THE ELIMINATION OF THE DEPARTMENT OF DEFENSE GROUND COMBAT EXCLUSION RULE MAY BE THE KEY TO INVALIDATING TWO BFOQ DEFENSES

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 expressly prohibits employers from discriminating against potential employees on the basis of race, color, religion, sex, or nationalorigin.[1] In choosing between candidates who are equally qualified for a position, employers may not allow such factors to influence their hiring decisions. While the legislative history on gender discrimination under Title VII in sparse, this class receives the same level of protection as any other protected class, with the exception of race. The Bona Fide Occupational Qualification (BFOQ) defense permits discrimination on the basis of sex if an employer can demonstrate that a facially discriminatory policy or practice is reasonably necessary for the normal operation of a business.[2] Race has been expressly excluded as a BFOQ.[3] The BFOQ defense is an exacting standard. The Supreme Court has held that the BFOQ exception must be "narrowly interpreted"[4] and that the employer must have a "basis in fact"[5] for its claim that no members of the excluded sex could perform the tasks in question. Employers who successfully utilize the BFOQ defense may engage in gender-based discrimination with the blessing of the law.

The BFOQ defense, however, not only contradicts the purpose and meaning of the Civil Rights Act, but is also fundamentally at odds with an understanding of equality under the law. While many generalizations and assumptions exist regarding the physical and emotional differences between men and women, such beliefs are based upon questionable stereotypes and outdated notions. They are often raised by those who desire to perpetuate the "weaker sex" fallacy or fantasy: "These generalizations are based upon notions of romantic paternalism. This is the concept under which women are stereotyped as 'the weaker sex' whose functions are confined to the home,

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[1] 42 U.S.C. § 2000e-2(a) (2012).
[2] 42 U.S.C. § 2000e-2(e)(1) (2012).
[3] *Id*.
[4] Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991).
[5] Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

while the male acts as benevolent dictator and sole breadwinner."[6] The BFOQ defense also collides with the prohibition against allowing customer preference to influence employment decisions. The Equal Employment Opportunity Commission (EEOC) guidelines provide that "the refusal to hire an individual because of the preferences of … clients or customers" will extinguish the use of the BFOQ defense.[7] The recognition that customer preference is not a permissible employment consideration is firmly established in American jurisprudence.[8]

This paper will examine the vacillatory and unequal standards that have been used in the application of equal protection laws to gender bias cases. In examining laws that prohibit sex-based discrimination, the paper will review the BFOQ defenses of public safety and privacy, the rationale of those defenses, and the question of whether the time has come to eliminate them. A discussion of the authenticity defense has been omitted; the courts and EEOC guidelines allow employers to use gender-based selection criteria for the purpose of casting actors and actresses in order to ensure verisimilitude.[9] It should be noted, however, that discriminatory hiring for authenticity purposes must still meet the requirements of a BFOQ exception.[10] With the Department of Defense's recent decision to rescind the rules that prohibited women from holding combat roles in the military, the public safety and privacy exceptions of the BFOQ defenses must become a historical marker in our nation's quest for gender equality. The evolution of the role of women in the military is therefore discussed, using the integration of African Americans into the armed services as both a backdrop and an analogy for the ways in which the military has broken down racial and gender barriers. Finally, this article concludes with an analysis of the Department of Defense's inclusion of women in combat roles and whether or not this step is a harbinger of the collapse of other gender-based barriers in the near future.

II. THE FOURTEENTH AMENDMENT AND EQUAL PROTECTION

The Fourteenth Amendment contains an explicit guarantee of equal protection under the law to all American citizens, along with an express provision that requires every state in the union to provide such protection.

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[6] Eliot A. Landau & Kermit L. Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 DRAKE L. REV. 417, 420 (1971).
[7] 29 C.F.R. § 1604.2(a)(1).
[8] Diaz v. Pam American World Airways, Inc., 442 F.2d 385, 387-88 (5th Cir. 1971).
[9] 29 C.F.R. § 1604.2(a)2.
[10] Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GEND. L. & POL'Y 169, 181 (2009).

The Fifth Amendment makes a similar guarantee applicable to the federal government.[11]

The Fourteenth Amendment, in relevant part, provides: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."[12] The guarantees of the Fourteenth and Fifth Amendments ensure that all people will be treated equally by those who enact and enforce the laws. Over the years, the Supreme Court has explored the parameters of this promise:

> Here, then, is a paradox: The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox, the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.
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> The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly attached.[13]

During certain periods in American history, courts and legislatures have drawn bright lines of demarcation between the genders.[14] Such lines were presented as necessary acknowledgments of the natural order in the development of humankind. This very un-Darwin-like approach undergirded sexual stereotypes and justified differential treatment of females based on chromosomal chance—all supported by legislative and judicial determinations of what was best for women. It was not until 1971 that the Supreme Court invalidated any of the statutes that classified individuals on the basis of sex. In *Reed v. Reed*, the mother of a deceased child challenged

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[11] U.S. Const. amend. V.
[12] U.S. Const. amend. XIV.
[13] Joseph Tussman and Jacobusten Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 535, 538 (1949).
[14] Bradwell v. State, 83 U.S. 130, 141-142 (1872); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a cap on the number of hours women were permitted to work per week); Goesaert v. Cleary, 335 U.S. 464 (1998) (upholding a statute that prevented women from being barmaids unless they were the spouse or daughter of the proprietor).

an Idaho statute that maintained a preference for selecting men over women to administer an estate to which they had equal claims. Justice Burger, delivering the unanimous opinion of the court, wrote: "To give a mandatory preference to members of either sex over members of the other … is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." Justice Burger concluded that the selection process "in this context may not be lawfully mandated solely on the basis of sex."[15]

In the following years, the Supreme Court wavered in its decisions involving sex discrimination. The Court readily struck down classifications based on stereotypical assumptions about the roles of men and women. In *Weinberger v. Wiesenfeld*, the Court declared that the presumption that a husband is the spouse responsible for financially supporting a family violated the Equal Protection Clause.[16] Interestingly, not all discriminatory statutes assumed that males were the more responsible and rational of the sexes. In Oklahoma, for instance, females previously received preferential treatment in the purchase of beer with a 3.2 percent alcohol content. In *Craig v. Boren*, the Court considered whether an Oklahoma statute that "prohibit[ed] the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18" violated the Fourteenth Amendment by establishing different standards for males and females in the 18–20 age group.[17] Acknowledging that "*Reed* emphasized that statutory classifications that distinguished between males and females are 'subject to scrutiny under the Equal Protection Clause,'" the Court relied upon the *Reed* requirement that such gender-based differences "must serve important governmental objectives and must be substantially related to the achievement of those objectives" to find the Oklahoma statute unconstitutional.[18] Justice Rehnquist's dissenting opinion, however, signaled that the Court would soon follow a different direction in gender discrimination cases, establishing an intermediate standard of review for cases involving sex-based hiring. He disagreed strongly with the majority, stating that "[t]he only redeeming feature of the Court's opinion … is that it apparently signals a retreat by those who joined the plurality of opinion in *Frontiero v. Richardson*.'"[19] The *Frontiero* plurality had determined that strict scrutiny, as opposed to the "rational basis" analysis, should be used in examining sex discrimination cases.[20] Justice Rehnquist believed that gender bias should be subjected to

[15] Reed v. Reed, 404 U.S. 71, 92 (1971).
[16] Weinberger v. Wiesenfeld, 420 U.S. 636, 644 (1975).
[17] Craig v. Boren, 429 U.S. 190, 192 (1976).
[18] *Id*. at 197.
[19] *Craig*, 429 U.S. at 217 (Rehnquist, W. dissenting).
[20] Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

the rational basis analysis.[21] The Court's decision in *Craig v. Boren*, coupled with Justice Rehnquist's dissent, converged into a shift away from the *Frontiero* approach, and birthed a new standard—intermediate scrutiny—for sex-based discrimination cases. Under this test, gender-based classifications must serve an important governmental objective and must be substantially related to the achievement of those objectives.

The Court approved this intermediate standard for reviewing sex-based discrimination cases in *Califano v. Goldfarb*, in which a widower challenged the Federal Old-Age, Survivors, and Disability Insurance Benefits (OASDI) program.[22] The program allowed widows to collect death benefits automatically; widowers, on the other hand, were required to demonstrate that they had received financial support from their wives in order to obtain benefits. The government contended that this distinction was based on the differing needs of widowers and widows: "the denial of benefits reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny the benefits unless they were in fact dependent."[23] The Court acknowledged the importance of giving deference to congressional decisions under the American system of governance, but stressed that "to withstand constitutional challenge … classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[24] The Court reasoned that "the conceivable justification for writing the presumption of wives' dependency into statute is [an] assumption … based simply on 'archaic and overbroad' generalizations," and found that "such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits."[25]

III. LACK OF CLARITY IN DETERMINING SUSPECT CLASSIFICATION

Since its inception, the intermediate scrutiny standard has been the benchmark by which gender discrimination is examined. As noted above, this standard was created in *Craig v. Boren*. In his dissenting opinion, Justice Rehnquist issued a stinging rebuke of the majority, whom he accused of creating intermediate scrutiny, which the Court had never before used, "out of thin air."[26] Indeed, the determination of whether a group is categorized as a suspect class (and therefore subject to the strict scrutiny standard) or a

[21] *Craig*, 429 U.S. at 217 (Rehnquist, W. dissenting).
[22] Califano v. Goldfarb, 430 U.S. 199 (1976).
[23] *Id.* at 207.
[24] *Id*. at 210-11.
[25] *Id*. at 217.
[26] Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, W. dissenting).

quasi-suspect class (which falls under the intermediate scrutiny standard) depends largely upon amorphous factors developed by the Supreme Court. Legal scholar Cass Sunstein has pointed out this lack of clarity: "To say the least, the Court has not laid down a clear test for deciding whether [strict] scrutiny will be applied."[27] Similarly, Professor Thomas Simon has observed that "the Court uses a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and nonsuspect classes is drawn in a haphazard way."[28]

This vacillation appears to be a barometer of how the judicial system views the level of protection that a particular group deserves—which can vary from court to court. Professor Marcy Strauss succinctly lists the disparate factors that the courts rely upon to determine whether a classification is suspect or non-suspect:

> Different courts emphasize different factors without any real explanation why some are more important than others. For example, some courts are exclusively concerned with the "discrete and insular" nature of the group, others focus on immutability of the group's characteristics, and still others are mostly concerned with the group's history of discrimination.[29]

Strauss has distilled these varying factors into the following five categories:

1. Prejudice against a discrete and insular minority;
2. History of discrimination against the group;
3. The ability of the group to seek political redress (i.e., political powerlessness);
4. The immutability of the group's defining trait; and
5. The relevancy of that trait.[30]

Thus far, the Supreme Court has granted suspect classification status only to race[31] and national origin.[32]

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[27] Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 35 (2003).
[28] Thomas Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 141 (1990).
[29] Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV., 135, 138-39 (2011).
[30] *Id*. at 146.
[31] Adarand Constructors v. Pena, 515 U.S. 200 (1995); Loving v. Virginia, 388 U.S. 1 (1967).
[32] Graham v. Richardson, 403 U.S. 365 (1971).

If the contours of suspect classification are ambiguous, then the lines that demarcate quasi-suspect classification are truly perplexing. It is axiomatic that rules based on stereotypes and broad generalizations about the differences between men and women are constitutionally infirm.[33] The other critical factor to address, then, is the important governmental interest that such a rule serves. How much deference must be granted to a legislative classification? How relevant are the congressional debates that purport to justify the nexus between the classification and the government objective? What legislative objectives rise to the level of importance that will occasion different treatment on the basis of sex?

Assessing the importance of a government objective is a broad and equivocal process. Legislatures are granted wide latitude in establishing the objectives of enactments that make distinctions on the basis of sex. However, the Supreme Court has placed certain limits on this discretion. Statistical correlations alone are insufficient to justify differential treatment based on gender. Numerical composition is not, standing alone, likely to meet the important government objective test. Moreover, the "categorical exclusion" of an entire gender without regard to one's individual merit is generally a violation of the Fourteenth Amendment.

IV. BONA FIDE OCCUPATIONAL QUALIFICATIONS

The intermediate scrutiny standard is now well-settled in American constitutional law. Its existence, however, does not justify its use. It is troublesome that sex-based discrimination continues to exist—and is, in fact, entirely legal—in some limited but critical areas of employment. The foundation of this permissible gender-based discrimination emanates from, of all places, the Civil Rights Act of 1964. Title VII of the Civil Rights Act states:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ any individual … on the basis of his religion, sex, or national origin in a bona fide occupational qualification if [that qualification] is reasonably necessary to the normal operation of that particular business or enterprise.[34]

While the term "reasonably necessary" appears to be a lax standard, the courts have been unequivocal in ensuring that the term is construed in the

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[33] *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (striking down a rule presuming the dependency of the female surviving spouse); Craig v. Boren 429 U.S. 190 (1976) (rejecting the assumption that women mature more quickly than men).

[34] 42 U.S.C. § 2000e-2(e)(1) (2012).

narrowest fashion. The EEOC's Interpretive Guidelines provide that "the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label[s]—'Men's jobs' and 'Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other."[35] The EEOC's Interpretive Guidelines emphasize that the refusal to hire based on assumptions about a gender and "stereotyped characterizations of the sexes" will be grounds for rejecting the application of the bona fide occupational defense.[36]

The Congressional record offers very little legislative history regarding the application of Title VII to sex discrimination cases, and many courts have pointed out this lack of guidance in issuing their opinions. Justice Rehnquist, writing for the minority in *Meritor Savings Bank v. Vinson*, explained that gender inequality was an eleventh-hour addition to the bill: "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives."[37] Subsequently, "the bill quickly passed as amended, and we [were] left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[38] In *Diaz v. Pan American World Airways*, Judge Tuttle noted that sex "was added on the floor and engendered little relevant debate" that might reveal legislative intent.[39] In fact, "many have suggested that its inclusion was something of a joke, intended by opponents of racial desegregation to derail the passage of the bill altogether."[40]

This paucity of information left the interpretation of the provision to the courts, which resulted in a series of conflicting decisions. Two main approaches for determining whether or not a BFOQ defense is valid emerged from the confusion: the "all or substantially all" test and the "essence of the business" test. The "all or substantially all" test is difficult to satisfy, for it requires employers to demonstrate that being of a particular gender is an "absolute bar to job performance or [that] virtually all members of one sex are unable to perform [that function] and testing for individual capabilities is not feasible."[41]

The "essence of the business test" was created in *Diaz v. Pan American Airways, Inc*., in which Pan American's policy of hiring only females for the

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[35] 29 C.F.R. § 1604.1(a).
[36] *Id.*
[37] Meritor Savings Bank v. Vinson, 447 U.S. 57, 64 (1986).
[38] *Id.*
[39] *Diaz*, supra note 8, at 386.
[40] Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1267, n.53 (2003).
[41] Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense in Intentional Sex Discrimination*, 52 OHIO STATE L.J. 5, 16 (1991).

position of flight attendant was challenged.[42] The *Diaz* court found that "[d]iscrimination based on sex is valid only if the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[43] The court conceded that women might be better suited for the position, but this possibility was not enough to meet the "essence of the business" test:

> The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as … their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.[44]

When the Supreme Court ultimately set the standard for determining the validity of a BFOQ defense in *Dothard v. Rawlinson*, it recognized both of these tests as acceptable forms of analysis. The Court held that a BFOQ defense can succeed when "'the essence of the business operation would be undermined by not hiring members of one sex exclusively'"[45] or when employers possess "'reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'"[46] Thus, courts may use either approach: "After the Supreme Court authorized the use of both analyses, Courts began to employ the "all or substantially all" and the "essence of the business" [tests] concurrently."[47] Both of these tests have been so narrowly interpreted that BFOQ defenses are rarely found valid. For instance, customer preference alone does not justify a BFOQ exception. The *Diaz* court rejected that rationale in determining whether being a female was BFOQ for the position of flight cabin attendant that was reasonably necessary to the normal operation of the defendant's business.[48] The trial

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[42] Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).
[43] *Id*. at 388.
[44] *Id.*
[45] Dothard v. Rawlinson, 443 U.S. 321, 333 (1977) (*quoting* Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971)).
[46] *Id.* (*quoting* Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).
[47] Kate Manley, *The BFOQ Defense: Title VII Concession to Discrimination*, 170 DUKE J. GEND. L. & POL'Y 169, 175 (2009).
[48] Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

court had found that "Pan Am's passengers overwhelmingly preferred to be served by female stewardesses," that "an airline cabin presents a unique environment in which an air carrier is *required* [emphasis added] to take account of the psychological needs of its passengers," and that such "psychological needs are better attended to by females."[49] All of these "unique" factors, however, were not enough to meet the BFOQ requirements; the Fifth Circuit determined on appeal that catering to such desires was not a "primary function" of Pan Am's business.[50]

V. THE PUBLIC SAFETY DEFENSE

The need to ensure public safety can be a successful BFOQ argument, but it too is interpreted very narrowly: "Employers may not invoke the BFOQ defense because a task is 'strenuous, dangerous, obnoxious, boring or unromantic.'"[51] This BFOQ exemption has prevailed in cases in which employing a certain gender creates a truly dangerous situation. For instance, prisons have been permitted to restrict the employment of women on public safety grounds. In *Dothard v. Rawlinson*, Dianne Rawlinson applied for a prison guard position with the Alabama Board of Corrections. Rawlinson held a college degree and had majored in correctional psychology.[52] After being denied employment because she did not meet the minimum weight requirement, she filed suit under Title VII, claiming that the weight requirement served "disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections."[53] During the course of the trial, the Board of Corrections adopted Administrative Regulation 204, which prevented female correctional counselors from working with male inmates "in 'contact positions,' that is, positions requiring continual close physical proximity" in maximum-security institutions.[54] Rawlinson amended her complaint to challenge Regulation 204, as well.

The Supreme Court found that requirements regarding height and weight violated Title VII because "the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance." However, the Court held that Regulation 204 was a valid BFOQ exception.[55] In upholding Alabama's policy of assigning only males to contact positions with male

[49] *Id.* at 387-88.
[50] *Id.*
[51] Weeks v. Southern Bell Tel & Tel. Co., 408 F.2d 228, 23 (5th Cir. 1969).
[52] Dothard v. Rawlinson, 433 U.S. 321 (1977).
[53] *Id.* at 329.
[54] *Id.* at 324-25.
[55] *Id.* at 331.

inmates in Alabama's maximum-security prisons, the Court reasoned that "the employee's very womanhood would … directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."[56] The Court also noted that, in an environment rife with danger, "it would be an oversimplification to characterize [the regulation] as an exercise in 'romantic paternalism.'"[57] The Court acknowledged the BFOQ exception is extremely narrow, but found that, due to rampant violence and security issues in maximum-security facilities, the employment of women as guards in contact positions "would pose a substantial security problem, directly linked to the sex of the prison guard."[58] This determination was based upon the serious risk of potential harm to all persons involved—not only the female guards, but also the prison inmates—rather than a paternalistic notion that women had to be protected from dangerous prisoners.

Not all dangerous circumstances merit a BFOQ defense, even if the employer can prove the existence of genuine health risks that apply to only one gender. The Supreme Court refused to apply the public safety exception in *Int'l Union v. Johnson Controls*, finding that an employer's "fetal-protection policy," which prohibited fertile women from holding jobs at a battery-manufacturing facility that might expose them to lead, was an unconstitutional.[59] Under this policy, women had to produce medical documentation of their infertility in order to fill positions that might cause actual or possible lead exposure beyond OSHA standards. The petitioners filed a class action suit contending that the policy violated the anti-sex discrimination provision of Title VII. Even though working with these materials was potentially dangerous for pregnant women—the blood levels of eight of the company's pregnant employees had been found to exceed OSHA standards—the Supreme Court rejected the respondent's claim that fetal safety was a legitimate concern that impacted the essence of its business: "No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making."[60] A clear line of demarcation distinguishes a result in *Johnson Controls* from *Dothard*. In *Dothard*, there was a palpable likelihood that women guards would face attacks by inmates. In *Johnson Controls*, fetal safety concerns were not closely connected to job performance.

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[56] *Id.* at 336.
[57] *Id.* at 335.
[58] *Id.* at 336.
[59] Int'l Union v. Johnson Controls, 499 U.S. 187, 203-04 (1991).
[60] *Id*.

VI. THE PRIVACY DEFENSE

The use of privacy concerns to justify a BFOQ exception stems from the belief that having employees of one sex attend to the personal needs of members of the opposite sex is an invasion of privacy. The impetus for such rules has its foundation in customer preference, which is the very basis underlying the crux of antidiscrimination laws. Despite the Supreme Court's reluctance to accept customer preference as justification for gender discrimination, the Court intimated that sexual privacy might support a BFOQ defense in *UAW v. Johnson Controls.*

Same-sex privacy has been sanctioned by the courts both to accommodate customer preference and as a cost-control mechanism. In *Fesel v. Masonic Home of Delaware, Inc.*, a male nurse was denied employment at a Masonic home dedicated to the care of elderly Masons and their wives and widows.[61] Upon applying for the position, the nurse was informed by the facility's Director of Nursing Services that the home did not employ male nurse's aides. The administrators of the home believed that hiring male nurse's aides would undermine the essence of the home's operation because some of the female residents would not consent to receiving care from a male, and some would even leave the home if male nurse's aides were on staff.[62]

The district court upheld this defense, finding "that the Masonic Home has shown that it had a factual basis for believing that the employment of a male nurse's aide would directly undermine the essence of its business operation."[63] It considered both customer preference and cost concerns in reaching this decision:

> (1) Many of the female guests would not consent to intimate personal care by males, and
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> (2) The operation of the Home in November 1973 was such, and the size of the staff was sufficiently small, that the Home could not hire a male nurse's aide for any shift in such a manner that there would always be at least one female on duty to attend to the personal care needs of these female guests objectively to male care.[64]

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[61] Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd mem.,* Fireman's Ins. Co. v. Liberty Mut. Ins. Co., 591 F.2d 1334 (3d Cir. 1979).
[62] *Id.* at 1352.
[63] *Id*. at 1354.
[64] *Id.*

Yet same-sex privacy has also been rejected as a BFOQ justification. In *Breiner v. Nevada Department of Corrections*, the Director of the Nevada Department of Corrections reorganized prison staffing in response to frequent instances of sexual contact between male guards and the female inmates at the Southern Nevada Women's Correctional Facility.[65] To curtail this misconduct, the director decided to hire only women for the facility's three correctional lieutenant positions. The correctional lieutenants were "responsible for the prison's day to day operations."[66] The Department of Corrections asserted that the gender restriction imposed on these positions was a BFOQ. The Ninth Circuit's response to this contention was terse: "Neither *Dothard* nor any of the cases on which NDOC relies support a BFOQ based on the bare assertion that it would be 'impossible … to ensure that any given male correction lieutenant would take action to prevent and stop sexual misconduct.'"[67] The Court emphasized that prison administrators had multiple means available, such as strict investigation and discipline procedures, to secure employee compliance with the facility's rules.[68] The Court also rejected generalizations about the patience and maternal tendencies of women, and the purported "instincts and … innate ability" that would make them "immune to manipulation by female inmates."[69]

Regardless of the rationale behind it, using same-sex privacy to justify a BFOQ can easily perpetuate gender inequality. The healthcare field is a prime example; it is rife with sexual stereotypes, such as the assumption that nursing is a "female" profession, which can make it difficult for men to enter the nursing field and for women to move into more senior medical positions. Professor Amy Kapczynski has examined how sexual privacy BFOQs "reinforce the hierarchical segregation of the job market" in the medical field.[70] She argues that "[i]f women cannot be assigned male nurses for intimate care but men can be assigned female nurses, hospitals and courts are defending rules that help ensure that women will continue to dominate the nursing field."[71] In addition, she points out that same-sex privacy concerns often do not apply to physicians: "the same hospitals that refused to allow male nurses to provide intimate care for female patients regularly allowed male doctors to provide such care for female patients."[72] Kapczynski contends that these contradictory rules result in a gender-based hierarchy in

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[65] Breiner v. Nevada Dep't of Corr., 610 F.3d 1202 (9th Cir. 2010).
[66] *Id.* at 1205.
[67] *Id*. at 1215.
[68] *Id.* at 1217.
[69] *Id.*
[70] Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1264 (2003).
[71] *Id*. at 1265.
[72] *Id*. at 1264-65.

which "[m]en are steered into highly paid, high-prestige doctor positions, while women are expected to staff lower-paid nursing positions. The only plausible explanation for this professionalism bias is gendered job stereotyping."[73]

VII. OBLITERATING THE LINES

With the passage of the Women's Armed Service Integration Act of 1948, women became permanent members of the United States Armed Forces.[74] The Act initially limited the number of women who could serve in the military,[75] but that provision was eliminated in 1967.[76] In the ensuing years, restrictions continued to be placed on the roles that female service members could hold. "In February 1988, the Department of Defense adopted a 'risk rule' that excluded women from noncombat units or missions if the risks of exposure to direct combat, hostile fire or capture were equal to or greater than the risks in the combat units they support."[77] The exclusion of women from most combat jobs, according to the General Accounting Office, has discouraged numerous women from entering the armed services.[78]

It was once believed that until "judicial and legislative impediments to the integration of females" were eliminated, the military would be "powerless to effect the non-discrimination standards which the very same courts and legislatives have promulgated at the civilian level."[79] Like many barriers that have been imposed throughout history against protected classes, however, the restrictions on female soldiers have been lifted.

The "risk rule" was rescinded in 1994. On April 28, 1993, Secretary of Defense Les Aspin issued a memorandum in which he instructed the military to create more employment opportunities for women and established an Implementation Committee to review and make recommendations about the process. On January 13, 1994, he released a memorandum regarding the "Direct Ground Combat Definition and Assignment Rule," in which he stated that the Implementation Committee had "concluded that, as written, the risk rule [was] no longer appropriate."[80] Yet Aspin simply replaced the risk rule

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[73] *Id*. at 1265.
[74] Women's Armed Servs. Integration Act of 1948, Pub. L. No. 625, 62 Stat. 356 (1948).
[75] *Id.*
[76] Pub. L. No. 90-130, 81 Stat. 374 (1967).
[77] DAVID F. BURRELLI, CONG. RESEARCH SERV., R42075, WOMEN IN COMBAT: ISSUES FOR CONGRESS at 3 (2013).
[78] *Id.*
[79] Tim M. Callaghan, *Bona Fide Occupation Qualifications and the Military Employed: Opportunity for Females and the Handicapped*, 11 AKRON L. REV. 183, 201 (1977).
[80] Memorandum from Sec'y of Def. Les Aspin, to the Sec'ys of the Army, Navy, and Air Force et al., subject: Direct Ground Combat Definition and Assignment Rule (13 Jan. 1994).

with another unequivocal restriction of the role of women in the military: "Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground."[81] This half-of-the-loaf approach was pared back even further as the Secretary noted that the assignment rules might, in some circumstances, become more restrictive. Such limitations would include:

- where the Service Secretary attests that the cost of appropriate berthing and privacy arrangements are prohibitive;
- where units and positions are doctrinally required to physically collocate and remain with direct combat units that are closed to women;
- where units are engaged in long range reconnaissance operations and Special Operations Forces missions; and
- where job related physical requirements would necessarily exclude the vast majority of women Service members.[82]

The new policy seemed to provide greater opportunities for women. However, an argument to the contrary could easily be articulated; the restrictions enumerated by the Secretary clearly allowed for a subjective determination of a women's ability to meet physical requirements and what constitutes "long range reconnaissance operations." Critics of the policy stated that these new restrictions also "[put] women at greater risk since they removed the 'substantial risk' of being captured from ground combat."[83]

Soon afterward, the United States entered into a series of conflicts in the Middle East, in which women served in many capacities, including patrolling villages as foot soldiers, driving in convoys, and engaging in missions as weapon-firing troops. This involvement triggered the review of and alterations to policies restricting women's roles in the military.[84] Among these was the Ike Skelton Nation Defense Act for Fiscal Year 2011, which was designed to promote gender equality in the military.[85] Section 535 of the Act mandates:

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[81] *Id.*
[82] *Id.*
[83] DAVID F. BURRELLI, CONG. RESEARCH SERV., R42075, WOMEN IN COMBAT: ISSUES FOR CONGRESS at 5 (2013).
[84] Kate O'Bierne, *An Army of Jessicas*, NAT'L REV., May 19, 2003; Tony Perry, *Women on Iraq's Front Lines*, L.A. TIMES, Nov. 13, 2008.
[85] Pub. L. No. 111-383, 214 Stat. 4217 (2011).

> The Secretary of Defense, in coordination with the Secretaries of the military departments, shall conduct a review of laws, policies and regulations, including the collocation policy, that may restrict the service of female members of the Armed Forces to determine whether changes in such laws, policies, and regulations are needed to ensure that female members have equitable opportunities to compete and excel in the Armed Forces.

The Act articulates a need for change and a desire to provide equal opportunities for women within the military. A little more than a year later, the Office of the Under Secretary of Defense released a report that identified four steps that the Department of Defense intended to take in order to equalize gender differences:

1. Eliminate the co-location exclusion from the 1994 policy;
2. As an exception to policy, allow Military Department Secretaries to assign women in open occupational specialties to select units and positions at the battalion level (for Army, Navy, and Marine Corps) whose primary mission is to engage in direct combat on the ground;
3. Based on the exception to the policy, assess the suitability and relevance of the direct ground combat assignment prohibition to inform future policy decisions; and
4. Pursue the development of gender-neutral physical standards for occupational specialties closed due to physical requirements.[86]

Despite those efforts, four women who served in the wars in Iraq and Afghanistan sued the United States Department of Defense (DOD) on November 27, 2012, challenging the Department's exclusion of women from combat duty.[87] Plaintiff Mary Jennings Hegar, who attained the rank of major as a combat pilot, served three tours in Afghanistan and "was involved in ground combat."[88] Staff Sergeant Jennifer Hart was deployed to Afghanistan in 2004, where she "was called upon to accompany male combat arms soldiers on 'door kicking missions,' searching villages for insurgents."[89] In 2007, she was deployed to Iraq. "While in Iraq, Staff Sergeant Hunt's

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[86] UNDER SEC'Y OF DEF., REPORT TO CONGRESS ON THE REVIEWS OF LAWS, POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES (Feb. 2012).
[87] Hegar v. Panetta, No. 3:12-cv-06005 (N.D. Cal. filed Nov. 27, 2012).
[88] *Id.*
[89] *Id.* para. 17.

Humvee vehicle was hit by an Improvised Explosive Device (IED), causing shrapnel injuries to her face, arms and back."[90] She was later awarded a Purple Heart for her service. However, due to the Department of Defense's combat exclusion policy, she was precluded from even applying to attend combat leadership school.[91] Captain Alexandra Zoe Bedell served in the U.S. Marine Corps and "was barred, solely because she [was] a woman, from competing for assignment to a combat arms military specialty (MOS), such as the infantry.[92] She was twice deployed to Afghanistan, yet the combat exclusion policy interfered with Captain Bedell's ability to fulfill her duties as officer-in-charge of the First Marine Expeditionary Force Female Engagement Team (FET), wherein she trained and deployed marines to serve as FET members in direct support of the infantry.[93] First Lieutenant Colleen Farrell is an active duty officer in the U.S. Marine Corps, currently stationed at Marine Corps Base Camp Pendleton in California. She was commissioned in 2008 and was assigned the position of Air Support Control Officer. First Lieutenant Farrell deployed to Afghanistan in 2010, where she served as the team leader of her unit's FETs. She was stationed in Afghanistan from September 2010 until April 2011, during which time she and between 12 and 20 of the FET members she supervised engaged in missions and patrols alongside male infantry marines, performing outreach with Afghan civilians, particularly Afghan women. Like the infantrymen with whom they served, First Lieutenant Farrell and the women in her charge were regularly in danger of drawing enemy fire, being ambushed by insurgents, and being injured or killed by IEDs.

In their suit, which remains pending, the plaintiffs assert that the DOD's policy of excluding women from direct ground combat violates the Equal Protection Clause of the Constitution. They contend that, "[a]s a result of this policy, women are barred from more than 238,000 positions across the Armed Forces, including all infantry positions, and from certain military occupational specialties and training schools."[94] The plaintiffs also assert that the DOD's gender discrimination does not serve an important government interest.

The Supreme Court has made it clear that government-mandated discrimination based on sex is unconstitutional unless it is supported by an "exceedingly persuasive" justification that is "substantially related to important governmental objectives."[95] Any such justification must be

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[90] *Id.*
[91] *Id.* para. 20.
[92] *Id.* para. 24.
[93] *Id*. para. 26-28.
[94] *Id*. para. 1.
[95] U.S. v. Virginia, 518 U.S. 515, 533 (1996).

genuine, not hypothetical, and cannot rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[96] The DOD's policy of categorically excluding women from certain combat positions, regardless of their individual qualifications and capacities, does not and cannot meet this standard, for it is built upon stereotypical assumptions.[97] Collectively, the plaintiffs also maintain that the combat exclusion rule effectively denies them from pursuing opportunities for further training and for promotion. It is difficult to articulate a rationale for preventing female soldiers from engaging in training.

Cultural beliefs, historical practices, stereotypes, and social mores have all shaped the role of women in American society during times of war. America has moved well beyond the days when it was accepted that "men must provide the first line of defense while women keep the home fires burning."[98] Since then, women have graduated from our nation's service academies, received aviation training, engaged in combat, and earned medals in recognition of their service. Benefits for married servicemen and servicewomen have been equalized, as well.[99] In announcing the Department of Defense's plan to remove barriers to women, Secretary of Defense Panetta noted: "Women have shown great courage and sacrifice on and off of the battlefield, contributed in unprecedented ways to the military's mission and proven their ability to serve in an expanding number of roles. The Department's goal in rescinding the [combat exclusion] rule is to ensure that the mission is met with the best-qualified and most capable people, regardless of gender."[100] The Secretary stressed the need to ensure that occupational performance be "gender neutral."[101] The targeted completion date for the implementation of the Secretary's gender-neutral policy is January 1, 2016.[102]

Of course, the struggle to overcome prejudice and social and historical practices is hardly new to the U.S. Military. History is repeating itself here; the obstacles that women have faced in battling exclusionary rules in the armed forces echo the experiences of black servicemen in earlier years. In the 1946 Port of Chicago mutiny trial, black navy personnel claimed that the

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[96] *Id*.
[97] *Id*. para. 4.
[98] United States v. St. Clair, 291 F. Supp. 122, 125 (S.D. N.Y. 1968).
[99] Frontiero v. Richardson, 411 U.S. 677 (1973).
[100] News Release, U.S. Dep't. of Def., Defense Department Rescinds Direct Combat Exclusion Rule; Service to Expand Integration of Women in Previously Restricted Occupations and Units (Jan. 24, 2013).
[101] *Id*.
[102] *Id*.

navy's policy barred them from advancing because of their color.[103] On July 17, 1944, a massive explosion rocked the Port Chicago Naval Magazine on the San Francisco Bay. "Three hundred twenty men, two hundred two of whom were black enlisted men died."[104] This disaster represented "more than 15 percent of all black naval casualties during the war."[105] A mere three weeks after the explosion, survivors of the tragedy were ordered to commence loading the munitions ship.[106] Out of fear that another explosion might occur, they refused to obey the order. The commander of the depot alleged that their refusal to return to work amounted to "a mutinous attitude," and he recommended that the men be "charged with mutiny before a general court martial."[107] They were subsequently tried over a thirty-three-day period and were found guilty after a mere eight minutes of deliberation.[108] A series of appeals, the reconvening of the court martial trial board, and a motion to set aside the convictions followed the ruling. On June 6, 1946, the vast majority of the sentences were set aside.[109] The navy responded quickly, eliminating the rules that debarred black naval personnel from advancing. On February 27, 1946, Circular Letter 46-48 provided:

> Effective immediately all restrictions governing types of assignments for which Negro naval personnel are eligible are hereby lifted. Henceforth, they shall be eligible for all types of assignments in all ratings in all activities and all ships of naval service…. [I]n the utilization of housing, messing, and other facilities, no special or unusual provisions will be made for the accommodation of Negroes.[110]

The gradual inclusion of black men in the armed forces was "a three-stage process moving from almost complete exclusion of blacks to segregation and then to integration."[111] This evolution spanned centuries; black men were first enlisted in the U.S. Army during the Revolutionary War. Similarly, the inclusion of women in the military has been a multistep process. Women served in non-combat roles as battlefield nurses, cooks, and

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[103] Charles Wollenberg, *Blacks vs. Navy Blue: The Mare Island Mutiny Court Martial*, 58 CAL. HIST., no. 1, at 67-75 (1979).
[104] ROBERT L. ALLEN, THE PORT CHICAGO MUTINY 64 (Heyday Books 1993) (1989).
[105] *Id*.
[106] Wollenberg, *supra* note 103, at 62, 65.
[107] *Id*.
[108] *Id*. at 70.
[109] *Id*. at 73.
[110] BUREAU OF NAVAL PERS., CIRCULAR LETTER 48-46 (1946).
[111] Charles Wollenberg, *Blacks vs. Navy Blue: The Mare Island Mutiny Court Martial*, 58 CAL. HIST. no. 1, at 74 (1979).

water bearers in the American Revolution.[112] The opponents of gender-neutral standards have advanced many of the arguments articulated against the integration of black soldiers in the military. Among these are the claims that such measures will disrupt the cohesiveness of service members and will diminish the effectiveness of various units. Such arguments did not prevail in the context of race; hopefully, they will meet a similar fate in the context of gender.

VIII. CONCLUSION

Broad stereotypes and social mores have long affected the laws and judicial decisions that have determined the role of women in American society, from employment opportunities to military service. While great strides have been made toward gender equality, we have yet to fulfill the Fourteenth Amendment's mandate of equal protection for all. Limitations based on gender remain permissible pursuant to the Bona Fide Occupational Qualifications defenses. Such restrictions seem antithetical to the purpose of the very agency charged with enforcing equal opportunity in the work place. While the narrow interpretation of the BFOQ exception relative to public safety appeared to be a pragmatic justification at the time the Supreme Court's decision in *Dothard v. Rawlinson,* recent gender equalization rules adopted by the Department of Defense call into question the Court's reasoning that a female "employee's very womanhood would … directly undermine her capacity to provide the security that is at the essence of a correctional counselor's primary responsibility."[113] Barriers imposed purely on the basis of one's gender make it impossible to ensure equal opportunities for women. Inherent in equality is the notion that individuals will be judged by their own ability to perform or an objective measure of their own skills and competence—not "subjective assumptions and stereotypical conceptions regarding the ability of women to do a particular work."[114]

The goal of giving women equal protection under the law is within reach. The U.S. Supreme Court has declared, "[W]e are beyond the day when an employer could insist that [employees] matched the stereotype associated with their group."[115] Congress, as well, has hinted at its willingness to enact changes in the armed forces that will further gender equalization. The Ike Skelton National Defense Authorization Act is unequivocal in allowing the Secretary of Defense, in conjunction with other military leaders, "to

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[112] The History of Women in the Military (2011) http://www.womensmemorial.org/H&C/History/earlyyears(amrev).html.
[113] Dothard v. Rawlinson, 433 U.S. 321, 336 (1977).
[114] *Id.* (*citing* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971)).
[115] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

determine whether changes in … laws, policies, and regulations are needed to ensure that female members have equitable opportunities to … excel in the Armed Forces."[116] The U.S. Supreme Court has expressed its willingness to follow the lead of Congress regarding its authority to exclude women from aspects of the military. The Court has noted that its "most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing with the management of military forces."[117] If federal courts will truly defer to congressional intent, then the path towards eliminating the public safety and privacy BFOQ defenses is now open. With the rescission of the combat exclusion rule by the Department of Defense—an integral part of the executive branch—the courts hold the key to one of the last doors barring women from full access to equal employment opportunities. The revocation of the combat exclusion rule also provides for the elimination of the co-location restrictions. This is a recognition that "…privacy BFOQs are not based upon [service members'] abilities, but instead are needed to fulfill third party desires…"[118] The very nature of combat assignments presents an "environment rife with danger." Thus, the new Department of Defense policy contradicts the core of the *Dothard* decision by allowing female soldiers to serve in combat positions. Few would doubt that the potential for harm in a war zone is greater than that in a prison. If war is hell, as General Sherman pronounced, then an argument based on dangerous circumstances, which allowed the U.S. Supreme Court to uphold the public safety BFOQ defense in *Dothard*, must fail.

[116] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 535(a), 124 Stat. 4217 (2011).
[117] Rostker v. Goldberg, 453 U.S. 57, 69 (1981).
[118] Manley, supra note 10, at 191.