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Bodily Privacy, Toilets, and Sex Discrimination

The Problem of "Manhood" in a Women's Prison

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Unfounded assumptions about sex and gender roles, the untamable potency of maleness and gynophobic notions about women's bodies inform and influence a broad range of policy-making institutions in this society. In December 2004, the U.S. Court of Appeals for the Sixth Circuit continued this ignoble cultural pastime when it decided *Everson v. Michigan Department of Corrections*.[1] In this decision, the Court accepted the Michigan Department of Correction's (MDOC's) claim that "the very manhood" of male prison guards both threatens the safety of female inmates and violates the women's "special sense of privacy in their genitals." MDOC argued that concern for the women prisoners' safety and rights to privacy warranted designating the prison guard positions in the housing units at women's prisons as "female only." The Everson Court accepted this argument and declared that the sex-specific employment policies were not impermissibly discriminatory. While protecting women prisoners from sexual abuse and privacy violations is of paramount importance for any correctional institution, I argue that the Sixth District Court's decision relies on unacceptable and offensive stereotypes about sex, gender, and sexuality, and it undermines Title VII's power to end discriminatory employment practices.

The *Everson* decision is ostensibly a Title VII case. But the significance of this case is the insight it affords us into the perpetuation of defining women's right to privacy in terms of their need for modesty.[2] Rather than evaluate employment policies for prison guards to ensure they are designed to protect women prisoners from sexual abuse, which is what the case purports to do, the court shifts its focus to the matter of protecting women prisoners from the shame of being seen by male guards while using a toilet.

Obviously, anxieties about privacy violations while using a toilet are profoundly strong in Western culture. Put simply, toilets are everywhere—at work, business, school, government buildings, stores, hospitals, and military facilities—and we carry our toileting anxieties with us wherever we go. So it is not surprising that we find the same anxieties surfacing in women's prisons. But not only is toilet anxiety an unsound basis for a Title VII decision, but cultural fears of genital exposure prevent us from realizing social equality. It is women who are paying a higher price. While claiming to protect women prisoners, this decision reinforces misogynistic and sexist assumptions about women. And these assumptions advance men's interests—*all* men—and oppress women—*all* women. If we are ever to realize a fairer, more equal society, we need radically to rethink our toilet anxieties. Toileting is a vital human activity; unjust toileting policies (such as "whites only" toilet policies) affect us in a deeply personal way. And prisons, because they institutionalize profound disparities of power, are sites in which we should be particularly certain to cast aside toilet anxieties and instead evaluate policies according to the highest standards of equality and fairness, not in terms of our fear of exposed genitals.

A "Special Sense of Privacy"

Before beginning my analysis of the *Everson* decision, I provide some background information about the events that brought this case to the courtroom. *Everson v. Michigan Department of Corrections* principally concerns a Title VII dispute. Title VII of the Civil Rights Act of 1964 is the primary federal protection against harassment and unequal employment opportunities in the private sector. Employers may not discriminate against any employee "with respect to his compensation, terms, conditions, or privileges of employment," nor can employers "limit, segregate, or classify" employees on the basis of their sex. Title VII was amended in 1972 so that it would apply to federal and state government.

Although Title VII was created in part to ensure equal employment opportunities for men and women, the courts have long accepted the claim that men and women are, when it comes to certain employment situations, importantly different. Indeed, our court system accepts that the differences between men and women are so significant and unerasable that employers can refuse to hire either men or women, choose to promote or advance men or women only, and segregate men and women into separate employment sectors (creating what some feminists refer to as "gender ghettoes" in the workplace). If an employer can successfully argue that a person's sex is a bona fide occupational qualification (BFOQ), then treating women and men employees differently is not a violation of Title VII. To establish a BFOQ defense, an employer must show three things:

1. The employer has a "basis in fact" for its belief that gender discrimination is "reasonably necessary"—not merely reasonable or convenient—to the normal operation of its business.[3]
2. The "job qualification must relate to the essence, or to the central mission of the employer's business."[4]
3. No reasonable alternatives exist to discrimination on the basis of sex.[5]

It is important to note that the BFOQ defense does not aim to show that sex discrimination is not taking place; rather, it argues that discriminatory treatment is justified.

In its recent decision, the *Everson* court reviewed the Michigan Department of Corrections employment policy stipulating that all COs (correctional officers) and RUOs (residential unit officers) in the housing units in the women's prisons would be female only. This sweeping sex-specific employment policy was created to eliminate the long-standing problem of sexual abuse and mistreatment of female inmates. During the 1990s, several human rights organizations reported that the sexual abuse of female prisoners by male guards was "rampant." Nothing was done to address prison conditions until a lawsuit by the U.S. Department of Justice and, barely a year later, a lawsuit by the female prisoners were initiated. Both lawsuits were decided against MDOC.

Highlights of the history of sexual abuse in MDOC's women's prisons during the 1990s include the following:

- In 1993, the Michigan Women's Commission advised the MDOC that "sexual abuse and harassment are not isolated incidents and that fear of reporting such incidents is a serious problem" (*Mich. Comp. Laws Ann.* § 10.71).
- In 1996, the Human Rights Watch concluded that "rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are continuing" and that male corrections staff routinely violate inmate privacy rights by "improperly viewing inmates as they use the shower or toilet" (*Everson v. MDOC* [2004]).
- In 1999, the UN Commission on Human Rights claimed that corrections officers retaliate against women who report sexual abuse.
- In May 1999, the Civil Rights Division of the U.S. Department of Justice settled a lawsuit against the MDOC after investigating allegations of sexual abuse of women prisoners in Michigan prisons. The lawsuit, reported "a pattern of sexual abuse, including sexual assaults by guards, 'frequent' sexual activity between guards and inmates, sexually aggressive acts by guards (such as pressing their bodies against inmates, exposing their genitals to

inmates, and fondling inmates during 'pat-down' searches), and ubiquitous sexually suggestive comments by guards . . . [as well as] improper visual surveillance of inmates, including the 'routine' practices of watching inmates undress, use the shower, and use the toilet." In the "*USA* agreement" emerging from the suit, the MDOC pledged to minimize one-on-one contact between male staff and female prisoners and to institute a "knock and announce" policy, which would require male officers to "announce their presence prior to entering areas where inmates normally would be in a state of undress" (*Everson v. MDOC* [2004]).

- In July 2000 a lawsuit initiated by female inmates (the "*Nunn* lawsuit," which charged the MDOC with tolerating "rampant sexual misconduct, sexual harassment, violation of privacy rights, and retaliation by correction officers" [*Everson v. MDOC*]) was settled, with an award of just under $4 million going to the inmates. In addition to the monetary relief, the MDOC pledged, among other things, to restrict pat-down searches of female inmates by male staff, to require male staff to announce their presence in female housing areas, and to "maintain areas where inmates may dress, shower, and use the toilet without being observed by male staff" (*Everson v. MDOC* [2004]).

Shortly after the two highly public and expensive lawsuits were settled, the newly appointed director of the MDOC decided that the best way to respond to the rampant sexual abuse of their prisoners was to eliminate all male guards from women's prisons.

The *Everson* court accepted MDOC's claim that "the female gender" is a bona fide occupational qualification for the prison guard positions in the women's prisons. In other words, the court determined that the nature of the job *requires* that it be done by a female, and though the MDOC is discriminating against males, it is not violating Title VII. In explaining this decision, the court focused on two lines of reasoning: (1) that courts must acknowledge the "unusual responsibilities" with which prison administrators are burdened and not "tie their hands" by limiting the means by which they fulfill those responsibilities and (2) that the safety and privacy concerns of female inmates make sex-specific employment policies reasonable. Let us first consider the first line of reasoning, that the "unusual responsibilities" with which prison administrators are burdened justify sex-specific employment policies. Relying on well-established precedent, the court cited the U.S. Supreme Court when claiming that prison officials "must grapple with the 'perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.'"[6] In addition to

achieving this complex cluster of penalogical goals, prison officials must provide a secure and safe environment that protects the legal rights of its inmates as well as its employees.

It is well accepted by both prison officials and the courts that realizing these goals necessitates the complete observation of inmates at all times. It is believed that this panoptic regime enables the guards to prevent inmates from harming the guards, other inmates, or themselves. Thus, while prison inmates suffer a loss of privacy that would violate the constitutional rights of nonincarcerated individuals, this loss is regarded as acceptable given the intolerable dangers that can arise behind closed doors and privacy screens. Bill Martin, director of the MDOC, testified that

> any time you put barriers in a facility from observation, *direct observation*, it puts I think inmates and staff at certain risk. For instance, if a window curtain is up on a cell door and an officer, male or female, it doesn't matter, can't see in, there's no way we can intervene in a suicide attempt because we don't know that's going on. We just don't know what's behind it, and it seems contrary then to other recommendations that you put windows in other doors [so] that you can always see in.[7]

George Camp, a "corrections consultant," testified that doors and screens are

> barriers [that] give inmates an opportunity . . . to do things that they ought not be doing, for the staff not to be aware, not to interact with them, and I think that runs counter to being alert, observant, and in the know, and you have to have that. . . . Once you abandon any part of the turf at *any time* or *any place*, you have sent a signal that this belongs to the inmates and it cannot, and once you do that, it leads to a creeping and eroding of the legitimate rights, *the legitimate obligation of a prison staff to be everywhere*, to be informed, to be alert.[8]

So guards have not only the right but the duty to observe inmates at all times, including when they dress, shower, and use the toilet. But the question before the *Everson* court is this: Does requiring *male* guards to observe unclothed *female* inmates violate the female inmates' right to privacy to an intolerable degree? And this brings us to the Sixth District Court's second line of reasoning: that the safety and privacy interests of female inmates support the claim that all guards in women's housing units must be female.

Consider the court's discussion of the inmates' right to safety first. Declaring that "no amount of sexual abuse is acceptable," the *Everson* court agreed with the MDOC that it must adopt employment policies

that ensure, as much as reasonably possible, the elimination of the sexual abuse of female inmates.[9] The MDOC argued that the only way adequately to protect female inmates was to hire only female prison guards. To hope to screen out the abusive male guards from the nonabusive ones was deemed unreasonable, since "some male officers possess a trait . . . a *proclivity for sexually abusive conduct*—that cannot be ascertained by means other than knowledge of the officer's gender."[10] Thus, to use the language of the BFOQ defense, the MDOC has claimed that it is a "basis in fact" that those with a proclivity for the sexual abuse of females are males, and that barring all males from employment as prison guards is a "reasonably necessary" means of ensuring that individuals with this "proclivity" are not unwittingly employed. So while the *Everson* court did not assert that *all* male guards will necessarily sexually abuse female inmates, it did assert that the very fact that a guard is a man gives sufficient reason to conclude that he may have "the proclivity" to be sexually abusive. Moreover, the MDOC argued, and the court agreed, that all other employment policies intended to protect male guards' right to equal employment opportunities (such as requiring that they be paired with a female guard) would necessarily compromise the inmates' safety. The court agreed with the MDOC that the complete elimination of all male guards from women's housing units was a reasonably necessary means of protecting female inmates from those guards with the "proclivity" for sexual abuse.

Notably absent from this discussion of sexual abuse proclivities is a defense of the assumption that female inmates will be safe (or, at least, substantially safer) in the hands of female guards. It seems the court believed either that no woman has a proclivity to abuse women sexually or that if some women do have such a proclivity, they are so rare that a female-only hiring policy does not put the female inmates in an unacceptably unsafe situation. Alternatively, the court may have been assuming that the sexual abuse of female prisoners by female guards is a less serious problem (that is, that it creates a less serious violation of an inmate's interest in safety) than the sexual abuse of female prisoners by male guards. I suspect that the notion of the sexual abuse of women prisoners by women guards was simply outside the court's conceptual framework. I return to these questionable assumptions later.

Of greater interest for the *Everson* court than the safety of the female inmates was the question of the right to privacy. Does a female prisoner's right to privacy necessitate the elimination of male guards? The court argued that it does. While acknowledging that all prisoners "lose many of their freedoms at the prison gate,"[11] the court claimed that a prisoner "maintains some reasonable expectations of privacy," particularly when it concerns forced exposure to strangers. Justice Rogers, writing for the *Everson* court, stated that most people

> have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. . . . *We cannot conceive of a more basic subject of privacy than the naked body.* The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.[12]

The court noted that this "special sense of privacy" goes beyond shielding one's bare genitals while showering, dressing, or toileting, for it includes sleeping, waking up, brushing one's teeth, and requesting sanitary napkins.

> The housing unit serves as inmates' "home," the place where they "let their hair down" and perform the most intimate functions like "showering, using the toilet, dressing, even sleeping." In the housing units, inmates spend a great deal of time in close contact with the officers, who supervise "the most intimate aspects of an inmate's life in prison, what time they go to sleep, where they sleep, when they get up, brush their teeth, use the restroom, shower, dress." [Moreover,] inmates must request sanitary napkins and other personal items from the officers.[13]

With this, the *Everson* court established that brushing one's teeth is an act of intimacy on a par with defecating. And with this alarmingly expanded notion of genital privacy, the court certainly ensured that there is no way to keep women inmates safe from male guards—for as long as a male guard can see the female inmate engaging in any act of intimacy (which he certainly *must* be able to do, to fulfill the requirements of his job), he is violating her "special sense of privacy."

Interestingly, this "special sense of privacy in our genitals" causes not only humiliation for the exposed person humiliation but discomfort for the "modest" observer as well. George Sullivan, a "corrections professional," testified that "as a simple matter of their own self-consciousness and modesty, most male staff are very reluctant to search women's garments, personal care/sanitary items, observe them nude in showers or while using toilets."[14] George Camp testified that male guards are "tentative" around female prisoners. Michael Mahoney, a corrections expert for the Department of Justice, testified that when male guards are "reluctant . . . to view females in a state of undress, in the use of toilet facilities, in dressing, and other kinds of situations, they may reluctantly, not pursue vigorously their supervision requirements because of the natural reluctance to not do that."[15] The unease male guards allegedly experience is so intense that the court claimed it reasonable to assume that they are incapable of competently performing their duties.

This line of reasoning is interesting for several reasons. First, safety and privacy interests, which began as two distinct matters, have merged and are now connected. Requiring the male guards to view the female inmates' acts of intimacy so discomforts the guards that they are incapable of fulfilling their job requirements, which therefore places them, the other guards, and all the prisoners at risk. Second, notice that the court has transformed a case inspired by the "rampant sexual abuse" of female prisoners—abuse that included horrific accounts of rape, sexual violence, degradation, and intimidation—into a discussion centered on the male guards' discomfort and modesty. The women prisoners are no longer victims of the male guards' sexual abuse; instead, it is the male guards who are incapacitated by their crippling embarrassment from having to see women prisoners use a toilet.[16]

But perhaps the most striking feature of this analysis of genital shame is the court's claim that male guards violate a female inmate's "special sense of privacy" through no fault of their own; it is their "very manhood" that is the source of the problem. I am not entirely clear what this "manhood" is (the presence of a certain set of genitals, the absence of another kind, specific levels of hormones, types of sexual desires and experiences, a sense of self-identification), since the court provides no indication. I do know that the court concludes it is because of the "manhood factor" that *no* male guard—no matter how conscientious, professional, and committed to justice—is able adequately to respect female inmates' privacy and maintain prison security.

Toilets and Sanitary Napkins

The court's reasoning in *Everson v. MDOC* is alarming: it rests on unjustifiable assumptions about sex and sexuality, in particular the notion of the untamable potency of maleness and necessary modesty of femaleness, and it prioritizes the validation of these assumptions over an interest in ending discriminatory employment practices.

Let's take a closer look at the claim that women have a special sense of privacy in their genitals. We saw that this special sense of privacy includes far more than the exposure of one's genitals to members of the "opposite sex" but extends to include brushing one's teeth, sleeping, and requesting a sanitary napkin. But how are we to make sense of the court's claim that a female prisoner's privacy is violated if she has to ask a male guard for a sanitary napkin (and the implied claim that her privacy is *not* violated if she makes the same request to a female guard)?

The most logical reason to request a sanitary napkin is so that one can attend to one's menstrual activities. Menstruation is a quintessentially female activity. Despite the fact that we all know that, in theory at least,

most (if not all) the women prisoners will menstruate at some time while in prison, the particulars of these experiences are hidden from others. However, the moment one requests a sanitary napkin, this experience becomes public. Not literally—no one will see her menstruate. But that request makes public that she will menstruate or is menstruating right at the time of the request. And it must be something about that fact that is the source of embarrassment.

Iris Marion Young discusses societal attitudes about menstruation and the resulting imperative that women hide all evidence of their menstrual experiences:

> On the one hand, for a culture of meritocratic achievement, menstruation is nothing other than a healthy biological process. . . . On the other, from our earliest awareness of menstruation until the day we stop, we are mindful of the imperative to conceal our menstrual processes. . . . Keep the signs of your menstruation hidden—leave no bloodstains on the floor, towels, sheets, or chairs. Make sure that your bloody flow does not visibly leak through your clothes, and do not let the outline of a sanitary pad show. Menstruation is dirty, disgusting, defiling, and thus must be hidden.[17]

Young identifies the anxious bind menstruating women are in: they are normal and decent members of society as long as they are hiding the fact that they are menstruating. If they give any sign that they are at that moment bleeding—if they leak, let a tampon fall from their purse or pocket, allow a pad to bulge through their clothing, or talk about it in any way except in urgent whispers ("Do you have a tampon I can use? I got my period early!")—then they are disgusting and indecent. And while nonincarcerated women can hope to keep their menstruation out of the public eye, women prisoners cannot possibly keep their menstruation hidden from others. As long as they are under complete surveillance, as concerns for prison safety allegedly require, every aspect of their life, including their menstrual experiences, is on full view.

No wonder the *Everson* court cites having to ask a male guard for a sanitary pad as being a source of intense humiliation for a female prisoner—a humiliation so intense that requiring her to announce her menstrual needs is a violation of her constitutional rights. Of course, the exposure of one's genitals is not required when requesting a sanitary napkin, but the request makes clear that she *has* genitals, and that they are the kind of genitals that generate a bodily need that the male guard, as a male, does not have. So even though her genitals are politely hidden, her request publicizes those genitals as effectively as a strip search. The court is careful to insist that there is nothing about the male guard in particular that violates her privacy—nothing he believes, says, or does. Rather, it is his body—his

"very manhood"—that causes the humiliation. Given the nature of her body and its dirty business, there is simply no way for him not to cause her humiliation. With this line of reasoning, the court clearly accepts the attitudes about menstruation that Young identifies. (Just what are we to make of that woman who unashamedly asks male guard for a sanitary pad or tells all and sundry about her menstrual cycle? She's a vulgar hussy—no wonder she's in prison!)

But what if we believed that all humans are essentially the same insofar as we all have bodies that need maintenance, that these maintenance activities are not shameful, and that to be observed engaging in such activities is not humiliating—no more humiliating than to be seen eating, for example? And what if we believed that a woman's body, though in some minor ways different from a man's, is not *essentially* different? And what if we believed that menstruation is a normal, healthy bodily activity? If we did hold these beliefs, then the notion of an adult woman feeling embarrassment when asking a man for a sanitary napkin is unremarkable—no more embarrassing than asking for a Kleenex.

In addition to disturbing attitudes about menstruation, the court's discussion of bodily privacy implicitly accepts the notion that men are less vulnerable to injury than women. Part of the very notion of "maleness" is the idea that men can easily (naturally?) tolerate experiences that would harm (or, perhaps worse, "toughen") women. Despite the court's claim to the contrary, this special sense of privacy concerning women's genitals does not seem to be universal, for when we look to the language of this case (and of the cases it cites as precedent), we see that U.S. courts treat a male prisoner's right to bodily privacy very differently—and far more cavalierly—than a female's. The *Everson* court states that the basis for this "right against the forced exposure of one's body to strangers of the opposite sex" is to be found in the Fourth and Eighth Amendments to the U.S. Constitution, as well as in the due process clause of the Fourteenth Amendment.[18] But the discussions of bodily privacy in these cited cases are not entirely consistent. The cases that concluded inmates have a right to be free of forced exposure to members of the opposite sex all concerned male guards subjecting female inmates to body searches, urinalysis tests, and strip and "pat-down" searches. The cases concerning male inmates being viewed by female guards were decided rather differently; in these, the courts argued that while male prisoners indeed have a *prima facie* right to bodily privacy, that right does not outweigh the needs of prison administration. For example, *Cornwell v. Dahlberg*—a case repeatedly used by the Sixth District Court as precedent for their decision in *Everson*—concerns a male prisoner's claim that being subjected to a body search in view of female guards was cruel and unusual and, therefore, was unconstitutional.[19] *Cornwell* concluded that the question is not whether or not a prison can permissibly subject a male prisoner to a body search in front of female prison guards—

the court declared that there is no doubt that it can—but instead whether or not the manner in which they conducted the body search violated the prisoner's constitutional rights. So, according to the *Cornwell* court, the discussion should focus on whether or not needless violence was used during a body search or a more comfortable location for the body search could have been found. In the *Cornwell* case, the body search was conducted outside on the cold, muddy ground. But since the body search took place right after a prison uprising, the court concluded that in such instances the needs of the prison can legitimize body searches of prisoners on cold, muddy grounds in full view of female prison guards. *Cornwell* concluded that blanket policies forbidding the exposure of prisoners' genitals before prison guards of the opposite sex would restrict the needs of the prison administration unduly.

The *Everson* decision that the female prisoners' rights to privacy entail ensuring that no male guards ever see their exposed genitals is a radical departure from precedents concerning male prisoners and a dramatic development of the (few) decisions concerning female prisoners. So why do our courts claim that prison administrators are free to subject male prisoners to treatment that, when inflicted on female prisoners, violates "simple human decency"? Perhaps it is that "manhood" factor of which the court speaks, which apparently inures men to privacy violations; for it certainly seems that a female's "womanhood" is nothing but a source of vulnerability. As evidence for the existence of "womanhood" and its nature, the *Everson* court cites a U.S. Supreme Court decision concerning the employment of female guards in Alabama maximum-security prisons. There the U.S. Supreme Court stated that

> the essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs *could be directly reduced by her womanhood.* There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.[20]

The *Everson* court argues that, just as the "very womanhood" of a female guard will undermine prison security in men's prisons, so, too, does the "very manhood" of a male guard undermine his capacity to provide security in women's prisons. Notice, though, that a female guard's "womanhood" places her at risk of being victimized by male prisoners—her womanhood instigates her sexual victimization. But the male guard's "manhood" places the female prisoners at risk—his manhood victimizes them.

These twin assumptions—that women are by nature sexually seductive victims and that men are by nature sexual predators—perpetuate the most invidious and intolerable myths about men and women. And yet our courts are consistently relying on these myths when making decisions about the employment policies of prisons and about the treatment of its prisoners.

Privacy, but Not Safety

At first glance, *Everson* seems to be a victory for both women prison guards and women prisoners. Not only are women prison guards guaranteed access to certain employment opportunities at women's prisons in Michigan but, perhaps more important, women prisoners are guaranteed protection from the sexually abusive antics of male prison guards. Yet this victory is a pyrrhic one. As to the first concern, this case actually ensures that women prison guards will have dramatically reduced employment opportunities. Only about 4 percent of Michigan prisoners are women, and despite an increase in the general prison population in Michigan, the percentage of women prisoners is shrinking.[21] Thus, while women have been guaranteed access to a small number of jobs in women's prisons, that number is minuscule compared to the jobs that are being closed to them at men's prisons.[22]

As to eliminating sexual abuse, the *Everson* court claims that MDOC's sex-specific employment policy will eliminate sexual abuse perpetuated by male guards against female inmates. But there is no reason to believe that the policy will eliminate the sexual abuse of female inmates, for of course sexual abuse is not limited to incidents of men abusing women. Explaining its support of the elimination of male guards, the court mentions that 60 percent of the sexual misconduct charges lodged against COs between 1994 and 2000 were against male officers. This implies, of course, that 40 percent of the charges were against female officers. So a sex-specific employment policy will not eliminate, or even drastically reduce, the number of sexual assault cases that we can expect to occur in future years, when all the guards in the housing units are female. Why, then, does the court conclude that this sex-specific guard policy is the only way to ensure prisoner safety?[23] Perhaps the court is less concerned with the number of assaults committed by guards than with the kind of assaults committed. That is, perhaps they regard female-inflicted sexual assault as a less serious threat to female prisoner safety. Although such a belief would be hard to defend, it is in keeping with the idea developed earlier, that "manhood" is imbued with a kind of potency that makes manhood-motivated sexual assault a terrible harm. If one believes that "womanhood" is weak and prone to injury, it would make sense (in a very strange sort of way) to think that female-inflicted sexual assault is, while a bad thing, not nearly as damaging as male-inflicted sexual assault.[24]

Perhaps the court assumes that any same-sex sexual assault is less horrific than "cross-sex" sexual assault because same-sex sexual assault does not involve opposite-sex genital exposure and therefore avoids causing genital shame. But the sexual assault of male prisoners (by male prisoners and male guards) is considered a serious problem in our society, and all evidence suggests that incidents are on the rise. And I doubt anyone would take seriously the suggestion that male prisoners would be safer if all men's prisons followed MDOC's lead and adopted same-sex employment policies, so that male prisoners were victimized only by men.[25]

To understand the reasoning behind the MDOC employment policy, one must attend to the fact that sex-specific hiring applies only to female guards in the housing units, where, as the court stated, the women prisoners "let their hair down." The court cannot possibly think that housing units are the only sites for sexual assaults against women prisoners. Therefore, since male guards will continue to be employed in other locations within the women's prisons, they will still have ample opportunity to sexually assault the female prisoners. Despite the assurances of MDOC and the *Everson* court, we have no reason at all to think that this employment policy will reduce the number of sexual assaults committed by male guards.[26] So again we are back to the idea that there must be something very precious about those private moments during which one brushes one's teeth and hair, showers, sleeps, and uses a toilet. To be sure, most people would prefer to maintain a sense of modesty and not to be forced to expose their genitals to others. But I do not think anyone's objection to being sexually victimized stems from or is even essentially connected to their sense of modesty. Nor do I think anyone would prioritize privacy while using the toilet over security from sexual assault while in the dining hall or laundry. And, despite claiming to design an employment policy that will protect women's prisoners constitutionally guaranteed rights to safety *and* privacy, the *Everson* court has prioritized the right to privacy—and a patently gender-specific one at that—at the expense of the right to safety. Rather than focus on the serious injustices the women prisoners are suffering in these prisons, the court chooses to focus on the discomfort felt when asking for sanitary pads. In doing so, the court grossly trivializes sexual assault, undermines Title VII, and squanders the opportunity to require that the MDOC confront and resolve the myriad of problems within its prisons. The women prisoners may be spared the shame of being forced to urinate in view of male guards, but they are not safe, and the far-too-long-standing tradition of protecting female modesty at the cost of other interests continues.

Notes

1. *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (2004).

2. For fuller discussions of the development of women's right to privacy being defined essentially in terms of protecting female modesty, see Anita L. Allen and Erin Mack, "How Privacy Got Its Gender," *Northern Illinois University Law Review* 10 (1990): 441–78; and Carol Danielson, "The Gender of Privacy and the Embodied Self: Examining the Origins of the Right to Privacy in U.S. Law," *Feminist Studies* 25, no. 2 (Summer 1990): 311–39.

3. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); see also *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (1971).

4. *Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

5. *Reed v. County of Casey*, 184 F.3d 597 (1999).

6. *Rhodes v. Chapman*, 452 U.S. 337 (1981).

7. *Everson v. MDOC* (2004); emphasis added.

8. *Everson v. MDOC* (2004); emphasis added.

9. *Everson v. MDOC* (2004).

10. *Everson v. MDOC* (2004); emphasis added.

11. *Everson v. MDOC* (2004), citing *Covino v. Patrissi*, 967 F.2d 73 (1992).

12. *Everson v. MDOC* (2004), citing both *Lee v. Downs*, 641 F.2d 1117 (1981), and *York v. Story*, 324 F.2d 450 (1963); emphasis added.

13. *Everson v. MDOC* (2004), citing testimony of Michael Mahoney, director of John Howard Association, a private, not-for-profit prison reform group and expert for the Department of Justice.

14. *Everson v. MDOC* (2004).

15. *Everson v. MDOC* (2004).

16. For an interesting discussion of the problems created for employers when female modesty and bathroom privacy are prioritized over employment equality, see Ruth Oldenziel, "Cherished Classifications: Bathroom and the Construction of Gender/Race on the Pennsylvania Railroad during World War II," *Feminist Studies* 25, no. 1 (Spring 1999): 7–41.

17. Iris Marion Young, *On Female Body Experience* (Oxford: Oxford University Press, 2005), 106–7.

18. *Everson v. MDOC* (2004).

19. *Cornwell v. Dahlberg*, 963 F. 2d 912 (1992).

20. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); emphasis added.

21. My impression from this court case is that Michigan's prison population trends are typical and that this discussion can be extended to other state prison populations.

22. MDOC is not prohibiting men from holding all CO and RUO positions in women's prisons; rather, its female-only policy applies to guard positions in the housing units only. But the scope of *Everson* extends beyond women's prisons. The *Everson* court cites previous cases that considered the legitimacy of sex-specific employment policies in other contexts, including psychiatric hospitals, dormitories, and mental health care facilities. Yet none of the cases cited by the *Everson* court determined it legitimate to eliminate completely the employment of any member of one sex from all positions. Rather, each of the previous cases argued that reserving a small percentage of certain positions for members of one sex does not violate Title VII. (For example, an employer can specify that the third-shift janitor in a female dormitory be female but cannot employ only female janitors.) The *Everson* court has swept aside all of these previous efforts to balance equal employment interests with sex-segregation interests and instead has provided the groundwork for prioritizing sex discrimination over equality. And, given the history of employment discrimination women have faced in this society, I suspect that women will pay a high price for the preservation of their right to privacy.

23. The court does not reveal the relative percentage of male and female correctional officers, which makes a fully informed decision concerning the relative dangers of male and female guards impossible.

24. It is tempting to believe that the wrong of sexual acts between guards and prisoners stems not from the alleged "special sense of privacy in their genitals" but from the disparate

power relations between the guards and prisoners. Notice that if a female prisoner's genitals are exposed to a male guard, she is seen to have suffered a harm; yet, when a male guard exposes *his* genitals to a female prisoner, she *again* is seen to be a victim. Thus it would seem that it is not genital exposure per se that shames a person but the role one occupies (and whether or not one is choosing to expose one's genitals) that determines whether or not one is shamed. Yet consider this: three female prison guards who worked in the Baraga prison units in Michigan were charged with "having illegal sexual activity" with male inmates. Yet the perceived victims in this case are the women guards, not the male prisoners. This is because although the women guards chose to have sexual relations with the male prisoners, they are seen to have been duped by the male prisoners. County prosecutor Joseph O'Leary claims that the male prisoners "used that relationship to get into their worlds and lure them into [theirs]." Because the women were not raped (and not even being considered is the possibility that the men were raped by the women), O'Leary added that "there's no victim in the traditional sense." So why are criminal charges being brought against the three women guards, if no one believes the male prisoners were harmed and it is believed that the women were exploited? MDOC director Patricia Caruso explained the need for prosecution: "This type of activity is not acceptable," and the punishment of the guards sends a "loud and clear message" to other guards (John Flesher, "Female Prison Workers Accused of Sex with Male Inmates," Associated Press State and Local Wire, March 2, 2006). No doubt a message is being sent, but that message is not that any prisoner is vulnerable to the abuses of guards but that *women*—as prisoners *or* guards—are vulnerable to the abusive harms of "manhood." The real wrong the women guards committed, it seems, was in falling victim to the seductive manhood of the male prisoners.

25. The court's discussion of opposite-sex genital observation assumes that sex categories are binary and that all guards and prisoners are either male (with fully effective "manhood" powers) or female (with a fully existent "womanhood" in place). It seems that intersexual, transsexual, and transgendered guards and prisoners are simply not a conceptual possibility. Yet intersexuals, transsexuals, and transgendered guards and prisoners do exist, and their existence necessarily calls into question the court's simplistic assumptions about gender and sex.

26. Since the sex-specific employment policy has been in place, reports of sexual assault committed against female prisoners by male guards have increased. Deborah LaBelle, an attorney representing four hundred women prisoners in Michigan, stated, "The number of sexual assaults is on the rise. I think that it's a consistent system of denial. If you continue to deny that it's happening, you create the culture that's happening now." Patricia Caruso, the current MDOC director, responded, "Anyone can make a complaint, it doesn't make it true." See Amy F. Bailey, "Corrections Department Director Says Changes Are Keeping Abuse Down," Associated Press State and Local Wire, May 24, 2005.