THE ROLE-MODELING BFOQ: COURT CONFUSION AND EDUCATIONAL PROMISE

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INTRODUCTION

In *Hazelwood School District v. United States*, the Supreme Court considered the hiring practices of a Missouri school district after a teacher alleged that the district had engaged in a "pattern or practice" of discrimination in violation of Title VII of the Civil Rights Act of 1964.[1]

1. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309 (1977). A "pattern or

Prior to the Supreme Court's review, the United States District Court for the Eastern District of Missouri, determining whether the school district discriminated against teachers on the basis of their inclusion in a protected class, did not examine the availability of qualified individuals in the relevant labor market.[2] Instead, the district court considered the percentage of students within the protected class that were in the local school district and compared them to the percentage of teachers in the same protected class that were employed by the district.[3] The court concluded that the school district had not violated Title VII because the low proportion of teachers in the protected class mirrored the low proportion of students in the protected class in the student body.[4] On appeal, the Supreme Court determined that the district court's analysis was incorrect, finding that the demographic comparison of students and teachers was "irrelevant" to a finding of discriminatory intent.[5]

Undoubtedly, in the context of establishing the discriminatory intent of a systemic disparate treatment case, the Supreme Court's approach was the more logically coherent analysis. Because student demographics of a school district do not necessarily correlate with the demographics of available teacher candidates, as the disparity may be the result of factors besides employer discrimination, it would be incorrect to infer discriminatory intent based simply upon a comparison of the teacher and student populations. Since *Hazelwood*, a number of Supreme Court cases have established that the appropriate inquiry in some discrimination cases involves a comparison of the proportion of employees in the protected class and the proportion of qualified individuals in the protected class in the relevant labor market.[6] However, the district court's analysis that

practice" case exists where a defendant-employer regularly engages in acts that deprive individuals of the full enjoyment of their Title VII non-discrimination rights; Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977). Under the *Teamsters* framework, the plaintiff has the initial burden of establishing that the unlawful discrimination was a regular procedure or policy utilized by the employer. The plaintiff is not charged with proving the employer's discriminatory intent. If the plaintiff satisfies its burden, the burden shifts to the employer to prove that the plaintiff was denied the employment opportunity for lawful reasons. *Id.* at 336.

2. United States v. Hazelwood Sch. Dist., 392 F. Supp. 1276, 1287 (E.D. Mo. 1975) *rev'd and remanded*, 534 F.2d 805 (8th Cir. 1976) *vacated and remanded*, 433 U.S. 299 (1977).

3. *Id.*

4. *Id.*

5. *Hazelwood Sch. Dist.*, 433 U.S. at 311 (agreeing with the Court of Appeals that the comparison should be made to the relevant labor market, but remanding the case to district court to determine that market).

6. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989) (acknowledging that it is the "comparison-between the racial composition of the qualified

compared the student population to the demographic composition of their teachers raises interesting questions about an educational hiring system that follows this approach. This approach would allow school districts to hire certain individuals in an attempt to reflect the protected class identities of their student body. This idea illustrates that although comparing the protected classes of educators and their students may be "irrelevant" in the context of establishing a systemic disparate treatment *prima facie* case, this relationship is anything but irrelevant when the overlap of protected classes is considered in the context of the bona fide occupational qualification (BFOQ) exemption and the possible impact that demographic convergence could have on academic achievement.

This comment will explore the relationship of the same-sex BFOQ defense and its possible application in the educational sphere. Part I has served as an introduction to the material, exploring the general concepts that are at play in the context of employment discrimination and systemic disparate treatment cases. Part II of the comment explores the statutory provisions of Title VII that are relevant to the BFOQ analysis and, additionally, delves into the Supreme Court and lower courts' reading of the same-sex BFOQ standard. In Part III, the comment identifies the lower courts' acceptance of a same-sex role-modeling BFOQ, illuminating the courts' inconsistent treatment of the defense as well as its conceptual overlap with other same-sex BFOQs. Part IV explains the logical consistency behind the establishment of a standalone role-modeling BFOQ, which does not lie in combination with other same-sex BFOQs. Additionally, Part IV culminates in an explanation of the potential impact of the role-modeling BFOQ's application in the context of educational institutions. Finally, Part V summarizes the findings of the comment and considers the future of same-sex BFOQs in the educational sphere.

persons in the labor market and the persons holding at-issue jobs-that generally forms the proper basis for the initial inquiry in a disparate-impact case"); Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 632 (1987) (finding that an employer's affirmative action program for a special skill position would be justified if the employer demonstrates a manifest imbalance in their workforce, which can be proved through a comparison of the positions that demand special training and those in the labor force who possess the relevant qualifications); EEOC v. Shell Oil Co., 466 U.S. 54, 56 (1984) (considering the parties' arguments concerning the relevant labor market in a Title VII "pattern or practice" case).

I. THE FORMATION OF THE BFOQ DEFENSE: THE ACCEPTANCE OF DISCRIMINATION IN EMPLOYMENT DECISIONS

A. Statutory Background

Title VII of the Civil Rights Act of 1964 establishes a stringent barrier to discriminatory acts by prohibiting the pervasive gender discrimination that has historically prevented women from accessing equal opportunities in the workplace.[7] However, Title VII originated as a protective measure for individuals who had suffered race, religion, and national origin-based discrimination. The inclusion of gender protections in the landmark legislation was added on the floor of the House of Representatives where it was only conceived as an eleventh-hour legislative strategy to defeat the passage of the broader statute.[8] At the time, critics of Title VII argued that the inclusion of gender-based protections mandated further meetings, hearings, and findings, as gender was fundamentally different from the other types of protected classes in the bill and, consequently, should be treated in separate legislation.[9] Therefore, the critics argued, Title VII could not pass in its current form.[10] Yet, the argument failed to carry the day and Title VII was passed with the amendment to protect gender

7. "It shall be an unlawful employment practice for an employer—
(1) 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 race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
42 U.S.C. § 2000e-2 (2006).

8. 110 CONG. REC. 2547–84 (1964) (record of the offering to amend the statute to include women). On the floor, Congressman Howard W. Smith read a letter from a female constituent who lobbied for gender-based protections by explaining that women needed jobs to compensate for their inability to find a husband. Smith, in introducing the gender-based provision, facetiously asked his Congressional colleagues: "[W]hy the Creator would set up such an imbalance of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice." *Id*, at 2577 (1964).

9. *See id.* (statement of Rep. Celler quoting letter from United States Department of Labor); *id.* at 2584 (statement of Rep. Green arguing for the careful consideration of biological differences between men and women in the context of employment).

10. *See id.* (noting critics' views regarding the inclusion of gender-based protections in the bill).

discrimination fully intact.[11]

Under Title VII, sex-based discrimination claims arise in a variety of forms and may be supported by different classifications of evidentiary support.[12] Courts have recognized a spectrum of claims, including disparate treatment claims, which allege that a plaintiff is a member of a protected class, that they are qualified for a position, and that they suffered an adverse employment action, or at least were treated differently than similarly situated employees.[13] In systemic disparate treatment claims, a subset of disparate treatment cases, plaintiffs may prove disparate treatment on two grounds. First, the plaintiff may demonstrate that the employer has announced a formal policy of discrimination.[14] Second, a plaintiff who fails to allege or demonstrate that the employer utilized a formal policy may establish a valid systemic disparate treatment claim by demonstrating that the employer used a pattern of employment choices that illustrates a practice of disparate treatment.[15]

Courts have established three defenses to a plaintiff's systemic disparate treatment claim. First, a defendant-employer may challenge the factual basis of the plaintiff's case, attacking the proof that underlies the plaintiff's claim.[16] Second, when the plaintiff utilizes statistics to establish the systemic disparate treatment case, the defendant-employer may challenge the inference of discriminatory intent that the plaintiff urges.[17] An employer's third possible defense to a plaintiff's systemic disparate treatment case is preserved in the text of Title VII, where the statute explicitly allows employers to discriminate during employment decisions on the basis of an

11. 42 U.S.C. § 2000e-2 (2006).

12. *See generally*, Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 105-06 (2006) (discussing the framework for considering disparate treatment).

13. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (outlining the initial burden of the complainant to establish a prima facie case of racial discrimination in a Title VII trial).

14. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (stating that a policy requiring higher contribution into a fund simply due to being a woman constitutes discrimination).

15. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (basing a Title VII violation on whether a certain group had been treated regularly and purposely less favorably, and whether these differences were racially motivated).

16. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 338 (1977) (stating that a defendant "may endeavor to impeach the reliability of the [plaintiff's] statistical evidence, [and] may offer rebutting evidence").

17. *See* EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 322 (7th Cir. 1988) (finding that disparate results were reasonably shown to be attributable to the women's low interest rather than the employer's lack of encouragement from the employer).

individual's inclusion in a protected class.[18] In contravention to the broader theme of the text, Congress included language in Title VII that protected discrimination on the basis of inclusion in a protected class when being part of that class was a BFOQ for the position of employment.[19] Section 703(e) of Title VII provides that:

> . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[20]

Unfortunately, due to the limited consideration and debate over the inclusion of gender in Title VII, there is a dearth of information concerning the motivation, treatment, and standard of the BFOQ in Title VII's legislative history. After the House adopted sex as a protected class, several Representatives urged the House to mirror the amendment in the already existing BFOQ section as well.[21] At the time, Representative Goodell of New York highlighted the utility of a gender-based BFOQ, stating that:

> [t]here are so many instances where the matter of sex is a [BFOQ]. 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.[22]

Congresswoman Green, who had actively voiced her opposition to amending Title VII to include gender discrimination, found that many of her concerns were ameliorated by the inclusion of gender in the BFOQ umbrella. She stated:

> [it] make[s] a great deal of difference to [an] elderly woman and her family as to whether [a] qualified nurse is a man or a woman. Under the terms of [gender-based discrimination] the hospital

18. *See* 42 U.S.C. §2000e-2(e)(1) (2006) (permitting hiring and employment based on religion, sex, or national origin when it would be a bona fide occupational qualification).
19. *Id.*
20. *Id.*
21. *See* 110 CONG. REC. 2718 (1964) (statement by Rep. Goodell).
22. *Id.*

> could not advertise for a woman registered nurse because under the [gender] amendment . . . this would be discrimination based on sex. The suggestion of [Mr. Goodell] helped a great deal, however.[23]

Congresswoman Green's closing sentence, explaining that Goodell's amendment "helped a great deal," implied that she personally believed that amending the BFOQ provision to include gender would remediate some of the danger posed by a strict reading of the language that barred sex discrimination.[24] Yet, these explanations, which seemingly defined the BFOQ defense as a broad provision, were some of the rare moments that the BFOQ subsection was considered in the House.

Comparatively, the Senate's debate provides limited but additional demarcation, illuminating the BFOQ exception's boundaries as a fairly limited provision. Senator John McClellan, a staunch opponent of Title VII, sought to introduce multiple amendments that would weaken the strength of Title VII. Specifically, one amendment aimed to broadly preserve an employer's business discretion, allowing him or her to discriminate when, on the basis of "substantial evidence," the employer subjectively believed that discriminatory hiring practices would be "more beneficial" to the normal operations or goodwill of their particular business.[25] However, Senator Clifford Case, the floor manager of the bill, countered that expanding the BFOQ provision to provide employers with broad discretion in discriminatory hiring practices would swallow the ultimate objective of the bill, fundamentally eliminating the legislation's protective power.[26] Senator McClellan's amendment to the BFOQ

23. *Id.* at 2720.

24. *Id.*

25. *See* 110 CONG. REC. 13,825 (1964) (statement of Senator McClellan). Commentators have argued that the Senate's ultimate rejection of Senator McClellan's goodwill argument implies that employers have extremely limited discretion in considering customer preferences, which is the "major component" of goodwill when making employment decisions. Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1030 (1977) [hereinafter Siriota].

26. *See* 110 CONG. REC. 13,825 (1964) (statement of Senator Case: "We who believe in fair employment practices and the intervention of the Federal Government in this field to the extent provided for by the leadership amendment must resist the amendment of the Senator from Arkansas with all the power, because it would destroy the bill."). Senator Case additionally introduced a separate amendment, unrelated to the BFOQ exception, which had previously been introduced and defeated in the House of Representatives. The amendment provided that Title VII actions would be limited to decisions or practices based *solely* on sex, race, national origin, or religion. Again, in the floor debate, Senator Case highlighted that the amendment would place a heavy burden on plaintiffs, undermining the purpose the entire statute. The amendment also failed to garner support.

provision was subsequently defeated by a vote of sixty-one to thirty, implying the Senate's understanding of the BFOQ exception as a provision with limited sweep.[27]

In 1965, prior to court interpretation of the BFOQ provision, a House report on the Equal Employment Opportunity Act of 1965 provided an opportunity for Congress to clarify its reading of the crucial subsection. While the Equal Employment Opportunity Act of 1965 was a legislative source entirely separate from the Civil Rights Act, it also contained the term "bona fide occupational qualification." The House Education and Labor Committee's report on the legislation explained that the BFOQ is:

> meant to apply in *those rare circumstances* where a reasonable, good faith, cause exists to justify occupational distinctions based upon religion or national origin, or *the more common circumstances, widely accepted by contemporary standards*, where a reasonable, good faith, and justifiable ground exists to perpetuate occupational distinctions based upon sex.[28]

Although legislatively distinct from Title VII, the temporal proximity and conceptual overlap between the two BFOQ provisions implies that Congress intended the Title VII BFOQ defense to have a similarly limited scope of application.

Ultimately, however, due to a confluence of factors, including the rapid inclusion of gender as a protected class in Title VII, the BFOQ provision's lack of prolonged debate, and the conflicting congressional treatment of the BFOQ exemption, the BFOQ exemption had been abandoned in murky territory, without clear scope or application. Yet, it is worth noting that the provision had some areas of clarity. Congress explicitly did not include race in the BFOQ exception as a result of the United States' historical discrimination against people in racial minority groups, as well as due to the belief that there are no occupations that people of a specific race could perform that other races could not.[29] But, the

27. *Id.* at 13,826. However, some commentators have argued that the overwhelming defeat of Senator McClellan's amendments were the result of acts of Congressional solidarity and not their understanding of the scope of the bill. *See* Sirota, *supra* note 25 at 1030 (discussing considerations that may have led to the Senate's rejection of McClellan's proposed amendments). Indeed, the commentators have argued that the BFOQ exception was intended as a broad exception. *See* Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357, 368 (2004) (elaborating upon and discussing the BFOQ defense in Title VII legislative history) [hereinafter Waldman].

28. H.R. Rep. No. 718 at 5 (1965) [emphasis added].

29. *See* 110 CONG. REC. 2550 (1964) (statement of Senator Cellar: "We did not include

broader application of the law was still unclear. Commentators recognized that if the BFOQ exception was construed broadly, as Senator McClellan advocated, it would give way to the pervasive discrimination that had prompted the enactment of Title VII; whereas, if the courts applied an overly narrow reading, the BFOQ exception would offer little security to employers who argued that they deserved some level of discretion in their hiring practices and that, at times, employment decisions that were based upon an individual's inclusion or exclusion in a protected class were necessary to effectively operate their business.[30]

B. The Supreme Court's Narrow Reading of the BFOQ Exception

The Supreme Court encountered its first substantive opportunity to demonstrate its reading of the BFOQ exception in 1977, dissipating some of the fog that had persisted after Congress's cluttered treatment of the defense.[31] In *Dothard v. Rawlinson*, the Supreme Court endorsed the BFOQ exemption but only as a narrow exception to Title VII's sweeping stance against discrimination.[32] *Dothard* involved a female who sued an Alabama state penitentiary after she applied for a "contact" correctional counselor position and was denied the employment.[33] The penitentiary defended the suit on several grounds, including an assertion that being male was a BFOQ for contact positions.[34] While the Supreme Court offered a limited reading of the BFOQ clause, stating that it was "an extremely narrow exception to the general prohibition of discrimination on the basis of sex," the Court accepted the penitentiary's argument that male gender was a BFOQ for contact positions in the penitentiary.[35] The Court found

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the word 'race' because we felt that race or color would not be a bona fide qualification, as would be 'national origin.' That was left out. It should be left out."). *See also* 110 CONG. REC. 2556 (1964) (Senator Cellar explaining why Congress should reject an amendment to add race as a BFOQ: "[T]he basic purpose of title VII is to prohibit discrimination in employment on the basis of race or color. Now the substitute amendment, I fear would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole that could well gut this title.").

30. Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1258-59 (2003) [hereinafter Kapczynski].

31. Dothard v. Rawlinson, 433 U.S. 321 (1977).

32. *Id.* at 334.

33. *Id.* at 323-24.

34. *Id.* at 332-33.

35. *Id.* at 334-37. Courts and commentators have separated, conceptually, the terms of gender and sex. Where "sex" is defined by the biological differences between men and women, "gender" concerns the socially constructed expected manner in which one is supposed act as a result of their sex. However, because Title VII prohibits discrimination based on gender as well as sex, and the close dissection of these terms is not crucial to this

that the male-only policy was rooted in the penitentiary's real concerns for the central function of the job – physical safety – and highlighted that in the violent environment of the Alabama prison, it would be reductionist to label the regulation as "romantic paternalism."[36] The Court explained that because it was reasonable to think that the inherent "womanhood" of the female guards would encourage sex offenders with a history of crime towards women to commit subsequent crimes, the presence of women in the correctional atmosphere would undermine "[t]he essence of a correctional counselor's job" – to maintain prison security.[37] Consequently, despite employing a narrow reading of the BFOQ clause, the Court accepted the correctional facility's male-only BFOQ defense.[38]

Eight years later, in *Western Air Lines v. Criswell*, the Supreme Court refined its interpretation of the BFOQ exception, this time in the context of a lawsuit under the Age Discrimination in Employment Act of 1967 (ADEA).[39] The ADEA provides for a BFOQ defense in language that mirrors the BFOQ language of Title VII and in *Western Air Lines*, the Court illustrated that its analysis of the exception was identical under both pieces of legislation.[40] In *Western Air Lines*, the Court encountered an employment policy that required flight engineers, the third "pilot" in larger commercial aircraft during the era, to retire at age sixty.[41] At the time of the lawsuit, the Federal Aviation Administration refused to establish a mandatory retirement age for flight engineers but required both pilots and first officers on commercial flights to retire at age sixty.[42] At that time, the ADEA generally prohibited employers from mandating retirement before age seventy and, consequently, the employer argued that age sixty was a

comment, the terms will be used interchangeably. *See* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (highlighting the law's broad indifference to distinctions between gender and sex). Moreover, this treatment within the comment is not inconsistent with the term's treatment in discrimination law. Commentators have highlighted that "[t]he word 'gender' has come to be used synonymously with the word 'sex' in the law of discrimination" and while this treatment is imperfect, it is consistent. Jonathan A. Hardage, *Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit "Effeminacy" Discrimination?*, 54 ALA. L. REV. 193, 195 (2002).

36. *Dothard*, 433 U.S. at 335.

37. *Id.*

38. *Id.* at 336-37.

39. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 411-12 (1985) (describing Congress's general guidance on age classification under Title VII for bona fide occupational qualifications).

40. *Id.* at 416.

41. *Id.* at 403-05.

42. *Id.* at 404.

BFOQ for flight engineers.[43] The defendant's evidence highlighted that the possibility of heart attacks positively correlated with increases in age and, therefore, the defendant argued that the age sixty retirement provision was out of concern for the physical safety interests of the airline's passengers.[44] On appeal, the defendant-airline challenged a jury instruction, which combined the statutory language of the ADEA and the *Dothard* precedent, reading that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of defendant's business."[45] The trial court informed the jury that "the essence of Western's business is the safe transportation of their passengers" and additionally stated:

> One method by which defendant Western may establish a BFOQ in this case is to prove:
>
> (1) That in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each second officer over age [sixty] on an individualized basis to determine his particular ability to perform his job safely; and
>
> (2) That some second officers over age [sixty] possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.[46]

The Supreme Court, relying on the consensus of a number of U.S. Courts of Appeals, as well as an EEOC regulation, approved the jury instruction.[47] Citing the Fifth Circuit Court of Appeals, the Supreme Court found that, alternatively, an employer could establish a BFOQ defense if it "had . . . a factual basis for believing, that all or substantially all [of the persons in the protected class] would be unable to perform safely and efficiently the duties of the job involved."[48] While the latter standard is used with less frequency than the one established in the jury instructions, courts have utilized both standards in establishing a BFOQ defense.[49]

The Supreme Court's most recent and notable analysis of the BFOQ exception arrived in 1991 when it considered an employer's fetal protection

43. *Id.* at 406.
44. *Id.*
45. *Id.* at 407.
46. *Id.* at 407-08.
47. *Id.* at 416-17.
48. *Id.* at 414 (quoting Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).
49. *See* Torres v. Wis. Dept. of Health & Soc. Serv., 859 F.2d 1523, 1530 (7th Cir. 1988) (utilizing the "substantially all" standard in the BFOQ context).

policy.[50] In *International Union, UAW. v. Johnson Controls, Inc.*, the Supreme Court continued its narrow reading of the BFOQ exception, rejecting a battery-manufacturer's same-sex BFOQ defense of a policy that excluded women who were capable of bearing children from positions that exposed the women to lead.[51] While the defendant-corporation argued that its fetal-protection policy fell within the third-party safety exception BFOQ, which the court had considered in *Western Air Lines*, the Supreme Court relied on the specific language of the BFOQ defense to reject the employer's argument.[52] The Supreme Court highlighted that the BFOQ exception limited its application to "occupational" skills and aptitudes.[53] Consequently, although past Supreme Court cases considered BFOQs on the basis of third-party safety, examining the safety of the inmates in *Dothard* and the safety of the passengers in *Western Airlines*, the safety of the third parties was part of the "essence of the business," e.g. the safety of inmates and the safety of passengers.[54] Comparatively, the safety of the unborn fetuses in *International Union* played no part in the "essence" of the employer's business, which was manufacturing batteries.[55] While the employer urged a broader interpretation of the BFOQ exception, suggesting that the welfare of the next generation could be considered part of the "essence" of its business, the Court rejected the argument, continuing its trend of a limited reading of the BFOQ exception.[56]

C. The Lower Courts' Reading of the BFOQ Exception

In spite of the Supreme Court's extremely narrow reading of the BFOQ provision, cases which primarily focused on the employer's interest in the physical safety of third-parties, the lower courts have extrapolated from Title VII and the Supreme Court's reading of its text a variety of different employer interests that may establish a sex-based BFOQ.

50. Int'l Union UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

51. *Id.* at 204.

52. *Id.* at 201-202; *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 406 (1985).

53. *Int'l Union UAW*, 499 U.S. at 202-03; Dothard v. Rawlinson, 433 U.S. 321, 335 (1977); *Western Air Lines, Inc.*, 472 U.S. at 401.

54. *Int'l Union UAW*, 499 U.S. at 202-03.

55. *Id.* at 203.

56. *Id.* Notably, Justice White highlighted in his concurrence his concern for the Court's narrow application of the BFOQ rule, fearing that such a reading would fail to protect at least one same-sex BFOQs that the lower courts had already established. He wrote that "[t]he 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." *Id.* at 219 n.8.

Commentators have split over the manner of labeling and dividing the lower courts' BFOQ exceptions, naming the BFOQs different things and dividing them in different ways, reflecting the opaqueness of justification behind some of the courts' decisions.[57] Generally, however, the courts have recognized three types of broad employer interests that, when demonstrated by an employer, establish a valid same-sex BFOQ defense. First, lower courts have recognized an employer's BFOQ defense when the employer demonstrates that they have an interest in protecting the privacy of their clientele, who desire only to be viewed by members of their same gender.[58] Second, courts have found that an employer establishes a valid sex-based BFOQ when the employer illustrates that it is part of the essence of a position to "rehabilitate" their clientele, which can only be effectively performed by members of the client's same gender.[59] Third, the lower courts, following in the wake of the Supreme Court's *Dothard* decision, have allowed employers to establish a BFOQ defense when the physical safety interests of the employer and third-parties would be jeopardized by a hiring policy that did not discriminate on the basis of gender.[60]

While the Supreme Court has never explicitly accepted a privacy interest BFOQ, the lower courts have generally held that a hiring policy is valid when it discriminates on the basis of gender to protect an employer's interest in its clientele not being viewed or touched by members of the opposite sex.[61] Surprisingly, the majority of the privacy interest BFOQ cases have arisen in a context where the third-party clientele are offered minimal privacy: correctional facilities.[62] Courts have found that the privacy interests of prisoners – in being patted down during safety sweeps or viewed improperly by opposite-sex correctional officers – legitimizes an

57. *Compare* Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77 (2003) [hereinafter McGowan], *with* Kapczynski, *supra* note 30 (articulating how heteronormative stereotypes disrupt courts' willingness to impose Title VII requirements). *See also* Waldman, *supra* note 27 (explaining the scope of the BFOQ exception).

58. This is reading is consistent with the Congressional intent as the privacy interest BFOQ was explicitly referenced during the debate in the House of Representatives over the provision. 110 CONG. REC. 2718 (1964).

59. *See* Torres v. Wis. Dep't of Health & Soc. Services, 859 F.2d 1523, 1532 (7th Cir. 1988) (recognizing the same-sex rehabilitation BFOQ in regards to a female prison because many prisoners had been physically and sexually abused by men).

60. *See* Levin v. Delta Air Lines, Inc., 730 F.2d 994, 999 (5th Cir. 1984) (holding that a defendants' removal of pregnant flight attendants from flight duty was justified under the BFOQ exception)

61. *See* Gibson v. W. Va. Dep't of Health and Human Res., Div. of Health, 452 S.E.2d 463, 466 n.7 (W. Va. 1994) (accepting argument that the policy was necessary to "preserv[e] the dignity, autonomy and individuality" of the patients).

62. Waldman, *supra* note 27 at 372.

employer's gender-based hiring policy under the BFOQ provision. The courts have been especially amenable to a correctional facility's same-sex BFOQ defense when the facility houses female inmates.[63] For example, in *Everson v. Michigan Department of Corrections*, the Sixth Circuit Court of Appeals upheld a correctional facility's female-only guard policy under a privacy interest BFOQ.[64] There, a group of male correctional facility employees sued their employer under Title VII for a policy that designated 250 positions as "female only."[65] The Sixth Circuit, noting the widespread history of abuse of female inmates at the hands of male correctional officers, as well as the "reasonable expectations of privacy while in prison," found that the female-only hiring policy was justified under the BFOQ exception because, among other factors, privacy was part of the "essence" of the correctional facility's business.[66]

Valid privacy BFOQs have not been limited to the correctional context and courts have recognized privacy BFOQs in other occupations where the clientele expresses an interest in not being viewed by the opposite gender. In addition to correctional officer positions, courts have found privacy interest BFOQs in two other occupational scenarios: employment in custodial work and employment in the medical field. Courts have allowed employers to defend a same-sex hiring policy when the custodial position involves the possibility of same-sex viewing, such as work in a female-only dormitory or in a male-only restroom.[67] Courts have

63. *See* Reed v. Cnty. of Casey, 184 F.3d 597, 599-600 (6th Cir. 1999) (highlighting the special protections female inmates are afforded by state law and finding a same-sex BFOQ); Robino v. Iranon, 145 F.3d 1109, 1109-11 (9th Cir. 1998) (finding that privacy, security, and rehabilitation interests were all ensnared in the female prison context). *See also* Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751 (2005) (arguing that female prisoners deploy the protection of the Fourth Amendment against unscrupulous actions taken by male prison guards).

The privacy concerns of female inmates are often intertwined with concerns of guard-on-prisoner sexual abuse. However, because this sexual misconduct falls into the physical safety interest BFOQ category, it is not explicitly addressed here. Additionally, some commentators have noted that the privacy-interest BFOQ are usually evaluated using a two part test. "First, [the courts] evaluate whether using employees of a particular gender implicates the 'essence of the business,' looking at whether bodily modesty interests are at stake. Second, the commentators argue that courts analyze whether the employer can selectively assign job responsibilities to minimize the privacy clashes that would otherwise ensue." Waldman, *supra* note 27 at 372. However, because this analysis is not particular to privacy interests and is generally applicable to all same-sex BFOQs, this analysis should not be considered under the isolation of the same-sex privacy umbrella. *Id.*

64. Everson v. Mich. Dep't of Corr., 391 F.3d 737, 761 (6th Cir. 2004).

65. *Id.* at 739-40.

66. *Id.* at 757 (quoting Cornwell v. Dahlberg, 963 F.2d 912, 916 (6th Cir.1992)).

67. *See* 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

additionally recognized an employer's privacy interest BFOQ in a number of cases in the medical field, where the employer's clientele have maintained an interest in not being viewed or examined by members of the opposite sex.[68]

In the second category of same-sex BFOQs, courts have recognized an employer's BFOQ defense when the employer establishes that discriminatory hiring is necessary to effectively address the "rehabilitative" goals of a position. As with the same-sex privacy BFOQ exception, courts have been receptive to the "rehabilitative" same-sex BFOQ in the context of correctional facility hiring. In *Torres v. Wisconsin Department of Health and Social Services*, for example, the Seventh Circuit Court of Appeals highlighted the importance of rehabilitation in the prison context, which only female guards could provide to the employer's female inmates.[69] The Seventh Circuit, noting that many of the female prisoners previously had suffered both physical and sexual abuse at the hands of males, highlighted the testimony of the prison's superintendent who argued that providing female prisoners with an environment free of men in positions of authority was necessary to foster the facility's rehabilitative goal.[70] Although the court required additional facts to resolve whether the rehabilitative goal was supported by same-sex hiring, the court made clear that the employer could establish the rehabilitative BFOQ defense on the totality of the circumstances in the record.[71] Additionally, the court did not demand that the employer produce an objective record of the rehabilitative necessity of female guards, which the district court had more stringently

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); Brooks v. ACF Indus., Inc., 537 F. Supp. 1122 (S.D. W.Va. 1982) (holding that sex was bona fide occupational qualification for employment in an employer's custodial department because duties of custodian included work in the male bathhouses where there was no reasonable plan that the employer could implement to solve the conflict between male employees' privacy rights and female janitor's employment rights).

68. *See* EEOC v. Mercy Health Ctr, No. CIV-80-1374-W, 1982 U.S. Dist. LEXIS 11256, at *13 (W.D. Okla. Feb. 2, 1982) (finding that female sex was a BFOQ for a staff nurse position in the labor and delivery area because a number of patients had expressed discomfort with the presence and use of male nurses); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1354 (D. Del. 1978) *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (holding that a nursing home had a factual basis for believing that the employment of a male nurse's aide would "would directly undermine the essence of its business operation because . . . many of the female guests would not consent to intimate personal care by males").

69. Torres v. Wis. Dep't of Health & Soc. Serv., 859 F.2d 1523, 1530-32 (7th Cir. 1988).

70. *Id.* at 1530.

71. *Id.* at 1532.

required.[72] Courts have also entertained the idea of a same-sex rehabilitative BFOQ in contexts besides prisons, such as in a university campus security position, where consoling female victims of sexual assault was necessarily a female-only position and, thus, could establish a same-sex BFOQ.[73]

Finally, courts have generally accepted an employer's same-sex BFOQ defense when the employer establishes that part of the essence of its business is "physical safety," which can only be maintained by a hiring policy that discriminates on the basis of gender. Surprisingly, after the Supreme Court's decision in *Dothard*, lower courts have been hesitant to characterize male sex as a BFOQ for correctional officer positions where the peculiar and unsafe circumstances, like those of the Alabama prison in *Dothard*, have not been present.[74] However, a limited number of decisions, following the general analysis in *Dothard*, have recognized that a male-only hiring policy was necessary to protect the physical safety interests of the employer in maintaining the security of a prison by not surrounding the mostly male inmates with women guards.[75] Courts have been less reticent to accept the physical safety interests of female inmates in the correctional environment, finding that a same-sex BFOQ for female guards is often necessary to protect the female inmates from sexual abuse by male guards.[76] In this context of female inmates and male guards, there is an overlap of BFOQ concerns, inextricably intertwining the privacy interests

72. *Id.*

73. Moteles v. Univ. of Pa., 730 F.2d 913, 921 (3d Cir. 1984) (discussing that the defendant-employer should have had the opportunity to establish a BFOQ for the position at issue).

74. *See* Griffin v. Mich. Dept. of Corr., 654 F. Supp. 690, 704 (E.D. Mich. 1982) (stating that "[i]t is consistent with common sense, fairness and the state of the law to say that a blanket exclusion of women, in order to protect them from the rigors and difficulty of the prison system, is clearly unlawful under Title VII."); *see also* Bagley v. Watson, 579 F. Supp. 1099, 1104 (D. Or. 1983) (highlighting that there was no demonstrable evidence that female prison guards could not safely or efficiently perform the task of guarding male prison inmates); Gunther v. Iowa State Men's Reformatory, 462 F.Supp. 952, 956–58 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (dismissing the *Dothard* court's "stereotypical" views of the capacity of female guards to safely maintain a mostly male prison population).

75. *See* St. John's Home for Children v. W. Va. Human Rights Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988) (finding that male-only BFOQ was necessary for child care professionals working with boys because "[s]upervising violent, aggressive, male adolescents involves protecting the weaker members of the patient community from the stronger ones . . . .").

76. Everson v. Mich. Dep't of Corr., 391 F.3d 737, 754 (6th Cir. 2004) (finding that a correction facility's plan to mostly govern female prisoners with female prison employees was a logical approach and would "significantly enhance security at the [prison's] female facilities.").

of the prisoners, which have been discussed above, and their corresponding physical concerns.[77] Courts have additionally evaluated and recognized a same-sex physical interest BFOQ in limited scenarios where the "essence" of an employer's business involves the safe travel of third parties and the pregnancy of a female employee, which could potentially jeopardize the successful completion of that safety objective.[78]

The lower courts' acceptance of same-sex discrimination under the BFOQ exception is not as sweeping as it initially may seem. Courts have generally maintained the Supreme Court's reading of the BFOQ provision as a "narrow" exception to the Title VII rule against discrimination, recognizing that a broader reading would engulf the protections that Title VII provides.[79] Nevertheless, it is worth noting the types of BFOQ arguments that the lower courts have consistently rejected. These arguments illustrate the alignment of the lower courts and the Supreme Court when applying the BFOQ exception, as well as the extremely fine line, and perhaps inconsistency, between the lower courts' acceptance and rejection of some employers' BFOQ arguments.

Courts have most readily disposed of employers' same-sex BFOQ arguments when they are premised on traditional sex stereotypes. A number of courts have held that employers cannot defend a male-only hiring policy through a BFOQ defense for positions that involve demanding physical labor or heavy lifting. In these circumstances, courts have highlighted that an employer's reliance on assumptions about female physical capacity or gender stereotypes about female strength are misplaced and do not sufficiently support a same-sex BFOQ defense.[80] For

77. *See* Robino v. Iranon, 145 F.3d 1109, 1109-11 (9th Cir. 1998) (finding that privacy, security, and rehabilitation interests were all ensnared in the female prison context); *Everson*, 391 F.3d at 754.

78. Levin v. Delta Air Lines, Inc., 730 F.2d 994, 999 (5th Cir. 1984) (holding that a defendants' removal of pregnant flight attendants from flight duty was justified under the BFOQ exception). However, in *Levin*, the limitation was placed on pregnant females, not females generally, illustrating a common dispute under the BFOQ exclusion.

There is a fourth category of BFOQ cases that is rarely considered, in which employers rely on federal statutory support to ratify their sexually discriminatory employment choices. In *Hill v. Berkman*, for example, the court held that the Army's male-only policy for combat positions, which has subsequently been abandoned, was not a Title VII violation because the federal statutory authority addressed and demanded the discrimination. 635 F. Supp. 1228 (E.D. N.Y. 1986).

79. *See supra* Part II. B.

80. Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973) *cert. granted, vacated*, 414 U.S. 970 (1973); *see also* Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979) *aff'd*, 612 F.2d 1079 (8th Cir. 1980)(explaining that a refusal to hire a woman on the basis of stereotyped characterizations is prohibited by the equal employment provision); Mitchell v. Mid-Continent Spring Co. of Ky., 583 F.2d 275, 280-81 *modified on denial of reh'g*, 587 F.2d 841 (6th Cir. 1978) (finding that the employer's "bona

example, in *Jurinko v. Edwin L. Wiegand Co.*, the court rejected an employer's BFOQ defense of a policy that prohibited hiring married women into production jobs because the policy was based on sex stereotypes concerning the women's physical capacity.[81] In *Jurinko*, the employer maintained a practice of placing new employees into the most physically demanding jobs in its production field.[82] The defendant-employer argued that the policy reasonably assumed that women, as a class, would not be able to perform every production job necessary for its line of business due to their lacking physical strength.[83] However, the court found that the individual capacities of women should be measured as such and that the company's assumption of the physical incapacity of women was both legally and logically misplaced.[84] Therefore, the court held that because the employer's defenses were based on gender stereotypes they were insufficient to establish a BFOQ defense.[85]

One of the most challenging areas of the lower court's same-sex BFOQ doctrine – and one of the murkiest in terms of court logic – involves the gender preferences of an employer's clientele. Generally, courts have held that an employer cannot justify a sex-based BFOQ defense based upon its customer's broad preference for one gender over another. In *Fernandez v. Wynn Oil Company*, the Ninth Circuit Court of Appeals rejected an employer's sex-based BFOQ defense for hiring a male to its Director of International Operations position when the employer argued that the customer preferences of its South American clientele demanded that a male occupied the position.[86] The court held that even if the record supported the conclusion that a female would have a harder time dealing in business in South America due to the region's cultural bias against women, the clientele business partners' stereotypical view of women was insufficient to support the employer's gender-based BFOQ defense.[87] Yet, several courts

fide lifting requirement cannot be implemented by the blanket exclusion of all females"; Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971)(finding that the "company attempts to raise a commonly accepted characterization of women as the 'weaker sex' to the level of a BFOQ"); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (holding that the legitimate requirement of lifting thirty five pounds be open to men and women).

81. *Jurinko*, 477 F.2d at 1044 n.11.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir. 1981).

87. *Id.* at 1276; *see also* Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992)(stating that fellow employees' and customers' moral preferences do not constitute BFOQ for sex discrimination); Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist., 659 F. Supp. 1450, 1472 (S.D. N.Y. 1987) (finding that the

have implied, but never held, that when accommodating a customer preference for gender supports the essence of a business, it may be possible for an employer to establish a same-sex BFOQ.[88] In *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit did not accept an employer-airline's argument that its customers' preference for female flight attendants justified their female-only hiring policy because it did not go to the essence of their business: providing safe transportation.[89] However, the court reasoned that a customer preference could justify a gender-based BFOQ when it is premised on "the company's inability to perform the primary function or service it offers."[90] Yet, decisions that have formally held that a customer preference justifies a BFOQ have been rare, if non-existent.[91]

Courts have been similarly dismissive of employers' same-sex BFOQ defenses when they are premised on deference to the employer's business discretion. Like the customer-preference argument, lower courts have been hesitant to accept employers' arguments that courts should be deferential to an employer's business judgment when they maintain a discriminatory hiring policy. For example, in *Wilson v. Southwest Airlines*, a court found that an airline's business judgment, which called for exploiting "female sex appeal" in ticket sales positions as a marketing tool in an attempt to ensure profitability, was an insufficient justification for a female-only hiring policy.[92] While the court recognized that the airline's policy might have aided their profit-based endgame, the small gain in the "battle-of-inches" with other airlines was not a sufficient basis to support a sex-based BFOQ defense.[93]

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school district violated VII when they assigned only male drivers to bus routes serving private religious schools that strongly preferred male drivers).

88. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

89. *Id.* at 388.

90. *Id.* at 389; *see also* Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 294-95 (N.D. Tex. 1981) (discussing that advertisements of airlines use of attractive females in positions with consistent customer contact was a crucial part of its corporate image).

91. Courts have deemed, in dicta, that being female is a BFOQ for the position of a Playboy Bunny because female sexuality is reasonably necessary to perform the essence of the job, to excite and entice male customers. *See* Aromi et al. v. Playboy Club, Case No. CS-32986-74 (New York Human Rights Appeal Board, 1971) (discussing the decisions of St. Cross v. Playboy Club, Appeal No. 773, Case No. CFS 22618-70 (New York Human Rights Appeal Board, 1971); Weber v. Playboy Club, Appeal No. 774, Case No. CFS 22619-70 (New York Human Rights Appeal Board, 1971)). Generally, sexualized businesses, such as the Hooters Restaurant chain, which incorporates both food service as well as scantily clad servers, have raised questions about the limitations of the customer preference doctrine. *See generally*, Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 204 (2004) (discussing the merits of Hooters policy to hire certain applicants).

92. *Wilson*, 517 F. Supp. 292 at 303.

93. *Id.* at 304. Courts have considered also considered business discretion argument in

At this point, it is helpful to untangle the classes of valid and invalid BFOQs, to which there is some degree of overlap. Commentators have highlighted that the customer preference and business discretion BFOQs, which courts have sweepingly rejected, are similar to the privacy and rehabilitation BFOQs, which the courts have accepted.[94] It is undisputable that, to some degree, the privacy and rehabilitative interests of an employer contain some logical overlap with customer preferences. However, they are not inseparable. The rehabilitation BFOQ, which permits sex-based hiring in order to further the goal of psychological rehabilitation, is dependent upon the premise of the clientele more readily accepting the help of individuals of the same gender. Yet, unlike the customer preference BFOQ, this acceptance is not necessarily the result of the same level, or type, of subconscious process. A woman who distrusts males after years of abuse at the hands of a male is not like an airplane passenger who simply prefers female attendants. An abused woman can react subconsciously to reject males out of a fundamentally *uncontrollable* fear or repulsion, which results from the harms that lurk in her past.[95] The airline passenger's customer preference is not a result of fear but rather, a different type of subconscious process, which is based upon positive attraction.[96] While both preferences are the result of subconscious processes, courts may distinguish between the two because the abused woman's fear may be retroactively the result of a purely negative and harmful experience, whereas the male's choice, as it is attraction based, appears less reactionary and seems to be the result of a greater level of discernment and decision-making. More likely, the courts have distinguished between rehabilitation and customer preference BFOQs as a result of the necessity of the underlying employment objective. Customer-preference is often attacked on the grounds that the gender-discrimination does not further the

a variety of other contexts, including female wait-staffs. *See* Levendos v. Stern Entm't, Inc., 723 F. Supp. 1104, 1107 (W.D. Pa. 1989) *rev'd on other grounds*, 909 F.2d 747 (3d Cir. 1990) (rejecting the offered notion that only men should be waiters in a high-class restaurant in order to display a better image to their clientele); Guardian Capital Corp. v. N.Y. State Div. of Human Rights, 46 A.D.2d 832 (N.Y. App. Div. 1974) (finding that an employer's decision to replace male waiters with female waitresses was not justified under a state-based BFOQ exception).

94. Kapczynski, *supra* note 30.

95. *See, e.g.*, Olson v. Marriott Intern., Inc, 75 F.Supp.2d 1052, 1064 (D. Ariz. 1999) (discussing the admissibility of an expert's report that proposed that it is imperative that women who are abused have the ability to choose the sex of their massage therapist, "[w]ithout choice there is a potential for the reenactment of trauma").

96. *See Wilson*, 517 F. Supp. 292 at 294 (noting that Southwest's advertising agency determined that since the commuter market served predominately male businessmen they should shed their conservative image and project an "airline personification of feminine youth and vitality.").

"essence" of many of the employment scenarios where it is offered, whereas, in rehabilitation cases, the same-sex policy often speaks to the heart of the employment, promoting psychological rehabilitation.[97]

The same-sex privacy exception is more difficult to separate from the customer preference doctrine, with some commentators going so far as to call the privacy BFOQ an exception to the court's broader rejection of the customer-preference doctrine.[98] Ultimately, this is more or less true. Privacy cases usually concern circumstances where clientele complain about being viewed by individuals of an opposite gender.[99] In these cases, while the privacy concern does not necessarily go to the "essence" of the business, such as maintenance of a safe prison, clean dorm, or delivery of a child, courts have acknowledged the BFOQ because of the interest of the clientele is often supported by some evidence of psychological harm that may result from the unwanted viewing of people of the other sex.[100] Consequently, while it is logical to categorize the privacy BFOQ as a subset of the customer preference defense, the courts' different treatment of the subsection, as compared to the other customer preference cases, is also logical due to the psychological harm that can result from an invasion of privacy.

II. THE SAME-SEX ROLE-MODELING BFOQ

A. Role-Modeling: A Confused Acceptance

The courts have established another bona fide occupational qualification, the same-sex "role-modeling" BFOQ, which has created a conflicting analysis, confused acceptance, and ultimately raised more questions than it has answered for the courts. A number of lower courts have defended employment practices on the basis of this "role-modeling" BFOQ, finding that sex-specific hiring was necessary to accomplish an employer's primary goal of role-modeling for its clientele. Yet, the same-

97. *Compare* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (discussing that Pan-Am's primary function is "transporting passengers safely from one point to another"), *with* Torres v. Wis. Dep't of Health & Soc. Serv., 859 F.2d 1523, 1532 (7th Cir. 1988) (noting that the employer's business was "administering a prison for female felons" and rehabilitation of the inmates is necessary).

98. *See e.g.*, Waldman, *supra* note 27 at 372 (arguing that courts have "carved out a small exception" to the customer preference doctrine when the case involves customer preferences for employees of a particular gender to preserve the clientele's personal privacy).

99. *Id.*

100. McGowan, *supra* note 57 at 96-97. *See also* Kapczynski, *supra* note 30 at 1270 (discussing the possible bases for privacy BFOQ).

sex role-modeling BFOQ remains unclear because, factually, it often lies in combination with other BFOQs that courts often consider and reference during their analysis. This means that, in practice, most courts devote part of their analysis to the primacy of the role-modeling BFOQ, but then note the legitimacy that other BFOQs add to further the "essence" of the position. To some degree, the acknowledgement of the presence of other same-sex BFOQs is logical. The "role-modeling" BFOQ certainly reflects elements of the rehabilitative BFOQ explored above, but it is also commonly found in combination with an employer's privacy or physical safety BFOQ defense. Consequently, while commentators have recognized "role-modeling" as a standalone BFOQ, courts have generally not recognized the "role-modeling" BFOQ unless it lies in combination with another, more strongly established, occupational qualification. The "role-modeling" same-sex BFOQ has been recognized in three basic employment positions: positions that involve the rehabilitative efforts of youth psychiatric facilities or sex victims; the rehabilitative effort of youth correctional programs; and finally, moral or religious positions that incorporate the mission of their employer.[101]

In the context of youth psychiatric facilities and sex victims, the courts have acknowledged a defendant's same-sex role-modeling BFOQ defense most commonly when it is found in combination with a privacy BFOQ. In this line of cases, courts have highlighted that the essence of an employer's business incorporates the clientele's interest in psychological rehabilitation, which requires a positive role-model of the same gender. However, in this same analysis, the courts will often note that the clientele's subsequent privacy interest also demand that they are treated by employees whose gender matches their own. In one of the leading cases on the role-modeling BFOQ, *Healey v. Southwood Psychiatric Hospital*, the Third Circuit Court of Appeals noted that the "essence" of a hospital's business was to treat emotionally disturbed and sexually abused children.[102] The court then recognized aspects of both the employer's same-sex role-modeling interests as well as privacy interests of the children.[103] In *Healey*, the court stated that for a hospital that treated emotionally and sexually abused children, the "therapeutic mission [of the hospital] depends on subtle interactions such as 'role modeling' rather than the more concrete behavior modification techniques . . . ."[104] However, the court noted that, in addition to therapeutic goals, "privacy concerns [also] justify [the hospital's]

101. *See infra* Part III. A.
102. Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132-33 (3d Cir. 1996).
103. *Id.*
104. *Id.* at 134.

discriminatory staffing policy" because of the hospital staff's role in the hygiene, menstrual, and sexuality concerns of the patients.[105] Consequently, while the court discussed both BFOQs, it was only after the court analyzed both and recognized the combination of the two that it found a valid same-sex BFOQ, holding that, "due to both therapeutic and privacy concerns, Southwood is an institution in which the sexual characteristics of the employee are crucial to the successful performance of the [challenged] job."[106]

Courts have recognized the same-sex role-modeling BFOQ most commonly in the occupational context of youth correctional programs, which, similar to positions in psychiatric hospitals, ensnare privacy concerns. For example, in *Leggett v. Milwaukee County*, a court recognized the necessity of role-modeling in a youth correctional context, but only recognized the role-modeling BFOQ in combination with the privacy concerns of the employer.[107] There, a female Juvenile Correctional Officer alleged that a Milwaukee County policy, which denied women the opportunity to earn overtime pay through working an overnight shift, was invalid and discriminatory.[108] In denying the female guard's claim, the court noted that 3,264 of the youth correctional facility's 3,851 population were male and found that "the implementation of same-gender role modeling and mentoring . . . provides greater rehabilitative success."[109] The court also acknowledged that "the importance of protecting juveniles' privacy interests . . . [and] nighttime observation of juveniles in various states of undress and in the throes of puberty by opposite-gender staff members is damaging and impedes the rehabilitation process."[110] Citing the county's evidence, the court relied on the combination of employer's interests in role-modeling and clientele-privacy to justify the same-sex BFOQ defense of the correctional facility.[111]

105. *Id.* at 133.

106. *Id.* at 134; *see also* Torres v. Wis. Dep't of Health & Soc. Serv., 859 F.2d 1523, 1528 (7th Cir. 1988) (emphasizing that the validity of BFOQ can only be ascertained with a more comprehensive understanding of the business of an employer).

107. Leggett v. Milwaukee Cnty., 04-C-422, 2006 WL 3289371 at *3 (E.D. Wis. Nov. 8, 2006). *See also* In re Juvenile Det. Officer Union Cnty., 837 A.2d 1101, 1109-10 (N.J. Super. Ct. App. Div. 2003) (calling the other role-modeling cases "persuasive" but only referencing privacy interests); In Long v. State Personnel Board 41 Cal.App.3d 1000 (1974) (finding a requirement for certain chaplains to be male permissible in part because of privacy interests of the young boys involved); City of Phila. v. Pa. Human Relations Comm'n, 300 A.2d. 97, 103 (Pa. Cmwlth. 1973) (discussing how there is a need for certain sexual characteristics in employees when dealing with troubled youth).

108. *Leggett*, 2006 WL 3289371 at *2.

109. *Id.*

110. *Id.*

111. *Id.* at *3.

Youth correctional facilities, unlike positions in psychiatric hospitals, have also been found to involve the same-sex physical safety BFOQ that courts have acknowledged in adult correctional facilities.[112] In *Leggett*, the court acknowledged that:

> [s]exual misconduct in the institutional setting has a severe effect on juveniles and damages the credibility and morale of the institution in general. Moreover, heterosexual assaults and misconduct are more likely than homosexual assaults and misconduct. Therefore, it is inefficient from a risk management standpoint to assign a staff member to an opposite-gender [for the questioned position].[113]

In concluding that the employer-correctional facility had established a valid same-sex BFOQ, the court ultimately acknowledged the presence and importance of three BFOQs: role-modeling, privacy, and physical safety.

Finally, and most controversially, courts have acknowledged an employer's same-sex role-modeling BFOQ defense, even when it is not supported by other BFOQ exceptions, in the limited circumstances in which the "essence" of the employer's mission is to exemplify a moral or religious life.[114] In these cases, courts have allowed the termination of employees due to their position as a "negative role model," usually in reference to unwed pregnant females.[115] In *Chambers v. Omaha Girls Club, Inc.*, the leading opinion on the "negative role model" BFOQ exception, the Eighth Circuit Court of Appeals upheld a negative role model BFOQ defense when an after-school club fired an unmarried female

112. *Id.* at *2. *See also* St. John's Home for Children v. W. Va. Human Rights Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988) (finding that male-only BFOQ was necessary for child care professionals working with boys because "[s]upervising violent, aggressive, male adolescents involves protecting the weaker members of the patient community from the stronger ones . . . .").

113. *Leggett*, 2006 WL 3289371 at *2. In these scenarios, it appears that the courts' concerns are actually the inverse of gender concerns in the adult correctional setting. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977). The court is worried about female guards sexually abusing and physically assaulting the male juveniles while in adult settings, as in *Dothard*, the court worried about female guards being physically assaulted by the inmates due to their inherent womanhood. *Id.* Ultimately, therefore, the court's concerns here are actually more reflective of the abuse scheme that courts have recognized in the male-guard and female-inmate populations of the adult correctional facilities.

114. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987). *See also* Dolter v. Wahlert High Sch., 483 F. Supp. 266, 271 (N.D. Iowa 1980) (finding an issue of material fact as to whether a teacher's pregnancy validated the school's dismissal of her under the BFOQ exception); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 808 (N.D. Cal. 1992) (acknowledging that the defendant could assert that the employee needed to be a "role model" given their moral views).

115. *Chambers*, 834 F.2d 697 at 705.

instructor after she informed her employer that she was pregnant.[116] During the trial, the employer, a club designed to assist African American adolescent girls, highlighted that the club emphasized relationship-building between staff-members and the youth and also that it trained its instructors to act as role models in the hope that the girls would emulate the adults' behavior.[117] The court found that the club's rule banning single parent pregnancies among its staff members was valid and recognized that "the role model rule [was] reasonably necessary to the Club's operations" and, thus, the court held that the role model rule qualified as a bona fide occupational qualification.[118]

Religious employers have also been successful in defending their termination policies based upon a negative role-modeling BFOQ.[119] For example, in *Harvey v. Young Women Christian Association*, the court ratified the termination of an unwed pregnant African American counselor.[120] There, the employer, the Young Women Christian Association (YWCA), argued that the counselor's status as a single pregnant female was "contrary to the Purpose [sic] and philosophy [of the position] and violated plaintiff's agreement to espouse these principles in her employment."[121] The court accepted the argument, finding that the employee's agreement to highlight the goals and philosophy of the YWCA to the young members established a rational relationship between the demands of her employment and the contrary opinion of her unwed pregnancy, which was exacerbated by her stated desire to advertise her condition of pregnancy.[122] Ultimately, the court found for the defendant-employer, implicitly accepting the legitimacy of the negative role model BFOQ defense and utilizing it to inoculate the employer's decision to terminate the employee.[123]

B. Lower Court Rejection of Employers' Role-Modeling BFOQ Arguments

Like the cases where courts have accepted the role-modeling BFOQ, it is easiest to understand the cases where the courts have rejected the role-modeling argument when the cases are divided by occupational theme.

116. *Id.* at 698.
117. *Id.* at 699.
118. *Id.* at 705.
119. Harvey v. Young Women's Christian Ass'n, 533 F.Supp. 949 (W.D. N.C. 1982).
120. *Id.* at 954.
121. *Id.* at 954-55.
122. *Id.* at 955.
123. *Id.*

Surprisingly, the factual circumstances of the rejected cases are often quite similar to the factual background of the cases where the courts have recognized the role-modeling BFOQ. Despite the factual similarities, the cases where courts have rejected the BFOQ exception are distinguished by the courts findings, which do not acknowledge the presence of another same-sex BFOQ. For example, in *Jatczak v. Ochburg*, a federal district court ruled that an employer, whose business was counseling mentally ill youth, failed to demonstrate that there was any type of same-sex BFOQ for its counseling positions.[124] The employer in *Jatczak*, a sheltered workshop and community mental health program for young adults, argued that it was necessary to fill a vacant counseling position with a male because it was necessary to have a male role model for the predominantly male workshop population.[125] The employer specifically highlighted the program's large African American population, who were often involved in family situations lacking a father or significant male role model.[126] Additionally, the employer argued that it was necessary to hire a male to provide counseling in sexuality and sexual development.[127] Yet, the court characterized the sheltered workshop's argument for a male role model as an argument for the customer-preference of its youth clientele.[128] Ultimately, although the court recognized that a same-sex role-modeling BFOQ might be appropriate in some circumstances, there, the defendant-employer had failed to meet its burden of proving that a male counselor was essential to the function of the workshop and, consequently, the court rejected the gender-based hiring decision.[129]

Jatczak is illuminating. In *Jatczak*, the defendant-employer raised many of the same role-modeling arguments that other courts had ratified, but in this instance the court rejected their arguments. Unlike the same-sex role-modeling BFOQ cases where the court recognized the legitimacy of the BFOQ, in *Jatczak*, the court did not acknowledge the presence of additional same-sex BFOQs.[130] Consequently, this is a case of the role-modeling argument standing alone, unsupported by a factual finding of another BFOQ. As a result, the court's analysis yields a customer preference argument as opposed to acknowledging the legitimacy of the same-sex BFOQ.

Yet, this analysis appears to be flawed. To understand why the same-

124. Jatczak v. Ochburg, 540 F.Supp. 698 (E.D. Mich. 1982).
125. *Id.* at 704.
126. *Id.* at 700.
127. *Id.* at 700-01.
128. *Id.* at 703-04.
129. *Id.* at 705.
130. *Id.*

sex role-modeling BFOQ does not fall under the customer preference umbrella, it is necessary to reassess the court's rejection of the customer preference BFOQ. In the line of cases where the defendant-employer has argued that a customer-preference justifies the sex-based hiring, courts have looked to the "essence" of the business, construed narrowly, to determine whether or not argument has merit.[131] In *Fernandez v. Wynn Oil Company* the court determined that the essence of the position was to do business with South Americans, which could be accomplished by both sexes.[132] In *Diaz v. Pan American World Airways, Inc.*, the court determined that essence of the business was safe travel, and held that flight attendants of both sexes could accomplish that task.[133]

Comparatively, in cases of sexual victim and mental health counseling and rehabilitation, the "preference" of the customers is not really at issue. If construed insensitively, the gender preference of the youth-victims and those with disabilities may be central to their choice or responsiveness to an individual of the same gender. However, in these circumstances, the "preference" is not so much of a preference as it is a reflection of the immutable and subconscious feature of their condition or disability.[134] Consequently, in *Jatczak*, when the court dismissed the patients' responsiveness to a gender as a preference, it implied a level of consciousness and cognitive decision-making that is fundamentally inaccurate.[135]

Courts have also rejected the same-sex role-modeling BFOQ in the context of correctional facilities when the employer has failed to illustrate that another BFOQ, such as physical safety or privacy, would be jeopardized by a gender-blind hiring policy. In *Henry v. Milwaukee County*, the Seventh Circuit Court of Appeals, after rejecting a juvenile correctional facility's privacy and physical safety BFOQ defenses, subsequently dismissed the employer's same-sex role-modeling BFOQ

131. Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

132. *Fernandez*, 653 F.2d at 1276-77.

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

134. *See* Ashlie E. Case, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309, 316 (2005) (finding that commentators and researchers have recognized that "anywhere between [forty] and [eighty-eight] percent of incarcerated women have been victims of some sort of sexual and/or physical abuse sometime in their lives prior to incarceration, the . . . 'presence of male staff in women's housing units' creates 'a sexualized atmosphere that is experienced as intimidating by the women'").

135. The difference here may be that in *Jatczak*, the court found a complete lack of "evidence" that role-modeling was a necessity for the boys, unlike other cases where the employers had established the necessity of role-modeling function of the employment. *Jatczak*, 540 F. Supp. at 704.

argument.[136] The employer's argument was substantively identical to the role-modeling arguments that other courts had acknowledged in cases involving youth correctional facilities.[137] In *Henry*, the superintendent of a juvenile correctional facility explained that he had implemented a role-model program for his youth inmates because research indicated that "'gender mentoring improves the chances of child behavior changes being positive'."[138] Consequently, to support the role-modeling program he had initiated, the superintendent found it necessary to hire same-sex correctional officers for third duty, or nighttime, positions.[139] Regardless, the court highlighted that counseling was not part of the official duties of the correctional officers and that the night-shift position did not offer substantial opportunities for counseling-type conversations to occur.[140] Therefore, the court found that the county had failed to support its position that male only positions during the clientele's sleep was reasonably necessary for its role-modeling or rehabilitative efforts.[141]

Finally, courts have essentially rejected employers' role-modeling BFOQ defenses in occupational circumstances that do not involve youth and are not in combination with other same-sex BFOQ concerns.[142] For example, in *EEOC v. Hi 40 Corporation, Inc.*, the court, in part, dismissed a weight loss center's subtle argument that it was necessary for a female to hold counseling positions at the center in order to act as positive role models for the employer's clientele.[143] There, the customers were ninety-five percent women and the court acknowledged that the counselor's duties included providing instruction on diet programs, counseling customers about weight, and monitoring the progress of customers.[144] While the court recognized that the customers felt uncomfortable with men performing many of these duties, the court construed this concern as an issue of customer preference and refused to find a true privacy BFOQ.[145] Furthermore, although the court acknowledged that the counselors "may serve as role models . . ." because "[o]ften counselors have had their own

136. Henry v. Milwaukee Cnty., 539 F.3d 573, 584-85 (7th Cir. 2008).

137. *Id.*

138. *Henry*, 539 F.3d at 583.

139. *Id.*

140. *Id.* at 585.

141. *Id.* To a large degree, this argument is the same made by other juvenile correctional facilities the cases are essentially factually indistinguishable. The court here distinguished *Torres* on the grounds that the same-sex role-modeling policy there was more narrowly tailored. *Id.* at 582.

142. EEOC v. Hi 40 Corp., Inc., 953 F. Supp. 301, 305 (W.D. Mo. 1996).

143. *Id.* at 302.

144. *Id.* at 302-04.

145. *Id.* at 304.

personal weight loss experience and have faced the same challenges the customers face," the court did not recognize this evidence as sufficient to support a role-modeling BFOQ.[146]

C. Distinguishing the Role-Modeling BFOQ and the Rehabilitation BFOQ

After a thorough analysis of the same-sex role-modeling BFOQ, there is a question of what distinguishes it from the same-sex rehabilitative BFOQ. This question is important for several reasons: first, it is important to understand why the role-modeling BFOQ should be treated separately from the rehabilitative BFOQ; second, if the two are conceptually different but similar, how can the courts only accept the role-modeling BFOQ when in combination with another BFOQ but not when it stands alone? Ultimately, the manner in which the courts have defined and shaped the role-modeling BFOQ lends it to be a subset of the rehabilitative BFOQ as opposed to being entirely distinct.

As courts have applied the role-modeling BFOQ, there is undoubtedly a great deal of overlap between it and the rehabilitative BFOQ. In order to distinguish between the two defenses, it helps to understand the scenarios of each BFOQ's acceptance. Courts have recognized the same-sex rehabilitation BFOQ in circumstances where adults of a particular gender have been negatively impacted by the other gender.[147] Consequently, in order to facilitate their rehabilitation, it is necessary to separate them from individuals of the other gender.[148] In rehabilitation cases, the purposes of the same-sex policy isn't necessarily for the positive influence of the hiring, but rather, to avoid the negative reactions to those of the opposite gender.[149]

Comparatively, the same-sex role-modeling BFOQ aspires to the theoretical inverse. Employers have argued and courts have accepted that it is not necessarily the psychological rejection of the other gender that necessitates the same-sex hiring, but rather, the rehabilitation in this instance involves the positive pull that an individual of the same gender can provide to an individual, usually a youth.[150] There is an underlying

146. *Id.* at 303.

147. *See, e.g.*, Torres v. Wis. Dep't of Health & Soc. Serv., 859 F.2d 1523, 1532 (7th Cir. 1988) (recognizing the same-sex rehabilitation BFOQ in regards to a female prison because many prisoners had been physically and sexually abused by men).

148. *Id.*

149. *See id.* at 1530 (noting that female prisoners had negative reactions to men in positions of authority).

150. *See, e.g.*, Leggett v. Milwaukee Cnty, 04-C-422, 2006 WL 3289371 at *2, *3 (E.D.

assumption that divides the two, which is that the youth are more emotionally and intellectually malleable, a concept lacking in the rehabilitation BFOQ. Moreover, there is a broad assumption that in rehabilitative scenarios, something has gone wrong.[151] In role-modeling scenarios, there is not necessarily a need for an event or condition to rehabilitate the clientele from. Ultimately, the ideas are quite similar, but not the same. It is difficult to state the degree of space between the two concepts because courts have used them closely, if not interchangeably.[152] However, fundamentally, the defining distinction between the rehabilitation and role-modeling BFOQ lies in the underlying reason for the use of the same-sex hiring. For adults, the goal is to avoid the clientele's negative reactions to the opposite gender in an attempt to not impede, and to some degree facilitate, rehabilitation.[153] For the youth, the role-modeling BFOQ has been used to pull their rehabilitation in a specific and positive direction by using the influence of the employee as a conduit.[154]

III. A STANDALONE ROLE-MODELING BFOQ

A. A Same-Sex Role-Modeling BFOQ is a Logical Extension of the BFOQ Standards Already Accepted by the Courts

If the role-modeling and rehabilitative BFOQ exceptions contain such a large degree of overlap, it would be inconsistent for the courts to assess the two exceptions with different standards. Despite the lower courts' rejection of the same-sex role-modeling BFOQ when it is not in combination with another BFOQ, courts should begin to accept a standalone role-modeling BFOQ defense. Initially, it should be noted that courts have already begun to accept the same-sex role-modeling BFOQ.[155] In a variety of cases involving different occupational scenarios, courts have

Wis. Nov. 8, 2006) (arguing that male staff acted as models and mentors for the juveniles).

151. *See, e.g.*, *Torres*, 859 F.2d 1523 (discussing at length Wisconsin's goal of rehabilitating female inmates).

152. *See, e.g.*, *Leggett*, 2006 WL 3289371 at *2 (conflating the role-modeling and rehabilitation BFOQs).

153. *Torres*, 859 F.2d 1523.

154. *See* Wendy Bunston, *Working with Adolescents and Children who have Committed Sex Offences*, 21 AUSTL. & N.Z. J. FAM. THERAPY, 1, 5 (2000) (finding that in same-sex group therapy of adolescent sex offenders that "the group functions as . . . a safe space where participants can honestly disclose their individual struggles. . . . In particular, the boys who have been in the group for longer periods are able to challenge new members directly and this process appears to achieve a swifter level of accountability and disclosure than would occur within individual treatment sessions.").

155. *See supra* Part III. A.

led their BFOQ analysis by establishing the primacy of a same-sex role-modeling BFOQ.[156] However, all of these cases have followed this initial commentary, which supports the inference of a standalone role-modeling BFOQ, with subsequent analysis that highlights the presence of other same-sex BFOQs, seemingly undermining the comprehensive legitimacy of the role-modeling defense.

Although some cases have recognized the role-modeling BFOQ when it is not in combination with another BFOQ defense, such as the line of cases that involve the termination of employees that would act as "negative role-models" for the clientele, these cases are not truly Title VII gender cases. The courts have acknowledged that it is not really the gender that is the BFOQ, but rather the state of unwed pregnancy.[157] Often, the employers' conditions of employment in these cases do not simply prohibit the employment of unwed pregnant women, but also unwed men who have caused a pregnancy.[158] Therefore, while the courts have analyzed these cases under a Title VII disparate treatment analysis, on the basis of their discrimination against women, a proper application of the Title VII doctrines would analyze the discrimination under a disparate systemic impact standard because the statute is facially neutral.[159] In these instances, the BFOQ exception would not apply and, instead, a business necessity defense would be applicable.[160] Additionally, in the limited cases where the employment standards in question do facially discriminate on basis of gender, only preventing unwed pregnant *females* from maintaining employment, the condition of employment still is not gender based - it is based on the alternative lifestyle the pregnancy represents.[161]

156. *Id.*

157. *See* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 699 (8th Cir. 1987) (allowing a rule that terminated negative role-modeling, which included "single parent pregnancies," including both pregnant females and males causing pregnancy).

158. *Id.*

159. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (asserting that facially neutral policies are considered under Title VII's disparate impact standard).

160. *See* Harris v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980) (finding that although the BFOQ exception and business necessity are similar, they are not identical). Generally, the business necessity defense is asserted by employers in disparate impact cases where they maintain that a hiring practice, although having a disparate impact on a protected class, "accurately – but not perfectly – ascertains an applicant's ability to perform successfully the job in question." El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242 (3d Cir. 2007).

161. *See, e.g.*, Harvey v. Young Women's Christian Ass'n, 533 F.Supp. 949, 954 (W.D. N.C. 1982) (stating that "the motivating factor behind the discharge of the plaintiff was not that she was female, nor that she was pregnant, nor that she was black," but rather that she intended to represent to her youth groups a lifestyle contrary to the mission of her employer).

Consequently, while this lineage of cases leads towards the idea of a same-sex role-modeling BFOQ, it does not cleanly establish a standalone same-sex role-modeling BFOQ due to the confusion that the unwed pregnancy places over the defense. Ultimately, both the courts' acknowledgement of the role-modeling BFOQ in combination with other BFOQs and the courts' recognition of role-modeling BFOQ of unwed pregnant mothers support the position of a standalone same-sex role-modeling defense.

More importantly, a standalone same-sex role-modeling BFOQ is logical because it is consistent with the standard articulated by the Supreme Court in *Dothard* and its other BFOQ cases.[162] By definition, it should not be necessary for a bona fide occupational qualification to be found in combination with another BFOQ to create a defense if it sufficiently satisfies the statutory standard. No phrase in Title VII, its legislative history, or in the precedent of the courts supports the inference that a BFOQ cannot, by itself, create an employer defense. Title VII simply states that it will not be unlawful "for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where [the protected class] is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[163] Statutorily, there is no demand for multiple layers of reasoning to support a BFOQ defense. The other gender-based BFOQs that the courts have accepted have been recognized, at least on one occasion, on their own merit and not in combination with another BFOQ.[164] It would be both doctrinally and logically inconsistent to demand this stringent combination of BFOQ support for only the same-sex role-modeling BFOQ.

Finally, while the Supreme Court and lower courts have consistently read the BFOQ defense as a narrow exception to the Title VII rule against gender discrimination, the role-modeling BFOQ coalesces with the courts' limited reading of the provision. Stated bluntly, there are many occupational circumstances, including the positions already highlighted by the courts, where same-sex role-modeling "is reasonably necessary to the normal operation or essence of defendant's business."[165] In employment contracts where the necessity of moral character is considered, role-modeling is clearly an essential part of the business. Yet, the role-modeling BFOQ should not be limited to these occupational circumstances.

162. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (interpreting Title VII of the Civil Rights Act of 1964 as permitting sex-based discrimination in circumstances that reasonably require the normal operation of a particular business).

163. 42 U.S.C. § 2000e-2(e)(1) (2006).

164. *See supra* Part II. C.

165. *Dothard*, 433 U.S. at 333.

Commentators have defined role-modeling in a variety of ways, but Theodore Kemper, an author of a number of social power and status papers, has described a role model as a person who "'possesses skills and displays techniques which [an] actor lacks . . . and from whom, by observation and comparison with his own performance the actor can learn.'"[166] In positions where the necessity, or centrality, of this type of role-modeling is clearly considered, especially where youth of a particular gender is involved, it is apparent that part of the "essence" of the employer's business is to provide a strong role-model for their clientele. In these instances, consistency and logic demand that the employer is afforded the privilege of the same-sex role-modeling BFOQ as they would with other BFOQ defenses.

B. Standalone Same-Sex Role-Modeling Utilitarian Value

The courts' application of a "role-modeling" BFOQ, which does not need to be found in combination with another BFOQ, has the potential to increase the productivity of crucial areas of society, namely education. Several occupations, including youth counselors and educators, incorporate role-modeling as a central objective of their position. Even within Title VII, Congress has already illustrated that BFOQs in the educational sphere are different than BFOQs in other employment scenarios. Congress wrote in Title VII:

> [I]t shall not be an unlawful employment practice for *a school, college, university, or other educational institution or institution of learning to hire and employ employees* of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[167]

While, contextually, the BFOQ preserved by Congress in this text explicitly relates to religious educational institutions, it is a concession that

166. Jeanne J. Speizer, *Role Models, Mentors, and Sponsors: The Elusive Concepts*, 6 SIGNS 692, 693 (1981) [hereinafter Speizer] (citing Theodore D. Kemper, *Reference Groups, Socialization and Achievement*, 33 AM. SOC. REV. 31-45 (1968)).

167. 42 U.S.C. § 2000e-2(e)(2) (2006) [emphasis added].

highlights that the educational environment, and the position of teacher, is inherently different than other employment scenarios when it comes to the characteristics of its employees.[168] In fact, the religious education provision was questioned for many reasons during the legislative debate, but the legislators readily concurred that it was necessary for the teachers to adhere to the religious denomination of the exempt organization for it to effectively carry out its mission.[169] At the core of this concession is the idea that educational leaders should possess the traits and characteristics that they are trying to instill in the children because role-modeling is part of the essence of their position.[170]

While the implication of the religious educational exemption gives some encouragement, more fundamentally, courts should allow educational institutions to choose employees on the basis of sex, accepting role-modeling as a standalone same-sex BFOQ, because role-modeling is part of the "essence" of educational positions. The Supreme Court's test for BFOQ establishes that a same-sex BFOQ is sufficient when a gender is necessary for an occupation because it "is reasonably necessary to the normal operation or essence of defendant's business."[171] Clearly, the role of educational institutions is to educate their students, or youth clientele. But how do we define the scope of what the teachers are supposed to

168. *See* Ashlie C. Warnick, *Accommodating Discrimination*, 77 U. CIN. L. REV. 119, 169 (2008) [hereinafter Warnick] (highlighting that "[a]bsent the religious employment-discrimination exceptions, schools would not be able to ensure that their employees were devout followers of the faith or conducted their lives as *role models* for students") [emphasis added]. However, some courts have highlighted that one of Congress' primary motivations for the exemption of religious schools from Title VII requirements was the legislators' desire to avoid religious-freedom complications. *See* Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 976 (D. Mass. 1983) (stating that some of the senators expressed concern that without an exemption for religious organizations, "an unconstitutional encroachment on the operations of religious organizations by the government would result").

169. 110 CONG. REC. 2587 (1964) (Representative Roush stating, "I lived on the campus of a denominational college. That college insists not only that its administrators, not only its teachers and professors adhere to its religious beliefs, but insists that the janitors and everyone else who is employed by that school to adhere to those beliefs. That college should have the right to compel the individuals it employs to adhere to its beliefs, for that college exists to propagate and to extend to the people with whom it has influence its convictions and beliefs. To force such a college to hire an 'outsider' would dilute if not destroy its effect and thus its very purpose for existence.")

170. Warnick, *supra* note 168 at 167 (explaining that "[i]t seems evident that the central purpose of religious organizations and their schools is to convey their religious message and teachings. The Archdiocese of Chicago, for instance, says that its 'schools exist primarily to evangelize and educate students for the Church's mission.' By requiring employees to conduct their personal lives according to religious doctrine, religious schools communicate to their students the righteousness of those beliefs. All employees act as role models for a school's students.").

171. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 407 (1985).

teach? If teachers are charged with merely teaching the content of their grade-level curriculum, which construes the role of educators extremely narrowly, then it appears that the task of role-modeling is not truly part of the "essence" of their position.

Yet, many researchers, educational theorists, and courts, who have considered the role of teachers, have found that the role-modeling aspect of an educator's position is one of its core elements. This consideration of educators as role models for their pupils stretches back to the foundations of the country.[172] In colonial America, communities expected teachers to be religiously conservative, morally acceptable, and loyal to the local government.[173] As the country and the position of the American educator matured with industrialization and urbanization, the strict shackles placed on the educator's life loosened, reflecting a weakening emphasis placed on religious values, but the inherent notion of educators as role models did not abate.[174] Today, although under less scrutiny than in past eras, teachers are still expected to be exemplars of morality.[175]

Courts have echoed this understanding, acknowledging that teachers are role models in decisions that have occurred outside of the BFOQ context.[176] Yet, courts have also recognized that there are bounds to the discretion that school boards may employ when considering the morality of their teachers.[177] Generally, courts have established that school districts may not terminate an educator simply because the district disapproves of an educator's lifestyle, but the district possesses broad discretion when a teacher's immorality in the community is likely to have a negative impact on their teaching.[178]

In *Littlejohn v. Rose*, the Sixth Circuit Court of Appeals found that a school board's decision not to rehire a recently divorced teacher was a violation of the teacher's freedom of choice in a family matter.[179] Comparatively in *Sullivan v. Meade Independent School District, No. 101*, the Eighth Circuit Court of Appeals accepted the termination of an unmarried teacher who lived with a male friend close to school because it

172. John Martin Rich, *The Teacher as an Exemplar*, 75 HIGH SCHOOL J. 94 (1991-1992) [hereinafter Rich].

173. *Id.* at 94.

174. *Id.* at 95.

175. *Id.* at 96-97.

176. *See, e.g.*, Sullivan v. Meade Indep. Sch. Dist. No. 101, 530 F.2d 799 (8th Cir. 1976) (discussing a school district's dismissal of a teacher that was viewed in the community as a role model for conduct, which was seen as violating the communities values while not entertaining a BFOQ defense).

177. Rich, *supra* note 172 at 96-97.

178. *Id.* at 95-96

179. Littlejohn v. Rose, 768 F.2d 765, 771 (6th Cir. 1985).

was a violation of community values and had an adverse effect on students.[180] While these cases stress that the teachers' "immorality"[181] would affect their ability to effectively perform their position, it is clear that the goal of the occupation in these cases utilizes a broader conception of an educator's role, incorporating themes of role-modeling that entangle more than merely teaching grade-level content.

In 2003, the Supreme Court briefly addressed the role-modeling argument in the seminal affirmative action case *Grutter v. Bollinger*.[182] The Court wrote that:

> [i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.[183]

Although the Court notably focused on the legitimacy of the government due to its racial diversity, its subsequent accent on the "path" to leadership emphasizes an accessibility that is reflective of role-modeling theory.[184]

Researchers have provided additional support to the courts' understanding of teachers as role models. Commentators have often taken the role of educators as role-models to be so fundamental that little analysis is given. These commentators simply take for granted that it is implicitly part of a teacher's occupation to be a positive role-model. Jeanne J. Speizer writes that "the presence of role models in the learning environment has been considered an important aspect [of some educational scenarios]. . . [and] [t]he value of role models in other settings and for other populations has often been asserted."[185] Other researchers simply state that modeling and role-modeling are fundamentally part of the expectations of

180. *Sullivan*, 530 F.2d at 808.

181. *Id.* at 801.

182. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

183. *Id.*

184. *Id.* However, in *Wygant v. Jackson Board of Education*, the Supreme Court directly confronted the idea of role-modeling in schools, rejecting "role-modeling" as the basis of affirmative action policy because it had no logical stopping point and was unrelated to the underlying harm that affirmative action attempts to remedy. 476 U.S. 267 (1986). While *Wygant* is instructive of the limits on role-modeling in the affirmative action context, role-modeling is considered by a different standard in the BFOQ context and, consequently, *Wygant* is not given substantial treatment in this Comment. *Id.*

185. Speizer, *supra* note 166 at 694.

the occupation of an educator. For example, John M. Rich writes that "[m]any school boards and communities expect teachers to set good examples and act as exemplars to students in their dress, grooming, social amenities, and morals."[186] Other commentators have highlighted the difference in efficacy of teachers when they are considered role models.[187] While this does not necessarily prove that role-modeling is part of the "essence" of their job, it supports the conceptual framework that if educational gains are narrowly considered the only "essence" of the teacher's role, then role-modeling can contribute significantly to that core goal and, thus, may be incorporated as part of the "essence" of the position.[188] In this light, the definition of role model and teachers are so closely tied, that some find them to be interchangeable.[189]

Ultimately, the degree to which role-modeling is considered part of the "essence" of an educator's job will be case-by-case. Formal teacher-student role-modeling programs and informal emphases on the relationship between educators and students have proliferated in education, especially in the urban context, as researchers and districts have noted the need and efficacy of these structures.[190] Researchers have noted that many concerns of the inner-city school, including "[p]overty, infant mortality, one-parent homes, children raising children, racism, child abuse, substance abuse, urban blight, declining test scores" have prompted the initiation of formal role-modeling programs.[191] Perhaps, in factual scenarios where role-modeling is officially part of the faculty's duty, it would be far more likely in these contexts that a court would find role-modeling as part of an occupation's central objective.

Finally, it is worth noting that many of the other same-sex BFOQs, such as privacy interests, physical safety interests, and rehabilitative interests, are present in the educational sphere, albeit to a degree that does

186. Rich, *supra* note 172 at 94.

187. *See* Thomas Dee, *Teachers, Race, and Student Achievement in a Randomized Experiment*, 86 REV. OF ECON. & STATISTICS 195, 209 (2004) [hereinafter Dee] (finding that "role-model effects" lead to student achievement and indicate that assignment to an own-race teacher significantly increased the math and reading achievement of both black and white students).

188. *See, e.g.*, Andrew J. Martin & Martin Dowson, *Interpersonal Relationships, Motivation, Engagement, and Achievement: Yields for Theory, Current Issues, and Educational Practice*, 79 REV. OF EDUC. RES. 327, 333 (2009) [hereinafter Martin & Dowson] (discussing how interpersonal relationships, like those with a teacher, can lead to academic success).

189. *See, e.g.*, Dennis E. Fehr, *When Faculty and Staff Mentor Students in Inner-city Schools*, 25 MIDDLE SCHOOL J., 65 (1993) (defining mentor as a word that could mean role model or teacher).

190. *Id.*

191. *Id.*

not meet the level that would establish a BFOQ. Therefore, while none of these interests are strong enough in this educational context to actually establish a same-sex BFOQ by itself, courts, which have been more acquiescent to BFOQ arguments when other interests are present, should more readily accept the role-modeling BFOQ in an educational employment case when the other interests are lurking in the factual background of the case.[192] A court's analysis of the privacy, physical safety, and rehabilitative interests of a school will differ factually from case to case, but generalizing can serve to illustrate the basic premise of the argument. While the interests of many same-sex BFOQs are present in the educational context, the privacy concerns of students are likely an issue at almost every grade level. The Supreme Court has considered the privacy interests of public school students in a variety of Fourth Amendment cases, illustrating the specter of privacy invasion that looms in the public school environment.[193] While the accepted privacy BFOQ cases have mostly dealt with same-sex viewing, some cases have gone as far to note that privacy interests are concerned where conversation involving private, or sexual, matters are concerned.[194] Consequently, in some school districts, especially those that require heavy searches or observation by teachers, the same-sex privacy interests of its students may support a same-sex hiring decision. Perhaps, if a school were to illustrate physical safety or rehabilitative interests, hiring decisions based on same-sex role-modeling could be supported by the additional physical restraint or rehabilitative concerns that are only possible through gender-based hiring.[195]

C. The Potential Achievement Gains Made by the Hiring of Same-Sex Teachers

A standalone same-sex role-modeling BFOQ would provide

192. *See supra* Part III. A.

193. *See, e.g.*, Shannon O'Pry, *A Constitutional Mosh Pit: The Fourth Amendment, Suspicionless Searches, and the Toughest Public School Drug Testing Policy in America*, 33 TEX. TECH L. REV. 151, 166-238 (2001) (discussing the Supreme Court's jurisprudence involving searches of students on school grounds and the application to various scenarios).

194. Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132-133 (3d Cir. 1996).

195. These ideas may seem far-fetched, but the diversity of the educational landscape in the United States, which can often involve both orderly and violent schools, not all that dissimilar from a prison, and students who have mental health or learning disability issues, not dissimilar from those in psychiatric hospitals, suggests that there may be utility for such a rule. *See generally*, Kari L. Higbee, *Student Privacy Rights: Drug Testing and Fourth Amendment Protections*, 41 IDAHO L. REV. 361, 365 (2005) (stating that "[w]ith the influx of school-related violence and increasing drug-related problems, school administrators have necessarily taken measures to prevent such disciplinary problems").

educational institutions and administrations with the hiring discretion that they require to maximize their students' educational opportunities. Initially, it should be highlighted that many of the gains made by students through role-modeling are not quantifiable in terms of academic gains. Role-modeling, as a concept, serves primarily to provide students with an exemplar for them to mirror; copying teacher mindsets and habits primarily deals with intangible characteristics. However, it is not as if an educator teaches a class well and, in turn, the students, in viewing him or her as a role model, then automatically begin to learn well. The students do not replicate a carbon copy of the teacher's successful actions. It is the mindsets and habits, not the *success*, that the students are mirroring.[196] Therefore, it is possible that many of the gains made by students through role-modeling, by learning to mirror their teacher's habits and traits, would improve in many ways that may not ultimately yield quantifiable outcomes. However, many of the characteristics that teachers model for their students, such as perseverance, method, and adaptability, could – and do – eventually lead to student emulation and, ultimately, academic achievement.[197]

Research has shown that a teacher's role in a student's life is one of the greatest factors in determining their academic success.[198] Both common sense and empirical research have illustrated that the achievement of students can vary widely depending on the assignment of their teacher.[199] With the United States slipping in the world educational rankings for both language and math,[200] researchers should examine the root causes and

196. *See* Anthony F. Grasha, *A Matter of Style: The Teacher as Expert, Formal Authority, Personal Model, Facilitator, and Delegator*, COLLEGE TEACHING, Fall 1994, at 142 (discussing the variety of styles employed by teachers).

197. Martin & Dowson, *supra* note 188 at 331.

198. *See* GEORGE D. KUH, ET. AL., WHAT MATTERS TO STUDENT SUCCESS: A REVIEW OF THE LITERATURE 34 (2006) ("[v]irtually everyone agrees that student-faculty interaction is an important factor in student success").

199. *See, e.g.*, Andrew J. Wayne & Peter Youngs, *Teacher Characteristics and Student Achievement Gains: A Review*, REV. OF EDUC. RES., Spring 2003, at 89, 101 [hereinafter Wayne & Youngs] (noting that while research is mixed, there is evidence that shows that years of teaching experience, the selectivity of undergraduate institution, teachers' test scores, and regular licensure are associated with higher student achievement); Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 AM. ECON. REV. 247, 251 (2004) (concluding that "teacher quality may be a key instrument in improving student outcomes."). *Cf.* C. Kirabo Jackson, *Student Demographics, Teacher Sorting and Teacher Quality: Evidence From the End of School Desegregation*, 27 J. OF LAB. ECON. 213, 249 (2009) (discussing the decrease of quality teachers in certain schools saw a diminished "teacher value added").

200. Jessica Shepherd, *World education rankings: which country does best at reading, maths and science?* THE GUARDIAN, Dec. 7, 2010, 10:43 PM, http://www.guardian.co.uk/news/datablog/2010/dec/07/world-education-rankings-maths-

possible solutions for the decline.[201] Teachers, as the educational system's most fundamental resource, have received a large degree of attention.[202] While some reports have studied the quantity of teachers necessary to attain a satisfactory education, others, recognizing the limited resources of the public education system, have focused on the quality of teachers in an attempt to divine what characteristics make an "effective" teacher.[203] This research has produced a large body of results, some of which is conflicting, and some of which is common sense.[204] However, there is a growing consensus among all researchers that all systemic decisions that can be made to increase the quality and impact of a teacher is crucial to the vitality of the public education system in the United States[205]

Research has found that one of the ways that teachers increase their impact is tied closely to the concept of role-modeling. A number of studies have found that teachers are more effective at teaching students who belong to the same demographic group as them.[206] If students do in fact achieve at a higher rate when they are being taught by an individual of the same demographic group, it is worth highlighting the researchers' explanation of this phenomenon. Researchers have labeled the increase in academic achievement by individuals when they are being taught by those of matching demographics as the "role model" effect.[207] Commentators have hypothesized that the "role model" effect of teachers exists for a variety of reasons, stemming from the biases and archetypes of both the students and the teachers.[208] The broadest and most elusive explanation involves what

science-reading.

201. Greg Palkot, *American high school students slip in global education rankings*, FOX NEWS, Dec. 3, 2013, http://www.foxnews.com/world/2013/12/03/american-high-school-students-slip-in-global-education-rankings/.

202. *See* Wayne & Youngs, *supra* note 199 at 89 (discussing how policy makers and researchers continue to focus on teachers as a way of improving education).

203. *Id.*

204. *Id.* at 101.

205. *Id.* at 89-90.

206. *See, e.g.*, Lucia A. Nixon & Michael D. Robinson, *The Educational Attainment of Young Women: Role Model Effects of Female High School Faculty*, 36 DEMOGRAPHY 185, 192 (1999) [hereinafter Nixon & Robinson] (finding that the empirical data of student success supported their hypothesis that "female faculty in high school provide role models for young women").

207. Dee, *supra* note 187. *See generally*, Eva Pereira, *The Role Model Effect: Women Leaders Key to Inspiring The Next Generation*, FORBES (Jan. 19, 2012, 6:19 PM) http://www.forbes.com/sites/worldviews/2012/01/19/the-role-model-effect-women-leaders-key-to-inspiring-the-next-generation/ (noting how the girls set higher goals for themselves in certain regions where there was female politicians and attributing this to a "role-model effect").

208. Thomas S. Dee, *A Teacher Like Me: Does Race, Ethnicity, or Gender Matter?* 95 AM. ECON. REV. 158, 159 (2005).

researchers call "passive" teacher effects.[209] Passive teacher effects are triggered by a teacher's demographics, including his/her gender, racial, or ethnic identities, as opposed to his or her actions or behaviors.[210] Researchers have found that the "presence of a demographically similar teacher raises a student's academic motivation and expectations."[211] An additional phenomenon, which researchers have labeled the "stereotype threat," is the converse of the "role-modeling" effect.[212] In cases of "stereotype threat," students with differing identities from their teacher adopt a stereotypical view of that teacher, assuming that the teacher holds biases against them.[213] As a result, the student lowers their academic aspirations and achievement.[214] Finally, other research has highlighted that students are not the only actors in the educational environment and often, the teachers' own biases and archetypes can impact the educational environment of a student who belongs to a different demographic background.[215] For example, in his 2005 study, Dee demonstrated that "[t]he odds that a student was perceived as inattentive or disruptive are respectively at least nineteen and thirty-seven percent higher when the teacher is of the opposite gender."[216] Consequently, it appears that both the teachers and students, in perceiving one another and reacting negatively to those with differing identities while positively reacting to similar individuals, reciprocally impact achievement in the classroom.

This brings us to the central question: would a same-sex hiring BFOQ have an impact on student achievement gains? To answer this question, it is important to inquire into studies that examine whether students whose gender matches the teacher's gender achieve at a higher rate. Due to the recent scrutiny on teacher success and effectiveness, a variety of studies have inspected the demographics of successful and unsuccessful teachers, while only a limited number have measured the achievement impact of gender matching between students and teachers.[217] The few studies that have addressed the demographic interactions between students and teachers have been based upon localized studies with small sample sizes in very

209. *Id.*
210. *Id.*
211. *Id.*
212. Claude M. Steele & Joshua Aronson, *Stereotype threat and the intellectual test performance of African Americans*, 69 J. OF PERSONALITY & SOC. PSYCHOL. 797 (1995).
213. *Id.*
214. Dee, *supra* note 208.
215. *Id.*
216. *Id.* at 162.
217. Mark O. Evans, *An Estimate of Race and Gender Role-Model Effects in Teaching High School*, 23 J. OF ECON. EDUC. 209, (1992).

narrow conditions.[218] In the mid-1990s, a number of studies measured student-achievement against a variety of variables, including mutual gender identification with their teachers.[219] To a large degree, these studies were uncontrolled, broad in their scope, and conflicting in their results.[220] More recently, researchers have narrowed the scope of the tests and have found that the results "clearly indicate that exposure to female faculty and professional staff in [education] has a significant positive effect on the educational attainment of young women . . . ."[221] A variety of studies have found similar results, recognizing that female students taught by female teachers are more likely to achieve academically.[222] The impact of the role-modeling effects of male educators teaching male students has received considerably less attention.[223] However, Thomas Dee, one of the pre-eminent researches in gender concordance in the educational sphere, bluntly summarized his years of data: "[s]imply put, girls have better educational outcomes when taught by women, and boys are better off when taught by men."[224]

D. How the Role-Modeling BFOQ Would Be Applied in Education

The obvious questions surrounding the application of a same-sex role-modeling BFOQ in the educational environment is how and where it will be applied. Some schools have utilized student-focused programs, which are designed to negate the student's stereotype threat of their teachers by teaching the students about diversity, as an effective way to overcome teacher-demographic barriers.[225] Yet, ultimately, even if this plan were to be effective, the program would still fail if the root-problem were not a

218. Dee, *supra* note 208.

219. *Id.*

220. *Id.*

221. Nixon & Robinson, *supra* note 206 at 189. A study of the National Education Longitudinal Study of 1988 illustrated that female students achieved at a higher rate when taught by female teachers, while male students underperformed. Thomas S. Dee, *Teachers and the Gender Gaps in Student Achievement*, 42 J. OF HUM. RESOURCES 528, 546 (2007).

222. Speizer, *supra* note 166 at 697 (noting that study showed that "gifted high school girls in accelerated math courses are likely to achieve at a math level if the course is taught by a woman in an all-girls class or in a class where there are at least a sizable . . . . number of girls relative to that of boys").

223. Patricia Bricheno & Mary Thornton, *Role model, hero or champion? Children's views concerning role models*, 49 EDUC. RES. 383, 394 (2007).

224. Thomas S. Dee, *The Why Chromosome*, EDUC. NEXT, Fall 2006, at 69, 71.

225. *See, e.g.*, CENTER FOR RESEARCH ON GIRLS AT THE LAUREL SCHOOL SHIELDING STUDENTS FROM STEREOTYPE THREAT – A GUIDE FOR TEACHERS, https://www.laurelschool.org/about/documents/stereotypeTHREAT.pdf (discussing The Laurel School's approach and thoughts on the stereotype threat).

result of passive student stereotyping but as a result of the teacher's biases.[226] Similarly, if the stereotype-threat ultimately is the underlying cause, certain teacher training will not impact the student biases.[227] Therefore, only comprehensive bias and archetype training that aim to change the viewpoints of both students and teachers will sweepingly impact the potential problem. Yet, the feasibility of a plan of this nature is questionable. Educators are already stretched for time in a school day and are unlikely to be receptive to plans that could instead be spent preparing students for crucial standardized tests or to plans that seek to change viewpoints that the teachers do not believe that they hold.

Consequently, the most feasible and effective program would not ameliorate the underlying biases of the teachers and students, but would rather embrace the positive effects that the demographic overlap of students and teachers can have on the educational process and rather attempt to align the demographics. Predictably, schools of different sizes will have different demographic make-ups. However, overall, the schools will not be single sex. When courts have recognized the same-sex role-modeling BFOQ, it has largely been in employment scenarios where the gender of the youth clientele has been singular – either male or female.[228] While some of the cases considered by the lower courts involved mixed-gender clientele, the flexibility of the employer's workforce generally allowed the employer's policy to gender-match between the employees and the clientele.[229] However, some circumstances have established the necessity of a role-modeling BFOQ, even when the gender of the clientele was not unitary. In *Leggett v. Milwaukee County*, the court acknowledged the necessity of a same-sex role-modeling BFOQ for male guards even though there was a female inmate population.[230] Therefore, it would not be unprecedented for educational employers to utilize a role-modeling same-sex BFOQ despite the mixed-gender of its student population.

Ultimately, the application of a same-sex role-modeling BFOQ in education could come in two forms. First, educational employers could

226. Dee, *supra* note 208 at 164.

227. *Id.*

228. *See, e.g.*, Leggett v. Milwaukee Cnty., 04-C-422, 2006 WL 3289371 at *3 (E.D. Wis. Nov. 8, 2006) (approving a same-sex role modeling BFOQ for a predominantly male juvenile center).

229. *See, e.g.*, Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132-33 (3d Cir. 1996) (illustrating that an employer that had both male and female clientele could assign gender-specific employees as it was not necessary to have an entirely male or female population, as long as it was sufficient to support the role-modeling objective of the business).

230. *Leggett*, 2006 WL 3289371 at *2 (finding it necessary to have gender balance that promotes the role-modeling of its mostly male inmate population).

argue that a same-sex role-modeling BFOQ is necessary to correct a gender-imbalance in the teacher population of the school and should aim to be as close to even as possible. Thomas Dee writes that "[o]ne clear benefit of this approach is that it does not require a clear understanding of the extent to which the effects documented . . . are driven by passive responses (e.g., role-model effects and stereotype threat) or active biases in student or teacher behaviors."[231] However, Dee correctly notes that maintaining an equally balanced teacher force would have the "unintended and undesirable" consequences of possibly setting back students who did not match the traits of the teachers.[232] Consequently, if a school is sixty percent female, strictly maintaining a perfectly equal gender balance may not be an economically purposeful use of the school district's money.

Comparatively, a second approach suggests that educational employers apply a same-sex role-modeling BFOQ that would be reflective of the gender demographics of their students. As with the prison population in *Leggett*, employers could argue that, in order to appropriately maintain the necessary level of role-models for the students, the employment of gender role-models should be proportionate to the student demographics.

In its application, the same-sex role-modeling BFOQ would likely utilize a form of the *Leggett* proportion-based approach. This standard would allow a school district to argue that it possesses a sex-based BFOQ when, due to an imbalance in the gender of hired teachers as compared to the gender of the student population, the employer necessarily would need to hire an individual of a specific gender in order to promote its role-modeling objective. Although this may seem like an unworkable standard because any discrepancy in the student demographics and the demographics of the teachers would create a viable cause of action, this is not necessarily the case. In disparate treatment cases, courts already compare the demographics of one group, the employed teacher population for example, to the demographics of another appropriate group, qualified teachers in the relevant teacher market.[233] The standard employed in *Hazelwood*, which requires a statistical disparity sufficiently substantial to raise such an inference of causation,[234] is flexible enough to prevent a flood of litigation. Therefore, in comparing the gender demographics of the student population and the gender demographics of its teacher populations,

231. Dee, *supra* note 208 at 164.

232. *Id.*

233. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310-311 (1977) (holding that comparing demographics of the employed teacher population to the demographics of qualified teachers in the relevant labor market is appropriate).

234. *Id.* at 309.

courts could import the same standard and only find a valid same-sex BFOQ when there are discrepancies in the proportions of student and teacher demographics are sufficiently substantial to raise a concern for the effectiveness of the school's ability to provide adequate same-gender role-models.

Taken in the abstract, the difference between the two possible policies, one that aims for an even gender split and one that is reflective of the student demographic population, appears to be of little significance. If the gender split of the student population is even, then there is no tangible difference between the policies, because in either case, the district's goal will be to maintain a teacher workforce that maintains gender balance. However, research shows that the gender demographics of students vary depending upon the educational placement of the student and the type of school placement.[235] In one Maryland school in 2011, the female population of the twelfth grade was nearly double that of the male population.[236] Many researchers have highlighted the need for male teachers in urban schools who could serve as role-models for the male students.[237] One study by the Council of the Great City Schools noted that in the early 1990s, "there was one male teacher for every [thirty-four] male students in urban schools, while there was one female teacher for every 12.3 female students."[238] Additional research shows that single-sex education in inner-city schools is effective at reversing trends of black male underperformance and, in the spirit of experimentation against a backdrop of failure, an increasing number of schools are attempting to define classrooms based upon gender concentration.[239] In these instances of large

235. *See*, U.S. DEPARTMENT OF EDUCATION, HIGHER EDUCATION: GAPS IN ACCESS AND PERSISTENCE STUDY 42 (2012), *available at* http://nces.ed.gov/pubs2012/2012046.pdf (illustrating that males are almost twice as likely to be in a special education placement, whereas females are more likely to be in a charter school); NATHANIAL S. HOSLEY, SURVEY AND ANALYSIS OF ALTERNATIVE EDUCATION PROGRAMS 8 (showing that in a survey of alternative education programs in Pennsylvania the student gender breakdown was seventy percent male and thirty percent female).

236. *See, e.g.*, *National Center for Education Statistics, Common Core Data* http://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&InstName=Coppin&SchoolType=1&SchoolType=2&SchoolType=3&SchoolType=4&SpecificSchlTypes=all&IncGrade=-1&LoGrade=-1&HiGrade=-1&ID=240009001530 (last visited May 13, 2014) (showing that there were 144 males enrolled compared to 212 females at Coppin Academy).

237. *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1744 (1992). *See also* LAURA LIPPMAN, ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY 92 (1996) [hereinafter Lippman] (stating the need to recruit male teachers who could serve as role models for male students).

238. Lippman, *supra* note 237 at 92.

239. Kusum Singh, et al., *Single-Sex Classes and Academic Achievement in Two Inner-City Schools*, 67 J. OF NEGRO EDUC. 157 (1998). *See also* Sharon K. Mollman, *The Gender*

degrees of gender disparity, employers should be able to correct the imbalance of teacher gender-ratio to reflect the student population by promoting role-modeling, and thus, achievement of their students.

CONCLUSION

The Supreme Court's decision in *Hazelwood School District v. United States* properly rejected the district court's consideration of student demographics when considering them in the context of a disparate treatment case.[240] Yet the district court's consideration of student demographics in the context of educational hiring practices was not completely mistaken. The Supreme Court decisions that have interpreted the same-sex BFOQ exception to the Title VII requirement against discrimination have provided that when gender is part of the "essence" of a position, employers may validly discriminate on the basis of gender when making employment decisions. While the Supreme Court has maintained that this exception is narrow, the lower courts have expanded its application to a variety of occupational contexts that establish the appropriateness of gender-based hiring practices when the employer's third-party clients have privacy interests, physical safety interests, or rehabilitative interests that would be jeopardized by a non-discriminatory hiring practice.

More elusively, at the nexus of these three protected interests, the lower courts have recognized a same-sex role-modeling BFOQ, which provides that discriminatory gender hiring practices may be necessary in order to promote the positive role-modeling of youth clients. However, the lower courts' limited application of the same-sex role-modeling BFOQ to occupational circumstances where it is in combination with the other BFOQs is logically inconsistent with the overarching statutory requirements of the exception. Consequently, the primacy given to the role-modeling BFOQ in certain applications, as well as its necessity as part of the "essence" of a variety of occupations, establishes that the same-sex role-modeling BFOQ should be a standalone exception, which does not need to lie in combination with other BFOQs in order to defend a discriminatory hiring practice.

The policy implications of a same-sex role-modeling BFOQ could have an overwhelmingly positive impact on the educational system in the United States. Role-modeling has been a consideration in the U.S.

Gap: Separating the Sexes in Public Education, 68 IND. L.J. 149, 161 (1992) (discussing the importance of education in promoting gender equality).

240. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

educational system since its inception and courts, including the Supreme Court, have recognized that educators provide a model that students look to emulate and replicate. As a result of the biases and archetypes that both students and teachers bring into the classroom, research illustrates that students achieve at a higher rate when they are being instructed by an educator of demographic convergence. Research also demonstrates that students, by viewing individuals of their gender in leadership and socially successful roles, receive a boost in academic performance as they attempt to mirror the intangible traits of their role model. Consequently, in schools where there is a large gender disparity in classrooms and grade levels, a gender-based role-modeling BFOQ would allow school districts to hire individuals to reflect the characteristics of the student body. This approach would provide a proportionate number of gender-based role-models for the students that boost their success through the passive effects of role-modeling. The degree to which a role-modeling BFOQ would impact the educational system is unclear. However, given the number of failing schools that have large gender disparities in its student and teacher populations, role-modeling BFOQ seems to be an effective method to combat the trend of student dropouts and academic underperformance in these schools. Indeed, it is a strong step in the right direction as it speaks directly to the essence of the mission of education.

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