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# THE CASE OF THE MALE OB-GYN: A PROPOSAL FOR EXPANSION OF THE PRIVACY BFOQ IN THE HEALTHCARE CONTEXT

Emily Gold Waldman<sup>†</sup>

## I. INTRODUCTION

“Join an all female Obgyn practice in the Columbus suburbs,” states one job posting on obgyn.net, a comprehensive website for obstetrician-gynecologists (“OB-GYNs”).<sup>1</sup> “Join all female Obg group 20 minutes outside San Francisco,” states another.<sup>2</sup> Yet a third posting comes from an Atlanta “privately owned all female group [that] wants to add another Obgyn.”<sup>3</sup> A recent issue of *Boston Magazine* contains an advertisement from About Women By Women, P.C., a medical practice located in Wellesley, Massachusetts that describes itself as offering “[f]emale OB/GYNs specializing in Obstetrics, Gynecology, [and] Infertility”;<sup>4</sup> the practice’s website explicitly states that it has an “all-female staff.”<sup>5</sup>

As the above examples illustrate, the face of the typical OB-GYN practice is changing rapidly. Over the past ten years, women have gone from filling slightly less than half of the nation’s OB-GYN residencies to filling more than two-thirds of them.<sup>6</sup> All-female OB-GYN medical

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1. Posting of National Physicians Placement Services (Columbus, OH) to <http://www.obgyn.net/cfm/jobs/jobs.cfm> (Apr. 17, 2002) (copy on file with author).

2. Posting of National Physicians Placement Services (San Francisco, CA) to <http://www.obgyn.net/cfm/jobs/jobs.cfm> (Apr. 29, 1999) (copy on file with author).

3. Posting of National Physicians Placement Services (Atlanta, GA) to <http://www.obgyn.net/cfm/jobs/jobs.cfm> (Feb. 14, 2001) (copy on file with author).

4. About Women By Women, P.C., *BOSTON MAG.*, Aug. 2003, at 176.

5. About Women By Women, P.C., available at <http://www.aboutwomenbywomen.yourmd.com>.

6. Tamar Lewin, *Women’s Health is No Longer a Man’s World*, N.Y. TIMES, Feb. 7,

practices have risen in popularity.<sup>7</sup> Job openings frequently express preferences for female applicants—sometimes, as illustrated above, by describing the medical practice as an all-female group.<sup>8</sup> Female OB-GYNs are sometimes offered higher starting salaries,<sup>9</sup> and numerous physicians report that male medical students are being discouraged from entering the field.<sup>10</sup> A recent *New York Times* article highlighted the case of one male OB-GYN, David Garfinkel, who was terminated less than two years after he was hired by Morristown Obstetrics after allegedly having been told that because he was a male, he “wasn’t drawing as many patients as they had expected.”<sup>11</sup> Dr. Garfinkel responded by suing the medical practice for gender discrimination.<sup>12</sup>

Obstetrician-gynecologists widely recognize the phenomenon, but vary in their responses to it. Some view the change as entirely appropriate. They argue that the intimate nature of the specialty prompts women to seek out physicians of the same sex, both because they feel more comfortable,

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2001, at A1 (stating that in 2001 women filled 70.3 percent of the nation’s OB-GYN residencies, compared with slightly less than half ten years ago). In 1980, women accounted for only one-third of first-year OB-GYN residents. Susan Ladd, *OB/GYN: A Woman’s Place?*, GREENSBORO NEWS & REC., Sept. 20, 1996, at D1.

7. See, e.g., Kate Stone Lombardi, *A Clinic Where All the Doctors Are Women*, N.Y. TIMES, Dec. 3, 2000, at WE8 (explaining that the rising need for female doctors has led to the rise of all-female practices).

8. See, e.g., Ann Carnahan, *A Woman’s World: Female OB/GYNs Can Name Their Ticket*, DENVER ROCKY MOUNTAIN NEWS, Jan. 23, 2000, at 8F (stating that female OB-GYNs are heavily recruited over their male counterparts); Bob Condor, *Women Obstetricians Have Male Counterparts on Run*, CHI. TRIB., June 16, 1996, at 1 (referring to a second-year resident who stated that recruitment advertisements clearly express a preference for female applicants).

9. See, e.g., Carnahan, *supra* note 8, at 10F (noting a statement by Daniel Stern, the president of the National Association of Physician Recruiters, that clients of his company are paying more for female OB-GYNs who have just finished their residencies, with men receiving offers from \$140,000 to \$160,000, and women receiving up to \$175,000 with signing bonuses); Sally Jacobs, *No Men Need Apply: As Demand Soars for Female Gynecologists, Males Search For Work*, BOSTON GLOBE, May 29, 1996, at 57 (stating that medical practices may offer women salaries that are twenty percent higher than those offered to men). These disparities are generally explained on the grounds that women attract more customers and build their employers’ practices more quickly. *Id.* at 60.

10. See, e.g., Jamie Jordan, *A Question of SEX: Are Male OB/GYN Specialists Becoming an Endangered Species?*, ST. J.-REG. (Springfield, IL), June 24, 1996, at 13 (noting that a male OB-GYN who began practicing in 1987 stated that he had been advised by many people against going into gynecology); Lewin, *supra* note 6, at A14 (quoting, among others, a young male OB-GYN who stated that he was “discouraged from becoming a gynecologist at every step of the process”). Such statements contrast interestingly with the experience of Dr. Vanessa Haygood, who entered the OB-GYN field in 1982, and noted that at that time, “it wasn’t a specialty in which women were welcomed.” Ladd, *supra* note 6, at D1.

11. Lewin, *supra* note 6, at A1.

12. *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 773 A.2d 665 (N.J. 2001).

and because they believe that their health concerns can be more fully understood by a doctor who has physically undergone the same experiences.<sup>13</sup> Other OB-GYNs—both female and male—are troubled by the phenomenon, arguing that it reflects reverse discrimination and bad medicine. “‘It’s unrealistic for women to say that their doctor has to have gone through labor to understand labor. . . . They’d never expect their cancer doctor to have had cancer,’” stated one female OB-GYN.<sup>14</sup>

As this trend continues, increasing numbers of male OB-GYNs may bring gender discrimination cases to court, just as Dr. Garfinkel has. But how will—and how should—these cases be resolved? In fact, courts have not yet ruled on the precise question of whether an OB-GYN practice can make explicitly gender-based decisions about which physicians to hire and fire. The few cases that have included gender discrimination causes of action brought by male OB-GYNs have been resolved on other grounds,<sup>15</sup> and the New Jersey courts have not yet addressed this aspect of Dr. Garfinkel’s case. Meanwhile, although commentators have—both in a cluster of articles published in the 1970s and 1980s<sup>16</sup> and in a recent

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13. See, e.g., Ladd, *supra* note 6, at D1 (quoting a female OB-GYN as stating that “[t]hings many patients say to me are, ‘I feel like you know what I’m talking about.’ ‘I feel like you could have been in this position.’ . . . They’re just more comfortable from a physical and emotional standpoint.”). Similarly, one *New York Times* article included the following reflection from a female OB-GYN who practices in an all-female practice:

There’s a lot of very fine male gynecologists out there, but many women find it easier to talk to another woman when the subject is sexuality or menopause or pregnancy . . . And it’s perfectly understandable. Find me a lot of men who’ll go to a female urologist for their yearly prostate exam. . . . [M]any of our patients tell us how glad they are to be able to see women, who know exactly what they’re going through.

Lewin, *supra* note 6, at A14. See also Nicole Peradotto, *In Choosing A Doctor, More Women Are Putting Gender First*, BUFFALO NEWS, Feb. 24, 1998, at 1D (quoting a female OB-GYN as stating that “[s]ometimes women perceive that they’re not being taken seriously by the medical establishment and that their complaints, such as PMS, are not considered well-founded by science. . . . Unless you’ve lived through it, you can’t understand it.”).

14. Lewin, *supra* note 6, at A1.

15. See *infra* pp. 389-91 (discussing *Underkofler v. Cmty. Health Care Plan, Inc.*, No. 99-7838 2000 U.S. App. LEXIS 19040, at \*1 (2d Cir. Aug. 4, 2000) and *Veleanu v. Beth Israel Med. Ctr.*, 98 Civ. 7455 (VM), 2000 U.S. Dist. LEXIS 13948, at \*1 (S.D.N.Y. Sept. 24, 2000)).

16. See generally Carolyn S. Bratt, *Privacy and the Sex BFOQ: An Immodest Proposal*, 48 ALB. L. REV. 923 (1984); Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327 (1985-86); Kenneth W. Kingma, Comment, *Sex Discrimination Justified Under Title VII: Privacy Rights in Nursing Homes*, 14 VAL. U. L. REV. 577 (1979-80); Elsa M. Shartsis, Comment, *Privacy as Rationale for the Sex-Based BFOQ*, 1985 DETROIT C. L. REV. 865 (1985); Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977).

resurgence of commentary on the subject<sup>17</sup>—generally attacked the notion of accommodating customers' privacy-based preferences, they have given scant attention to the reasons for, and the implications of, the recent trend towards female OB-GYNs.

The first court that *does* have to address the precise question of gender preferences in the OB-GYN context will face some complex questions about anti-discrimination law and its desirable reach. Under Section 703 of Title VII of the Civil Rights Act, it is an unlawful employment practice to treat individuals differently because of their sex.<sup>18</sup> But Title VII also justifies differential treatment where sex is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>19</sup> The current formulation of this standard states that in order to qualify as a bona fide occupational qualification (“BFOQ”), a job qualification must relate to the “essence” or “central mission” of the employer’s business.<sup>20</sup> Courts will thus have to determine whether female sex is a BFOQ for practicing as an OB-GYN. This article both explores this specific question and, more broadly, proposes a new framework under which questions like these should be considered. In so doing, it reaches a conclusion opposite to that advanced by the majority of commentators who have written on the subject, some within the past year.

The question of whether there should be male OB-GYNs is not an easy one. In general, customer preferences for a particular gender do not alone justify a BFOQ. In the gender context, BFOQs are traditionally found when a particular gender is necessary for “authenticity or genuineness” (as in the case of an actor);<sup>21</sup> when certain sex-related characteristics are physically necessary to do the job-at-hand (as in the case of a sperm donor or a Playboy bunny<sup>22</sup>); or when only one gender is physically capable of safely performing the job-at-hand (as in the case of a parole officer in a maximum-security male prison).<sup>23</sup> Courts differentiate

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17. See generally Jillian B. Berman, Note, *Defining the “Essence of the Business”: An Analysis of Title VII’s Privacy BFOQ After Johnson Controls*, 67 U. CHI. L. REV. 749(2000); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L. J. 1257 (2003); Sharon M. McGowan, *The Bona Fide Body: Title VII’s Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77 (2003).

18. 42 U.S.C. § 2000e-2(a) (1994).

19. 42 U.S.C. § 2000e-2(e)(1) (1994).

20. See *infra* p. 369.

21. See, e.g., *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (discussing situations in which sex-linked elements of a job predominate); see also Sirota, *supra* note 16, at 1059-60 (discussing the interpretation of the authenticity/genuineness BFOQ).

22. See, e.g., *Wilson*, 517 F. Supp at 301 (noting the female BFOQ for Playboy bunnies).

23. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 333-37 (1977) (holding that an Alabama regulation under which women could not be hired as correctional counselors in

these cases from ones in which consumers merely *prefer* to be served by employees of a particular gender, as in the case of airline passengers who generally enjoy being served by female flight attendants,<sup>24</sup> or even in the case of a company with many Latin American associates who would refuse to deal with a female in a management position.<sup>25</sup>

Within the general rule that customer preferences for a particular gender do not justify a BFOQ, however, is a small exception generally known as the “privacy BFOQ.” This exception holds that in certain instances, consumers’ privacy interests can justify sex-based employment discrimination. The Supreme Court itself has not yet addressed the issue of whether customer privacy-based preferences can ever give rise to a BFOQ.<sup>26</sup> A number of lower courts, however, have found that customer privacy interests in prisons, restrooms, and—most importantly for the purposes of this article—healthcare institutions are sufficient to create a BFOQ.<sup>27</sup> For example, several courts have held that hospitals are entitled to employ only female nurses in their labor and delivery units.<sup>28</sup>

Even so, the case of the male OB-GYN presents a unique situation. As this article will discuss, in the cases where lower courts have found privacy BFOQs in the healthcare context, an important part of their reasoning typically relates to tradition—that is, the view that certain situations (for example, bathing an elderly woman in a nursing home) implicate bodily modesty interests that are so fundamental, ingrained, and deeply held that being of a particular gender is virtually necessary for effective job performance. By contrast, there is no question that male OB-GYNs are capable of performing their jobs; until recently, they were the norm. Although bodily modesty interests are certainly implicated in a gynecological examination, women’s long history of using male OB-GYNs

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contact positions at maximum-security all-male prisons was justified under the BFOQ exception).

24. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding that being female is not a BFOQ for a flight attendant position); *Wilson*, 517 F. Supp. at 296, 304 (holding that being female is not a BFOQ for a flight attendant).

25. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (holding that being male is not a BFOQ for a management position in a Latin American company even if many clients would refuse to deal with a female manager).

26. See, e.g., *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991) (stating that the Supreme Court has not addressed whether customer privacy-based preferences can give rise to a BFOQ).

27. See *infra* Part III (discussing privacy BFOQs created by several lower courts).

28. See *EEOC v. Mercy Health Ctr.*, No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 12256, at \*11-\*13 (W.D. Okla. Feb. 2, 1982) (holding that gender-based discrimination against male labor and delivery nurses was justified because of the expectant mother’s personal privacy interest); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981) (upholding a BFOQ for female labor and delivery nurses), *vacated on other grounds* by 671 F.2d 1100, 1102-03 (8th Cir. 1982); see also *infra* pp. 373-77.

demonstrates that these interests are not prohibitive in this context. Indeed, it seems clear that the choice of a female OB-GYN reflects a preference, not a literal necessity.

There are thus three potential paths toward resolving this issue. First, courts could “hold the line” and essentially keep the status quo in place; that is, they could refuse to extend the privacy BFOQ to this context, reasoning that even if female sex has been held to be a BFOQ for labor nursing positions, the prevalence of males in the OB-GYN field renders it absurd to declare female sex a BFOQ for OB-GYNs. Second, courts could contract the privacy BFOQ, reasoning that female sex should be a BFOQ for neither labor nurses nor OB-GYNs, given that men are capable of providing the healthcare services at the essence of these businesses. This is the path advocated by many commentators, who argue that the privacy BFOQ is fundamentally inconsistent with anti-discrimination law.<sup>29</sup> Third, courts could expand the privacy BFOQ, holding that female sex is a legitimate BFOQ for both labor nurses and OB-GYNs.

This article argues that the first path is both untenable and undesirable. For the doctrine to develop to the point that female sex is a BFOQ for a labor nurse—but not for the physician delivering the baby—would be profoundly inconsistent with Title VII. After all, the lack of a long history of female OB-GYNs (in contrast to the longstanding prevalence of female midwives and labor nurses) is directly related to the gender biases that used to dominate medicine.<sup>30</sup> Allowing these divergent histories to play a dispositive role in the analysis would therefore be deeply ironic. Moreover, the article argues that the general prevalence and long history of male OB-GYNs actually cuts both ways in the analysis. On the one hand, the predominance of males in the field makes the claim that female sex as a BFOQ for OB-GYNs seems incongruous, even somewhat silly. On the other hand, the fact that women are choosing female OB-GYNs in spite of the longstanding predominance of male OB-GYNs—and even in spite of their own personal history of using male OB-GYNs, often for many years—suggests that something other than uninformed, unthinking prejudice is at work here. Given that malignant biases were the fundamental evil against which Title VII was directed, it is strange indeed that indications of their absence could work in *favor* of finding a Title VII violation.

Although this article therefore argues strongly against treating labor nurses and OB-GYNs differently in the BFOQ analysis, it recognizes that a real choice still remains between the second path (rejecting the privacy

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29. See *infra* pp. 381-83 (discussing these commentators' positions).

30. See JUDITH WALZER LEAVITT, *BROUGHT TO BED: CHILD-BEARING IN AMERICA, 1750-1950*, 110-12 (1986) (noting that in 1900, only six percent of physicians in the United States were women).

BFOQ for both jobs) and the third path (expanding it so that it covers both types of jobs). This article argues in favor of the third path, and more generally, in favor of expanding the privacy BFOQ to protect interests other than bodily modesty. Although the article does not argue that differential pay is warranted—once a male OB-GYN is hired, for example, the law does and should require his employer to pay him the same salary and benefits as a similarly-situated female<sup>31</sup>—it does argue that employers should, in certain instances, be permitted to make hiring and firing decisions that take employee gender into account, even when physical modesty interests are not at stake. In making this argument, the article closely analyzes the nature of the trend toward female OB-GYNs, an assessment that is absent from recent commentators' articles on the subject.

This conclusion departs not only from the majority of commentators' positions, but also from case law precedent. As this article discusses in detail, courts have typically focused their inquiry only on whether a bodily modesty interest is implicated in the business. This article argues, however, that rather than making customer nudity the *sine qua non* for the establishment of a privacy BFOQ, courts should instead apply a broad, three-pronged test.

The first prong of this test would examine whether the customer preference is for *same-gender* service, as opposed to a general preference of male and female customers for a position to be filled by employees of only one gender (e.g., a general preference among airline passengers for female flight attendants). This article contends that preferences for same-gender care should be less presumptively suspect, because they do not necessarily rest on general stereotypes about the sexes (e.g., that only men should be firefighters, or that only females should be nurses) and because they have less potential to keep one gender entirely out of a certain field of employment. The second prong requires that the business at issue implicate privacy and/or therapeutic interests that are gender-related.<sup>32</sup>

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31. Doing otherwise is prohibited by the Equal Pay Act, which provides that:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1) (1998).

32. For example, the business at issue might frequently involve discussions between its customers and employees about intimate sexual concerns, or might require its employees to serve as role models for an all-female or all-male clientele. Whether or not a specific position implicates gender-related privacy or therapeutic interests would require a context-



This criterion thus expands the existing privacy BFOQ standard because it can be met by interests other than bodily modesty. Finally, as a backstop, the third prong requires that the preference for same-gender service not derive from malignant gender stereotypes (e.g., that women are less intelligent than men, or do not belong in positions of authority).

This article argues that when these three criteria have been satisfied, courts should be willing to recognize a BFOQ on the basis of customer preference. This revised BFOQ might continue to be referred to as the “privacy BFOQ” (with an understanding that it has been broadened to encompass “psychological privacy” interests). Alternatively, it could be referred to as a “privacy BFOQ” when privacy interests are primarily driving the preference for same-gender care, and as a “therapeutic BFOQ” when the interests at issue are more therapeutic in nature.<sup>33</sup>

Under this revised BFOQ test, female sex would be recognized as a BFOQ for OB-GYNs, and medical practices would not be liable for favoring female OB-GYNs in employment decisions. This reformulation of the BFOQ defense would also have implications beyond the specific question of the male OB-GYN. By explicitly moving beyond the current formulation of the privacy BFOQ defense, it would allow far more gender-based employment decisions than are currently permissible in the law. Most obviously, it would have dramatic implications in the healthcare context, not only in medical practices, but also in settings such as mental health facilities and gyms, since these businesses also frequently implicate gender-related privacy and/or therapeutic interests, which in turn often prompt customer preferences for same-gender care. Depending on the specific context, such preferences can often stem from the heightened ability for the caregiver to serve as a role model, the greater comfort in discussing intimate concerns with the caregiver, and/or the caregiver’s shared physicality and firsthand experience with the same gender-related concerns that his or her customers or patients have. This revised BFOQ would permit employers to respond to these preferences even when no nudity on the part of the customer is involved.

Such an expansion of the privacy BFOQ would be consistent with the purposes of Title VII and the BFOQ exception. This article argues that within the context of gender discrimination, Title VII should be interpreted fundamentally as preventing gender-based employment decisions that are

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specific inquiry.

33. Of course, as illustrated *infra*, the distinction between privacy and therapeutic interests are not always obvious; a woman’s discomfort in discussing intimate sexual concerns with a male physician could be seen as embodying both types of interests. Other times, the distinction is clearer; nurse and nurse’s aide positions typically implicate only privacy interests, whereas counselor positions with significant role-modeling functions fall more into the “therapeutic” category.

based on and/or perpetuate malignant and detrimental characterizations of the sexes. The very fact that a BFOQ exception exists in the gender discrimination context—as opposed to the racial discrimination context, in which there is no such exception—underscores this point. Thus, when the job at issue truly implicates privacy or therapeutic concerns that are gender-related, and the evidence indicates that customer preferences derive from these concerns rather than malignant gender biases, it is consistent with Title VII and the “essence of the business standard”<sup>34</sup> to recognize gender as a BFOQ.

As mentioned above, and as discussed at greater length in this article, there are a number of ways that same-gender care in certain professions—particularly the healthcare professions—can directly lead to increased effectiveness in the services provided. Moreover, it is particularly appropriate that this article’s proposed reformulation would expand the BFOQ defense in the healthcare world, given that (as is shortly discussed in greater detail) Title VII’s legislative history reveals that Congress recognized the heightened importance of the BFOQ defense in the healthcare setting. This article is thus limited to delineating and analyzing how the reformulated BFOQ would play out in the healthcare context, particularly using the case study of the male OB-GYN. The proposal, however, is general in nature and is certainly applicable to other employment settings that implicate gender-related privacy or therapeutic concerns.

The article proceeds in three main parts. First, it discusses the general case law surrounding customer preferences for a particular gender, looking at the enactment and development of the BFOQ defense, particularly in the context of customer preferences. It argues that the courts’ general rejection of the customer preference rationale for BFOQs was entirely appropriate, given that these preferences typically reflected malignant gender biases—most often, chauvinistic attitudes that result in female subordination.

Second, the article examines the rise of the privacy BFOQ. It argues that the courts were correct in recognizing the privacy BFOQ, given the qualitatively different nature of the customer preferences at issue in these cases. It acknowledges that the critical commentary regarding the privacy BFOQ is largely negative, but suggests that these commentators tend to incorrectly assume that customer preferences for same-gender healthcare necessarily derive from unconscious prejudices about “appropriate” gender roles and women’s sexual vulnerability. In making this argument, the article highlights the reasons that actual patients of female OB-GYNs have given for preferring same-gender gynecological care. Moreover, the article argues that courts have not gone far enough in recognizing BFOQs in the

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34. See *infra* pp. 369-72 (describing the essence of the business standard).

healthcare context. In so doing, it identifies cases in which courts explicitly refused to find a gender BFOQ despite the considerable gender-related therapeutic interests implicated by the employment position in question, simply because of their belief that only bodily privacy interests could justify a BFOQ. The article suggests that the privacy BFOQ should be broadened, based on the three criteria described above, to cover a wider range of cases.

The article's final section turns to the specific issues surrounding the male OB-GYN. It analyzes how a discrimination lawsuit brought by a male OB-GYN would likely be addressed under the current doctrine, and then evaluates how the case would be considered under the reformulated BFOQ.

## II. OVERVIEW: CUSTOMER PREFERENCES AND THE GENDER BFOQ

The BFOQ defense to gender-based discrimination was added to the Civil Rights Act<sup>35</sup> on February 10, 1964, in the House's final stages of deliberation over the Act.<sup>36</sup> Representative Goodell of New York, noting that the Act already included a BFOQ defense for religious and national origin discrimination, suggested amending it to include sex as well. Interestingly enough, Representative Goodell appealed specifically to the healthcare world, stating:

There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are bona fide occupational qualifications, and it seems to me they would be properly considered here as an exception.<sup>37</sup>

The amendment was soon added, with the drafter of the original BFOQ defense indicating that his initial omission of sex had simply been an oversight. No opposition to the BFOQ defense is apparent from the *Congressional Record*; support for the change appears to have been unanimous.<sup>38</sup> Indeed, after the alteration was made, one legislator—

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35. 42 U.S.C. § 2000e-2(e)(1) (1994).

36. See generally Sirota, *supra* note 16, at 1027-33 (describing the legislative history behind the inclusion of Title VII sex discrimination and BFOQ provisions into the Civil Rights Act of 1964). Title VII was extended to prohibit sex discrimination on February 8, 1964. See 110 CONG. REC. 2577 (1964) (statement of Rep. Smith) (“[T]his amendment is offered to the fair employment practices title of this bill to include within our desire to prevent discrimination against another minority group, the women . . .”). The BFOQ was expanded to cover sex on February 10, 1964. *Id.* at 2718.

37. *Id.* at 2718 (statement of Rep. Goodell).

38. *Id.* at 2718 (indicating that there was a “unanimous-consent request that those words be added”).

Representative Green of Oregon—reiterated the importance of the BFOQ defense to gender-based discrimination in the healthcare world. She posed the following hypothetical:

In a large hospital an elderly woman needs special round-the-clock nursing. Her family is seeking to find a fully qualified registered nurse. It does not make any difference to this family if the nurse is a white or a Negro or a Chinese or a Japanese if she is fully qualified. But it does make a great deal of difference to this elderly woman and her family as to whether this qualified nurse is a man or a woman. Under the terms of the amendment adopted last Saturday [whereby Title VII was expanded to prohibit gender discrimination] the hospital could not advertise for a woman registered nurse because under the amendment by the gentleman from Virginia [Rep. Smith] this would be discrimination based on sex. The suggestion of the gentleman of New York [Rep. Goodell] helped a great deal, however.<sup>39</sup>

The only other elaboration of the BFOQ defense in Title VII's legislative history can be found in two related documents that were submitted to Congress on April 8, 1964. The first, an Interpretive Memorandum on Title VII submitted by Senators Clark and Case on April 8, 1964, stated:

[I]t would not be an unlawful employment practice to hire or employ employees of a particular religion, sex, or national origin in those situations where religion, sex, or national origin is a bona fide occupational qualification for the job. This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence. This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.<sup>40</sup>

The second was a memorandum prepared by Senator Clark in response to various questions that had previously been posed by Senator Dirksen.<sup>41</sup> This dialogue reads as follows:

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39. *Id.* at 2720 (statement of Rep. Green).

40. *Id.* at 7213.

41. *Id.* at 7217 (statement of Sen. Clark).

*Question.* Now I turn to discrimination on account of sex. Frankly, I always like to discriminate in favor of the fairer sex. I hope that the might of the Federal Government will not enjoin me from such discrimination. But let us look further at this provision. Historically, discrimination because of sex has been a protective discrimination because we do not believe that women should do heavy manual labor of the sort which falls to the lot of some men. This is not true, of course, in some other countries where we see pictures of women working on the roads and in the mines. Then, too, we discriminate in favor of women because of nimble abilities in many fields, such as the assembly of radios and delicate instruments and machines. Where the discrimination is not in the best interest of the fairer sex we have approached the problem by specific prohibitions such as the requirement of equal pay for women doing the same work as men.

*Answer.* Wherever sex is a bona fide qualification or disqualification for a particular job, [T]itle VII does not require that equal job opportunity be given to both sexes.<sup>42</sup>

Thus, the legislative history of the BFOQ (scant though it is)—along with the relatively permissive statutory language that gender-based discrimination is permissible when “sex . . . is a bona fide occupational qualification *reasonably* necessary to the normal operation of that particular business or enterprise”<sup>43</sup>—suggests that Congress intended the BFOQ defense to have a fairly broad effect. As Michael Sirota notes, however, since the Civil Rights Act’s passage, “[b]oth the courts and the Equal Employment Opportunity Commission [EEOC] have interpreted the BFOQ provision narrowly . . . and have allowed BFOQs only in very limited circumstances.”<sup>44</sup>

Indeed, the general rule regarding gender-based BFOQs is that customer preferences are insufficient to create a BFOQ. This rule derives from the conjunction of two seminal Fifth Circuit cases: the 1969 case of *Weeks v. Southern Bell Telephone & Telegraph Co.*<sup>45</sup> and the 1971 case of *Diaz v. Pan American World Airways, Inc.*<sup>46</sup> The *Weeks* court, evaluating a BFOQ question in a context *not* involving customer preferences, framed the issue as whether the employer could demonstrate “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.”<sup>47</sup> Two years later, the

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42. *Id.* (emphasis added).

43. 42 U.S.C. § 2000e-2(e)(1) (1994) (emphasis added).

44. See Sirota, *supra* note 16, at 1026.

45. 408 F.2d 228 (5th Cir. 1969).

46. 442 F.2d 385 (5th Cir. 1971).

47. *Weeks*, 408 F.2d at 235.

*Diaz* court, evaluating a BFOQ question in the customer preference context, elaborated on this standard. It stated that customer preferences for a particular gender could justify a BFOQ “only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.”<sup>48</sup>

Together, the *Weeks* and *Diaz* tests can be seen as creating a two-pronged—and very stringent—inquiry.<sup>49</sup> One prong involves the assessment of whether the job duties under consideration require that the worker be of one sex only (that is, whether only one sex can perform those duties safely and efficiently). The other prong—which has generally become the dominant prong in assessing BFOQ claims—examines whether those duties are reasonably necessary to convey the essence of the employer’s business.

Applying this rigorous standard, courts have repeatedly rejected the argument that customer preferences can justify a gender-based BFOQ. For the most part, such cases have arisen in contexts where customer preferences for or against women have reflected—either subtly or overtly—chauvinistic attitudes toward females as subservient, inferior, and/or worthy of objectification. The *Diaz* case itself provides a good example of the attitude towards women that often drove these preferences. There, the defendant employer, Pan American World Airways, Inc. (Pan Am), argued that female sex was a BFOQ for flight attendants because passengers “overwhelmingly preferred to be served by female stewardesses.”<sup>50</sup> Pan Am highlighted female flight attendants’ allegedly superior abilities in the non-mechanical aspects of the job, such as “providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible . . . .”<sup>51</sup> The *Diaz* court appropriately rejected the argument that customers’ preferences that they be served by women justified a BFOQ, explaining that the “primary function of an airline is to transport passengers safely from one point to another” and that female flight attendants’ superior abilities to enhance the flight environment were only tangential to that function.<sup>52</sup>

In other cases, stereotypic attitudes regarding women’s “proper place” have even more blatantly shaped preferences for employees of a particular

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48. *Diaz*, 442 F.2d at 388.

49. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-36 (5th Cir. 1976) (describing in greater detail the relevant inquiry under the *Weeks* and *Diaz* tests); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 299 (N.D. Tex. 1981) (describing the *Weeks* and *Diaz* decisions as having “given rise to a two step BFOQ test.”).

50. *Diaz*, 442 F.2d at 387 (summarizing evidence submitted by Pan Am in regard to its experience with hiring male and female cabin attendants).

51. *Id.*

52. *Id.* at 388.

gender. In *Fernandez v. Wynn Oil Co.*,<sup>53</sup> for example, Wynn Oil Company (Wynn) argued that being male was a BFOQ for a particular management position that required significant contact with its Latin American distributors and clients.<sup>54</sup> Wynn argued that a female would not be able to attract and do business with the company's Latin American associates because many of them "would be offended by a woman conducting business meetings in her hotel room."<sup>55</sup> Wynn's regional manager stated explicitly that a woman in a high-level management position would not be accepted by these associates because "of the prevalent mores relating to the proper roles of men and women in those countries."<sup>56</sup> The district court, applying *Diaz*, concluded that male gender was indeed a BFOQ for the position, stating that "[a]s quaint as that notion appears to the American mind, it is a very real and formidable obstacle to the success of any business enterprise in South America."<sup>57</sup> The Ninth Circuit, however, disagreed, stating that "stereotypic impressions of male and female roles do not qualify gender as a BFOQ" and that foreign customs should not be permitted to limit the enforcement of Title VII in the United States.<sup>58</sup> Although the Ninth Circuit did affirm the district court's ruling on other grounds,<sup>59</sup> it left no doubt that in its view, the facts presented by Wynn did not give rise to a BFOQ.

*Diaz* and *Fernandez* both illustrate how traditional conceptions about the genders' "proper roles" can lead to preferences for employees of a particular gender. The case of *Wilson v. Southwest Airlines Co.*,<sup>60</sup> meanwhile, illustrates how objectifying attitudes toward women can also result in such preferences. Southwest Airlines Co. (Southwest), whose clientele primarily included male businessmen, adopted a marketing strategy whereby it actively promoted its ability to provide "tender loving care" to its passengers.<sup>61</sup> It dressed its flight attendants in "high boots and hot-pants," featured them in advertisements designed to showcase their attractiveness, and encouraged them to "maintain an atmosphere of

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53. No. CV-78-0160, 1979 U.S. Dist. LEXIS 10704 (C.D. Cal. July 30, 1979), *aff'd*, 653 F.2d 1273 (9th Cir. 1981).

54. *Fernandez*, 1979 U.S. Dist. LEXIS, at \*3-\*5. Wynn did not acknowledge that it had discriminated on the basis of gender in the plaintiff's case; it merely argued that if it had done so, the BFOQ defense would have protected it. *Id.* at \*3.

55. *Id.* at \*4.

56. *Id.* at \*5.

57. *Id.* at \*10-\*11.

58. *Fernandez*, 653 F.2d at 1276-77 (9th Cir. 1981).

59. The court agreed with Wynn's contention, and the finding of the district court, that Wynn's decision not to promote the plaintiff had been based not on her gender, but rather on her lack of qualifications. *Id.* at 1275-76.

60. 517 F. Supp. 292 (N.D. Tex. 1981).

61. *Id.* at 294.

informality and ‘fun’ during flights.”<sup>62</sup> When faced with a claim of gender discrimination brought by rejected male applicants, Southwest argued that having exclusively female flight attendants was essential to its business because of its identity as the “love airline.”<sup>63</sup> The district court, however, concluded that even if Southwest’s “love image” had indeed enhanced its ability to attract passengers, being female still did not constitute a BFOQ for these positions.<sup>64</sup> The court emphasized that despite Southwest’s marketing strategy, its primary business function was still the transportation of passengers,<sup>65</sup> and that “sex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability.”<sup>66</sup>

The courts have thus appropriately made clear, through their rigorous application of the “essence of the business” test, that customer preferences deriving from chauvinistic or biased attitudes will not justify gender BFOQs. Although the Supreme Court has not itself addressed a case in which a BFOQ was alleged to exist based on customer preferences, its statements on the general subject of BFOQs have indicated its approval of the “essence of the business” test, and its belief that BFOQs should be construed narrowly. In *Dothard v. Rawlinson*,<sup>67</sup> for example, the Court stated that “the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex,” and that Title VII was intended to prohibit the refusal “to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.”<sup>68</sup> In the Court’s most recent ruling on the BFOQ standard, *Automobile Workers v. Johnson Controls, Inc.*,<sup>69</sup> the majority framed its opinion around the “essence of the business” standard, holding invalid employer Johnson Controls’ practice of excluding women who were capable of childbearing from battery-making jobs that exposed them to lead.<sup>70</sup> The Court emphasized that in order to qualify as a BFOQ, a job qualification must relate to the “‘essence’” or to the “central mission of the employer’s business.”<sup>71</sup> Since the women’s fertility did not “actually interfere[] with [their] ability to perform the job”<sup>72</sup> of battery-making, the Court concluded that being a male (or a woman whose inability to bear children was

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62. *Id.* at 295.

63. *Id.* at 294-95.

64. *Id.* at 302-03.

65. *Id.* at 302.

66. *Id.* at 303.

67. 433 U.S. 321 (1977).

68. *Id.* at 333-34.

69. 499 U.S. 187 (1991).

70. *Id.* at 211.

71. *Id.* at 203 (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)).

72. *Johnson Controls*, 499 U.S. at 204.



medically documented) did not constitute a BFOQ.<sup>73</sup>

Thus, there is clearly a widely-enforced presumption against allowing customer preferences to give rise to a BFOQ, as enforced by a stringent “essence of the business” standard whereby courts narrowly define the fundamental nature of the employer’s business. This presumption, however, is not absolute, as evidenced by the development of the privacy BFOQ, to which this article now turns.

### III. THE PRIVACY BFOQ: AN EXCEPTION TO THE RULE AGAINST CUSTOMER PREFERENCES

Within the general framework described above, courts have carved out a small exception to deal with cases in which customer preferences for employees of a particular gender affects their privacy interests. These cases generally arise in three main contexts: prisons (where the “customers” are prisoners);<sup>74</sup> janitorial settings;<sup>75</sup> and healthcare facilities such as hospitals, medical practices, mental health centers, and gyms. This article, as noted above, focuses on the privacy BFOQ in the healthcare world.

In contrast to the general presumption against allowing customer preferences to create a BFOQ, courts have been quite willing to recognize a BFOQ when a customer’s privacy interests are implicated. They typically use a two-part test. First, they evaluate whether using employees of a particular gender implicates the “essence of the business,” looking at whether bodily modesty interests are at stake. Second, they analyze whether the employer can selectively assign job responsibilities to minimize the privacy clashes that would otherwise ensue.

The first court to confront this issue in the healthcare context was the District Court of Delaware, in the case of *Fesel v. Masonic Home of Delaware, Inc.*<sup>76</sup> In *Fesel*, the court considered a case in which a male nurse was suing the Masonic Home, a small nursing home with a population of twenty-two women and eight men.<sup>77</sup> The Masonic Home

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73. *Id.* at 206.

74. *See, e.g.,* Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998) (affirming the dismissal of male corrections officers’ complaint regarding gender-based staffing assignments at a female prison); Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994) (reversing the dismissal of male inmate’s complaint regarding strip searches conducted by female guards).

75. *See, e.g.,* Hernandez v. Univ. of St. Thomas, 793 F. Supp. 214 (D. Minn. 1992) (holding that the defendant university had raised a genuine issue of material fact as to whether female sex was a BFOQ for custodial work in a women’s dormitory); Norwood v. Dale Maint. Sys., 590 F. Supp. 1410 (N.D. Ill. 1984) (holding that male sex was a BFOQ for a janitorial position in a male restroom during daylight hours).

76. 447 F. Supp. 1346 (D. Del. 1978).

77. *Id.* at 1348.

(Home) had told the plaintiff that it would not hire a male nurse's aide because of its belief—supported by documentary evidence from a number of the Home's female patients and their families—that its female patients would object to having a male nurse's aide assist them with activities involving intimate personal care.<sup>78</sup> In its motion for summary judgment, the Home argued that being female was a BFOQ for the position.<sup>79</sup> The district court, finding that further factual development was necessary, denied the Home's motion.<sup>80</sup>

At trial, the court directed a verdict for the Home.<sup>81</sup> In reaching this conclusion, the *Fesel* court first applied the “essence of the business” test, noting that to prevail, the Home had to demonstrate a factual basis for its belief that hiring males “would undermine the essence of its business operation.”<sup>82</sup> The court ruled that the Home had satisfied this prong, stressing the considerable bodily modesty interests at stake:

The Home has the responsibility of providing twenty-four hour supervision and care of its elderly guests. Fulfillment of that responsibility necessitates intimate personal care including dressing, bathing, toilet assistance, geriatric pad changes and catheter care. Each of these functions involves a personal touching as to which each guest is privileged by law to discriminate on any basis. Because our tort and criminal laws recognize these personal privacy interests, the Home cannot legally force its female guests to accept personal care from males. Since it is clear that a substantial portion of the female guests will not consent to such care, it follows that the sex of the nurse's aides at the Home is crucial to successful job performance.<sup>83</sup>

The court then recognized an additional prong specific to the establishment of a privacy BFOQ: the employer must show that “due to the nature of the operation of the business, it would not be feasible to assign job responsibilities in a selective manner so as to avoid a collision with the privacy rights of the customers.”<sup>84</sup> Here, too, the *Fesel* court concluded that the Home had met its burden.<sup>85</sup>

The *Fesel* court's approach has been followed by other courts that have addressed similar situations. In *Backus v. Baptist Medical Center*,<sup>86</sup>

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78. *Id.* at 1352.

79. *Fesel v. Masonic Home of Del., Inc.*, 428 F. Supp. 573, 574 (D. Del. 1977).

80. *Id.* at 574.

81. *Fesel*, 447 F. Supp. at 1354.

82. *Id.* at 1350.

83. *Id.* at 1352-53.

84. *Id.* at 1351.

85. *Id.* at 1353.

86. 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds by* 671 F.2d 1100 (8th Cir. 1982).

for example, a male nurse sued after his employer, a hospital, refused his request for a full-time position in the labor and delivery unit.<sup>87</sup> The hospital, highlighting the intimate nature of the position (which included “checking the cervix for dilation, shaving the perineum, giving an enema, assisting in the expulsion of the enema and sterilizing the vaginal area”),<sup>88</sup> argued that female sex was a BFOQ.<sup>89</sup> The *Backus* court, applying the two-part test used in *Fesel*, agreed.<sup>90</sup>

Similarly, in *EEOC v. Mercy Health Center*, the court was quick to conclude that female gender was a BFOQ for a staff nurse position in the labor and delivery area.<sup>91</sup> The court stressed that the staff nurses’ duties required “not only substantial contact with the mother’s genitalia but also substantial invasion of the mother’s body,”<sup>92</sup> and that a substantial number of patients had expressed discomfort with the use of male nurses.<sup>93</sup> The court also accepted the hospital’s contention that it was not feasible to assign job duties in a way that would alleviate these concerns.<sup>94</sup>

It is critical to note that not all healthcare cases involve situations where females are the preferred sex. In *Jones v. Hinds General Hospital*,<sup>95</sup> a female nursing assistant sued her employer after she was laid off even though male orderlies with less seniority were retained.<sup>96</sup> Here, the hospital did not argue that being male was a BFOQ for the particular nursing assistant position in question; rather, it argued that having a certain *number* of male employees (as nursing assistants and orderlies) was necessary to protect the privacy interests of its male patients.<sup>97</sup> The hospital explained that various functions performed by nursing assistants or orderlies (such as catheterization) entailed “the manipulation or exposure of patients’ genitalia or other private areas of their bodies,” such that same-gender care was often needed.<sup>98</sup> It argued that because prior to the layoffs the hospital employed more females than males, it was justified in terminating only women.<sup>99</sup> The court agreed, placing weight on the testimony of one of the hospital’s doctors that some of the older male patients were “terribly modest and [became] quite upset at the prospect of female nursing

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87. *Id.* at 1192.

88. *Id.* at 1193.

89. *Id.*

90. *Id.*

91. No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 11256, at \*13 (W.D. Okla. Feb. 2, 1982).

92. *Id.* at \*5.

93. *Id.* at \*7.

94. *Id.* at \*13.

95. 666 F. Supp. 933 (S.D. Miss. 1987).

96. *Id.* at 934.

97. *Id.* at 935.

98. *Id.* at 935.

99. *Id.* at 935.

assistants viewing or touching their private areas,”<sup>100</sup> and finding that “there were no reasonable scheduling alternatives available that could have been used by the Hospital to preserve privacy interests of male patients.”<sup>101</sup>

The Supreme Court, without expressly addressing the legitimacy of the privacy BFOQ, has implied that it might well be valid in certain circumstances, notwithstanding the stringent “essence of the business” standard. When Justice White suggested in *Automobile Workers v. Johnson Controls*<sup>102</sup> that the Court’s strict application of the “essence of the business” test would render the privacy BFOQ invalid,<sup>103</sup> the majority explicitly disagreed, writing:

Justice White predicts that our reaffirmation of the narrowness of the BFOQ defense will preclude considerations of privacy as a basis for sex-based discrimination. We have never addressed privacy-based sex discrimination and shall not do so here because the sex-based discrimination at issue today does not involve the privacy interests of Johnson Controls’ customers. Nothing in our discussion of the “essence of the business test,” however, suggests that sex could not constitute a BFOQ when privacy interests are implicated.<sup>104</sup>

Thus, both explicitly and implicitly, courts have expressed support for the argument that customer preferences stemming from privacy interests are qualitatively different from typical customer preferences for service from a particular gender. The *Backus* court, for example, referred to the “distinction between a privacy right and a mere customer preference.”<sup>105</sup> Why have courts been so much more deferential in these cases? The courts’ explicit language has focused largely on the traditional bodily modesty interests implicated in these businesses. Beneath the surface, however, three distinctive features of these cases render them qualitatively different from the typical customer preference cases.

First, the privacy cases relate to preferences for same-gender service, rather than a general sentiment that only men or only women belong in a certain position. This contrasts markedly with cases like *Diaz*<sup>106</sup> and *Southwest*,<sup>107</sup> in which the defendant airlines tried to argue that both male

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100. *Id.* at 936.

101. *Id.* at 937.

102. 499 U.S. 187 (1991).

103. *Id.* at 220 n.8 (White, J., concurring) (“The Court’s interpretation of the BFOQ standard also would seem to preclude considerations of privacy as a basis for sex-based discrimination, since those considerations do not relate directly to an employee’s physical ability to perform the duties of the job.”).

104. *Id.* at 206 n.4.

105. *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1194 (E.D. Ark. 1981).

106. *Diaz v. Pan Am. World Airways*, 422 F.2d 385 (5th Cir. 1971).

107. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

and female passengers were simply more comfortable being served by women, or that a predominantly male passenger group enjoyed receiving “tender loving care” from female flight attendants. Such arguments have two problems: first, they are often correlated with traditional, stereotyped views about appropriate “gender roles”; and second, they have the potential to keep one gender entirely out of a field of employment. Had the defendants in *Diaz* or *Southwest* prevailed, males might have been unable to obtain jobs as flight attendants. On the contrary, the holdings in the privacy BFOQ cases described above did not have the potential to keep males or females entirely out of the field of nursing, as illustrated by the juxtaposition of *Backus* (female patients’ preferences for female intimate care) and *Hinds*<sup>108</sup> (male patients’ preferences for male intimate care).

Second, in the privacy cases described above, the courts agreed that the essence of the businesses at issue implicated gender-related privacy interests. They explicitly emphasized the bodily privacy interests at stake in the relevant nursing positions. The *Backus* court, for example, stressed that the obstetric ward of the hospital was a “unique section,” because “[a]n obstetrical patient constantly has her genitalia exposed.”<sup>109</sup> Similarly, the *Mercy* court emphasized that a labor patient would experience “medically undesired tension” were a male nurse to perform upon her the “sensitive and intimate duties” inherent in the job.<sup>110</sup> There appears to have been little doubt in the courts’ minds that these intimate duties went to the essence of the nursing positions at issue.

Third, the courts largely indicated that in their view, malignant or chauvinistic stereotypes were not driving customer preferences for same-gender care. This attitude was not universal; the *Fesel* court stated that it viewed the elderly women’s desire for female nurses as “undoubtedly attributable to their upbringing and to sexual stereotyping of the past.”<sup>111</sup> The other courts, however, suggested that they viewed the preferences for same-gender care as a natural result of the human inclination toward modesty, rather than as a result of sexual stereotyping. The *Backus* court, for instance, approvingly quoted an employment law treatise’s statement that “[g]iving respect to deep-seated feeling of personal privacy involving one’s own genital area is quite a different matter from catering to the desire of some male airline passenger to have . . . an attractive stewardess.”<sup>112</sup> The *Hinds* opinion also stressed the modesty concerns at issue, with no

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108. *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987).

109. *Backus*, 510 F. Supp. at 1193.

110. *EEOC v. Mercy Health Ctr.*, No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 12256 at \*12 (W.D. Okla. Feb. 2, 1982).

111. *Fesel v. Masonic Home of Del.*, 447 F. Supp. 1346, 1352 (D. Del. 1978).

112. *Backus*, 510 F. Supp. at 1194 (quoting 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 43.02[3][b] (2d ed. 1997) (internal quotation marks omitted)).

suggestion that it viewed gender bias as playing a role in customer preferences.<sup>113</sup> Interestingly, the *Mercy* court specifically pointed out that the labor patients had made no complaints “regarding the race or national origin of the staff nurses or student nurses,”<sup>114</sup> but had only expressed concern about their gender. The court likely chose to include this point—which is otherwise of dubious relevance to the actual issue at hand—because it wanted to emphasize that the patients were not bigots, but merely concerned about gender privacy in a particularly intimate realm.

These three factors render the privacy cases qualitatively different from the typical customer preference cases, such that courts have appropriately treated them differently. Most commentators, however, have argued strongly against the privacy BFOQ, contending that it reflects malignant gender biases. They suggest that the privacy BFOQ contradicts the purpose of Title VII because it ratifies and “freezes” traditional attitudes toward appropriate gender roles.

Interestingly, many of these articles were authored during the 1970s and 1980s, when the privacy BFOQ was first developing, partially in response to female patients’ preferences for female labor nurses. For example, Michael Sirota wrote in 1977 that:

If Title VII were construed to permit cautious employers to invoke the privacy claim on behalf of their customers, traditional employment roles would remain frozen. . . . While the presence of members of the opposite sex may initially shock or surprise customers, repeated exposure eventually may result in customer acceptance of the new work roles.<sup>115</sup>

Eight years later, in response to decisions like *Fesel* and *Backus*, Deborah Calloway wrote that “by embracing third party privacy interests, the lower courts have unduly broadened the bfoq defense. . . . By expanding the defense to encompass privacy interests, courts permit employers to discriminate on the basis of customer preferences and community standards regarding appropriate male and female jobs.”<sup>116</sup> Like Sirota, Calloway was particularly concerned about the potential for the privacy BFOQ to “freeze” community mores. She wrote:

By enacting Title VII Congress intended to remove artificial barriers that “operate to ‘freeze’ the status quo of prior discriminatory employment practices.” If the bfoq defense permits employers to hire employees on the basis of the community’s assumptions, stereotypes and preferences, the exception swallows the rule because even widely shared social

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113. *Hinds*, 666 F. Supp. at 936.

114. *Mercy*, 1982 U.S. Dist. LEXIS 12256, at \*7.

115. Sirota, *supra* note 16, at 1065.

116. Calloway, *supra* note 16, at 350-51.

norms frequently are motivated by discriminatory animus or the products of past discrimination.<sup>117</sup>

Ironically enough, in support of this anti-freezing argument, virtually all of these commentators explicitly pointed to the prevalence of male OB-GYNs. They argued that the predominantly male nature of the OB-GYN profession proved that women's bodily privacy interests were not prohibitive; thus, any asserted privacy interests in the desire for female labor nurses were largely a cover for conscious or unconscious discriminatory views about appropriate gender roles. Calloway, for instance, noted that "[f]emale patients accept treatment by male doctors and, when asked, even express a preference for male doctors. . . . [S]ocial norms often reflect stereotyped notions of appropriate male and female roles and privacy interests are asserted when women or men try to break into occupations traditionally held by the opposite sex."<sup>118</sup>

Carolyn Bratt, writing in 1984, stated:

[F]emale patients may suffer embarrassment from bodily care provided by male nurses despite their acceptance of treatment by male gynecologists and obstetricians.

In effect, these patients have an expectation that nurses will be female and doctors will be male. Surprise and sometimes shock may occur when a patient discovers females and males performing non-traditional medical roles.<sup>119</sup>

Similarly, Kenneth Kingma wrote in 1980 of *Fesel*: "Respect existed for the male gynecologist but not for a male nurse's aide. . . . [The court's ruling] perpetuated the prejudiced view toward male aides, and failed to carry out the forward-looking purposes of Title VII, namely, to prohibit unfair and stereotyped employment practices."<sup>120</sup>

Likewise, Elsa Shartsis, writing in 1985, commented:

[M]ost obstetrician-gynecologists are men, apparently to the satisfaction of their patients. That men have enjoyed a paternalistic, managerial status, as compared to that of women, is an accepted fact in our society. . . . So while a woman's sense of bodily privacy may dictate that she refuse gynecological care by a male physician, the man's traditional professional status overcomes the patient's reticence. The male nurse, however, may not share this professional edge.<sup>121</sup>

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117. *Id.* at 359 (internal citations omitted).

118. *Id.* at 361 (internal citations omitted).

119. Bratt, *supra* note 16, at 946.

120. Kingma, *supra* note 16, at 590.

121. Shartsis, *supra* note 16, at 894-95.

She thus concluded that women's discomfort with male nurses was merely due to a "cultural lag."<sup>122</sup>

Two decades later, there is an obvious irony to these arguments. Now that women actually have the option of selecting female OB-GYNs, they are doing so in droves. This phenomenon casts doubt on the frequent argument that customer preferences for same-gender care necessarily derive from traditional stereotypes about gender roles. Indeed, quotations by numerous female patients and OB-GYNs collected from newspaper articles documenting the trend toward female OB-GYNs suggest that qualitatively different interests are driving these preferences.

One theme that echoes among many female patients is their desire to have a doctor who has undergone similar physical experiences, from gynecological examinations to physical changes such as menopause. Sandy Hudgins-Brewer, a female nurse practitioner who does gynecological exams, stated that young females coming in for their first Pap smear often prefer to see her, because she can relate to their concerns.<sup>123</sup> "I remember my first Pap real well and I was scared out of my mind," she said.<sup>124</sup> She also reported that many menopausal women tell her that it is difficult to discuss their symptoms with male doctors who have never experienced menopause.<sup>125</sup> Dr. Judith Ortman-Nabi said that when she was in practice with male physicians, female patients would seek her out, stating, "I want to speak with the female doctor. I'm so-and-so's patient, but since you're a woman you could [sic] talk about menopause."<sup>126</sup> Amy Gallagher, a patient who has used female OB-GYNs and nurse-midwives, stated that it was important to her to have a female healthcare provider during her pregnancy.<sup>127</sup> "There is so much going on spiritually, emotionally and physically that you need someone who has been through those experiences before," she explained.<sup>128</sup> Dr. Lauren Streicher, an OB-GYN practicing in an all-female practice, reported that patients are particularly attracted to the idea of having obstetricians who have themselves given birth,<sup>129</sup> a sentiment echoed by patient Peggy Hamilton. Hamilton explained that her choice to see a female OB-GYN was "about going to someone who had had two children and knew what labor was all about."<sup>130</sup>

A related theme was that female patients feel more comfortable

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122. *Id.* at 895.

123. Jordan, *supra* note 10, at 13.

124. *Id.*

125. *Id.*

126. Peradotto, *supra* note 13, at 1D.

127. *Id.*

128. *Id.*

129. Condor, *supra* note 8, at 8.

130. Ladd, *supra* note 6, at D1.



discussing intimate topics with female OB-GYNs. Dr. Sheri Baczkowski stated that “[w]e see a lot of teen-agers [sic] who have menstrual problems that they don’t want to talk about with a man, or teens who are concerned about their body image.”<sup>131</sup> Dr. Diana Collins explained that some patients “want to discuss very personal things, to do with their sex lives, their libido, things they say ‘I couldn’t tell a man.’”<sup>132</sup> Kristi Amfahr, a patient, stated that she “[couldn’t] imagine talking to a male doctor about sex or ‘anything intimate.’”<sup>133</sup> She reflected, “[s]ay there was some really embarrassing issue I had to talk about, like something hormonal . . . I would feel more secure talking to a woman.”<sup>134</sup> In fact, Dr. Linn Parsons, an OB-GYN professor at Bowman Gray School of Medicine, stated that a six-month study of male and female residents indicated that female patients are particularly drawn to female OB-GYNs when their medical needs implicate therapeutic concerns. She reported that women patients seemed to choose “women doctors based on what their complaint was,” as evidenced by the fact that the female residents “saw more menopausal complaints, PMS, marital and sexual problems—the type of problem[s] that often take[ ] a lot more time in terms of counseling.”<sup>135</sup>

That the choice of female OB-GYNs is not simply due to traditional mores or stereotypes is underscored by the fact that many patients, such as Lewis, Hudgins-Brewer, Morgan-Mann, Ruth Bergdorf,<sup>136</sup> Pat Kellogg Friedman,<sup>137</sup> Judy Kaven,<sup>138</sup> Rachel Powers,<sup>139</sup> and Barbara Spruill<sup>140</sup> reported switching from a male OB-GYN to a female one, sometimes after many years of having seen a male physician. This suggests that even after overcoming any inhibitions about being physically examined by a male OB-GYN, these patients were still attracted to the idea of a female OB-GYN. It also suggests that the choice of a female OB-GYN is often due not to uninformed stereotypes, but informed experience. Both of these points stand in contrast to commentators’ suggestions that once patients get

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131. Peradotto, *supra* note 13, at 1D.

132. Ladd, *supra* note 6, at D1.

133. Carnahan, *supra* note 8, at 8F.

134. *Id.*

135. Ladd, *supra* note 6, at D1.

136. *See* Jacobs, *supra* note 9, at 60 (stating that Ruth Bergdorf switched to a female OB-GYN at age thirty-seven).

137. *See* Andrea Gerlin, *Is the Male Gynecologist Going Extinct?*, CHATTANOOGA TIMES, Feb. 22, 1996, at D1 (interviewing a woman who said that she switched from a male to a female OB-GYN because the male OB-GYN appeared to be insensitive).

138. *See* Carnahan, *supra* note 8, at 9F (noting that Judy Kaven saw the same male OB-GYN for seventeen years and then switched to a female OB-GYN).

139. *See* Condor, *supra* note 8, at 1 (stating that Powers saw a male OB-GYN for four years and then switched to a female OB-GYN).

140. *See* Ladd, *supra* note 6, at D1 (reporting that Spruill switched from a male to a female OB-GYN after moving to a new city).

used to healthcare from the opposite sex, or get over their traditional conceptions about gender roles, they will no longer prefer same-gender care.<sup>141</sup>

Nonetheless, in a recent resurgence of articles published on the topic of the privacy BFOQ, commentators have continued to argue that preferences for same-sex healthcare derive from and reinforce gender stereotypes, without substantive consideration of the current trend toward female OB-GYNs, the expressed reasons for that trend, or whether those reasons contribute anything to the analysis. Amy Kapczynski, for example, argues that:

Same-sex privacy cases . . . reinforce a symbolic order of gender that has a discriminatory effect upon women, because, for example, it casts them as constitutively vulnerable to sexualized attack, and as essentially and necessarily modest in a way that resonates with tendencies to propertize women and deny them sexual agency.<sup>142</sup>

Kapczynski further attacks as illogical any argument that cross-sex observation of one's naked body is more intrusive than observation by a member of the same sex.<sup>143</sup> She therefore argues that the same-sex privacy BFOQ should "rarely, if ever, be judged legitimate."<sup>144</sup>

Similarly, Sharon McGowan argues that underlying the privacy BFOQ are the problematic normative assumptions that a woman's modesty deserves special protection and that cross-sex observation is particularly harmful and degrading.<sup>145</sup> McGowan therefore supports abolition of the privacy BFOQ outside of the prison context, where concerns about rape of female prisoners may warrant it.<sup>146</sup> Jillian B. Berman also advocates constriction of the privacy BFOQ in the healthcare setting, arguing that "sex says little about a doctor's qualifications and selecting a doctor because of her sex perpetuates privacy norms and invidious discrimination."<sup>147</sup>

These commentators' arguments largely track those made by commentators in the 1970s and 1980s, with relatively little attention given either to the changes in the landscape since that time, or to possible reformulations of the privacy BFOQ that might address several of their chief concerns. Kapczynski, for example, questions how it can "be more or

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141. See, e.g., Sirota, *supra* note 16, at 1065 ("While the presence of members of the opposite sex may initially shock or surprise customers, repeated exposure eventually may result in customer acceptance of the new work roles.").

142. Kapczynski, *supra* note 17, at 1261-62.

143. *Id.* at 1269-70.

144. *Id.* at 1262.

145. McGowan, *supra* note 17, at 100-08.

146. *Id.* at 79.

147. Berman, *supra* note 17, at 773-74.

less *private*—as opposed to comfortable, intuitive, pleasing, or embarrassing—to be seen in a state of undress by a male nurse rather than by a male doctor.”<sup>148</sup> The possibility that the privacy BFOQ could, however, be expanded to encompass OB-GYNs receives limited consideration. Berman does acknowledge the possibility, but quickly rejects it;<sup>149</sup> Kapczynski notes the trend toward female OB-GYNs in a footnote, but simply posits that courts likely “would not be persuaded that female patients’ privacy rights are grounds for BFOQs in these cases, in large part because women have long been attended to by male ob-gyns.”<sup>150</sup> Similarly, although Kapczynski and McGowan argue that the privacy BFOQ reinforces notions of women’s sexual vulnerability and modesty,<sup>151</sup> they do not consider the extent to which this concern could be addressed through the application of a privacy BFOQ on a gender-neutral basis, as in *Jones v. Hinds General Hospital*.<sup>152</sup>

More broadly, neither Kapczynski, McGowan, nor Berman delve into the actual reasons expressed by women who have sought out female OB-GYNs. Instead, they apparently assume that such preferences derive from the irrational belief that a greater infringement of privacy results from cross-sex observation of one’s nude body. Putting aside the question of whether such a belief is irrational (and whether, if it is, Title VII should be concerned with its eradication) this argument fails to take account of the myriad reasons that actual women have given for their choice of a female OB-GYN, and the fact that concerns about bodily modesty are often not at the top of the list.

This article’s exploration of the reasons underlying the trend toward female OB-GYNs leads to its conclusion—in direct contrast to the bulk of commentary on the subject—that the courts should go even further in establishing the privacy BFOQ defense. Instead of focusing their inquiry on whether bodily modesty interests are implicated, and making such a determination the necessary prerequisite for the establishment of a privacy BFOQ, the courts should instead bring to the forefront the three basic principles outlined above and make them the explicit criteria for the privacy BFOQ. That is, the privacy BFOQ should apply in all instances

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148. Kapczynski, *supra* note 17, at 1270.

149. *See, e.g.*, Berman, *supra* note 17, at 772-73 (“Extending the privacy BFOQ to male obstetricians and gynecologists would have the perverse effect of resexualizing the profession . . . . Given this country’s commitment to equal employment, the privacy BFOQ should not be extended to physicians absent a compelling justification.”).

150. Kapczynski, *supra* note 17, at 1265 n.49, 1266.

151. *See id.* at 1284-85 (arguing that courts rely on traditional notions of chastity that restrict women’s sexual autonomy); McGowan, *supra* note 17, at 98-99 (discussing the court’s view of the potential for trauma and anxiety for women, as compared to men, if subjected to cross-sex observation).

152. 666 F. Supp. 933 (S.D. Miss. 1987).

where courts find that customers have: (1) a preference for same-gender care in (2) a business that itself implicates privacy or therapeutic interests that are specifically gender-related,<sup>153</sup> and (3) the preference is not based on, and does not perpetuate, malignant characterizations of the genders.<sup>154</sup>

Under the current doctrine, this is largely not occurring, since most courts regard the privacy BFOQ as limited to cases in which customers appear nude before employees. The formative privacy BFOQ cases, such as *Backus*<sup>155</sup> and *Mercy*,<sup>156</sup> all emphasized the physically intimate nature of the jobs at issue, and several courts have described the privacy BFOQ as protecting only bodily privacy.<sup>157</sup> When faced with customer preferences

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153. Thus, the preference of a particular supervisor or customer for employees of the same gender would be insufficient; the business itself must be explicitly gender-related.

154. This final concern has been emphasized by commentators who argue that in certain instances, differential treatment on the basis of gender should be permissible. For example, Chai R. Feldblum, Nancy Fredman Krent, and Virginia G. Watkin have argued that all-female organizations (such as schools or youth activities) should be permitted under a "compensatory purpose" rationale if they satisfy the following four-pronged test:

(1) there is a sex-based disadvantage suffered by [the group's] membership related to its basis of classification; (2) the intention in forming or continuing the organization is to compensate for this disadvantage; (3) *the organization's programs and policies are not based upon and do not perpetuate archaic and stereotypical notions of the abilities or roles of the sexes*; and (4) it is the organization's single-sex policy and programs that directly and substantially help its members compensate for the previous disadvantages.

Chai R. Feldblum, et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 219 (1986) (emphasis added).

Similarly, Ruth Colker has argued that the principle of anti-subordination should be brought to the forefront of equal protection jurisprudence, arguing that "race- and sex-based equal protection doctrine emerged from a concern for the subordination of blacks and women" and that "a race- or sex-specific rule could be viewed as a positive step towards eliminating race- or sex-based inequalities, as redressing subordination rather than creating differentiation." Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058-59 (1986). Specifically, Colker proposes that a gender-based policy should not be presumed invalid unless it produces a negative disparate impact on a single sex, and that even if it does produce such an impact, the policy should still be held constitutional if its purpose has a "powerful impact on redressing subordination." *Id.* at 1060.

This article's proposal echoes those advanced by these articles in its concern for the potentially subordinating effects of gender-based preferences. It differs from them, however, in an important respect, satisfaction of the three-prong standard proposed by this article does not hinge on—in fact, does not even consider—the existence of a history of subordination and the need to remedy that history. Rather, this article's point is that there are *other* reasons for gender-based preferences that should legitimately be taken into account and given effect, as long as doing so will not result in subordination.

155. *Backus v. Baptist Med. Ctr.*, 671 F.2d 1100 (8th Cir. 1982).

156. *EEOC v. Mercy Health Ctr.*, No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 12256 (W.D. Okla. Feb. 2, 1982).

157. See, e.g., *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1060 (D. Ariz. 1999) (noting that "[a]lthough the inquiry into whether sex constitutes a BFOQ usually focuses on

for same-gender healthcare that relate more to therapeutic interests than to physical modesty concerns, courts have typically shown little deference. In *EEOC v. Hi 40 Corp.*,<sup>158</sup> for example, the court rejected a weight loss center's claim that female sex was a BFOQ.<sup>159</sup> The center, whose clientele was ninety-five percent female, employed exclusively female counselors, largely for therapeutic purposes.<sup>160</sup> As the court explained:

The customers who attend Physicians Weight Loss centers are seeking help and guidance to lose weight. Often weight loss is a difficult endeavor for them and they need help and guidance to succeed. The customers may have failed in losing weight on their own and may suffer from low self-esteem. Embarrassment about their bodies and a reluctance to let others know their weight and measurements may also be experienced by the customers. Counselors at Physicians Weight Loss may serve as role models and motivators for customers. Often counselors have had their own personal weight loss experience and have faced the same challenges the customers face.

Some female customers of Physicians Weight Loss object to having their measurements, whether by tape or caliper, taken by a man and would not feel comfortable discussing emotional and physiological issues associated with weight loss with a man. These emotional and physiological issues may involve sexual relationships and physical issues uniquely related to women.<sup>161</sup>

Despite the court's apparent acceptance of this argument, it still rejected the center's claim that being female was a BFOQ for the counseling positions. The court explicitly rejected the "proposition that Physicians Weight Loss customers have a privacy interest that extends to the counseling function"<sup>162</sup> and indicated that only bodily privacy interests were relevant to the analysis. It then stressed that the bodily privacy interests at stake were minimal, because the body measurements were taken

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key job skills or the employer's central mission, courts also have found an employee's sex to be a BFOQ in certain situations in which a customer's or client's bodily privacy interests might otherwise be compromised."); see also *EEOC v. Sedita*, 816 F. Supp. 1291, 1296 (N.D. Ill. 1993) (reducing the issue of whether female sex was a BFOQ for instructor positions in a women's health club to the question of whether the "touching at issue" in the relevant positions—namely, "touching clients on their breasts, inner thighs, buttocks, and crotch area when taking measurements and instructing members on the use of equipment and proper exercise form"—implicated protectable privacy interests, or whether only cases involving "exposure to nudity, touching of genitals, and observance of private bodily functions" could rise to that level).

158. 953 F. Supp. 301 (W.D. Miss. 1996).

159. *Id.* at 305-06.

160. *Id.* at 302-03.

161. *Id.* at 303.

162. *Id.* at 304.

through clothing and could even be taken by the women themselves if they felt uncomfortable with having the counselor take them.<sup>163</sup>

Similarly, in *Jatczak v. Ochburg*,<sup>164</sup> the court also essentially rejected the notion that therapeutic interests served by same-gender care could justify a BFOQ. There, a female filed suit after being denied, on the basis of gender, a child-care worker position at a community mental health program for young adults that was an outpatient facility of the Michigan Department of Health.<sup>165</sup> The position involved teaching appropriate work skills and behavior to mentally ill young adults, ninety-five percent of whom were male, to assist them in obtaining “employment in the outside world.”<sup>166</sup> The director of the program had obtained permission from the Civil Service to classify the position as “male only” because of the need for a male role model to demonstrate and exemplify appropriate work behavior to the predominantly male population, the importance of providing a male figure to the majority of male patients who lacked a father or other similar significant males in their lives, the need to have a male present to counsel the male patients on the topic of male sexuality, and the concern that many of the male patients had previously had negative experiences with females in positions of authority.<sup>167</sup> The director of the program testified that “it was absolutely essential that the position in question be filled by a male.”<sup>168</sup> Nonetheless, the *Jatczak* court rejected the argument that male sex was a BFOQ for the position.<sup>169</sup> It stressed that the position involved “no responsibility for intimate body contact with the clientele,” and found that “[a]ny counseling provided by the worker was purely incidental.”<sup>170</sup>

This article does not mean to suggest that courts always minimize the therapeutic interests implicated in same-gender care. On the contrary, two cases—*City of Philadelphia v. Pennsylvania Human Relations Commission*<sup>171</sup> and *Healey v. Southwood Psychiatric Hospital*<sup>172</sup>—illustrate how courts can appropriately take such interests into account in their assessment. In *City of Philadelphia*, Philadelphia argued that female gender was a BFOQ for the positions in its juvenile hall facility that involved supervision of females, and that male gender was a BFOQ for the

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163. *Id.*

164. 540 F. Supp. 698 (E.D. Mich. 1982).

165. *Id.* at 700.

166. *Id.*

167. *Id.* at 701.

168. *Id.*

169. *Id.* at 704-05.

170. *Id.* at 704.

171. 300 A.2d 97 (Pa. Commw. Ct. 1973). This case was decided under state law rather than Title VII. Because the court interpreted the state anti-discrimination law's BFOQ provision using federal precedent, however, this distinction is essentially irrelevant. *See id.* at 100 n.3.

172. 78 F.3d 128 (3d Cir. 1996).

positions involving supervision of males.<sup>173</sup> The court accepted this argument, noting not only the physical privacy interests at stake (since supervisors sometimes had to supervise daily showers and perform full body searches for contraband)<sup>174</sup> but also the therapeutic interests implicated by the position. The court explained:

It is the role of the Supervisor to gain the confidence and the respect of the children in order to aid them in regaining a proper perspective of the trying problems of growing up in a dangerous, hostile, competitive world. The Commission cannot expect the City to produce cold, empirical facts to show that girls and boys at this age relate better to Supervisors of the same sex. It is common sense that a young girl with a sexual or emotional problem will usually approach someone of her own sex, possibly her mother, seeking comfort and answers . . . . A like situation prevails for the boys. To expect a female or a male supervisor to gain the confidence of troubled youths of the opposite sex in order to be able to alleviate emotional and sexual problems is to expect the impossible.<sup>175</sup>

Thus, the court found that these interests justified gender-based BFOQs for the positions,<sup>176</sup> albeit over a strong dissent arguing that the positions in question “involve[d] dealings with the children when they are in various states of undress only to a minimal extent,”<sup>177</sup> and that there was no reason to think that “women cannot handle security or counseling problems for the boys” or vice versa.<sup>178</sup>

Similarly, in the more recent *Healey* case, the Third Circuit explicitly stated that therapeutic considerations had influenced its BFOQ analysis.<sup>179</sup> Southwood Psychiatric Hospital (Southwood) was treating emotionally disturbed and sexually abused male and female adolescents and children.<sup>180</sup> It maintained a policy of gender-based staff assignment to ensure that at least one female and one male were present on every shift.<sup>181</sup> This policy resulted in the reassignment of the plaintiff, a child care specialist, to a less desirable shift, and she brought a Title VII action against Southwood.<sup>182</sup> Southwood argued that its gender-based staffing policy was justified as a BFOQ, noting both the physical privacy and therapeutic interests at

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173. *City of Phila.*, 300 A.2d at 99.

174. *Id.* at 101.

175. *Id.* at 103.

176. *Id.* at 104.

177. *Id.* at 105 (Blatt, J., dissenting).

178. *Id.* at 106 (Blatt, J., dissenting).

179. *Healey*, 78 F.3d at 133.

180. *Id.* at 130.

181. *Id.*

182. *Id.*

stake.<sup>183</sup> It asserted that role modeling was an important aspect of the staffers' role,<sup>184</sup> and also claimed that a balanced staff was "necessary because children who have been sexually abused will disclose their problems more easily to a member of a certain sex."<sup>185</sup> The court found that "due to both therapeutic and privacy concerns," Southwood had indeed established a gender-based BFOQ, ruling that both factors went to the essence of Southwood's business.<sup>186</sup>

*City of Philadelphia* and *Healey*, however, represent exceptions to the general presumption that a privacy BFOQ can only be established in response to bodily modesty interests. It is time for the rest of the courts to abandon this limitation. The case law's emphasis on the "essence of the business" test highlights what should be viewed as the fundamental purpose of Title VII: to prevent prejudice and stereotypes from blocking equally qualified employees from work. Although *Johnson Controls* certainly reiterated that the "essence of the business" test is intended to be stringent, nothing in its discussion of the "essence of the business" test foreclosed the validity of the privacy BFOQ, as the majority specifically pointed out.<sup>187</sup> Rather, the strictness of the Court's application of the test lay in its unwillingness to validate BFOQs that were not related to *occupational* issues—that is, those "job-related skills and aptitudes . . . that affect an employee's ability to do the job."<sup>188</sup>

Focusing on the healthcare context, this article has identified several ways in which being of a particular gender can directly affect an employee's ability to do the job. First, same-gender counselors often have a better ability to serve as role models. This heightened ability can take on great importance in the gym or mental health setting, as the defendants in *Hi 40 Corp.* and *Healey* described with respect to females, and as the defendants in *Jaczak* described with respect to males.

Second, patients frequently are more comfortable and willing to discuss intimate, gender-specific topics with physicians and counselors of the same gender, as illustrated by the quotations of many patients in the articles discussed above, and as alluded to by the *City of Philadelphia* court. This interest can be seen as implicating a type of "psychological" privacy that is sometimes even more significant to patients than is physical privacy. It is obvious that the more willing patients are to share their

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183. *Id.*

184. *Id.* at 133.

185. *Id.* Southwood did not claim that females would always disclose their problems more easily to females or that males would necessarily be more forthcoming with males; rather, it claimed that the preferred sex would depend on the child's sex as well as the sex of the person who had abused him or her. *Id.*

186. *Id.* at 134.

187. *Johnson Controls, Inc.*, 499 U.S. at 206 n.4.

188. *Id.* at 201.



gender-related concerns with their healthcare providers, the more complete and effective their healthcare will be. Unlike airline service, in which flight attendants' respective "soothing" abilities are largely tangential to the essence of the business, a patient's willingness—or lack thereof—to raise health-related concerns and questions with his or her healthcare provider goes directly to the heart of the healthcare business. If a healthcare provider is not fully informed about all of the health problems plaguing a patient, he or she cannot provide that patient with effective care.

Third, same-gender healthcare providers have the advantage of shared physicality. As numerous patients and physicians described, the first-hand experience with gynecological examinations, menstruation, menopause, and pregnancy that female OB-GYNs often possess can often make them more effective caregivers. As Dr. Wendy Pesterfield put it, "'I've been there. I've had menstrual cramps. I've had labor pains. I've had morning sickness. I think while men can be very good ob/gyns and can be sympathetic, I don't know that they could have the empathy and understanding that a female could have.'"<sup>189</sup> By the same token, Dr. Judith Ortman-Nabi noted that "'if you take the example of urologists, the majority are male . . . . A woman urologist would have no idea what it feels like to have trouble voiding because of a prostate that's big, just as a man can't relate to what some women are going through.'"<sup>190</sup>

This is not to say that female gender is a *necessity* for OB-GYNs and diet counselors in all-female gyms, nor that male gender is a necessity for urologists. Rather, this article's argument is that preferences for same-gender healthcare that relate to physical modesty should not be given more deference than preferences relating to therapeutic interests, and, moreover, that neither type of preference should be dismissed as simply masking malignant, stereotypical attitudes about appropriate gender roles. Both types of preferences clearly relate directly to the essence of many healthcare businesses, and neither relies on nor perpetuates a chauvinistic conception of the genders. Thus, both types of interests would satisfy the second prong of the proposed three-prong BFOQ test and—if the other two prongs were also met—would entitle an employer to take gender into account when making employment decisions.

#### IV. THE CASE OF THE MALE OB-GYN: HOW WOULD, AND SHOULD, IT BE RESOLVED?

Having outlined the proposal for a reformulated privacy BFOQ, this

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189. Carnahan, *supra* note 8, at 9F.

190. Peradotto, *supra* note 13, at 1D.

article now returns to the specific question of the male OB-GYN. A comparison of the ways in which the current privacy BFOQ doctrine and this article's revised BFOQ doctrine would analyze this issue provides support for this article's proposal.

As of yet, courts have not had to rule on whether female sex can qualify as a BFOQ for OB-GYNs and thus justify even explicit gender discrimination in employment decisions. Dr. Garfinkel's case, brought in 1998 under the New Jersey Law Against Discrimination<sup>191</sup> (whose relevant language tracks that of Title VII almost exactly)<sup>192</sup>, has not been addressed on the merits due to the procedural questions.<sup>193</sup> Meanwhile, two courts in the Second Circuit have heard cases brought by male OB-GYNs claiming gender discrimination, but neither court ended up reaching the fundamental issue. In *Underkofler v. Community Health Care Plan, Inc.*,<sup>194</sup> a male OB-GYN claimed that he had been terminated because of his gender and replaced by a female.<sup>195</sup> The Second Circuit affirmed the district court's grant of summary judgment to the defendant, finding that the defendant had offered a legitimate, non-discriminatory reason (poor job performance) for the plaintiff's termination.<sup>196</sup>

In *Veleanu v. Beth Israel Medical Center*,<sup>197</sup> the court came closer to reaching the fundamental question. There, a male OB-GYN charged that he had been terminated because his defendant employer (a faculty practice group of OB-GYNs affiliated with Beth Israel Medical Center) "sought to establish a staff of younger, female physicians."<sup>198</sup> In support of his gender discrimination claim, the plaintiff argued that the defendant had hired a female employee to replace him,<sup>199</sup> and also pointed to the defendant's willingness to accommodate female patients who requested female OB-GYNs.<sup>200</sup>

The *Veleanu* court found that neither of these arguments raised an inference of gender discrimination.<sup>201</sup> First, it found that the evidence did not support plaintiff's argument that the new female employee had been

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191. N.J. STAT. ANN. § 10:5-1 et seq. (West 2003).

192. See, e.g., *Spragg v. Shore Care*, 679 A.2d 685, 693 (N.J. Super. Ct. App. Div. 1996) (stating that "Title VII of the Civil Rights Act of 1964 contains a BFOQ provision virtually identical to ours.").

193. See *Garfinkel v. Morristown Obstetrics & Gynecology Assoc.*, 773 A.2d 665, 667 (N.J. 2001) (holding that plaintiff's gender discrimination claim was not subject to arbitration and could proceed in a court of law).

194. No. 99-7838, 2000 U.S. App. LEXIS 19040, at \*1 (2d Cir. Aug. 4, 2000).

195. *Id.* at \*2.

196. *Id.* at \*5-7.

197. 98 Civ. 7455 (VM), 2000 U.S. Dist. LEXIS 13948, at \*1 (S.D.N.Y. Sept. 25, 2000).

198. *Id.* at \*3.

199. *Id.* at \*25.

200. *Id.* at \*22.

201. *Id.* at \*23-38.

specifically hired to replace him.<sup>202</sup> More interestingly, in response to the plaintiff's argument about the defendant's accommodation of female patients, the court stated that such accommodations were appropriate because of the personal privacy interests inherent.<sup>203</sup> Appealing to *Backus*, *Fesel*, and *Jones*, the court noted that OB-GYNs provide "intimate and sensitive personal care to a women's [sic] body," and that such care "implicates the patients' privacy rights, personal dignity and self-respect."<sup>204</sup> The court concluded that individual accommodations of patients' preferences were legitimate and did not give rise to an inference of discrimination against the plaintiff.<sup>205</sup> The court did not address, however, whether it would be permissible for a medical facility not only to accommodate those female patients who specifically requested female OB-GYNs, but also to take gender into account in employment decisions generally. Indeed, the court stated that it "need not address the permissible bounds to which this principle [the legality of accommodating female patients' requests] may carry."<sup>206</sup>

How *will* the first court that must address these boundaries rule? In fact, the existing doctrine does not provide a clear indication of the answer. Depending on its sympathies, a court could easily find justification for ruling either way. On the one hand, a defendant employer could make a good argument that the privacy BFOQ justifies gender-based employment decisions regarding OB-GYNs. It could highlight the considerable bodily modesty interests at stake, and could also appeal to precedents like *Backus* and *Mercy*. If female gender is a BFOQ for labor nurses, the defendant would argue, why not for OB-GYNs themselves? The *Veleanu* court's language indicates that it might have been sympathetic to such an argument, although it is far from certain that this would have been the outcome.

Indeed, a male plaintiff could make strong counter-arguments. First, he could point to the predominance of males in the OB-GYN field. It is difficult—indeed, virtually impossible—to make a credible argument that male OB-GYNs are incapable of doing their jobs, given that at least as of 2001, the majority of OB-GYNs were still male.<sup>207</sup> This phenomenon places the court in a more difficult position than that faced by the *Backus* and *Mercy* courts, since labor nurses have long been female.<sup>208</sup>

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202. *Id.* at \*25.

203. *Id.* at \*22-\*24.

204. *Id.* at \*23.

205. *Id.* at \*23-\*25.

206. *Id.* at \*24-\*25.

207. Lewin, *supra* note 6, at A1 (noting that as of 2001, sixty-four percent of the physicians practicing obstetrics and gynecology were male).

208. See, e.g., LEAVITT, *supra* note 30, at 171-95 (describing how until the mid-twentieth century, childbirth in the United States took place most often in the home, assisted

Additionally, a male OB-GYN could point out that courts applying the privacy BFOQ typically conceive of it as protecting physical privacy, and that the evidence indicates that this is not the primary concern of OB-GYN patients. As discussed above, most patients' statements indicate that their preferences for female OB-GYNs stem largely from interests relating to psychological comfort. For both of these reasons, the court addressing this case will not have the luxury, as the *Backus* and *Mercy* courts did, of resting its holding on traditional mores about women's bodily modesty.

The inability of the existing doctrine to satisfactorily resolve this question indicates a fundamental weakness in its approach. Given the doctrine's emphasis on those privacy interests that are deeply ingrained in tradition, a male OB-GYN may well convince the courts that female sex simply cannot be a BFOQ for OB-GYNs. But such a finding would be ironic in no small sense. Were a court to decide that female sex is *not* a BFOQ for OB-GYNs, we would be left with the troubling result that being female is a BFOQ for labor nurses, but not for the physician who actually delivers the baby. It is that result that would truly freeze societal attitudes, by giving inappropriate deference to a history shaped by gender bias. On the other hand, for a court to decide that being female is now a BFOQ for OB-GYNs would undeniably seem inconsistent with the current conception of the privacy BFOQ as a very narrow, tightly constrained exception. Technically, of course, such a holding could be justified solely on grounds that nudity is implicated in a gynecological examination. But this rationale is problematic not only because there is proof that bodily modesty interests are not prohibitive in this context, but also because it represents a narrow, overly formalistic approach to a profound question about how far we want Title VII's anti-discrimination mandate to reach. The reformulated BFOQ would provide a more satisfactory approach toward resolving this question, by explicitly expanding the privacy BFOQ on a principled basis and acknowledging that it goes beyond instances where gender is an absolute or virtual necessity.

Using this article's three-prong test to determine whether female sex is a BFOQ for OB-GYNs would yield a straightforward answer: yes. The first prong would clearly be satisfied. Only females see OB-GYNs; thus, this issue implicates a preference for same-gender healthcare, rather than a general view that only males or only females should be physicians. Indeed, although a finding that female sex is a BFOQ for OB-GYNs might further discourage men from specializing in this field, it would certainly not keep them out of the general field of medicine. The second criterion is also met, as significant gender-related privacy and therapeutic interests are by

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by female "helpers" and midwives; childbirth then moved to hospitals, under the direction of male obstetricians and amid "the bustle of [nurses wearing] starched skirts").

definition implicated in the OB-GYN field, as described above. The third prong would be satisfied as well, because this preference does not derive from malignant gender stereotypes about men. There is no evidence that any of the female patients seeking a female OB-GYN refuse to see male physicians for other medical matters, or that they believe men are less intelligent or competent physicians. On the contrary, the evidence indicates that women are specifically seeking out female physicians for the particular aspect of medical care that is the most intimate and gender-specific. Moreover, as discussed above, the fact that so many women used a male OB-GYN for years before switching to a female OB-GYN underscores that this preference is not based on malignant or ignorant biases.

This proposal's straightforward resolution of the question should not be seen as reflecting callousness toward the plight of male OB-GYNs. There is no question that the broadened BFOQ defense proposed by this article would impose harms on the non-preferred sex in various healthcare employment settings, and this is a definite cost. That said, the statutory recognition of the BFOQ defense to gender discrimination, the legislative history's explicit indication that concern about respecting patients' preferences for same-gender healthcare helped to bring about that defense, and the recent data regarding patients' (emphatically non-chauvinistic) reasons for preferring same-gender healthcare all militate in favor of a robust application of the defense in the healthcare context. Accordingly, this article disagrees with the sentiments of one frustrated male OB-GYN who stated that, "I've learned that they're not looking for me if the ad says they need an ob-gyn in an all-female practice . . . . I don't see how it's different from an ad saying 'physician wanted to join all-Caucasian practice'."<sup>209</sup> This article contends that there *is* a real difference—and that the doctrine should be developed accordingly.

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209. Lewin, *supra* note 6, at A14.