

# **Court Constructed Theories of Gender: Knowing Man and Woman in an American Employment Law Context**

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## **Introduction**

The bona fide occupational qualification exception to Title VII of the Civil Rights Act (“BFOQ”) allows employers to engage in sex-based discrimination “in those certain instances where...sex...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2. Cross-gender prison guard cases, those in which an individual of one sex seeks to guard inmates of the opposite sex, provide a unique opportunity to see how the courts have analyzed and applied the BFOQ test. The cross-gender prison guard case asks the court to assess whether the “womanness”/“manness” of an individual disqualifies her/him from effectively carrying out the duties of the job. In these cases, courts are to use a skills based assessment which places the burden on the employer to prove the duties of the job, what level of proficiency is needed to perform those duties safely and efficiently, and that substantially all members of the category of individual to be excluded fail to perform the duties of the job to the requisite level of proficiency. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234 (5<sup>th</sup> Cir. 1969). The employer is barred from resort to stereotypes but must demonstrate that the inability of a category of workers to perform the duties of the job is based in fact. *Id.* See also *Phillips v. Martin Marietta Corp.*, 400 US 542 (1971). It is this skills based assessment that protects workers from pernicious stereotypes and prejudices, which would unfairly limit their employment options.

What courts, including the United States Supreme Court, have actually done is abandon the skills based assessment and instead have developed an independent and unsupported theory of gender which unfairly disqualifies both men and women from employment. By comparing the gender representations in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a case involving women seeking to work as prison guards in men’s prisons, to *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (6<sup>th</sup> Cir. 2004), a case involving men seeking to remain working as prison guards in the housing units of women’s prisons, it becomes easier to see a theory of gender underlying these two decisions. The theory of gender that the courts have established is both chilling and represents a problem beyond equal employment opportunity.

It is important to note at the outset that both the prison systems in *Dothard* and *Everson* were operating in violation of the constitutional rights of the inmates. Violence and sexual violence against inmates were rampant in these institutions. See *Pugh v. Locke*, 406 F. Supp. 318 (D.C. Ala 1976), *Everson*, 391 F.3d at 741-42. This question of equal opportunity employment, then, is grounded in a larger context of reforming these prisons to at least provide a minimum level of safety for the inmates. Getting the equal

employment opportunity question right, then, was part and parcel of these prison systems' larger plans to address constitutional rights violations within the prisons.

### ***Dothard v. Rawlinson***

In *Dothard v Rawlinson*, the Supreme Court upheld an Alabama administrative regulation prohibiting women from serving as correctional counselors (prison guards) in any of the state's maximum-security institutions for men. *Dothard*, 433 U.S. at 333. To reach this conclusion, the Court abandoned the basic requirements of the bona fide occupational qualification exception to Title VII of the Civil Rights Act. In its place, the Court constructed a model of masculinity that normalizes male rape of women and posits women as the initiators of such rape. Based upon this unsupported notion of women as rape initiators, the Court disqualifies women from an entire category of employment.

#### **1) Setting of *Dothard***

The conditions in the prisons administered by the Alabama Board of Corrections ("ABOC") were set out in an earlier class action lawsuit, *Pugh v. Locke*, 406 F.Supp. at 325, in which inmates of the Alabama prisons sued on the grounds that the prison conditions violated their constitutional rights. Investigations into the conditions at the prisons revealed that prisoners were living in filth and degradation. "Windows [were] broken and unscreened, creating a serious problem with mosquitoes and flies." *Id.* at 323. Inmates were forced to sleep on "filthy cotton mattresses [that]... spread contagious disease and body lice." *Id.* Over-crowding was so severe that many inmates were living in dormitory style arrangements with bunks pushed so close together that there was no walking space between them. *Id.* at 322-323. Other inmates slept on mattresses placed on the floors in hallways and even in the restroom facilities by the urinals. *Id.* One facility, housing over 200 men, was found to have only one functioning toilet. *Id.* at 323. "A United States public health officer...found these facilities wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors." *Id.* at 323-324.

Not only were the facilities administered by ABOC unsafe from a sanitation perspective, they were also plagued by almost unfettered inmate on inmate violence. *Id.* at 324. This came about partially because ABOC engaged in no screening or assessment of inmates with regard to level of security needed to house them or the mental health services needed to treat them. Rather, inmates were assigned to facilities and to particular units or dormitories based on available space. *Id.* This failure to assess incoming inmates meant that 10% of the general mingled inmate population was psychotic (needing to be confined to special facilities for the criminally insane) and another 60% were disturbed enough to require treatment. *Id.*

This failure to assess inmates was further exacerbated by severe understaffing at ABOC

facilities. Testimony by the former prison commissioner revealed that large institutions in the ABOC system needed a minimum of 692 guards to ensure a safe and controlled environment. *Id.* at 325. However, at these same facilities, ABOC only employed 383 guards. *Id.*

Over-crowding, dilapidated facilities, failure to assess inmates, and understaffing combined to create “rampant violence and [a] jungle atmosphere” at ABOC prison facilities. *Id.* The court found that

violent inmates are not isolated from those who are young, passive, or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft, and assault are everyday occurrences among the general inmate population. *Id.* at 324.

Testimony was also presented to illustrate the problem of young inmates being gang raped and then pimped out by stronger inmates. *Id.* at 325. In *Pugh v. Locke*, the court found that the conditions in ABOC facilities constituted “cruel and unusual punishment” of the inmates. *Id.* at 329.

## 2) A Theory of Gender

It is within this context that the Supreme Court sets out to evaluate Diane Rawlinson’s claim that the Alabama Board of Corrections (“ABOC”) unlawfully rejected her application for the position of correctional counselor based both on a disparate impact claim (restrictive height and weight requirements) and on a disparate treatment claim (an ABOC regulation that limited women to serving in only 25% of available correctional counselor positions). *Dothard*, 433 U.S. at 323-326.

In approaching the disparate treatment claim, the Court first cites with approval the wording of the bona fide occupational qualification exception as constructed by the 5<sup>th</sup> Circuit Court of Appeals in *Weeks v Southern Bell Tel. & Tel. Co.* This construction of the Title VII exception states that

an employer could rely on the bfoq exception only by proving that he had a reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. *Id.*

To succeed on a BFOQ argument then, an employer bears the burden of proving:

- (a) the duties of the job involved,
- (b) the level of proficiency at those duties necessary to perform safely and efficiently, and

(c) that substantially all women would be unable to perform the job duties to the requisite standard of proficiency and safety.

Further, in demonstrating element (c), the employer is required to demonstrate that it has relied upon actual factual information to prove that substantially all women could not perform the job- and not merely relied upon “romantic paternalism” or archaic notions of women and appropriate roles for them. *Id.* at 334.

In the *Dothard* case, the Alabama Department of Corrections failed both parts (a) and (b) of the bona fide occupational qualification exception. The ABOC failed to adequately describe the position of correctional counselor or to outline the actual duties of the position. The District Court determined only that “correctional counselors are persons who are commonly referred to as prison guards. Their duties primarily involve security rather than counseling.” *Id.* at 327.

The inappropriateness of such a vague notion of the required job duties is made clearer if applied to other types of jobs. For example, one could say that a construction worker must be proficient in the job duty of constructing; or a lawyer must be proficient in lawyering; or as here, a prison guard must be proficient in securing. None of these constructions of a job duty is sufficient for a BFOQ exception because none of the duty descriptions are specific enough to provide information about the types of skills, let alone the level of skill proficiency, required to perform safely and efficiently.

An employer unable to meet the threshold requirement of describing the duties of the job would seem doomed in asserting a BFOQ disqualifying all women from employment. In fact, the Supreme Court determined that ABOC had failed to provide an adequate description of prison guard duties when it invalidated Alabama’s height and weight restrictions as violative of Title VII. In the disparate impact section of the case, the Court upheld the lower court’s decision that height and weight requirements, which exclude 41.13% of women from correctional positions, are untenable in the face of the ABOC’s “failure to offer any evidence of any kind in specific justification of the standards.” *Id.* at 331.

The Court acknowledges the failure of ABOC to present evidence in support of job duties or qualifications for prison guards in its discussion of the disparate impact case. However, in its analysis of the BFOQ portion of the case, the Court fails acknowledge that the BFOQ exception requires in part, the same showing of required job duties as the rebuttal of a disparate impact case. Instead, the Supreme Court essentially determines that an employer can make a factual showing of women’s unsuitability for entire categories of jobs in the absence of information about the job duties or skills needed to perform those jobs. In its BFOQ analysis, the Court glosses over the first two elements of the BFOQ test to focus entirely on whether or not there is a factual reason to disqualify women from the prison guard position. No reference is made to specific job duties or needed proficiency at those duties aside from the vague reference to the duty “to maintain

prison security,” *Id.* at 335.

While eliminating 2/3 of the required elements of the BFOQ exception test, the Court does acknowledge that it is impermissible to disqualify women from categories of employment based on nothing more than stereotypes about the proper role and function of women, *id.* at 333. The Court, then, engages in a slight of hand. Instead of basing its decision on impermissible stereotypes about women, the Court makes “factual” determinations about the nature of men and masculinity.

First, the Court argues that men convicted of rape would target female prison guards for further acts of rape. “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.” *Id.* It is important to remember that this is part of the Court’s factual analysis of women’s ability to perform as prison guards, yet no facts regarding women are raised. Rather, the Court’s factual analysis focuses on the likely recidivism of male rapists.

Further, no facts or statistics are presented to support the contention that all or a majority of the sex offenders in Alabama prisons are there for sexually assaulting adult women. If the argument is one of recidivism (those who have sexually assaulted women in the past will do so again), there logically needs to be some evidence that the sex offenders in question targeted adult women. Sex offender pedophiles or those who targeted men, based on the Court’s own thin recidivism argument, would seemingly be as unlikely to attempt rape of a female prison guard as any other man without a history of raping women.

That there are flaws in this line of argumentation merely underscores the fact that the argument is pretextual. Ultimately, the Court determines that it is not rapists who rape, but men who rape. “[I]nmates, deprived of a normal heterosexual environment, would assault women guards...” *Id.* “[T]here are few visible deterrents to inmate assaults on women custodians.” *Id.* 336. The Supreme Court, then, argues that men, deprived of consensual heterosexual sex and in the absence of visible deterrents, will rape women.

Here, the Court’s argument focuses entirely on the bodily integrity of women. What the Court has done is construct a vision of masculinity that only by reference to the male-female binary inherent in patriarchy creates a derivative notion of the female. The Court declares, as a matter of fact, that men need heterosexual sexual contact and when denied it consensually, they will take it by force. *Id.* at 335. Women then are defined entirely by their bodies and the relationship of their bodies to men’s sexual desires; desires that are enforced by violence. Men take sex. Women are rape-able. Male rape of women is normal.

That women are rape-able, however, is not sufficient to disqualify women from working as prison guards. There is nothing inherent in a woman’s capacity to be the victim of a

sex crime that would indicate that she cannot perform the job duties to the requisite standard of proficiency and safety as required to defeat a BFOQ. To reach this conclusion, the Court must take a further step. Women are not merely rape-able but rape initiating. It is the presence of a woman, in the absence of visible deterrents that induces the male inmate to rape. “[T]he inmates would assault a woman because she was a woman.” *Id.* There is no male agency in this description of the norm of male rape of women. The woman’s mere presence, the requirement of the male inmate to be confronted with the female essence of rape-ability, causes these men to rape. “The employee’s very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility.” *Id.*

In reaching this conclusion, the Court abandoned the test for a BFOQ exception. The BFOQ requires the *employer* to bear the burden of proving a factual basis for the belief that women could not perform the job. There is no indication that ABOC made the argument that women would pose a security risk because they are rape initiating. Rather, ABOC asserted that women are psychically different and deficient when compared to men and that rural men feel superior to women. *Id.* at 344. The BFOQ requires that the employer bear the burden of proving women unable to perform the job. Here, the Supreme Court has absolved them of this requirement and instead makes an argument for them.

Further, this argument is part of element (c) of the BFOQ exception test as outlined by the Court. This element requires a factual assessment that substantially all women would not be able to perform the job. Neither ABOC nor the Court provides any factual basis for the contention that women prison guards pose a security risk to the facility because of their “womanhood.” In the absence of any factual presentation, the Court asserts that male inmate rape of women is normal and women, by their very womanhood, incite rape in those men “deprived of a normal heterosexual environment.” *Id.* at 335. In so doing, the Court validates pernicious and false notions of the nature of womanhood while at the same time stripping women of the legal protections in Title VII, which were designed to shield women from such stereotypes.

### ***Everson v. Michigan Department of Corrections***

*Dothard* creates a theoretical framework that finds that women incite rape in men denied consensual heterosexual sex and thus women undermine the security of the male prison guards who would be required to protect them. *Dothard* 433 U.S. at 336. In *Everson v. Michigan Department Corrections*, the shoe is on the other foot. Here male prison guards, who had previously worked in the housing units of women’s facilities are seeking to retain those jobs in the face of a Michigan Department of Corrections (“MDOC”) administrative decision to limit certain prison guard positions, those corrections officer and residential unit officer positions in the housing units within female facilities, as women only. *Everson*, 391 F.3d at 740.

Like the Supreme Court in the *Dothard* case, the 6<sup>th</sup> Circuit Court of Appeals in *Everson* abandons the basic requirements of the bona fide occupational qualification exception to Title VII of the Civil Rights Act. However, rather than finding that womanness is the disqualifying factor, as the Supreme Court did, the *Everson* court locates the problem of employing certain prison guards in manness.

In *Everson*, the 6<sup>th</sup> Circuit Court of Appeals overturns a district court determination that Michigan's administrative regulation, which prohibited men from serving as Corrections Officers (CO) and Residential Unit Officers (RUO) in women's prisons, was based on invalid sexual stereotypes. Instead, the Court of Appeals determines that the very "manhood" of a prison guard disqualifies males from being guards in the housing facility for female inmates. The *Everson* court follows *Dothard's* construction of a masculinity that normalizes male inmate rape of women but then extends this construction to apply to even those men not denied a "normal heterosexual environment." Using this understanding of gender, the Court supports MDOC's argument that the only way to protect the careers of male prison guards, which could be sullied by allegations of rape, is to find that the "manness" of men disqualifies them from holding positions within the housing units of female facilities. *Everson*, 391 F.3d at 754-55.

### 1) Setting of *Everson*

By all accounts, the conditions for women inmates in MDOC facilities were an extreme example of malfeasance in our prison system. Outside independent reviews reported rampant sexual abuse of female prisoners, predominantly but not exclusively at the hands of male prison guards. Between the years 1994 and 2000 male prison staff perpetrated about 91% of the cases of sexual abuse of female inmates in Michigan. *Id.* at 755. In 1997 and 1998, 50% of all convictions of male staff nationwide for criminal sexual conduct against women prisoners were of Michigan staff. *Id.* at 742. Sexual abuse by prison guards was also apparently well known and accepted by the MDOC administration. A 1996 investigation by Human Rights Watch determined that "rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are a continuing and serious problem within the women's prisons in Michigan [and] have been tolerated over the years at both the institutional and departmental levels" *Id.* at 741.

That the subjugation of women through sexual violence was a part of MDOC's operating procedure is made even more clear when one realizes that at some facilities the rape and sexual abuse of inmates involved at the very least an aggressor guard and a voyeur. For example, at the Wayne facility "one officer works the "A" wing, one officer works the "B" wing, and one officer works at a desk, where he or she watches the other two officers as they make their rounds." *Id.* at 741. This workplace configuration, where the interactions of security guards with inmates is observed by a third party, suggests that sexual misconduct was well known (observed) and accepted within the ranks of prison guards and guard supervisors.

## 2) A Theory of Gender

It is within this context that the 6<sup>th</sup> Circuit Court of Appeals begins its analysis and application of the BFOQ exception. Because male prison guards had worked in corrections officer (CO) and residential unit officer (RUO) positions in the housing units of women's prisons for years prior to MDOC's change in policy, the *Everson* court does not address the first component of the BFOQ test, the duties of the job involved.

Instead, the court focuses on the second and third components of the BFOQ exception. These elements have been variously described as a finding that "substantially all [members of one gender] would be unable to perform safely and efficiently the duties of the job involved," *id.* at 748 (citing *Int'l Union v. Johnson Controls*, 499 US 187, 207 (1991)), or that "it is impractical or highly impractical to determine on an individual basis the fitness for employment of members of one gender," *Everson*, 391 F.3d at 748-49 (citing *Harris v. Pan Am World Airways Inc.*, 649 F.2d 670, 676 (9<sup>th</sup> Cir. 1980)). It is important to note once again this determination of the impracticability of finding individual members of one gender fit for particular employment is a factual assessment and must not be based on stereotypes. *Dothard*, 433 U.S. at 334. As in the *Dothard* case, the *Everson* court must determine if as a matter of fact the very gender of the individual disqualifies him or her from certain employment.

In making its factual assessment of whether it is "impractical to determine on an individual bases the fitness for employment" of men as COs and RUOs in Michigan's female correctional facilities, the *Everson* court explicitly follows the precedent set in *Dothard* to determine if the "very manhood of male COs and RUOs undermines their capacity to provide security." *Everson*, 391 F.3d at 755. In fact, the *Everson* court specifically cites as precedent the following language from *Dothard*,

The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility. *Id.* at 755 (citing *Dothard*, 433 U.S. at 336).

It is important to note that here the *Everson* court is explicitly accepting the construction of gender as laid out by the Supreme Court in the *Dothard* case as a legal precedent. The Supreme Court has determined that in the context of male inmates, an employees' womanhood would incite an inmate to rape the women unless there was some visible deterrent to doing so. At first blush, this gender construction would seem to be of little help to the *Everson* court. The *Everson* case does not deal with male inmates or female guards. However, the *Everson*, court takes the *Dothard* gender construction and extends it a step farther. The *Everson* court finds that "some male officers possess a trait

precluding safe and efficient job performance—a proclivity for sexually abusive conduct—that cannot be ascertained by means other than knowledge of the officer’s gender, and thus gender [is] a legitimate proxy for a safety-related job qualification.” *Id.*

The *Everson* court construed abstention from engaging in sexually abusive conduct as a job skill and determined that it is impossible to determine if men, on an individual basis, can perform this skill—ability to refrain from the commission of a sex crime—with the necessary efficiency or proficiency. Finding it impossible to determine on an individual basis which men are prone to engaging in criminal sexual conduct, the court finds all men unfit for employment as COs and RUOs on safety grounds.

To succeed on this argument of safety, MDOC had to present expert testimony to prove their contention that hiring men to work in the housing units is factually unsafe. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11<sup>th</sup> Cir. 1993). In support of this idea that it is impossible to determine if men can perform the job skill of not committing a sex crime at work, MDOC presented the long history of problems with sexual abuse of prisoners in Michigan’s female prison facilities. This argument seems somewhat circular. Evidence presented demonstrated that MDOC condoned the sexual abuse of female inmates by prison guards for years. *Everson* 391 F.3d at 741. Having created a work environment which at the very least tolerated, if not encouraged, the commission of sex crimes, MDOC now argues that the culture of sexual violence against inmates that they institutionalized is evidence that male employees cannot refrain from engaging in the tolerated practice of victimizing the inmates. *See id.* at 754-55.

This argument is even more specious when it is realized that MDOC failed to engage in basic screening of applicants for prison guards, which could detect if male applicants had previously engaged in criminal conduct. *Id.* at 742. Criminal background checks for prospective prison guards are lawful, *see Zamlen v. City of Cleveland* and *Gregory v. Litton Systems Inc.*, 316 F. Supp. 401 (C.D. Cal 1970) and were a required component of MDOC’s settlement of previous lawsuits regarding conditions in its women’s facilities. *Everson*, 391 F.3d at 742. MDOC’s complete failure to properly assess job candidates does not logically equate to the impossibility of such an assessment.

Viewing abstention from the commission of a crime as a job skill, however, demands such an assessment. The BFOQ exception requires that employees be able to perform necessary job duties with the requisite level of proficiency and efficiency. *Dothard*, 433 U.S. at 323-326.

If not engaging in sexually abusive conduct is a skill, then the male claimants in this case must point to some assessment that can determine whether or not a person will engage in future criminal conduct or concede the employer’s argument that such an assessment is impracticable. Ultimately, the court finds that pre-employment screening and psychological testing, “[g]iven its speculative value...does not qualify as a reasonable alternative to gender-specific assignments.” *Everson*, 391 F.3d at 756.

The Court then, has determined that abstention from sexually abusing the prisoners is a job skill and that there is no test that can determine if a male can perform this skill. This determination by the court ignores the evidence that 10% of the acts of sexual violence against female inmates were actually perpetrated by female guards. *Id.* at 755. Using the courts own argument that the proclivity for engaging in sexually abusive misconduct is unascertainable, the fact that this trait is possessed by both sexes poses something of a problem in terms of employment. If both men and women, as categories, must be excluded from working as prison guards in the housing units of female prisons because there is no way to know which guards will sexually abuse the prisoners then the state of Michigan will find itself in a conundrum. A BFOQ analysis, which disqualifies all humans from employment, suggests that some aspect of the analysis has gone awry.

Even restricting this analysis to men, the court cannot truly mean that as a matter of employment law, the impossibility of determining which male may commit a sex crime at work in the future disqualifies all men from working as prison guards in female prison facilities. If this were the case, any employer should be able to assert a legitimate BFOQ disqualifying men from all prison guard positions within female facilities and not just those jobs in the housing unit. For that matter, if men can be excluded from employment based on the potential to commit rape in the future then an employer should be able to assert a BFOQ disqualifying males from any position in which a male employee might come into contact with women.

At first blush, the construction of gender in *Everson* would seem to support just that. The *Everson* court's notion of impracticability of determining which man will commit a sex crime extends *Dothard's* construction of rape normality. Rape is no longer restricted to men "deprived of a normal heterosexual environment" as in *Dothard*. *Everson* extends the notion of male rape normality to include all men. The male prison guards in *Everson* are free men not inmates. However, according to the *Everson* court, gender alone, the mere fact of being a man, renders it impossible to determine if a male employee will engage in sexual violence against women and thus all men are excluded from the prison guard positions in question. *Id.* at 755.

The *Everson* court's support of the notion of rape normality, however, is not sufficient to understand the limited holding of the case. *Everson* does not hold that men cannot serve as prison guards in a female prison but rather that men cannot serve as prison guards in the *housing unit* of a female prison. *Id.* at 761. That men may commit sex crimes, then, must not be sufficient to disqualify men from working as prison guards in the housing units of female prisons.

Having determined that maleness is a legitimate indicator of a proclivity for the commission of a sex crime, the *Everson* court extends its gender analysis by arguing that the CU and RUO positions, the housing unit positions, are unique in the prison setting because they put male officers in contact with naked female bodies. Arguing that female inmate privacy rights are to be considered in a BFOQ analysis, the court speaks at length

about prisoner nudity. “We cannot conceive of a more basic subject of privacy than the naked body. 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.” *Id.* at 757 (citing *York v. Story*, 324 F.2d 450, 455 (9<sup>th</sup> Cir. 1963)). The court further finds that “most people have a special sense of privacy in their genitals” and that state prisoners, while having a diminished right to privacy retain the right to not be “forced unnecessarily to expose their bodies to guards of the opposite sex.” *Everson*, 391 F.3d at 757.

Through this discussion, the court places a qualifier on its holding that maleness is a proxy for engaging in sexual abuse of women. It is not that men in the absence of visible deterrents rape women. The *Everson* court indicates that men in the absence of visible deterrents and when confronted with the naked female body rape women. Like the construction of gender in the *Dothard* case, women are dehumanized and defined entirely by the relationship of their bodies to men’s desires. Here again, flowing from the *Dothard* case, is the notion that women and the presence women’s bodies incite men to rape. While any man may rape, he is more likely to do so in the presence of the nude female body.

Having found that there is a privacy right, which limits forced exposure of the body, the court seems to conflate which party in this context is being “forced.” Ultimately, the forced exposure that MDOC seeks to protect against and the court upholds is the “forced” exposure of male guards to the naked female inmate body and whatever negative consequences that that may involve for the men. *Everson*, 391 F.3d at 754. The court notes the testimony of a correctional consultant that “when [male] staff may feel reluctant...to view females in a state of undress, in the use of toilet facilities, in dressing, and other kinds of situations, they may reluctantly, not pursue vigorously their supervision requirements because of the natural reluctance to not do that.” *Id.*

It is this reluctance of men to be forced to witness the naked female body and its powers to incite men to rape, which the court ultimately finds excludes men from CO and RUO positions in the housing units of MDOC women’s facilities. “[A] basis in fact exists that privacy screens preclude proper surveillance of inmates and that allegations of sexual abuse engender hesitancy in male officers and mistrust between inmates and guards, and thus the “very manhood” of male COs and RUOs undermines their capacity to provide security.” *Id.* at 756.

### **A Problem Beyond Equal Employment**

The issue in the *Everson* case is not a question of whether the women in Michigan’s correctional facilities needed and deserved immediate relief from an unacceptable and unconscionable atmosphere of sexual torture. As the 6<sup>th</sup> Circuit Court of Appeals noted, “no amount of sexual abuse is acceptable...” *Id.* However, because of the appalling

conditions for women in the MDOC system, some feminists have posited that *Everson* creates an inherent conflict for feminists, pitting the desire for women's equal employment opportunities on the one hand against women's rights to be free from sexual coercion and violence on the other. Ashlie Case, Case Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 Yale J.L. & Feminism 309 (2005).

This seems to be something of a false start. The American legal system's approach to equality is one of negative freedom, a removal of barriers such that like things are treated like. In the cases flowing from *Dothard*, like *Everson*, which hold that women are uniquely and specially qualified for certain prison guard positions in women's prisons, there is no impediment to based oppression. Rather than serving as a means to gain redress for very real grievances, the courts in these cases create a theory of gender that stands as a shield protecting systems of oppression from analysis or litigation. This is a problem beyond equal employment opportunitywomen holding those security guard jobs, rather, the limitation in those cases is put on men. Men, because of their manhood, are disqualified from certain employment. Far from pitting groups of feminists against each other, cases such as *Everson* create a conflict between men's rights to equality of employment and women's rights to freedom from sexual coercion and violence.

Even this realization, however, is in some sense missing the point. Instead of conceptualizing the problem of *Dothard* and its progeny as one of competing feminists issues, this line of cases can be seen to create a framework through which the courts understand gender and thus conceptualize men and women as essentially unequal. Herein is the true problem created by these cross-gender prison guard BFOQ exception cases. The Supreme Court has abandoned the BFOQ test which is a skills-based test and in its place created a construction of gender. This construction of gender is not based on evidence but rather is based on destructive stereotypes that support gender-based oppression. Further, the Court's construction of gender is legal precedent that other courts, like the 6<sup>th</sup> Circuit Court of Appeals, feel bound to follow and apply.

Worse, that legal precedent normalizes male rape of women while reducing both sexes to their bodies. Women, in these cases, are viewed as over sexualized bodies, seductresses, who "force" men to rape. Men are animals who are powerless to control themselves in the presence of the female body. While the reduction of both sexes to nothing more than their bodies is harmful to men and women, this court constructed theory of gender is especially harmful to women. In *Everson*, the court confronted with institutionalized acceptance of the sexual victimization of inmates by both male and female guards takes the position that "boys will be boys." Rather than addressing the true problems presented by MDOC's operational procedures, the Court determines that men just can't handle being confronted with naked women. Under the guise of protecting women inmates from sexual assault, the court takes the position that women incite rape. If women inmates, who must use the restroom, take showers, and change clothes in the housing unit, weren't so darn sexy then male guards could behave appropriately. The *Everson* court, then, excuses MDOC's system of institutionalized rape of female inmates as a natural

consequence of forcing men into proximity of naked women.

Far from a radical re-conceiving of gender, the *Dothard* and *Everson* courts abandon the BFOQ skills test in favor of the same old stereotypes about men and women that the BFOQ test is supposed to protect against. These cases, then, are less about equal employment opportunity and more about reinforcing traditional notions of gender and shoring up, through legal precedent, gender-based oppression. Rather than serving as a means to gain redress for very real grievances, the courts in these cases create a theory of gender that stands as a shield protecting systems of oppression from analysis or litigation. This is a problem beyond equal employment opportunity.