Privacy and the Sex BFOQ: An Immodest Proposal

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Since the adoption of Title VII of the Civil Rights Act of 1964, courts have been called upon to determine whether an employer can avoid liability for refusing to hire employees of one sex by invoking the privacy rights of its customers. Two recent court decisions are illustrative of the question and its resolution. In Backus v. Baptist Medical Center, the defendant employer's policy of excluding male nurses from the labor and delivery section of its obstetrics and gynecology department was challenged. The defendant established that most of the duties of a labor and delivery nurse involve exposure to the patient's genitalia and that a male nurse would be objectionable to obstetrical patients. The court upheld the employer's practice of excluding male nurses on the theory that their presence would constitute a violation of the patient's right of privacy. Similarly, in Owens v. Rush a female deputy in a county sheriff's office alleged that she had been discriminated against in violation of Title VII because she was not notified of the opening for the position of head jailer. Because the job of jailer involved overseeing male prisoners who lived in a communal environment without private showers and toilets, the court accepted the defendant sheriff's defense that being male was a
bona fide qualification for the job.  

Any exception to Title VII's mandate of nondiscrimination in employment undermines the Act's goal of equal employment opportunity.  

A privacy-based exception must therefore be carefully scrutinized. This Article begins with a discussion of the bona fide occupational qualification (BFOQ) exception to Title VII. This section is followed by a criticism of the various methodological approaches employed by courts and suggested by commentators for analyzing employer allegations that hiring an opposite-sex employee jeopardizes customers' privacy rights. Because the right of privacy is the core of this employer defense, the nature and extent of the right of privacy is explored in the next section of the Article. The final section contains an analysis of the privacy-based sex BFOQ defense in light of the customer's right of privacy.

I. THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION

Title VII of the Civil Rights Act of 1964* embodies a federal guarantee of nondiscrimination in employment by prohibiting hiring and other employment practices that discriminate on the basis of sex.  

Nevertheless, the Act does contain an exception to its general rule of nondiscrimination. An employer may hire workers on the basis of sex when sex is a BFOQ reasonably necessary to the normal operation of

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* Id. at 1550-51.

* Moreover, the struggle for economic equality is of central and enduring importance to the goal of full equality for women. Whether single or married, women require a share of the economic goods sufficient for both sustaining life and promoting self-development. Without such a share, women are extremely vulnerable to economic coercion, which is at least as oppressive and debilitating as political coercion. The relative well-being of women determines their ability to exercise their constitutional and statutory guarantees of civil and political equality. See V. Held, Property, Profits, and Economic Justice 1-19 (1980).

Since the inception of the organized women's movement during the mid-nineteenth century, equality in employment has been recognized as a crucial factor in women's struggle to achieve economic and ultimately full equality. For example, The Declaration of Sentiments, adopted July 19, 1848 at the First Women's Rights Convention, enumerated women's grievances against economic, social and political oppression:

He has taken from her all right in property, even to the wages she earns . . . .

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but scant remuneration. He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known.


* Id.
that particular employer's business.  

When first introduced, the Title VII legislation did not mention sex as a protected classification. Rather, sex was added by an amendment which emanated from the floor of the House of Representatives. Therefore, relevant legislative history to aid in interpreting the BFOQ provision as applied to sex is meager. Any broad construction of the BFOQ defense would, however, seriously undermine the goal of eradicating sex discrimination in the workplace. Broad interpretations would permit the continued exclusion of women, qua women, from many occupations. In light of this danger, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with promulgating rules for implementing as well as enforcing Title VII, has issued guidelines based on a narrow reading of the BFOQ provision.

The EEOC guidelines provide that the BFOQ exception is unwarranted when discriminatory hiring decisions are based upon general "assumptions of the comparative employment characteristics" of the excluded sex, or upon "stereotyped characterizations of one of

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10 Id. § 2000e-2(e)(1). Title VII's BFOQ provision states in pertinent part that "it shall not be an unlawful employment practice for an employer to hire and employ [an individual] . . . 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." Id.


12 Two facets of equality in employment for women are pay equity and access to employment opportunities. For example, the gap between median pay for full-time female and male workers actually increased during the last 25 years. In 1955 the annual earnings of full-time female workers was 63.9% of male earnings. By 1981 female earnings had declined to 59.2% of male earnings. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEPT OF LABOR, EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN: U.S. POLICIES, Table 12 (1982) [hereinafter cited as WOMEN'S BUREAU]. Currently, although the concentration of women in particular occupations has decreased somewhat, the American workforce continues to reflect an overwhelmingly gender segregated employment pattern. Female workers are concentrated in the lowest-paying occupational categories: women represent 81% of all clerical workers, 97% of all private household workers, and 60% of all other service workers. Id. at Table 18. Not only have these jobs traditionally received low pay, but they also have provided only limited opportunities for advancement to higher paying jobs. Id. at 15.

Within occupational groups, a segregative pattern of placing female workers in the lowest paying jobs is also visible. Female workers in professional and technical occupational groups comprise 96.5% of all registered nurses, 85.2% of all librarians, and 83.7% of all elementary school teachers; whereas they comprise only 8.6% of all industrial engineers, 12.8% of all lawyers and judges, and 13.4% of all physicians. Id. at Table 11. The undervaluation of work traditionally performed by women coupled with this sex-segregated pattern of employment accounts for some of the pay discrepancy between female and male workers. Id. at 15.

13 See 29 C.F.R. § 1604.2(a) (1983).

14 Id. § 1604.2(a)(1)(i). An example of such an impermissible assumption is the notion that the turnover rate among women is higher than among men.
the sexes.” Moreover, the EEOC guidelines state that sex is not a BFOQ when the refusal to hire applicants based on sex is predicated on the preferences of third parties, such as co-workers, clients, or customers.\textsuperscript{16}

Although court decisions interpreting the BFOQ provision shed some light on the parameters of the defense, the contours of the provision are not precisely defined. While the United States Supreme Court has placed its imprimatur on the view that the BFOQ provides “only the narrowest of exceptions” to Title VII’s general mandate of equality in employment opportunity,\textsuperscript{17} the Court has not otherwise endorsed any particular formulation of the BFOQ defense.

Lower court decisions involving the BFOQ embody varying degrees of restrictive interpretations. The most restrictive view recognized by some lower courts is similar to the one espoused in the EEOC guidelines.\textsuperscript{18} It provides that the BFOQ defense is available to the employer only when the job in question requires either a person with a sex specific physical characteristic or a person of a particular sex for authenticity purposes.\textsuperscript{19} Another narrow interpretation of the BFOQ is that an employer may rely on the defense only by proving that the employer has “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.”\textsuperscript{20} Under this formulation, the employer must establish that these duties apply

\textsuperscript{18} Id. § 1604.2(a)(1)(ii). Impermissible stereotypes include the idea that men are less capable of assembling equipment and women are less capable of aggressive salesmanship.

\textsuperscript{16} Id. § 1604.2(a)(1)(iii).

\textsuperscript{17} Dothard v. Rawlinson, 433 U.S. 321, 333-34 (1977). In Dothard, a 22 year-old woman sought employment as a “correctional counselor” and was denied on the basis of an Alabama statute that required such counselors to weigh at least one hundred and twenty pounds and be at least five feet, two inches tall. The Supreme Court reversed the district court and held that being male is a BFOQ “for the job of correctional counselor in a ‘contact’ position in an Alabama male maximum security penitentiary.” Id. at 337 (footnote omitted).

\textsuperscript{18} See Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). In Rosenfeld, the employer rejected the female plaintiff without testing her ability to fill the position of agent-telegrapher. The employer restricted the applicants for the position to men because the job was "arduous." The job entailed climbing over and around box cars to adjust vents, collapse bunkers and close and seal doors. Sometimes the agent-telegrapher had to lift objects weighing over 25 pounds and occasionally over 50 pounds. Id. at 1223.

\textsuperscript{19} The court in Rosenfeld stated: "[b]ased on the legislative intent and on the Commission’s interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.” Id. at 1225.

\textsuperscript{20} Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). The Weeks court found that the employer telephone and telegraph company had not proven that the job of switchman came within the BFOQ exception to Title VII’s general prohibition. Id. at 238.
to the "essence of the business operation." In one case, an airline company attempted to justify its female-only hiring policy for cabin attendants through the use of the BFOQ defense. Although the airline company introduced evidence that all, or substantially all, males could not perform the non-mechanical functions of the job (such as soothing passengers) as well as females, these non-mechanical aspects of the cabin attendant job were deemed only tangential to the essence of the business of providing safe air transportation. Hence, the court ruled that the presence of male cabin attendants would not jeopardize the airline's ability to provide safe transportation. Because the BFOQ exception has generally been narrowly interpreted, employers claiming the defense rarely have been exonerated from charges of facially discriminatory practices. For example, the Ninth Circuit has held that an employer's compliance with single-sex, state protective legislation does not establish a BFOQ defense for its refusal to hire women. Similarly, an employer cannot claim that the "strenuous, dangerous, obnoxious, boring or unromantic tasks" associated with a particular job establish a male BFOQ. Customer preference for one sex over the other, the additional expenses incurred in hiring employees of both sexes, and a male BFOQ predicated on an employer fetal vulnerability program have also been rejected as justifications for a BFOQ.

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2 Id.
3 Id.
4 Id.
5 Id.
7 Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 288, 236 (5th Cir. 1969).
9 Prior to 1973, EEOC Guidelines provided that an employer qualified for a sex BFOQ if the "expense [of providing separate facilities for employees of each sex] would be clearly unreasonable." 29 C.F.R. § 1604.1(a)(iv) (1966). However, the EEOC repealed the "clearly unreasonable" regulation and substituted a new provision providing:

Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex. 29 C.F.R. § 1604.2(b)(5) (1983). This regulation treats the failure to expend money for restrooms as an unlawful employment practice. See Sirota, supra note 11, at 1052-56 (citing cases).

10 Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259 (N.D. Ala. 1982); EEOC v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1646 (W.D.N.C. 1980). The Olin court described its fetal vulnerability policy as one "under which women of childbearing capability have not been allowed
In spite of the typically narrow interpretation accorded the BFOQ provision of Title VII, instances of successful use of the defense do exist. For example, the Supreme Court sustained Alabama’s policy of assigning only male prison guards to “contact” positions in its maximum security prisons for men. Although the Court specifically limited its holding to the facts of the case, it nonetheless held that the presence of female prison guards would undermine prison security. In particular, the Court noted that inmates’ reactions to a female guard’s “very womanhood” might be adverse.

The BFOQ defense may also be used successfully in those instances where sex “is necessary for the purpose of authenticity or genuineness,” or when the job requires a person with a sex-specific physical characteristic. Under this defense, employers may hire only females as actresses or only males as sperm donors. The authenticity BFOQ also has permitted Playboy Clubs to hire only females as “bunnies,” and has justified a state’s preference for hiring only females to perform police undercover assignments directed at illegal abortionists and purse snatchers.

In spite of these examples of successfully invoked BFOQ defenses, court opinions display a remarkable degree of uniformity regarding the narrow nature of the BFOQ exception; and most courts carefully scrutinize employer BFOQ defense claims. This judicial approach is especially warranted given Title VII’s goal of achieving equal employment opportunities. Indeed, any broadly viewed exception to Title VII’s nondiscrimination mandates would tend to perpetuate sex-segregative employment patterns and the wage depression associated with such employment patterns.

The usually close judicial examination of employer’s BFOQ claims, however, is noticeably absent in one category of court decisions. These cases involve sex BFOQ defenses predicated upon alleged inva-
sions of third parties' privacy rights. Employers claim that an inva-


In cases relating to inmate complaints, the privacy issue arises out of allegations that employment of opposite-sex guards violates the inmates' constitutional right of privacy. Although the institution may raise the equal employment mandates of Title VII as a defense, Title VII is not directly implicated. The analysis developed in this Article for resolving the privacy issue in the context of Title VII litigation, however, is applicable to inmate-initiated lawsuits. See Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980) (upholding male guards of female inmates where accommodation is possible); Avery v. Perrin, 473 F. Supp. 90 (D.N.H. 1979) (permitting female to deliver mail to male prisoner since the privacy invasion is small); Doe v. Duter, 407 F. Supp. 922 (W.D. Wis. 1978) (denying female students in delinquent girls' school injunction to prohibit participation of male staff members in bodily search of female students who refused to cooperate in the conduct of the search); Hand v. Briggs, 380 F. Supp. 484 (N.D. Cal. 1973) (dismissing suit by male inmate because complaint merely alleged female guards were in a position to invade inmates' privacy—not that females had actually done so); In re Long, 55 Cal. App. 3d 788, 127 Cal. Rptr. 732 (1976) (granting petition of male wards alleging the female staff personnel invaded wards' privacy by observing wards in bedrooms and bathrooms); Sterling v. Cupp, 44 Or. App. 755, 607 P.2d 206 (1980) (granting injunction to prevent female guards from performing body searches of clothed prisoners).

sion of their customers’ privacy rights would occur if the employer is forced to hire members of the excluded sex. To date, the remarkable feature of these decisions recognizing a privacy-based sex BFOQ is that the mere incantation of the words “right to privacy” seemingly justifies recognition of the sex BFOQ defense.\(^7\)

II. A CRITIQUE OF CURRENT TREATMENT OF THE PRIVACY-BASED BFOQ\(^8\)

Some jurists and commentators dismiss employer-customer privacy

\(^7\) For example, in City of Philadelphia v. Pennsylvania Human Relations Comm’n, 7 Pa. Commw. 500, 300 A.2d 97 (1973), the court upheld a same-sex BFOQ for supervisors in youth centers stating, “if sex is not ‘relevant’ in the supervision of children who range in age from seven to sixteen in various stages of undress, where can it be?” Id. at 505, 300 A.2d at 102. In Iowa Dep’t of Social Servs. v. Iowa Merit Employment Dep’t, 261 N.W.2d 161 (Iowa 1977), the court upheld a male BFOQ for guards of male prisoners stating, “it is apparent, and is undisputed, there would be a constitutional violation of inmates’ rights if the guards were women.” Id. at 165.

\(^8\) The recent cases invoking a privacy-based BFOQ defense are hauntingly reminiscent of the so-called Locke\(r\) era. At the turn of the twentieth century, a series of Supreme Court decisions overturned legislated protections for workers, thus perpetuating an employer-worker status quo detrimental to all workers. Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (invalidated minimum wage for women); Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (invalidated minimum wage for women); Locke\(r\) v. New York, 198 U.S. 45 (1905) (invalidated maximum hours for bakers). See also State v. Barbe, 132 La. 768, 61 So. 784 (1913) (invalidated eight-hour law for stationary firemen); Commonwealth v. Boston & Main R.R., 22 Mass. 206, 110 N.E. 264 (1915) (invalidated 9-hours-work-in-10-hours-time law for railroad workers); State v. Miksicek, 225 Mo. 561, 125 S.W. 507 (1910) (invalidated six-day-work-week act). But see Bunting v. Oregon, 243 U.S. 426 (1917) (upheld maximum hours for manufacturing establishments); State v. Lumber Co., 102 Miss. 802, 59 So. 923 (1912) (upheld maximum hours for manufacturing establishments); People v. Klink Packin\(g\) Co., 214 N.Y. 121, 108 N.E. 278 (1915) (upheld one day of rest in seven for all workers). Similarly, today’s court decisions invoking a privacy-based BFOQ validate occupational segregation, thereby perpetuating an employer-worker status quo detrimental to present-day workers.

It is ironic that today’s employers, like employers at the turn of the century, avoid prosecution for violations of remedial employment legislation by invoking the rights of others. In the Locke\(r\) era, employers raised the right of their employees to contract without interference from the state. Today, employers claim that their customers’ privacy rights validate the em-
arguments as nothing but cynical and feeble rationalizations for maintaining the discriminatory status quo. Other commentators dismiss the privacy-based sex BFOQ defense as merely a species of the previously rejected pure customer preference defense. Alternatively, others draw a distinction between private and public employment. With respect to public employment, the constitutional dimensions of the right of privacy are present, and thus the customer's rights have been deemed to outweigh the employee's rights under Title VII. In the private employment situation, however, the question has sometimes been resolved in favor of the employee's employment rights because constitutional guarantees and protection are not applicable to private sector employment. Finally, in many cases courts have required public and private employers to accommodate both the customers' privacy rights and the employees' equal employ-

payers' refusal to hire because of sex. In both the historical and contemporary settings, the parties whose rights are supposedly at risk because of legislative mandates are not the complainants. See K. DAVIDSON, R. GINSBURG & H. KAY, CASE AND MATERIALS ON SEX-BASED DISCRIMINATION 15 (1974) (noting that almost all constitutional challenges to maximum hour legislation for women were initiated by the employer alone).

Today, with the exception of inmate-initiated challenges to employment of opposite-sex correctional personnel, see supra note 36, it is unclear whether customers object to the presence of opposite-sex employees. *Compagny* v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (D. Del. 1978) (nine nursing home patients objected to hiring of male nurses), aff'd mem., 591 F.2d 1334 (3d Cir. 1979), *with In re Long*, 55 Cal. App. 3d 788, 127 Cal. Rptr. 732 (1976) (letter from 41 wards expressing satisfaction with presence of female staff). The evidentiary problem is similar to that which occurs when employers raise customer preference as the justification for a sex BFOQ. The employer relies on "the vague attitudes of a vaguer assortment of strangers." A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 15.40, at 4-32 (1983).

In Justice Marshall's dissenting opinion in the Alabama prison guard case, he voiced his own incredulity and suspicions concerning the use of the privacy-based BFOQ:

It is strange indeed to hear state officials who have for years been violating the most basic principles of human decency in the operation of their prisons suddenly become concerned about inmate privacy. It is stranger still that these same officials allow women guards in contact positions in a number of nonmaximum-security institutions, but strive to protect inmates' privacy in the prisons where personal freedom is the most severely restricted.


40 C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 148 n.65 (1980). Pure customer preferences are preferences of co-workers, employers, clients or customers not arising within the context of bodily privacy. 29 C.F.R. § 1604.2(a)(1)(iii) (1983). For example, in *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1979), the airlines claimed a female BFOQ predicated in part on its claim that airline passengers preferred female flight attendants.

41 Sirota, *supra* note 11, at 1062 n.226.

42 *See infra* notes 59-83 and accompanying text.

43 *E.g.*, Iowa Dep't of Social Servs. *v. Iowa Merit Employment Dep't*, 261 N.W.2d 161 (Iowa 1977).

ment rights. Under this judicial approach, a sex BFOQ is only granted if the defendant employer can show that accommodation imposes an unreasonable burden on the employer.

All of these methods of addressing the privacy-based sex BFOQ argument have been both employed in court decisions and suggested by commentators. Consequently, the adequacy of each as a conceptual framework for analyzing the privacy-based BFOQ must be evaluated.

To assert a right is to make a strong moral or legal claim. Unexamined acceptance as well as facile dismissals of the privacy-based BFOQ defense fail to address the question of whether a right is really at stake. A summary affirmance of the defense may insulate the employer's actual violation of Title VII even though the customer's right of privacy is not infringed. Similarly, a summary denial of the defense may overlook, and thus leave unprotected, a legitimate facet of the right of privacy. Therefore, both of these cursory approaches are unsatisfactory.

The approach that allows the privacy-based BFOQ defense in the context of public, but not private, sector employment impermissibly constricts the right of privacy. Rights encompass far more than mere limitations on what government may do to an individual. A right involves an entitlement to do or have something, or not to do or have something done. Moreover, a right affords protection from interference with the enjoyment of the right, and the prophylactic function of a right is not necessarily conditioned upon the identification of the government as the intruder. For example, tort law affords protection from individuals whose actions represent unauthorized intrusion on the right of privacy.

In fact, constitutionally imposed limits on the government's power to invade a person's bodily integrity may be less extensive than the limitations imposed on private citizens whose actions intrude upon another person's bodily integrity. The fourth amendment prohibits the government from only unreasonable searches and seizures of the

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46 See cases cited supra note 36.
49 V. Heid, supra note 7, at 7.
50 See generally W. Prosser, HANDBOOK ON THE LAW OF TORTS 807-09 (1971).
body, but in civil law, any unconsented-to and offensive touching of another person is a battery entitling the plaintiff to an award of at least nominal damages. Therefore, although a police officer may touch a person in the context of a constitutionally permissible search, he or she could not perform the same act without liability in the status of a private citizen. Although a person may voluntarily waive the right that precludes a private citizen from invading his or her bodily integrity, without such a waiver, the private citizen must respect that right of bodily integrity. In those instances when government may constitutionally invade a person's bodily integrity, however, it may do so even over the objections of that person.

The employer accommodation approach is also an inadequate, if not impermissible, method for resolving the privacy-based sex BFOQ issue. Title VII expressly mandates reasonable employer accommodation only in the context of discrimination based on religion. Prior to the enactment of that express provision, the Supreme Court had affirmed a lower court ruling which held that the EEOC's authority to place upon an employer a duty to accommodate an employee's reasonable religious practices lacked a statutory basis. In view of that holding, the courts arguably may lack the authority to require an employer to show that accommodation places an undue hardship on that employer as a condition precedent to granting a privacy-based BFOQ.

Assuming that the courts do have the authority to impose such a requirement as a condition precedent to granting a sex BFOQ, the Supreme Court's interpretation of the religious accommodation provision of Title VII necessarily implies that the requirement is a toothless one. In another Title VII religious discrimination case, the Court held that neither an employer nor a union has any obligation to take steps inconsistent with an otherwise valid collective bargaining agreement in attempting to accommodate an employee's religious practices. Moreover, according to the Court, an employer is under

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50 U.S. Const. amend. IV.
51 W. Prosser, supra note 49, at 35.
52 A person may consent to an intentional invasion of his bodily interest, thus preventing the existence of a tort. Id. at 101.
53 The only mention of accommodation comes in Title VII's definition of "religion": "'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1982) (emphasis added).
no obligation to impose undesirable shifts on other employees or to agree to substitute or replace workers if such accommodation requires "more than de minimis cost."  

The accommodation approach also fails to address the threshold question of whether the customer's privacy rights actually are jeopardized by the employer's compliance with Title VII's sex nondiscrimination provisions. The subsidiary issue of whether accommodation is possible should only be raised after a determination that the customer's privacy rights are actually jeopardized by the hiring of an opposite-sex employee. To date, court decisions have assumed an affirmative answer to the threshold question without offering a sufficient explanation. Finally, the accommodation solution clearly perpetuates some types of occupational segregation. To the extent that these segregative employment patterns are permitted to continue under this "solution," economic equality without regard to gender is impeded. The shortcomings of the various approaches illustrate that the issue of whether a privacy-based BFOQ is necessary must be addressed by carefully exploring and analyzing the right of privacy itself.

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66 Id. at 84.
68 The BFOQ verbal formulations that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively," Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971), and that the employer has "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," Weeks v. Southern Bell Tel. & Tel. Co., 406 F.2d 228, 235 (5th Cir. 1969), do not help to resolve the privacy-based BFOQ issue. Typically, the employer does not claim that members of the excluded sex cannot perform the required tasks. Rather, the employer claims that the presence of an opposite-sex employee impinges upon the customer's privacy rights.

The BFOQ defense could be limited to only those situations in which members of one sex cannot perform the work, but, if so limited, there is almost no need for a BFOQ defense. Title VII does not require employers to hire applicants who cannot perform the job. Therefore, under this narrow interpretation, the BFOQ would act only to excuse employers from individually testing applicants of the excluded sex if there is a factual basis for believing that all, or substantially all, members of that sex cannot perform the tasks essential to the business operation.

The Supreme Court has not embraced any particular formulation of the BFOQ defense. Therefore, the door is still open for claims of sex BFOQ predicated on considerations other than the ability to perform the job. But see Hayes v. Shelby Memorial Hosp., 30 Empl. Prac. Dec. (CCH) ¶33,058 (N.D. Ala. 1982) (where employer claimed a non-pregnancy BFOQ based on the potential of fetal harm, holding that pregnancy does not adversely affect an expectant woman's job performance).
III. THE RIGHT OF PRIVACY

The concept of a right of privacy is surrounded by a maelstrom of differing opinions as to its source, its nature, and its extent.\(^{55}\) Legal\(^{80}\) and philosophical\(^{61}\) literature attempting to define "privacy" or the "right of privacy" is voluminous. Despite this definitional uncertainty among scholars, the validity of the privacy-based BFOQ must be examined in light of the nature and extent of the right asserted.

One methodological approach for exploring the concept of privacy is to identify and categorize those instances where legal recognition has been extended to a right of privacy. Although the United States Constitution does not contain an explicit right of privacy, the Supreme Court has recognized that the right of privacy emanates from specific constitutional limitations on governmental power.\(^{62}\) For example, Supreme Court cases interpreting the fourth amendment's guarantee of the right to be free from unreasonable searches and

\(^{55}\) As one writer describes the problem, "[t]he most striking thing about the right of privacy is that nobody seems to have a very clear idea what it is." Thompson, The Right of Privacy, 4 Phil. and Pub. Aff. 295 (1976).


seizures highlight one facet of constitutional privacy. This understanding of privacy comports most closely with the pedestrian view of privacy as freedom from intrusions into one's personal affairs.

Another component of constitutional privacy embraces the right of the individual to be "free in action, thought, experience, and belief from governmental compulsion." The roots of this concept of privacy are found in the first amendment's protection of associational rights and guarantees of freedom of speech, press, and religion; in the ninth amendment's reservation of rights to the people; in the fourteenth amendment's guarantees of liberty and equal protection; and in the penumbras surrounding the entire Bill of Rights. In addition, to the extent that application of the fifth amendment's privilege against self-incrimination "reflects our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may live a private life," it, too, protects this aspect of constitutional privacy.

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See, e.g., Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J. dissenting); Boyd v. United States, 116 U.S. 616 (1886). The third amendment's guarantee that "[n]o soldier shall, in time of peace be quartered in any house, without the consent of Owner," U.S. Const. amend. III, also represents a limitation of governmental power from which a right of privacy might be derived.

Justice Brandeis captured this aspect of privacy when he wrote that the makers of the Constitution "conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).


U.S. Const. amend. I. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969) (protecting under the first amendment the possession of obscene material in home "[f]or also fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy"); West Virginia v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute in public school violates first amendment).


U.S. Const. amend. XIV. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (right of privacy encompasses woman's decision to have an abortion); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of criminals offends fundamental nature of the rights to marry and to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (no power to standardize children through compulsory public school education); Meyer v. Nebraska, 262 U.S. 390 (1923) (no power to foster homogeneous people).


An individual’s interest in avoiding governmental disclosure of personal matters is another facet of the right of privacy recognized in constitutional law. Unlike the more dynamic aspects of privacy involving thought, experience, action, belief and choice, this constitutional component of privacy is largely undefined and unevenly protected.

While the Constitution does permit certain types of governmental inspection-of-the-body procedures, such as body searches and fingerprinting, as well as literal invasions of the body in the form of vaccinations, blood tests, and body cavity searches, these invasions impinge upon privacy in varying degrees of severity. Because “no more basic aspect of personal privacy can be found than bodily integrity . . .,” the fourth amendment imposes significant limitations on when and how governmental invasions of the body may be undertaken. Moreover, the eighth amendment’s prohibition of cruel and unusual punishment implicitly presumes respect for bodily integrity.

Supreme Court decisions recognizing a right of privacy demonstrate that a cluster of rights are sheltered under the umbrella of con-

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7 Whalen v. Roe, 429 U.S. 589, 599 (1977). In Whalen the appellees contended unsuccessfully that the existence of readily available information regarding their use of certain drugs invaded their “zone of privacy.” Id. at 598, 600.


7 Cf. Bell v. Wolfish, 441 U.S. 520 (1979) (visual inspection of pre-trial detainees’ body cavities is permissible).

80 Cantor, A Patient’s Decision To Decline Life-Saving Medical Treatment: Bodily Integrity Versus The Preservation of Life, 26 Rutgers L. Rev. 228, 241 (1973). Accord Benn, supra note 60, at 12 (“[v]ery intimate connection between the concepts of oneself and one’s body . . . must take the body as its first and most basic reference for control over personal identity.”); Parker, supra note 60, at 283-84 (“privacy is control over when and by whom the [physical] part of us . . . can be seen or heard . . . touched, smelled, or tasted by others”).

81 See generally 2 W. LaFave, supra note 76, at 215-371.

These decisions also demonstrate that only certain privacy claims made against the government receive constitutional recognition and protection. Constitutional law is not, however, the only source of the right of privacy.

Nonconstitutional sources as well as statutory law define and protect aspects of the right of privacy. Uncontested-to intrusions upon an individual's physical solitude or seclusion is a recognized tort. Tort law also offers protection to the individual's interest in avoiding disclosure of personal matters via the torts of public disclosure of private facts and false light in the public eye. Bodily integrity also finds protection in criminal sanctions against assaults upon the body as well as in civil tort actions for intentional interference.

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83 Repose, sanctuary, and intimate decisions have been identified by one taxonomist as the components of privacy. Repose is defined in accordance with the classic sense of privacy. It is the right of the individual to block out certain stimuli. Sanctuary is the right of a person to keep things within the zone of sanctuary. The freedom to make certain fundamental decisions without the state's injection of factors which disrupt that process is defined as the privacy of intimate decisions. Comment, A Taxonomy, supra note 60, at 1451, 1456, 1466.

84 For example, in Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court denied a federal cause of action for police circulation of photographs of people arrested for shoplifting.

85 A law review article initiated the development of an independent tort based on an invasion of the right of privacy. Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1900). This tort has been the subject of much debate. Dean Prosser argued that the tort law of privacy was composed of distinct kinds of invasions of distinct interests of the plaintiff in emotional tranquility (intrusion upon seclusion), reputation (public disclosure of private facts and false light in the public eye), and intangible property (appropriation of name or likeness). He believed that the only things which tied these four torts together were the common name and the interference with the right "to be let alone." See W. Prosser, supra note 49, at 807-09. While others have rejected this idea that tort privacy is a composite of separate interests that have no independent value, the common thread seems to be a protection of individuality or freedom. See Bloustein, An Answer to Dean Prosser, supra note 60, at 1002.

Others have criticized the tort law of privacy as a "less precise way of approaching more specific values, as, for example, in the case of freedom of speech, association, and religion," and as a petty tort. Kalven, supra note 60, at 327. However, this criticism is answered by the argument that intrusion on our privacy, especially by mass publicity, is an offense to the right to be self-determining. "[T]o the degree the tort remedy can preserve . . . life option[s] in an age pervaded and dominated by the mass media of communication, it should be fostered and developed. Bloustein, Warren and Brandeis' Tort, supra note 60, at 620.


87 The impermissible intrusion can be into the plaintiff's home, hotel room or even the plaintiff's shopping bag. The intrusion can be by mechanical means such as wiretaps and microphones as well as by actual physical entry. W. Prosser, supra note 49, at 807-08.

88 The impermissible public disclosure can be publicizing the plaintiff's debts or medical pictures of the plaintiff's anatomy. Id. at 809-12.

89 This invasion of the plaintiff's privacy can consist of the unauthorized use of plaintiff's name on a petition or as a candidate for public office. It also includes the use of the plaintiff's name on books or articles which the plaintiff did not author. Id. 812-14.

90 See, e.g., MODEL PENAL CODE § 211.1 (1980). Under the Model Code a person is guilty of assault if he "(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to
with the person. These non-constitutional sources evidence a "majoritarian sentiment regarding the legitimacy and importance of particular facets of the rights of . . . privacy."  

Although this taxonomy of constitutional, non-constitutional and statutory law reveals a multifaceted right of privacy, it does not provide an analytical tool for evaluating the privacy-based sex BFOQ. Indeed, what is needed is a principle which ties together the various components of the right of privacy. Because popular meanings of privacy vary enormously both cross-culturally and trans-historically, they must be viewed skeptically as the source of such a principle. In fact, privacy frequently is confused with the notions of modesty and embarrassment. Such notions are by and large culturally conditioned and may have little relationship to privacy. For example, certain places (bathrooms) and certain activities performed in those places (defecation) often become symbolic of the entire range of the privacy concept. Clearly, neither bathrooms nor defecation are intrinsically any more private than are dining rooms and eating. Nevertheless, people who internalize these culturally conditioned associations are embarrased if the bathroom is invaded and the act of defecation is observed. In contrast, an invasion of the dining room and the observation of the act of eating is not likely to elicit such intense feelings.

In order to transcend cultural influences, a unifying principle tying together the various components of the right of privacy must come from the universal, or core, values served and vindicated by the

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91 There are four torts involving intentional interference with the person. Battery protects the plaintiff's body from intentional, offensive and unconsented contact. W. PROSSER, supra note 49, at 34-35. The plaintiff's interest in freedom from the apprehension of a battery is protected by the tort of assault. Id. at 37-38. The tort of false imprisonment protects the plaintiff's interest in freedom from restraints of movement. Id. at 42. Finally, the tort of intentional infliction of mental distress protects the plaintiff's interest in freedom from mental injuries such as shock, fright or other extreme reactions which affect the body. Id. at 49-62.

92 Modesty means ideas of propriety in dress, speech or conduct determined by conventional rules of behavior. WEBSTER'S NEW COLLEGIATE DICTIONARY 733 (1981). Embarrassment is the self-conscious distress a person experiences when there is a breach of those customs and manners. Id. at 367. A breach of the right of privacy entails the denial of some attribute of what it means to be human. Such a denial is described as the debasement or degradation of another person.

93 Fried, supra note 60, at 487-88.

94 In one sense, the meaning of privacy can never be totally free of cultural influences. "[W]e cannot escape from the bias of our own times and places, our own historical situations." Gerety, supra note 60, at 238.
concept of privacy. The core values have been variously described as "autonomy . . . over the intimacies of personal identity", "the right to be self-determining", respect for "individual dignity," "human dignity," or "individuality"; and the "right of personhood." Moreover, because control over one's body is a fundamental prerequisite to all forms of autonomy, privacy also refers to control over this basic manifestation of selfhood.

From these various expressions of the core values protected by the right of privacy, a unifying principle emerges. The right of privacy in all of its facets seeks to preserve the condition of being human rather than being merely conscious or sentient. Unfortunately, this formulation of privacy's unifying principle operates at an abstract level, unconducive to practically evaluating an employer's claim that hiring an opposite-sex employee jeopardizes customers' privacy rights. Nevertheless, it does help to focus the analysis when such a privacy claim is asserted. The inquiry courts should undertake is whether the employer's claim for protection of the customer's right of privacy truly involves the potential violation of the conditions necessary for the preservation of the customer's selfhood. Such an approach "encourage[s] wise reflection . . . of any action . . . that appears to transgress what it means to be a human at a given time and

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98 Fried, supra note 60, at 488. Fried opines that a "true" invasion of privacy occurs only when the designation of a place or activity as private implicates the core value of the right of privacy. Id.
97 Gerety, supra note 60, at 236. The author also states: "Without such control, much that we take as distinctively human—love, reflection, choice—cannot flourish or perhaps even survive in our society." Id. at 266.
96 Bloustein, Warren and Brandeis' Tort, supra note 60, at 620. Accord A. Westin, supra note 61, at 7; Singer, supra note 60, at 693.
99 Kalven, supra note 60, at 326.
100 Singer, supra note 60, at 695.
101 Bloustein, An Answer to Dean Prosser, supra note 60, at 1002-03. Because the concept of individuality is a peculiarly Western idea, perhaps the concept is the Western manifestation of the universal right of respect for human dignity.
102 Craven, supra note 60, at 706. The essence of personhood is a rebuttable presumption that all persons have a right to live their lives free of government regulation. Thus, personhood includes all those matters not considered to be fundamental rights such as having hair of a certain length and riding a motorcycle without a helmet. Id. at 710.
103 Gerety, supra note 60, at 266 and n.119.
104 Bloustein, supra note 60, at 1003.
105 Furthermore, the numerous definitions of privacy indicate an uncertainty regarding whether privacy is "a psychological state, a form of power, a right or claim . . . [or] a freedom not to participate," Parker, supra note 60, at 276; a "condition," Lusky, supra note 60, at 709; an "immunity," Benn, supra note 60, at 2; a "boundary," Shils, supra note 60, at 282; "breathing space," Kanvitz, supra note 60, at 277; a "rallying point," Symposium on Privacy, 31 Law & Contemp. Probs. 253 (1966); a "zone," Henkin, supra note 60, at 1425; or, a "rebuttable presumption," Craven, supra note 60, at 706.
Finally, an analysis of an employer's privacy-based sex BFOQ defense must take into account the waivable nature of the right of privacy. Participation in society necessarily entails some relinquishment of one's right of privacy. Moreover, the power to voluntarily relinquish some aspect of one's privacy rights is implicit in the very nature of the right. Indeed, if "renunciation [of privacy] from the inside is practically impossible" then privacy is a meaningless concept. Privacy is an equally meaningless concept when no practical possibility exists for "the abrogation of privacy by intrusion from the outside." Thus, any discussion of the nature of the privacy rights of a person isolated from humanity is illogical. This is true not only because no one is present to intrude upon the person's solitude, but also because the person cannot relinquish the solitude with respect to another because none is present.

Once voluntary relinquishment of some part of the right of privacy occurs because a social relationship is entered into and certain social roles are assumed, it is no longer reasonable to expect the same degree of privacy to exist in the relationship as existed prior to the relinquishment. If, for example, a person decides to see a doctor for the purpose of a physical examination, the doctor-patient relationship necessarily gives rise to an invasion of that patient's bodily integrity. Therefore, the patient has relinquished the right to object to the doctor's touching or observation of the patient's body.

Typically, employers raise the privacy-based sex BFOQ defense in employment situations where customers may be required to disrobe or where customers may have to perform bodily functions in the presence of an opposite-sex employee. This context is laden with culturally conditioned and emotionally charged notions of modesty and embarrassment. Moreover, the employer's defense appeals to the

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108 L. Tribe, supra note 82, at 892. Tribe makes clear that there is no need to apologize for the lack of total precision and concreteness in the various definitional attempts. "[T]here is hubris and fragility and, paradoxically, a bleak conservatism, in designing and defending any absolute right. Any fundamental rights of personhood and privacy too precisely defined or inflexibly defined defy the seasons and are likely to be by-passed by the spring floods." Id.

109 Shils, supra note 60, at 281.

108 Id.

108 Rachels, supra note 61, at 331. Rachels states:
In general, a fact about ourselves is someone's business if there is a specific social relationship between us which entitles them to know. We are often free to choose whether or not to enter into such relationships, and those who want to maintain as much privacy as possible will enter them only reluctantly.

Id.

110 See supra note 93.
most basic and readily understood component of privacy: bodily integrity. If the customer has waived his or her right of privacy or if the presence of an opposite-sex employee does not violate the conditions necessary for the preservation of the customer’s selfhood, however, a privacy-based sex BFOQ should not be recognized.

IV. AN ANALYSIS OF THE PRIVACY-BASED SEX BFOQ

The first inquiry in an analysis of the employer’s privacy-based sex BFOQ defense should be whether the customer, that is, the person whose privacy rights are asserted, stands in a coercive or noncoercive environment. A coercive environment embraces those situations where the customer has no practical or legal choice but to perform an act, such as disrobing or performing a bodily function, in the presence of an employee. Prisons and institutions such as hospitals and nursing homes are clearly coercive. Prisons are coercive because the presence of the customer (inmate) is legally compelled by judicial sentence; institutions are coercive because the need to relieve physical or mental suffering practically compels the customer (patient) to enter the environment. Noncoercive environments include all employment situations where the customer has a true choice regarding his or her presence. Most stores and shops are noncoercive settings because the customer voluntarily decides whether to enter such an environment.

One advantage of the coercive/noncoercive dichotomy is its focus on the customer, and especially on the customer’s choice. Such a perspective prevents the rationale supporting the result in one environmental context from being unthinkingly applied in the other. This advantage is particularly salient where the customer’s voluntary

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111 This proposal and the conclusions drawn herein are applicable in any situation where there is an alleged conflict between customer privacy rights and employee rights of equal employment opportunity. Therefore, the proposal and conclusions may be appropriately used in any Title VII litigation involving employers’ attempts to defend facial sex discrimination (refusal to hire, transfer, promote) by raising the privacy issue. However, the analysis does not seek to compel the use of unisex restroom facilities, sleeping quarters or disrobing areas. It is aimed only at facilitating the hiring, transferring or promoting of employees into jobs within these areas without regard to the sex of the employees.

112 One commentator noted that “[h]ospitals, prisons, military barracks, and live-in schools of all kinds deprive their inhabitants of privacy. This is part of the policy of those delegated to run such establishments, because in nonprivacy there is maximum opportunity to control behavior, to produce conformity to assigned roles.” Jourard, supra note 60, at 313.

113 The facilities provided in local, state or national parks and recreation areas are also noncoercive environments.
waiver of the right of privacy is concerned. While the voluntary waiver principle is operative in a noncoercive setting, it is ludicrous to argue that a customer has voluntarily waived his or her privacy right in a coercive setting.

Included within the customer’s right of bodily integrity is the right not to be subjected to unconsented observations and touchings. Nevertheless, when a customer decides to purchase a suit which requires a fitting by a clerk, that customer implicitly, if not explicitly, consents to an invasion of this right to be free from observation and touching. The invasion is necessary and incidental to the fitting process. The fact that the customer prefers to permit such observation and touching by only a same-sex clerk is not a privacy claim. Rather, the customer is merely complaining that the presence of an opposite-sex employee offends his or her notion of modesty predicated on the expectation that same-sex clerks will be employed. The principle underlying the recognition of the right of privacy — respect for human dignity — does not require protection of this culturally determined, and therefore changeable, idea of modesty which is inextricably tied to stereotypes regarding the conventional roles of women and men.

Certain forms of observation and touching unquestionably degrade

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114 At the moment an individual voluntarily enters a situation where they may be seen by others, some part of the right to be free from unconsented observations or touchings is relinquished. See Bloustein, An Answer to Dean Prosser, supra note 60, at 1004. If this were not true, all people would be compelled to divert their eyes as they pass one another on streets or in stores.

116 Compare the reactions of a Victorian woman and a contemporary woman to the inadvertent exposure of their knees. The Victorian woman, unlike her contemporary counterpart, would be embarrassed by this breach of her concept of modesty. See Rachels, supra note 61, at 332.

117 In Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973), a case involving a BFOQ for male clerks in a men’s department of a clothing store, the employer refused to hire female clerks on the basis of customer privacy rights. Although the court did not reach the issue, the employer argued that because males are clerks in men’s departments by tradition, the customer’s notions of modesty might be offended upon discovering an opposite-sex employee in a situation requiring the customer to disrobe and be touched in the fitting process. See also Hodgson v. Robert Hall Clothes, 473 F.2d 589 (3d Cir. 1973), cert. denied sub nom. Brennan v. Robert Hall Clothes, Inc., 414 U.S. 866 (1973); Hodgson v. City Stores Inc., 332 F. Supp. 942 (D. Ala. 1971), aff’d, 479 F.2d 235 (5th Cir. 1973). Although both of these decisions are Equal Pay Act cases involving other issues, the decisions assume an employer is justified in not hiring females to sell men’s clothes and vice versa.

It is interesting to note that women who purchase designer originals often expect the designer to be male. It is therefore logical to assume that they also expect that they will be involved in the selection and fitting process which, of course, involves disrobing and touching. There appears to be no analogous expectations surrounding the sale of men’s clothing.
and deny human dignity.\textsuperscript{117} The touching and observation involved in the fitting of a new suit, are not, however, intrinsically degrading whether performed by a same-sex or opposite-sex clerk. When a customer voluntarily permits an observation and touching by a same-sex clerk and is not denigrated by it, it is spurious to argue that the values protected by the right of privacy are threatened merely because the clerk is the opposite-sex of the customer.

When Congress enacted Title VII it intended to alter traditional employment patterns.\textsuperscript{118} To accomplish this goal, prevailing social mores must be altered.\textsuperscript{119} Soon after Title VII's enactment, both the courts and the EEOC rejected a sex BFOQ defense based on claims of pure customer preference, noting that Title VII was meant to eliminate such products of social stereotypes.\textsuperscript{120} Similarly, the privacy-based sex BFOQ arising in a noncoercive context should be rejected. If it is not rejected, customers' preferences and social prejudices will determine not only whether sex discrimination is valid but also whether employment patterns will change.\textsuperscript{121}

In the noncoercive setting, notions of modesty conflict with the employee's right to equal employment opportunities. The employee's right is far more important than any interest the customer may have in freedom from embarrassment.\textsuperscript{122} As the public becomes accus-
tomed to finding both female and male employees in all occupations, ideas of modesty will change concommitantly to accommodate the presence of opposite-sex employees. Furthermore, because the non-coercive environment is, by definition, one where the customer has a real choice, those customers who may be unwilling or unable to tolerate the presence of opposite-sex employees are free to forego the experience.

In the coercive setting, the analysis of the privacy-based BFOQ defense must be different than that employed in the noncoercive environment. For those incarcerated in prisons, detention centers, and juvenile facilities or committed to mental hospitals, confinement is involuntary. Consequently, inmates do not voluntarily waive any part of their right of privacy; nor can they choose to avoid the experience. Similarly, most patients in facilities, such as nursing homes and hospitals, do not enter voluntarily. Although some people may choose to forego medical treatment for religious or other reasons, most have no practical alternative but to enter the facility for treatment of their ailment. Therefore, admission to health facilities cannot constitute a waiver of privacy rights analogous to that implied when a person chooses to enter a truly noncoercive environment. Because observation and touching of a patient's body is an indispensible aspect of treating illness and injury, medical supervision and treatment inevitably entails some intrusions into the bodily integrity facet of the patient's right of privacy. Nevertheless, the patient relinquishes only so much of the protection afforded by the right of privacy as is necessary for the delivery of medical care. The patient's privacy rights require that medical personnel respect the basic inviolability of the patient's body during medical care. This respect is manifested in the personnel's competent and professional performance of their duties.

The BFOQ privacy cases arising out of hospital settings do not contain any allegations, or even intimations, that male nurses or female doctors cannot render competent and professional care to their opposite-sex patients. Moreover, the amount and type of observation and touching necessary for the delivery of medical treatment (the ac-

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ploymen opportunities. It is this author's opinion that this country's long-standing segregated employment pattern justifies the contemporary elevation of equal employment opportunities to a level above concern for individual embarrassment.

124 Sirota, supra note 11, at 1065.

124 Medical personnel are trained to respect the inviolability of the body. See Comment, Sex Discrimination Justified Under Title VII: Privacy Rights in Nursing Homes, 14 VAL. U.L. Rev. 577, 589 (1979-1980).
tual intrusion of the patient's bodily integrity) remains the same re-

guardless of the sex of the medical personnel providing the treatment.

The crux of the complaint in these cases is often that some male pa-

tients may experience embarrassment when treated by a female doc-

tor. Yet, those same male patients willingly accept intimate bodily

care from female nurses. Similarly, some female patients may suffer

embarrassment from bodily care provided by male nurses despite

their acceptance of treatment by male gynecologists and ob-

stetricians.

In effect, these patients have an expectation that nurses will be

female and doctors will be male. Surprise and sometimes shock may

occur when a patient discovers females and males performing non-

traditional medical roles. Because 96.5% of all registered nurses are

female and 86.6% of all doctors are male, the patient's expecta-

tions certainly are not irrational; but preservation of the conditions

necessary for human dignity does not require legal protection of such

expectations. Furthermore, insofar as these expectations are predic-
ated on sex-role stereotypes, they should not be permitted to im-

pede the Title VII purpose of equality of the sexes for employment

opportunities.

The analysis of the employer's privacy-based sex BFOQ defense

arising out of such coercive environments as prisons, detention cen-

ters, juvenile facilities, and mental hospitals should be similar to the

analysis applied to a hospital setting. Prisoners and other people law-

fully confined against their will by the state do not voluntarily relin-

quish any facet of their right of privacy. In fact, the Supreme Court

has specifically held that convicted offenders as well as pretrial de-

tainees retain certain constitutional rights including the right of pri-


126 Women's Bureau, supra note 12, at Table 11.

128 Professor Wasserstrom's observations on the role played by sexually segregated bath-

rooms in our culture are relevant to the thesis that customers' notions of privacy have a lot to
do with sexism rather than "true" privacy.

The case against [sexually segregated bathrooms] now would rest on the ground that
they are, perhaps, one small part of that scheme of sex-role differentiation which uses
the mystery of sexual anatomy, among other things, to maintain the primacy of hetero-
sexual sexual attraction central to that version of the patriarchal system of power rela-
tionships we have today.

The conjecture about the role of sexually segregated bathrooms may well be inaccurate
or incomplete. The sexual segregation of bathrooms may have more to do with privacy
than patriarchy. However, if so, it is at least odd that what the institution makes rele-
vant is sex rather than merely the ability to perform the eliminatory act in private.

Wasserstrom, Racism, Sexism and Preferential Treatment: An Approach to the Topics, 24
The Supreme Court decisions, however, make it clear that, although prisoners do not waive their right of privacy, "[t]he fact of confinement, as well as the legitimate goals and policies of the penal institution, limits these retained constitutional rights." The analysis of a sex BFOQ predicated on inmates' privacy should begin with the determination of whether the act complained of actually is an infringement of the right of privacy. Regardless of the gender of guards and inmates, all body cavity searches of inmates as well as all observations by guards of inmates in the act of showering, disrobing, or performing bodily functions are invasions of the bodily integrity facet of the inmates' privacy rights. While consent would remove all grounds for objections to such invasions, it is lacking in this context because inmates, by definition, do not voluntarily enter the coercive environment.

Once the complained of act is deemed an invasion of a facet of the right of privacy, the next step should be to determine if the invasion is nonetheless justified. In the context of involuntary institutionalization, the very fact of confinement coupled with the necessity for institutional security, internal order, and discipline may override some aspects of the inmates' privacy rights. The scope of the intrusion, the manner in which it is conducted, the reason for initiating it, and the place where it occurs are all relevant factors in balancing the need for the particular intrusion against the invasion of privacy. Obviously, there is room to disagree about the weight assigned to these factors and the particular balance struck by the court in a particular case. There is no logical reason, however, to include in the equation the gender of the guards and the inmates.

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129 A body cavity search may involve either a visual or physical examination of the mouth, rectum and vagina of an inmate.
130 Bell v. Wolfish, 441 U.S. 520, 560 (1979); id. at 576-77 (Marshall, J. dissenting); id. at 594 (Stevens, J. dissenting).
131 A person's privacy rights are not an impenetrable shield against all unconsented to intrusions. Bloustein, An Answer to Dean Prosser, supra note 60, at 1004.
133 Id. at 559.
134 For an excellent discussion of inmates' privacy rights which provides background for an understanding of these factors, see Singer, supra note 60. See also Jourard, supra note 60, at 313-14 for a discussion of the psychological aspects of privacy in institutional life.
135 Inmates who have complained about visual body cavity searches objected to the proce-
For example, although strip searches accompanied by body cavity searches are gross intrusions into the inmates' right of bodily integrity, the Supreme Court has upheld the Bureau of Prisons' policy requiring inmates to expose their body cavities for visual inspection as part of a strip search conducted after every contact with an outside person.\(^1\) Assuming that the Supreme Court struck the correct balance between legitimate correctional needs and inmates' privacy rights, of what relevance is the guard's gender? The actual degree of physical invasion into the inmate's body does not increase or decrease because of the gender of the guard. Although opposite-sex guards may abuse opposite-sex inmates under the guise of performing an otherwise constitutionally permissible body cavity search, same-sex guards may conduct searches of same-sex inmates in an equally abusive fashion. Moreover, abusive conduct by either female or male guards, regardless of the inmate's gender, is not condoned by any Supreme Court decision permitting limitations on an inmate's privacy rights.\(^2\) The remedy, however, for an unjustifiable violation of an inmate's bodily integrity by a guard is punishment of the guard, and not the wholesale exclusion of all opposite-sex guards from the institution.\(^3\)

Institutions have the duty to employ guards who will not engage in abusive treatment of inmates. It is impossible to establish, however, that a nonabusive body search cannot be performed by a guard on an opposite-sex inmate.\(^4\) Without such a showing, denial of employ-

dure without reference to the sex of the guards. See Bell v. Wolfish, 441 U.S. 520 (1979). Cf. York v. Story, 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964). In York a male police officer took pictures of the nude plaintiff in various indecent positions after telling her that such a procedure was necessary in order to file her complaint. The pictures were not made for any legitimate purpose. The officer circulated the prints within the department. It is hard to imagine that the act would have been a less outrageous violation of the plaintiff's right of privacy if the police officer had been a female.

\(^5\) Bell v. Wolfish, 441 U.S. 520, 558-60 (1979). The decision is applicable to pretrial detainees as well as convicted inmates. Id. at 546.

\(^6\) Id. at 560.

\(^7\) Justice Marshall made an analogous point in the Alabama prison guard case wherein the majority permitted the state to exclude female guards because of the potential of inmate assaults. "The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women . . . but to take swift and sure punitive action against the inmate offenders." Dothard v. Rawlinson, 433 U.S. 321, 346 (1977) (Marshall, J. dissenting).

\(^8\) Moreover, as suggested by Justice Marshall:

if women [or men] guards behave in a professional manner at all times, they will engender reciprocal respect from inmates, who will recognize that their privacy is being invaded no more than if a woman [or man] doctor examines them. The suggestion implicit in the privacy argument that such behavior is unlikely on either side is an insult to the professionalism of guards and the dignity of inmates.
ment opportunities on the basis of a guard's gender is based on impermissible assumptions and stereotypical characterizations of the sexes and their relationship to each other.\textsuperscript{140}

In the context of a coercive institutional environment, respect for human dignity, the unifying principle of the various facets of the right of privacy, does require justification of all invasions of the inmates' privacy rights by weightier counterveiling correctional considerations. Respect for human dignity, however, does not require freedom from justifiable invasions by opposite-sex actors. Moreover, the equal employment mandates of Title VII support the exclusion of sex as a factor in balancing institutional needs and inmates' privacy rights.\textsuperscript{141} While inquiries regarding whether a particular institutional practice is an invasion of the inmate's right of privacy and whether the invasion is justified by weightier counterveiling correctional considerations are proper in a privacy analysis, questions of gender are not. The privacy rights of inmates are no more at risk if opposite-sex guards are employed than if same-sex guards perform the complained act.\textsuperscript{142}

V. CONCLUSION

The guarantee of equal employment opportunity in Title VII must be zealously guarded. Although the statutorily created BFOQ defense is an exception to Title VII’s general mandate forbidding employment discrimination on the basis of sex, the typically narrow interpretation of the BFOQ provision in both EEOC guidelines and court decisions imposes significant limitations on the extent of this exception. The courts' acceptance of a privacy-based sex BFOQ defense represents a threat to Title VII's dual goals of equal employment opportunity and nondiscrimination. Thus, the privacy-based BFOQ must be closely scrutinized.

In order to properly evaluate the privacy-based sex BFOQ, the

\textsuperscript{140} There is reason to believe that the presence of female guards in male prisons may actually further the rehabilitative process by creating an environment more closely analogous to the real world which includes females as well as males. \textit{Id.} at 346.

\textsuperscript{141} \textit{See supra} notes 11-13 and accompanying text.

\textsuperscript{142} A comment made by the Associate Warden at San Quentin supports the idea that male inmates' objections to female guards have more to do with sexism than privacy. “The problem is that it can ruin the tough image of the convict. How can you do the Bogart thing when you have a woman guarding you.” \textit{San Francisco Chron.}, March 28, 1973, at 2, col. 8, \textit{cited in H. Kay, Cases and Materials on Sex-Based Discrimination} 574 (2d ed. 1981).
The public versus private employment analytic framework should be rejected. Such rejection is necessary because the approach is premised upon the erroneous idea that privacy rights are more extensive in the public sector than in private sector employment. Also, the public-private dichotomy fails to address the central question: whether any facet of the right of privacy is in issue.

The unifying principle of the multifaceted right of privacy is preservation of human dignity. When a privacy-based claim is asserted, it must be evaluated in terms of whether the alleged invasion violates the conditions necessary for the preservation of selfhood. The claim must not be confused with culturally conditioned notions of modesty and embarrassment or with stereotyped characterizations of the sexes. Because privacy rights can be waived when a true invasion of the right of privacy is in issue, the analysis of the claim must take into account whether the person whose rights are asserted stands in a coercive or noncoercive environment. In a coercive environment, consent is always lacking, therefore, once an act is deemed an invasion of the right of privacy, the only remaining issue is whether the infringement is justified by weightier counterveiling considerations.

This proposed framework for evaluating the privacy-based BFOQ defense to Title VII violations may appear immodest to some readers. Absent such an approach, notions of modesty, as opposed to true privacy rights, will outweigh and triumph over congressional policy and the arduous and continuing struggle for the eradication of employment discrimination on the basis of sex.