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EMPLOYMENT DISCRIMINATION — TITLE VII — NINTH CIRCUIT HOLDS THAT EXCLUDING MEN FROM SUPERVISORY POSITIONS IN WOMEN’S PRISON VIOLATES TITLE VII. — *Breiner v. Nevada Department of Corrections*, 610 F.3d 1202 (9th Cir. 2010).

Title VII of the Civil Rights Act of 1964<sup>1</sup> generally prohibits sex discrimination in employment.<sup>2</sup> But sex-segregated prisons present a unique challenge under Title VII, since prison guards of the opposite sex can threaten inmates’ safety.<sup>3</sup> Although Title VII permits sex-based restrictions where sex is a bona fide occupational qualification (BFOQ) for a specific position,<sup>4</sup> courts have differed on whether sex is a BFOQ for prison guard positions.<sup>5</sup> Recently, in *Breiner v. Nevada Department of Corrections*,<sup>6</sup> the Ninth Circuit held that Title VII forbade the Nevada Department of Corrections (NDOC) from restricting three supervisory positions in a women’s prison to women only.<sup>7</sup> *Breiner’s* reasoning and holdings demonstrate the limitations of Title VII in promoting sex equality within U.S. prisons. Title VII’s gender-neutral emphasis on individual job opportunities harms female employees, and its failure to prioritize inmate safety when applied to correctional employment harms female inmates.

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<sup>1</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006).

<sup>2</sup> See *id.* § 2000e-2(a) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .”).

<sup>3</sup> See generally, e.g., AMNESTY INTERNATIONAL’S CAMPAIGN ON THE U.S., “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 38–61 (1999) (documenting sexual abuse of female inmates by male guards and inadequate institutional responses); HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) (same); M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428 (2010) (documenting sexual abuse of inmates of both genders).

<sup>4</sup> 42 U.S.C. § 2000e-2(e)(1) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

<sup>5</sup> Compare *Dothard v. Rawlinson*, 433 U.S. 321, 334–37 (1977) (holding male sex is a BFOQ for guards in men’s prison because of dangerous conditions and presence of sex offenders), *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 747–61 (6th Cir. 2004) (holding female sex is a BFOQ for certain types of guards in women’s prison to prevent sexual abuse and promote rehabilitation of female inmates), and *Torres v. Wis. Dep’t of Health & Soc. Servs.*, 859 F.2d 1523, 1528–32 (7th Cir. 1988) (en banc) (holding female sex may be a BFOQ based on female inmates’ rehabilitation needs), with *Henry v. Milwaukee Cnty.*, 539 F.3d 573, 581–86 (7th Cir. 2008) (holding male sex is not a BFOQ in men’s units of a juvenile detention center because job responsibilities can be rearranged to protect inmates’ privacy), and *Gunther v. Iowa State Men’s Reformatory*, 612 F.2d 1079, 1085–87 (8th Cir. 1980) (same in men’s medium security prison).

<sup>6</sup> 610 F.3d 1202 (9th Cir. 2010).

<sup>7</sup> *Id.* at 1204–05, 1216.

In 2002–2003, officials learned of serious sexual misconduct at the Southern Nevada Women’s Correctional Facility (SNWCF).<sup>8</sup> The Inspector General of the NDOC investigated the facility and reported, among other problems, that prison staff frequently provided female inmates with contraband in exchange for sexual contact, and that the guards’ behavior persisted because of a “lack of supervisory and management oversight and control.”<sup>9</sup> The report recommended both replacing the management team and retraining lower-level employees.<sup>10</sup> The NDOC’s director also determined that “[many] of the correctional employees compromised . . . were male correctional employees in supervisory positions.”<sup>11</sup> In response, the NDOC placed women in three of the prison’s supervisory positions and also aimed to employ women in seventy percent of subordinate positions.<sup>12</sup>

A group of male correctional officers sued the NDOC, claiming that the gender restrictions on the supervisory positions violated Title VII.<sup>13</sup> The NDOC moved for summary judgment, which the district court granted.<sup>14</sup> Since the NDOC’s policy discriminated overtly, it was permissible under Title VII only if it constituted a de minimis restriction or if sex was a BFOQ.<sup>15</sup> The district court examined the policy within the context of the Nevada correctional system and concluded that the resulting harm was de minimis because it restricted a small fraction of total promotions, especially given that the vast majority of correctional supervisors were men.<sup>16</sup> Although this holding was sufficient to grant summary judgment, the district court also held that sex was a BFOQ.<sup>17</sup> Ninth Circuit precedent required that the NDOC show “1) that the job qualification justifying the discrimination is reasonably necessary to the essence of its business; and 2) that [sex] is a

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<sup>8</sup> *Breiner v. Nev. Dep’t of Corr.*, No. 2:05-CV-01412-KJD-RJJ, 2009 WL 367501, at \*1 (D. Nev. Feb. 9, 2009).

<sup>9</sup> *Id.* Additionally, there was “widespread knowledge and acceptance of the inappropriate activities” within the prison. *Id.* at \*2.

<sup>10</sup> *Id.* at \*2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The supervisory positions designated for women were at the level of correctional lieutenant. *Id.*

<sup>13</sup> *See id.* at \*4.

<sup>14</sup> *Id.* at \*7.

<sup>15</sup> *Id.* at \*4 (citing *Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 747 (6th Cir. 2004); *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998) (per curiam)). The judicially created de minimis exception allows overt discrimination where a policy presents a “minimal restriction” on employment. *Tharp v. Iowa Dep’t of Corr.*, 68 F.3d 223, 226 (8th Cir. 1995) (quoting *Timm v. Gunter*, 917 F.2d 1093, 1102 n.13 (8th Cir. 1990)) (internal quotation marks omitted).

<sup>16</sup> *Breiner*, 2009 WL 367501, at \*4 (citing *Robino*, 145 F.3d at 1110). Specifically, the court observed that only “three out of thirty-one . . . promotions from 2003 to 2005” were affected, and that twenty-nine out of thirty-seven correctional lieutenants hired over a five-year period were male. *Id.*

<sup>17</sup> *Id.* at \*5.

legitimate proxy for the qualification.”<sup>18</sup> Emphasizing that “[t]he professional judgment of NDOC officials” deserved deference,<sup>19</sup> the district court concluded that the NDOC’s goals of strengthening inmate privacy and improving safety and security justified the restrictions.<sup>20</sup> Sex was a legitimate proxy for a “proclivity for sexually abusive conduct” because some male officers possess this trait and gender is the only way to determine its presence.<sup>21</sup> Furthermore, the district court held that “the NDOC’s legitimate penological interests” outweighed the interests of male employees in the three supervisory positions.<sup>22</sup>

The Ninth Circuit reversed. Writing for a unanimous panel, Judge Berzon<sup>23</sup> first dismissed the NDOC’s argument that the plaintiffs lacked standing because they had not applied for the restricted positions.<sup>24</sup> The Ninth Circuit then reversed both holdings. First, the court held that the restrictions were not *de minimis*. While the district court had analyzed the positions within the context of the statewide correctional system, the Ninth Circuit held that “the denial of a single promotion opportunity” could violate Title VII.<sup>25</sup> Since the NDOC’s policy was facially discriminatory, it did not matter that, on average, men were more likely than women to be hired as supervisors.<sup>26</sup>

Second, the court held that sex was not a BFOQ. It began by recalling that the BFOQ exception “is an ‘extremely narrow exception to the general prohibition of discrimination on the basis of sex’ that may be invoked ‘only when the *essence* of the business operation would be undermined’ by hiring individuals of both sexes.”<sup>27</sup> Though the panel noted that the NDOC had not explicitly identified the job qualification for which sex was meant to be a proxy,<sup>28</sup> it determined that the NDOC’s goal was to “reduce the number of male correctional employees being compromised by female inmates.”<sup>29</sup> Based on statements

<sup>18</sup> *Breiner*, 610 F.3d at 1210 (alteration in original) (quoting *EEOC v. Boeing Co.*, 843 F.2d 1213, 1214 (9th Cir. 1988)).

<sup>19</sup> *Breiner*, 2009 WL 367501, at \*5.

<sup>20</sup> *Id.* at \*6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Judges Noonan and Ikuta joined the opinion.

<sup>24</sup> *Breiner*, 610 F.3d at 1206. The court found standing on the grounds that at least one of the officers had demonstrated that he was discouraged from applying because of the gender restrictions and was otherwise eligible for the position. *Id.* at 1206–07.

<sup>25</sup> *Id.* at 1208 (citing *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009); *Alvarado v. Tex. Rangers*, 492 F.3d 605, 612 (5th Cir. 2007); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1121–22 (9th Cir. 2004)).

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* at 1210 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 333–34 (1977)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1211 (quoting *Breiner v. Nev. Dep’t of Corr.*, No. 2:05-CV-01412-KJD-RJJ, 2009 WL 367501, at \*2 (D. Nev. Feb. 9, 2009)) (internal quotation marks omitted).

of past NDOC directors, the court identified three reasons why the NDOC believed that restricting the supervisory positions to women would accomplish this goal:

(1) [M]ale correctional lieutenants are likely to condone sexual abuse by their male subordinates; (2) male correctional lieutenants are themselves likely to sexually abuse female inmates; and (3) female correctional lieutenants possess an “instinct” that renders them less susceptible to manipulation by inmates and therefore better equipped to fill the correctional lieutenant role.<sup>30</sup>

The court then rejected all three theories. It rejected the first “because NDOC ha[d] not shown that ‘all or nearly all’ men would tolerate sexual abuse by male guards, or that it is ‘impossible or highly impractical’ to assess applicants individually for this qualification.”<sup>31</sup> Based on a survey of past prison BFOQ decisions, the court concluded that “even in the unique context of prison employment, administrators seeking to justify a BFOQ must show ‘a high correlation between sex and ability to perform job functions,’”<sup>32</sup> and the NDOC had not met this burden.<sup>33</sup> The court rejected the second theory, that male supervisors are more likely to commit sexual abuse, for similar reasons. In this case, there was no evidence that any supervisor had had sexual contact with an inmate.<sup>34</sup> Furthermore, prison administrators had other resources to monitor employees and prevent misbehavior, and the NDOC had not shown that these alternatives would fail to solve the problem.<sup>35</sup> Finally, the court rejected the theory that women have an instinct that renders them less susceptible to manipulation by female inmates, based on “the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the . . . ability of women to do particular work.”<sup>36</sup> The court criticized all three theories for “rel[ying] on entirely specious gender stereotypes that have no place in a workplace governed by Title VII.”<sup>37</sup> Thus, despite the fact that the NDOC’s judgment deserved deference, the court did not find the “basis in fact” required to designate sex as a BFOQ.<sup>38</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (quoting *EEOC v. Boeing Co.*, 843 F.2d 1213, 1214 (9th Cir. 1988)).

<sup>32</sup> *Id.* at 1213 (quoting *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991)).

<sup>33</sup> *Id.* This conclusion was also based on the fact that when the report came out, a private company had been running the prison, whereas the state had since resumed control, so the court was hesitant to draw inferences from the behavior of the company’s employees. *Id.* at 1213–14.

<sup>34</sup> *Id.* at 1214.

<sup>35</sup> *Id.* at 1215.

<sup>36</sup> *Id.* (alteration in original) (quoting *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971)) (internal quotation marks omitted).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1216 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)).

*Breiner's* reasoning suggests that Title VII is inadequate to remedy gender inequality in women's prisons in two specific ways.<sup>39</sup> First, Title VII's gender-neutral emphasis on individual job opportunities ignores the larger context of the correctional system, within which female employees have historically been disadvantaged<sup>40</sup> and remain a minority,<sup>41</sup> despite strong evidence that they are as competent as male employees.<sup>42</sup> Second, since Title VII applies to a wide range of employers, it is not built to address the unique challenges of prisons. Thus, *Breiner's* BFOQ analysis gives insufficient consideration to the prevention of sexual violence in correctional facilities. *Breiner* demonstrates that Congress should enact prison-specific legislation to ensure that important equality interests are considered when courts decide prison employment cases.

First, Title VII as interpreted by courts does not adequately protect the interests of female correctional employees in that it fails to acknowledge the larger context of the correctional field. In *Breiner*, the district court observed that the overwhelming majority of correctional lieutenants recently hired in Nevada were men, and the three positions at the SNWCF were only a small fraction of total available positions in the state.<sup>43</sup> But because Title VII emphasizes equal access to individual opportunities,<sup>44</sup> the Ninth Circuit declined to consider this context. It is important that the court considered the individual interests at stake; promotion opportunities within the correctional field are generally competitive,<sup>45</sup> and the *Breiner* plaintiffs specifically desired the supervisory positions at the SNWCF.<sup>46</sup> However, gender equality would have been better served by legal standards that balanced these concerns in light of the larger gender-unequal context.

Similarly, the gender neutrality of Title VII prevented the *Breiner* court from considering that women have historically been disadvantaged within the correctional field. This fact need not have been dis-

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<sup>39</sup> This comment will focus on women's prisons, but similar concerns could certainly apply to men's prisons, where sexual assault can also be pervasive. See McGuire, *supra* note 3, at 434-35.

<sup>40</sup> SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER* 161-64 (2d ed. 2007).

<sup>41</sup> *Id.* at 169-72; see also *supra* note 16.

<sup>42</sup> Joycelyn M. Pollock, *Women in Corrections: Custody and the "Caring Ethic,"* in *WOMEN, LAW, AND SOCIAL CONTROL* 97, 101 (Alida V. Merlo & Joycelyn M. Pollock eds., 1995).

<sup>43</sup> See *Breiner v. Nev. Dep't of Corr.*, No. 2:05-CV-01412-KJD-RJJ, 2009 WL 367501, at \*4 (D. Nev. Feb. 9, 2009).

<sup>44</sup> See 42 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful for an employer "to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual*" in employment (emphasis added)); see also *Ricci v. DeStefano*, 129 S. Ct. 2658, 2689 (2009) (reversing grant of summary judgment to defendants based on denial of single promotional opportunity to plaintiffs).

<sup>45</sup> See MARTIN & JURIK, *supra* note 40, at 176.

<sup>46</sup> See *Breiner*, 610 F.3d at 1208.

positive; indeed, courts should also be able to consider whether a restriction will carve out a special space for only female employees that, perversely, would simultaneously make it more difficult for them to find employment in men's prisons<sup>47</sup> (an area where Title VII has had a significant positive impact for women).<sup>48</sup> Essentially, Title VII's requirement of complete gender neutrality runs the risk of perpetuating historical disadvantage,<sup>49</sup> especially in environments such as prisons where gender imbalances are very large.

Second, *Breiner* shows that Title VII can be read to restrict the measures that prisons can take to prevent the sexual abuse of female inmates. Because Title VII applies to all fields, it is not specifically equipped for the "unique context"<sup>50</sup> of prisons, where employees have near-absolute control over sex-segregated inmates. In women's prisons, male guards often exploit this power and commit sexual abuse.<sup>51</sup> As a result, some women's prisons have excluded men from contact positions, a choice that several courts have upheld.<sup>52</sup> In these cases, courts have interpreted Title VII to accommodate inmates' interests — for example, by defining the "essence" of a prison's business to include inmate safety,<sup>53</sup> or by explicitly balancing employment interests against inmates' privacy interests<sup>54</sup> — and thus have found sex to be a BFOQ.

Likewise, *Breiner* implicitly acknowledged that preventing sexual abuse is a legitimate duty for prison employees,<sup>55</sup> but it did not conclude that sex is a BFOQ. This incongruity probably results from the fact that *Breiner* involved supervisory, not contact, positions. Thus, its BFOQ analysis focused on the likelihood that most or all male *supervisors* would themselves commit or tolerate sexual abuse, as well as on the availability of other measures to prevent future incidents (such as retraining employees and sanctioning misbehavior).<sup>56</sup>

Aside from the fact that this "most or all" standard seems far too high — even a small minority of male supervisors committing or tol-

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<sup>47</sup> See Myrna S. Raeder, *Gendered Implications of Sentencing and Correctional Practices: A Legal Perspective*, in *GENDERED JUSTICE* 173, 200 (Barbara E. Bloom ed., 2003).

<sup>48</sup> Pollock, *supra* note 42, at 99.

<sup>49</sup> See generally CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 32, 34 (1987) (suggesting that formal equality may perpetuate the subordination of women because of "the substantive way in which man has become the measure of all things," such that gender neutrality means "hold[ing] women to a male standard and call[ing] that sex equality").

<sup>50</sup> *Breiner*, 610 F.3d at 1213.

<sup>51</sup> See sources cited *supra* note 3.

<sup>52</sup> See, e.g., *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 740 (6th Cir. 2004); *Tharp v. Iowa Dep't of Corr.*, 68 F.3d 223, 224 (8th Cir. 1995).

<sup>53</sup> See *Everson*, 391 F.3d at 753.

<sup>54</sup> See *Tharp*, 68 F.3d at 226.

<sup>55</sup> See *Breiner*, 610 F.3d at 1211.

<sup>56</sup> *Id.* at 1213–15.

erating sexual abuse could seriously jeopardize inmates' safety<sup>57</sup> — the court's analysis of the possibility of sexual abuse was misguided. The court dismissed the claim that men are more "apt" to commit sexual abuse than women are as an "entirely specious gender stereotype[]"<sup>58</sup> despite the fact that this stereotype corresponds to an unfortunate social reality.<sup>59</sup> It ignored the power imbalance between male guards and female inmates that may drive sexual abuse in the first place.

Although the court was correct to doubt that women have special female instincts, it neglected to consider that the NDOC's policy could have changed the institutional culture of the SNWCF. Some feminist scholars have argued that male guards' power over female inmates creates an exaggerated version of the patriarchal system within which "men are socialized to dominate women socially, legally, and politically."<sup>60</sup> In this gendered environment, men become sexual aggressors, and women become sexual objects, leading to both sexual violence itself and insufficient responses to it.<sup>61</sup> For example, one male correctional officer explained his reluctance to report colleagues' violations as "a brotherhood thing";<sup>62</sup> such statements demonstrate that sexual violence may be kept under wraps due to a sense of male solidarity.<sup>63</sup>

<sup>57</sup> While this risk alone may not justify restricting all men from these positions, it is an important consideration that the BFOQ framework fails to address.

<sup>58</sup> *Breiner*, 610 F.3d at 1215.

<sup>59</sup> See, e.g., Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates to Be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31, 32 n.5 (2002) ("Perpetrators of sexual abuse against females are almost exclusively male."); see also McGuire, *supra* note 3, at 434–35 (noting that although "sexual abuse of prisoners by staff occurs across all gender lines," abuse of women by men is proportionally more common and more serious).

<sup>60</sup> Faith E. Lutz, *Ultramasculine Stereotypes and Violence in the Control of Women Inmates*, in WOMEN IN PRISON 183, 183 (Barbara H. Zaitzow & Jim Thomas eds., 2003); see also Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 777 (2005) (arguing that instances of male guards abusing female prisoners "are shaped by an arguably false but, nevertheless, socially controlling image of relations between women and men" (quoting CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 180 (1979)) (internal quotation marks omitted)).

<sup>61</sup> Generally, complaints of sexual abuse receive insufficient internal investigation. See, e.g., HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 3, at 5 ("[I]nternal investigatory procedures . . . were often fraught with conflicts of interest and a bias against prisoner testimony."); *id.* at 91 (describing an investigator's skepticism of an inmate's motives for reporting sexual abuse). Retaliation against inmates who report incidents is also common. See, e.g., *id.* at 6 ("Virtually every prisoner we interviewed who had lodged a complaint of sexual misconduct faced retaliation . . ."); *id.* at 95 (describing an inmate's reluctance to report sexual abuse out of fear of being placed in segregation); *id.* at 209 (noting that inmates' property was routinely confiscated when they reported sexual abuse).

<sup>62</sup> *Id.* at 312.

<sup>63</sup> Furthermore, as long as this environment persists, the alternative measures to reduce sexual violence identified by the *Breiner* court, such as internal investigations and employee discipline, see *Breiner*, 610 F.3d at 1215, will not be successful.

Indeed, the facts of *Breiner* suggest that SNWCF's institutional culture was a problem.<sup>64</sup>

Although feminist scholars differ as to whether same-sex employment policies are a good way to combat sexual abuse in prisons,<sup>65</sup> it is at least plausible that the NDOC's policy could have changed the male-dominant culture of the SNWCF, thus alleviating many of the corresponding problems while simultaneously preserving some employment opportunities for men. Yet because the BFOQ requirements are not designed with an awareness of sexual abuse risks in correctional environments, the Ninth Circuit in *Breiner* was unwilling to extend the doctrine far enough to account for these risks. As a result, the NDOC will have to wait and see whether sex restrictions really are necessary to prevent future abuse, rather than taking swift and comprehensive action to fix the problem.

These gaps in the law demonstrate the need for prison-specific rules in Title VII cases. As noted, some judicially created frameworks have been successful, but legislative reform would create more consistency.<sup>66</sup> Perhaps Congress could demand greater deference to policies designed to protect inmates' safety,<sup>67</sup> or perhaps it could relax the BFOQ requirements for sex restrictions favoring women. Without further development, however, administrators will remain constrained in their ability to remedy significant gender inequality in U.S. prisons.

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<sup>64</sup> See *Breiner v. Nev. Dep't of Corr.*, No. 2:05-CV-01412-KJD-RJJ, 2009 WL 367501, at \*1-2 (D. Nev. Feb. 9, 2009).

<sup>65</sup> Compare Ashlie E. Case, Case Comment, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309, 310-11 (2005) (arguing in favor of a BFOQ because preventing further sexual abuse should be a top priority, and "[r]esponses to the sexual abuse of female prisoners by male guards should not be loci of theoretical experimentation about the boundaries of gender and sexuality"), with Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 88 (2003) (arguing that the rationales behind BFOQ decisions are based on "rigid notions of sex differences" despite Title VII's demand that employers ignore stereotypes), and Suzanne Wilhelm, *Perpetuating Stereotypical Views of Women: The Bona Fide Occupational Qualification Defense in Gender Discrimination Under Title VII*, 28 WOMEN'S RTS. L. REP. 73, 79 (2007) (arguing that "although the courts are trying to help women, by formulating a paternalistic protection rationale for their decisions, the courts perpetuate traditional stereotypes of women . . . as weak human beings and/or seductive objects capable of manipulation"). Cf. Buchanan, *supra* note 60, at 773-88 (responding to antistereotyping arguments by emphasizing that sexual abuse of women by men harms women, and privacy law must account for it); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1284 (2003) (arguing that employers in same-sex privacy cases "treat the sexual privacy rights of men and women very differently . . . in a way that resonates uncomfortably" with sex stereotypes).

<sup>66</sup> For example, Congress could directly amend Title VII or add a new provision to the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006).

<sup>67</sup> Indeed, the *Breiner* court was skeptical that the NDOC had gone through a "reasoned decision-making process" that deserved deference. *Breiner*, 610 F.3d at 1214 (quoting *Robino v. Iranon*, 145 F.3d 1109, 1110 (9th Cir. 1998)) (internal quotation mark omitted). A different legislative framework could encourage prison administrators to reason through such decisions explicitly.