The Gender Line

Levit, Nancy

Published by NYU Press

Levit, Nancy.  
Project MUSE. muse.jhu.edu/book/7726.

For additional information about this book
https://muse.jhu.edu/book/7726
Making Men
The Socio-Legal Construct of Masculinity

Sometimes—rarely—discrimination results from a malicious prejudice buried deep in our soul. Sometimes—much more often—it results from unconscious biases, the assumptions of competence or incompetence, aptitude or ineptitude, a “fit” that is good or not. But sometimes—perhaps most often—discrimination is not rooted in the biases of any individual at all. Discrimination results simply from bureaucratic practices, from the unthinking repetition of the ordinary ways of operating in the world.

—Robert L. Hayman, Jr., The Smart Culture

The purpose of examining the various ways legal doctrines and the legal system disadvantage men is not to thrust men into victimhood. Victimhood presents a dilemma. On the one hand, failure to acknowledge victimization can allow forms of oppression to go unchecked. On the other hand, speaking in terms of victimization may promote passivity, helplessness, and blaming behavior on the part of victims. If we learn to examine gender role stereotypes as evidential facts, rather than mere opportunities for blame, we may be able to sidestep parts of the dilemma.

This chapter explores the ways legal doctrines disadvantage men through gender role stereotypes. It considers the ways these stereotypes construct masculinity, particularly how legal decisions require men to suffer certain types of harms without legal redress and exclude men from caring and nurturing roles.

The Legal Architecture of Male Aggression

It is empirically clear that male aggression is neither mythical nor insignificant. Women in America suffer approximately “two million rapes and four
million beatings” every year; they are more likely to be injured by men they know than by car accidents, rapes by strangers, and muggings combined. It is equally clear that until institutional structures and cultural norms that perpetuate male aggression are exposed, there is little hope of eradicating it. Tracing the origins of male aggression entails exploration of a complex web of social beliefs, behavior patterns, learned interactions, and psychosocial theories. However, even this approach is a relatively modern departure from the traditional view that male aggression is an inescapable part of male physiology.

Only recently have scholars begun to direct attention toward the ways law may reinscribe stereotypes of male aggression. For example, social acceptance of male aggression may be reinforced by rape laws that presume a woman’s consent to intercourse in the absence of her resistance. Dorothy Roberts notes the effect of legal decisions on assumptions about male aggression: “The stereotype of the aggressive, ‘macho’ Black male legitimates the massive incarceration of young Black men.” Similarly, labor arbitrators and judges create standards to distinguish acceptable from impermissible levels of picket line violence based on traditional assumptions about male aggression: “assumptions about the ‘animal exuberance’ of male workers are used to defend and rationalize a tolerance for a minimal level of violent behavior in the ‘rough and tumble’ of labor activity.”

The U.S. Supreme Court has given official imprimatur to the stereotype that males are aggressive. In *Michael M. v. Superior Court*, the Court held that criminalizing consensual sexual conduct for underage males but not underage females does not violate the equal protection clause because only women become pregnant, and, therefore, the genders are not similarly situated with respect to sexual intercourse. Expanding on its justification for upholding the males-only statutory rape law, the *Michael M.* Court depicts females as victims and males as aggressive sexual offenders. In fact, chastity protection was the state legislature’s asserted purpose, a fact the *Michael M.* majority ignored in its analysis. Instead, the Court viewed the matter as one of biology, noting that “males alone can ‘physiologically cause the result which the law properly seeks to avoid’” and holding that the “gender classification was readily justified as a means of identifying offender and victim.” This assumption of male sexual aggression, and its twin assumption of female passivity, not only offers a legal basis for criminalizing the conduct of only one gender, it also “construct[s] sexuality in limiting and dangerous ways.” The Court’s ruling in *Michael M.* perpetuates commonly held perceptions about male sex-
ual aggression, while its analysis fosters the belief that this aggression is biologically based.

Just as society has historically tolerated aggression by men, it has also tolerated aggression against men. The majority of male violence is directed against other men. Men are almost twice as likely to be the victims of violent crime and are treated more harshly in the criminal justice system. Men receive more severe criminal sentences, even when men and women commit precisely the same substantive offense. The percentage of men on death row exceeds the percentage of death-eligible offenses committed by men. In California, of 1,164 defendants convicted of first- or second-degree murder between 1978 and 1980, 5.5 percent were female; but of the 98 defendants sentenced to death, all were male. Of the “16,000 lawful executions in the United States, . . . only 398 (2.5%) [of those executed] have been females.” Some of this violence may be turned inward: men commit suicide in much more significant numbers than women.

Consider also the exclusion of women from military combat. Banning women from military combat positions sent distinct messages about the capabilities and appropriate social roles of women. The combat exclusion for women also sent explicit messages about social expectations of and appropriate roles for men. War is a gendered construct: just as women could not be combatants, men were not afforded the option to be noncombatants. Legally, only men could fight in combat. Men were exposed to the physical harms of war. Even more significantly, this rule legally shaped an exclusively male image of combatants.

For example, in United States v. St. Clair, a man argued that voluntary military service for women and involuntary registration for men constituted a denial of equal protection. But the federal district court rejected this claim, remarking that “the teachings of history [establish] that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning.” For many courts, the constitutional inquiry was determined by inescapable features of male physiology and social psychology: men possessed the strength to throw the grenades, the psychological wherewithal to suffer the indignities of war, and the social authorization to be killed first.

The Supreme Court gave its approval to this construct in Rostker v. Goldberg. The High Court has never considered whether the draft exclusion of women is valid, but held in Rostker that selective service registration for men, but not women, did not violate equal protection. The Rostker reasoning was an exercise in diversion because the Court simply deferred to leg-
islative and executive decisions regarding military affairs. It determined that since women were statutorily ineligible for combat, men and women were not similarly situated with respect to combat duty. Therefore, the combat exclusion for women was valid.

Rostker was not about legitimate physical or social differences between the sexes, but about stereotypic distinctions between warriors and homemakers. Omitted from the Court’s evaluation was any social contextualization of the combat exclusion. The Court did not consider that this exclusion might promote other forms of discrimination, such as the barring of women from political office for lack of military credentials, or that the exclusion itself might foster negative attitudes about women.

These are not simply the antiquated decisions of a bygone era; they are the archaic decisions of modern society, as the lower court holdings in the Citadel and VMI litigation attest. Sex-segregated institutions help construct the ideology of masculinity. They are, says Katherine Franke, “much more than all-male educational institutions; they are dedicated to the parodic celebration of, and ritual indoctrination in, the ways of masculinity for men.” The social and political ramifications of separating the sexes may be enormous.

Links between gender and aggression are institutionalized and “locked in” legally. Courts seem to accept the notion that men are militaristic; they are the warriors. Men possess the psychological capacity for aggression as well as the physical abilities for combat, while women lack both. The civic obligation of men is clear: the concept of citizenship for men is intricately tied to fighting. The casualties of this legal expression of personhood are not only the subordination of women, but also the construction of a rigid social order in which men have the exclusive sociopolitical obligation to engage in violence, to be the killers.

Male Toughness, Resilience, and Diminished Expectations of Privacy

One other area of legal decisions suggests the stoicism society has come to expect of men, while protecting the “vulnerability” of comparably situated women. In the past two decades, male and female inmates have filed suits complaining about cross-sex monitoring by prison guards. These are not cases of deliberate humiliation. Female inmates simply do not want to be observed by male guards and male inmates simply do not want to be ob-
served by female guards while dressing and undressing, showering, and using toilet facilities. Granted, this is the prison setting, in which inmates have diminished privacy expectations generally. However, as one court observed, it could not “conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”

Perhaps central to the problem is this construction of opposite sexes, but even leaving that issue aside for the moment, consider how courts have treated parallel claims of privacy infringement by male and female inmates.

Courts have consistently held that if male guards routinely watch female inmates engage in personal activities, this violates their constitutional privacy rights. In *Jordan v. Gardner* the Ninth Circuit Court of Appeals, sitting en banc, issued a thoughtful opinion discussing a prison policy that required male guards to conduct random, clothed body, pat down searches of female inmates. The court determined that the policy violated the Eighth Amendment’s prohibition against cruel and unusual punishment, and thus constituted the unnecessary and wanton infliction of pain. Because of the high incidence of prior sexual abuse among the inmates, the court found that women prisoners might be particularly vulnerable to the emotional impact of cross-sex body searches. In a parallel case, *Grummet v. Rushen*, involving female guards conducting pat down searches of male inmates, including the groin area, the court decided that “[t]hese searches do not involve intimate contact with an inmate’s body.” Other courts have held that out of deference to the privacy interests of female prisoners, male guards can be excluded from the women inmates’ living areas.

On the other hand, most courts have been much more reluctant to recognize that male inmates might suffer dignitary invasions if female guards frisk, strip search, or observe them while they are bathing, dressing, or defecating. In *Johnson v. Phelan* a pretrial detainee made the equal protection claim that female guards monitoring male prisoners could observe them naked in their cells and while they showered and used the toilet. This embarrassed him and offended his sense of “Christian modesty.” The Seventh Circuit Court of Appeals came close to sneering as it rejected Johnson’s claims:

Johnson’s complaint (and the brief filed on his behalf in this court by a top-notch law firm) [does] not allege either particular susceptibility or any design to inflict psychological injury. A prisoner could say that he is especially shy—perhaps required by his religion to remain dressed in the presence of the op-
posite sex—and that the guards, knowing this, tormented him by assigning women to watch the toilets and showers. So, too, a prisoner has a remedy for deliberate harassment, on account of sex, by guards of either sex. Johnson does not allege this or anything like it.

Far more important to the Johnson court was the prison’s interests in efficiency: “It is more expensive for a prison to have a group of guards dedicated to shower and toilet monitoring . . . than to have guards all of whom can serve each role in the prison.” And the court counterpoised the male inmate’s privacy interests with job opportunities for women as guards, which the court characterized as a “clash between modesty and equal employment opportunities.” “A prison,” said the court, “could comply with the rule Johnson proposes, and still maintain surveillance, only by relegating women to the administrative wing, limiting their duties (thereby raising the cost of the guard complement), or eliminating them from the staff.” Other courts have not seen the choices as so stark, and some of them have, quite sensibly, adjusted the physical structure of the facilities, job duties of the guards, or surveillance possibilities to accommodate the privacy interests of the inmates, the employment interests of the guards, and the security interests of the prisons.35

Reading between the lines, the majority opinion not only failed, as Judge Richard Posner noted in dissent, to recognize the essential humanity of prisoners (and Albert Johnson was a detainee who had only been charged with, not convicted of, a crime), but also diminished male interests in privacy. Cross-sex surveillance was not an unreasonable intrusion into male detainees’ privacy.

Other courts, similarly, have diminished the harms suffered by incarcerated males. In Somers v. Thurman, Somers alleged that female prison guards “subjected [him] to visual body cavity searches on a regular basis,” monitored his showers, and “made jokes among themselves.”36 These searches “violated prison regulations prohibiting unclothed body inspections by correctional employees of the opposite sex.” Despite these contentions of intrusive, demeaning, and unprofessional behavior violating institutional rules, the court held that the guards were entitled to immunity. Discounting some of the female inmate–male guard precedents, the court emphasized the psychological “differences between men and women,” and concluded that “[t]o hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.”
If the same allegations had been made by a female inmate, the decision likely would have looked much different.

Other courts have placed the onus on male prisoners to shield themselves from view: “there are alternative means available for inmates to retain their privacy. The use of a covering towel while using the toilet or while dressing and body positioning while showering or using a urinal allow the more modest inmates to minimize invasions of their privacy.” None of the female prisoner–male guard cases obligated the women inmates to cover themselves to protect their privacy. Only one court even attempted to explain the difference between the privacy protection afforded to men and that given to women. The differences in privacy protection were explained by the conclusion-begging statement that “male inmates and female inmates ‘are not similarly situated’” and the confusing bit of non sequitur reasoning that different security risks (which might or might not relate to gender) justified the differences in treatment.

In short, female guards can view male prisoners in various stages of undress but male guards cannot view female prisoners similarly disrobed. Women in custody are afforded more privacy than men. Simmering under the surface are assumptions about the motivations of the viewer: women guards would not view men as sex objects, but male guards might be inclined to leer. The tacit assumption is that male guards would perform their jobs with malevolent motives, while women guards are more likely to gaze benignly. Male prisoners have diminished expectations of privacy relative to similarly situated women prisoners. Again, the cultural assumptions about characteristic features of males—men are invulnerable and autonomous, and they can build their own walls—are reflected in legal doctrines determining their rights.

Suffering in Silence

From infancy, men learn to endure suffering silently and in private. Stoicism is ingrained in many and varied ways. Author William Styron says, “Women are far more able and willing to spill out their woes to each other. Men, on the other hand, don’t have that. Men are fatally reticent.” In describing the “rules of manhood,” sociologist Michael Kimmel explains that “[r]eal men show no emotions, and are thus emotionally reliable by being emotionally inexpressive.” Various legal constructs reinforce this silent stoicism. Consider the law regarding sexual harassment of men. This is not
the only area in which courts accept pervasive social stereotypes, either explicitly or implicitly, in ways that diminish the harms suffered by males, but it provides an important lens through which one can view the legal construction of gender.

Sexual harassment suits by men (which constitute approximately 10 percent of all such suits) often face ridicule. A Minnesota attorney who successfully represented a male city council aide in a sexual harassment suit against a female city council member reported that radio talk show hosts were mocking his client “to the hilt.” When eight men sued Jenny Craig International, they complained of both sex discrimination and sexual harassment: that female coworkers had taunted them with demeaning remarks and anatomical comments about their “tight buns,” and that because of their sex they were assigned unfavorable tasks and denied promotions in the predominantly female corporate structure. Columnists derided the suit, sarcastically referring to the workplace isolation suffered by “the Boston eight” as “harrowing,” suggesting that a number of recent sexual harassment claims by men are “guffaw-engendering,” and concluding that while “[i]t is far too late for judges to laugh this stuff out of court . . . that shouldn’t stop the rest of us.”

Even courts have difficulty seeing female-perpetrator/male-victim sexual harassment as equivalent to the prototypic gender model. In *Carter v. Caring for the Homeless of Peekskill, Inc.* a federal district court in New York held that a male employee had no claim for sexual harassment by the female “chairman” of the board of directors of his corporate employer, with whom he had a prior sexual relationship, since his “former paramour” had no supervisory power over him, even though she suggested he resign from his position “as a personal consideration’ to her.”

If men are sexually harassed by other men, they have no legally cognizable injury; if men are sexually harassed by women, they are not believed. The assumptions that the typical perpetrator of sexual harassment is male and the typical victim female are not unwarranted. The vast majority of workplace sexual harassment consists of men harassing women: approximately 90 percent of victims are female. Yet this prototype of male perpetrator and female victim may be transformed into a stereotype about sexual harassment that admits no other victim. The incidence of sexual harassment of men may be greater than people believe: of the total number of sexual harassment cases, between 9 and 15 percent are male victims.

The underreporting of sexual harassment by either gender is not surprising. “Sexual subjects are generally sensitive and considered private; women feel embarrassed, demeaned, and intimidated by these incidents.”
Importantly, just as women vastly underreport sexual harassment, so may men. A British Institute of Personnel and Development Survey “found that men were less likely than women to take legal action if harassed.” And just as women feel ashamed and humiliated by this harassment, men may feel absolutely silenced. Women fear that people will not believe their sexual harassment claims. In addition to the fear that people will not believe their claims, men may fear that people will believe their claims, but will regard them as effeminate. Because society equates being the target of sexual harassment with being something less than male, men may not want to admit that sexual harassment happened to them. This sentiment among individual men is not unrelated to society’s denial that males may be victims of sexual harassment. Treating a problem as nonexistent helps keep it that way.

Most significantly, some recent court interpretations hold that the federal employment statutes do not provide a cause of action for same-sex sexual harassment, or for harassment based on sexual orientation, the vast majority of which appears to be men brutalizing other men in a sexual manner. Courts are virtually uniform in rejecting claims of sexual harassment on the basis of sexual orientation. If an employer sexually harasses gay or lesbian employees because of their sexual orientation, the employee has no cause of action under Title VII. A number of these cases include extraordinarily vulgar and abusive comments as well as highly offensive touchings. For instance, in Carreno v. Local No. 226 International Brotherhood of Electrical Workers, coworkers performed “simulated sexual intercourse or sodomy” on Carreno. Yet the court reasoned that the coworkers treated Carreno abusively not because of his gender, but “because of his sexual preference.”

If, however, an employer sexually harasses an employee not on the basis of the employee’s sexual orientation, but on the basis of the employer’s sexual orientation, courts are willing to view the predatory activity as sexual harassment. Thus, as claimants, gays and lesbians do not have a cause of action for sexual harassment, yet, as alleged perpetrators, gays and lesbians must defend themselves against such causes of action.

Some courts addressing the issue have held that the right to sue under Title VII for sexual harassment does not apply to same-sex harassment of a sexual nature. Perhaps a majority of courts now allow same-sex sexual harassment cases, although this shift was a phenomenon of the mid-1990s, and some courts still view same-sex sexual harassment as outside the purview of Title VII. As this book was going to press, the Supreme Court
granted certiorari on the issue of whether same-sex sexual harassment presents a cognizable claim under Title VII.\textsuperscript{59}

Several recent cases illustrate the reasoning that prevailed in same-sex cases until the mid 1990s. In \textit{Polly v. Houston Lighting and Power Co.}, the male plaintiff was subjected to both verbal and physical abuse. Several of the defendants repeatedly called him “a ‘faggot,’ a ‘queer’ and a ‘fat bucket of . . . sh-t.’” The defendants kissed Polly; they grabbed and pinched his genitals, buttocks, and chest; and “on one occasion, Defendant Ubernosky forced a broom handle against Polly’s rectum.” Despite this conduct of a distinctly sexual nature, the federal district court held that Polly could not sue under Title VII for sexual harassment since the harassment was not “based upon his sex.”\textsuperscript{60}

The plaintiff in \textit{Goluszek v. H. P. Smith} suffered similar abuse: “[T]he operators periodically asked Goluszek if he had gotten any ‘pussy’ or had oral sex, showed him pictures of nude women, told him they would get him ‘fucked,’ accused him of being gay or bisexual, and made other sex-related comments. The operators also poked him in the buttocks with a stick.”\textsuperscript{61} Goluszek was a single male who lived with his mother. The court found that Goluszek “comes from an ‘unsophisticated background’ and has led an ‘isolated existence’ with ‘little or no sexual experience.’ Goluszek ‘blushes easily’ and is abnormally sensitive to comments pertaining to sex.” When he complained about the harassment by the other employees, the general manager found the allegations without substance. During his several years of complaints and grievances, which were not pursued or were dismissed for other reasons, Goluszek was reprimanded a number of times for tardiness and waste of time. At one point the general manager informed Goluszek by letter that if he continued to disrupt the workplace and waste company time by complaining about these incidents, it would constitute adequate cause for his termination. The employer ultimately discharged Goluszek for tardiness, an instance of absenteeism, and wasting company time.

The \textit{Goluszek} court found that the plaintiff “was a male in a male-dominated environment,” and that “if Goluszek were a woman H. P. Smith would have taken action to stop the harassment.” The court concluded that while “Goluszek may have been harassed ‘because’ he is a male . . . that harassment was not of a kind which created an anti-male environment in the workplace.”\textsuperscript{62} Thus, although Goluszek’s sexuality was attacked, the court relied on the idea that Title VII just does not preclude same-sex sexual harassment. Several subsequent cases have followed the \textit{Polly} and \textit{Goluszek} hold-
ings without additional analysis in order to dismiss claims by males of same-sex sexual harassment.63

While courts are taking the statutory dodge by simply holding that Title VII does not prohibit same-sex harassment, it is clear that employers and coworkers are treating some males differently because of their gender. Men who do not conform to conventional notions of maleness are punished. Goluszek, for example, was a single, sexually unsophisticated male who lived with his mother and who was offended by sexual conversation. It is precisely this departure from male norms that subjected him to sexual harassment as a male. The notion in Goluszek that the company did not foster an “anti-male environment” assumes that only a single type of male exists: one who can ignore an environment constantly charged with sexual innuendos, one who enjoys sexual repartee, and one who can withstand physical abuse. Kathryn Abrams observes that these plaintiffs “challenge accepted notions of what it means to be a man... Their combination of male characteristics—XY chromosomes, male genitalia—and what are usually thought to be female characteristics—sexual naivete or aversion to sexualized talk—seems to make the courts as uncomfortable as it makes their co-workers.”64

An important additional feature of many same-sex sexual harassment cases brought by male plaintiffs is the courts’ approach to the factual allegations of the complaints. Almost uniformly, courts minimize the facts and diminish any possible negative effects when men complain of sexual harassment. For instance, in Garcia v. Elf Atochem North America the male plaintiff complained to his union steward that the plant foreman had sexually harassed him on several occasions.65 The conduct involved the foreman grabbing Garcia’s crotch and “ma[king] sexual motions from behind [Garcia].” Before holding that sexual harassment of a male by a male supervisor was not actionable under Title VII, the court noted that the company had received prior similar complaints about the foreman, but determined that “[t]he conduct complained of was viewed as ‘horseplay’ and was not alleged to be sexually motivated.” In contrast, if these same sorts of obscene physical touchings had occurred between a man and a woman, the woman would have a valid cause of action.66

In Hopkins v. Baltimore Gas and Electric Co., the male plaintiff related over a dozen incidents of sexual harassment by his male supervisor, including inappropriate gestures, comments, and jokes, as well as direct questions about the plaintiff’s sex life.67 Hopkins alleged that his male supervisor, Ira Swadow, had sent him internal company correspondence with the words “S.W.A.K., kiss kiss” written on it; had kissed Hopkins at his
wedding reception; attempted to squeeze into a revolving door compartment with Hopkins; and had asked Hopkins “whether he had gone on any dates over the weekend and, if so, whether any of those dates had culminated in sexual intercourse.” Hopkins also testified about the following incidents:

Swadow entered the men’s room at work while plaintiff was using the facilities, pretended to lock the door, and said, “Ah, alone at last.”

. . . On one occasion, Swadow approached plaintiff while he was leaning against a table at work, pivoted an illuminated magnifying lens so that it was positioned above plaintiff’s crotch, and said, “Where is it?” . . . On another occasion, Swadow and plaintiff bumped into one another, and Swadow said to plaintiff, “You only do that so you can touch me.”

. . . On another occasion, in the course of a discussion which Swadow was having with plaintiff and a male vendor concerning the difficulties of surviving an airline crash in water, Swadow said that if he were in such a situation he would “find a dead man, cut off his penis and breathe through that.” In his deposition, plaintiff testified that he told Swadow that he was “sick” and that his remark was “inappropriate,” particularly in the presence of some one not employed by the Company.

The court determined that Title VII did not prohibit same-sex sexual harassment, but hedged its bet by also holding that the incidents the plaintiff complained of did not amount to sexual harassment, since “[n]one of the alleged incidents of sexual harassment by Swadow involved implicit or explicit requests or demands for sexual favors.” The court observed that “many of the incidents relied upon do not appear at all to have even been ‘sexual’ in nature, and several others involved essentially trivial conduct which would not in any event be actionable under Title VII.” Curiously, the court added that “Swadow never asked that plaintiff go out with him on a ‘date,’ and Swadow never touched plaintiff in a sexual manner.”

Rather than looking at the cumulative pattern of conduct, which courts consistently do in cross-gender sexual harassment cases, the Hopkins court viewed the incidents separately, as isolated and trivial events. If this approach to the evidence is adopted in same-sex sexual harassment cases, it will be virtually impossible for a plaintiff to meet the Meritor Savings Bank v. Vinson test that the sexual harassment must be “sufficiently severe or pervasive.” Moreover, instead of viewing what conduct was present, the Hopkins court concentrated on what forms of abuse were not present. Completely absent from the court’s interpretation was any evidence of how these incidents made the plaintiff feel.
The same pattern of analysis was replayed in *Vandeventer v. Wabash National Corp.* In deciding that the male plaintiff did not suffer a hostile work environment, the court observed,

Mr. Feltner alleges *only* that he was harassed by another man. . . . In particular, Mr. Feltner complained to Wabash National *only* that he was harassed by a coordinator (a crew or team leader) named Tremain Gall, who aimed the comments “drop down,” “dick sucker,” and “crawl under the table” at Mr. Feltner. Mr. Gall made a comment wondering whether Mr. Feltner could perform fellatio without his false teeth. Mr. Gall also asked Mr. Feltner if he would go with him to a gay bar. Those were the *only* comments Mr. Feltner ever complained about.

In rejecting Feltner’s quid pro quo sexual harassment complaint, the court noted, “[t]he *only* detriment allegedly suffered by Mr. Feltner was termination and possibly (although unsupported by the record) decreased productivity due to the hostile environment.” The language used by the *Vandeventer* court is language of diminishment. The text and subtext read perfectly clearly: Feltner was *only* harassed by one other man (it was a fair fight); he was *only* subjected to comments (and should have taken them like a man); and he *only* lost his job (buck up, pal).

A number of courts take a monolithic view of what constitutes sexual harassment, conceiving it only as the oppression of a female by “a male in a male-dominated environment.” In rejecting same-sex claims and sexual harassment claims based on the sexual orientation of the victim, courts draw and reinforce strict gender and sexual orientation lines. If a male had aimed the same sorts of verbal and physical intimidation present in *Polly, Goluszek,* or *Vandeventer* toward a female, the female would have a valid sexual harassment claim. In fact, in *Vandeventer,* while the court dismissed Douglas Feltner’s claims of a hostile environment, it allowed Lisa Vandeventer’s claims of a hostile environment based on derogatory sexual remarks to survive a motion for summary judgment.

Indeed, the anomaly of rejecting same-sex sexual harassment becomes clearer if we add one hypothetical fact to either *Polly* or *Goluszek.* Assume that a female employee had witnessed the events that occurred and filed a claim of sexual harassment based on the hostile work environment. If the same events had occurred and were simply *witnessed* by a woman, the woman probably would have a cognizable claim for a sexually hostile work environment. Thus, while the female bystander could recover for sexual harassment, the direct male victim would not have a remedy.
In holding that same-sex sexual harassment is not an appropriate basis for a Title VII claim, courts send a powerful message about gender roles: when men sexually harass other men, the victims do not suffer legally cognizable injuries. More simply, perhaps the message is that men do not suffer, or that “real men” do not suffer. Courts reveal a general unwillingness to believe that men could be offended by instances of sexual harassment. They trivialize men’s complaints about vulgar and insulting comments, and endorse employers’ messages that men who complain about these workplace incidents are providing appropriate grounds for their own termination. This approach reinforces social stereotypes of men as tough, sexually aggressive, and impervious to pain. Furthermore, it contributes to a cultural climate in which men cannot express their humiliation, their sense of invasion, or their emotional suffering.

The Exclusion of Men from Caring, Nurturing Roles

The feminist movement has brought us images of competent women at work, but not of caring, nurturing men at home. (Perhaps the critique is not appropriately just of feminism. This is a particular example of the larger question: Who is responsible for constructing the ideology of feminist men? Some feminists might say that it is men’s responsibility. My suggestion is that the responsibility is universal.) The images of competent women at work have been presented because feminism enabled women to enter the workplace, and because economic realities forced women into the workplace. True-life images of men at home are scarce, at least in part since those same economic circumstances (with the attendant forms of market discrimination), rather than any failures of feminism, keep women out of and men in the workplace, even if men might prefer a role as the primary child rearer.78

To the extent that the legal world reflects social conceptions of gender, men are excluded from family roles. For example, women are able to take parental leave more easily than men. “Men and women are not offered the same leave under present practices. Employers frequently give women more parental leave than men. The many employers who offer pregnancy leave but not child care leave are giving women some parental leave and men none.”79 Even when paternity leave is formally available, subtle or direct employer actions may discourage men from taking advantage of the leave:
Corporations take a far more negative view of unpaid leaves for men than they do unpaid leaves for women. Almost two-thirds of total respondents did not consider it reasonable for men to take any parental leave whatsoever. . . .

Even among companies that currently offer unpaid leaves to men, many thought it unreasonable for men to take them. Fully 41% of companies with unpaid leave policies for men did not sanction their using the policy.80

These social and institutional barriers to parental leave for men are a significant impediment to the equal division of child care responsibilities.81 The approach harms both men and women. If employers give women more generous parenting leave than men, men are excluded from and women are locked into parenting roles. Both genders are damaged because the underlying stereotypes limit their choices.

The legal precedents on this issue are more promising than the social practices of employers. Even several early cases allowed child-rearing leave to men if such leave was available for women.82 At least one recent decision implies that employers should not draw a stark distinction between maternal and paternal roles regarding child rearing. In Schafer v. Board of Public Education, Gerald Schafer applied for a one-year child-rearing leave to raise his infant son.83 The board routinely granted parenting leave to women. The leave was denied, and therefore Schafer had no choice but to resign from his teaching position. The Third Circuit Court of Appeals held that a collective bargaining agreement that permitted female teachers one year of unpaid leave for child rearing but denied this leave to male teachers violated Title VII. The court distinguished between disability leave for the period of actual physical disability relating to pregnancy or childbirth and child-rearing leave, which could be taken at any time by either sex.

In contrast to parental leave cases, courts have been less adept at perceiving the gender issues in cases that more indirectly present the question of what role a father should play in parenting. Significant evidence shows that courts discount men as potential custodial parents. Courts also subject women to a variety of gender biases in custody cases: mothers, for example, may sacrifice financial security for custody.84 However, for present purposes, the discussion will focus on the biases against men. While the empirical evidence is decidedly mixed, the cumulative evidence seems to indicate that gender biases run in both directions under different circumstances.

Reversing centuries of fathers’ proprietary rights to custody of their children, doctrinal law in the early 1900s began to encompass a preference for maternal custody of children of tender years.85 In the past two decades,
most states have abandoned the formal presumption in favor of mothers being awarded custody,86 and a number of states use language encouraging shared parenting in their custody statutes.87 However, gender is still a statutory consideration in several jurisdictions.88

The child’s best interests standard ostensibly considers more direct criteria of parenting capacity and patterns. Nevertheless, decisions favor mothers in a number of ways. Joint custody law still prefers mothers as physical custodians.89 The primary caretaker standard, adopted explicitly in West Virginia and Minnesota, and implicitly in a number of other jurisdictions, may be a thinly veiled return to the maternal preference standard, since “[i]t has been assumed that mothers are the primary caretakers of children and therefore the primary or psychological parents.”90 Even in states in which the formal maternal presumption is absent, judges may make decisions as though such a presumption still exists, or may exhibit strong biases against awarding custody to fathers. In one study of judges, approximately half agreed that custody awards may be “based on the assumption that children belong with their mothers.” Another survey of attorneys showed that “all but one attorney interviewed believed that some Vermont judges are biased against fathers in custody.”91 Moreover, as an empirical matter, mothers obtain sole custody in an overwhelming proportion of cases. A study conducted in California demonstrated that mothers obtained custody in two-thirds of all cases, while fathers received sole physical custody in 9 percent of all cases.92

Fathers normally obtain custody in contested custody cases.93 A recent study of Utah cases, however, suggests that while the proportion of fathers who obtain custody in the event of a formal dispute is still relatively high when compared to negotiated custody settlements, “sole custody was awarded to the father in 21 percent of the cases and to the mother in 50 percent of the cases.”94 Contested custody cases, though, account for only a small fraction of all custody cases. Less than 2 percent of divorces involving children necessitate a judicial determination of custody.95 Self-selection may also be a significant factor in determining who contests a custody decision.96

Even before the custody hearing, fathers may be discouraged from seeking custody. A survey of fathers reported that 35 percent of physical custody fathers and 10 percent of legal custody fathers wanted more custody than they requested, while only 12 percent of physical custody mothers and 7 percent of legal custody mothers felt this way.97 Some research suggests that attorneys may advise fathers not to request or fight for custody.98
Custody decisions obviously entail consideration of gender, but how gender frames the terms of the debate is not as clear. All too often, analyses of whether fathers or mothers are discriminated against in custody litigation revolve around which parent “gets” the children. It is as if the custody award is a proprietary entitlement, which gives one parent the physical custody of the children and the other parent the right to complain about a gendered decision. Courts and commentators increasingly recognize that the decisional focus must be on the circumstances that are best for the individual child. While some observers acknowledge that custody decisions send messages about the kinds of families a society wants to construct, courts often ignore the larger question of the reconstructive effects of particular tests.

Feminist Legal Theory and Maternal Preferences

Some feminist legal theorists are appropriating the domestic sphere as principally the province of women. Mary Becker, for example, argues that “a conspiracy of silence forbids discussion of what is common knowledge: Mothers are usually emotionally closer to their children than fathers.” The article is replete with mothers’ stories about their relationships with their children. She includes a couple of fathers’ stories, but only for the purpose of attesting to the mothers’ close relationships with their children. Thus, in Becker’s work, the different voice silences the male voice. Moreover, the article seems to disparage the emotional bonds between fathers and children by asserting, “Most mothers describe father’s love as: ‘[L]ess intense, less caring, or less understanding than mother love.’” Becker relies on one mother’s comments to argue that fathers do not have the same empathetic abilities as mothers: “A father just doesn’t seem to feel a child’s hurts and disappointments as his own the way a mother does.”

Becker advocates a maternal deference standard in custody cases. She claims that “judges should defer to the fit mother’s judgment of the custodial arrangement that would be best.” If this proposal is adopted (which is unlikely for constitutional reasons) or allowed to undergird custody arrangements, it will often prevent men from parenting. Yet Becker is not alone in urging that custody determinations should reflect the special emotional bonds between mother and child.

Of more general concern than the specific standard in custody cases is the approach in the theoretical literature to men as parents. Judgments
about males have come in the form of universals, rather than in the form of particulars of individual parents’ experiences. Theoretical literature depicts “mothering” as an activity exclusive to women. Fathers will continue to not be custodial parents as long as societal divisions of child care responsibility persist. Feminist theory could do much toward exploding the myth that parenting is a sex-linked trait, and toward fostering an understanding of how men can nurture and take on child care responsibilities.