Feminism for Men: Legal Ideology and the Construction of Maleness

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INTRODUCTION

The imagination is to transcend and transform experience it has to question, to challenge, to conceive of alternatives, perhaps to the very life you are living at the moment.¹

It may seem a little odd to suggest that feminist theory has overlooked men. In varying ways, liberal feminism, difference theory, dominance theory, and postmodern feminism have analyzed, objectified, vilified, and deconstructed men as a population, male as a gender and constellation of role expectations and typical behaviors, and men as historical crafters of doctrine, theory, and language. Yet, in several important respects, apart from the crucial role of culprit, men have been largely omitted from feminism.

Feminist legal theorists have paid mild attention to whether men could embrace feminist objectives—the “Can men be feminists?” question. This issue is treated as a relatively unimportant one, usually relegated to footnotes.² Legal literature has given relatively modest and incidental attention to how a wide variety of gender role stereotypes harm men, and how legal constructs perpetuate these stereotypes.³ The negative effect gender

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². While some feminist legal theorists have specifically disavowed the possibility of men embracing feminist objectives, others have been cautiously optimistic and more welcoming. Compare Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1294 n.91 (1987) (stating that while “[p]ro-feminist men play an important role in disseminating and implementing feminist ideas,” they do not share women’s experiences and thus cannot claim to be feminists) and Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 584 n.172 (1986) (“[Professor Kenneth] Karst is correct to disclaim the ability of a male to explore a feminine paradigm . . . .”) with Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 833 n.7 (1991) (favoring “a definition of ‘feminist’ that allows men, as well as women, to make this choice”) and Patricia A. Cain, Feminist Legal Scholarship, 77 IOWA L. REV. 19, 39 (1991) (urging feminist scholars to reach out to those who are not currently feminists, and stating “I hope my male colleagues will listen and join the conversation”) and Ruth Colker, Feminist Consciousness and the State: A Basis for Cautious Optimism, 90 COLUM. L. REV. 1146, 1162 (1990) (suggesting that “men are capable of empathizing with women’s situation in society if they are informed concretely about the conditions of women’s lives”).
³. Notable exceptions are Brian Bendig, Images of Men in Feminist Legal Theory, 20 PEPP. L. REV. 991 (1993) (analyzing the “andric imagery” used by feminists Marie Ashe, Kenneth Karst, Catharine MacKinnon, Suzanna Sherry, Robin West, and Frances Olsen); Mary Anne C. Case, Disaggregating Gender from Sex and Orientation or the Effeminate Man in the Law and Feminist Jurs-
role stereotypes have on men is typically subsidiary to the main focus of feminist legal literature, which has concentrated on documenting the patterns of subordination of women. Inquiry in feminist legal theory has focused instead on questions of feminist ideology, epistemology, and political philosophy. Theorists in disciplines other than law have demonstrated significantly more interest in constructs of masculinity. Perhaps most significantly, though, men have been omitted as participants in the reconstructive project.

The primary purpose of this Article is to suggest that feminist legal theory needs to turn its attention to issues of relational justice: avoiding gender role stereotyping in both directions. To this end, the Article evaluates how the different strands of feminist legal theory treat men. Over the course of the development of equal treatment theory, special treatment theory, radical feminism, and postmodern feminism, men have been treated
as objects of analysis, as "other," as oppressors, or have simply been omitted. In significant part, the inattention to the situations of men was understandable. Perhaps to come into being, feminist theory was necessarily exclusionary, carving out its own space. On the theoretical level, feminism is ready to take the next step and inclusively invite men into the discourse.

The second objective of this Article is to explore the ways in which men are harmed by gender stereotypes. The Article applies insights from feminist thought to situations in which gender role stereotypes operate to the detriment of men. Thus, the Article considers the ways in which legal constructs and methods of analysis have helped to shape masculinity. Maleness has been constructed in a number of ways by statutes, judicial decisions, and legal reasoning. I suggest that one component of male aggression has been legal doctrines that shape concepts of personhood by dictating who society's criminals and warriors are. The image of masculinity is also formed by legal responses to areas in which men suffer injuries. Laws preventing male plaintiffs from suing for same-sex sexual harassment, and analysts' lack of interest in male rape and spousal battery of men contribute to a climate in which men are taught to suffer in silence. In the areas of parental leave and child custody, men are socially and legally excluded from caring and nurturing roles. Various legal doctrines send distinct messages about what it means to be male. This cumulative legal ideology of masculinity is under-explored.

Finally, this Article will suggest ways that men and women can reconstruct a social world in which traditional gender roles diminish in importance. The point here is not simply that feminist discourse can be powerful without being a conversation of exclusion, but that for feminist objectives to succeed, they must become more all-encompassing. This Article argues that it is not only possible for men to become feminists, but imperative that they do. By demonstrating some of the ways patriarchy harms men, I hope to encourage men to care about, and to work toward, the dismantling of patriarchy.

I should start with a caveat and a couple of disclaimers. First, it may seem harsh to criticize feminist theory for succeeding, for doing what it set out to do: to thoroughly document the persistence of patriarchy across time and cultures. But this is not the nature of my critique. This Article argues that feminism has stalled in an important way by not reaching far enough.

One fear I have in embarking on this essay is that the project of cataloguing the omission of men from feminist theory might be seen as an attempt to diminish the centuries of horrors experienced by women. My purpose is quite the contrary. Instead, I hope to advance the cause of feminism by pointing out the more universal harms of gender role stereo-
typing. This Article is intended as a sympathetic critique, offered from the perspective of a feminist who is deeply troubled by the bipolar nature of the sameness-difference debate. A second concern is that exploring the treatment of men in and by feminist theory will itself foster both polarization of the gender categories "male" and "female" as well as an essentialist approach. Gay and lesbian legal theories remind us of how incomplete and unnuanced any dichotomous male/female analysis of gender is. A related concern is that the identification of gender stereotypes might reinscribe them. Finally, I worry that some of the substance of this piece will be coopted by those who would misuse the arguments toward antifeminist ends: either to deny the necessity of feminist legal theory or to distort the historical treatment of women. Yet this Article was largely impelled by the lessons of feminist theory itself—not to allow issues to remain silenced and to "question everything."

I. FEMINIST LEGAL THEORY AND THE TREATMENT OF MEN

Feminism in law has focused on the unjust subordination of women. Central to feminist legal theory are several premises: First, feminism maintains that culturally, politically, economically, and legally, women have been, and still are, subordinated, oppressed, degraded, and ignored. Second, feminism argues that law is in many ways gendered, it is an exercise of power, and it operates "to the detriment of women." Finally, feminist legal theory contends that this pervasiveness of patriarchy is unjust. "[F]eminism in law means advocacy to end restrictive treatment of all women."

7. I believe gender is fluid, both in the sense that it is found along a continuum, and in the sense that it is contextualized—gender is different things at different times in different contexts.

8. See, e.g., Wendy W. Williams, Notes from a First Generation, 1989 U. Chi. Legal F. 99, 105 (defining the gender constructs of male and female as "discontinuous complementary poles").


10. See Heather R. Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 Berkeley Women's L.J. 64, 77 (1985); see also Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. Legal Educ. 47, 60 (1988) ("The concerted and persistent search for excluded points of view and the acceptance of their challenges are equally critical to feminist theory and practice.").


A. Liberal Feminism or Equal Treatment Theory: Men as Objects of Analysis

Feminist legal theory has evolved through stages into several different camps. The equal treatment theorists, or liberal feminists, were the first wave of feminist legal theorists. These theorists argued for the abolition of all gender-based classifications. The hallowed building block of liberalism, that all men are created equal, was recast to include women. The goals of liberal feminism were assimilationist in nature: making legal claims that would ensure women received the same rights, opportunities, and treatment as men. Thus, liberal feminists demanded equal pay, employment, education, and political opportunities.

Equal treatment theory viewed men as the benchmark, the norm. Male experiences were an accepted and unquestioned reference point. In emphasizing the need for women to achieve equal opportunities, the obvious focus was on what opportunities, rights, and powers men possessed that women did not. Most references to the treatment of men were descriptions of past and present conditions, rather than evaluations of whether those norms were good or bad.

The model of formal equality was reinforced by court decisions. A significant number of the more prominent early cases seeking equal treatment for women were constructed as challenges to gender classifications that burdened men, thereby stigmatizing women as incapable of shouldering

13. See generally Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN’S L.J. 191, 198–205 (1989–1990) (elaborating on Dalton’s stages of feminist legal theory); Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 BERKELEY WOMEN’S L.J. 1 (1987–1988) (delineating historical stages of feminist theory). While there has been a historical progression through these stages of equal treatment theory, special treatment theory, dominance theory, and postmodern feminism, there currently exist proponents of each model. This classification comes with recognition that the categories are incomplete, overlapping, and populated with theorists who are not solidly unified.

14. “[S]ex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man.” Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329 (1984–1985); see also Ann C. Scales, Towards a Feminist Jurisprudence, 56 IND. L.J. 375, 426–28 (1980–1981).

those same burdens. Often these cases involved strategic choices on the part of feminists to attack gender-based classifications using male plaintiffs. As Director of the American Civil Liberties Union's Women's Rights Project (WRP), Ruth Bader Ginsburg developed the strategy of proceeding with cases involving male plaintiffs to press for formal equality for women: "Her briefs consistently characterized sex stereotypes as double-edged. She argued that rigid sex roles limited opportunities for freedom of choice and restricted personal development for members of both sexes." However, it is clear from the cases taken and arguments made that male plaintiffs were being used by women instrumentally, principally to advance women's rights:

In all of the cases that the WRP has argued before the Court, women's rights were presumably the central concern. In Kahn v. Shevin, for example, the WRP undoubtedly had little concern for the extra fifteen dollars added to Mel Kahn's annual tax bill because Florida gave widows, but not widowers, a limited property tax exemption. Similarly, in Craig v. Boren, the WRP did not participate simply to protect the right of eighteen to twenty-one year old boys to buy 3.2 beer in Oklahoma. In all of the cases women suffered the critical wrongs, but men were the legal complainants. Use of a male plaintiff was the only way, in many cases, to meet


17. See David Cole, Strategies of Difference: Litigating for Women's Rights in a Man's World, 2 LAW & INEQ. J. 33 (1984); Ruth B. Cowan, Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976, 8 COLUM. HUM. RTS. L. REV., 373 (Spring-Summer 1976). Yet some of these cases were pursued by men not as a part of the feminist cause, but as what Professor Ann Scales has termed "interpretive competition." See Ann Scales, Feminist Legal Method: Not So Scary, 2 UCLA WOMEN'S L.J. 1, 8 (1992) ("It is no accident that a majority of equal protection sex discrimination cases decided by the Supreme Court have been brought by men."). It has been suggested that men were more likely to succeed as plaintiffs. See Littleton, supra note 2, at 1291 n.70.

18. Cole, supra note 17, at 54 (footnote omitted).
standing requirements. Because the Court did not yet recognize the harm women suffered, a male plaintiff who suffered pecuniary harms was essential.\textsuperscript{19}

This litigation strategy did create a standard that was user-friendly to both sexes in the sense that it was gender-blind. Although the initial rubric was gender-neutral, its application in some cases has not yielded gender-neutral results, and instead has served to reinforce traditional role expectations.\textsuperscript{20}

Equal treatment theory was necessary to eradicate the worst forms of disparity in treatment of women. Liberal feminism was justly concerned with women's systematic and intentional exclusion from educational and vocational opportunities. These early feminists focused on basic disparities in the treatment of women, and approached the resolution of those disparities from a rhetoric of equality for women. Equal treatment theorists were primarily interested in opposing stereotypes of women as needing special protection. Even though these theorists made arguments about the dual disadvantages of gender stereotypes, they did not spin out the systematic implications of a wide variety of rules and laws which perpetuated gender role stereotypes that harmed men as well.

B. Cultural Feminism or Difference Theory: Men as Other

The second wave of modern feminists were the difference theorists, also referred to as cultural or relational feminists or special treatment theorists. These scholars would agree with liberal feminism's insistence on gender-neutral laws for most issues. However, they maintain that formal equality, particularly with regard to issues involving reproduction and child raising, denies important social and biological differences between women and men.\textsuperscript{21} They critique equal treatment theory for providing equality of opportunity only to the extent that women are the same as men, but not for accommodating the ways in which women are different from men. In their view, equal treatment theory will ultimately fail to arrive at gender equity due to fundamental differences between men and women.

\textsuperscript{19}Id. at 57.

\textsuperscript{20}See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (rejecting biological and psychological father's claim of right to have a parent-child relationship with the child of a mother married to another man); Rostker, 453 U.S. at 57 (upholding male-only draft registration); Michael M., 450 U.S. at 464 (upholding statutory rape law applicable only to men). But see International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) (rejecting an employer's attempt to view and treat women in the workplace primarily as reproducers).

The difference theorists call for acknowledgment of the differences between the genders, and recognition of the biological or social and cultural construction of gender roles. Some of them advocate the need for preferential treatment in the areas of reproduction and child rearing, while others more moderately support accommodation only for actual childbearing.

A central claim of difference theory is that women have distinctive methods of acquiring knowledge and of making moral decisions. Women and men typically display different emotional and cognitive patterns, different social skills or characteristics, possibly stemming from innate physiological traits or from different life experiences. Women operate with an ethic of care and are concerned about relationships and collaborative resolution of issues. Men reason toward an ethic of rights; they prize autonomous individualism and attempt to resolve issues with hierarchical and objective methods. Women speak in a "different voice": Whereas men are aggressive and competitive, women are sensitive, empathetic, and nurturing. Men are given identity in difference theory only through their differences from women.

In legal theory, cultural feminists argue that the differences between women and men justify different legal treatment on a range of issues. In the area of maternity leave, for example, difference theory necessitated the recognition that notions of formal equality could operate to the detriment


23. See, e.g., Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 BERKELEY WOMEN'S L.J. 1, 22 (1985). While Professor Kay is generally associated with sameness feminism, she recognizes the need to make allowances for pregnancy and childbirth, a distinct area of biological differences.


of women. Furthermore, at the institutional level, cultural feminists suggest that when women’s experiences and methods of reasoning are brought to bear on legal issues, they shape and alter not only traditional outcomes, but also the processes by which those outcomes are reached, in fundamental ways.

Professors Margaret Jane Radin and Robin West have argued that by demonstrating traits which, through biology or acculturation, are predominately possessed and employed by women, difference theory was not only important empirical work, but was a necessary form of political legitimation for women. Moreover, difference theory was an important form of compensatory scholarship, since it socially validated women’s experiences, which, for many years, simply did not count.

At a minimum, cultural feminism focuses on gender similarities and differences. In emphasizing capacities possessed distinctly or predominantly by women, the theory highlights differences between men and women. At the extreme, this has led some theorists toward a wholesale exclusion of men on a number of levels. First, on the theoretical level, the focus of analysis is women, rather than people. Second, difference theory, with its construction of the dichotomous categories of women and men, excludes those who do not fit neatly into either category. The essentialism of difference theory does not admit that there may be gradations of differences—that gender may be a continuum. Third, in significant respects, a number of cultural feminists may be interpreted as promoting the separatist philosophy that men cannot be reconciled with or included in feminism.

In the social sciences more than in law, these gender differences have been interpreted as an indication of women’s moral superiority. A number of theorists writing about the sociology of consciousness have sug-

30. See Margaret Jane Radin, Reply: Please Be Careful with Cultural Feminism, 45 STAN. L. REV. 1567, 1568 (1993); West, supra note 21, at 3 (women were not considered human beings).
gested that women are epistemologically privileged. Certain characteristics (female) are celebrated, while others (male) are not. The contention of some standpoint epistemologists is that the underprivileged position of persistent oppression creates an ability in women to discern reality more objectively than men. They also contend that because women’s nurturing or caring faculties are better developed, they are able to do different, and perhaps more exploratory, research than men. Some theorists make the stronger argument that feminist ethics should be privileged over masculinist values, and that the application of feminine ideology creates better social outcomes.

Arguments about the superiority of the feminine difference are one response to the marginalization experienced by women for centuries. Some of these arguments may have functioned correctly by adding the omitted accomplishments and contributions of women. Even the stronger argument that women hold a privileged epistemological status may have been a necessary step in claiming legitimacy for gender differences or in reversing an established hierarchy so that it could be examined, but such an argument comes with a price. On the level of discourse, this framework meant that dialogue was a competition. The form of the argument—that women’s ethics should prevail over men’s—sets up a discourse that is at best competitive, at worst combative. Whose values should prevail?

C. Dominance Theory or Radical Feminism: Men as Oppressors

A third group of feminist legal theorists analyze the inequality in power relations between women and men. Instead of focusing on gender


34. See Knut H. Sørensen, Towards a Feminized Technology? Gendered Values in the Construction of Technology, 22 SOC. STUD. SCI. 5, 8–9 (1992).

35. See, e.g., Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 33–36 (1988) (suggesting that if tort law adopted an “ethic of care,” the no duty to save rule would be abolished); A. Yasmine Rassam, Note, “Mother,” “Parent,” and Bias, 69 IND. L.J. 1165, 1169 (1994) (arguing that a feminist approach “renders a more honest and fair decision-making process than do other legal methodologies”).

36. See Martha Minow, The Supreme Court 1986 Term—Foreword—Justice Engendered, 101 HARV. L. REV. 10, 43 n.155 (noting that adoption of a woman-centered perspective may permit the consideration of male experiences as deviating from the norm).

37. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 8 (1987) (“Gender is an inequality of power, a social status based on who is permitted to do what to whom.”).
differences, dominance theorists, or radical feminists, emphasize women's subordination. They describe how the cultural and sexual domination of men structures social and legal relations between the sexes. They assert that legal concepts, crafted by men, operate to control patterns of behavior between men and women. Dominance theorists call attention to the fact that the male norm in law and society is universal and unchallenged.

Dominance theory dwells less on the individual experiences of women and is much more concerned with the class-based oppression of women. These theorists call attention to the social institutions and practices that promote gender inequality as well as the oppression of women. They cite pornography, prostitution, sexual harassment, restrictions on abortion, and inadequate responses to violence against women as examples of a social phenomenon that contribute to the oppression of women. Radical feminism argues for dramatic social transformation and redress of the power imbalance.

Dominance theory may tend to promote a circumscribed view of both men and women by representing men negatively and portraying women as the victims of centuries of male oppression. Under this theory, men subordinate, ignore, invade, harass, vilify, use, and torture women. They are, quite literally, the bad guys. The essential social relations between men and women are those of domination and submission: male domination and female victimization. Gender is constructed as social position and political prowess. Sexuality is the practice of subjugation. As Robin West capsulizes it, radical feminists believe that "the important difference between men and women is that women get fucked and men fuck: 'women,' definitionally, are 'those from whom sex is taken.'"
Importantly, not even the "good guys" are exempt from this description, for all men are potentially bad. Dominance theory opens the door to an essentialist position for the viewing of men as a uniform collective: none are better, some are worse, and all are guilty. Note that radical feminists are not the only ones to blame men:

To be blunt, it is almost impossible not to blind oneself to the violence in the world of which you are an indirect if not direct beneficiary, and most men do indeed benefit, at least in the short run, from the sexual violence from which many women fear or suffer.

In addition to viewing men as the perpetrators, dominance theory views gender discourse as a finite sum game in which there must be winners and losers. For dominance theorists, gender equates with and is defined by power. They argue that gender equality can only come through a shift in power: "Equality means someone loses power.... The mathematics are simple: taking power from exploiters extends and multiplies the rights of those they have been exploiting." If women can attain equality only by "taking power from those who have it," i.e., men, this sets up a fundamental antagonism between the sexes.

D. Postmodern Feminism: Men Omitted

Much of modern feminist legal scholarship has moved beyond the sameness-difference-dominance debate, although a number of ideas from

44. Andrew Ross, Demonstrating Sexual Difference, in MEN IN FEMINISM 47, 48-49 (Alice Jardine & Paul Smith eds., 1987) (referring to a syllogism constructed by some radical feminists: "Some men rape and kill women. All men are potential rapist-killers. Therefore, all women are potential victims.").

45. I am deliberately engaging in hyperbole and overstating the case as a rhetorical device to make the point.

46. Robin West, Feminism, Critical Social Theory and Law, 1989 U. CHI. LEGAL F. 59, 63; see also Duncan Kennedy, Sexual Abuse, Sexy Dressing and the Eroticization of Domination, 26 NEW ENG. L. REV. 1309, 1311 (1992) (suggesting that all men derive incidental benefits from the phenomenon of rape).


48. Id. at 22.

49. Indeed, if men write about feminism—and, perhaps, if women write about men in feminism—this may be viewed or perceived as an act of penetration or invasion. See Paul Smith, Men in Feminism: Men and Feminist Theory, in MEN IN FEMINISM, supra note 44, at 33.
cultural feminism are being adopted and implemented as mainstream social practice.\(^{50}\) A principal current focus of feminist exploration in law is postmodern feminism.\(^{51}\) Feminists influenced by postmodernism emphasize that there is no monolithic female experience, but many experiences that vary according to a woman’s race, class, ethnicity, and culture.\(^{52}\) Femininity is socially constructed,\(^ {53}\) and knowledge, rather than consisting of objective, timeless truths, is situational and constructed from a confluence of multiple perspectives.\(^ {54}\)

Another insight of postmodern feminism is that abstract theorizing should give way to pragmatic, contextual solutions.\(^ {55}\) An important facet of postmodernism generally, and postmodern feminism in particular, is that discourse, perhaps especially legal discourse, constructs social understanding.\(^ {56}\) Some authors suggest that in order to prevent gender hierarchies from self-reproducing, postmodern feminist theory must focus on the structural conditions perpetuating patriarchy.\(^ {57}\)

Postmodern feminism is concerned with the dilemma of essentialism: how feminists can remain unified on gender issues and yet recognize that feminists are shaped as much, if not more, by characteristics of race, class, and ethnicity.\(^ {58}\) Feminists drawing on postmodernism want to avoid unitary truths and acknowledge multiple identities.

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50. See, e.g., Anne C. Dailey, Feminism’s Return to Liberalism, 102 YALE L.J. 1265, 1268 n.14 (1993) (suggesting that the Supreme Court employed special treatment theory in California Federal Savings & Loan Ass’n v. Guerra, 479 U.S. 272 (1987), when it approved pregnancy disability leave for women even if no parallel disability leave was provided for men).

51. Another current in modern feminism explores questions of feminist methodology. See Bartlett, supra note 2.

52. Difference thus becomes not a binary phenomenon, but a multiply created, shifting set of phenomena. Mary Joe Frug, Sexual Equality and Sexual Difference in American Law, 26 NEW ENG. L. REV. 665, 674 (1992) (stating that feminist legal scholarship defines “sexual difference by the relationships or context in which sexual difference is asserted”); see also Martha Minow, Incomplete Correspondence: An Unsung Letter to Mary Joe Frug, 105 HARV. L. REV. 1096, 1098-99 (1992).


In struggling with the "no woman, many women" concept, much of postmodern feminism simply omits men. Of course, the postmodern perspective that women's identities are shaped by their cultural and social situations necessarily involves their interactions with men. The postmodern exploration of this subject considers the social construction of gender differences and the self. Nevertheless, the idea that there are many incarnations of women is a woman-centered theory in that the focus is on women. Even postmodern feminist ideas about the cultural composition of gender concentrate primarily on women. Thus, the reason behind the omission of men from postmodern feminism is not that men are irrelevant or that they are evil, but principally that the focus is on a different subject: woman or women.

E. Feminist Legal Theory in Perspective

None of this analysis is meant to suggest that the various incarnations of feminist legal theory are wrong, or that they have not been helpful. They have been absolutely critical in redressing the institutional blindness to the subordination of women, affirming women's experiences, empowering women, and elevating their social and political status. Although feminists have paid attention to the condition of men, their attention was for a particular purpose. Feminist arguments about how men have been disadvantaged were employed principally to create equal opportunities for women.

Much of feminists' inattention to men is understandable since women lacked the attention for centuries. In its nascency, feminist theory needed to focus on the situations of women. The establishment of women's identity and group consciousness may have required at least the temporary separation of the interests of men and women.

Feminism involves opposition to the unjust subordination of women. Underlying this definition, though, are broader suppositions that gender role stereotyping is unjust, that categorical assumptions about people must


60. As just one example of the point, and there are many: Professor Catharine MacKinnon created the paradigm for modern sexual harassment law. See CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). She described sexual harassment as a group based wrong to women inadequately recompensed under prevailing tort theories. Her theoretical work prompted the EEOC to acknowledge sexual harassment as sex discrimination in violation of Title VII. See Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 818 (1991).

61. Smith, supra note 49, at 35.
be closely examined, and that an awareness of the social, cultural, and political ramifications of any categorization must be considered. Gender disparities exist only as relational differences. We know gender stereotyping only by comparing the treatment of one group of people (women or men) to another group of people (men or women), while bearing in mind both differences and similarities in situations, functions, needs, and rights. The focus of feminist scholarship for the past two decades has been on how women differ from men, how women have been disadvantaged relative to men, and what corrective actions are needed to secure the financial, social, and political status of women.

Gender role stereotypes involve both male and female stereotypes. Clearly, any discrimination against men may ultimately result in harm to women. For example, punishing only men for statutory rape reinforces the model of males as aggressors and affords women "protection" while denying them sexual freedom. But it is vital to acknowledge that the indictment of gender role stereotypes reaches further than harms to women. Stereotypes that create constructs of masculinity harm men both directly and indirectly.

While some commentators have recognized that perpetuation of sex role stereotypes harms men as well as women, there has been no systematic application of feminist theory to stereotypes that injure men. Although the equal treatment theorists examined the burdens of stereotypes on men as well as women, they employed this strategy to advance the role of women. Furthermore, feminism in the modern era has done little to examine the more sophisticated and subtle ways in which stereotypes, particularly those stereotypes that have been internalized, affect men. Feminist legal theory has not comprehensively explored the negative effects

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63. The pattern that emerges from these [constitutional sex discrimination] cases reflects the traditional division of authority by sex that has allocated the public sphere of government and finance to men, the private sphere of home and family to women. Crippling as this division has been to women—and it has been crippling for many—it has imposed limitations on both sexes.


64. See supra text accompanying notes 18–19.
that gender role stereotypes have on men, or it has relegated consideration of such effects to footnotes.\textsuperscript{65}

In disciplines other than law, feminists have begun to address the various situations of men and concepts of masculinity.\textsuperscript{66} Importantly, the topic of masculinity was essentially nonexistent until feminists began to write about the centrality of gender in the construction of work, domestic life, and identity. Sociologist Michael Kimmel writes:

So how is it that men have no history? Until the intervention of women's studies, it was women who had no history, who were invisible, the "other." Still today, virtually every history book is a history of men. If a book does not have the word "women" in its title, it is a good bet that the book is about men. . . . These books do not explore how the experience of being a man structured the men's lives, or the organizations and institutions they created, the events in which they participated. American men have no history as gendered selves; no work describes historical events in terms of what these events meant to the men who participated in them as men.\textsuperscript{67}

Masculinity has received little attention in feminist legal theory. There has been only minimal, and quite recent, exploration of the ways in which legal theory and doctrines help to shape concepts of maleness.\textsuperscript{68} Inquiry needs to aim at discovering the ways in which legal constructs are interwoven with the social practices that define what it means to be male in this culture.

Many of the insights from the different incarnations of feminist theory can be applied to the treatment of men. To the extent that caring, contextualizing, unmasking, raising awareness, and emphasizing connections between people are important operating principles,\textsuperscript{69} they should be applied to men's relations to legal theory and doctrine.

Pragmatic feminism teaches the importance of looking at specific situations and the danger of universals.\textsuperscript{70} Feminists have argued for

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\textsuperscript{65} See supra note 2.
\textsuperscript{66} See, e.g., Michael S. Kimmel, The Politics of Manhood (1975); David H.J. Morgan, Discovering Men 6-23 (1992); see also supra note 5.
\textsuperscript{68} See supra note 3 and accompanying text.
\textsuperscript{69} "A touchstone of feminism is connection; over and over again, feminist theories speak about our interrelatedness, our interdependencies, ourselves and others as impossible of comprehension in isolation." Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877, 1921 (1988).
greater contextual analyses of the categories of identity—such as race, gender, class, ethnicity, and sexual orientation—that shape people's decisions and attitudes. These contextual methodologies can be applied to various situations and roles that shape the constructs of masculinity.

An important methodological tool of feminism involves unmasking gendered biases or assumptions made by social groups and institutions, laws, and legal doctrines. It is a process that involves evaluating whether rules operate in a neutral manner and, more generally, of making gender visible. The sections that follow attempt to make visible how the treatment of men by various legal doctrines reinforces stereotypic notions of maleness. For example, the law defining the kinds of injuries that are compensable under Title VII describes, legally, who can suffer. It speaks volumes about the ways law views men as impervious to emotional pain.

Feminist legal theory is ready to move beyond the singular interests of women. As just discussed above, the main point is that men have not been invited into the theoretical discourse; they have not been invited to the table (you should excuse the expression). The next section moves the discussion from the level of theory to practice. It suggests ways in which gender role stereotypes are both constructed and perpetuated by legal doctrine.

II. THE SOCIO-LEGAL CONSTRUCTION OF GENDER ROLES

DISADVANTAGES MEN AS WELL AS WOMEN

This section suggests that part of the focus of feminist legal theory needs to shift. The argument is not that we should shut our eyes to the fact that women have been systematically excluded from positions of social and political power or that women have been ignored, demeaned, sexually harassed, and otherwise brutalized. To acknowledge violence against men is not to diminish or deny the persistent and pervasive violence against women. The argument is that umbilical parts of the problem.

71. See, e.g., Deborah L. Rhode, Gender and Professional Roles, 63 FORDHAM L. REV. 39, 42-43 (1994) (observing that empirical research establishes that sex-linked behavioral variations are not present consistently and concluding that attention must be directed toward "the importance of context in eliciting traits traditionally associated with women").


73. See infra text accompanying notes 116-237.

74. See generally Susan Estrich, Rape, 95 YALE L.J. 1087 (1986) (examining the sexism in rape laws and their enforcement in the criminal justice system).
remain to be explored: In what ways have men systematically been harmed by gender stereotypes? How does this harm redound to the disadvantage of women and the impoverishment of legal theory?

The purpose of examining the various ways in which legal doctrines and the legal system disadvantage men is not to thrust men into victimhood.75 Professor Martha Minow has cautioned about the dilemma of victimhood: On the one hand, failure to acknowledge victimization “countenances oppression.” On the other hand, speaking in terms of victimization may promote passivity, helplessness, and blaming behavior on the part of victims.76 As a partial resolution of the dilemma, Minow suggests “[t]reating all participants as more than mere victims and more than mere perpetrators, recognizing the capacity of the most victimized for choice, redressing the structures of constraint, and treating responsibility not as blame but as the ability to respond . . . .”77

It is important for gender role stereotypes to be examined as evidential facts, rather than opportunities for blame. An exploration of the ways in which men have been disadvantaged by the gender role stereotypes contained in legal doctrines will elucidate how masculinity is constructed. An examination of the ways of constructing what it means to be male needs critical evaluation. The following sections consider the ways in which gender role stereotypes have harmed men both socially and legally.

A. The Legal Architecture of Male Aggression

It is empirically clear that male aggression is neither mythical nor insignificant.78 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 explo-

75. Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411, 1444 (1993) (discussing the dilemmas of acknowledging and ignoring victimization and evaluating the conditions and relations that create victims).
76. Id. at 1430–31.
77. Id. at 1444.
78. Contra KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 102 (1993) (arguing that male sexual aggression is significantly a matter of perception and “interpreting leers and leer-type behavior as a violation is a choice”).
79. See, e.g., Elizabeth A. Pendo, Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act, 17 HARV. WOMEN'S L.J. 157, 164 (1994) (women in America suffer approximately “two million rapes and four million beatings” every year); Steven B. Weisburd & Brian Levin, “On the Basis of Sex”: Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL’Y REV., 21, 32 (Spring 1994) (women are more likely to be injured by men they know than they are to be injured by car accidents, rapes by strangers, and muggings combined) (citing Nancy Gibbs, ‘Til Death Do Us Part, TIME, Jan. 18, 1993, at 38, 41).
ration of a complex web of social beliefs, behavior patterns, learned interactions, and psycho-social theories. However, even this approach is a relatively modern departure from the traditional view that male aggression is an inescapable part of male physiology. Feminist arguments, in emphasizing that women are less aggressive than men, may incorporate and promote stereotypical ideas.

Only recently have scholars begun to direct attention toward the ways in which legal doctrines and constructs 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. Professor Dorothy Roberts notes the proactive 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, Professor Dianne Avery observes that labor arbitrators and judges create standards to distinguish

82. See Lucinda M. Finley, A Break in the Silence: Including Women’s Issues in a Torts Course, 1 YALE J.L. & FEMINISM 41, 63 (1989) (questioning the use of a “reasonable woman” standard to evaluate women’s conduct as unhelpfully “replac[ing] one caricature with another”); Ruth Gavison, Feminism and the Public/Private Distinction, 45 STAN. L. REV. 1, 39 (1992) (suggesting that Professor Catharine MacKinnon’s argument in favor of regulating pornography depicts and reinforces “the perception of male sexuality as violent and abusive”).

A far more explosive suggestion regarding the backlash effect of feminism is noted by Professor Nadine Strossen. “Some research indicates that... advances in women’s rights may cause some male sexual aggression against women.” Nadine Strossen, A Feminist Critique of “The” Feminist Critique of Pornography, 79 VA. L. REV. 1099, 1112–13 (1993).
83. See, e.g., State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) (suggesting that a woman “must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend”). See generally Steven B. Katz, Expectation and Desire in the Law of Forcible Rape, 26 SAN DIEGO L. REV. 21 (1989).

Professor Susan Estrich notes the complicated interactions of legal and social norms—that male aggression in sexual relations is considered the norm and this notion is accepted in legal decisions:

The law did not invent the “no” means “yes” philosophy. Women as well as men have viewed male aggressiveness as desirable and forced sex as an expression of love; women as well as men have been taught and have come to believe that when a woman “encourages” a man, he is entitled to sexual satisfaction.

Estrich, supra note 74, at 1180.
acceptable from impermissible levels of picket line violence based on traditional assumptions about male aggression.\textsuperscript{85}

The United States Supreme Court has given official imprimatur to the stereotype that males are aggressive. In \textit{Michael M. v. Superior Court},\textsuperscript{86} 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.\textsuperscript{87} Expanding on its justification for upholding the males-only statutory rape law, the \textit{Michael M.} Court depicts females as victims and males as aggressive sexual offenders.\textsuperscript{88} The Court noted that "males alone can 'physiologically cause the result which the law properly seeks to avoid,'" and held that the "gender classification was readily justified as a means of identifying offender and victim."\textsuperscript{89} 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."\textsuperscript{90} The Court's ruling in \textit{Michael M.} perpetuates commonly held perceptions about male sexual aggression, while its analysis fosters the belief that this aggression stems from innate biological sources.

Just as society has historically tolerated aggression by men, it has also tolerated aggression against men. For example, the majority of male violence is directed against other men.\textsuperscript{91} Men are almost twice as likely to be the victims of violent crime,\textsuperscript{92} and men are treated more harshly in the

\begin{footnotesize}
\textsuperscript{85} Dianne Avery, Gender Stereotypes, Picket Line Violence, and the "Law" of Strike Misconduct Cases, 8 OHIO ST. J. ON DISP. RESOL. 251, 274 (1993) (observing that "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") (footnotes omitted).

\textsuperscript{86} 450 U.S. 464 (1981).

\textsuperscript{87} Id. at 471.

\textsuperscript{88} In fact, this was the state legislature's asserted purpose, which the Court ignored in its analysis. Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 1000 (1984); Williams, supra note 31, at 187. Note that some feminist commentators supported this punishment of male aggression. See, e.g., Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEX. L. REV. 387 (1984).

\textsuperscript{89} 450 U.S. at 467.

\textsuperscript{90} Bartlett, supra note 2, at 840.

\textsuperscript{91} "Men are three times as likely as women to be [homicide] victims ...." Bernie Zilbergeld, Is Male Violence Inevitable?, S.F. CHRON., June 23, 1991, Review, at 6 (reviewing MYRIAM MIEDZIAN, BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE (1991)).

\textsuperscript{92} See Bennett Roth, Most Women Know Their Attacker, Research Finds; Study Explores Crime Victims in U.S., HOUSTON CHRON., Jan. 31, 1994, at A1.
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criminal justice system. Some evidence indicates that men receive more severe criminal sentences, even when men and women commit precisely the same substantive offense. The percentage of men on death row disproportionately exceeds the percentage of death-eligible offenses committed

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93. See, e.g., Wark v. Robbins, 458 F.2d 1295, 1298 (1st Cir. 1972) (holding that imposing a 6 to 12 year sentence on a male prisoner for escape from prison while a similarly situated female prisoner who escaped from women's reformatory would receive a maximum of 11 months was justified by the different "risks of violence and danger to inmates, prison personnel, and the outside community"); United States v. Redondo-Lemos, 817 F. Supp. 812, 815 (D. Ariz. 1993) (finding an equal protection violation in sentencing from probation office statistics showing that male drug offenders were sentenced to 36 months while similarly situated female drug offenders were sentenced to an average of 32 months, and data that showed 11% of males receiving probation while 35% of females received probation), rev'd, 27 F.3d 439 (9th Cir. 1994) (holding that the data relied on by the district court established disparate impact but not disparate treatment); State v. Houston, 534 A.2d 1293, 1296 (Me. 1987) (holding that a judge's policy of imposing a two-day minimum jail term when a male assaults a female coupled with the gendered statement that men "can't go around hitting women" violates equal protection); Rodgers v. Ohio Parole Bd., No. 92AP-709, 1992 WL 341382 (Ohio Ct. App. Nov. 17, 1992) (holding that the Court of Claims lacked jurisdiction to consider claims of defendant where black male defendant and his two white female co-defendants were convicted of kidnapping and gross sexual imposition; as a male penitentiary inmate, the defendant received a parole eligibility date of October 1992, while his co-defendants, who were inmates at the women's reformatory, were assigned parole eligibility dates in July 1986); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 76 (1991) (finding that nationwide, 50.4% of women who committed crimes subject to mandatory minimum sentences received such a sentence while 61.5% of men did); Charles J. Corley et al., Sex and the Likelihood of Sanction, 80 J. CRIM. L. & CRIMINOLOGY 540, 541 (1989) (stating that among convicted offenders, females received disproportionately less severe sentences than their male counterparts for similar crimes); Michael E. Faulstich & John R. Moore, The Insanity Plea: A Study of Societal Reactions, 8 LAW & PSYCHOL. REV. 129, 132 (1984) (reporting that results of study testing simulated news account of a shooting death indicated both male and female respondents were more accepting of a female defendant raising the insanity defense than a male defendant). But see Leslie G. Street, Despair and Disparity in Florida's Prisons and Jails, 18 FLA. ST. U. L. REV. 513, 520 (1991) ("Women are generally imprisoned for less serious offenses than men, but serve longer sentences for their lesser offenses."). There is also significant evidence that women who "offend judicial expectations" of appropriate gender roles—such as women who commit crimes of violence—receive longer sentences than their male counterparts. Kit Kinports, Evidence Engendered, 1991 U. ILL. L. REV. 413, 421.
by men. Some of this violence may be turned inward: Men commit suicide in much more significant numbers than women.

Another prominent example of institutionalized male aggression is 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, James St. Clair 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,

94. Harris v. Pulley, 692 F.2d 1189, 1198-99 (9th Cir. 1982) (Defendant submitted affidavits showing that 5.5% of the 1164 defendants convicted of first or second degree murder in California between 1978-80 were female, but that of the 98 defendants sentenced to death, none were female.), rev'd, 465 U.S. 37 (1984); Victor L. Streib, Death Penalty for Female Offenders, 58 U. CIN. L. REV. 845, 874-75 (1990); Victor L. Streib & Lynn Sametz, Executing Female Juveniles, 22 CONN. L. REV. 3, 4 (1989) (noting that of the "16,000 lawful executions in the United States, ... only 398 (2.5%) [of those executed] have been females").


98. Id. at 125.
the psychological wherewithal to suffer the indignities of war, and the social authorization to be killed first.99

The Supreme Court gave its approval to this construct in *Rostker v. Goldberg.*100 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* Court’s reasoning was an exercise in diversion in that the Court deferred to legislative and executive decisions regarding military affairs. It reasoned 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.

It is clear from the Court’s analysis that *Rostker* was not about legitimate physical or social differences between the sexes, but about stereotypic distinctions between warriors and homemakers.101 Omitted from the Court’s evaluation was any social contextualization of the combat exclusion. The Court did not consider that such exclusion might promote other forms of discrimination, such as barring women from political office for lack of military credentials, or that the exclusion itself might foster negative attitudes about women.102

These are not simply the antiquated decisions of a bygone era; they are the anachronistic decisions of modern society. In 1991, in *United States v. Virginia,*103 the United States District Court for the Western District of Virginia reviewed the state-funded Virginia Military Institute’s (“VMI”) males-only admissions policy. The District Court found that VMI’s unique educational methodology justified its single-gender admissions standard. VMI asserted it had a mission to create “citizen-soldiers,” and fulfilled that mission in part by creating solidarity through terror-bonding among the members of its entering class. Those methods included a spartan life in

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102. See Peach, supra note 96, at 229.

barracks, "indoctrination . . . rituals, . . . minute regulation of individual behavior, [and] frequent punishments."104

The Fourth Circuit Court of Appeals reversed and held that VMI's policy violated the Equal Protection Clause, but stated that single-sex education could be supported by adequate pedagogical justification, and specifically suggested that the state create a separate, but comparable, program for women.105 Virginia subsequently created the Virginia Women's Institute for Leadership at Mary Baldwin College, which was approved as a parallel VMI-style educational program for women.106 Just recently, the Supreme Court granted certiorari to review the constitutionality of single-sex educational programs.107

On April 13, 1995, in Faulkner v. Jones,108 another panel of the same Appeals Court held that the Citadel in South Carolina was required to admit its first female cadet in August unless the state either stopped funding a male-only institution or established a comparable female-only institution.109 Thus, both Faulkner and United States v. Virginia support the

104. Id. at 1422.
106. See United States v. Virginia, 852 F. Supp. 471, 476 (W.D. Va. 1994), aff'd, 44 F.3d 1229 (4th Cir.), cert. granted, 116 S. Ct. 281 (1995). In reviewing the Virginia Women's Institute for Leadership (VWIL), the district court excused significant substantive differences between the educational programs at VWIL and VMI, including a lack of advanced math, engineering, and physics courses, which would preclude women at VWIL from earning an engineering degree that would be available at VMI. Id. at 477. Also unavailable at VWIL, but not of significance to the court, would be the military barracks lifestyle experience and any military training other than the Reserve Officer Training Corps program. Id. at 478.
107. United States v. Virginia, 116 S. Ct. 281 (1995). As of this writing, the Court has heard oral arguments in the case, but has not rendered a decision.
109. The panel decision was by two-to-one vote, over a strident dissent by Judge Clyde H. Hamilton:

Throughout this litigation, Faulkner has represented vehemently that she does not want a Citadel for women or a parallel program such as VWIL. Rather, her sole purpose is to gatecrash her way into the Corps of Cadets, contending that any single-gender program is per se unconstitutional. . . . Faulkner does not want a "female Citadel," contending that the nature of the Citadel experience cannot be replicated. She wants to join the Corps of Cadets because it can provide her with a unique educational experience, but, as all parties agree, the unique experience provided by the Citadel is grounded in its single-gender status. By joining the Corps of Cadets, Faulkner, again as all agree, would be destroying the very uniqueness that . . . she seeks to attain.

. . . . I cannot accept the majority's invitation to be a party to the destruction of a venerable institution . . . .

Id. at 456-57.
notion that sexually segregated education is acceptable, as long as "separate but equal" facilities for women exist. Professor Katherine Franke capsulizes what these decisions mean for the legal construction of the ideology of masculinity: "The Citadel and VMI are much more than all-male educational institutions; they are dedicated to the paradic celebration of, and ritual indoctrination in, the ways of masculinity for men." As this Article discusses later, the social and political ramifications of rigidifying the separation of genders may be enormous.

Links between gender and aggression are institutionalized by the legal treatment of the manifestations of aggression in that the cultural image of aggressors is legally "locked in." Courts have developed an ideological framework that draws upon and perpetuates traditional gender role stereotypes: 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 socio-political obligation to engage in violence, to be the killers.

B. Suffering in Silence

From infancy, men learn to endure suffering silently and in private. Emotional stoicism is ingrained in many and varied ways. In describing the "rules of manhood," 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.

110. Franke, supra note 25, at 86.
111. See infra text accompanying notes 318-360.
112. See generally Karst, supra note 3, at 533 n.135 (citing Maccoby & Jacklin, Sex Differences in Aggression: A Rejoinder and Reprise, 51 CHILD DEV. 964 (1980), for the proposition that aggression is largely the product of acculturation).
114. Selective Draft Law Cases, 245 U.S. 366, 368 (1918) ("The highest duty of the citizen is to bear arms at the call of the nation.").
115. See, e.g., Karst, supra note 3, at 525-28.
116. Bill St. John, Authors on Stage: William Styron on Styron; His Darkness and American Male Suicide, ROCKY MTN. NEWS, May 1, 1994, at 74A ("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." (quoting William Styron). See generally JACK BALSWICK, THE INEXPRESSIVE MALE (1988).
This section looks at one such set of constructs—the law regarding sexual harassment of men. The example of same-gender sexual harassment is not the only instance 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 ten percent of all such suits) often face ridicule from and diminution by society. If men are sexually harassed by other men, they have no legally

118. For instance, there is a split among the circuits regarding whether male plaintiffs suing for sex discrimination, so-called “reverse discrimination,” are required to establish the additional element “that the defendant is the unusual employer who discriminates against the majority.” Compare Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (quoting Parker v. Baltimore & Ohio Ry. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981)) and Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1251-52 (10th Cir. 1986) (same) with Loeffler v. Carlin, 780 F.2d 1365, 1369 (8th Cir. 1985), rev'd on other grounds sub nom. Loeffler v. Frank, 486 U.S. 549 (1988) (holding that male plaintiff suing for sex discrimination was required to fit the McDonnell Douglas framework, but was not required to make a special showing of "background circumstances").

Regarding spousal abuse of husbands, see ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS 186-97 (1977) (noting researcher Suzanne Steinmetz’s contention that husband beating is more underreported than wife beating); Julia J. Chavez, Comment, Battered Men and the California Law, 22 SW. U.L. REV. 239, 240-43 (1992) (pointing to a gender-specific California statute regarding the admission of “battered woman’s syndrome” evidence, and suggesting that “the battered male defendant does not have the same protection afforded a battered female defendant”). Regarding sexual assault of men, see Michael B. King, Male Sexual Assault in the Community, in MALE VICTIMS OF SEXUAL ASSAULT 1, 1 (Gillian C. Mezey & Michael B. King eds., 1992) (“Rape of men reported to law enforcement agencies contributes between 5-10 percent to the total rapes reported.”).


120. See, e.g., Carter v. Caring for the Homeless of Peekskill, Inc., 821 F. Supp. 225, 228, 230 (S.D.N.Y. 1993) (holding that male employee has no claim for sexual harassment by female “chairman” [sic] 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”). See also Cecelia Goodnow, Role Reversal Film’s Table-Turning Premiere Fuels Debate Over Sexual Harassment, SEATTLE POST-INTELLIGENCER, Dec. 17, 1994, at C1 (An attorney whose practice consists of approximately 60 percent sex discrimination and harassment issues said of Michael Crichton’s book Disclosure about a male victim of sexual harassment: “It overemphasizes what is probably a minuscule problem in the workplace—the harassment of men.”); Colleen O’Connor, Films Distort Reality of Sexual Harassment, DALLAS MORNING NEWS, Jan. 5, 1995, at D2 (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.”); Daniel Seligman, The Follies Come to Boston, FORTUNE, Apr. 3, 1995, at 142 (sarcastically referring to the workplace social isolation suffered by eight men who sued Jenny Craig International 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”).
cognizable injury; if men are sexually harassed by women, they are not believed. Some commentators ignore the reality that a number of men are victims of sexual harassment. The assumptions that the typical perpetrator of sexual harassment is male and the typical victim is female are not unwarranted given the incidence reports. The vast majority of workplace sexual harassment consists of men harassing women: approximately ninety percent of victims are female. Most victims of sexual harassment are women. Yet this prototype of male-perpetrator and female-victim may be transformed into a stereotype about sexual harassment that admits no other victim. A significant problem is the wholesale denial that men may be the victims of sexual harassment. The incidence of sexual harassment of men may be greater than people believe.

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. And just as women feel ashamed and humiliated

121. See, e.g., Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861 n.15 (3d Cir. 1990) (drawing on Catharine MacKinnon’s work to suggest that "there is a sexual power asymmetry [sic] between men and women and that, because men’s sexuality does not define men as men in this society, a man’s hostile environment claim, although theoretically possible, will be much harder to plead and prove").


123. See BARBARA A. GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS 54 (1985) (noting that sexual harassment of men is “common” and estimating its incidence at perhaps up to 9% of the total cases occurring—yet suggesting that most reported incidents of harassment of men would not come within the legal definition of the offense); OFFICE OF MERIT SYSTEMS REVIEWS AND STUDIES, U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 98 (1981) (The results of an EEOC survey reported: “[W]omen are much more likely to be victims of sexual harassment than men—42% of all female federal employees but only 15% of male employees, reported being sexually harassed.”); Bradley Golden, Note, Harris v. Forklift: The Supreme Court Takes One Step Forward and Two Steps Back on the Issue of Hostile Work Environment Sexual Harassment, 1994 DET. C.L. REV. 1151, 1173 (1994) (“Although less common, the instances of female supervisors harassing male employees seems to increase with the number of female supervisors.”).


125. See Andrew Bolger, Sexual Harassment of Men Highlighted, FIN. TIMES, Mar. 3, 1995, at 11 (A British Institute of Personnel and Development Survey “found that men were less likely than women to take legal action if harassed.”); Sonia Purnell, Men “Failing to Disclose They Are Sex Pest Victims”, DAILY TELEGRAPH, Mar. 3, 1995, at 5 (Dianah Worman of the Institute of Personnel and Development said: “Men are less comfortable with taking this issue forward. If they do, they are going to feel their ego is bruised, as colleagues will say, ‘You should be so
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 the social level of denial that males may be victims of sexual harassment. Treating a problem as nonexistent helps keep it that way. As the history of the social and legal treatment of women demonstrates, not saying anything about events allows them to go unnoticed.

Most significantly, some recent court interpretations hold that the federal employment statutes do not provide a cause of action for same-gender 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 involve 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."132

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 based on sexual orientation as sexual harassment based on the gender of the victim.133 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.134

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.135 Several recent cases illustrate the reasoning. In Polly v. Houston Lighting & Power Co.,136 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 Channelview sh-t.'"137 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."138 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."139


133. See Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983) (determining that unwelcome homosexual harassment is a violation of Title VII), aff'd, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981) (holding that a male who rejects homosexual advances of a male supervisor states a cause of action under Title VII); Mogilefsky v. Superior Court, 20 Cal. App. 4th 1409 (1993) (supporting cause of action by male employee who was subject to male employer's explicit sexual requests, and holding more generally that California law prohibits same-sex harassment).


135. Perhaps a majority of courts do allow same-sex sexual harassment cases, see, e.g., Williams v. District of Columbia, No. 94-02727 (JHG), 1996 WL 56100, at *7 (D.D.C Feb. 5, 1996), although a significant number of courts view same-sex sexual harassment as outside the purview of Title VII, see id. at *8 (listing cases). There may be a cause of action under state statutes. Compare Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 454 (N.J. 1993) (holding in dicta that "the (New Jersey Law Against Discrimination] protects both men and women and bars both heterosexual and homosexual harassment") with Hart v. Nat'l Mortgage & Land Co., 189 Cal. App. 3d 1420 (1987) (holding that California unfair employment practice statute did not apply to same-gender sexual harassment).


137. Id. at 4.

138. Id.

139. Id. at 5.
The plaintiff in Goluszek v. H.P. Smith\(^{140}\) 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.\(^ {141}\)

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."\(^ {142}\) 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, that it would constitute adequate cause for his termination.\(^ {143}\) The employer ultimately discharged Goluszek for tardiness, an instance of absenteeism, and wasting company time.

The 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."\(^ {144}\) 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."\(^ {145}\) Thus, although Goluszek's sexuality was attacked, the court relied on the idea that Title VII simply does not preclude same-gender sexual harassment. Several subsequent cases have followed the Polly and Goluszek holdings without additional analysis in order to dismiss claims by males of sexual harassment by other males.\(^ {146}\)

\(^ {140}\) 697 F. Supp. 1452 (N.D. Ill. 1988).
\(^ {141}\) Id. at 1454.
\(^ {142}\) Id. at 1453.
\(^ {143}\) Id. at 1454.
\(^ {144}\) Id. at 1456.
\(^ {145}\) Id.
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.\textsuperscript{147} 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. Yet, according to the court, Goluszek brought about his own termination by wasting company time complaining about his working environment. 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.”\textsuperscript{148}

An important additional feature of many same-gender sexual harassment cases involving 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,\textsuperscript{149} the male plaintiff complained to his union steward that the plant foreman had sexually harassed him on several occasions. The conduct involved the foreman grabbing Garcia’s crotch and “make[ing] sexual motions from behind [Garcia].”\textsuperscript{150} Before holding that sexual harassment of a male by a

\textsuperscript{147} Note that female on female sexual harassment typically does not present a cognizable claim either. See supra note 129. Thus, the difference in treatment is a result of the combined operation of legal constructs and social facts, the latter being the greater incidence of male on male sexual harassment.

\textsuperscript{148} Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2515 (1994). Professor Abrams also notes that “courts are far more sympathetic to male sexual harassment claimants when they present the image of a normative, unambiguously male subject who receives unexpected sexual attention from another male in the workplace.” Id. She contrasts the Polly and Goluszek cases with that of Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991), aff’d sub nom., Phetosomphone v. Allison Reed Group, Inc., 984 F.2d 4 (1st Cir. 1993), in which two male plaintiffs charged their male employer with quid pro quo sexual harassment for requiring them to engage in sexual activities with him and a female employee. Abrams, supra, at 2515.

\textsuperscript{149} 28 F.3d 446 (5th Cir. 1994).

\textsuperscript{150} Id. at 448 (second alteration in original).
male supervisor was not redressible 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.

In Hopkins v. Baltimore Gas & 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. The court determined that Title VII did not prohibit same-gender sexual harassment, but hedged its bet by also holding that the incidents the plaintiff complained of did not amount to sexual harassment:

None of the alleged incidents of sexual harassment by Swadow involved implicit or explicit requests or demands for sexual favors.

Indeed, many of the incidents relied upon do not appear at all to

151. Id.
152. See, e.g., Cornwell v. Robinson, 23 F.3d 694, 698 (2d Cir. 1994) (holding that evidence of male coworkers grabbing their own crotches in plaintiff's presence, making sexual propositions, and touching plaintiff's chest constituted a cognizable Title VII claim); King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994) (holding that defendant's touching plaintiff's buttocks and thigh, looking at her in a sexually suggestive manner, and making remarks with sexual overtones amounted to potential sexual harassment).
154. 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, id. at 824 (footnote omitted); had kissed Hopkins at his wedding reception, id. at 824–25; attempted to squeeze into a revolving door compartment with Hopkins, id. at 829; 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." Id. at 825. 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 airplane 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 [sic] not employed by the Company.

Id. at 824, 825.
have even been "sexual" in nature, and several others involved essentially trivial conduct which would not in any event be actionable under Title VII. According to plaintiff's own deposition testimony, Swadow never asked that plaintiff go out with him on a "date," and Swadow never touched plaintiff in a sexual manner.155

Rather than looking at the cumulative pattern of conduct, which courts consistently do in cross-gender sexual harassment cases,156 the Hopkins court viewed the incidents separately, as isolated and trivial events. If this methodological approach to the evidence is adopted in same-gender sexual harassment cases, it will be virtually impossible for a plaintiff to meet the Meritor Savings Bank v. Vinson157 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 in the factual circumstances. Completely absent from the court's interpretation was any evidence of how these incidents made the plaintiff feel.158

The same pattern of analysis was replayed in Vandeventer v. Wabash National Corp.159 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

155. Id. at 835.
156. See, e.g., Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) ("Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."); King v. Hillen, 21 F.3d at 1580 (reversing the Merit Systems Protection Board for failing to consider "the effect on the workplace of the totality of the conduct"); Andrews v. City of Phila., 895 F.2d 1469, 1486 (3d Cir. 1990) (directing the trial court on remand to view evidence of both a sexual nature—name-calling and displays of pornography—and evidence of a nonsexual nature—anonymous phone calls, disappearance of plaintiff's case files, and destruction of plaintiff's property—"in its totality" to see if all of the incidents amounted to sexual harassment); Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445 (N.J. 1993) (determining that courts should not consider "each incident in isolation," but instead "must consider the cumulative effect of the various incidents").
158. Cf. Harris, 114 S. Ct. at 371 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive."); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (noting the importance of evaluating alleged incidents of sexual harassment from the victim's perspective).
159. 867 F. Supp. 790 (N.D. Ind. 1994).
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 have a monolithic view of what constitutes sexual harassment. They conceive sexual harassment only as the oppression of "a male in a male-dominated environment." In rejecting same-gender 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

160. Id. at 798 (citations omitted) (emphasis added).
161. Id. (emphasis added).
163. See Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc) (criticizing the "bizarre result" that "only the differentiating libido runs afoul of Title VII"), aff'd and remanded sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); see also Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) ("The equal harassment of both genders does not escape the purview of Title VII . . . ."). But see Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (When a supervisor "makes sexual overtures to workers of both sexes . . . the sexual harassment would not be based upon sex because men and women are accorded like treatment."); Bandy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike.") (emphasis in original).
164. See, e.g., Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993) (finding that sexual advances of a single supervisor coupled with sexual innuendos and obscene name-calling constituted sexual harassment of a woman); Hansel v. Public Serv. Co., 778 F. Supp. 1126, 1132 (D. Colo. 1991) (deeming that numerous incidents of sexual assault, lewd comments, male intrusion into a women's restroom, and sexually explicit workplace graffiti directed at the victim by name were "egregious" sexual harassment); Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984) (holding that conduct consisting of offensive and abusive language, indecent exposure, and posted drawings depicting sex acts constituted sexual harassment).
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.165

Indeed, the anomaly of rejecting same-gender sexual harassment becomes clearer by adding 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 facts had occurred and were simply witnessed by a woman, the woman probably would have a cognizable claim for a sexually hostile work environment.166 Thus, while the female bystander could recover for sexual harassment, the direct male victim would not have a remedy.

In holding that same-gender 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 incidents in the workplace 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.

165. See Vandeventer v. Wabash Nat'l Corp., No. 4:93 cv 46 AS, slip op. at 22 (N.D. Ind. Oct. 12, 1994) ("While this court will not argue with that assessment [that Vandeventer's affidavit is composed merely of vague conclusory statements with no supporting facts], it does not quite agree that this plaintiff has failed to make an issue of fact regarding incidents other than the two about which she complained.").
166. See, e.g., Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) ("Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."), aff'd in part and rev'd in part sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 452 (N.J. 1993) (holding that if a plaintiff witnessed harassment of same sex employees, this would support her perceptions of a sexually hostile work environment).
C. The Exclusion of Men from Caring, Nurturing Roles

The feminist movement has brought us images of competent women at work, but not of caring and nurturant men at home.\(^{167}\) 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 childrearer.\(^{168}\)

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 much more easily than men.\(^{169}\) 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. \ldots\)

Even among companies that currently offer unpaid leaves to men, many thought it unreasonable for men to take them. Fully 41% of

\(^{167}\) Perhaps the critique is not appropriately just of feminism. This is a particular example of the larger question of 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.


\(^{169}\) “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.” David K. Haase, Evaluating the Desirability of Federally Mandated Parental Leave, 22 FAM. L.Q. 341, 360 (1988).
companies with unpaid leave policies for men did not sanction their using the policy . . . 170

Professor Martin Malin suggests that these social and institutional barriers to affording men parental leave are a significant impediment to the equal division of child care responsibilities.171 Again, this disparate treatment of the sexes harms both men and women. If employers give women more generous parenting leave than men, men are precluded 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 childrearing leave to men if such leave was available for women.172 At least one recent decision implies that employers should not draw a stark distinction between maternal and paternal roles regarding childrearing. In Schafer v. Board of Public Education,173 Gerald Schafer applied for a one-year childrearing leave to raise his infant son. 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 which permitted female teachers one year of unpaid leave for childrearing but denied this leave to male teachers violated Title VII.174 The court distinguished between disability leave for the period of actual physical disability relating to pregnancy or childbirth, and childrearing leave, which could be taken at any time by either gender.175

In contrast to parental leave cases, courts have been less adept at perceiving the gender issues in cases that more indirectly present the ques-

171. See Martin H. Malin, Fathers and Parental Leave, 72 TEX. L. REV. 1047, 1064-79 (1994) (drawing on recent sociological work and cross-cultural comparisons to suggest that many men want parental leave to become more involved in child care, but face structural barriers).
172. See, e.g., Ackerman v. Board of Educ., 372 F. Supp. 274 (S.D.N.Y. 1974) (denying defendant's summary judgment motion on male teacher's claim that allowing child care leave for female but not male teachers was unconstitutional); Danielson v. Board of Higher Educ., 358 F. Supp. 22 (S.D.N.Y. 1972) (denying defendant's summary judgment motion on claim that male college lecturer was denied equal protection when child care leave that was made available to female faculty members was refused him).
173. 903 F.2d 243 (3d Cir. 1990).
174. Id. at 247.
175. Id. at 247-48.
tion 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; 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. In the past two decades, most states have abandoned as unconstitutional the formal presumption in favor of mothers being awarded custody, and a number of states use language encouraging shared parenting in their custody statutes. However, gender is still a statutory consideration in several jurisdictions.

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 prefer mothers as physical custodians. The primary caretaker standard, adopted explicitly in West Virginia and Minnesota, and implicitly in a number of other juris-


180. See, e.g., TENN. CODE ANN. § 36-6-101(d) (1991); see also Jennison, supra note 3, at 1149, 1152 (noting that “[u]ntil 1990, Georgia’s custody statute prohibited a prima facie right to custody in fathers, but not mothers”; also observing that Wyoming and Tennessee still permit the consideration of gender as a factor in custody determinations).

dictions, may be a thinly veiled return to the maternal preference standard. 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. Moreover, as an empirical matter, mothers obtain sole custody in an overwhelming proportion of cases.

Several commentators suggest that fathers usually get custody in contested custody cases. 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

182. See Alan M. Levy, Debunking Myths: The Indispensable Role of Fathers, FAM. ADVOC., Winter 1993, at 30, 30 ("It has been assumed that mothers are the primary caretakers of children and therefore the primary or psychological parents."). See generally Laura Sack, Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases, 4 YALE J.L. & FEMINISM 291 (1992) (discussing the West Virginia and Minnesota standards in operation). But see Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 193-96 (1992) (studying the 35 reported cases in West Virginia since the adoption of the primary caretaker standard, noting that "68% of the cases appealed involved fathers who received custody at the trial court level even though the mother seems to have been the primary caretaker and fit," and suggesting that, even under this standard, there is a strong judicial bias against mothers if the father does more childrearing than average, if the mother leaves the children for some reason, or if the mother has extramarital sex).

183. See, e.g., MARYLAND SPECIAL JOINT COMMISSION ON GENDER BIAS IN THE COURTS, REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 27 (1989) (approximately half of the surveyed judges agreed with the statement that custody awards may be "based on the assumption that children belong with their mothers"); Leslie A. Cadwell, Note, Gender Bias Against Fathers in Custody? The Important Difference Between Outcome and Process, 18 VT. L. REV. 215, 249 (1993) ("[A]ll but one attorney interviewed believed that some Vermont judges are biased against fathers in custody."); Jennison, supra note 3, at 1150 (reviewing recent cases from states with custody statutes that are representative of the nationwide differences in statutory approaches to custody and concluding that "bias continues to operate in some state legislatures and courts, making it impossible in certain instances for fit fathers to obtain custody").

184. See ELEANOR E. MACCOBY & ROBERT H. Mnookin, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112 (1992) (A study conducted in California shows that mothers obtained custody in two-thirds of all cases, while fathers received sole physical custody in 9% of all cases.); Stephen J. Bahr et al., Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?, 28 FAM. L.Q. 247, 256 (1994) (While the mothers receiving sole custody in Utah decreased from "91 percent in 1970-74 to 70 percent in 1990-93," fathers were awarded sole custody five percent of the time during both those periods.); Carol Bohmer & Marilyn L. Ray, Effects of Different Dispute Resolution Methods on Women and Children After Divorce, 28 FAM. L.Q. 223, 227 (1994) ("In New York, mothers were awarded sole or residential custody of children in 63 percent of the cases overall (sole custody, 31 percent; residential custody, 32 percent.").

185. See, e.g., Becker, supra note 182, at 182-83 (referring to a study of 55 contested custody cases in Orange County, North Carolina between 1983 and 1987; in 14 of those cases, the mother was alleged to be mentally unstable); Harriet Newman Cohen, Finding Fairness in Financial Settlements, FAM. ADVOC., Summer 1994, at 57, 59 (claiming statistics show that fathers may obtain custody in more than 50% of contested custody suits).
settlements: "[S]ole custody was awarded to the father in 21 percent of the cases and to the mother in 50 percent of the cases." It should be recognized, though, that contested custody cases involve a small fraction of all custody cases. Less than two percent of divorces involving children necessitate a judicial determination of custody. Self-selection may also be a significant factor in determining who contests a custody decision.

Even before the custody hearing, fathers may be discouraged from seeking custody. A survey of fathers reported that thirty-five percent of physical fathers and ten percent of legal fathers wanted more custody than they requested, while only twelve percent of physical mothers and seven percent of legal mothers felt this way. Some research suggests that attorneys may advise fathers not to request or fight for custody.

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 a gendered way 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 in the modern era 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.

Significantly, some feminist legal theorists are appropriating the domestic sphere as principally the province of women. Professor Mary

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186. Bahr et al., supra note 184, at 257 (reporting on Utah cases between 1970 and 1993).
187. MACCOBY & MNookIN, supra note 184, at 138 (one and one-half percent).
188. "If only a small number of mothers and fathers litigate custody, the number of fathers and mothers who win these suits may be heavily influenced by which mothers and fathers go to court." Jennifer E. Horne, Note, The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents, 45 STAN. L. REV. 2073, 2086 (1993) (emphasis added).
190. See, e.g., Cadwell, supra note 183, at 244 (reporting the results of the Vermont Task Force on Gender Bias in the Legal System survey).
191. See, e.g., BARBARA K. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 244–55 (1989) (advocating that biological mothers should have the exclusive ability to make custody decisions for the first six weeks after a child is born); Nancy S. Erickson, The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority, 2 LAW & INEQ. J. 447 (1984) (arguing that substantial deference should
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." Her 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 Professor Becker's work, the different voice silences the male voice. Moreover, her article disparages 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, . . . the bond fathers have with their children is simply not as strong.' 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.'

On the doctrinal level, 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 Becker's 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 not to be custodial parents as long as societal divisions of child care responsibility persist. Feminist theory could do much toward exploding the myth that

be accorded to an unwed mother's custody preferences; Martha A. Fineman, The Neutered Mother, 46 U. MIAMI L. REV. 653, 666–67 (1992) (suggesting that gender-neutral concepts may significantly harm mothers who have organized their lives around caregiving activities).

192. Becker, supra note 182, at 137.
193. Id. at 135, 143-46, 148–52.
194. Id. at 147, 149, 150.
195. Id. at 147 (alterations in original).
196. Id.
197. Id. at 139.
parenting is a sex-linked trait, and toward fostering an understanding of how men can nurture and take on child care responsibilities.199

III. RECONSTRUCTING IMAGES OF GENDER: BLENDING THEORY AND PRAXIS

A. Overcoming the Resistance of Feminism to Integration

1. Abandonment of the Retributive Approach

A common response to the recitation of the harms that men suffer is that these are injuries which men sustain—and the double meaning is intentional. When I was describing to a feminist friend the harms gender role stereotypes inflict on men, such as requiring them to be the only ones to serve in combat, she responded, “Yes, but men are the ones to declare war. They made their bed, let them lie in it.” Although the metaphor was oddly mixed, the argument is a serious one deserving attention: The substantive inequities underlying these stereotypic classifications result from a world view that men have architected and perpetuated. More simply, men have achieved various benefits from patriarchy, thus they must accept the downsides.200

This argument is retributive in nature: It claims that men deserve their injuries from the system “they” have constructed, and that their injuries result from a rational distribution of privileges and burdens. The next deductive step in this line of reasoning is that since men created these constructs that are now disadvantaging them, women have no obligation to intercede on men’s behalf. The retributive response is actually a package of

199. See Barbara J. Risman, Intimate Relationships from a Microstructural Perspective: Men Who Mother, 1 GENDER & SOC’Y 6 (1987) (mothering is a learned behavior). See generally CARL N. DEGLER, IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT 293–309 (1991) (citing studies that suggest that there is no biological determinism regarding significant social features of homo sapiens, particularly parenting roles); MARVIN HARRIS, OUR KIND: WHO WE ARE, WHERE WE CAME FROM, WHERE WE ARE GOING 230–33, 252–55 (1989) (no biological differences favor women exclusively as nurturers); Janet Z. Giele, Gender and Sex Roles, in HANDBOOK OF SOCIOLOGY 291 (Neil J. Smelser ed., 1988) (examining various types of societies, from small agrarian cultures to modern social groups, to show how gender roles are historically and culturally variable).

200. See, e.g., PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY xiii (1986) (“The equal treatment of ‘unequals’ is unjust. The paternal demand for ‘equal’ custodial rights; the law that values legal paternity or male economic superiority over biological motherhood and/or maternal practice, degrades and violates both mothers and children.”).
somewhat interrelated arguments about prestige, comparative advantage, and responsibility to make social changes.

A related response is that in terms of financial, social, and political status, men have money, clout, and power. The argument is that men are harmed not cumulatively, but only at the margins. And that even though gender stereotyping harms men, it harms women much more. In so many cases, legal rules favor men. Even seemingly neutral rules operate to favor men. Thus, some feminists claim that because patriarchy hurts women much more than men, women's situation deserves to be the focus of attention.

Most people would agree that harms to women simply swamp harms to men. The question here is not whether the collective harms to women exceed those to men. Historical facts are not deniable. However, there is a significant hazard to viewing this on a collective level at all times. The question instead should be whether individual injustices should prevail.

It is unquestionable that women, on the whole, are disadvantaged much more seriously and persistently than men. This is not a response to my point; it is my point: that feminist theory should not engage in this sort of response, otherwise it becomes a bizarre game of one-upmanship or one-downpersonship. In fact, the real disservice may be in the repeated attempts to deemphasize the experiences of men and to diminish the harms of being male. Focusing on comparing the disadvantages of men and women reinforces on a theoretical level what society says on a social level: Suck it up. Be tough. You are male.

It is important to abandon the retributive approach to males—the “that's what you get for constructing patriarchy, sucker” approach. Instead of constructing an argument of blame, we must ask what is a responsible approach for the future in the sense of justice, fairness, and rational ethics. As Professor Angela Harris notes, “The tendency to think about oppression as an all-or-nothing concept—one is either ‘an oppressor’ or ‘a victim’—prevents us from seeing how groups can be oppressed and privileged at the same time.”

For example, Stephanie Wildman writes:

The debate about whether it is men or women who are hurt by discrimination perpetuates the discrimination itself. It confuses the issue as to who is the victim of sex discrimination. While it is true that men are hurt by sex discriminatory attitudes, the overwhelming evidence is that women are the real victims of sex discrimination.


ways in which stereotypes trap members of dominant groups. The questions that are not being asked are: How are men constrained into masculine gender roles that keep them from expression, inhibit certain social contacts, and preclude “crossing over” into traditionally female roles; and how might women and men, gays and straights, children and parents, and society as a whole benefit more from relational, rational, and constructive perspectives than from a combative, win-lose perspective?

2. The Distributional Argument

Some feminists take the position that feminism is exclusively about women. For them, the concerns are distributional in several ways. First, feminism has limited intellectual resources and must expend them on improving the conditions of women. Second, in a world of scarce material resources, people must make choices. If providing benefits for men who are operating in traditionally female spheres or roles uses up some resources, this use leaves fewer resources available for women.\(^1\)

For instance, Professor Christine Littleton argues that including men necessarily results in the exclusion of women.\(^2\) Her example is the Family and Medical Leave Act (FMLA), which, she argues, would have provided far more extensive coverage for women if it had left men out of the equation. Littleton argues that in its rush to include men as covered family members entitled to medical leaves, the legislation excluded several categories of women: lesbians (whose partners cannot be spouses under present law), women living in nontraditional or extended families, and working women unable to afford the unpaid leave provided by the FMLA.\(^3\)

But as Professor Littleton acknowledges, legislators exhibited no inclination to include the excluded categories of women.\(^4\) There is no evi-

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203. See, e.g., Connell, supra note 6, at 73 ("An academic man teaching a feminist course, for instance, may be seen as taking resources away from women . . . .").


205. Id. at 33-37.

206. Id. at 32 n.78.

This is not to say that the bill’s fate would have been any different. The women who have been “left out” of the FMLA are those with less power—economic and political. Therefore their inclusion would not be likely to yield greater chances of passage. However, there is always the possibility that a different coalition of forces could, at least over time, alter the result. And even if a differently designed FMLA would likewise have been defeated, it is still important for us to focus on the women who would have been excluded from the FMLA had the President signed it as it stood on May 10, 1990.
dence that the marginalized subgroups of women were sacrificed to make room for men. Instead, Littleton repeats this assumption as the conclusion. She points to the resultant categories of included women in the FMLA as if they came from the policy of including men.

The distributional argument may collapse on itself in a far more important way. The assumption in the FMLA example is that the inclusion of men excludes women politically by diminishing their collective political clout. In fact, the FMLA may be a good example of recent legislation that became law due to its policy of including men. At least the vehicles need to be in place to permit men to engage in parenting roles. If legislation providing benefits relating to traditionally female roles applies only to women, it institutionalizes the gender stereotype and makes it impossible for men to participate in these roles.

While Littleton’s example is the easy case to challenge, her general proposition—that working on men’s issues may siphon credibility or resources away from women’s issues—may be accurate in one sense. If women’s organizations devote precious resources to educating the public about, say, the sexual harassment of effeminate men, they risk losing both time and credibility with conservative or moderate groups that are not ready for these changes. There is unquestionably a price to be paid in the short run. The point at which I differ with Littleton is that I believe the prospects of far greater long-term gains from the initial investment of resources—in order to allow these issues to sift into public consciousness—outweigh the short-term losses.

Considerations of resource distribution may also be a way of pointing to the current position of feminist theory in a larger sweep of time. At this juncture, focusing feminist theory almost exclusively on the situations of women may be a result of the relative novelty of feminist legal theory in a historical time span.

The argument about scarcity of resources suggests a corollary: If feminists focus their attention on how men are disadvantaged by gender role

Not only does such a focus help us avoid the trap of thinking the game is over when it is only half won (and therefore packing up and going home), but it also may encourage strategies that do not lead to trading off the rights of some women for the rights of other women and some men.

Id. (citations omitted).

207. See 139 CONG. REC. S985-1003 (1993) (statement of Sen. Boxer) (“The [FMLA] does not just apply to women, but to men and women, to fathers, as well as to mothers, to sons as well as to daughters.”).
stereotypes, it may provide fuel for male backlash against feminism under the guise of male suffering. If men have been advantaged in so many ways for so long, why focus on their burdens? Won’t this simply perpetuate patriarchy?

Opportunism can always rear its ugly head. But if the disadvantages to men from gender stereotypes prove to be the result of patriarchy, this finding will not provide an intellectually honest venue to complain about women or feminism. The harms of patriarchy are not harms to only one gender. Nor should the description of those harms be a competitive event between the genders.

### 3. Addressing the False Consciousness Problem

The argument about opportunistic backlash by men points to a more fundamental problem concerning the acknowledgment of the negative consequences of gender stereotypes. A third feminist response might question whether these disadvantages of being male are real—real in the sense of being harms acknowledged by men and real in the sense of being something other than an artifice or device of backlash against the gains achieved by women. Some feminists would say that all of the disadvantages are true, but that men do not seem to mind that they get the best of it. If the average man was told: “You really are disadvantaged. You poor schmuck. You are more likely to die in a fight. You belong to the only gender that can fight in a war. You are less likely to be given parental leave so that you can stay home with an infant,” many men would say, “So, what’s the problem?” In fact, some men may enjoy the seeming disadvantages of traditional roles or may be willing to accept them in exchange for greater advantages.

Perhaps one might conclude that men are so mesmerized by patriarchy that they do not recognize the problem. To them, it is not a problem. This conclusion may be the flip side of the feminist false consciousness argument, which is that women internalize the ideology of patriarchy and assume, falsely, that their choices are their own.208 Many women make “choices” that reinforce their historically assigned roles. If prevailing politi-

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cal and social ideologies are such potent forces, they may operate on members of dominant as well as subordinate groups.  

Just as women have internalized stereotypes of inadequacy, men may have internalized the stereotypic images and behaviors of dominant norms. A significant body of literature demonstrates how subordinate groups adopt the cultural assumptions and negative stereotypes of the groups which dominate them. Similar work applies the internalization thesis to members of dominant groups. Many men may be captivated by the psychological construct of masculinity. It is utterly unsurprising that members of a dominant social group would accept, act out, and even exaggerate stereotypes that favor their social interests.

Perhaps our culture has not given men a choice to see any alternatives, or has distorted their choices. Habits, attitudes, and positions of authority may be so deeply ingrained that some men are unable to see themselves as agents of domination, or as victims. The less charitable reading is that

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210. See, e.g., Dolkart, supra note 128, at 224–26 (arguing that women who are victims of sexual harassment internalize the oppression, experiencing self-devaluation, lowered self-esteem, and vulnerability to sexual violence). For a discussion of similar internalization of negative stereotypes by subordinate racial groups, see DERRICK BELL, RACE, RACISM AND AMERICAN LAW 363–64 (3d ed. 1992).


212. See, e.g., Barbara F. Reskin, Bringing the Men Back In: Sex Differentiation and the Devaluation of Women’s Work, in THE SOCIAL CONSTRUCTION OF GENDER 141, 149 (Judith Lorber & Susan A. Farrell eds., 1991) ("Dominants respond to subordinates’ challenges by citing the group differences that supposedly warrant differential treatment. . . . Serious challenges often give rise to attempts to demonstrate biological differences scientifically. The nineteenth-century antislavery and women’s rights movements led reputable scientists to try to prove that women’s and Black’s brains were underdeveloped."); see also Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1284–88 (1992) (arguing that negative depictions of subordinated groups are internalized by members of both the dominant and subordinate groups).
men's acceptance of gender stereotypes is not due to the coercion of a dominant ideology, but, instead, is a process of making conscious choices that is shaped by powerful incentives of self-interest.\textsuperscript{213}

In any event, whether through choice, controlling ideology, or a more likely combination of the two, patriarchy will continue to perpetuate itself unless feminists examine and dismantle it.\textsuperscript{214} The focus of feminist scholarship has been almost exclusively on the ways in which men subjugate women, rather than on exploring the complex system of structures and beliefs that impel the perpetual dominance of men.\textsuperscript{215} To the extent that men unthinkingly accept the dominant ideology, transformation is only possible through an understanding of the methods of cultural transmission and replication.

B. Changing the Construct of Masculinity

No simple solutions, rules, or guidelines can readily solve the pervasive gender inequities. Such inequities are historical, social, psychological, legal, economic, and linguistic. The sources of patriarchy are many: historical male dominance replicating itself, social constructs that perpetuate traditional roles, and laws that entrench the traditional constructs. Moreover, these forces—history, social roles, legal rules, and individual postures and inclinations—are significantly intertwined. What follows are some

\textsuperscript{213} Professor Mari Matsuda refers to the "exasperated challenge" of dominant group members: "[W]hen will she be satisfied, when will all this talk about excluded voices end, and when will the excluded accept the fact that they are now members of the club, so that we can get on with the conversation that was interrupted when they knocked on the door?" Mari J. Matsuda, \textit{Pragmatism Modified and the False Consciousness Problem}, 63 S. CAL. L. REV. 1763, 1765 (1990).

\textsuperscript{214} It should also be recognized that the argument that men are not harmed because they do not feel disadvantaged confuses issues of ideology, socialization, and psychology with questions of justice and ethics. It assumes that the psychological reaction of a component of society (men who draw this conclusion) should be determinative of what is good for society. Thus, whether the false consciousness problem is true or false, the argument is a diversion.

suggestions toward unpacking the structural and institutional biases in jurisprudence that work to reify traditional gender roles. The recommendations aim to encourage discussion of men's experiences, recognition of intertwined oppressions and subtle stereotyping, legal emphasis on the social construction of gender, and development of legal doctrines that promote rather than inhibit crossing over traditional gender lines. These suggestions are simply directions in which jurisprudential inquiry should move in order to change the prevailing construct of masculinity.

1. Encouraging Recognition of Men's Experiences

As feminist theory teaches, the personal is political. Private lives are inextricably connected to cultural and political contexts. A wealth of literature attests to women's gendered existence, explaining that women experience reproduction, sexual violence, employment circumstances, and other events in ways that men do not. This literature explores how men and women exhibit different attitudes, behaviors, interests, priorities, modes of reasoning, and styles of speaking and listening. An assumption underlying many of these writings is that men have universal experiences that women do not share. This assumption is probably not based on a belief that all men have identical experiences, but instead on a lack of exploration into the varieties of men's experiences.

Popular literature has made some attempts to validate men's personal and social experiences. However, antifeminist rhetoric often accompanies

216. See generally Fineman, supra note 11, at 37.
218. See, e.g., SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE, 15 (1975) ("[Rape] is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.") (emphasis in original); ANDREA DWORKIN, INTERCOURSE 63–67 (1987) (contrasting men's experience of sex as subjects and women's experience of sex as objects); Lucinda M. Finley, Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 886, 893 (1989) ("[L]egal language is a male language because it is principally informed by men's experiences. . . . Universal and objective thinking is male language because intellectually, economically, and politically privileged men have had the power to ignore other perspectives and thus to come to think of their situation as the norm, their reality as reality, and their views as objective."). But see Carrie Menkel-Meadow, Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers, in 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 196 (Richard L. Abel & Philip S.C. Lewis eds., 1989) (suggesting that gender differences within genders are far more significant than gender differences between genders).
these efforts, and such efforts may be part of a broader social backlash to recoup rights "given" to women. Some jurisprudential writings address the social and legal experiences of men of color. Other writings focus on the collective treatment of gay men. Yet experiential discussions regarding the various dimensions of maleness, and ideological discussions regarding the construction of maleness, are largely missing from the jurisprudential universe. Some feminist legal theorists are beginning to give attention to men's experiences, but such consideration does not constitute a large body of literature.

Professor Mari Matsuda has developed a theory of multiple consciousness, which posits that outsiders, such as women and people of color, develop the ability to shift their perspectives between the viewpoint of a marginalized group and the viewpoint of a dominant culture, while belonging to both. The broader point is that no category of identity, whether it is race, gender, class, ethnicity, or some combination of those or other groupings, is coherent or stable. While Professor Matsuda sees the phenomenon of multiple consciousness as relating particularly, if not exclusively, to the experiences of the disempowered, Professor Carol Gilligan suggests that men as well as women possess "double vision."

220. See, e.g., Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431; D. Marvin Jones, "We're All Stuck Here for a While": Law and the Social Construction of the Black Male (unpublished manuscript, on file with the UCLA Law Review).
222. See Leslie Bender, Teaching Torts as if Gender Matters: Intentional Torts, 2 VA. J. SOC. POL'Y & L. 115, 127-31 (1994) (offering examples of gender stereotypes in tort cases for use in the classroom, and noting: "Most importantly, students learn that gender does not always mean woman, and sex does not only mean female. Issues of sex and gender, as well as race, class, sexual orientation, age, ethnicity, and disability are about men, too."); Emily F. Hartigan, From Righteousness to Beauty: Reflections on Poetics and Justice as Translation, 67 TUL. L. REV. 455, 480 (1992) ("Women must hear men's experiences of pain to understand their own power . . . ").
224. Harris, supra note 202, at 768.
The phenomenon of multiple consciousness may apply to the ways in which men are disempowered. Perhaps men do fill all of the roles they are assigned—the subjects of false consciousness, perpetrators, collaborators, and victims. Perhaps only a moderate size group of men become the monolithic male—a white, middle or upper middle class, able-bodied, heterosexual male with traditional values. Contexts in which stereotypic masculine virtues do not inure to the benefit of that group may also exist. At least some resentment may stem from this sort of disempowerment.

The disempowerment may not just be a loss of power in the sense that the group has always enjoyed power. At a deeper, less reactionary level, being a stereotypic white male may not be as easy as some feminists have depicted it. The manifestations of patriarchy may in fact create the male sentiment of disempowerment in some spheres. Men's experiences with disempowerment and the construction of their oppression need to be explored.

Much greater inquiry needs to be directed toward the cultural, economic, racial, and class circumstances that shape different men's experiences. In what ways are men's experiences not monolithic? How are men treated who do not identify as typically male? How have men been hurt as men? The group-based treatment of men may not be the result of subordination as was the case with women, but may be due to compulsions to engage in dominant behavior, rigidified role expectations, a lack of cultural mobility, and a narrow range of acceptable psychological responses or social behaviors. Even if men's experiences are "the norm," the norm must be explored by asking who is the generic man that typifies the norm, and what are the experiences, characteristics, and social expectations of nongeneric men? If gender and perspectives based on gender are fundamental to knowledge, law, and social relations, attention must be given to the gendered experiences of men.

The methodology of consciousness-raising promoted by a number of feminists may be particularly suited to this task. Professor Katharine

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228. Of course, the reactionary fervor is apparent in some camps. See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).
230. David H.J. Morgan suggests rereading classic texts in sociology, literature, and religion to explore ways in which notions of masculinity have been historically constructed. See MORGAN, supra note 66, at 54–65 (discussing the "Protestant ethic and the spirit of masculinity").
Bartlett suggests that consciousness-raising involves "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative."\(^{231}\) Consciousness-raising is not a method reserved exclusively for women,\(^{232}\) although one specific purpose of the methodology is to create a voice for people who have not been heard.

Men, in groups with other men and with women, should be encouraged to engage in consciousness-raising to test the ways in which society has relegated men to stereotypically male roles. One might immediately recoil from a vision of white men engaged in a "testosterone drenched\(^{233}\) weekend retreat at which they complain about being victims of the feminist movement."\(^{234}\) It is vital, therefore, to make a sharp distinction between consciousness-raising as a practice of psychological support and consciousness-raising as an epistemological method.

Some methods of consciousness-raising are indoctrinative in that they are directed principally at cultivating ideological or psychological confed-

\(^{231}\) Bartlett, supra note 2, at 831.


\(^{233}\) Philip Walzer, Are We Not Men?, VIRGINIAN PILOT, Nov. 28, 1994, at E1.

\(^{234}\) Some theorists, such as Catharine MacKinnon, might object that men cannot engage in consciousness-raising because their consciousness is the world.

Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.

erates. More promising for purposes of promoting inquiry and rationality are the support groups that move toward epistemological advances—those that have to do with questioning, testing, and ultimately reaching reasonably justified propositions—as was usually the case in the feminist movement. Consciousness-raising should be used not simply to solidify or strengthen directions already known, but to examine whether beliefs are warranted. To the extent that traditional gender roles hurt men, consciousness-raising may enable men and women to view men's injuries in ways they might not otherwise expose.

Importantly, consciousness-raising and, more generally, communication about gender differences need not be relegated to either gender in an exclusive grouping. If, as sociolinguists are establishing, men and women are acculturated to view the world and the process of discourse differently, it is vital to encourage dialogue across genders. Bridging perceptual and experiential gaps requires conversation, not unidirectional messages.

2. Recognizing Intertwined Oppressions

The discussion has proceeded as though male and female were sufficiently explanatory categories, and as though identity was dependent solely on gender. It is crucial to recognize that various forms of oppression—types of choicelessness and powerlessness—are intertwined. Oppressions of gender intersect with other oppressions, including those of race, sexuality, class, and ethnicity. Isolating gender for analytic purposes may be a


236. Thus, the notion that feminism sanctions discrimination against white men needs empirical testing. See Joyce Price, Toppled by-Isms; White Males Say They're Now the Minority It's OK to Oppress, WASH. TIMES, Mar. 31, 1993, at A1, A12 ("Bill Spriggs, an economist with the Economic Policy Institute in Washington, says there is 'absolutely no academic evidence that supports the notion white men are losing ground.").


Feminism for Men

less than fruitful endeavor, because gender has no single meaning. Just as feminist theory runs the risk of essentializing women, so does any analysis of male disempowerment risk essentializing men.

Cultural stereotypes at the intersection of race, gender, and sexuality classify offenders and crimes. Assumptions about race and gender may lead to suppositions about sexuality. Depictions of “typical” welfare recipients reinforce stereotypes at the intersection of class, race, and gender. Attitudes about gender and sexuality pathologize nonheterosexual lifestyles, and preclude gays and lesbians from parenting roles. Social and legal research is only beginning to explore the interpenetrations of multiple structures of oppression and the simultaneous operation of several interlocking stereotypes.

Analytically, it is often extraordinarily difficult to consider at once the disadvantages of race, gender, class, age, nationality, sexual orientation, disability, geography, and even institutional prestige. But it is vitally important not to let facets of oppression become excuses for intransigence or isolationism. Economic necessity may impose certain constraints since some families cannot afford to have men (and women) not working outside


239. See ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988).


241. See Peter Kwan, Beyond the Pale: Jeffrey Dahmer and the Effemination of Gay Asian Men, Speech Presented at the Crit Networks Conference on Critical Legal Studies (Mar. 11, 1995) (using the play M. Butterfly—and Song's deception of M. Gallimard to which he was a willing participant—to demonstrate how perceptions of Asian women and men shape assumptions about their sexuality).

242. See Peter B. Edelman, The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 HASTINGS L.J. 1, 18 (1987) (“The all-too-prevalent public stereotypes of the poor are the black female unmarried welfare recipient with many children and the black male ‘hustler’ who lives off the welfare checks of the various women whose children he has fathered.”); Jeanne L. Vance, Note, Womb for Rent: Norplant and theUndoing of Poor Women, 21 HASTINGS CONST. L.Q. 827, 832 (1994) (“The public perception is that welfare mothers are unmarried and non-white.”).


of the home. But this fact does not mean that men cannot be feminists or do housework, nor does it mean that the economically entrenched social positions are inalterable over time.

3. Minimizing the Significance of the Biological Construct

In the recent decade, a significant amount of research has explored biological, psychological, and social differences between men and women, and boys and girls. Some feminist literature has concentrated on the

245. See Malin, supra note 171, at 1066 ("The father’s primary role in providing economic security functions as a barrier to increased parental involvement in the family."); Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 14 WOMEN’S RTS. L. REP. 151, 155 (1992) ("[F]or a vast number of two-parent families, two wage earners were an economic necessity.").

246. Sociologist Arlie Hochschild suggests that the gendering of housework is not immanent. Adding together the time it takes to do a paid job and to do housework and child care, I averaged estimates from the major studies on time use done in the 1960s and 1970s, and discovered that women worked roughly 15 hours longer each week than men. Over a year, they worked an extra month of twenty-four-hour days. Over a dozen years, it was an extra year of twenty-four-hour days.

... Twenty percent of the men in my study shared housework equally. Seventy percent of men did a substantial amount (less than half but more than a third), and 10 percent did less than a third. Even when couples share more equitably in the work at home, women do two-thirds of the daily jobs at home, like cooking and cleaning up—jobs that fix them into a rigid routine. Most women cook dinner and most men change the oil in the family car. But, as one mother pointed out, dinner needs to be prepared every evening around six o’clock, whereas the car oil needs to be changed every six months, any day around that time, any time that day.

ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 3–4, 8 (1989). Hochschild’s findings are confirmed in a recent study by two economists, Michael Leeds and Peter von Allmen. See Marilyn K. Melia, Housework: Is the Division of Labor Unfair? There Are Other Explanations Than the ‘Men Are Scum’ Theory, CHI. TRIB., May 7, 1995, § 6, at 1. In a survey of 4500 married couples in which the partners were between the ages of 25 and 44 and both had careers, the participants kept track of the hours each week they spent on housework, however they defined those chores as domestic. "Among the chief findings of the study was that 15 percent of the men reported less than one hour a week of work.... [T]he median amount of work for men was about five hours weekly, and the median for women was about 20 hours." Id. An important additional finding was that if husbands increased the number of hours they worked around the house, wives did not decrease their work. Id.

247. The wealth of this research attests to a strong cultural location for gender, although almost all of the works point to a confluence of constitutive biological, social, economic, and institutional forces. See, e.g., SUSAN BASOW, GENDER: STEREOTYPES AND ROLES (1992); ANNE FAUSTO-Sterling, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN (1985); CYNTHIA FUCHS-EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER (1988); SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); PHILIP KITCHER, VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE (1985); R.C. LEWONTIN, BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA (1992); THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990); Kathryn Abrams, Social
biological as opposed to cultural determinants of gender. Undeniably, real differences exist between the reproductive physiologies of males and females, and, to a lesser extent, their physical capabilities. In addition, scholars have rightly criticized the Supreme Court for its failure to acknowledge the reality of these differences, and to accommodate their impacts. Yet some feminist literature and legal doctrine unjustifiably emphasize the biological construction of gender in areas in which differences are products of socialization as well as physiology.

On the theoretical level, Joan Williams trenchantly notes the dangers of relational feminism's embrace of the values of domesticity, which thereby highlights the dichotomous structure of the biological differences model. She carefully points out that recent research disputes traditional ideas that biology compels social behaviors:

More recent studies ... challenge the notion that patterned differences between men's behavior and women's are attributable to permanent (and perhaps innate) psychological differences. An example is a study of men who "mother," which found that men exhibit the "nurturing" characteristics commonly associated with women when they play the primary parenting role conventionally assigned to females.

Significant evidence is accumulating that attests to the malleability of "biological" roles, and to their variability over time and space and cultures. To some extent, perceptions of biological differences may...
reflect not empirically significant facts but social stereotypes. Professor Laurence Tribe suggests that "a gender classification [may be] so woven into the entire social understanding of women that it reflects what the judiciary itself still perceives as a genuine gender difference."253

Other theorists have also acknowledged the cultural construction of gender,254 and have explored specifically how the association of care-giving tasks and responsibility with women are the product of acculturation.255 One of the lessons of postmodern theory is that a clear division between biological and social experiences is no longer a tenable one. Almost everything is biosocial, for even where biological bases for conduct exist, socialization exacerbates the issue.256

The mistaken notion that certain biological tendencies are imperatives is also embedded in legal doctrine. In fact, the Supreme Court's scrutiny of gender differences is based significantly on the biological differences model. In California Federal Savings & Loan Ass'n v. Guerra,257 the Court upheld a California statute requiring employers to provide leave to women for pregnancy and childbirth, even though the statute had no parallel provisions for men affected by pregnancy, childbirth, or any other disabling conditions. This holding clearly reinforces the idea that only women need parenting leave.258 Even when the biological differences are not the impor-

women of Juchitan, Mexico, that appeared in a Wall Street Journal article. Matt Moffett, The Strong Women of a Mexican Town Crush Stereotypes, WALL ST. J., April 2, 1991, at A1. The women of Juchitan dominate both the local economy and the men. The Juchitan people descend from the Zapotec Indians, a tribe with Amazonian traits. The Juchitan women are physically dominant over men (in terms of size and strength), and they possess an arm lock on the local market. Women are the primary breadwinners, while men assume most of the child care responsibilities.

Id. at 1854 n.165 (citations omitted).

253. TRIBE, supra note 249, at 1571.

254. See Christine A. Littleton, Equality and Feminist Legal Theory, 48 U. PITT. L. REV. 1043, 1051 (1987) ("The category is social, not biological."). Indeed gender is an almost perfect example of a cultural construct in that it is umbilical to sociological roles, sexual roles, and political roles.

255. See, e.g., Leslie Bender, Sex Discrimination or Gender Inequality, 57 FORDHAM L. REV. 941, 946 (1989).

256. Gender is a "systematic social construction of masculinity and femininity that is little, if at all, constrained by biology." Sandra Harding, Introduction to FEMINISM AND METHODOLOGY 1, 8 (Sandra Harding ed., 1987).


258. In Cal Fed, the Court reasoned that the goals of the Pregnancy Discrimination Act to provide equal employment opportunities to pregnant women justified the preferential treatment. Id. at 286-87. The literature on the issues involved in the Cal Fed debate is vast. See, e.g., Littleton, supra note 2, at 1297-99; Wendy S. Strimling, The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed, 77 CAL. L. REV. 171 (1989); Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special
tant ones, a court may place tremendous legal weight on the historical and biological accoutrements of gender. Legalizing combat for men only, as in *Rostker v. Goldberg*, and criminalizing sexual intercourse for men but not women, as in *Michael M. v. Superior Court*, both illustrate this biologism.

An issue that is presently before the Supreme Court which highlights the biological-social construction debate is the constitutionality of single-sex education. In the cases involving the Virginia Military Institute and the Citadel, the Court may soon decide whether single-sex education itself is constitutional. In other cases across the country, lower courts have often upheld single-sex educational programs. In *Mississippi University
for Women v. Hogan,\textsuperscript{265} although the Supreme Court invalidated the University’s policy of excluding men from the nursing school, it specifically declined to decide whether “separate but equal” education itself was unconstitutional.\textsuperscript{266}

Hogan left open the possibility of a compensatory justification for single-sex education in that it might be seen as a specific affirmative action remedy for past discrimination.\textsuperscript{267} The VMI court recognized a second potential justification for single-sex programs—that such programs afford students a diversity of educational options.\textsuperscript{268} However, the touted “uniqueness” of the VMI educational experience\textsuperscript{269} is directly traceable to the idea that innate biological differences justify separation of the sexes. On appeal to the Fourth Circuit, appellees argued that the VMI educational experience was a “highly specialized program for the distinctive physiological and developmental characteristics of males.”\textsuperscript{270}

In holding that if VMI were forced to admit women, it would “materially alter the very program in which women seek to partake,”\textsuperscript{271} the Fourth Circuit Court of Appeals’ ruling in VMI reinforced the idea that these biologically located differences were outcome determinative. Very critically, the testimony offered regarding the VMI model concerned psychological and sociological differences between the sexes.\textsuperscript{272} Yet the court treated the evidence as though it pointed to inalterable aspects of

\textsuperscript{265} 458 U.S. 718 (1982).
\textsuperscript{266} Id. at 720 n.1 (“Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide ‘separate but equal’ undergraduate institutions for males and females.”).
\textsuperscript{267} Id. at 727–28.
\textsuperscript{269} 766 F. Supp. at 1421 (the attributes of which include “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values”).
\textsuperscript{270} Brief for Appellee at 20, United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (No. 91-1690), cited in Brian Scott Yablonski, Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute, 47 U. MIAMI L. REV. 1449, 1468 (1993).
\textsuperscript{271} United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993).
male physiology, rather than reflected a more malleable process of socialization.\textsuperscript{273}

Even though the Fourth Circuit remanded the case to the trial court, requiring Virginia to defend its policy of providing only one single-sex program, the reasoning of the original decision, and of the appellate decision after remand, held intact the concept that single-sex education is constitutional.\textsuperscript{274} On remand, the district court determined that an appropriate cure for the equal protection violation of an all-male military college would be the construction of a comparable all-female college program.\textsuperscript{275} Associating genders with distinct constellations of physical, emotional, and mental characteristics has important political consequences. The hazard is that overemphasis of the biologic construct can reify gender differences.\textsuperscript{276}

The social message of single-sex educational programs is unmistakable: There is something problematic about the presence of women in all-male bastions, or the presence of men in traditionally female domains.\textsuperscript{277} No doubt this message is frighteningly reminiscent of the rationales racists advanced in favor of "separate but equal" racially segregated schools. Yet the arguments that were persuasive to the Supreme Court in \textit{Brown v. Board of Education}\textsuperscript{278}—that a "badge of inferiority" would inherently attach and stigmatize in a dual system\textsuperscript{279}—are notably absent from the recent single-sex education opinions.\textsuperscript{280} Rather, underlying many of the decisions is the notion that inherent differences between the genders justify the separatism.\textsuperscript{281} The courts thus depict gender differences as fundamental and

\textsuperscript{273} Id. at 1412-13.
\textsuperscript{277} The choice of terminology is intended. See generally Deborah L. Rhode, \textit{Association and Assimilation}, 81 NW. U. L. REV. 106 (1986).
\textsuperscript{278} 347 U.S. 483 (1954).
\textsuperscript{281} See, e.g., Faulkner v. Jones, 51 F.3d at 443 ("[D]ifferences in the programs could reflect established differences in the educational needs of two genders so long as the value of the benefits provided to one gender did not ... tend to lessen the dignity, respect, or societal regard of the other gender.").
enduring traits. The social, political, and institutional scaffolding that constructs these differences recedes into the background.

Trying to allocate responsibility between the biological and the cultural in law, particularly at a time when the wealth of empirical evidence points to deep interactions of the social and the biological, seems at a minimum unhelpful. At the extreme, allowing evidence of socialized gender differences to masquerade as innate biological differences is dangerously misleading. Instead, at this juncture in history, people should accept that gender is biosocially determined, and emphasis should go toward recognizing that much can be done with the cultural construct. A substantial body of literature asserts that learned behaviors can reinforce or defeat traditional stereotypes.282 A cumulative lesson of critical legal studies, critical race theory, and feminist theory is that representations of reality often have the extraordinary ideological power to shape reality.283

4. Encouraging the Crossing of Traditional Gender Lines by Creating Awareness of Subtle Stereotypes

Gender stereotyping is pervasive, persistent, subtle, and often unconscious. It is an amorphous subject in part because generalizations about the characteristics of a gender may be made for a wealth of reasons, ranging from heuristic efficiency to prejudice.284 Moreover, the conceptions of appropriate social roles for men and women are deeply embedded in society.285 Furthermore, stereotyping is a proactive social force that often shapes behavior and constrains choices.286 Gender role stereotypes create
and maintain occupational segregation by sex, inhibit women's upward mobility, limit women's earning power, and shunt men away from domestic roles. Coupled with the insidious nature of gender stereotypes are the social enforcement mechanisms that rigidify gender roles. Many subtle gender stereotypes are socially entrenched and legally enforced. For example, employment requirements about dress and appearance that are acceptable under Title VII may simply reflect community norms that are premised on gender role stereotypes.

Attention must be directed toward the subtle ways in which legal doctrines perpetuate gender role segregation. In some areas, the easy targets of gender prejudices have already been exploded. Categorical gender exclusions in particular occupations violate Title VII, and employment decisions may not lawfully depend on explicitly gender-linked character-

287. Almost half of all employed women work in occupations that are at least eighty percent female, and over half of employed men work in occupations that are at least eighty percent male.

... [S]ex-typed traits commonly associated with a job often have little inherent connection with performance; instead the perception that a job requires masculine traits typically derives from associating the job with its incumbents.


288. Thus, masculinity begins in escape—the perceived need to separate from a feminine identity. The main demands for positive achievement of masculinity arise outside the home, and those demands reinforce the boy's need to be what his mother is not. In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all others: don't be a girl.

Karst, supra note 3, at 503. See Donald R. McCreary, The Male Role and Avoiding Femininity, 31 SEX ROLES 517 (1994) (males who act in stereotypically feminine ways are significantly more likely to be teased, ostracized, and perceived negatively than males who display gender-congruent behavior). See also supra text accompanying notes 117-236.


290. See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.) (holding that hiring only females as flight attendants is not justified by customer preferences for being served by women), cert. denied, 404 U.S. 950 (1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (holding that despite the airline's marketing campaign featuring the sex appeal of its flight attendants and ticket agents, sex was not a bona fide occupational qualification for those jobs).
istics. Yet the process of stereotyping makes exposing assumptions, generalizations, and decisions based on gender extremely difficult.

On the doctrinal level, cases challenging subtle and pervasive gender role stereotypes have not fared well. Even to the extent that male plaintiffs have been successful in sex discrimination litigation, they have been victorious only when they established direct economic disadvantages. Were a male plaintiff to bring a claim of subtle discrimination based on gender role stereotypes, he might be laughed out of court, just as some women have been.

For instance, what would the Supreme Court have done with Andy Hopkins v. Price Waterhouse? In Price Waterhouse v. Hopkins, Ann Hopkins was a candidate for partnership in an accounting firm. Initially, her employer placed her candidacy on hold and later denied her consideration for partnership. Hopkins' personnel file contained evaluations by various partners of her qualifications for partnership. The partners' criticisms included that “she is a lady using foul language,” that although she was “at the top of the list or way above average,” she was too “macho,” “overly aggressive,” and that she should be required to take a “course

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291. See, e.g., Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (holding that airline's strict weight requirements for flight hostesses was discriminatory), cert. denied, 460 U.S. 1074 (1982).

292. See, e.g., Deborah L. Rhode, Perspectives on Professional Women, 40 STAN. L. REV. 1163, 1188 (1988) (“When a female applicant for a given position (e.g., litigator) does not fit the evaluator's prototype (e.g., aggressive male), her credentials will be judged with greater skepticism.”).

293. See, e.g., Loeffler v. Frank, 486 U.S. 549 (1988) (permitting an award of prejudgment interest along with back pay to a male postal worker who brought a successful sex discrimination claim); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (recognizing that male plaintiff seeking admission to women's nursing college would be hindered in earning the degree and obtaining the specialized training that would enable him to earn a higher salary).

294. See, e.g., Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), cert. denied, 475 U.S. 1058 (1986); see also Case, supra note 3, at 50.

If asked by a man fired for effeminate behavior whether he should win a Title VII challenge, I would unhesitatingly say yes; if asked if I thought he would win, I would have to express more doubts. I would, among other things, need to be assured either that he worked in one of those rare environments that prohibited discrimination on the basis of sexual orientation or that he was demonstrably not gay, because discrimination against effeminate gay men is generally overdetermined. Moreover, even if he were not at any risk of being fired for his sexual orientation, if his effeminate behavior were within his control, I would as a prudential matter advise him not to risk his job unless he were not only prepared to bring a test case, but also prepared to lose.

Id.

295. 490 U.S. 228 (1989).


297. Id. at 1113.
at charm school." One of Hopkins' supporters commented that Hopkins had matured from a "tough-talking, somewhat masculine hard-nosed manager to an authoritative, formidable but much more appealing lady partner candidate." The partner who explained the Board's decision to Hopkins advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Price Waterhouse Court ultimately held that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

What if the stereotype had not been that Ann Hopkins was "too aggressive" and "should go to charm school," but that Andy Hopkins was "too passive" in seeking out clients, "not competitive enough," and too deferential to others in the office? Perhaps the Court would have relied on the rubric about not "second-guessing" an employer's business judgment. The Court might have stated that Price Waterhouse was entitled to require certain attributes in its partners. It is a decent bet that

298. Id. at 1117.
299. Id.
300. Id.; cf. James Stewart, Are Women Lawyers Discriminated Against at Large Law Firms?, WALL ST. J., Dec. 20, 1983, at 1, 17 (reporting about a woman attorney who was denied a promotion and sued for sex discrimination, see Hishon v. King & Spalding, 467 U.S. 69 (1984), because she "just didn't fit in" at a law firm that held a bathing suit competition among its summer law clerks); Craft v. Metromedia, Inc., 572 F. Supp. 868, 878 (W.D. Mo. 1983), aff'd in part and rev'd in part, 766 F.2d 1205, 1211 (8th Cir. 1985), cert. denied, 475 U.S. 1058 (1986) (co-anchor of nightly news was given make-up and wardrobe counseling, and was effectively demoted to general reporting because the broadcast company allegedly considered her "too old, too unattractive, and not deferential enough to men"; the court of appeals upheld the district court's determination that appearance standards were not based on stereotypical images of women). See generally Radford, supra note 285.
301. 490 U.S. at 250. The Court ultimately issued an opinion regarding the burden of proof in mixed motive employment discrimination cases, holding that once a plaintiff has shown that gender stereotyping played a "motivating role in an employment decision," id. at 252, the defendant's rebuttal burden would be to prove that "it would have made the same decision in the absence of discrimination." Id. at 252-53.
302. I am indebted to Sam Marcosson for this example.
303. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999 (1988) ("In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'" (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).
the Court would not have viewed such a case as presenting a gender stereotyping question.304

The Supreme Court’s latest message about gender stereotyping in Price Waterhouse may mislead observers into thinking that stereotypes are readily recognizable. Price Waterhouse was the easy case because it involved the unusual situation in which there was direct evidence of overtly gendered comments.305 Yet language in Price Waterhouse implies that many cases will involve readily identifiable stereotypes. Indeed, in referring to the role the expert testimony played in Price Waterhouse, the Court observed that “it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course in charm school.’” 306

Moreover, in focusing on the most blatant evidence of stereotyping, the Price Waterhouse Court may have overlooked the more subtle evidence in that case. The Court drew a sharp demarcation between language it found to promote gender stereotypes—adjectives like “macho” and “masculine”—and language it determined was an appropriate, albeit unfavorable, evaluation of Hopkins’ personality—adjectives like “brusque” and “harsh.”307 Implicit in this separation of gendered comments from purportedly gender-neutral evaluative remarks is the idea that comments which cumulatively indicate a person acted unconventionally by not conforming with the norms of his or her gender are not gendered comments.308

304. See, e.g., Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327, 332 (9th Cir. 1979) (finding that firing of an effeminate male preschool teacher did not state a cause of action under Title VII); Smith v. Liberty Mut. Co., 569 F.2d 325 (5th Cir. 1978) (holding that an employer’s refusal to hire an effeminate male did not constitute a Title VII violation); see also Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992), in which the Sixth Circuit Court of Appeals flatly dismissed the idea that sexually harassing a gay man reflected a gender stereotype. See generally Samuel Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1 (1992).
305. See Chamallas, supra note 215; at 2398 (noting that Price Waterhouse involved “‘smoking gun’ evidence”).
306. 490 U.S. at 256.

The Court unquestioningly accepted the firm’s harsh evaluation of Hopkins’ personality and concluded that her “aggressiveness apparently spilled over into abrasiveness,” without further examining the employment context in which the appraisal was made. Hopkins’ uniqueness in the pool of partnership candidates, her deviation from the feminine stereotype, the exaggerated perception of her “aggressive” behavior by her male peers, the use of a subjective evaluation, and the direct evidence of sex stereotyping all strongly suggest that the evaluation of Hopkins’ interpersonal skills was also imbued with discrimination. By failing to recognize that the terms used to describe Hopkins’ personality were not gender neutral in the context of her employment situation, the Court legiti-
In most instances, gender stereotyping will not be the result of explicit references to gender, as in Ann Hopkins' case. Instead, the stereotyping will occur without explicit references to gender, or will involve a gender stereotype couched in purportedly neutral language. Most gender stereotyping cases probably will involve much more subtlety than Price Waterhouse—shrugs, glances, gestures, code words, with nothing written or memorialized in a file. In order to prevent stereotyping, courts must tune into these subtle forms of gender discrimination.

In particular, it should be recognized that adverse employment actions for nonconformity with conventional gender role expectations are employment discrimination on the basis of gender. At present, however, society punishes those employees who cross over into nontraditional roles and occupations, and the legal system leaves them without redress. Deviation from gender norms incurs tremendous social disapproval, and even ritualized violence. Socially sanctioning those who cross the gender divide is one method of permanently entrenching that gap.

Legal sanctions reinforce these social norms and inhibit men from crossing over into traditionally female occupations. When men adopt traditionally female roles, they are punished for their cross-gender behavior. For example, in Strailey v. Happy Times Nursery School, the Ninth Circuit Court of Appeals allowed the firing of an effeminate male preschool teacher who wore a gold earring—someone who explicitly defied conventional gender role expectations in his choice of employment and attire. The court held that Title VII offered no relief for discrimination based on nonconformity to traditional gender roles. Some of the sanctioning process may be for being essentially female, thus males who occupy roles associated with females are subordinated in the same ways that females are. But other sanctions may be punishment for adopting characteristics associated with women—the crossing of traditional gender lines may be the sanctionable offense. There is evidence that soci-

311. 608 F.2d 327 (9th Cir. 1979).
312. Id. at 332 ("[D]iscrimination because of effeminacy . . . does not fall within the purview of Title VII.").
ety penalizes men for crossing into nontraditional occupations. A striking example of this disparate treatment occurred in Spaulding v. University of Washington,313 in which male and female members of the University's School of Nursing faculty sued for sex-based wage discrimination.

The suit sought to remedy historically depressed wages in the predominantly female School of Nursing compared to wages in other departments composed predominantly of male faculty members. While the male faculty member in the nursing school argued that "he received a salary "infected" by the discrimination the female faculty members suffered," the Ninth Circuit held that he had no standing to sue under Title VII or the Equal Pay Act because he made "no claim that he received a lower wage because of his sex."314 Thus, although the male faculty member suffered an injury identical to that experienced by the female faculty members, and although this injury flowed from the depressed wages of a traditionally female occupation, the court found that the male lacked standing to redress his economic injuries.315

The image of working women has changed dramatically over the past quarter century. Some legal constructs are now in place to eradicate barriers to female entry in male-dominated occupations.316 In contrast, the image of working men has remained remarkably constant, and no legal constructs attempt to promote men into traditionally female roles.317 Not only are positive social images of men who embrace female qualities limited, but men are legally disadvantaged if they adopt female roles. Indeed, as Strailey and Spaulding demonstrate, occupational segregation is

314. Id. at 709 (emphasis added).
315. See Torrey, supra note 3, at 393. While the Spaulding court ultimately rejected the comparable worth theory advanced by the female nurse plaintiffs, 740 F.2d at 705-06, the court denied the male nurse plaintiff the opportunity to have the substance of his claim reviewed. Id. at 709.
316. Of course, significant impediments, such as the glass ceiling phenomenon, remain. See, e.g., Mark S. Kende, Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners, 46 HASTINGS L.J. 17 (1994).
317. In popular culture the images of men who are the primary parents, such as Mrs. Doubtfire, Mr. Mom, and Kramer v. Kramer, involve exceptional men and a plot that revolves around the extraordinary nature of the men in these typically female social roles. In an unsurprising plot twist, not only are these images exceptional for men, these men are superior to the typical female: in all, the men are portrayed as the better nurturers.
concretized as a matter of doctrine. Role fixity may be deeply unconscious, therefore, only through persistent exposure of the social bases for many gendered assumptions will the constraints on crossing gender lines be diminished. In addition, direct reversals of established legal doctrines are necessary to make the crossing of gender lines become realistically possible.

C. Drawing Men to Feminism

Many feminists have adopted a methodology of inclusion toward people, groups, and ideas.318 The approach to males should be one of inclusiveness, rather than exclusion. Professor Lea Brilmayer explains:

Feminism would be more powerful as a political movement if it were more inclusive; if we tried to take seriously the subjective identification people have with the movement, and stopped trying to discriminate between those with the “real” feminist credentials and those who should be dismissed as “sell outs” or “traitors.”

Inclusive feminism requires defining the core to include more people rather than fewer. It means taking at face value, and treating in good faith, a person’s claim to identify with the feminist movement. It means genuinely preferring to see others as feminist if they wish to be seen that way, and only reluctantly concluding that the definition is not broad enough to encompass their set of views. It means treating differences of opinion as being different, legitimate views about what feminism requires. It means not trying to silence others by ostracizing them or by calling them traitors or “honorary males” . . .319

Moreover, by considering only one dimension, feminism may risk losing the interest of women who intuitively feel that both women and men should take part. For feminism to succeed in promoting large-scale societal

change, not only must it be nonexclusionary, but at least a critical mass of men must become feminists. In order for feminist changes in policy to occur, notions of femininity and masculinity must be redefined. One cannot simply change the way women are, but must also change men.

The lessons of the social movements in the past attest to the need for a broad base of support for fundamental changes. Members of the white majority played significant parts in the successes of the civil rights movement. Evidence exists that some men have in the past and are currently playing key roles in encouraging the breakdown of traditional gender barriers. Barbara Ehrenreich argued early on that changes in male consciousness accounted for significant cultural and political shifts on gender issues. Harry Brod points out that history contains numerous instances...

320. See Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994); Gary Peller, Race Consciousness, 1990 Duke L.J. 758. But see Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 60-74 (1987) (arguing that civil rights reforms generally promote majoritarian interests). The reverse is also probably true: Civil rights movement progress has essentially stalled because of white resistance. See Hayman & Levit, supra note 279.

321. Interestingly, in some instances the development of parental or healthcare-giving leaves has occurred because of the activism of some male attorneys, who also seek to spend more time with their families and who seek to humanize their commitments to work. In my own research into law firm policies, I have uncovered instances of middle-aged men who have become innovators on issues of leave, either because their daughters have become lawyers and consequently understand more fully the impediments of the "glass ceiling" as it affects mothers, or because of their own needs to spend time with families, often second families they began in their more mellow middle years. ... The key to understanding this phenomenon is to realize that innovation may be sparked by women raising issues or making demands, but the effects of these innovations may be pursued by surprising sources, such as "merciful men" like the Duke in The Merchant of Venice.

Carrie Menkel-Meadow, Portia Redux: Another Look at Gender, Feminism, and Legal Ethics, 2 Va. J. Soc. Pol'y & L. 75, 113-14 (1994) (footnote omitted); see also Connell, supra note 6, at 72 ("Some men want to support feminism, and some men—not always the same ones—have been useful to feminism (for instance, in passing anti-discrimination laws, introducing women's studies programs in universities, and so on.").

Regarding the history of men's support for feminist enterprises, see R.W. Connell, Drumming Up the Wrong Tree, 7 Tikkun 31, 31 (1992) ("Some of the first feminist consciousness-raising groups in the late 1960s had both women and men as members."); Michael Shiffman, The Men's Movement: An Exploratory Empirical Investigation, in Changing Men: New Directions in Research on Men and Masculinity 295, 295 (Michael S. Kimmel ed., 1987) ("Struggles for women's equality in the United States have included male activists from the very start. About one-third of the signatories at the 1848 Seneca Falls Convention were men.").

of male alliances with and support of feminist causes. (Others, of course, have mounted fierce opposition to the women's movement.)

In many ways, society is just beginning to experience the variety of men's responses to feminism. The "men's movement" actually comprises a spectrum of sociopolitical positions. This loose umbrella term encompasses organizations ranging from anti-feminist, pro-masculinist men's rights activists to liberal pro-feminist groups, and from groups with an anti-sexist socialist orientation to groups with a male religious perspective.

Given the range and variety of men's responses to feminism, can men generally be encouraged to recognize and understand the oppression of women? Further, can large segments of the male population be drawn to the cause of feminism? These questions go to the heart of feminism's sociopolitical struggle, since many men resist efforts to include them in the feminist enterprise. Part of the answer may lie in feminists extending an open invitation to men to participate in dialogue. Inclusion of majority group members may diffuse misconceptions and resentment, as well as help

323. The history of antisexist men is an essential part of the history of feminism. In the nineteenth century, for example, many men supported feminist demands; many of them were also active as abolitionists—William Lloyd Garrison, Frederick Douglass, Thomas Wentworth Higginson, Parker Pillsbury, and Samuel Joseph May. Some supportive husbands of suffrage leaders, such as Henry Blackwell, husband of Lucy Stone, and James Mott, husband of Lucretia Mott, were activists for women's rights in their own right as well. The history of profeminist men includes not only support of women but also men's relationships reconstructed to feminist or humanitarian standards, rather than patriarchal "male bonding."


324. See generally ANTIFEMINISM IN AMERICAN THOUGHT: AN ANNOTATED BIBLIOGRAPHY (Cynthia D. Kinnard ed., 1986); EHRENREICH, supra note 322; Michael S. Kimmel, Men's Responses to Feminism at the Turn of the Century, 1 GENDER & SOC'Y 261 (1987).

325. SEIDLER, supra note 5, at 26.

326. See CLATTERBAUGH, supra note 5 (developing a typology of six different sociopolitical perspectives on the men's movement); DOTY, supra note 5, at 57-66 (identifying nine masculinist perspectives).

327. See EHRENREICH, supra note 322; FALUDI, supra note 228; CAROL SMART, FEMINISM AND THE POWER OF LAW (1989). It should be noted that most women also resist defining themselves as feminists. See, e.g., Elizabeth A. Cook, Feminism and the Gender Gap—A Second Look, 53 J. POL. 1111, 1113 (1991) ("Slightly more than a quarter of both men and women are classified as feminists, and slightly less than one-third of both sexes fall into the potential feminist category."); Claudia Wallis et al., Onward Women!, TIME, Dec. 4, 1989, at 80, 85 (reporting that in a Time-CNN survey of 1000 women nationwide, only 33% identified themselves as feminists). However, many women and men may share feminist concerns while rejecting the label. See id. at 81 (regarding women).
to avoid political and social backlash. Another part may involve encouraging recognition among men and women of the ways in which patriarchy harms men, so that women do not exclusively appropriate the harms of a gendered universe. This approach necessitates viewing victimization as less of a political or epistemological stance and more of an evidential one.

The broader project involves encouraging men to become feminists. It is a distinctly underexplored possibility, probably because the issue is elusive and variations exist among different racial, social, economic, and political groups, as well as within individual ideological positions. There is considerably more research and commentary on what draws women to feminism, what gender, race, and class characteristics correlate with existing feminist orientations, and what qualities of feminism repel men.

In her pioneering work, Gender Politics: From Consciousness to Mass Politics, Ethel Klein identifies three principal "paths" to feminism: self-interest, group-consciousness, and political or ideological values. Relying on a national voter study conducted in 1972 of 2705 men and women, Klein determined that "[m]en and women took different paths to feminism. Women developed a group consciousness while men supported feminism because of the ideological concerns and values expressed by the movement."

Many men become feminists because they believe in the goals of feminism, and are persuaded by the anecdotal, narrative, and empirical evidence offered to support its propositions. Men may develop "sympathetic feminist consciousness" because of their perceptions that women do not

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329. See supra text accompanying notes 76–77.
331. See Josefina Figueira-McDonough, Gender, Race, and Class: Differences in Levels of Feminist Orientation, 21 J. APPLIED BEHAVIORAL SCI. 121 (1985).
334. Id. at 96–97.
have sufficient political capital or mobility.\textsuperscript{335} Thus, to promote the creation of feminist consciousness or sympathy among men, the feminist critique of gendered situations must be relentless. Feminists must continue, as they have been, to unmask the gendered nature of teaching, learning, scholarship, and legal doctrine.

More recent research indicates that variables other than moral or religious factors may be more important influences than previously thought in creating support for or opposition to feminist beliefs and values. A random telephone survey of four hundred people in Muncie, Indiana ("Middletown"), conducted by the Social Science Research Center at Ball State University, confirmed Klein's hypotheses that among women, support for feminist beliefs and values was related to personal experiences and group consciousness.\textsuperscript{336} However, "while personal experience variables were also significant for men,"\textsuperscript{337} stronger correlations existed between social class and ideological variables.\textsuperscript{338} This work indicates that in order to cultivate support for feminist precepts, greater attention needs to be directed to the class effects of particular policies and laws. Thus, to combat the political rejection of feminism, feminists could encourage identification by men and women with feminist ideology and objectives by focusing on

\textsuperscript{335} See Debra Kalmuss et al., Feminist and Sympathetic Feminist Consciousness, 11 EUR. J. SOC. PSYCH. 131, 136 (1981) ("The critical issue for supporters from the dominant group is the perceived position of other members of the dominant ingroup. Men who believe that other men would resist equality in sex roles are more likely to show heightened sympathetic feminist consciousness than those who perceive support for equal roles among most men.").


\textsuperscript{337} \emph{Id.} at 212 ("Financial dissatisfaction was negatively related to feminism; unlike women, it is men satisfied with their finances who support feminism . . . . As in the case of women, men who are less happily married have higher feminism scores.").

\textsuperscript{338} However, the direct and indirect consequences of social class for men are not consistent. On the one hand, the direct effect of class on feminism, as well as the indirect effect through the relation between class and belief in economic restructuring, mean that class is negatively related to feminism. On the other hand, the indirect effect of class because of the relationship of class with financial dissatisfaction means that social class is positively related to feminism. The latter relationship suggests that some men feel financially secure and, thus, they are not threatened by a non-discriminatory job market. \emph{Id.} at 214. The research reveals that race and class dimensions are also important for women:

The general tendency is for women in the lower classes, for reasons such as their more frequent acceptance of economic restructuring and their greater dissatisfaction with their financial situation, to favor assimilationist feminism. Apparently, black women especially have felt the harm resulting from a market that unjustly discriminates among job seekers. These findings imply that there may be a new source of recruits for the assimilationist feminist movement other than educated women, who are the most active in this movement, and that is working class women. \emph{Id.}
the relations between class or status and the political ramifications of feminism.

Feminists should also try to foster men's interest in writing about gender issues, and in becoming involved in interpreting, adopting, expanding on, and reacting to feminist ideals and methodologies. Disciplines other than law, such as English, modern languages, history, and psychology, have shown significantly more interest in men's relations to and alliance with feminism. Historian Natalie Zemon Davis maintains, "We should not be working on the subjected sex any more than a historian of class can focus exclusively on peasants. Our goal is to understand the significance of the sexes, of gender groups in the historical past."

Part of men's relations to feminism includes exploration of how social and legal constructs define masculinity, as section II of this Article tried to demonstrate. Professor Mark Fajer succinctly capsulizes why the social learning must begin early: "To be blunt, we can hardly expect that boys who learn that their peers who cry or play with dolls are sissies and faggots will grow into men interested in displaying sensitivity or in taking on child-care responsibilities." Encouraging the recognition that gender role stereotypes harm both genders should not feed backlash. Instead, men may be more likely to become feminists if they are encouraged to identify with an oppressed group. As the struggles of the early feminists attest, the

339. While there are a number of men writing about feminism, see, e.g., Roy L. Brooks, Feminist Jurisdiction: Toward an Understanding of Feminist Procedure, 43 U. KAN. L. REV. 317 (1995); Dennis Patterson, Postmodernism/Feminism/Law, 77 CORNELL L. REV. 254 (1992); Thomas Ross, Despair and Redemption in the Feminist Nomos, 69 IND. L.J. 101 (1993); Verchick, supra note 72, the field is composed predominantly of female writers.


341. See, e.g., AGAINST THE TIDE: PRO-FEMINIST MEN IN THE UNITED STATES 1776-1990: A DOCUMENTARY HISTORY (Michael S. Kimmel & Thomas E. Mosmiller eds., 1992). However, the scholarship is somewhat pessimistic. See, e.g., Stephen Heath, Male Feminism, in MEN IN FEMINISM, supra note 44, at 1, 1 ("Men's relation to feminism is an impossible one. This is not said sadly nor angrily . . . but politically.").


343. Fajer, supra note 9, at 632; see also SEIDLER, supra note 5, at 13-18 (encouraging men to adopt feminist methods in shaping new definitions of masculinity: to attend to their concrete experiences, to not disavow their emotional needs, and to participate in consciousness-raising groups).

344. Paul Lichterman describes the results of his research into why men joined one antisexist men's organization, Men Overcoming Violence ("MOVE"): "The men at MOVE want to fight male battery as a concomitant of what they consider a patriarchal society. At the same time, they want MOVE activities to focus on their personal feelings as men." Paul Lichterman, Making a Politics of Masculinity, 11 COMP. SOC. RES. 185, 187 (1989).
development of a political commitment to issues of gender justice is directly tied to the development of personal consciousness.

And these explorations will need to address how to move beyond ideas of "victim" and "wrongdoer," while still considering past injustices. They will need to examine the larger ideological issues, such as which social and legal arrangements most fairly and effectively promote childrearing. They will need to directly talk about the increased sharing of feelings and sympathies. The concerns of feminism for so many years have centered on promoting women's participation in social and political processes. Now women and men must work together to transform social institutions, and to encourage men to more fully participate in social spheres reserved exclusively for women.

The standards for change must draw on principles that come from feminism and the criteria of rationality. The visions for the future must be based on moral, rational principles, and founded greatly on the use of reason—questioning assumptions, evidentially analyzing arguments, and focusing attention on cumulative, comprehensive, and converging evidence. Egalitarianism is one way of saying no prejudice, no pre-judgment. Feminist theory should not distance itself from rational cooperative inquiry, particularly at a time when basic conceptions of science and rationality are being increasingly recognized.

346. See, e.g., Carbone & Brinig, supra note 215, at 1007–08 (arguing for the separation of marital roles and childrearing and the substitution of a child-centered approach).
347. Kate Millett has described the family as "[p]atriarchy's chief institution." KATE MILLETT, SEXUAL POLITICS 45 (Ballantine Books 1969).
350. Levit, supra note 348, at 273.
and reason are changing rapidly. Modern conceptions of rationality demand awareness of inquiry-debilitating blinders, acknowledgment that moral responsibility extends beyond one's own passionate beliefs, and realization of the need for cooperative inquiry on social questions. Some feminist legal theories are moving in this direction of collaborative rational inquiry by, for example, crossing the boundaries of jurisprudential schools, or connecting feminist theory to larger, foundational philosophical questions.

Transformation of social institutions necessitates acceptance of a wide variety of methods of knowing, and the use of reason that is informed by, but not confined to, social class, gender, identity politics, or economics. The dismantling of patriarchy requires acknowledging experiences.


355. Christine Jolls, The Rule of Law and Economics in Feminist Legal Theory, Presented at the AALS Annual Meeting (Jan. 5, 1996) (arguing that feminist theory could bring a more behavioral approach to law and economics that would inform economic conceptions of value and individual preferences by importing distributional objectives—such as improving the situations of women—as measures of efficiency).

356. Jane E. Larson, The World and Other Things, Presented at the AALS Annual Meeting, (Jan. 5, 1996) (suggesting that the important questions for the future of feminist theory are tied to broader humanist inquiries, such as questions of human nature, public good, or appropriate relations between individuals and the state).

357. See PETER M. BLAU, STRUCTURAL CONTEXTS OF OPPORTUNITIES (1994) (knowledge of complex particulars should not be estranged from general philosophical positions and in fact should be part of the bolstering of that position); RANDALL COLLINS, SOCIOLOGICAL INSIGHT: AN INTRODUCTION TO NON-OBSERVABLE SOCIOLOGY (2d ed. 1992) (stressing common misinterpretations about what may be going on in social groups).

358. The dangers of exalting "group thought" can be seen in varied examples throughout history in claims of absolute epistemological privilege based on social class, city, state, race or "blood," ethnicity, nationality, and ideology. See, e.g., BARROWS DUNHAM, HEROES AND HERETICS: A POLITICAL HISTORY OF WESTERN THOUGHT (1964). This is not to discount different perceptions based on some of those same categories. See, e.g., Matsuda, supra note 223.
ential knowing—a recognition that one's own experiences may be contradicted by others' experiences—and yet acknowledging that this epistemological method is necessarily partial. Changing dominant values and creating abilities to self-reflect and to imagine empathetically what it means to be of a different gender will necessitate openness on both an epistemological and sociopolitical level, concentration of thought and resources, and time on a large scale.

IV. CONCLUSION: LEGAL IDEOLOGY AND MASCULINITY

This Article should not be seen as an attempt to diminish the centuries of horrors experienced by women. On the contrary, the purpose of this Article is to advance the cause of feminism by pointing out the more universal harms of gender role stereotyping. Gender role stereotypes harm both men and women, and stereotyping harms to one gender also rigidify role expectations of the other gender. Feminist theory needs to explore more fully how legal doctrines construct masculinity, and feminists must reach out to men as compatriots.

We may wonder, even if feminist legal theory turns its attention to the situation of men, what good it will do if the fundamental power structures in society—peers, families, churches, the media, and the more or less silent acculturation processes—have such force in shaping gender. Formidable institutions take strong positions that gender equality should not


361. Most people are socialized to try to live up to [male and female stereotypes], and most of us succeed in some degree. I assume the reader is an academic achiever. Think back to the time when you were in high school. Would you cheerfully have traded some of your academic talents for qualities that more closely fit the prevailing stereotypes of masculinity or femininity? If you are male, did you wish you could be an athletic hero? If you are female, did you wish you could be the belle of the ball? If your answer is “No,” you are built of sterner stuff than I was.

Karst, supra note 29, at 459-60; see also MORGAN, supra note 66, at 75-80, 82 (occupations and work are significant sources of male identity); Nancy F. Russo, Sex-Role Stereotyping, Socialization, and Sexism, in ALICE G. SARGENT, BEYOND SEX ROLES 150, 151 (2d ed. 1985) ("Sex role socialization begins at birth, as soon as gender assignment is made. Infants are barely out of the womb when their behaviors receive labels in accordance with gender stereotypes, labels that have the power to distort reality."). See generally NANCY ROMER, THE SEX ROLE CYCLE: SOCIALIZATION FROM INFANCY TO OLD AGE (1981).
exist. Perhaps the gendered assumptions and practices among well-intentioned, equality-seeking individuals are also intractable. As Professor Martha Minow has observed, "Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference." Professor Charles Lawrence demonstrates the power of unconscious racial stereotyping. Similarly, deleterious gender stereotypes of both women and men are subtly perpetuated. This gendered content becomes locked into assumptions, and the assumptions transform into rules. Gender equity will necessitate massive changes in social and psychological development, shifts in the division of labor both inside and outside the home, and transformations in parenting roles. One of many places to begin is with legal ideology.

In many ways, current legal doctrines foster a separatist ideology. They reflect and reinforce the sharp separation of the genders and promote a construct of masculinity that does not admit of feminine qualities, characteristics, or roles. Laws and legal doctrines contain implicit assumptions about masculinity. To the extent that legal precedents shape gender difference, the message is inescapably clear: real men embody power; they are society's breadwinners, criminals, and warriors; and they feel no pain. The legal system reinforces these social images and their psychological attendants of stoicism and emotional isolation.

One can tell a great deal about a society by examining who populates that society's criminal and warrior classes. This country protects women from aggression, and places men in roles that demand aggression. Recent decisions such as Faulkner v. Jones and United States v. Virginia segregate...
gate males and females for educational purposes solely on the basis of
gender. Other decisions, such as those concerning criminal sentences,369
same gender sexual harassment,370 and child custody,371 rigidify gender
roles. These legal doctrines form pieces of the American cultural mosaic,
and they must change in order to promote realistic social change. Relegat-
ing women to domestic roles, reserving militaristic roles for men, and pun-
ishing any attempts to cross over traditional gender boundary lines are
interrelated phenomena that offer an impoverished view of both women
and men. As distinctly social constructions, gender roles and relations
have the potential to change.372

Laws and legal doctrines contain ideological messages. What courts
say and do matters, since legal language shapes and reinforces social mean-
ings.373 Courts and commentators must critically examine the social and
legal constructs that keep both genders in their prescribed roles. Unless it
becomes acceptable for men to hurt, for men to leave roles that foster
aggression, for men to complain about the effects of gender role stereotypes,
and for men to participate more fully in realms traditionally occupied by
women, feminism has little chance of moving forward or expanding its
audience. Feminist legal theorists need to explore constructs of masculinity
toward the end of promoting practices and politics of masculinity that
comport with feminist objectives.

We are in a period of large-scale institutional change—nations form-
ing, collapsing, and defining themselves; the end of the Columbian era of
expansionism; the rise of postmodernism; the shaking up of societies and of
psyches.374 These currents mean that fissures exist in large power blocs,

369. See supra note 94.
370. See supra text accompanying notes 119–166.
371. See supra text accompanying notes 176–199.
372. See THE SOCIAL CONSTRUCTION OF GENDER, supra note 212.
373. See Finley, supra note 218, at 888. For example, language choices such as “domestic
violence” (impliedly a private affair) or “spousal battery” (a real crime deserving of prosecution)
may affect public responses. See Christine A. Littleton, Women’s Experience and the Problem of
374. See generally JEREMY BRECHER & TIM COSTELLO, GLOBAL VILLAGE OR GLOBAL
PILLAGE: ECONOMIC RECONSTRUCTION FROM THE BOTTOM UP (1994) (regarding many aspects
of international unsettlement); RONALD STEEL, TEMPTATIONS OF A SUPERPOWER (1995) (regard-
ing accelerating conflict and tension-loaded changes, disintegration, decentralization, restructur-
ings and expansions of powers in Eastern Europe and Africa).
as well as in individual attitudes, postures, and inclinations, especially among middle class and professional groups. The time is ripe for theory to change and for social practices to alter. The regnant institutions will not impel change. Theory can help reshape deeply embedded social practices, but first theory must evolve. As the history of feminist thought attests, the very asking of different questions often heralds that change.