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ABANDONMENT IN "PROGRESS": KEEPING OUR PROMISE TO INCARCERATED WOMEN TO KEEP PRISONS SEX-SEGREGATED

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INTRODUCTION

The American judiciary is at odds with itself. While willing to limit prison employees to those of the same sex as inmates in the interest of women's safety and rehabilitation, it is unwilling to apply the same limiting standard to inmates themselves.[1] In recent years, states began allowing male inmates into female-only prisons on account of self-professed transgender identity.[2] From 2021 to 2024, 47.38% of federally incarcerated "trans-identifying males" (TIM) were convicted of sexual crimes.[3] This number dwarfs that of non-TIMs in federal prisons (18.8%) according to the most recently available federal reports.[4] Some also only

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[1] *Compare* Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 336–37 (1977) (holding that being male is a bona fide occupational qualification for contact positions in male prisons), *and* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530, 1532 (7th Cir. 1988) (giving deference to a prison administration's decision to limit the sex of workers who staffed a women's prison in order to further rehabilitative interests), *and* Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998) (upholding a prison's policy to place only female guards in positions that raise inmate privacy or safety concerns), *with* Alyssa Guzman, *New Jersey Inmate Claims She Was Sexually Assaulted by Trans Prisoner in Women's Prison*, N.Y. POST (Sept. 6, 2023, 4:54 PM), https://nypost.com/2023/09/06/new-jersey-prisoner-claims-she-was-sexually-assaulted-by-trans-prisoner-lawsuit/ (explaining a female inmate's allegations that she was sexually assaulted by a transgender inmate who was not disciplined by prison officials), *and* Anna Slatz, *Exclusive: Rapist Quietly Transferred to Washington Women's Prison*, REDUXX (Dec. 15, 2022), https://reduxx.info/exclusive-rapist-quietly-transferred-to-washington-womens-prison/ (discussing a Washington women's correctional facility with eight male inmates, many of whom have committed violent crimes against women), *and* Mary Margaret Olohan, *California Forces Transgender 'Belief System' on Female Prisoners Housed with Biological Males, Lawsuit Says*, DAILY SIGNAL (Nov. 17, 2021), https://www.dailysignal.com/2021/11/17/exclusive-california-forces-transgender-belief-system-on-female-prisoners-housed-with-biological-males-lawsuit-says/ (discussing a lawsuit filed against a California prison after a female inmate was sexually assaulted by a biological male), *and* Matt Masterson, *Lawsuit: Female Prisoner Says She Was Raped by Transgender Inmate*, WTTW (Feb. 19, 2020, 3:56 PM), https://news.wttw.com/2020/02/19/lawsuit-female-prisoner-says-she-was-raped-transgender-inmate (examining an Illinois female inmate's allegation that she was raped by a transgender inmate transferred to her housing unit).

[2] Gary Cornelius, *Transgender Inmates: Treating Them Fairly, Keeping Them Safe*, LEXIPOL (July 29, 2022), https://www.lexipol.com/resources/blog/addressing-housing-and-safety-for-transgender-inmates/ (listing California, New York, and New Jersey as states that allow inmates to be housed based on gender identity rather than biological sex).

[3] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., TRANSGENDER INMATE REPORTS (2021–2024) (on file with author) (noting that 47.38% is an average of the data provided for 2021 (48.47), 2022 (45.93), 2023 (47.18), and 2024 (47.94) in a Freedom of Information Act request).

[4] OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NCJ-307149, PRISONERS IN 2022–STATISTICAL TABLES, at 33 (2024). It is notable that this figure, 18.8%, is the maximum possible percentage of cisgender men convicted of sexual crimes for 2022 given that the data

began identifying as transgender after arriving in a male-only prison.[5] In some instances, TIMs transferred to female prisons have sexually assaulted female inmates.[6] In most instances, TIMs transferred to female prisons have created fear, paranoia, and traumatic flashbacks.[7] For environments obligated by their state legislatures to promote minimum standards of safety and rehabilitation, transferring TIMs into them is dangerously and diametrically opposed to these standards.[8]

To equip female inmates with an effective legal avenue to single-sex prisons, this Comment will argue that courts should apply a "bona fide occupational qualification" (BFOQ)-inspired stencil from Title VII. As Title VII pertains to employees, this Comment will not directly apply Title VII to claims brought by female inmates. Instead, it will apply the legal formula courts presented to justify granting a BFOQ to prison employers seeking to limit guard positions to one sex. By applying the formula, courts have allowed employers of prisons to bar male guards from working in close contact with female inmates in the interest of women's rehabilitation.[9] The basis of the formula presented is that this interest is the goal, that is, the "essence of the business" or operation of prisons.[10] Further, "all or substantially all" TIMs housed in a female-only prison

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demonstrates that only 1.1% of men were convicted of "sexual abuse." *Id.* The rest of the figure is comprised of the statistic that 17.7% of cisgender men were convicted of "other" crimes against public order that included "sexual offenses" (excluding "sexual abuse"), bribery, perjury, escape, contempt, etc. *Id.* Thus, the figure is likely over-inflated given the inclusion of these other crimes against public order.

[5] *See, e.g.*, Slatz, *supra* note 1 (reporting that a male sex offender switched gender identities over a decade after initial incarceration in a male prison).

[6] *See* Guzman, *supra* note 1; Masterson, *supra* note 1; *see also* Press Release, Office of the District Attorney for Bronx County, Rikers Island Inmate Sentenced to 7 Years in Prison for Raping Female Inmate (Apr. 25, 2022) (on file with author) https://www.bronxda.nyc. gov/downloads/pdf/pr/2022/35-2022%20ramel-blount-sentence-rape-rikers.pdf (offering an example in which a TIM inmate raped a female inmate from behind by pushing down on her neck in the shower area of the Rose M. Singer Rikers Island prison facility).

[7] *See* Slatz, *supra* note 1; Masterson, *supra* note 1.

[8] *Compare* Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1755, 1789 (2010) (discussing each state's efforts to increase prisoner safety and wellness through oversight mechanisms), *with* Guzman, *supra* note 1 (discussing a woman's accusations that the New Jersey Department of Corrections failed to take action to prevent harassment by transgender inmates).

[9] *See, e.g.*, Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530 (7th Cir. 1988) (stating that the BFOQ exception applies to the rehabilitative purpose of a women's prison).

[10] *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

undermine this essence.[11] In that many incarcerated women have been physically or sexually abused by men before prison, multiple prisons successfully pleaded a BFOQ barring male guards, who are vetted professionals, from close contact positions in female prisons for the sake of these women's rehabilitation.[12] The same can be true for TIM inmates, many of whom, unlike male guards, have already demonstrated a propensity to inflict abuse onto female inmates.[13]

Part I will first examine the history of prisons and their progression from housing men and women together without regard to criminal severity, to housing men and women separately. This historical backdrop will underscore the long-standing separation between the sexes in prisons. It will then explore Title VII's bona fide occupational qualification exception, examining two cases and summarizing related rulings employing the exception. The first of the two primary cases involved an all-male prison that prevailed under a BFOQ exception after only allowing male guards in "contact positions."[14] The second case pertains to an all-female prison which prevailed under a BFOQ exception after only allowing female guards in "living unit" positions.[15] Part II will examine a lawsuit involving TIM transfers to a California women's prison and these men's acts of violence against female inmates. Part III proposes and applies a solution to the endangerment of these California female inmates by TIMs through a bona fide occupational qualification framework. Part IV addresses counterarguments and presents recommendations for

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[11] *Cf. id.* (considering whether "all or substantially all" men could perform the same duties as women).

[12] *See, e.g.*, *Torres*, 859 F.2d at 1524, 1530, 1533 (reversing and remanding the district court's denial of a BFOQ and narrowly holding that the prison's rehabilitative mission may support a BFOQ defense for a women's prison employing only female guards); *see also Words from Prison – Did You Know…?*, ACLU (June 12, 2006), https://www. aclu.org/documents/words-prison-did-you-know#_ednref28 (finding that seventy-nine percent of women incarcerated both federally and in-state reported past physical abuse, over sixty percent reported past sexual abuse, and that incarcerated females are three to four times more likely to have experienced abuse either as a child or as an adult than incarcerated males); CORR. ASS'N OF N.Y., WOMEN IN PRISON PROJECT (2002) (citing Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J.L. & PSYCHIATRY 301, 317 (1999)) (finding that over eighty percent of women incarcerated at a New York prison endured physical and sexual abuse during childhood, and that over ninety percent endured one of the two in their lifetime).

[13] *Compare, e.g.*, Guzman, *supra* note 1 (reporting a female inmate's allegation of sexual assault by a transgender inmate who prison officials did not discipline), *with Minimum Qualifications and Disqualifiers*, W. VA. REG'L JAIL, https://www.wvarj.org/163/Minimum-Qualifications-Disqualifiers (last visited Aug. 21, 2024) (listing past physical abuse of another as a disqualifier for a correctional officer position).

[14] Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 336–37 (1977).

[15] *Torres*, 859 F.2d at 1524–25, 1532 (remanding case to the district court to apply a lower standard to resolve the issue of whether the BFOQ was necessary to achieve the facility's rehabilitative purpose).

ensuring the safety of TIMs who may bear a special physical risk in male prisons.

BACKGROUND

I. THE HISTORY OF AMERICAN PRISONS

American prisons were not always separated by sex.[16] Until Indiana established the first female-only prison in 1873, both women and children were incarcerated with men.[17] Until after the American Revolution, incarceration arrangements did not take into account the level of offenses each man, woman, and child committed to arrive in prison.[18] And even though the period from the late 1770s to 1873 hosted the systematic sorting of misdemeanants from felons, the conditions prompting sex-separated prisons in the following century showed this form of segregation was far from perfect—and simply insufficient anyway.[19] Indeed, one of the chief complaints motivating the establishment of America's first female-only prison in 1873 was the inherent brutality in placing women and children in a confined population with "hard-core male offenders."[20] As the change from co-ed prisons to sex-segregated prisons showed, the rehabilitation and safety concerns of female inmates did not end with removing *violent* male felons from the presence of female offenders.[21] Ranging from in-prison prostitution to fatal violence, the side effects of the very arrangement of male inmates with any criminal history with female inmates posed inherent issues.[22]

Once Indiana did open an all-female prison, scholars note a marked difference in approach between the traditional male prison and the new

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[16] Barry Ruback, *The Sexually Integrated Prison: A Legal and Policy Evaluation*, 3 AM. J. CRIM. L. 301, 301 (1975).

[17] *Id.*

[18] Nicole Hahn Rafter, *Gender, Prisons, and Prison History*, 9 SOC. SCI. HIST. 233, 235 (1985).

[19] *See* Ruback, *supra* note 1616, at 301; Rafter, *supra* note 1818, at 235.

[20] Ruback, *supra* note 1616, at 301.

[21] *See* Rafter, *supra* note 1818, at 238–39 (explaining how the women's reformatory movement, which had been successful in many states in creating a system of rehabilitation prisons just for women, influenced separate quarters for women felons housed in male prisons but caused women to be treated with a lower standard of care because the male prisoners required more attention than the female prisoners).

[22] *See* Ruback, *supra* note 1616, at 318 (discussing that "the natural upshot of confining unredeemed prostitutes with sexually deprived males" is prostitution and inferring that it would be diametrically contradictory to the rehabilitation interests of a woman incarcerated for prostitution to be in an environment that fosters prostitution); *Id.* at 327.

female prison.[23] The female prison prioritized rehabilitation, while the male prison had long focused on discipline.[24] This difference was born out of societal assumptions about the roots of offending, ease of rehabilitating, and optimal method of correction for male and female offenders.[25] Within the variety of professed understandings motivating this difference in approach, some echoed a rigid obsession with gender roles.[26]

Despite these different roles, it was not as if prisons pampered female inmates.[27] While male prisons tended to tailor programs for different prisoners—such as those for the mentally ill, elderly, and those nearing release—female prisons prioritized teaching the inmates skills like cosmetology.[28] While male inmates attended academic classes during the day, female inmates practiced sewing, cooking, and waiting tables.[29] On the other hand, some institutional differences between male and female prisons found their justifications in biology.[30] In addition to there being considerably fewer female prisoners than male prisoners, incarcerated females were (and are) "generally less violent" than their male

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[23] *Id.* at 301–02 (noting that the first women's prison emphasized "discipline and regularity").

[24] *Compare* Rafter, *supra* note 1818, at 238–39 (describing women's prisons as "rehabilitatively [sic] oriented"), *with* Rafter, *supra* note 1818, at 237 (listing lockstep, whipping, and paddling in the traditional methods of punishment used to discipline male prisoners).

[25] *See* Ruback, *supra* nofte 1616, at 301 (stating the founders of the first all-female prison in Indiana "believed that women criminals should be rehabilitated apart from men"); Rafter, *supra* note 1818, at 236, 238–39 (explaining the belief that "what was basically wrong with female criminals was their failure to be 'true' women"); *see also* Jessica Pishko, *A History of Women's Prisons*, JSTOR DAILY (Mar. 4, 2015), https://daily.jstor.org/history-of-womens-prisons/ (discussing the differences in how male and female prisoners were treated historically based on societal assumptions about women).

[26] *See* Rafter, *supra* note 1818, at 234, 236 (explaining the theory that females committed crimes because they lacked the ability to act in accordance with expectations of women). Today, courts have justified different treatment of otherwise similarly situated men and women by consistently recognizing the persistent biological differences between men and women. *See, e.g.*, Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1527 (7th Cir. 1988).

[27] *See* Rafter, *supra* note 1818, at 234, 238 (explaining that female prisons, as opposed to alternatives to institutionalization, were aggressively funded until the Great Depression despite the relatively small increase in female offending—let alone violent or felonious offending).

[28] *Id.* at 243–44. *See also The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229, 1231 n.10 (1973) ("[S]maller institutions are more conducive to individualized treatment and private rooms; larger institutions can support a broader range of vocational programs and less costly custodial supervision.").

[29] Rafter, *supra* note 1818, at 237.

[30] *See id.* at 236.

counterparts.[31] They were also much less likely to attempt escape.[32] These realities led to different punitive measures within prison life.[33] While male prisoners were disciplined by being "paddled," female prisoners—not requiring physical incapacitation—were prematurely sent to their cells without dinner.[34]

A. Broadening Sex Separation to Prison Guard Arrangements

With the rise of female-only prisons came discussion of which sex would be permitted to staff them, and more specifically, which sex would be permitted to staff positions requiring close contact with inmates.[35] These close contact positions included guard roles entailing entry into sleeping areas to conduct nighttime body counts, patrol of the outside of shower rooms when occupied by inmates, and performance of physical searches.[36] Throughout the especially staggering increase in female-only prisons between 1900 and 1935, female guards could work in male-only prisons and male guards could work in female-only prisons—but only in limited roles away from the inmate population.[37] Beginning in the 1970s, women pursued closer-contact guard positions in male-only prisons through Title VII of the Civil Rights Act of 1964.[38]

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[31] EMILY D. BUEHLER & RICH KLUCKOW, BUREAU OF JUST. STATISTICS, NCJ 308699, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2022–STATISTICAL TABLES, at 8 (2024) (showing that in 2022, 1,653,600 men were incarcerated in the United States compared to only 174,000 women); Rafter, *supra* note 1918, at 244.

[32] *See* Rafter, *supra* note 181818, at 236.

[33] *See id.* at 237.

[34] *Id.*

[35] *See, e.g.*, Rafter, *supra* note 1818, at 236 (stating that early reformers eschewed the congregate model used in male prisons in favor of the cottage plan, which called for staffing women's dwellings with "motherly matron[s]"); *see also* Rosemary Gartner & Candace Kruttschnitt, *A Brief History of Doing Time: The California Institution for Women in the 1960s and the 1990s*, 38 L. & SOC'Y REV. 267, 277 n.10 (2004) (explaining that male correctional officers rarely had close contact positions with female prisoners until the 1970s when there was a shift in staffing as men increasingly stepped into such positions).

[36] Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1525 (7th Cir. 1988).

[37] Rafter, *supra* note 1818, at 234 (stating that twenty women's prisons were established in the United States between 1900 and 1935); Gartner & Kruttschnitt, *supra* note 3535, at 277 n.10 (explaining how, in California, the only male employees within female prisons were those performing perimeter surveillance as well as medical and religious professionals for special circumstances).

[38] *See, e.g.*, Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 324 (1977) (analyzing a claim brought by a woman challenging a prison's height and weight requirements as a violation of Title VII).

1. Title VII's Bona Fide Occupational Qualification Exception for Sex

The "bona fide occupational qualification" (BFOQ) is an exception to Title VII of the Civil Rights Act of 1964's prohibition on employment discrimination.[39] Although Title VII bars discrimination in employment on the basis of race, color, religion, sex, and national origin, its BFOQ exception is not available for race or color.[40] When it came to characteristics such as sex, however, Congress found sufficient distinction to allow employers a BFOQ exception on this ground.[41] Given "sex" was only added to Title VII as a protected characteristic at the eleventh hour of Congressional deliberation, House debate on its application as a BFOQ was limited to the final day prior to vote.[42] But even on this day, House Representative Charles Goodell proposed allowing certain employers to treat sex as a BFOQ for a pro-female reason which ought to be obvious.[43] He explained that "[t]here are *so many* instances where the matter of sex is a bona fide occupational qualification," offering the example of an elderly woman only wanting a female nurse to care for her.[44] When Title VII passed, its BFOQ exception included sex.

Sex-based BFOQ defenses, as opposed to those of religion and national origin, dominate BFOQ jurisprudence.[45] After the passage of Title VII, courts did not have an abundance of guidance when attempting to carve out an appropriate scope for the exception.[46] Aside from the sparse legislative history, courts looked to the Equal Employment Opportunity Commission's (EEOC) written guidelines.[47] These guidelines state the EEOC's belief that the sex-based BFOQ "should be interpreted narrowly."[48] With this declaration, the EEOC lists more instances in which a sex-based BFOQ is *un*acceptable than acceptable.[49] Unacceptable

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[39] 42 U.S.C. § 2000e-2(e).

[40] § 2000e-2(a)(1)–(2) (defining "employment practice[s]" as hiring, discharge, compensation, terms and conditions within employment, in-work privileges, limitations, segregation, and classifications); § 2000e-2(e) (including only religion, sex, and national origin in the BFOQ exception).

[41] § 2000e-2(e); Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 171 (2009) (explaining Congress's belief that racial discrimination was different than sex discrimination).

[42] Manley, *supra* note 4141, at 171; Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 297 n.12 (N.D. Tex. 1981).

[43] *See* 110 CONG. REC. 2718 (1964).

[44] *Id.* (emphasis added).

[45] Manley, *supra* note 4141, at 170.

[46] *See id.* at 171 (explaining that the legislative history of the BFOQ defense and the EEOC guidelines are limited); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (stating "we are left with little legislative history to guide us in interpreting [Title VII's] prohibition against" sex discrimination).

[47] Manley, *supra* note 4141, at 172.

[48] 29 C.F.R. § 1604.1(a) (1972).

[49] *See* § 1604.1(a)(i)–(iv).

situations include an expectation that women may quit employment at a higher rate than men, sex stereotypes, or the superficial preferences of the employer, coworkers, or consumers.[50]

With the EEOC's guidelines came the first option for how courts assessed the validity of an employer's BFOQ. In section (a)(2) of the guidelines, the EEOC states that employment practices which discriminate based on sex are appropriate when doing so is necessary in preserving the business' "authenticity or genuineness."[51] This guidepost, however, is as limited as it reads, as the only example the EEOC lists is the job of an actor or actress.[52]

Courts first examining BFOQ defenses referenced the EEOC's guidelines, but gradually created a multi-part test which later decisions plucked from.[53] Five years after Title VII's passage, in *Weeks v. Southern Bell Telephone & Telegraph Company*, the Fifth Circuit rejected a company's BFOQ defense for not hiring the female appellant for a position requiring the lifting of objects exceeding thirty pounds.[54] The court developed a test that imputed a burden on the employer to establish through a reasonable belief or factual basis that "all or substantially all" of the affected demographic could not "safely and efficiently" perform the job's duties.[55] Since the employer did not individually test each female applicant's ability to lift a weight traditionally considered "low," its contended BFOQ did not stand.[56] The court did, however, leave open the

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[50] § 1604.1(a)(1)(i)–(iii).

[51] § 1604.1(a)(2).

[52] *Id.*

[53] *See* Weeks v. S. Bell Telephone & Telegram Co., 408 F.2d 228, 233 (5th Cir. 1969) ("Section 1604.1(3) of the Commission's Guidelines provides: 'The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, *protecting women against exploitation and hazard*. Accordingly . . . *restrictions on lifting will be honored* except where the limit is set at an unreasonably low level which could not endanger women.'") (emphasis added); *see also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387–88 (5th Cir. 1971) (referencing section 1604.1 and creating a multi-part test that requires the "essence of [a] business" to be in jeopardy before granting a BFOQ).

[54] 408 F.2d at 230, 232–33, 236.

[55] *Id.* at 235.

[56] *See id.* at 233, 235–36 (citing section 1601.1(a) which states "nondiscrimination requires that individuals be considered on the basis of individual capacities").

possibility that an employer could have a valid BFOQ for higher weights—acknowledging the differences in physical strength between the sexes.[57]

Soon after, in *Diaz v. Pan American World Airways*, the Fifth Circuit added an "essence of the business" test.[58] The court explained that the "essence of the business" is the business's "primary function."[59] In this case, an airline refused to hire male flight attendants because airline passengers generally preferred the *aesthetic* of female flight stewardesses.[60] The court, however, characterized an airline's "primary function" as transporting passengers safely, not appearing attractive.[61] Since the physical appearance of flight attendants did not "so seriously affect" the safe transport of passengers on an airline, this basis for hiring did not amount to a valid BFOQ.[62]

Decades after this decision and others invoking the test, the EEOC embraced the "essence of the business" standard and its versatile scope in a discussion letter.[63] Citing *Chambers v. Omaha Girls Club*, in which the Eighth Circuit allowed an employer to discharge an unmarried female employee after she became pregnant, the letter explained that "the *psychological needs* of an employer's clients . . . can make sex a BFOQ."[64] In *Chambers*, the court found the employer's discharge of the pregnant, unmarried employee acceptable because the "essence of the business" was to promote and model "positive options."[65] As subjective as it may have come off, the court lent deference to the employer's *individual* determination that pregnancy out of wedlock was contrary to this essence.[66]

As we will see in the following case, courts began employing the "all or substantially all" and the "essence of the business" tests in tandem to assess the validity of employers' proposed BFOQs. Through *Weeks* and *Chambers* respectively, employers gained theoretical permission to hire based on the physical realities of employees and clientele and the

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[57] *See id.* at 234 (suggesting that a different outcome may have been reached upon a showing that certain duties of a switchman were so strenuous that women could not perform them).

[58] 442 F.2d at 388.

[59] *See id.*

[60] *See id.* at 386–87.

[61] *Id.* at 388.

[62] *Id.*

[63] EEOC Informal Discussion Letter from Dianna B. Johnston, Assistant Legal Couns. for U.S. Equal Emp. Opportunity Comm'n, on Title VII BFOQ Psychotherapy (Aug. 22, 2005).

[64] Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 699 (8th Cir. 1987); EEOC Informal Discussion Letter from Dianna B. Johnston, *supra* note 63 63(emphasis added).

[65] *Chambers*, 834 F.2d at 699, 701–02.

[66] *See id.* at 701–02 (giving deference to the business's genuine belief that staff members who were pregnant out of wedlock would send a contrary message to teenage girls).

psychological needs of clientele.[67] This aided decisions involving arguably more consequential physical realities and psychological needs: those of guards and inmates in prisons.

B. Prioritizing Female Interests in Male Prisons: Dothard v. Rawlinson

The Supreme Court's decision in *Dothard v. Rawlinson* extended courts' acknowledgment of the differences between male and female physicality—initiated in *Weeks*—to the prison context.[68] In *Dothard*, Alabama had established statutory height and weight requirements for state prison staff.[69] Applicants had to be at least 5 feet, 2 inches tall, and weigh 120 pounds.[70] At the time, Alabama's Board of Corrections ("the Board") operated, among others, four male-only prisons and one female-only prison.[71] The Board employed 435 staff and fewer than 13% were women.[72] Of this portion, all were either at female prisons or in *non-contact* positions at male prisons.[73]

Dianne Rawlinson applied for a position as a prison guard, or "correctional counselor" (CC).[74] The Board rejected her application because she weighed under 120 pounds.[75] Upon her rejection, Rawlinson sued in the Middle District of Alabama, alleging the height and weight requirements violated Title VII.[76] While this litigation was pending, the

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[67] *See* Weeks v. S. Bell Telephone & Telegram Co., 408 F.2d 228, 234 (5th Cir. 1969) (indicating that evidence of a female's physical inability to perform a duty may be evidence that justifies a BFOQ defense); *see also Chambers*, 834 F.2d at 702 (justifying the discharge of a pregnant worker because the business's purpose was to provide role models for young girls and an unmarried pregnant employee conveys a contradictory message).

[68] *See* Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 336–37 (1977) (holding that the BFOQ exception applies to hiring only males for contact positions in a male prison); *see also Weeks*, 408 F.2d at 235 (requiring employers to show a factual basis that women would not be able to perform certain duties that men can perform).

[69] *Dothard*, 433 U.S. at 327.

[70] *Id.*

[71] *Id.* at 326.

[72] *See id.* at 327.

[73] *See id.*

[74] *Id.* at 323.

[75] *Id.* at 323–24.

[76] Mieth v. Dothard (*Mieth*), 418 F. Supp. 1169, 1172, 1178 (M.D. Ala. 1976) (per curiam) (suing in the Middle District of Alabama under the name *Mieth v. Dothard*); Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 324, 336–37 (1977) (appealing the *Mieth v. Dothard* decision to the Supreme Court under the name *Dothard v. Rawlinson*).

Board instituted Administrative Regulation 204.[77] This allowed prison wardens and directors to identify a CC position they assessed entailed enough close contact duties for them to order that it only be open to the sex that matched the inmate population.[78] It appeared to be a discretionary balancing test.[79]

These close-contact duties included ones:

> A. [t]hat[, if containing] the presence of the opposite sex[,] would cause *disruption of the orderly running* and *security* of the institution[;]
> B. [t]hat . . . would require *contact* with the inmates of the opposite sex *without the presence of others*[;]
> C. [t]hat . . . would require patrolling *dormitories*, *restrooms*, or *showers while in use*, frequently, during the day or night[;]
> D. [t]hat . . . would require *search of inmates* of the opposite sex on a regular basis[;] and
> E. [t]hat . . . would require that the [CC] Trainee *not be armed with a firearm*.[80]

Upon the regulation's passage, Ms. Rawlinson amended her complaint to challenge it as well.[81]

The district court rejected the prison system's contention that the height and weight requirements as well as Administrative Regulation 204 fell within the BFOQ exception of Title VII.[82] It explained that "[l]abeling a job as 'strenuous' and then relying on the stereotyped characterization of women['s physicality] will not meet the burden of demonstrating a [BFOQ]."[83] In that Alabama's height and weight requirements disproportionately disqualified women from CC positions, the court demanded "objective, demonstrable evidence" that females were incapable of performing the job of a CC.[84] It derived this objectivity standard from

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[77] *Dothard*, 433 U.S. at 324–25 (noting that "[w]hile the suit was pending, the Alabama Board of Corrections adopted Administrative Regulation 204").

[78] *See id.* at 325 n.6.

[79] *See id.* at 325–26.

[80] *Id.* (emphasis added). It is notable that the absence of a firearm in a guard's possession justified barring females from guard positions in male prisons. *See id.* This may show the Board of Correction's understanding that a female guard would need a weapon other than her natural defenses to safely perform close contact duties in a male prison.

[81] *Id.*

[82] *See* Mieth v. Dothard (*Mieth*), 418 F. Supp. 1169, 1182, 1185 (M.D. Ala. 1976) (per curiam).

[83] *Id.* at 1180 (citing Weeks v. S. Bell. Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969)).

[84] *Id.* (citing *Weeks*, 408 F.2d at 236).

Weeks's "all or substantially all" test.[85] The *Weeks* court had stated that although men are possibly stronger than women, it is not clear whether men can lift more than women.[86]

The Supreme Court reversed the district court's decision.[87] The majority concluded that the physical risks associated with female guards in close-contact positions in male-only prisons were high enough to couch the Board's Administrative Regulation 204—arguably the more sexually discriminatory policy—within the confines of Title VII's sex-based BFOQ exception.[88]

The majority's fundamental concern was the risk of sexual assault of female guards by male inmates.[89] Anticipating the dissent's allegations of sexism, the Court explained that "it would be an oversimplification to characterize [its upholding of] Regulation 204 as . . . 'romantic paternalism.'"[90] Indeed, in that the sex offenders within the prison were not sorted from non-sex offenders, "there [were] few . . . deterrents to inmate assaults on women [CCs]."[91] Given that both parties' experts acknowledged security risks, the Court determined that "[t]here is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison."[92]

Justice Rehnquist's concurring opinion took an even more risk-averse approach.[93] He thought the height and weight requirements could be appropriate as a "*predictor* of strength to justify" its disparate impact on

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[85] *Compare id.* (insisting that objective evidence was needed to prove that women could not do the job rather than stereotyped characterizations), *with Weeks*, 408 F.2d at 235 (holding there must be reasonable cause to believe all or substantially all women could not do the job based on available facts).

[86] *Weeks*, 408 F.2d at 236.

[87] Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 336–37 (1977) (holding that the District Court erred in ruling being male is not a BFOQ for correctional officers in close contact positions in all-male prisons).

[88] *Id.* at 334–35.

[89] *Id.* at 335–36.

[90] *Compare id.* at 335 (holding that legitimate dangers to women in this environment were far more substantial than other cases where women were excluded in the past), *with id.* at 346–47 (Marshall, J., dissenting) (arguing this circumstance is yet another example where men excluded women from employment opportunities without women's input based on underlying male sentiments).

[91] *Id.* at 335–36 (majority opinion).

[92] *Id.*

[93] *See id.* at 337 (Rehnquist, J., concurring).

female applicants.[94] At the same time, his view echoed the district court's preference for less presumption and more hard evidence—which was widely available even then.[95] He also, however, suggested that for the sake of effective security in prisons, CCs needed an "*appearance* of strength" in addition to enough height and weight.[96] A female applicant could breach the 5 feet, 2 inches, and 120-pound margin, he explained, but may not be physically intimidating enough to ward off attacks by male inmates.[97]

The dissent, penned by Justice Marshall, condemned what he interpreted as a patronization of female autonomy.[98] He also blamed "the threat of depraved conduct by prison inmates" for robbing women of job opportunities.[99] If only America could deter the depraved conduct of male criminals, he implied—leaving out the fact that prisons exist to do this—women could work in the cells of hardened offenders without pause.[100] To him, however, it should not be this restrained depravity that decides for women whether they can pursue occupations.[101] "[T]he argument that a particular job is too dangerous for women may appropriately be met by" the response that it is Title VII's purpose "to allow the individual woman

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[94] *Id.* at 339 (emphasis added).

[95] *Compare id.* at 331–32 (majority opinion) (holding that the appellants provided none of the requisite evidence needed to correlate height and weight requirements with strength despite how illustrative such a test would be), *with id.* at 339 (Rehnquist, J., concurring) (arguing evidence of height and weight correlating to strength could have justified the requirements but noting that such evidence was lacking in this case). *See also* Mieth v. Dothard (*Mieth*), 418 F. Supp. 1169, 1180 (M.D. Ala. 1976) (per curiam) (explaining that the Board of Corrections needed to provide evidence that height and weight requirements corresponded to competency in that role and failed to do so); ALFRED B. SWANSON ET AL., BULLETIN OF PROSTHETIC RESEARCH, THE STRENGTH OF THE HAND 147 (1970) (showing males' grip strengths in both hands exceeded that of females by an average of roughly twenty-three kilograms of pressure, demonstrating one objective difference in strength based on sex); Lloyd L. Laubach, *Comparative Muscular Strength Between Men and Women: A Review of the Literature*, 47 AVIATION, SPACE, & ENV'T MED. 534, 535 (1976) (using 9 studies to determine that female upper body strength was only 55.8% of male upper body strength, lower body strength 71.9%, and trunk strength 63.8%, exemplifying objective physical strength differences between men and women across several major muscle groups).

[96] *Dothard*, 433 U.S. at 339–40 (Rehnquist, J., concurring).

[97] *See id.* at 340.

[98] *See id.* at 345 (Marshall, J., dissenting).

[99] *Id.*

[100] *See id.* (characterizing these occupational restrictions as yet another anecdote of women receiving punishment for men's misconduct without recognizing that these restrictions serve to remediate men's misconduct).

[101] *See id.* at 341.

to make that choice for herself."[102] This begs the question: what might Justice Marshall say to a female *inmate* who cannot make the choice of who supervises her—or even sleeps next to her—for herself?

The concerns that carried the day in *Dothard* revolved around the safety of female guards. This demonstrates a difference in priority between incarcerated males and females earlier in the twentieth century.[103] Additionally, as we will see in the case that follows, this underscores the attention courts give to the safety of the physically weaker female—and how this safety is crucially intertwined with rehabilitative interests.[104]

C. Prioritizing Female Interests in Female Prisons: Torres v. Wisconsin Department of Health and Social Services

Torres v. Wisconsin Department of Health & Social Services, decided by the Seventh Circuit slightly over a decade after *Dothard*, examined the reverse arrangement: male guards in female-only prisons.[105] The court's logic, however, was inmate-centered as opposed to *Dothard*'s guard-centric approach.[106] The common denominator among these different focuses is the female identity.

Torres involved Wisconsin's only female-only maximum-security prison, Taycheedah Correctional Institution (TCI).[107] After two years in her role, TCI's Superintendent announced a BFOQ plan to be

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[102] *Compare id.* at 335 (majority opinion) (arguing the uniquely threatening conditions of male maximum-security prisons exempt this situation from the general purpose of Title VII), *with id.* at 341 (Marshall, J., dissenting) (using the majority's language to show that despite the inherent dangers of this circumstance, the general rule that dangers should not preclude women from a position should prevail).

[103] *See generally* ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830-1930, at 63 (1981) (describing how women's prisons existed as a means of rehabilitating women based on the prevailing principles of femininity, women's greater moral force, and the inherent difference between males and females).

[104] *See* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1527, 1529–30 (7th Cir. 1988) (holding that the physical differences between men and women were essential to considering how male guards' presence may affect female prisoners' rehabilitation).

[105] C*ompare id.* at 1524 (hearing arguments in a situation in which male guards oversaw intimate quarters of a female prison and were moved out of those positions), *with* Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 323–26 (1977) (examining a situation in which a female was denied the opportunity to serve as a CC in a male prison).

[106] *Compare Torres*, 859 F.2d at 1530 (justifying its holding as protecting female inmates from male guards), *with Dothard*, 433 U.S. at 335–36 (1977) (supporting its holding as protecting female guards from male inmates).

[107] *Torres*, 859 F.2d at 1524.

implemented over the next two years to make all "living units" at TCI staffed exclusively by female guards.[108] These "living units" were distinguished as having special staffing needs for reasons similar to the "contact positions" in *Dothard*.[109] "Living units" entailed cells and communal showers.[110] Guards responsible for these areas patrolled the showers, performed nighttime body counts, conducted pat and strip searches, and ensured inmates honored the ten minutes of visual privacy to which they were limited.[111] TCI's Superintendent desired to make these responsibilities female-only for three reasons: (1) rehabilitation, (2) security, and (3) privacy.[112] Upon learning that sixty percent of the inmates at TCI were physically or sexually abused by men prior to incarceration, she judged that it was in the inmates' best interest to limit the close-contact guard roles to other females.[113]

Three males employed in "living unit" roles at the time of the Superintendent's announcement sued under Title VII in the Eastern District of Wisconsin after being required to move to other areas of the prison over the course of the BFOQ policy's two-year implementation.[114] The district court assessed each of the Superintendent's professed bases for the policy and found all three wanting.[115] On the Superintendent's rehabilitation concern, the court acknowledged TCI's witnesses' testimonies that the presence of male guards could interfere with female inmates' path to rehabilitation.[116] Since TCI failed to present *empirical* evidence as opposed to mere abundant caution, though, the court rejected the BFOQ.[117]

The district court did not explain its idea for protecting female inmates' privacy when it came to pat searches—where a guard of either sex runs their hands over an inmate's entire body.[118] It also neglected to address how it would navigate strip searches which can be conducted by

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[108] *Id.* at 1525.

[109] *Compare id.* (describing guard duties in living units as overseeing areas where inmates undress, shower, and sleep), *with Dothard*, 433 U.S. at 324–25 (categorizing contact positions as duties that entail close physical proximity to inmates while patrolling areas where inmates shower, sleep, and use the restroom).

[110] *Torres*, 859 F.2d at 1525. The "cells" which housed the inmates were not traditional "cells with bars, but [were] more akin to college dormitory rooms." *Id.* at 1524.

[111] *Id.* at 1524–25.

[112] *Id.* at 1526.

[113] *Id.* at 1530.

[114] *Id.* at 1524–25.

[115] Torres v. Wis. Dep't. of Health & Soc. Servs., 639 F. Supp. 271, 279–81 (E.D. Wis. 1986).

[116] *Id.* at 279–80.

[117] *Id.* at 280.

[118] *See Torres*, 859 F.2d at 1525–26.

male guards in emergencies.[119] These searches require inmates to fully undress.[120] One of the natural consequences of limiting living unit positions to female guards would be that, even in emergencies where an inmate needs to be strip-searched, only female guards would be available to conduct it. The district court did not address its view on male guards entering cells in the middle of the night for body counts, either.[121]

On appeal, the Seventh Circuit reversed the district court's decision as to rehabilitation.[122] The court's decision was a strong acknowledgment of the unique circumstances surrounding female prisons.[123] For this unique circumstance, the court implied TCI had "special license" to pursue a BFOQ through innovative methods.[124] Aside from the pressure of maintaining order inside and securing the prison from both illegal access and escape, "[p]rison administrators are responsible . . . for rehabilitating, to the extent that *human nature* and inadequate resources allow, the inmates placed in their custody."[125] The court acknowledged the inevitable reality TCI faced: broken women whom its own State Legislature obligates it to fix—whose conditions are often made especially fragile because of male brutality in their pasts.[126] Derived from the Supreme Court's own language, the court described this responsibility as a "Herculean obstacle[]."[127] The court was not willing to make TCI's responsibility any more difficult by allowing males into traumatized females' spaces—an action that would exacerbate the difficulty in combatting "human nature" to reach rehabilitative goals.

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[119] *See id.*

[120] *Torres*, 639 F. Supp. at 276.

[121] *See Torres*, 859 F.2d at 1526.

[122] *Id.* at 1530–31, 1533.

[123] *See id.* at 1528–29.

[124] *See id.* at 1529–30.

[125] *Id.* at 1529 (emphasis added) (quoting Procunier v. Martinez, 416 U.S. 396, 404 (1974)).

[126] *See id.* at 1529–30; *see also* WIS. ADMIN. CODE HSS app. § 303-01 (1985) ("[Women] cannot participate in programs . . . unless they are safe. Thus, a safe setting is essential to rehabilitation programs . . . . It is quite possible that security staff has more influence on the development of inmate[s] . . . than anyone else in prison. This is because inmates have more *contact* with [them]. The security staff, then . . . greatly influences the process of rehabilitation.") (emphasis added).

[127] *Torres*, 859 F.2d at 1529 (quoting *Procunier*, 416 U.S. at 404).

Consequently, the court prioritized the physical and mental safety of women, much like the *Dothard* Court.[128] Also, similar to the Court's analysis in *Dothard*, the Seventh Circuit used common sense.[129] Quoting the Supreme Court again, the court began its agreement with TCI's rehabilitation-focused methods with the inference that "[t]he Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist."[130] Rehabilitation, it explained, is not "a mere matter of 'consumer preference,'" like a man's partiality for an attractive, female flight attendant.[131] "Certainly, it is hardly a 'myth or purely habitual assumption' that the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of *stress* to females."[132] The court derived this statement from other dynamics, including male nurses in labor and delivery areas as well as male janitors in female bathrooms.[133] The stark distinctions between these settings and that of a female prison, however, are (1) the women in the former spaces can leave; and (2) it is unlikely that the heightened proportion of past male abuse exists for women in the former spaces.

Notably, the court quoted the statement arguably central to the *Dothard* ruling, that "there is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison."[134] And the Seventh Circuit knew it was navigating a situation involving male *guards* in *its* case, not inmates as in *Dothard*—yet it *still* addressed this potential for assault.[135] It then commented that this

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[128] *Compare id.* at 1531 (holding that male guards jeopardized female inmates' rehabilitation by serving in close contact positions), *with* Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 335–36 (1977) (reasoning that male inmates endangered female guards serving in roles with frequent contact).

[129] *Compare Torres*, 859 F.2d at 1531 (articulating that women would obviously be uncomfortable with unrelated men intruding in otherwise intimate spaces), *with Dothard*, 433 U.S. at 335–36 (pointing out that imprisoned sex-offenders clearly would be likely to sexually assault women again if women were introduced into the prison).

[130] *Id.* at 1527 (quoting Michael M. v. Superior Ct., 450 U.S. 464, 481 (1981) (Stewart, J., concurring)).

[131] *Id.* at 1530; *see also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (holding the consumer preference for the "cosmetic effect that female stewardesses provide" is not reasonably necessary to the normal operation of an airline).

[132] *Torres*, 859 F.2d at 1531 (emphasis added) (citation omitted) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)).

[133] *Id.* (first citing EEOC v. Mercy Health Ctr., 1982 WL 3108, at *5 (W.D. Okla. Feb. 2, 1982); and then citing Norwood v. Dale Maint. Sys., 590 F. Supp. 1410, 1422–23 (N.D. Ill. 1984)).

[134] *Id.* at 1531 (quoting Dothard v. Rawlinson (*Dothard*), 433 U.S. 321, 335 (1977)) (alteration in original).

[135] *Id.*

declaration by the Court was "a *common-sense* understanding of penal conditions."[136] This "basis in fact," void of the empirical evidence the district court both here and in *Dothard* demanded, is sufficient for a BFOQ, at least in the unique context of prison.[137]

This "at least" qualifier is exactly how Judge Cudahy characterized the majority's opinion in his dissent.[138] Comparing the provision of safety from violence in female prisons to the much less imminent provision of adequate healthcare and education, he argued the majority's ruling forced courts to "recognize this experimental license as a necessary element of prison administration in BFOQ cases."[139] The Supreme Court and Seventh Circuit would hardly shy away from this accusation.[140]

Judge Easterbrook also wrote a dissent.[141] Twice, he conceded that only employing female guards for "living unit" positions may be in the best interest of female inmates, but fell short of complete loyalty to the majority because of the differing opinions of experts.[142] He described the concept of a battered woman's "past" noted in one expert's explanation "that male guards [may] *hinder rehabilitation* by reminding the prisoners of their *past*," as merely "unhappy encounters with men."[143] Broad research does not give these "encounters" the same passive characterization.[144] In the spirit of this description, Judge Easterbrook went on to question why "the need to employ female guards to promote rehabilitation establish[es] the 'necessity' of doing so."[145] He did not

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[136] *Id.* (emphasis added).

[137] *See id.* at 1529, 1531–32.

[138] *See id.* at 1534 (Cudahy, J., dissenting).

[139] *Id.*

[140] *See supra* text accompanying notes 8687–8788, 99100.

[141] *Torres*, 859 F.2d at 1535 (Easterbrook, J., dissenting).

[142] *Id.* at 1535–36.

[143] *Id.* at 1536 (emphasis added).

[144] *See e.g.*, Gunnur Karakurt et al., *Impact Partner Violence on Women's Mental Health*, 29 J. FAM. VIOLENCE 693 (2014) (listing depression, post-traumatic stress disorder, and substance abuse as consequences women face due to male intimate partner violence); Alison M. Nathanson et al., *The Prevalence of Mental Health Disorders in a Community Sample of Female Victims of Intimate Partner Violence*, 3 PARTNER ABUSE 59, 60 (2012) (discussing how victims of intimate partner violence experience higher levels of Post Traumatic Stress Disorder than others); MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES at 145 (1990) (finding women severely battered by men were likely to suffer depression or attempt suicide).

[145] *Torres*, 859 F.2d at 1537 (Easterbrook, J., dissenting).

mention the Wisconsin Legislature's explicit requirement of TCI cited by the majority.[146]

D. Related Cases

The Eleventh and Ninth Circuits tackled another angle of the concern of mixed-sex populations of prison guards and inmates: privacy.[147] In *Hardin v. Stynchcomb*, a county jail rejected a female applicant for the "Sheriff I" (likened to a "deputy" sheriff) position.[148] When asked why, the jail admitted it would not hire females for the position because it traditionally involved six initial months in "contact positions" in the male section of the jail.[149] It argued sex was a BFOQ because "contact positions" entailed duties such as "work[ing] on the floor among the inmate population" and supervising male inmates, so females staffing these roles would violate the inmates' privacy.[150] The Eleventh Circuit disagreed.[151] It explained that since the policy of new hires spending six months at the jail's male section was negotiable, the jail could realistically hire a female deputy sheriff without placing her around the male inmate population.[152]

Two points distinguish this case from *Dothard* and *Torres*. First, the Sheriff I position includes placement options away from the inmate population: the employer simply did not utilize them in considering the female applicant.[153] Dissimilarly, the CC position in *Dothard* definitively entailed performing searches and patrolling while inmates showered, slept, and used the restroom.[154] In *Torres*, the "living unit" positions entailed duties involving close contact with inmates as they showered, slept, and were searched.[155] What is more, the prison Superintendent in *Torres* moved the male guards who filed suit to other areas within the prison away from inmates.[156] This was exactly the alternative the Eleventh Circuit in *Hardin* suggested upon rejecting the jail's proposed

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[146] *Compare id.* at 1537 (majority opinion) (noting the Wisconsin legislature's mandate of rehabilitation for prison systems), *with id.* at 1535–38 (Easterbrook, J., dissenting) (lacking any discussion of the Wisconsin's legislature's rehabilitation mandate).

[147] *See* Hardin v. Stynchcomb, 691 F.2d 1364, 1373–74 (11th Cir. 1982); Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998).

[148] 691 F.2d at 1365–66.

[149] *Id.* at 1366–67.

[150] *Id.* at 1367–68.

[151] *Id.* at 1372.

[152] *Id.*

[153] *Hardin*, 691 F.2d at 1373 ("[I]t appears that modification of the system of *rotating* deputy sheriffs will *avoid the clash* between privacy rights and equal opportunities without . . . substantially affecting the efficient operation . . . or undermining its essential functions.") (emphasis added).

[154] Dothard v. Rawlinson *(Dothard)*, 433 U.S. 321, 325 n. 6 (1977).

[155] Torres v. Wis. Dep't of Health & Soc. Serv., 859 F.2d 1523–25 (7th Cir. 1988).

[156] *Id.* at 1525.

BFOQ.[157] And even though the court rejected the jail's BFOQ, it acknowledged there was justification for concern regarding female guards in close proximity to male inmates.

The difference between the county jail in *Hardin* and the long-term prisons in *Dothard* and *Torres* is also noteworthy. The court in *Hardin* noted this difference in a footnote, stating the county jail "may be distinguished from the penitentiaries in *Dothard*, in its *significantly smaller number of sex offenders* and the [resultant] diminishment in the *threat of sexual assault*."[158] The jail in *Hardin* hosted "an average stay of under one month" and held populations containing noncriminal "witnesses in protective custody."[159]

The Ninth Circuit in *Robino v. Iranon*, unlike the Eleventh Circuit in *Hardin*, approved of a privacy-based BFOQ.[160] This distinction is perhaps credited to the fact that the institution at issue is a prison—not a jail—paying homage to *Hardin*'s above footnote.[161] In *Robino*, four male guards sued the Director of the Women's Community Correctional Center (WCCC) in Hawai'i for the prison's policy of limiting six "First Watch" positions to females.[162] The WCCC, after receiving "serious allegations" and observing "the ensuing problems with morale among both the inmates and the [guards]" relating to the sexual abuse of female inmates by male guards, appointed a task force.[163] The WCCC charged this task force with determining "the best policy to protect female inmates."[164] It concluded that reserving six "First Watch" positions to female applicants was the best policy.[165] This was because these positions, like the positions at issue

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[157] 691 F.2d at 1374. "Defendants have also failed to prove that they cannot rearrange job responsibilities so that female deputies assigned to the male section of the jail will not have to perform duties that impinge upon inmate privacy rights." *Id.* These job responsibilities may include duties such as "strip searches or observations in inmates' use of shower or toilet facilities." *Id.* (emphasis added).

[158] *Id.* at 1367 n.9 (emphasis added) (citations omitted).

[159] *Id.* at 1368.

[160] *Compare id.* at 1372 (holding that there was no privacy-based BFOQ), with Robino v. Iranon, 145 U.S. F.3d 1109, 1110 (9th Cir. 1998) (finding that there was a BFOQ that was necessary to secure the privacy interests of the female inmates).

[161] *See supra* note 157 158and accompanying text.

[162] 145 F.3d at 1110.

[163] *Id.* at 1110–11.

[164] *Id.* at 1110.

[165] *Id.*

in *Dothard* and *Torres*, entailed observing inmates in the showers and toilet areas, as well as in unsupervised areas.[166]

Although not penning the phrase "essence of the business" in the opinion, the Ninth Circuit employed this test to rule that sex was a BFOQ for the "First Watch" positions at the WCCC.[167] It stated this BFOQ was "*reasonably necessary* to accommodate the privacy interests of the female inmates and reduce the risk of sexual conduct between [guards] and inmates."[168] This "reasonably necessary" language takes after *Diaz*'s verbiage in its use of the essence test.[169]

The Ninth Circuit also echoed both the deference owed to prisons in their attempts to determine the optimal conditions for inmates as well as the reasonableness of a female's request to avoid such vulnerability around males.[170] Commending the WCCC's consideration of "security, rehabilitation, and morale" as well as privacy, the court acknowledged that "a person's interest in not being viewed unclothed by members of the opposite sex *survives incarceration*;" and that prisons must be given space to innovate to solve any conflicts with this interest.[171] Quoting *Torres*, it stated this innovation could be employed "based on available information and experience" as opposed to empirical evidence.[172]

ANALYSIS

II. APPLYING THE BFOQ STENCIL IN CALIFORNIA PRISONS: CHANDLER V. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

A. The Regulations

California Senate Bill 132 or "The Transgender Respect, Agency, and Dignity Act" went into effect on January 1, 2021.[173] The Act added two provisions to the California Penal Code, Sections 2605 and 2606.[174] Section 2605 instructs the California Department of Corrections and Rehabilitation (CDCR), the State's network of public prisons, on how to

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[166] *Id.* at 1111.

[167] *Compare id.* at 1110 (holding that sex was a BFOQ for positions where the prison guard responsibilities required observation of inmates in showers and toilet areas), *with Diaz*, 442 F.2d at 388 (defining the "essence of the business" test as "business operation[s] would be undermined by not hiring members of one sex exclusively").

[168] *Robino*, 145 F.3d at 1110 (emphasis added).

[169] 442 F.2d at 388 ("[T]he non-mechanical aspects of the job of flight cabin attendant are not 'reasonably necessary to the normal operation' of Pan Am's business . . . .").

[170] *See Robino*, 145 F.3d at 1110–11.

[171] *Id.* (emphasis added).

[172] *Id.* at 1110 (quoting *Torres*, 859 F.2d at 1532).

[173] S.B. 132, 2019–2020 Reg. Sess. (Cal. 2021) (codified as amended at CAL PENAL CODE §§ 2605–06 (West 2021)).

[174] S.B. 132 §§ 3–4.

handle the initial intake of inmates.[175] Specifically in the context of a TIM entering the prison system, the CDCR is to, "in a private setting" without the input of female inmates, "ask each individual entering into the custody of [CDCR] . . . [t]he individual's gender identity, . . . [w]hether [they] identif[y] as transgender," and their "gender pronoun and honorific."[176] In the event a male inmate already admitted into a male prison "inform[s] . . . staff of their gender identity, . . . staff shall *promptly* repeat" the same process above.[177] This is a way for the CDCR to reassess and reassign in accordance with a TIM's desired housing arrangement *after* initial placement.[178]

Section 2606, in presupposing that transgender identity is fully valid "regardless of anatomy," further encodes that TIMs "[b]e housed at a correctional facility designated for men or women *based on the individual's preference*.[179] This includes, if the TIM is eligible, prison extracurriculars, such as the "Community Prison Mother Program."[180] The Program, as listed in this Section, contains no qualification of being biologically female.[181] This Section also requires serious consideration of the individual's own "perception" of which "bed assignment" would be best.[182] It demands deference of the same degree for the "housing [of] the individual with another incarcerated person of their choice."[183] Nothing in the Section requires the consent of the other person, or the matching anatomy of cellmates.[184]

If the CDCR "has . . . security concerns" with the individual's "preferred housing placement," it must "certify in writing a specific and articulable basis why" it is "unable to accommodate" the preference.[185] This basis cannot be "[t]he anatomy, including, but not limited to, the genitalia or other physical characteristics," nor "[t]he sexual orientation" of the individual.[186] And if the CDCR is successful in rejecting an

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175 PENAL § 2605(a)–(d).
176 PENAL § 2605(a)(1)–(3).
177 PENAL § 2605(c) (emphasis added).
178 *See id.*
179 PENAL § 2606(a), (a)(3) (emphasis added).
180 PENAL § 2606(a)(3).
181 *See id.*
182 PENAL § 2606(a)(4).
183 *Id.*
184 *See id.*
185 PENAL § 2606(b).
186 PENAL § 2606(c)(1)–(2).

individual's requested placement, as soon as the individual "raises concerns for their health or safety," the "placement shall be reassessed" all over again, reiterating subsection (c) of Section 2605.[187]

Title 15, Section 3269 of the California Code of Regulations (CCR), effective April 11, 2024, prescribes how CDCR cells must be filled.[188] The traditional cell houses two inmates, and staff consider multiple personal factors about an inmate in assigning them a cell: "race, date of birth, age, weight, height, birth place," and national origin.[189] Sex is not considered.[190] Other general factors assessed are an incoming inmate's record of in-cell assaults or violence and reports of prior sexual intimidation, threats, coercion, or harassment.[191] If an inmate carries this history, the CDCR considers them for a single cell, housing only that inmate.[192] Later in the regulation, however, it is clear that this adjustment occurs only if the inmate behaves in one of these ways *to a current or former cellmate*—and the behavior must be within a "pattern, . . .not just an isolated incident."[193] This allows a TIM to request a cell assignment with a female inmate after having sexually assaulted another female inmate who was not his cellmate.

In the same regulation, there is a general provision allowing for the consideration of single-cell designation by staff if there is a mental health concern.[194] This theoretically allows for a female inmate suffering from post-traumatic stress disorder upon being forced to live in close quarters with a TIM inmate to move into a single-person cell, but as we will see below, the grievances of female inmates were *universally dismissed*.[195] The very next subsection, though, carves out a provision *specifically* for transgender and gender dysphoric inmates, providing *them* with a special classification committee to determine appropriate housing.[196] This "appropriate housing" may entail Section 2606's obligation for staff to seriously consider the TIM inmate's own "perception" of which cell assignment is best for him.[197]

If any inmate refuses a housing assignment, they are subject to discipline.[198] As we will also see, the female inmates documenting their

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187 PENAL § 2606(e); *see also* PENAL § 2605(c).
188 *See* CAL. CODE REGS. tit. 15, § 3269 (2024).
189 tit. 15, § 3269(a), (b)(2).
190 *See id.*
191 tit. 15, § 3269(b)(12), (16).
192 tit. 15, § 3269(e).
193 tit. 15, § 3269(e),(e)(1).
194 *See* tit. 15, § 3269(g).
195 See e.g., *infra* note 241–44244 and accompanying text.
196 *See* tit. 15, § 3269(h).
197 *Id.*; See CAL. PENAL CODE § 2606(a)(4) (West 2021).
198 tit. 15, § 3269(i).

victimization by TIMs in their prison understand this, and thus fear punishment for refusing a cell assignment with a TIM or reporting their grievances about it.[199]

California effectuated Assembly Bill (AB) 1104 into the State's penal policy on January 1, 2024.[200] In recently adopting a mission statement listing "rehabilitati[on]" as an indispensable provision of prison operations, the state assesses it as "essential" to provide a rehabilitative atmosphere for inmates to, among other goals, give them an "opportunity to heal from trauma."[201] In other words, AB 1104 declares that "[t]he purpose of incarceration is rehabilitation," and prisons must operate accordingly.[202]

B. The Grievances

Less than seven months after Senate Bill 132 went into effect, female inmates began submitting panicked grievances stemming from the presence and actions of TIMs transferred to their prison.[203] Krystal Gonzalez, for example, reported a TIM shoved her while she was merely standing around.[204] "[A] few days later," as Ms. Gonzalez was waiting to receive medication, the same TIM walked up behind her and thrusted his penis against her.[205] Upon doing so and seeing her react, the TIM mockingly asked, "do you like my ponytail?"[206] Ms. Gonzalez "was so freaked out" and "didn't know what to do."[207] When she subsequently asked prison staff for help, she was told all she could do was attempt to transfer out of the prison.[208]

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[199] *See*, *e.g.*, Exhibit A at 2–5, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (containing a handwritten complaint from an inmate expressing concern about receiving punishment for reporting a sexual assault by a TIM).

[200] *See* A.B. 1104, 2023–24 Reg. Sess. (Ca. 2024) (amending Sections 1170 and 5000 of the Cal. Penal Code).

[201] A.B. 1104, § 1(c), (e), (h).

[202] A.B. 1104, § 1(d).

[203] *See*, *e.g.*, Exhibit B at 11–14, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[204] *See*, *e.g.*, Exhibit A at 2–5, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[205] *Id.*

[206] *See id.*

[207] *Id.*

[208] *Id.*

Doing so would seriously impair her rehabilitation, however: "it [wouldn't] be fair if I was uprooted from here *where I have grown and changed . . . for the better*."[209] She reiterated, "rubbing his penis on somebody is sexual assault . . . and I shouldn[']t be punished for reporting it."[210] She ultimately requested that the CDCR "[h]alt any impending transfers of males to wom[e]n's housing . . . and transfer back [all] males currently in wom[e]n's housing."[211] She desperately contended that TIMs "with penises[,] particularly violent offenders and sex offenders," should not be able to share cells with female inmates, and that female inmates ought to be able to "refuse contact" with TIMs.[212]

Nadia Romero also complained of a TIM physically accosting her without provocation: "a new man who has moved into my unit has a bad habit of trying to *grab me*."[213] This takes a profound toll on her psyche, which in turn debilitates her process of rehabilitation.[214] She continued in her written grievance,

> *I have experienced brutal, severe abuse in my life*[,] and I have been experiencing *bad flashbacks and nightmares since being forced to live with men here*. I get all shook up and teary eye[d][;] and I don't understand it. I literally hyperventilate anytime one comes . . . . I know they are still men and the way they *exercise* . . . is far from a woman.[215]

Ms. Romero went on to bring up the unequal prioritization of TIMs' safety and mental health over that of female inmates.[216] This echoed the discrepancy within Section 3269 of Title 15 of the CCR, which generally makes available single cells for women suffering mentally, but makes specifically available whichever cell arrangement a TIM prefers if he is mentally suffering.[217] More broadly, she stated, "[m]en who feel unsafe are allowed to transfer from men's prisons, but I have nowhere to transfer

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[209] *Id.* at 4, 6 (emphasis added).

[210] *Id.*

[211] *Id.* at 4.

[212] *Id.*

[213] Exhibit B at 11, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (emphasis added).

[214] *Id.* at 11, 13.

[215] *Id.* (emphasis added).

[216] *See id.* at 13.

[217] CAL. CODE REGS. tit. 15, § 3269(g)–(h) (2024); *see also* CAL. PENAL CODE § 2606(a)(4)–(b) (West 2021) (requiring that the CDCR grant TIMs the housing of their choice based on their health and safety perceptions or to specifically state the reasons that the request was denied).

where I can feel safe, and I am forced to live in constant fear."[218] When she sought professional help within the prison, said professionals "claim[ed] not to have an answer for this problem."[219] Ms. Romero ultimately begged that CDCR "[h]andle this as an emergency . . . because [she is] in physical and psychological danger."[220] She also specifically asked that the CDCR "[r]emove" the TIM who grabs her "and any male inmate from any location in which they have access to [her]."[221]

Janine Chandler is a devout Muslim.[222] Since her faith prohibits her from being in close proximity with unrelated men, "be[ing] exposed" to naked "male (trans women with penises) inmates" or undressing in view of them violates the tenets of her faith.[223] She goes on to point out in her written grievance that she is "subjected to a higher risk of violence, including rape," and that "being locked up with males is giving [her] *flashbacks* to [her] *abusive* husband," which impairs her rehabilitation.[224] Like Ms. Romero, Ms. Chandler pleaded with the CDCR to acknowledge the inequality in "[s]ex offenders [being] allowed to transfer from men's prisons so they don't get raped or murdered," while female inmates "have nowhere to transfer to, to escape violent men."[225] Living in "constant fear," Ms. Chandler also raised that many of the correctional officers "know how dangerous this situation is for" the female inmates because of potential rapes and other negative consequences of transferring in TIM inmates.[226]

There are multiple thematic similarities in these complaints, which represent only three of multiple in a stack of exhibits 204 pages in length.[227] First, all three women suffer impairment to their rehabilitative

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[218] Exhibit B at 13, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657); *see also* tit. 15, § 3269(g)–(h) (allowing changes to a TIM's housing assignment); *see also* PENAL § 2606(a)(4)–(b) (allowing TIMs to transfer based on their mental health perceptions).

[219] Exhibit B at 13, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[220] *Id.* at 11.

[221] *Id.*

[222] *See* Exhibit C at 34, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[223] *Id.*

[224] *See id.* at 36 (emphasis added).

[225] *Id.*

[226] *Id.*

[227] *See* Exhibits A–K at 1–204, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (demonstrating that this Article has referenced Exhibits A, B, and C but there are eight other exhibits).

interests: two of them more specifically from the flashbacks they experience of their past male abusers.[228] This lends credence to the Superintendent of the *Torres* prison's own observations—except here, as we will see, there were no steps taken to arrange the demographics of the prison in accordance with the rehabilitative needs of female inmates.[229] Furthermore, all three women either gathered that they had nowhere to escape the TIM inmates invading their space while TIM inmates did (given it is what brought them to the female prison initially), or that *they,* the *victims*, would be the ones ripped from rehabilitation-promoting routine and familiarity.[230] Lastly, these grievances stemmed from female inmates' experiences with intact or biologically unmanipulated males who identified as transgender.[231] One woman was thrust upon from behind by an anatomical male with a penis; another woman noticed the contrast in physical ability of the males in the prison by the way they exercised; and the last one was forcibly exposed to the bare penises of naked men undressing around her.[232]

This biological problem echoes the concerns in *Dothard* which still ring true today: "[t]here is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison."[233] Given that in multiple reports in other Western nations such as Canada and Sweden, researchers found that a highly disproportionate percentage of incarcerated TIMs were previously convicted of sex crimes, it is not difficult to suspect TIMs imprisoned in American territories like California fall into a similar demographic arrangement.[234]

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[228] *See* Exhibits A–C at 4, 6, 11, 13, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (noting that the flashbacks experienced by the two women are referenced in Exhibits B and C).

[229] *See* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530 (7th Cir. 1988).

[230] *See* Exhibits A–C at 4, 6, 13, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (noting the inmate in Exhibit A was concerned about her rehabilitative efforts being disrupted and the inmates in Exhibit B and C felt they had no escape).

[231] *Id.* at 4, 11, 13, 34.

[232] *Id.* at 4, 13, 34.

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

[234] *See* Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Person Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE, Feb. 2011, at 1, 5, 6 (demonstrating that TIMs were more likely to be convicted of a violent crime than females); *see* CORRECTIONAL SERVICE OF CANADA, RESEARCH REPORT: EXAMINATION OF GENDER DIVERSE OFFENDERS 14, 24 (2022) ("Almost all offenders (82%) with a sex offence history were trans-women.").

C. CDCR's Response

The CDCR disapproved—did nothing about—every grievance.[235] It cited Senate Bill 132's Sections 2506 and 2606 as well as CCR 15 § 3269 as authority over its decisions.[236] For Ms. Gonzalez's grievance, the CDCR responded with a reiteration of Section 2606, that "transgender . . . inmates, regardless of anatomy, shall be housed at a correctional facility designated for men or women *based on the individual's preference*."[237] The CDCR in "[c]omplying with the law," defended its disapproval by noting that, at least when the TIM who thrust his penis against Ms. Gonzalez first transferred to her prison, he was reviewed by a "multi-disciplinary team" and was "required to attend a mandatory institutional cultural awareness class."[238]

The CDCR responded to Ms. Romero's grievance similarly but did not neglect to add that it "has remained committed to providing a safe, humane, *rehabilitative*[,] and secure environment for all incarcerated persons, including those in the transgender . . . communit[y]."[239] Since "the incarcerated population is diverse with unique needs, . . .[Ms. Romero's] grievance is disapproved."[240]

In that Ms. Chandler's grievance invoked religious freedom concerns, the CDCR "disapproved" her complaint because she was not being housed in the same *cell* as a TIM inmate *at the time* of her documentation.[241] Ms. Chandler noted, however, that it violated her religious beliefs to merely "be exposed" to naked males or to expose herself unclothed to males.[242] Given the interior layout of prisons and sometimes communal showering,

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[235] *See* Exhibits A–C at 8–9, 15–18, 38–39, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (demonstrating that the CDCR denied all three inmates' grievances).

[236] *Id.* at 8–9, 15–16, 38–39.

[237] *See* Exhibit A at 8–9, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (emphasis added).

[238] *Id.*

[239] *See* Exhibit B at 15–16, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (emphasis added).

[240] *Id.*

[241] *See* Exhibit C at 38–39, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[242] *Id.* at 34, 36.

this exposure is not limited to within an inmate's cell.[243] The CDCR effectively dismissed this concern.[244] Additionally, in the same response in which the CDCR invalidated Ms. Chandler's claim due to her cellmate not *currently* being a TIM, it reiterated that TIMs are lent deference to "*their* perception of health and safety" in determining "any bed assignment" and "housing . . . with another incarcerated person of *their* choice."[245]

III. SOLUTION: THE BFOQ STENCIL

Proposing a BFOQ for sex in the interest of female inmate rehabilitation would ace both the "all or substantially all" and "essence of the operation" tests that courts have invoked. The "all or substantially all" test theoretically imputes a burden on the CDCR's female inmates to demonstrate through reasonable belief or factual basis that "all or substantially all" TIMs are incompatible with California's requirement that the CDCR promote rehabilitation in its female prisons.[246] The "essence of the business operation" test, as expanded upon by *Chambers* and *Torres*, tasks the CDCR's female inmates with demonstrating that the "primary function" of their prison—rehabilitation—is at odds with the presence of TIM inmates.[247] This includes functions based off "clients,"i.e. female inmates', psychological makeups and past trauma.[248]

This "all" qualifier appears in all three of the above grievances. Ms. Gonzalez, because of her experience being battered and sexually assaulted by a TIM inmate, requested that the CDCR "[h]alt *any* impending transfers of males" and "transfer back [*all*] males currently in wom[e]n's housing."[249] Ms. Romero, in being battered by a TIM inmate and suffering flashbacks of traumatic experiences at the hands of another male, endures what resembles a panic attack by the fact she is forced to live with *any*

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[243] Tori Richards, *Newsom Needs to Halt Transgender Mixing of Prison Populations, Women Advocates Say*, WASH. EXAM'R (June 29, 2021), https://www.washingtonexaminer.com/news/newsom-halt-transgender-mixing-prison-populations-women-advocates (interviewing Lauren Adams, Legal Director of Women's Liberation Front (WoLF), who stated, "women have been sexually abused in the past and must now contend with nude men sharing communal showers.").

[244] *See* Exhibit C at 38–39, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[245] *Id.* (emphasis added).

[246] *Cf.* Weeks v. S. Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969) (noting that a BFOQ exception will not apply unless a company can show that "all or substantially all" women will be unable to perform the duties of the job).

[247] *See* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 704 (8th Cir. 1987); Torres v. Wis. Dep't. of Health & Soc. Servs., 859 F.2d 1523, 1530–31 (7th Cir. 1988).

[248] EEOC Informal Discussion Letter from Diana B. Johnston, *supra* note 6363; *see also Torres*, 859 F.2d at 1529–30 (noting the past abuse experienced by the female inmates and the impact that male authority would have on the primary goal of rehabilitation).

[249] *See* Exhibit A at 4, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (emphasis added).

males.[250] She, like Ms. Gonzalez, also requested that the CDCR "[r]emove . . . *any* male inmate from *any* location" where they can access her.[251] Likewise, Ms. Chandler's faith prohibits intimate exposure among *any* unrelated males; and she protested that the presence of *any* males in the prison increases her and *all* other female inmates' risks of being raped.[252]

According to AB 1104, the CDCR's "primary function" is rehabilitation.[253] The California Legislature's demand for rehabilitation-focused operation within the Central California Women's Facility (CCWF), where Ms. Gonzalez, Ms. Romero, and Ms. Chandler are incarcerated, is the same as the demand for rehabilitation-focused operation within the prison in *Torres* made by the Wisconsin Legislature.[254] As it pertains to Ms. Gonzales, she faced an ultimatum following her assaults to either remain in constant fear or "uproot[]" herself from the prison in which she has made great rehabilitative strides through routine and familiarity.[255] Both constant fear and being tossed from prison to prison harm the rehabilitative interests the CDCR is assigned as its "essence of the business [operation]" or "primary function."[256] Moreover, both Ms. Romero and Ms. Chandler have abusive

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[250] *See* Exhibit B at 11, 13, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[251] *See* Exhibit A–B at 4, 11, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (emphasis added).

[252] Exhibit C at 34, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (emphasis added); *see also* Torres, 859 F.2d at 1531 (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)) (emphasis added) (citation omitted) ("Certainly, it is hardly a 'myth or purely habitual assumption' that the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of *stress* to females.").

[253] *See* A.B. 1104, §1(c)–(d), 2023–24 Reg. Sess. (Cal. 2024).

[254] *Compare id.* (declaring that "the purpose of incarceration is rehabilitation"), *with Torres*, 859 F.2d at 1529–30 (noting that the administrators in the female prisons had to be innovative to achieve the goal of rehabilitation mandated by the Wisconsin Legislature), *and* Wis. Admin. Code HSS § 303-01 (1985) (stating that the goal of discipline is "[t]he rehabilitation of inmates").

[255] *See* Exhibit A at 4, 6, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[256] *See* Exhibits A–B at 4, 6, 13, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657); *see Torres*, 859 F.2d at 1530 (noting that the prison's "essence of the business" is rehabilitation); *see* Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971) (noting that a business may discriminate based on customer preference if it is necessary to perform the business's "primary function").

pasts at the hands of men.[257] The "flashbacks" they both experience due to their experiences among TIMs in the CCWF disturb their rehabilitative processes.[258] This disturbance contradicts the CDCR's "essence of operation."

Notably, the Seventh Circuit refuted the lower court's demand for TCI's Superintendent to show empirical evidence of the disturbance caused by a male presence in the contact areas of the prison.[259] The Seventh Circuit lent deference to TCI's Superintendent without demanding it first observe the empirical results of male guards supervising female inmates.[260] CDCR has consistent, documented evidence of the results of placing biologically male inmates (TIMs) among female inmates. *The women suffering within the CCWF have a factual basis exceeding the Seventh Circuit's standard.*[261]

Perhaps even more importantly, Ms. Gonzalez, Ms. Romero, and Ms. Chandler strongly resemble *Robino*'s circumstances that ultimately provided a valid BFOQ for sex; and this was in California's own Ninth Circuit. Like in the CCWF, the Women's Community Correctional Center (WCCC) in Hawai'i was fielding "serious allegations" of sexual abuse, but between female inmates and male guards.[262] In *Robino*, the WCCC was justified in keeping males away from female inmates because it was "reasonably necessary to . . . reduce the risk of sexual conduct between [guards, who are males] and inmates[, who are female]."[263]

Such is the general problem and necessary solution of the CCWF's dynamic between female inmates and TIM inmates. *Robino* also believed the female inmates' concerns about their privacy, acknowledging that, for example, "a person's interest in not being viewed unclothed by members of the opposite sex survives incarceration."[264] This establishes direct support for the CDCR's action to tend to Ms. Chandler's concerns about

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[257] *See* Exhibits B–C at 11, 13, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[258] *Id.*

[259] *See Torres*, 859 F.2d at 1525, 1529, 1531–32 (rejecting an empirical standard for determining a BFOQ exception in favor of using a totality of the circumstances standard and considering the experiences of those within the prison).

[260] *Id.*

[261] *See* Exhibits A–C at 4, 6, 13, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (demonstrating that the harassment and risk of sexual assault that the women within the CCWF experience is enough to justify barring biological male inmates from female prisons).

[262] *See* Robino v. Iranon 145 F.3d 1109, 1110–11 (9th Cir. 1998).

[263] *Id.*

[264] *Id.* at 1111; *see also* Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) ("[I]t is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex."); *see also* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").

undressing around and seeing undressed TIMs.[265] Moreover, the case for her specifically is even stronger constitutionally because it carries a religious implication.[266] Finally, in that all *Robino* asked of the WCCC in forming a BFOQ for sex was the prison authorities' "available information and experience," the CCWF has ample information available to it regarding encounters between female inmates and TIMs to act.[267] Its possession of female inmates' individual reports of past trauma informing their victimizations within the prison also justifies adjustments under both *Robino* and *Torres*.

IV. ADDRESSING COUNTERARGUMENTS

The consistent concerns of the three women profiled above revolved around the anatomical properties and physical abilities of the TIMs around them. Section 2606 of the California Penal Code allows for this in subsections (1) and (2), stating that the medical intervention of a TIM inmate requesting transfer to a female prison is of *no consequence*.[268] The first step in creating a dynamic in which biological males could reside in female prisons is changing this clause. Since the penises of TIMs are what were used to victimize Ms. Gonzalez, intimidate Ms. Chandler, and are the primary producer of the testosterone giving males a stark physical advantage over females that Ms. Romero was frightened by, no TIM with a penis should be allowed in a female prison.[269] This is non-negotiable. Moreover, the physical or chemical castration of an adult male does not

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[265] *See* Exhibit C at 34, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657).

[266] *Id.* (showing the urgency and severity of Ms. Chandler's situation in which she is forced to share intimate space with males, violating her Muslim faith).

[267] *Robino*, 145 F.3d at 1110; *see* Exhibits A–C at 4, 11, 34, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657) (demonstrating three of at least eleven complaints involved female inmates and their encounters with TIM inmates).

[268] *See* CAL. PENAL CODE § 2606(a)(3) to (c)(1)–(2) (West 2021) (requiring corrections officials to not take the individual's anatomy into account when assessing the individual's housing assignment).

[269] *See* Exhibits A & C at 4, 34, 36, Chandler v. Cal. Dep't of Corr. & Rehab., 2021 U.S. Dist. Ct. Motions LEXIS 294736 (E.D. Cal. 2022) (No. 1:21cv1657); *see Testosterone: What it is, Function & Levels*, CLEV. CLINIC (Sept. 1, 2022) https://my.clevelandclinic.org/health/articles/24101-testosterone ("Testosterone is a hormone that [a male's] gonads (testicles . . .) mainly produce. Testosterone levels are naturally much higher in male[s] at birth than . . . female[s] at birth.").

automatically negate the testosterone he has produced and stored.[270] Broad research shows that males who have undergone genital reassignment surgery or hormonal intervention retain a physical advantage over females.[271] This necessitates both castration and consistent hormonal intervention to suppress the testosterone at the root of this advantage, and considerable time undergoing this hormonal manipulation.[272]

If there is ever an acceptable place for a biological male within a female prison, he ought to be separated from female inmates at all times. Further, every female in the prison ought to have the express right to demand for his exit regardless.

An option which best serves female inmates is tasking male prisons to better protect trans-identifying male inmates from violent, intact male inmates. Just as a female inmate's right to safety does not end when she enters the walls of a prison, a male inmate's right to safety does not end with his location, either. This is of especially pressing concern when the male inmate in question has stark hormonal and/or surgical vulnerabilities. At the end of the day, however, the physical risk one individual endures does not justify a transfer of said physical risk onto a biologically weaker party. Women are not means to an end.

CONCLUSION

The American prison system is wrought with sometimes unavoidable danger and despair. It is difficult to imagine a nation in which our prisons are free of these attributes. In our attempts to reform prisons to better prioritize rehabilitation, however, it is a grave inconsistency to sacrifice the rehabilitation of women—who have no control over their fellow inmates—for the social affirmance of a group predisposed to sexual

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[270] *See* Jeffrey A. SoRelle, et al., Impact of Hormone Therapy on Laboratory Values in Transgender Patients, 65 CLINICAL CHEMISTRY 170, 172, 174 (2019). Only a quarter of trans-identifying males who were treated with oral spironolactone—the strongest medication used to increase estrogen—and other oral estrogen therapies could lower levels of testosterone to that of females. *Id*. Moreover, another quarter could not lower their testosterone significantly at all with these treatments. *Id*.

[271] Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT'L J. OF ENV'T RSCH. &PUB. HEALTH at 1, 1 (2022) ("Male physiology cannot be reformatted by estrogen therapy in transwoman athletes because testosterone has driven *permanent effects through early life exposure*.") (emphasis added); SoRelle, *supra* note 270270, at 172, 174 (finding fewer than half of tested males showed decreased testosterone levels after six months of hormone treatments); Jason Jarin, et. al., *Cross-Sex Hormones and Metabolic Parameters in Adolescents with Gender Dysphoria*, 139 PEDIATRICS at 1, 4 (2017) (finding that nearly all males on estrogen maintain levels of testosterone above biological females).

[272] *See* SoRelle, *supra* note 270270, at 172 (finding that for the males who did show decreased testosterone, it took *at least* six months of consistent, intensive hormone treatment).

disorder and violence. This sacrifice materializes in housing trans-identifying male inmates with female inmates, regardless of whether their identification is genuine or fraudulent.

Prisons have employed the bona fide occupational qualification exception of Title VII to prioritize the safety and rehabilitation of women. In these cases, the male threats took on two postures. The first threat category consisted of male inmates, who were subordinate to female guards in both authority and weaponry. The second threat category consisted of male guards, who were vetted employees with significant benefits to lose if they were reported to have abused female inmates. When it comes to TIM inmates, however, their "male threat" is not only equal to women in authority and advantageous to them in physicality, but also vetted—adjudicated, even—as violent and sexually disordered. They have much less to lose while sleeping beside and assaulting women as "equals" in a facility neither of them can escape. Courts should recognize their own history and prohibit male inmates from walking among females in proximity when they have already found it is justifiable to prohibit male guards—and other male inmates—from doing the same.

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