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Case Comment

Conflicting Feminisms and the Rights of Women Prisoners

Ashlie E. Case†


INTRODUCTION

Following two lawsuits and confronted with a wealth of information alleging rampant sexual abuse of female inmates in its facilities, the Michigan Department of Corrections (MDOC) to minimize access to secluded areas and one-on-one contact between male staff and inmates, implement a “knock and announce” policy in which male officers announce their presence prior to entering areas where inmates undress, restrict cross-gender pat-downs, and study feasibility of increasing the presence of female officers in the housing units. Four years later, Nunn v. Mich. Dep’t of Corr., 1998 U.S. Dist. LEXIS 15639 (E.D. Mich. 1998), was brought by female inmates alleging sexual misconduct, sexual harassment, violation of privacy rights, and retaliation by corrections officers. The plaintiffs settled for $4 million in damages and an injunction obligating the MDCO to restrict cross-gender pat-downs by male staff, require males to announce their presence upon entering housing units, maintain certain areas where inmates shower, dress, and use the bathroom free of male staff observation, and make a good faith effort to limit officers in housing units to women. Settlement Agreement Regarding Injunctive and Declaratory Relief, Nunn v. Mich. Dep’t of Corr. (No. 96-CV-71416).

1. U. S. v. Michigan, 1994 U.S. Dist. LEXIS 16024 (E.D. Mich. 1994), was brought after a United States Department of Justice investigation of an alleged pattern of sexual abuse of female inmates and other misconduct by male guards, in violation of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. (2000). The settlement required the Michigan Department of Corrections (MDOC) to minimize access to secluded areas and one-on-one contact between male staff and inmates, implement a “knock and announce” policy in which male officers announce their presence prior to entering areas where inmates undress, restrict cross-gender pat-downs, and study feasibility of increasing the presence of female officers in the housing units. Four years later, Nunn v. Mich. Dep’t of Corr., 1998 U.S. Dist. LEXIS 15639 (E.D. Mich. 1998), was brought by female inmates alleging sexual misconduct, sexual harassment, violation of privacy rights, and retaliation by corrections officers. The plaintiffs settled for $4 million in damages and an injunction obligating the MDCO to restrict cross-gender pat-downs by male staff, require males to announce their presence upon entering housing units, maintain certain areas where inmates shower, dress, and use the bathroom free of male staff observation, and make a good faith effort to limit officers in housing units to women. Settlement Agreement Regarding Injunctive and Declaratory Relief, Nunn v. Mich. Dep’t of Corr. (No. 96-CV-71416).

2. A 1993 study by the Michigan Women’s Commission advised the Department of Corrections that “sexual assault and harassment are not isolated incidents and that fear of reporting such incidents is a significant problem.” Everson v. Mich. Dep’t of Corr., 391 F.3d 737, 741 (6th Cir. 2004). Three years later, Human Rights Watch reported that “rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are continuing and serious problems within the women’s prisons in Michigan [and] have been tolerated over the years at both the institutional and departmental levels.” HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) available at http://hrw.org/reports/1996/Us1.htm. [hereinafter HUMAN RIGHTS WATCH, ALL TOO FAMILIAR] Between 1997 and 1998, Michigan personnel accounted for ten out of twenty convictions of male staff nationwide for criminal sexual conduct against women prisoners. In 1998, Human Rights Watch issued a second report about retaliation against female inmates who made public accusations of abuse. HUMAN...
Department of Corrections (MDOC) enacted a policy to assign only female corrections officers to housing units and transportation duties in women’s prisons. This decision represented MDOC’s effort to curb the systemic and persistent sexual abuse of female inmates by male guards. A group of MDOC employees, both male and female, sued alleging violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), and Michigan’s Elliott-Larsen Civil Rights Act (the “Elliott-Larsen Act”). Following a bench trial, the United States District Court for the Eastern District of Michigan ruled that gender was not a bona fide occupational qualification (“BFOQ”) for the positions in question and struck down the policy. In *Everson v. Michigan Department of Corrections*, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court and upheld MDOC’s policy, finding that gender was a BFOQ for the positions in question. The court based its decision on the safety, security, and privacy interests of the inmates.

*Everson* raises significant gender and sexuality issues. First, the decision sits at the intersection of feminist and queer theory, implicitly adhering to assumptions about gender stratification and heteronormativity, without critically analyzing those assumptions or even taking cognizance of their presence. This Comment argues that this failure to do so is just fine: Responses

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4. Mich. Comp. Laws § 37.2202. The parties identified no relevant substantive differences between the Elliott-Larsen Act and Title VII. Therefore, the Court of Appeals decided the state law claim on the same basis as the federal claim. *Everson v. Mich. Dep’t of Corr.*, 391 F. 3d at 748, n.14 (6th Cir. 2004).


7. *Id.* at 750.
to the sexual abuse of female prisoners by male guards should not be loci of theoretical experimentation about the boundaries of gender and sexuality.

Second, the Everson decision creates a situation where different "feminist" values conflict: One is the battle for equal employment under Title VII; the other is the protection of women from serious sexual abuse and continued subordination. This Comment suggests that feminists should be willing to evaluate the consequences of success in the context of statutory equal employment rights: For female prisoners, equal employment for corrections officers can have decidedly negative consequences. Feminists should conclude that no interest in jobs should trump the right of female inmates to be free from sexual abuse at the hands of those entrusted with their protection.

This Comment concludes that corrections departments should be permitted to designate female BFOQs for positions in which male guards are likely to have sexual access to female inmates without offending Title VII, and that scholars, feminist, queer or otherwise, ought not stand in the way. A context-specific inquiry is appropriate for both the statutory and scholarly analyses.

I. STATUTORY AND CASE BACKGROUND

A. Title VII and the BFOQ

Title VII of the Civil Rights Act of 1964 broadly proscribes gender-based discrimination in the workplace; but the ban is not absolute. Title VII permits overt discrimination if the disparate treatment is based on a bona fide occupation qualification ("BFOQ"). The BFOQ defense allows for gender-based discrimination "in those certain circumstances where... sex... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise.”

The Supreme Court had held that the BFOQ defense is written, and is to be read, narrowly. "[S]tereotyped characterizations of the sexes" are not sufficient to establish it. In order to invoke the BFOQ defense, an employer must have a "basis in fact" for its belief that gender discrimination is

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8. Title VII provides in relevant part: "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." 42 U.S.C. 2000e-2(a)(1) (2000).
10. Id.
13. Id. at 335.
"reasonably necessary" to the normal operation of its business, and the job qualification "must relate to the essence, or to the central mission of the employer's business." The employer must further establish that there are no reasonable alternatives to discriminating on the basis of sex. The burden ultimately rests on an employer to establish a BFOQ defense.

The federal courts have used several formulations of the BFOQ test in evaluating this defense. An employer can meet the test by showing that (1) "all or substantially all [members of one gender] would be unable to perform safely and efficiently the duties of the job involved;" (2) "it is impossible or highly impractical" to determine on an individualized basis the fitness for employment of members of one gender; or (3) that "the very womanhood or very manhood of the employee undermines his capacity to perform a job satisfactorily."

B. The Everson Case

Faced with one of the worst correctional systems in the nation, MDOC designated jobs in female housing and transport as female-only. The housing units are the portions of the facility where inmates shower, dress, and use the toilet; they also constitute the locations where the vast majority of sexual abuse by male guards occurs. During the transport of inmates, the women are shackled and often require assistance using the restroom. In all, the female-only designations applied to 250 assignments, or roughly 2.5% of the 10,000 correctional officer positions in the Michigan prison system.

15. Johnson Controls, 499 U.S. at 203.
16. Reed v. County of Casey, 184 F.3d 597, 600 (6th Cir. 1999).
18. Johnson Controls, 499 U.S. at 207 (quoting Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).
19. Harriss v. Pan Am. World Airways, Inc., 649 F.2d 228, 235 (5th Cir. 1980) (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969)).
20. Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1528 (7th Cir. 1988) (en banc).
21. See supra note 2. Michigan was the situs of ten of the twenty nationwide prosecutions against male guards for sexual abuse of female inmates in 1994. In 1996, Human Rights Watch issued a report concluding that "rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are continuing and serious problems within the women's prisons in Michigan [and] have been tolerated over the years at both the institutional and departmental levels." HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, supra note 2. See also AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE," VIOLATION OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, AMR 51/01/99, March. 1999, at 39. [hereinafter AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE].
22. The designation applied to roughly half of the positions in the three women's facilities in Michigan. Between 50 and 100 guards would be affected because most of the positions are already filled by female officers. No male guard would be subjected to a loss in pay, seniority, or promotion due to the policy. Brief of Amici Curiae American Civil Liberties Union at 6, Everson v. Mich. Dep't of Corr., 391 F.3d 737 (2004). [hereinafter ACLU Amicus Brief]
In *Everson*, the Sixth Circuit found that MDOC satisfied the test for a BFOQ: the goals of security, safety, and privacy can justify gender-based assignments to housing and transportation duties in female correctional facilities:

[Viewed in proper perspective, the exclusion of males from these positions is 'reasonably necessary' to 'the normal operation' of MDOC's female facilities. MDOC reasonably concluded that a BFOQ would materially advance a constellation of interests related to the 'essence' of MDOC's business—the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates—and reasonable alternatives to this plan have not been identified. 23]

The Sixth Circuit faulted the District Court for failing to give MDOC's reasoned decision the deference to which prison administrators are entitled. 24

1. Reasoned Decisions of Prison Officials

As the Sixth Circuit explained, prison officials are entitled to deference because they are entrusted with achieving the goals of the criminal justice system, and, unlike courts, are equipped with the institutional competence to do so. 25 Prison officials must innovate and experiment to come up with solutions to the distinct problems they encounter. 26 Because of the unusual responsibilities entrusted to them, the redoubtable challenges they face, and the unique resources they possess, the decisions of prison administrators are entitled to deference, even in the Title VII context. 27 Thus, the District Court erred when it failed to give appropriate deference to MDOC's position.

Courts often use the deference rationale to thwart inmates' claims of constitutional rights violations. Maintaining this deference to the reasoned judgments of prison officials is crucial to achieving the necessary changes that must be made in the women's prison context: namely, the removal of male guards from positions where they pose a risk of perpetrating sexual abuse on inmates. 28

23. 391 F.3d at 753.
24.  Id. at 750.
25. 391 F.3d at 750, (quoting Robino v. Iranon, 145 F.3d 1109, 1110-11 (9th Cir. 1998)).
26. 391 F.3d at 749-50. For cases counseling judicial restraint in the prison oversight context, see, for example, Reed v. County of Casey, 184 F.3d 597 (6th Cir. 1999); Tharp v. Iowa Dep't of Corr., 68 F.3d 223 (8th Cir. 1995); Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523 (7th Cir. 1988).
27. 391 F.3d at 750 (quoting Torres, 859 F.2d at 1529).
28. 391 F.3d at 749-50 (quoting Torres, 859 F.2d at 1532).
2. Concerns Warranting the BFOQ

a. Security

The Everson court found that security concerns supported the female-only designation of the positions in question.\(^2\) Clearly, the security of prisons relates to the essence of MDOC's business, and MDOC argued that the presence of male guards in female housing units imperiled security in a number of ways.\(^3\) First, the presence of males in the housing units necessitated "artificial barriers to security" such as screens on cell windows, doors on toilet stalls, and a moratorium on cross-gender pat-downs.\(^3\) Second, false allegations of sexual abuse created a "poisoned atmosphere"\(^3\) that led to misconduct on the part of both guards and inmates. Finally, male officers fearing false accusations become "gun shy"\(^3\) and are consequently unable to perform their duties of monitoring and disciplining inmates in a proactive fashion. All of these factors combined to create a security risk within the prisons due to the presence of male officers.

The court drew support for the exclusion of opposite-gender guards for security purposes from Dothard v. Rawlinson,\(^3\) in which the Supreme Court endorsed a male-only staff in Alabama's maximum security prisons by holding that gender was a BFOQ for prison guards.\(^3\) In Dothard, male inmates were housed in dormitory-style rooms without classification based on their offense. The court was concerned that male inmates deprived of a heterosexual environment, and sex offenders specifically, would assault female guards because they were women, thereby undermining the ability of the women to provide security as women.

The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.\(^3\)

In Everson, the court likewise found that the "very manhood" of male guards undermined their capacity to provide security because the modifications necessitated by their presence in the housing units precluded proper...

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29. 391 F.3d at 754.
30. Id. at 753.
31. Id.
32. Id.
33. Id. at 753-54.
35. 391 F.3d at 755 (quoting Dothard, 433 U.S. at 336).
surveillance of inmates. These conditions undermined the ability of the male guards to provide security as men.

b. Safety

Additionally, the court found that safety indisputably relates to the essence of MDOC’s business, and contributes to the justification for the female BFOQ. MDOC acknowledged that it is impossible to determine a particular man’s fitness for employment on an individualized basis because it cannot predict which officers will engage in sexual abuse, and therefore believed it must eliminate males to safeguard female inmates from sexual abuse. As noted previously, this view is entitled to substantial deference.

The court found that, given the severity of the harm to sexually abused inmates, MDOC was permitted to set “more stringent,” i.e. sex-based, qualifications for officer positions. No amount of sexual abuse is acceptable and the risk of harm is tremendous. Not only must sexually abused inmates endure the actual abuse, but they also face the risk of pregnancy and disease that accompany sexual assault. Above and beyond that, inmates risk grave consequences for reporting abuse, including but not limited to subsequent assaults, loss of privileges, placement in segregated housing or solitary confinement, and other retaliation by abusers and their cronies.

Given these realities, the hesitancy of female inmates to come forward and report abuse is not surprising. MDOC understood that without excluding

37. 391 F.3d at 755.
38. Id.
39. Id. ("proclivity for sexually abusive conduct" “cannot be ascertained by means other than knowledge of the officer’s gender, and thus gender was ‘a legitimate proxy’ for a safety-related job qualification. (citing Western Air Lines v. Criswell, 472 U.S. 400, 414-5 (1985)).
40. 391 F.3d at 755.
41. Id.
42. Id. (citing Harriss, 648 F.2d at 676).
43. 391 F.3d at 756.
44. “[N]early every woman ... interviewed reported various sexually aggressive acts of guards,” and investigators were “struck by [inmates’] almost universal fear of retaliation.” U.S. DEP’T OF JUSTICE, REPORT OF INVESTIGATION OF WOMEN’S PRISONS IN MICHIGAN 3 (1996).
45. Anecdotal evidence suggests that some female inmates ‘consensually’ engage in sex acts with guards in exchange for contraband such as extra food, clothing, etc., or simply wish to do so because they are deprived of access to partners with whom to engage in heterosexual contact. Some might argue that these women ought not be deprived of the opportunity to effectuate their own ends using sexual favors as the means. While this forum does not lend itself to a full treatment of this consideration, the mere agreement to engage in sexual activities by a person deprived of liberty with the person effectuating the deprivation cannot be described as consent. For this reason, many states and the federal government have enacted statutes criminalizing even “consensual” sexual contact with an inmate. See e.g., 18 USCS § 2243 (2005); Code of Ala. § 14-11-31 (2005); ALASKA STAT. § 11.41.410 (3)(B)(i) (2004); A.R.S. § 13-1419 (2004); A.C.A. § 5-14-126 (a)(1)(A)(2005); C.R.S. 18-3-402 (1)(f) (2004); CONN. GEN. STAT. § 53a-71 (a)(5) (2004); F.L.A. STAT. § 794.011 (4)(g), (9) (2004); O.C.G.A. § 16-6-5.1(b), (c)(1) (2004); HRS § 707-731(1)(c)(i) (2004); IDAHO CODE § 18-6110 (2004); 720 ILCS 5/11-9.2 (2004); IOWA CODE § 709.16 (2004); K.S.A. § 21-3520(a)(2003); KRS § 510.120(1)(c)(2004); MD. CRIMINAL LAW CODE ANN. § 3-314 (2004); MINN. STAT. § 609.345
male officers from female housing, it can only protect those women brave enough to come forward. Experience has shown that this strategy is insufficient to curtail the problem. And it is undisputable that the removal of male guards from positions in which they are able to sexually assault inmates would significantly decrease the likelihood that sexual assaults would occur. The Sixth Circuit thus found that the safety interests of the female inmates justified the female BFOQ for assignments in the locales where sexual abuse is most likely to occur.

c. Rehabilitation

Building on the security and safety justifications, the Sixth Circuit further pointed to the interest of rehabilitation to justify employment of a female BFOQ in this case. MDOC has an interest in providing inmates with a safe, secure housing facility absent the perceived threat of sexual assault. Commentators, researchers and amicus in this case have suggested that because anywhere between forty and eighty-eight percent of incarcerated women have been victims of some sort of sexual and/or physical abuse sometime in their lives prior to incarceration, the "constant presence of male staff in women’s housing units" creates "a sexualized atmosphere that is experienced as intimidating by the women." These conditions exacerbate the effects of assault when it occurs and further discourage victims from coming forward with their stories.

(1)(m)(2004); MISS. CODE ANN. § 97-3-104 (2004); § 566.145 R.S.MO.(2004); MCA § 45-5-502 (S)(a) (2004); R.R.S. NEB. § 28-322.01 (2004); RSA 632-A:4(III)(a)(2004); N.J. STAT. § 2C:14-2(c)(2)(2005); N.M. STAT. ANN. § 30-9-11(D)(2) (2005); N.D. CENT. CODE, § 12.1-20-06 (2005); ORC ANN. 2907.03(a)(6) (2005); 18 PA.C.S. § 3124.2 (2004); S.D. CODIFIED LAWS § 22-22-7.6 (2003); TEX. PENAL CODE § 22.011 (b)(8, 11) (2004); UTAH CODE ANN. § 76-5-412 (2005); VA. CODE ANN. § 18.2-64.2 (2004); REV. CODE WASH. (ARCW) § 9A.44.160 (2004); W. VA. CODE § 61-8B-10 (2005); WIS. STAT. § 940.225(2)(h) (2004); WYO. STAT. § 6-2-303 (a)(vi) (2004). But regardless of the motivation or preference of the inmate, the concerns of pregnancy and disease are still present with so-called consensual sex in this context, and as such adds to the argument that safety considerations warrant exclusion of males.

46. ACLU Amicus Brief, supra note 22, at 26.
47. 391 F.3d at 750.
48. It is not only actual physical and verbal sexual abuse but also the potential for this abuse that makes it so powerful a form of control over women inmates. See Lori B. Girshick, Accused Women and Incarceration in WOMEN IN PRISON: GENDER AND SOCIAL CONTROL (Jim Thomas and Barbara H. Zaitzow, eds. (2003) at 108 [hereinafter WOMEN IN PRISON].
49. See ACLU Amicus Brief at 28, n.10. Other reports indicate that 34% of incarcerated women have suffered sexual abuse prior to time in prison. T.L. Snell & D.C. Morton, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES, 1991 (U.S. Dep’t of Justice 1994). Still other researchers put the number at 35% AMERICAN CORRECTIONAL ASSOCIATION, THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD? (St. Mary’s Press 1990). Only 2% of women reported that their abuse prior to incarceration was perpetrated by a female relative. See Angela Browne et al., Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women, 22 INT’L J.L. & PSYCHIATRY 301, 313 (1999).
50. ACLU Amicus Brief, supra note 22, at 30.
51. Id.
The perceived threat of sexual abuse on an ongoing basis interferes with the inmates' ability to recover from past abuses and to begin to rebuild their lives for release. This is an interest on which prison officials can justifiably rely in setting prison policy, including employment policies. Thus, the court concluded that the goal of rehabilitation lends support to the female BFOQ.

d. Privacy

Finally, the Sixth Circuit considered the privacy interests of inmates to contribute to the justification of the female BFOQ. "[W]hile imates may lose many of their freedoms at the prison gate, they retain 'those rights [that are] not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." As one Court of Appeals has stated, "sexual abuse of a prisoner by a corrections officer has no legitimate penological purpose, and is simply not part of the penalty that criminal offenders pay for their offenses against society."55

A convicted prisoner has a reasonable expectation of privacy while in prison, particularly when related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than coextensive with those enjoyed by non-prisoners. "Most people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in prisons."57

The court noted that other federal courts have recognized that privacy interests can justify exclusion of male officers from certain positions in female prisons. In Robino v. Iranon, the Ninth Circuit found the designation of six out of forty-one positions in a women's prison "a reasonable response to the concerns about inmate privacy and allegations of sexual abuse by male

52. Id. at 28.
53. 391 F.3d at 750.
55. Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997). The Supreme Court, in Farmer v. Brennan, 511 U.S. 825 (1994), acknowledged that the sexual abuse of an inmate can constitute cruel and unusual punishment and thus offend the Eighth Amendment. While the Everson court does not address this concern, prison administrators might conclude that a BFOQ is necessary to avoid a substantial risk in transgressing the constitutional rights of inmates stemming from sexual abuse by guards.
56. 391 F.3d at 757 (citing Cornwell v. Dahlberg, 963 F.2d 912, 916 (6th Cir. 1992) and Kent v. Johnson, 821 F.2d 1220, 1227 (6th Cir. 1987)). The Sixth Circuit has found the "privacy" right against the forced exposure of one's body to strangers of the opposite sex to be manifested in the Fourth Amendment. See Cornwell v. Dahlberg, 963 F.2d 912, 916 (6th Cir. 1992) and Kent v. Johnson, 821 F.2d 1220, 1227 (6th Cir. 1987).
57. 391 F.3d at 757 (citing Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) and York v. Story, 324 F.2d 450, 455 (9th Cir. 1963)).
58. 145 F.3d 1109, 1109-10 (9th Cir. 1998)
[officers].” In Tharp v. Iowa Dep’t of Corr., the Eighth Circuit did not even reach the BFOQ argument, finding instead the policy to be a “reasonable gender-based job assignment policy” because, among other thing, it addressed “female inmate privacy concerns.” And the District of Nevada in Carl v. Angelone, stated that a BFOQ might be justified on the ground of “simple decency in order to afford female inmates as much privacy as possible, even if not constitutionally mandated or protected.”

The Sixth Circuit suggested that the need for a gender BFOQ in this context could be justified whether or not violations of constitutional rights were occurring contemporaneously. This is interesting in that it could be used to justify implementation of gender BFOQ in correctional systems without the widespread, rampant problems such as those experienced in Michigan. Leaving this door open provides for the reasoned decisions of prison administrators to conclude that exclusion of males is necessary, and designate more positions with a female BFOQ when the documented problems do not reach the level experienced by MDOC.

II. FEMINISM, QUEER THEORY AND FEMALE INMATES

While the analysis of the Sixth Circuit in Everson is persuasive on the proposition that the female BFOQ was justified under the circumstances to curb the rampant sexual abuse of female inmates by male guards, the opinion implicitly endorses certain premises about gender and sexuality. Although admittedly it is dangerous to have a sexuality carve-out for Title VII, the feminist/queer theory balance must be context-dependent, and in this context, feminists ought to come down on the side of protecting female prisoners.

The feminist movement pushed hard for the implementation of an equal employment paradigm, and thus many feminists are solidly within the equal employment camp. Concerns motivating the refusal to entertain sex-based employment policies may stem from a hesitancy to acquiesce to the idea that certain jobs are only to be performed by members of one sex: An example of this would be that only women can care for young children or provide housecleaning services, and that only men can fix cars or operate heavy machinery. Feminists are correct to maintain a high level of sensitivity to policies motivated by sex-based stereotypes. However, a female BFOQ for

59. 68 F.3d 223, 224 (8th Cir. 1995).
60. 883 F.Supp. 1433, 1442 n.3 (D. Nev. 1995).
61. 391 F.3d at 759. (“The District Court erred in holding that inmate privacy did not go to the essence of the MDOC’s business. In determining whether a particular job qualification goes to the essence of the employer’s business, a court must “undertake a functional analysis of the employer’s business, and not simply look to the employer’s mission statement or other documentation.”) Id.
62. “Regardless of whether its current conditions violate the constitutional rights of its inmates, a prison may invoke the bona fide occupation qualification defense, 42 U.S.C. 2000e-2(e), to justify measures taken to enhance inmate privacy.” 391 F.3d at 759.
certain positions in a female prison is not merely predicated upon outmoded stereotypes: It is based on the acknowledgement that the presence of men in this context leads to a great deal of sexual abuse. This is not a fanciful musing about appropriate gender roles, but rather a serious judgment that the alternative harm is too great to sustain an absolute proscription on sex-based employment policies in the narrow context of women’s prisons.

The presumption that Title VII forbids a sex-specific BFOQ has led to open season on female inmates by male guards. MDOC’s solution, while not “feminist” in terms of calling for formal equality in employment, is decidedly feminist in that it seeks to prevent the ongoing victimization and subordination of women. The solution chosen by MDOC is grounded in dominance feminism and accepts heterosexuality as the normative baseline.

Dominance feminism argues that men and women are different, and that these differences largely reflect the fact that in society women are subordinate and men are dominant. The primary source of women’s oppression is private power, particularly the threat of sexual violence. Dominance theory posits that law must respond to the inequality of power by, for example, abandoning its traditional “hands-off” attitude toward violence in the family and moving more aggressively to protect women from the abusive power of men in the private sphere.

These premises underlying dominance feminism contradict the questions posed by queer theory, which looks with skepticism at the rigid male and female distinction/hierarchy framework, and is suspicious of classification of identity categories as potentially complicit in the structures their assertion was intended to overthrow. Challenging the notion of a stable identity, therefore, may work to further the interests of those constituents it claims to represent.

Queer theory traces its genealogy from the pro-gay and feminist movements and has developed in large part upon the work of Judith Butler. In her 1989 book *Gender Trouble*, Butler sought to provoke critical examination of the basic vocabulary of the feminist movement, and sought to

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63. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR *supra* note 2; AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE, *supra* note 21.


66. ANNAMARIE JAGOSE, *QUEER THEORY*, at 91.

67. *Id.* at 96.

counter presumptions about the limits and propriety of gender to perceived notions of masculinity and femininity within feminism to prevent possible homophobic outcomes. Her position was that by idealizing certain forms of gendered expression, feminism ran the risk of creating new exclusionary hierarchies, and that to avoid this evil, the possible expressions of gender ought to be opened up without dictating the possibilities that may be realized.

Janet Halley has suggested that scholars use queer theory to take a break from feminism by moving away from feminism's "essential elements" of distinction between male and female, and the acceptance of subordination of female, and instead seeking alternative modes of assessing relationships between sex and power where male and female are not presupposed to have the salience that they have in feminism. She suggests that allowing feminism and queer theory to diverge can provide for the actualization of benefits that convergence of the disciplines might inhibit. But a divergence that suggests sex-neutral employment in women's prisons helps no one besides the guards who view the inmate population as a private harem. Here, the divergence creates a new injury, or at least fails to rectify an ongoing wrong.

In total institutions where the subject has no right of exit such as prisons or asylums, depersonalization is a way of life and a mechanism of control. The subject is cut off from the outside world and is vulnerable to circumstances that disrupt her prior conception of self. Once the process of depersonalizing the subject is complete, the subject comes to understand and depend on the privilege system as a framework of personal reorganization. The privilege system further establishes the hierarchy inherent in the basic structure of the prison environment. The punishment/privileges paradigm is unique to total institutions: Children are punished on the outside; adults typically are not.

In a total institution such as a women's prison, where all prisoners are female and male guards outnumber female guards two or three to one, there is

70. Id. at viii.
72. Id.
73. Id.
76. Id. at 16, 35.
77. Id. at 48. Rewards for compliance represent momentary recapturing of self. Id. at 49. "The building of a world around these privileges is perhaps the most important feature of inmate culture." Id. at 50. Likewise, where privileges are so important, their withdrawal is especially significant. Id. In the context of a women's prison, the providing of contraband such as extra underwear to inmates by guards in exchange for sexual favors epitomizes this privilege system.
78. Id. at 51.
79. Human Rights Watch, All Too Familiar, supra note 2. See also Girshick, supra note 48, at 103.
no question where the power balance rests. These women are prisoners: They are necessarily dominated by the state, and guards represent the day-to-day face of the state in their lives. The significance of male and female in the outside world is not diminished but rather set off in greater relief: Guards do not have to assert dominion over the inmates when it is a de facto characteristic of the relationship as sanctioned by the state. When most of the guards are male, gender has inherent meaning that is ignored at the peril of a vulnerable constituency.

Brenda Cossman suggests that queer theory postmodern feminism wants to avoid categorizing (free) women as subjects who lack sexual agency. But in the context of a prison, inmates are necessarily subject. They are the property of the state. Guards can search their bodies and their possessions at any time. Categorizing female inmates as subjects who lack sexual agency does not, therefore, have implications on the treatment of women who are not similarly situated, i.e. women who are not incarcerated.

Queer sensibilities necessarily reject the use of a female BFOQ such as that imposed in Everson because it makes sex the only salient characteristic of a person’s employment. As Amy Kapczynski acknowledges, sex-based BFOQs are of interest in part because they are “a key location where sexual difference is symbolized in the law.” She points out that in the same-sex privacy context, in contrast with the rest of the BFOQ doctrine, customer preference is considered an important aspect of the employer’s consideration. She objects to this use of customer preference because these kind of concessions “exactly reproduce the prejudices that generate gendered stratification and hierarchy in the work force in the first place.” Kapczynski argues against sex-specific measures to mediate between the discriminatory effects of a norm and discriminatory effects of attempts to change a norm.

The contexts where same-sex privacy interests have been held to substantiate BFOQs include labor and delivery rooms, nursing homes, and janitorial staffing of public bathrooms. Kapczynski’s analysis rings true in the aforementioned contexts, but as she notes, in the prison context, the privacy interests of the inmates have not generally been enough to override the equal employment interest of the guards. While it is unrealistic to expect that the
doctrine will be inverted to privilege the privacy interests of prisoners over the 'good' people, the use of the BFOQ voluntarily by corrections departments can work to alleviate the harms therein experienced. Note the irony that the substantial deference regime facilitates this change.

Critiquing feminist sensibilities, Halley suggests that feminism should be cognizant of the harm it may cause.87 Acknowledging that gender “still matters in the world in real and symbolic... ways,” she encourages feminism to “allow a critical engagement beyond its own imaginative borders.”88 She also advises that “feminism must also be encouraged to travel back;”89 a reinvigoration of feminist critique must be sensitive to the harms that have eventuated from feminist success in regulating the harms that sexuality presents for women. In the context of a women’s prison, the harms result from success achieved in the equal employment context where administrators are sometimes hesitant to condition assignments based on gender for fear of transgressing Title VII.

The way to effectuate feminist social change is not to perpetrate further injustice on the women who suffer as a result of feminist successes. Gender is particularly relevant in the prison context because, as an initial matter, inmates are assigned to a particular facility based solely on their biological sex. In the women’s prison context, without male guards present, no gender stratification could occur,90 experiences of sexual abuse would decrease and significant harm would be avoided.

In the prison context where the decision to sex-segregate inmates is generally unchallenged, the employment of unorthodox techniques in assigning employment duties should not be surprising. Surely there is something salient about the sex of an inmate if it is the characteristic by which incarceration assignments are made. To suggest that gender does not matter with respect to employing guards when the prisons in which they work are segregated based on gender borders on silly.

BFOQ was not necessary in men’s prison when accommodations could be made to respect inmate privacy without interfering with the operation of the facility, aff’d 612 F.2d 1079 (8th Cir. 1980); Harden v. Dayton Human Rehab. Ctr., 520 F. Supp. 769, 781 (S.D. Ohio 1981) (refusing female BFOQ for prison guard because employer failed to demonstrate that it could not structure job duties to avoid conflict between inmate privacy and equal opportunity employment). This phenomenon might have more to do with our society’s general contempt for the incarcerated and their claims for humane treatment than with any objective rejection of the interests they seek to protect.

88. Id. at 618.
89. Id. at 617, 618.
90. This is not in any way discounting the intimate relationships, sexual and otherwise, that develop among women in prison. While these relationships are also proscribed by law, they lack the danger inherent in the abuse patterns that occur between male guard and female inmate: in that context, there are at least two subordinating factors—status, gender, and potentially also class and race, since sixty percent of incarcerated women are members of a minority group. Barabra H. Zaitzow, “Doing Gender” in a Women’s Prison, in WOMEN IN PRISON 22, supra note 48.
The concern with Halley's project is not that it seeks to shake the foundations of gender, sexuality, and power—likely to help incarcerated women in the long run, including when they are out of prison. And Kapczynski's assertion that customer preference should not justify gender BFOQs based on same-sex privacy as a general matter is persuasive as well. But above all, consideration of context is imperative. The place to tinker with formulations of gender and sexuality is not a women's prison. Prison is a place where gender matters. As the opinion in Everson acknowledges, women in prison tend to have high rates of sexual abuse prior to incarceration. It is important to examine the institutional context within which women inmates live their lives, where daily and cumulative violence impacts them. To effectively punish and rehabilitate female inmates, it is imperative to take into account both the society from which they are removed and the subculture within which they are locked.

But Halley does make a useful critique of feminists: Perhaps it is time to 'take a break' from the usual line of fist-pounding for equal employment rights. Feminists should be willing to examine critically both the positive and negative results of our successes. If feminist policies are doing affirmative harm, we should not turn a blind eye because the policy is "equal" on its face. What the court does in Everson is pave the way for feminism to redress a real harm for which the push for equal employment rights under Title VII is at least partly responsible. Our focus now ought to be on taking a critical look at whether separate can mean equal—particularly in a context where our successes have heaped mounds of hardship on those least able to bear it.

To take a break from feminism as Halley suggests would be to abandon those most desperately in need of its protection. Feminists have fought for equal treatment, and the insistence on equality has brought great benefits. But that success has visited painful consequences upon some women—particularly in conjunction with the war on drugs and incarceration more generally: Now they lock up women, just like men. But at the same time feminists have gained a greater voice and influence over politics and policy. Those who have benefited from feminist successes ought not abandon those who have yet to realize much up side. The danger of further silencing such women with apathy, or with a refusal to view as salient the meaning of sex and gender in their lives, betrays the obligation of feminists to acknowledge the consequences of the

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92. 391 F.3d at 757, 759. See also Girshick, supra note 48, at 97.
93. Girshick, supra note 48, at 101 (emphasis added).
94. Id. at 101-02.
95. Susan F. Sharp & M. Elaine Eriksen, Imprisoned Mothers and Their Children, in WOMEN IN PRISON, supra note 48, at 120; see also Zaitow, supra note 90 at 22-23.
feminist agenda. Feminists have helped to create the current crisis in American prisons by urging equal employment across the board.

The time for archaic notions of fixed gender identities may be over: Queer theory certainly brings value to the project of equality by theorizing sex and sexuality in an analytic framework independent of gender. But the notion that gender differences are merely a social construction and thus ought not be acknowledged belies the real life experience of incarcerated women. A distinguishing characteristic of female prisoners compared to their male counterparts is their significantly increased likelihood of having survived sexual and/or physical violence, particularly by a male relative or intimate partner. To perpetrate greater harm upon them in the name of a theoretical dispute is perverse and cruel. Inmates, especially female inmates, in a total institution with no right of exit, are among the least able to bear the burden of deculturizing the population of their acceptance of gender meanings.

Maybe men should be able to guard women in prison upon abolition of separate public restrooms for free men and women. Until then, the privacy interests implicit in those designations ought to be taken into account when making decisions about the modes by which offenders are confined. Until male and female inmates are housed together, the safety interests of female inmates justify not making them sexually available to male guards. Blind demands for formal equality have to have a logical end point: equality is not valuable if it breeds or exacerbates inequality. Sexual access by male guards to female inmates is not what Title VII was meant to effectuate, nor what equal employment feminists battled to achieve. Feminists should not be apprehensive about demanding that women not be brutalized in our name under the guise of equal employment.

III. CONCLUSION

The place to wage theoretical battles about the truth of gender and sexuality is not the penitentiary. Why not the women's locker room of an exclusive country club? Medical experiments are not carried out on the powerless incarcerated: social ones should not be either.

96. Halley, et al., supra note 87 at 617.
97. Harriet Malinowitz, Queer Theory: Whose Theory?, 13 FRONTIERS 168 (1993) ("[O]verrepresented by prestigious academic institutions, drawing on closed-circuit calls for papers, using a post-structuralist vocabulary that unabridged dictionaries haven't yet caught up with, heavily interreferential and overwhelmingly white, the queer theorist network often resembles a social club open only to residents of a neighborhood most of us can't afford to live in." (quoted in Jagose, supra note 66, at 110)).
98. Zaitzow, supra note 90 at 22.

There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of
There is no Title VII wand to undifferentiate the perceived differences between the genders as experienced today in the United States. Men and women are different in this society and they are different in its prisons. Title VII does not insist on gender parity regardless of the consequences. Yet, through blind fixation on equal employment, feminists have provided for disastrous consequences in the women's prisons in the United States. As the ACLU argued as amicus in Everson, "Title VII does not force the MDOC or women inmates to abandon their best defense against the sexual abuse and its consequences when the limited nature of the gender-specific assignments accommodates the rights of both employees and inmates."

Everson does not solve all of the problems facing American corrections today: It most definitely does not say that corrections departments must remove male guards from contact positions in women's prisons forthwith. But it opens the door to achieving the same result by working within the corrections system to persuade administrators that the time has come to right this grievous wrong. Even if it represents a step back for the equal employment movement, and even if it means female corrections officers will be "relegated" to positions in women's prisons thereby dampening their opportunities for professional advancement, feminists should not be willing to accept the harm suffered by incarcerated women at the hands of male guards in the name of Title VII.

Ending the abuse and degradation of our nation's incarcerated women ought to trump equality of employment in this context. No academic musings can convince abused inmates that their plight is merely a product of a falsely constructed gender dichotomy and subsequent stratification, followed by their internalization of the false norms. Feminists and queer theorists ought to be more attentive to context.

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vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. In particular there would be no inhibitions about using prisoners as the subject of experiments, including social experiments such as the experiment of seeing whether the sexes can be made interchangeable. The parading of naked male inmates in front of female guards, or of naked female inmates in front of male guards, would be no more problematic than "cross-sex surveillance" in a kennel. . . . But we should have a realistic conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them. We must not exaggerate the distance between "us," the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.

Id. at 151-52.

100. ACLU Amicus Brief, supra note 22, at 8.