624 (stating that "[D]iscrimination may be valid in instances when privacy interests trump the principle of equal employment opportunity. And while accommodation or balancing of both issues is the goal, it is not always practicable.").

160. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). *See also* Int'l Union v. Johnson Controls, 499 U.S. 187, 203 (1991).

161. 447 F. Supp. 1346, 1352 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

162. 859 F.2d 1523, 1530–32 (7th Cir. 1988) (finding it an unfair and unrealistic burden to require the defendants to produce objective evidence, from empirical studies or otherwise).

163. 953 F. Supp. 301, 302 (W.D. Mo. 1996).

measurements taken by men would be a privacy intrusion.[164] There, the court stated that "[a] *minimal* intrusion on the privacy of customers must be tolerated if the elimination of that intrusion 'tramples' the employment opportunities" of men.[165] Whatever the reason, the discrepancy in the aforementioned privacy cases is apparent both when they are compared to non-privacy BFOQ cases and when they are compared to other privacy cases.

Furthermore, many privacy concerns are the result of gender stereotypes, which have been expressly denied as BFOQ motives.[166] This problem is exemplified in the common double standard treatment of male and female employees in privacy BFOQ cases. In most of the privacy BFOQ cases, employers maintain policies preventing men from cross-viewing positions, but not all prevent women from corresponding cross-viewing positions.[167] Society seems to be much more accepting of women providing intimate care for men, than it is of men providing intimate care for women, and this acceptance is noticeable in courts decisions. Accordingly, health care employers are more likely to ban male care providers from the intimate care of female patients than to ban females from the intimate care of male patients. Part of this difference can likely be accounted for by the stereotypical belief that women are better suited for caretaking and nursing positions. This difference could also be attributed to the societal conception that men, unlike women, cannot stifle their sexual thoughts from surfacing while at work. Men are often stereotyped as sexually motivated, having "one-track minds" that cannot stop them from ogling the naked female body. Whatever the reason, these stereotypes result in a discriminatory double standard in hiring and staffing procedures. Serious concerns arise when privacy BFOQs are actually premised upon stereotypes, however, since this contradicts the express rejection of stereotypes as valid BFOQ motives.

3. *Privacy BFOQ Cases Do Not Meet the Essence of the Business Test*

Even if we find that privacy concerns are based upon something other than customer preferences or stereotypes, opponents further argue that privacy-based BFOQs do not pass the main hurdle of a valid BFOQ defense- the "essence of the business" test. Under the test, employers must show that employees of one gender cannot successfully perform the job duties essential to fulfill the employer's primary business function.[168] However, in most privacy cases, an employer's business would not be undermined without gender-based hiring. For example, the essence of a hospital's business is to provide medical services for patients, the essence of a nursing home is to provide care for its patients, and the essence of a janitorial business is to provide cleaning services. In each of these examples, the fulfillment of the essence of the business could be achieved without gender-based hiring. Though some may argue that a hospital or nursing

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164. *Id*. at 303–304.

165. *Id*. at 304 (emphasis added).

166. *See*, *e.g.*, Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 301 n.21 (N.D. Tex. 1981).

167. *See*, *e.g.*, *Hi 40 Corp*., 953 F. Supp. at 302–303; Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

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

home's primary business is to provide services with the promise of privacy, this broader reading of the essence of the business test seems forbidden by *Johnson Controls*. There, the Supreme Court rejected the defendant's BFOQ argument that the essence of its business was to make batteries in an industrially safe manner, without harming unborn children.[169] Instead, the Court found that the essence of a business was to be interpreted narrowly, meaning that Johnson Controls' essence was solely that of manufacturing batteries.[170] In reaching this decision, the Court explained:

> [T]he safety exception is limited to instances in which sex . . . actually interferes with the employee's ability to perform the job. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job.[171]

If privacy BFOQ defenses have synonymous requirements, employers should be required to show that sex actually interferes with the employee's ability to perform the job. Since privacy BFOQs are not based upon the employees' abilities, but instead are needed to fulfill third party desires, it is unclear whether this is, in fact, a valid BFOQ under the Supreme Court's precedent. For this reason, the privacy defense is difficult to reconcile with the Supreme Court's narrow reading of the essence of business analysis.

4. *Many Privacy Concerns Could be Resolved by Rearranging Work Assignments*

Finally, if privacy defenses do meet the essence of the business test, there is yet another discrepancy between privacy and non-privacy BFOQ cases. Normally, courts require employers to show that no reasonable alternative to gender-based hiring exists.[172] However, many privacy requests could be fulfilled by rearranging the work assignments of current employees. When an employer need only rearrange the duties of existing staff to alleviate customer privacy concerns, a privacy BFOQ defense directly contradicts the requirement that no reasonable alternative to the discriminatory hiring exists.

Even if employers were required to equally hire both women and men, most could arrange tasks to allow for the privacy of patients. However, current BFOQ jurisprudence only requires that no *reasonable* alternative exist.[173] Nevertheless, it is still unclear what alternatives courts will find reasonable. Although gender-neutral hiring prevents discrimination, for some employers it is both wasteful and expensive. For example, a hospital or nursing home could be required to equally hire and staff male and female nurses. In situations where a male nurse could not fulfill all of the caretaking duties, a female nurse could be on hand to assist. Although this would require some employers to staff an additional employee, it is a potential resolution to the privacy concerns of

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169. *Id*. at 204–206.

170. *Id*.

171. *Id*. at 204.

172. *See*, *e.g.*, Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410, 1415–16 (N.D. Ill. 1984); Hardin v. Stynchcomb, 691 F.2d 1364, 1374 (11th Cir. 1982).

173. *Norwood*, 590 F. Supp. at 1415–16.

employers and their customers. Although many employers would consider this requirement quite burdensome, it is possible that courts would deem it reasonable based on the high value of equal opportunity employment.

Alternatively, employers could transfer discrimination costs directly to patients. For example, in *Wilson v. Sibley Memorial Hospital*, the Professional Nurses Registry maintained a system where private nurses were hired without regard for sex.[174] Even if a patient requested a nurse of a specific gender, the first available nurse was sent. If, on arrival, the patient was not satisfied, the nurse could be rejected, but the patient was required to pay for the nurse's full day of services.[175] Programs such as this shift the costs of discrimination to patients or customers, instead of placing them on employees. This type of system would allow men and women equal opportunities in hiring, but could still sometimes result in unequal work experience. Nevertheless, strategies that transfer the costs to patients are a controversial solution, given that not all patients with privacy concerns can afford to finance such requests. Accordingly, it is again unclear whether courts would consider this a reasonable requirement. Regardless of whether additional staffing requirements or cost shifting are reasonable tactics, the simple rearranging of work assignments could have reasonably resolved privacy concerns in some of the cases where courts permitted a privacy BFOQ. Given that most courts, at least outside of the privacy area, require employers to show that there is no reasonable alternative to a sex-based policy,[176] this illustrates yet another inconsistency with privacy-based BFOQs.

B. Safety BFOQ Contradictions

Contradictions also surface within the area of safety BFOQs. Although courts rarely uphold BFOQs based upon safety, the Supreme Court's decision in *Dothard v. Rawlinson* is an exception.[177] Safety BFOQ cases are often founded on views of women's physical ability or vulnerability, and *Dothard* is no different. There, the Supreme Court justified its decision to permit a safety BFOQ based upon the "peculiarly inhospitable" environment of the prison.[178] As a result of the "rampant violence," "jungle atmosphere," and non-segregation of sex offenders, the court found that a woman's ability to maintain order could be reduced by her very womanhood.[179] The Court concluded that women guards would be more vulnerable to attack and harassment, particularly because inmates were deprived of a "normal heterosexual environment [and] would assault women because they were women."[180] However, the record presented no evidence that women guards created a greater danger to the prison's security and nothing to support the risk that "inmates would assault a woman because

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174. 340 F. Supp. 686, 688 (D.C. Cir. 1972).

175. *Id*.

176. *See, e.g.*, *Norwood*, 590 F. Supp. at 1415–16; *Hardin*, 691 F.2d at 1374.

177. 433 U.S. 321, 334 (1977) (finding that being male was a BFOQ for the position of correctional officer).

178. *Id*. at 334.

179. *Id*. at 334–35.

180. *Id*. at 345 (Marshall, J., dissenting).

she was a woman."[181] Furthermore, these beliefs ignore the fact that while women, as a class, may be weaker than men, many individual women possess greater strength than their male counterparts. Rejecting the entire class of females, but permitting the entire class of males, based upon notions of relative strength, is an inexact and inaccurate method of selection. Moreover, though sexual assault against female guards may be more common, this does not take away from the fact that male guards are also attacked, a concern the court seemed to ignore. Without proof of the higher likelihood of female attack, it is unlikely that the Court reached its conclusion without the assistance of some gender stereotypes. In fact, this concern was highlighted in Justice Marshall's dissent:

> In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has . . . , upon closer inspection, been revealed as a cage."[182]

C. Resolving the Inconsistencies

How do we reconcile the fact that courts have expressly forbid motives of customer preference and stereotypes, but still allow the privacy BFOQ? First, it is important to consider whether privacy motives are somehow distinctive from other customer preference justifications. Although a privacy BFOQ is, at the core, one of customer preference, courts faced with privacy matters often consider them different and more valid than all other customer preference matters. So much so, that most courts gloss over the fact that privacy motivations are based on customer preference. Though some courts meet this discrepancy head on and find that privacy interests are a distinct issue, others completely ignore the inconsistency. This is, maybe in part, because privacy concerns are often not based upon a customer's *mere preference*, but are so deeply imperative that they are actually customer *requirements*. An unfulfilled privacy customer preference or requirement may inflict a dignitary harm on an individual, resulting in physical, emotional, or psychological damage.[183] This effect makes privacy preferences dissimilar from other customer preferences. Whereas the patron of a restaurant might feel slightly less comfortable with a male server, a patient requiring assistance with his or her intimate care may actually suffer serious distress from cross-sex viewing or touching. This increased gravity has been recognized by both scholars and courts. A leading

181. *Id*. (citation omitted).

182. *Id*.

183. *See*, *e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1534 (9th Cir. 1993) (Reinhardt J., concurring) (describing the emotional harm and physical illness an inmate experienced after an intrusive cross-sex body search).

treatise explains, "Giving respect to deep-seated feelings of personal privacy involving one's own genital areas is quite a different matter from catering to the desire of some male airline passengers to have a little diluted sexual titillation from the hovering presence of an attractive female flight attendant."[184] Similarly, in the case of *Jordan v. Gardner*, Judge Reinhardt's concurring opinion described an inmate's physical aversion to cross-sex touching: "After an inmate was searched by a male guard, her fingers had to be pried from the bars she had grabbed; she returned to her cellblock, vomited, and broke down."[185] Due to the increased severity of consequences, privacy customer preferences may be distinct from other customer preference motives.

Finally, privacy motives find express validation in the courts:[186] "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."[187] The *Backus* court, for example, found that constitutional privacy rights were at stake, explaining, "Defendant contends that if a male nurse is performing these duties, the patient's constitutional right to privacy is violated. We agree with the defendant."[188] Although the Constitution does not expressly provide a right to privacy, this right has been extracted from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[189] However, these rights are not unlimited, and the government's legitimate practices may sometimes overpower individual privacy rights.[190]

Even though some courts validate BFOQs under a right to privacy theory, others argue that no constitutional privacy right exists in the BFOQ circumstance. Given that patients and customers are fully able to reject care from members of the opposite sex, they argue that any constitutional right to privacy is circumvented by their assent.[191] Author Amy Kapczynski has taken a strong stance against the existence of such a right, explaining:

> The claim made in *Backus* that constitutional privacy rights are at stake in same-sex privacy BFOQ cases is similarly flawed. The court does not make clear where this right would come from or what its exact nature would be, but consider the possible alternatives. If the court is imagining some sort of

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184. EMPLOYMENT DISCRIMINATION, 3–43 Employment Discrimination § 43.02(3)(b) (Matthew Bender & Company, Inc., 2008). *See also* Int'l Union v. Johnson Controls, Inc., 886 F.2d 871, 890 (7th Cir. 1989) (quoting the same passage from the treatise); Torres v. Wisc. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1528 (7th Cir. 1988) (quoting the same passage from the treatise).

185. 986 F.2d at 1534.

186. *See, e.g.*, Hardin v. Stynchcomb, 691 F.2d 1364, 1373 (11th Cir. 1982); Backus v. Baptist Med. Ctr., 510 F. Supp. 1191, 1193 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); Forts v. Ward, 471 F. Supp. 1095, 1098 (S.D.N.Y. 1978), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980).

187. York v. Story, 324 F.2d 450, 455 (9th Cir. 1963).

188. 510 F. Supp. at 1193.

189. *See* Roe v. Wade, 410 U.S. 113 (1973).

190. *See* Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327, 335 (1985).

191. *See* Kapczynski, *supra* note 133, at 1268 ("[E]very legal right that patients have to privacy is rendered irrelevant by the fact that patients must consent to medical procedures.").

> penumbral right to same-sex privacy itself, rather than a choice of same-sex privacy, from where does it derive the parameters of this right? If Title VII violates this right when it requires hospitals to employ male nurses in labor and delivery rooms, why does it not also violate it in all of the other wards of a hospital or nursing home where patients receive intimate care? Furthermore, a constitutional right to same-sex privacy would imply that such a right must be protected by any healthcare provider that could be considered a state actor for these purposes—but no one claims that a patient not granted a same-sex nurse has a constitutional cause of action against the provider.[192]

Kapczynski is not alone in this opinion; several scholars agree that no constitutional right to privacy exists in these BFOQ cases, creating yet another incongruity in the case law.[193] The Supreme Court has not provided any clarity on the matter, leaving lower courts to address privacy BFOQ cases inconsistently because of the lack of a single authoritative approach.

D. Other Viewpoints on the Causes of Inconsistency

The reasons for the aforementioned inconsistencies have been discussed by other scholars as well. Robert Post has written extensively on the variation of decisions produced under Title VII claims. Post finds that the "courts' rhetoric of gender blindness does not explain their actual decisions in Title VII cases."[194] Instead, he finds inconsistencies can be attributed to the fact that "Title VII does not simply displace gender practices, but rather interacts with them in a selective manner."[195] He maintains that antidiscrimination law does not "liberate individuals from the thrall of social 'stereotypes,'" but instead intervenes "only to reshape the nature and content of social stereotypes."[196] This is in part due to his belief that antidiscrimination law itself is a social practice and that the law regulates social practices once they become controversial.[197] Similarly, authors Mayer G. Freed and Daniel P. Polsby have found the BFOQ defense to be replete with inconsistencies, explaining that nearly every requirement is subject to "substantial qualification."[198] They explain that BFOQ cases are often decided by the use of "discretionary line drawing in which the courts are required to exercise a judgment about the interaction of equality values and other social norms."[199] This discretionary line drawing results in inconsistent decisions due

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192. *Id*. at 1270 (footnote and information in parenthesis omitted).

193. *See*, *e.g.*, Calloway, *supra* note 191, at 340–42 (stating that a constitutional right to privacy "should be re-examined because statutorily mandated equal employment may not burden patient privacy enough to establish a constitutional violation").

194. Yuracko, *supra* note 129, at 150 (citing ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1–53 (2001)).

195. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 26 (2000).

196. ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1 (2001). This argument is developed further on pages 1–53.

197. Post, 88 CAL. L. REV. at 26-27.

198. Mayer G. Freed & Daniel D. Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 6 AM. B. FOUND. RES. J. 583, 587 (1981).

199. *Id*. at 601.

to the varying social values and norms.[200] Therefore, they suggest a different Title VII formulation to more adequately explain the current state of Title VII.[201] Such a formulation would "recognize that although explicit sex classifications are presumptively invalid, they can be justified where there are strong efficiency interests at stake or where there is a broadly shared social norm that requires that men and women be treated differently."[202] Finally, Kimberly A. Yuracko finds that "there is no plausible conception of business 'essence'" that can explain the inconsistency in cases that allows customer preference to create a BFOQ in some situations, but not in others.[203] Yuracko similarly argues that social values and preferences shape the decisions.[204] If these scholars' opinions are correct, we must question whether we are comfortable with courts crafting decisions that interact with and accept currently held stereotypes and norms, instead of eradicating them.

V. TITLE VII DOES NOT PROVIDE A BFOQ FOR RACE

An additional problem with the current application of the BFOQ defense is its apparent unequal treatment of race and gender discrimination. Although Title VII permits gender discrimination if motivated by a valid BFOQ defense, it does not allow the same exception for a BFOQ based upon race or color.[205] In other words, Title VII maintains that discrimination based upon race is never tolerable, but discrimination based upon gender is sometimes acceptable. This incongruity seems to suggest the framers believed that there was something inherently different between race and gender discrimination, or more simply, that gender discrimination was not always a problem. Because the lack of a race exception causes some BFOQ opponents to insist that a gender BFOQ is equally uncalled for, the reasons for this dissimilarity are important to consider.

The lack of a race BFOQ exception is notable because, in reality, race-based hiring occurs, even though Title VII does not provide an exception for it. Black actors are cast to portray black characters, white undercover agents are hired to infiltrate certain race-based hate groups (such as the Ku Klux Klan), and, when necessary, police officers are assigned neighborhood patrols based upon race. While Title VII forbids race-based hiring by excluding it as valid BFOQ classification, there is no doubt that positions exist where people are staffed based upon their race. One scholar has noted, "we ought to admit the possibility of a BFOQ in the case of race, as federal law does not, because there seems nothing harmful, in a realist production, in requiring that we have actors who look—and sound—like people of whatever racial identity they are representing."[206] Furthermore, the Seventh Circuit has recognized race as a

200. *See generally id.*

201. *Id*. at 589.

202. *Id*.

203. *See* Yuracko, *supra* note 129, at 149, 212.

204. *See generally id.*

205. *See generally* Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color a BFOQ?*, 35 U.S.F. L. REV. 473 (2001).

206. K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 47 (2000).

BFOQ within the confines of an equal protection case.[207] Taking the above information into consideration, it seems peculiar that a BFOQ based upon race does not exist.

The absence of a race-based BFOQ has been recognized by courts and scholars alike. Several courts have stated that Congress intentionally excluded race and color as BFOQ defenses.[208] Furthermore, the legislative history of Title VII shows that Congress considered, but rejected a race-based BFOQ,[209] where the House of Representatives discussed and denied an amendment to the BFOQ portion of the statute to include race and color.[210] Congress' decision to exclude race and color as permissible discriminatory classifications was due to the fact that they found race discrimination to be more prevalent and harmful than other forms of discrimination: "Title VII is a blanket prohibition of racial discrimination, rational and irrational alike, even more so than of other forms of discrimination attacked in Title VII."[211] A Congressman who spoke in opposition to the House of Representatives' proposed amendment to the BFOQ provision to include race and color addressed this, explaining:

> The trouble with the amendment offered by the gentleman from Mississippi is that it opens up a good deal more than the case of casting director looking for actors to play certain roles in dramatic production. If it was limited to that, it would be a lot more acceptable than it is. But it opens up other possibilities that I do not think any of us would want to open.[212]

Undoubtedly, Congressman O'Hara was worried about the continued discrimination a race-based BFOQ would allow. However, some scholars believe that Congress may not have provided a race exception because the members found it unnecessary, believing that Title VII did not outlaw all forms of racial discrimination. For example, one member of the Senate asked whether the Harlem Globetrotters or movie directors could still discriminate based on race.[213] The Senate was told that both groups would be exempt from Title VII's ban on discriminatory hiring; the Harlem Globetrotters did not have enough employees to be required to follow Title VII and movie directors could discriminate based on physical appearance instead of race.[214] Members of the House of Representatives were under similar impressions. For example, Congressman O'Hara stated: "In the example used, which involved a dramatic performance, some particular role may require a person whose skin is of a particular hue. I do not think that when you seek such person for that role, you come within the meaning of the unfair practices described in this bill."[215]

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207. Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996).

208. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982); Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982).

209. *See* 110 CONG. REC. 7217 (1964) (prepared statement of Sen. Clark & Sen. Case).

210. *See* 110 CONG. REC. 2550–63 (1964) (amendment offered by Rep. Williams).

211. *Rucker*, 669 F.2d at 1181.

212. *Id.* (statement of Rep. O'Hara).

213. 110 CONG. REC. 7217 (prepared statement of Sen. Clark & Sen. Case).

214. *Id.*

215. 110 CONG. REC. 2556 (statement of Rep. O'Hara).

Although other reasons may have been in play, the chief reason Congress excluded a race-based BFOQ was the concern that any allowance of racial discrimination would damage Title VII's effectiveness in prohibiting discrimination. As Congressman Celler precisely explained in rejecting an amendment to add race as a BFOQ, "[T]he basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color. Now, the substitute amendment, I fear would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole that could well gut this title."[216] Strangely, Congressmen did not voice concerns that the same setback would result from a gender-based BFOQ. But, why would a loophole for race gut the statute, while a loophole for gender would not? One likely explanation is that Congress fully realized a gender-based BFOQ would produce the same consequence, but found such a result inconsequential. This explanation is sensible, considering the diminished importance Congress placed upon gender discrimination, as opposed to racial discrimination. Realizing that this is a probable explanation, at least in part, one must consider whether the beliefs effecting the creation of the gender BFOQ exception allow the defense to remain appropriate today.

Therefore, when considering whether the gender-based BFOQ defense should still be available, it is helpful to consider the reasons Congress excluded a race-based BFOQ: they believed such an allowance would destroy the principle of Title VII by permitting discrimination, and establish a loophole that could gut the statute. Bearing in mind the lesser value Congress placed upon eradicating gender discrimination,[217] it is entirely possible that it fully realized a gender-based BFOQ would similarly permit discrimination, while providing a loophole for employers, but chose to disregard these consequences. If an attempt was made to defeat the statute by adding gender as a protected category, it is probable that many of the Congressmen voting for its passage did not consider gender discrimination problematic. In fact, if it was feasible that Congress would go so far as to reject the legislation in its entirety because of the inclusion of gender, it is possible that that the Congressmen actually endorsed the practice of gender discrimination, or at least turned a blind eye towards it. When Title VII was enacted, the country, or at least the majority of its leaders, had finally acknowledged that racial discrimination was wrong. However, gender discrimination was still common, and overwhelmingly accepted. Societal perceptions of working women and their abilities have significantly advanced since that time. If views of gender discrimination have changed, it is important to question whether the gender BFOQ defense needs to be altered, or even eliminated, to reflect these less discriminatory beliefs.

VI. DO REAL GENDER DIFFERENCES SUPPORT THE BFOQ DEFENSE?

The BFOQ defense is rooted in the belief that some very real and unavoidable differences exist between women and men that can cause one

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216. *Id*. at 2556 (statement of Rep. Celler).

217. *See supra*, note 11 (As noted, gender was not even included as a protected classification within the original construction of Title VII. It was added at the last minute by a Congressman hoping to prevent passage of Title VII).

gender to be better equipped for a position than the other. Furthermore, in providing a gender-based BFOQ defense, but not one based upon race, Congress has suggested that gender differences are either more significant or more genuine than those based upon race. To determine whether the BFOQ's authorization of gender-based hiring are appropriate, it is important to consider whether real gender differences do exist and, if they do, whether they are innate or learned traits. Certainly, it is not an uncommon belief that with all other variables being equal, a candidate of one gender may be better equipped for some positions than a candidate of the opposite gender. This belief is neither as common nor as acceptable, however, when the two equal candidates are of different races. There is a widespread belief that men and women are innately different and the BFOQ provisions further validate and promote this sentiment by conveying that men and women are, at times, unequally qualified for certain employment opportunities. While the notion of innate differences between women and men is certainly widespread, is it arguable whether this belief is actually accurate and well-founded. It may, instead, be based on false and outdated stereotypes persisting from earlier times of rampant gender discrimination and significant hiring inequities.

Although a BFOQ defense cannot legally be based upon stereotypes, it is questionable which gender differences attributing to BFOQs are real and which differences are, in reality, only perceived due to pervasive stereotypes. Countless studies have undertaken the examination of the differences between men and women, some finding statistical differences in skill sets, emotional traits, and cognitive processes.[218] Though gender differences are measured in many experiments, it is still unclear whether such differences are real, or if some other factor is causing performance differences. This determination is especially difficult since some studies find no differences after outside variables are controlled for, while others still find significant differences between the sexes.[219] Nevertheless, the following discussion examines the generalizations that can be made.

A. Measured Gender Differences

Men and women do exhibit some differences that could be relevant to their employability or suitability for certain positions. One particular focus of research has been on men's independence versus women's interdependence. Studies show that women experience more relationship-linked emotions and are more attuned to others' relationships.[220] Women focus more on personal relationships, while men focus on tasks and on connections with large groups.[221] Furthermore, "men gravitate disproportionately to jobs that enhance inequalities (prosecuting attorney, corporate advertising); women gravitate to jobs that reduce inequalities (public defender, advertising work for a charity)."[222] Studies examining gender and communication also show differences between men's and

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218. DAVID G. MYERS, SOCIAL PSYCHOLOGY, 180–97 (7th ed. 2002).
219. *See infra* Part VI.
220. *Supra* note 218, at 179–80.
221. *Id*. at 180.
222. *Id*.

women's communication styles. Whereas men tend to be directive, task-focused leaders, women are social leaders who focus on team spirit.[223] Men place a higher priority on winning, getting ahead, and dominating others.[224] Though men and women rarely score differently on intelligence tests overall, men demonstrate better spatial and mathematical reasoning abilities, while women perform better on tasks of verbal memory and distinguishing similar objects.[225] Not surprisingly, measured differences correlate with commonly held stereotypes of the sexes, making it difficult to know whether these findings are the result of genetic dispositions or socialization.

B. Stereotypes May be Causing these Differences

Although some studies find differences between males and females, these findings may be partially due to outside factors rather than actual dissimilarities. Studies have consistently shown that gender-based stereotypes regularly cause women to underperform or perform inaccurately.[226] The phenomenon known as the Pygmalion effect can arise when an individual performs better or worse, based upon the expectations of others.[227] In this process, other people's expectations are internalized by the individual, and he or she performs in accordance with those expectations. This effect has been extensively observed in testing situations where one group is expected to perform better or worse than another.[228] Given that most people unknowingly employ stereotyped assumptions based upon male and female abilities, this effect could easily trigger test results that measure differences in the performance of male and female subjects.

Furthermore, in what is known as a stereotype threat situation, impaired performance results from an individual's fear that his or her performance will confirm an existing stereotype of a group to which he or she belongs.[229] Countless studies have documented gender differences when subjects have been informed that one gender performs better on the task at hand. For example, in one study men and women with similar math backgrounds were given a math test.[230] When informed that the two genders were expected to perform equally on the test, no gender differences were found.[231] However, when told that men normally scored higher, women's test scores dropped dramatically.[232] In another

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223. *Id*. at 183.

224. *Id*.

225. Diane F. Halpern, Sex Differences in Cognitive Abilities, 292 (3d ed. 2000).

226. Mara Cardinu et al., *Why Do Women Underperform Under Stereotype Threat? Evidence for the Role of Negative Thinking*, 16 PSYCHOLOGICAL SCIENCE, 572, 572–578 (2005). *See also Gender Stereotypes Can Affect Men's and Women's Test Performance in Math, Study Shows*, Sept. 25, 2006 (available at http://www.nyu.edu/public.affairs/releases/detail/1207).

227. GARY P. LATHAM, WORK MOTIVATION: HISTORY, THEORY, RESEARCH AND PRACTICE 214–15 (Sage Publications, Inc., 2007).

228. *Id.*

229. *See* MYERS, *supra* note 218, at 344–45.

230. *Id.*

231. *Id*.

232. *Id*.

study, men and women university students were given a math test.[233] When the women tested alongside other women, they scored significantly better than those testing with men.[234] These findings can easily be translated to the employment context. Since gender stereotypes seem to permeate most workplaces, it is possible that in performance-based evaluations, women may underperform. This underperformance should be even more prevalent in male dominated areas, or in positions were women feel they are not the preferred gender.[235] Moreover, numerous studies have found that when the effects of stereotypes are controlled for, women's test scores are no different than those of men.[236] Therefore, if gender differences are measured, it is still unclear if outside factors, such as the Pygmalion effect or stereotype threat, are at play. The fact that commonly accepted gender differences sometimes trigger performance disparities should concern those who support the BFOQ defense, or argue for its expansion. Furthermore, even if these gender differences are accepted as accurate reflections of the participant's skills and behaviors, we must question whether any of the differences are significant or important enough to permit gender-based hiring procedures.

C. It is Unclear Whether Measured Differences are Innate or Socially Learned

Even if we accept that differences do exist between men and women, it still remains unclear whether such disparities result from innate or socially learned behaviors. This debate over whether behaviors, skills, and traits are ascertained primarily through nature or nurture has created what has been deemed a "bitter divide" in academia, with no clear consensus of belief.[237] For those trying to understand whether the BFOQ defense is harmful, however, this is an important debate. While some scholars contend that men and women are innately different, others maintain that any real differences result from the socialization that occurs after birth.[238] If measured differences between women and men are the result of socialization, the stereotypes that cause this socialization (which the BFOQ, at times, validates) further accentuate and prolong these gender differences. Thus, if gender differences are learned, there is a very real concern

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233. *Id*.

234. *Id*.

235. Of course, these stereotypes would also cause men to underperform in female dominated areas.

236. *See* MYERS, *supra* note 218, at 344–45. *See also* Michael Johns et al., *Knowing is Half the Battle*, 16 PSYCHOLOGY SCIENCE, 175, 175–179 (2005) (finding that when women were not informed of the stereotype threat they performed worse than men on a test, but when informed of the threat they did not).

237. Matt Crenson, *Nature Versus Nurture Divides Academia: Some See Merit in Saying Biology may have Role in Gender Inequalities*, THE BOSTON GLOBE, Feb. 28, 2005, *available at* http://www.boston.com/news/nation/articles/2005/02/28/nature_vs_nurture_divides_academia ; Steven Pinker, *Why Nature and Nurture Won't Go Away*, DÆDALUS (2004) (available at http://pinker.wjh.harvard.edu/articles/papers/nature_nurture.pdf).

238. *See generally* Kingsley R. Brown, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995); ROBERT PLOMIN, GENETICS AND EXPERIENCE: THE INTERPLAY BETWEEN NATURE AND NURTURE (1994); Robert Plomin & C. S. Bergeman. *The Nature of Nurture: Genetic Influences on "Environmental" Measures*, 14 BEHAVIORAL AND BRAIN SCIENCES 373 (1991).

that the BFOQ defense may be promoting differences, preserving the status quo, and prolonging gender discrimination. The theory of socialization is supported by strong research, with findings that most, if not all differences result from learned behaviors.[239]

It is indisputable that men and women are socialized to take on gender-specific roles, as gender stereotyping permeates all aspects of life. From the moment that we enter the world we are taught the way to act, the tasks to do, and the jobs to choose. Divisions of labor and responsibility in the home and professional world teach us the proper way in which to act and interact. This, of course, results in men more often using and developing more stereotypical masculine skills and women perfecting more stereotypical feminine skills. Socialization creates a cycle in which the current gender-role stereotypes are taught and internalized from generation to generation.[240] If the BFOQ defense allows employers to hire based upon stereotypical notions of gender differences, the theory of socialization illustrates how harmful the defense may be. If society internalizes legally protected gender-role divisions, the BFOQ may be furthering the cycle of gender inequality.

D. Employment Opportunities are Not Equal

Regardless of whether the presumed differences are due to innate differences or social stereotypes, it is undeniable that women fair far worse in their employment opportunities. Women, as a group, are significantly less likely to be found in high ranking, high prestige, and high paying positions. Though Title VII, the supposed equalizer, has been in place for over forty years, women still earn only 74 percent of what men earn.[241] While some rightfully argue that other variables are at play in this figure, research finds that those variables cannot fully account for this large of a gap.[242] Overall, men do have higher levels of education and more experience in the labor market.[243] Nevertheless, several studies aimed at isolating the effects of productivity-related factors, such as education and time spent in the labor market, show that 25 to 50 percent of the 26 percent pay gap cannot be explained by such factors.[244] Furthermore, it has been suggested that as much as 13 of the 26 percent pay gap can be attributed to gender discrimination.[245] Title VII was enacted to fight the prevalent discrimination in the country's labor market, and requires gender-neutral hiring practices in this endeavor. However, when the BFOQ permits gender discriminatory hiring in certain circumstances, this may in fact decrease the statute's fighting power.

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239. *See generally* Brown, *supra* note 238.

240. *Id*. at 1104.

241. E. Christopher Murray, *Commentary: The Sad Truth: Gender Pay Gap Still a Problem,* LONG ISLAND BUSINESS NEWS, Oct. 5, 2007.

242. *Id*. S*ee also* Stephanie Boraas & William M. Rodgers III, *How Does Gender Play a Role in the Earnings Gap? An Update*, 14 MONTHLY LAB. REV. 9 (Mar. 2003).

243. *See* Murray, *supra* note 241.

244. *Id*.

245. *Id*.

The risks inherent in the approval of a gender-based BFOQ are increasingly evident if one believes that gender differences are caused, even in part, by socialization based on existing stereotypes. A federal statute, such as Title VII, that allows employers to utilize gender-based hiring sends a message that at times, society, or at least its leaders, permits and agrees with gender discrimination. By allowing employers to exclusively hire men as prison guards and women as nurses, an underlying message surfaces that men are strong and powerful (and women are weak and unfit to act as prison guards) and that women are better caretakers and nurturers (and men are unfit for caretaking roles). A BFOQ defense that permits such gender-based hiring may only encourage and prolong these harmful stereotypes.

E. Gender Differences in the Privacy Context

Although it may be unclear whether qualification differences between women and men are real or perceived, in the privacy context, such skill differences become irrelevant. When a BFOQ is cited due to privacy concerns, it is not because of perceived gender-based abilities, but is based upon the gender of the applicant alone. In other words, when an employer partakes in discriminatory hiring due to privacy, it rejects applicants of the wrong gender precisely because of their gender, not due to a lack of skills or traits associated with their gender. For example, when employers argue for privacy-based BFOQs to permit the hiring of a female nurse for the intimate care of female patients it is not because of the nurse's superior caretaking skills nor the stereotype that she can provide more nurturing care, but is argued solely upon the fact that she is a woman. Accordingly, in the privacy context, physiological gender differences exclusive of any gender-role stereotypes really do seem to matter. Noticeably, courts have supported this belief.[246] Therefore, arguments that men and women are no different often fall on deaf ears.

VII. SHOULD THE BFOQ DEFENSE STILL BE AVAILABLE?

Although Title VII only permits gender-based hiring in a very narrow subset of circumstances, it still expressly allows some gender discrimination to occur. Strong arguments exist both for and against the BFOQ. The most frequently cited opposition to the BFOQ centers around the perception that the defense is harmful to women. However, as later discussed, some evidence contradicts this assumption. While some contend that the BFOQ defense should be expanded to conform to societal values and actual court decisions that accept gender-based hiring, on the other end are those who maintain that the BFOQ should be completely abolished because it results in the subordination of women and the prolongation of gender stereotypes. In the middle of these two polar opinions are two more moderate views. Some believe that the defense is absolutely essential for the workability of Title VII, and should stay exactly as is. Finally, some scholars argue that the defense should be narrowed to permit only the most essential cases of discrimination.

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246. *See*, *e.g.*, Backus v. Baptist Med. Ctr., 510 F. Supp. 1191 (E.D. Ark. 1981); Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

A. Arguments Supporting the BFOQ Defense

Several arguments supporting the BFOQ defense, founded in different schools of thought, offer convincing justifications that favor this defense. The sheer fact that the BFOQ exception was suggested, accepted, and placed on the books attests to the fact that many individuals believed in its legitimacy and necessity. Title VII expressly states that the BFOQ defense is permitted only when "reasonably necessary to the normal operation of that particular business. . . ."[247] The words of the statute inform readers that the framers believed in its necessity.

Economists often support the BFOQ defense, finding that it is needed for the efficient functioning of the economy. Accordingly, economists oppose the inefficiency that results from requirements that employers must equally hire both men and women, no matter the cost, for positions that customers would prefer one gender to fill.[248] Some economists argue for the elimination of Title VII completely, or alternatively, for an expansion of the BFOQ to further cater to customer preferences.[249] They maintain that permitting a BFOQ based upon customer preference would be more efficient overall because customers seek out their preferences regardless of the law. Thus, permitting a BFOQ defense would avert wasted efforts; it would prevent customers from wasting valuable time and effort seeking businesses that suit their preferences and prevent employers from wasting time, resources, and money attempting to circumvent the law. Finally, business owners and pro-business advocates argue that employers should have the right to run their businesses as they see fit, including hiring whomever they deem appropriate. Employers further argue they should have a right to staff their businesses with employees they choose and to increase profits and popularity by employing whomever their customers prefer. If businesses are not given complete control over their hiring decisions, employers believe that they should at least be offered an affirmative defense when gender-based hiring is a substantial factor in their success.

Though arguments against the BFOQ typically focus upon its detrimental affects on women, supporters respond that it permits discrimination against men as well. A consideration of the most common situations where the BFOQ is permitted illustrates that the majority of circumstances actually encourage the hiring of female employees. Certainly within the commercial sex industry, consisting of strip clubs, gentlemen's clubs, escort services, and sexually explicit men's magazines, nearly all businesses cater to men through the employment of females. A BFOQ is allowable within that sex appeal arena, permitting employers to discriminate against men in hiring, because the essence of most sex trade businesses is to sell sexual titillation to heterosexual men, which is triggered by the sex appeal of women. While there are some sex trade businesses that cater to women or homosexual men, they remain only a small

247. 42 U.S.C. § 2000e-2(e)(1) (2000).

248. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 76–77 (1992); J. Hoult Verkerke, *Book Review: Free to Search, Forbidden Grounds: The Case Against Employment Discrimination Laws*, 105 HARV. L. REV. 2080, 2080–81 (1992).

249. *See* EPSTEIN, *supra* note 248, at 299–309.

portion of the sex industry.[250] Thus, within the majority of commercial sex companies, men will be the ones discriminated against in hiring.

Additionally, within the privacy field, it is much more likely for employers to discriminate in favor of women. Due to society's double standard of permitting women to view males, but often renouncing mens' viewing of females, women will likely be hired disproportionably more often based on privacy concerns. Privacy-based BFOQs favor women, in part, due to the fact that women are more likely to request female caretakers for their intimate care. Thus, forbidding the BFOQ gender-based hiring that favors women would likely result in two consequences: (1) a reduction in women's employment within these positions if employers are forced to fill some of the positions with men, and (2) the diminishing of these job opportunities all together as some businesses will fail because of their inability to cater to client demands and/or privacy concerns. In view of this, a strong argument can be made for the continuation of the BFOQ defense, given that it may actually be helping, not harming women by providing an increase in employment opportunities.

Furthermore, without the current allowances of the BFOQ defense, women's privacy concerns would be disregarded. Women, on the whole, are much more likely to experience discomfort with cross-sex viewing or touching. For some individuals, privacy invasions may cause serious psychological and emotional harm. Ordinarily, courts have been sympathetic to these concerns, often permitting gender-based hiring or staffing. However, with the eradication of the BFOQ defense, employers would be strictly forbidden from continuing this practice. Accordingly, patients would, at times, have no option other than to be subjected to cross-sex viewing or touching. Given that privacy is a value deeply held by the majority of Americans, this should cause doubt for the workability of the full elimination of the BFOQ defense.

Although many complain of the harm the BFOQ defense causes women, as later discussed, some feminists argue in favor of the BFOQ defense, even when it places women in positions of commodification.[251] Those deemed as liberal feminists view commodification as a means to an end and assert that women should be empowered to choose for themselves whether to sell their sex, or sex appeal, as a commodity.[252] To further allow women this option, some liberal feminists argue for expanding the current BFOQ exceptions. They contend that occupations in which women are commodified often provide higher wages than those women could otherwise obtain.[253] In some circumstances, women may even use these more lucrative jobs as a means to rise out of low-income, dead-end employment and pursue better opportunities. In support of this argument,

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250. See, e.g., Yuracko, *supra* note 129, at 183 ("[T]here is a much greater demand for the commodification and sale of female sexuality than there is demand for the commodification and sale of male sexuality.").

251. *See, e.g.*, Ann Lucas, *The Currency of Sex: Prostitution, Law and Commodification*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 248, 248 (Martha M. Ertman & Joan C. Williams eds., 2005); Kathy Miriam, *Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking*, 36 JOURNAL OF SOCIAL PHILOSOPHY 1 (2005) (discussing differing views feminists take on commodification).

252. *See generally* Miriam, *supra* note 251.

253. *Id.*

Melissa Ditmore of the Network of Sex Projects testified before the U.N., "Many people opt for sex work because it is less degrading, better paying and provides more freedom than other available options."[254] Many feminists also argue against efforts to eradicate the BFOQ because they believe that women do not need to be paternalistically protected from commodification. Some economists also follow this line of reasoning, arguing that a more efficient marketplace is created when women have the choice to make money by whatever means they see fit, including the selling of their sexual appeal.[255] Clearly, multiple arguments support the continuation (or even extension) of the BFOQ defense.

B. Arguments Opposing the BFOQ Defense

Arguments opposing the BFOQ defense are also plentiful. The main concern with the defense stems from the negative effects discriminatory hiring has on the employment opportunities of the excluded and included sex.[256] Gender-based hiring is harmful because it limits the types of positions that individuals may apply for and fill. Furthermore, given the historical roles of women and men in the workplace, there is a heightened concern that gender-based hiring will have a disproportionately more detrimental effect on women. Positions typically associated with men are likely to be higher paying and to have higher prestige than positions associated with females. As such, without gender discrimination laws, men would more often be hired for higher pay, higher prestige positions such as businessmen, doctors, lawyers, executives, and other higher powered, management positions, while women would more often be hired for lower pay, lower prestige positions such as secretaries, child care workers, teachers, nurses, and other care-related non-management positions. Without employment discrimination laws, job segregation would lead to job stratification, and result in lower-status and lower pay employment for women.[257] Nevertheless, even if sex-based hiring is more likely to harm women overall, it will have detrimental effects on men's employment opportunities too, especially for men entering into professions historically dominated by females.

The most significant problem with the BFOQ defense occurs because of the validating effect it has on current gender stereotypes. Permitting sexual stereotypes reinforces them, allowing them to carry on far into the future. What's more, legal reinforcement sends a much stronger message than social reinforcement. By its very nature, the BFOQ defense contributes to gender stereotyping by legitimating gender discrimination. Authors Katherine Bartlett and Deborah Rhode acknowledge this concern, explaining:

> On the one hand, it may be reasonable to hire based on sex when the employment at issue implicates privacy or therapeutic interests that are gender

254. Melissa Ditmore, Network of Sex Work Projects, Addressing Sex Work as Labour, Prepared for the Working Group on Contemporary Forms of Slavery (Geneva, Jan. 21, 1999).

255. *See* Miriam, *supra* note 251, at 5–9.

256. *See*, *e.g.*, Suzanne Wilhelm, *Perpetuating Stereotypical Views of Women: The Bona Fide Occupational Qualification Defense in Gender Discrimination Under Title VII*, 28 WOMEN'S RTS. L. REP. 73 (2007) (finding that the BFOQ defense hurts women by keeping jobs sex segregated, fosters the view that women are weak and need protected, and symbolically degrading women).

257. *See* McGinley, *supra* note 99, at 273–74.

> related and the preference does not derive from harmful stereotypes. . . . On the other hand, applying the BFOQ exception in this context would seem to perpetuate age-old stereotypes that Title VII was meant to condemn—i.e., women's role washing and cleaning up after people, and men's role as the skilled professionals.[258]

Furthermore, even when discrimination is "based upon accurate stereotypes or generalizations, and [is] cost/benefit-justified, [it] nonetheless has undesirable social consequences," such as "perpetuat[ing] the social realities that make the predictions accurate," "reinforce[ing] biases and other inaccurate stereotypes," and "freezing . . . the underlying social reality."[259] Even courts have recognized this problem: "Is it significant that preferences for privacy from members of the opposite sex may be entirely culturally created, and that by recognizing such preferences the courts may encourage sex differences at the expense of equality in employment?"[260] Thus, there is a very real concern that a BFOQ defense may be solidifying gender stereotypes into law. The possibility that the very statute meant to alleviate gender discrimination may actually perpetuate the discrimination is undoubtedly troubling.

Furthermore, some scholars believe that the areas in which the BFOQ is currently permitted are illegitimate based upon the requirements of the defense.[261] As discussed previously, the case holdings on the BFOQ defense are inconsistent and, at times, difficult to reconcile. In privacy cases, courts often allow customer preferences to direct BFOQ defenses, but other courts have stated that customer preferences can never permit a BFOQ. Furthermore, scholars argue that, at the core, almost every BFOQ defense is based upon customer preferences.[262] Since customer preference is expressly prohibited as a motive for gender discriminatory hiring, some argue that nearly all BFOQ defenses should be prohibited.[263] Additionally, some scholars argue that the privacy concerns of patients or clients do not meet the main criterion of a valid BFOQ, since the essence of the business would not be undermined without gender-based hiring. What's more, Title VII is meant to change customer preferences, not cater to them.[264] Because these scholars do not find such motives legitimate, they argue for either a severe limitation or full elimination of the defense.

Opponents of the BFOQ cite the additional concern that the BFOQ defense is founded upon normative assumptions, many of which are outdated. Author Sharon M. McGown suggests that courts employ the following normative, paternalistic assumptions in order to permit BFOQs: (1) the likelihood that physical and sexual assault is prevalent in environments of confinement; (2)

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258. KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 116–17 (4th ed. 2006).

259. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 169–72 (1992).

260. Torres v. Wis. Dep't of Health & Soc. Servs., 838 F.2d 944, 950 (7th Cir. 1988).

261. *See*, *e.g.*, Kapczynski, *supra* note 133; Calloway, *supra* note 190; Wilhelm, *supra* note 256.

262. *See*, *e.g.*, Cantor, *supra* note 129, at 505–09 (explaining that "[u]ltimately, all BFOQ defenses are based on consumer preferences.").

263. *See* Wilhelm, *supra* note 256.

264. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

cross-sex observation causes a "dignity harm" for the individual observed; (3) sexual modesty is the mark of a civilized society; and (4) sex-segregation is a necessary for any effective rehabilitation program.[265] Each of the above normative justifications is then followed by further normative assumptions. For example, when courts maintain that physical and sexual assault against women is likely to occur in environments of confinement, McGown finds that they then make further assumptions that women are too weak for certain jobs and that only women are sexually vulnerable.[266] McGown notes that within courts' framing of BFOQ cases based upon the dignity harms from cross-sex observation, courts make judgments that modesty, especially women's, deserves protection and that cross-sex observation is particularly harmful.[267]

It is also concerning that in justifying BFOQ defenses, courts sometimes make decisions based upon stereotyped assumptions that are unfounded.[268] Often, these normative assumptions further preserve the status quo of inequality and involve the paternalistic treatment of women, both of which are motives Title VII aims to prevent. For those opposed to the BFOQ defense, this remains a serious complaint.

Though many BFOQ opponents agree that the defense should be restricted, they disagree over how severe further limitations should be.[269] Some opponents maintain that the BFOQ should be completely eliminated because of the multiple problems involved in the BFOQ's authorization of discriminatory hiring. Other opponents argue that abolishment of the defense is impractical, but that it should be greatly restricted.[270] The question of what should be prohibited and what should be permitted is not an easy one to answer. Some maintain that the only allowable BFOQ should be that of authenticity, because it really is necessary for the believability of certain roles. Others are slightly more lenient, finding that a privacy-based BFOQ defense should still be permitted in the limited situations where a business would truly fail without discriminatory hiring.[271] Those with a more strict approach often find that Title VII expressly forbids BFOQ defenses because all motives, even authenticity, are based upon customer preference.[272] This approach, therefore, renders the BFOQ exception useless and prohibits any hiring based upon gender.

C. The Author's Stance

Strong arguments weigh both for and against the continuation of the BFOQ defense and its current parameters. It is unquestionable that gender-discriminatory hiring practices do inflict some losses on both sexes. Gender-based hiring restricts individuals' employment opportunities, sometimes forcing

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265. Sharon M. McGown, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 88–120 (2003).

266. *Id*. at 89–96.

267. *Id*. at 101–08.

268. *See generally id.*

269. *Compare* Kapczynski, *supra* note 133, *with* Wilhelm, *supra* note 256 *and* Berman, *supra* note 59.

270. *See*, *e.g.*, Berman, *supra* note 59.

271. *Id*.

272. Wilhelm, *supra* note 256.

qualified applicants into lower paid positions. Discriminatory hiring also validates and prolongs gender stereotypes, instead of eradicating them. Often, this is done in a manner that is subordinates and harms women. Furthermore, most successful BFOQ motives are, at their core, founded on customer preference. The very statute with an objective of eradicating stereotypes, at times, inconsistently endorses them.

Endorsement of any law that results in such a significant assortment of problems should cause hesitation. After careful consideration, I conclude that elimination of the BFOQ defense is not the solution for this slew of problems. The defense is not only valuable, but also absolutely essential, for the realistic functioning of Title VII. Accordingly, I argue that the statute should remain fully intact. Although inconsistencies within case law support arguments to expand the defense, any expansion to further cater to discriminatory customer preferences and stereotypical impressions is dangerous, regardless of its efficiency.[273]

Although the eradication of gender discrimination should be a top priority, it is not paramount. We live in a society in which gender roles are so deeply engrained within our conceptions and understanding of appropriateness of social interactions, that BFOQ defenses are, at times, an inevitable necessity. Within the privacy context, the elimination of gender-based hiring is both unrealistic and undesirable.[274] While gender differences resulting from stereotypes and socialization are alarming, it is naïve to argue that such distinctions are never necessary.

Even though this validation of gender discrimination causes discomfort, I, like most of society, am willing to accept that consequence here. To be effective and operative, laws must interact with and accept some shared societal values. Consequently, any gender discrimination statute that provides absolutely no appreciation for the values of privacy and rehabilitation would be unworkable and ineffective. Thus, I find that the elimination of the BFOQ defense is an undesirable and unworkable approach to further reducing gender discrimination.

Some may argue that this opinion is irresponsible or inattentive to the eradication of discrimination. At this note's outset, I may have agreed. After all, current BFOQ jurisprudence allows both stereotypes and customer preference to dictate the law and furthers discriminatory notions by allowing them to legally subsist. Considering that society felt similarly tolerant of racial discrimination only forty years ago, it is important to be cognizant of the situation's parallels. Beliefs that African-Americans and whites are inherently different, although not generally accepted today, were prevalent before the enactment of Title VII. Since then, racial discrimination has significantly decreased, in large part, as a result

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273. Although I realize preserving the statute quo does not alleviate the current problem with the inconsistencies within the privacy field, I find it less problematic to allow some inconsistency in decisions than to further expand the accessibility of discrimination. While I do not support any alteration of the current statute, clarification from the Supreme Court on the availability of a privacy defense would be beneficial.

274. *See* Silvka v. Camden-Clark Mem'l Hosp., 594 S.E.2d 616, 625–26 (W.Va. 2004) (Maynard, J. dissenting) (explaining that "the privacy concerns at issue here are basic to human nature which has been essentially unchanged for thousands of years").

of initially unpopular legislation that fully forbid racial discrimination. This result provides some support to arguments for a complete ban of gender-based hiring. Social beliefs of gender differences have decreased since the passage of Title VII, much like racial differences, yet they have not disappeared. With even stricter gender discrimination laws, some argue, discrimination will further decline. However, I do not find the complete eradication of gender differences desirable, as I do with race. There are inherent differences between males and females, physiological and otherwise, which are not present between the races.[275]

At some point, the desirability of a BFOQ defense turns to a normative argument in which we must question the value of recognizing gender differences. Although most would agree that the acknowledgement of racial differences is inappropriate, the desirability of gender differences is not as clear cut. We must balance the right to equal employment opportunities against the rights of consumer privacy and both employer and employee autonomy. Lawmakers must mediate between these competing interests and attempt to achieve the most appropriate balance. Often, lawmaking is a process of selecting the lesser of two evils, and this process is undoubtedly apparent with the BFOQ defense. Accordingly, I believe that the defense, as currently written, accomplishes its desired goals. The exception, as is, forbids most forms of discrimination, but still permits gender-based hiring in narrow circumstances, such as privacy and rehabilitation.[276] Consideration of the legislative history leads me to believe this is precisely what the framers had in mind. Admittedly, the defense is not without serious fault. But, in light of the balancing of interests it must achieve, I see no superior alternative.

VIII. CONCLUSION

The BFOQ defense is not without significant downfalls. It has been interpreted inconsistently. Courts have allowed community norms and stereotypic beliefs to infiltrate their decisions. At times, the defense even operates to the detriment of both women and men. Furthermore, judicial acceptance of gender differences promotes and sustains gender stereotypes using a statute meant to eradicate them. These faults are both relevant and important. Nevertheless, no matter how troubling the downfalls are, elimination of the BFOQ defense is not the appropriate solution. Without the BFOQ, Title VII would not remain a fully functional statute. In reality, society and its leaders have decided that some values trump the importance of eradicating gender discrimination, and the BFOQ is needed to protect those values. Consequently, regardless of the various problems inherent in the availability of a BFOQ exception, the defense should remain as it has been for the past 44 years.

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275. *See*, *e.g.*, EEOC v. Mercy Health Ctr., No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 12256 at *7 (W.D. Okla. Feb. 2, 1982) (explaining that while there are no complaints regarding the race or national origin of nurses, there are many objections based upon gender).

276. The defense also permits gender-based hiring in authenticity circumstances and extremely limited safety situations. I do not take issue with these motives, but also do not consider them to be as valuable as privacy and rehabilitation motivations.