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# Trump, Gender Rebels, and Masculinities

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# TRUMP, GENDER REBELS, AND MASCULINITIES

*Dara E. Purvis\**

*Since the inauguration of President Trump, most of his Administration’s actions have been sharply conservative: notably, his efforts to ban transgender Americans from military service. There have been exceptions, however, such as proposals to create support for paid parental leave, an issue previously championed by Democrats.*

*This seeming contradiction of progressive and regressive policies can be reconciled by viewing the Trump Administration through the lens of masculinities theory. Hegemonic masculinity depends upon sharp differentiation between “real” men and everyone else, the latter occupying places in a hierarchy far below men. In this reading, Trump’s version of parental support makes sense: it focuses support solely on women, who in the view of hegemonic masculinity are the only proper caregivers for children. Similarly, masculinities analysis helps to explain targeting transgender Americans, as this group directly challenges a central tenet of hegemonic masculinity—that gender is binary and immutable.*

*Masculinities thus explains arguably contradictory policies and reveals that both policies reflect the Trump Administration’s hostility to principles of diversity and antidiscrimination. The Administration is not against antidiscrimination in all forms—only those that challenge the hegemonic ideals of masculinities.*

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## I. INTRODUCTION

On the campaign trail in the fall of 2016, the Trump campaign proposed a plan of six weeks' paid parental leave for new mothers.<sup>1</sup> Although most Americans support paid family leave (at least in the abstract),<sup>2</sup> the proposal broke with previous opposition to state-sponsored paid leave by the Republican Party.<sup>3</sup> Indeed, as the election date approached, support for paid family leave was a rare point of agreement between the Trump and Clinton campaigns.<sup>4</sup>

After Donald Trump's election, his daughter Ivanka Trump chaired a working group to discuss paid leave, and a paid leave proposal was included in the initial budget proposal in the summer of 2017.<sup>5</sup> The comparatively progressive support for what had historically been a feminist issue stood in stark contrast to Trump's extremely conservative actions in other spheres, such as his July 2017 tweets announcing that transgender soldiers would no longer be permitted to serve in the US military.<sup>6</sup>

The Trump Administration's contrasting treatment of working mothers and transgender servicemembers creates a puzzle: how to reconcile policy proposals seemingly pointed at opposite ideological ends. One reading of this contrast is a failure of intersectionalism. Having divided the electorate in November 2016, President Trump and his Administration gave some support to policies supported by

1. See Rebecca A. Brusca, *A Comprehensive Analysis of the Effects of Paid Parental Leave in the U.S.*, 19 DUQ. BUS. L.J. 75, 91–92 (2017); Trina Jones, *A Different Class of Care: The Benefits Crisis and Low-Wage Workers*, 66 AM. U. L. REV. 691, 754 (2017).

2. See Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 375 (2018).

3. See Brusca, *supra* note 1.

4. See Megan A. Sholar, *Donald Trump and Hillary Clinton Both Support Paid Family Leave. That's a Breakthrough.*, WASH. POST: MONKEY CAGE (Sept. 22, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/22/donald-trump-and-hillary-clinton-both-support-paid-family-leave-thats-a-breakthrough/?noredirect=on&utm\\_term=.4a49b21bffc0](https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/22/donald-trump-and-hillary-clinton-both-support-paid-family-leave-thats-a-breakthrough/?noredirect=on&utm_term=.4a49b21bffc0).

5. Danielle Paquette & Damian Paletta, *U.S. Could Get First Paid Family Leave Benefit Under Trump Budget Proposal*, WASH. POST (May 18, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/05/18/u-s-could-get-first-paid-family-leave-benefit-under-trump-plan>.

6. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>.

Republican white women while targeting and further isolating transgender people.<sup>7</sup>

Another reading, however, is that Trump's Administration is a textbook example of masculinities theory put into practice. Masculinities depends upon identifying what is appropriately masculine as well as other-izing all other traits perceived as feminine or homosexual.<sup>8</sup> There is a place in masculinities for the feminine, but it must be assigned to females and clearly delineated from the masculine ideal.<sup>9</sup> There is no place, however, for people who challenge the concept of gender as binary and unchangeable.<sup>10</sup> For this reason, it is entirely consistent for an administration embodying concepts of masculinities to provide support for feminine roles such as caregiving, but only when caregiving is properly identified as female and appropriately distinguished from masculine activities. This helps to explain the Trump Administration's family leave proposal, which would make paid parental leave dependent upon the recipient withdrawing funds from their Social Security benefits and thus retiring later.<sup>11</sup> Support for caregiving is explicitly structured as a tradeoff between work and childcare, sending the unmistakable message that the two worlds are incompatible and reinforcing the historic notion of separate spheres for men and women.<sup>12</sup> The Administration can thus give salutary support to women while underscoring profoundly antifeminist principles.

By contrast, there is no way to reconcile acceptance of transgender people with masculinities: they directly challenge the principles of difference upon which masculinities is based.<sup>13</sup> This helps to explain the full-frontal assault upon any legal protections of transgender people, including the Department of Education's withdrawal of guidance clarifying that Title IX of the Education Amendments of 1972's ("Title IX") prohibition of sex discrimination

7. See *supra* notes 5–6 and accompanying text.

8. See Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 418 (2010); John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477, 478 (2010).

9. See David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 528 (2010) (discussing how men determine what behaviors are acceptably masculine).

10. See Janine M. deManda, Comment, *Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, 508 (2002).

11. See Elizabeth Bruenig, Opinion, *Trump's Paid Family Leave Plan Would Punish Those Who Choose to Have Kids*, WASH. POST (Feb. 7, 2018), [https://www.washingtonpost.com/opinions/trumps-paid-family-leave-plan-would-punish-those-who-choose-to-have-kids/2018/02/07/dc612c0c-0b85-11e8-95a5-c396801049ef\\_story.html?noredirect=on&utm\\_term=.a79cb1d636e1](https://www.washingtonpost.com/opinions/trumps-paid-family-leave-plan-would-punish-those-who-choose-to-have-kids/2018/02/07/dc612c0c-0b85-11e8-95a5-c396801049ef_story.html?noredirect=on&utm_term=.a79cb1d636e1).

12. See Gwynn Guilford, *Trump's Maternity Leave Plan Is a Joke on Parents of All Genders*, QUARTZ (Sept. 18, 2016), <https://qz.com/783303/trumps-child-care-plan-will-put-women-even-farther-behind-in-pay-and-career-advancement/>.

13. See deManda, *supra* note 10.

also prohibits discrimination against transgender students,<sup>14</sup> the Department of Justice's reversal of its position regarding the applicability of Title VII of the Civil Rights Act of 1964's ("Title VII") prohibition of sex discrimination to transgender employees,<sup>15</sup> and Trump's tweets purporting to ban transgender servicemembers.<sup>16</sup>

Recognizing how completely the Trump Administration furthers principles of masculinities deepens our understanding of how and why the Administration is hostile to principles of diversity and antidiscrimination. The Administration is not against antidiscrimination in all forms—only those that challenge the hegemonic ideals of masculinities. This opens some narrow windows to restraining some of the Trump Administration's attacks upon diversity and exposes more clearly the animus underlying other efforts.

## II. CROSSED POLICIES: FAMILY LEAVE AND TRANSGENDER MILITARY SERVICE

### A. *Family Leave*

Alone among industrialized nations, the United States does not have a nationwide policy or requirement providing paid parental leave.<sup>17</sup> The sole federal statute regarding family leave is the Family and Medical Leave Act ("FMLA"), which provides only *unpaid* leave.<sup>18</sup> The FMLA is capped at twelve weeks of such unpaid leave per year and does not apply to all employers.<sup>19</sup> Only about half of American workers are covered by the FMLA's mandate,<sup>20</sup> and the majority of those employees generally cannot afford to take unpaid time off.<sup>21</sup>

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14. See Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEP'T JUST. & U.S. DEP'T EDUC. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEP'T JUST. & U.S. DEP'T EDUC. (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

15. See Jeff Sessions, *Memorandum on Revised Treatment of Transgender Employment Discrimination Claims under Title VII of the Civil Rights Act of 1964*, U.S. DEP'T JUST. (Oct. 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download>.

16. Sam Levin, *White House Announces Ban on Transgender People Serving in Military*, GUARDIAN (Mar. 24, 2018, 8:41 AM), <https://www.theguardian.com/us-news/2018/mar/23/donald-trump-transgender-military-ban-white-house-memo>.

17. See Brusca, *supra* note 1, at 76.

18. Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(e) (2018) (requiring only unpaid leave).

19. See Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1068 (2012).

20. *Id.*

21. See Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family*

In the absence of state-mandated leave policies, it is up to individual employers to decide whether to offer any family leave to their employees.<sup>22</sup> Some private companies voluntarily choose to provide their employees with paid parental leave, although a recent study found that only twelve percent of private sector employees had any paid leave through such employer-generated plans.<sup>23</sup> Paid leave is thus available only to a small minority of employees; unpaid leave is available but unrealistic for a significant number, and the remainder of American workers have no leave at all.

This lack of leave options seems to assume that employees simply do not have caregiving responsibilities that might interfere with their ability to come to work.<sup>24</sup> This is a very different approach than other countries that increased the availability of leave as families moved further and further away from a breadwinner/homemaker model, in which an employer might more reasonably expect the breadwinner to be free of any caregiving responsibilities, towards families more typically headed by two earners.<sup>25</sup>

The Trump campaign proposal to provide six weeks of paid leave would thus have been a significant change, although it was unclear from the start how broadly the proposed leave would be made available.<sup>26</sup> Initial statements on the Trump campaign website and explanations provided by Ivanka Trump in 2017 indicated that the leave would be available only to married mothers, excluding unmarried mothers, fathers, and adoptive parents.<sup>27</sup> Later discussions of the plan suggested that all three of the excluded categories might be included after all,<sup>28</sup> and in 2018 Senator Marco Rubio sponsored the Economic Security for New Parents Act, a more

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*Conflict Is a Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593, 1604 (2010).

22. See generally NAT'L CONF. STATE LEGISLATURES, *Paid Family Leave Resources* (Jan. 10, 2018), <http://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx> (noting that only four states currently mandate paid family leave).

23. See Brusca, *supra* note 1, at 76.

24. See Arianne Renan Barzilay, *Power in the Age of In/Equality: Economic Abuse, Masculinities, and the Long Road to Marriage Equality*, 51 AKRON L. REV. 323, 338 (2017).

25. See Eichner, *supra* note 21, at 1595.

26. See, e.g., Michelle Goldberg, *Donald Trump's Family Policy Is Terrible: It's also Great News for American Families*, SLATE (Sept. 14, 2016, 1:04 PM), <https://slate.com/human-interest/2016/09/donald-trumps-terrible-family-policy.html>.

27. See Danielle Paquette, *Donald Trump's New Paid Maternity Leave Plan Might Exclude Single Mothers*, WASH. POST (Sept. 20, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/09/20/donald-trumps-new-paid-maternity-leave-plan-might-exclude-single-mothers/>; see also Sarah E. Crippen et al., *What L&E Attorneys Need to Know About the Trump Administration*, FED. LAW., July 2017, at 46, 47.

28. Seth K. Kornfeld, *A Need Not Being Met: Providing Paid Family and Medical Leave for All Americans*, 56 FAM. CT. REV. 165, 169 (2018).

specific proposal supported by Ivanka Trump.<sup>29</sup> This plan provided paid leave by allowing new parents to pull money from their own Social Security benefits—so the paid leave would, many years down the line, delay the retirement of any parent who used it.<sup>30</sup> Rubio's bill was referred to the Committee on Finance in August 2018, and, given the change in leadership in the House of Representatives after the 2018 midterm elections, it seems unlikely that the plan will become law in the future.<sup>31</sup> That said, prominent Republicans discussing and supporting any form of paid family leave took an issue that had previously been one associated entirely with the Democratic Party<sup>32</sup> and claimed, in a high-profile way, that it would be a concern of the Trump Administration.<sup>33</sup>

### B. *Transgender Military Service*

During the campaign, Trump made a variety of conflicting statements about his stances on LGBTQ-related issues but at least claimed (albeit without any evidence) that he would be better for the LGBTQ community than Hillary Clinton.<sup>34</sup> After his inauguration, however, Trump took a variety of strongly anti-LGBTQ positions, most dramatically a public reversal on the inclusion of transgender servicemembers in the military.<sup>35</sup> Under President Barack Obama, the Department of Defense issued a set of regulations specifying that transgender people were eligible for military service and that transgender servicemembers could receive appropriate medical treatment at the cost of the government, including gender confirmation surgery if they so desired.<sup>36</sup>

In July 2017, however, Trump tweeted in the early morning hours, "After consultation with my Generals and military experts, please be advised that the United States Government will not accept

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29. See Bruenig, *supra* note 11.

30. *Id.*

31. See generally Sarah Binder, *Here Are 4 Things to Expect from a New, Trumpier, More Polarized Congress*, WASH. POST: MONKEY CAGE (Nov. 7, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/07/here-are-4-things-to-expect-from-a-new-trumpier-more-polarized-congress/?noredirect=on&utm\\_term=.cb7d35cbd11b](https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/07/here-are-4-things-to-expect-from-a-new-trumpier-more-polarized-congress/?noredirect=on&utm_term=.cb7d35cbd11b) (noting that Republican and Democratic lawmakers will be unlikely to cross party lines to pass legislation in the split-party Congress).

32. Naomi Jagoda, *Rubio Rolls Out Paid Parental Leave Bill*, HILL (Aug. 2, 2018, 4:34 PM), <https://thehill.com/policy/finance/400147-rubio-rolls-out-paid-parental-leave-bill>.

33. *Id.*

34. Kayla Epstein, *Trump's Stance on LGBT Rights Has Always Been Confusing*, WASH. POST (July 26, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/07/26/trumps-stance-on-lgbt-rights-has-always-been-confusing>.

35. *Id.*

36. Peter Grieser, *Administrative Contexts of Access to Gender-Confirmation Surgery*, 27 S. CAL. REV. L. & SOC. JUST. 165, 180–81 (2018).

or allow . . .”<sup>37</sup> “[t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . .”<sup>38</sup> “victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]”<sup>39</sup> Initial reaction to the tweets was partly one of confusion, as it was not immediately clear what the legal significance of tweets from the Commander-in-Chief were, and his statements left many questions of implementation open.<sup>40</sup>

The following month, Trump clarified at least some of the questions in a memorandum.<sup>41</sup> His memo indefinitely extended a temporary prohibition against transgender people enlisting into the military, required that the military discharge transgender servicemembers by late March 2018, and prohibited military health insurance or military doctors from providing gender confirmation surgery.<sup>42</sup> In February 2018, the Department of Defense issued a report largely replicating the memo’s policies.<sup>43</sup>

Legal advocacy groups immediately sued the Trump Administration seeking to enjoin application of the new policies and won a number of early victories, although the cases remain ongoing as this Article goes to print.<sup>44</sup> Just as in the case of paid family leave, the Trump Administration took a strong public stance on a potentially divisive issue, even though actual implementation of that stance remains unclear.

### III. MASCULINITIES

Masculinities studies initially developed among sociologists, although the field draws upon a number of wide-ranging subjects and has been applied far beyond sociological analysis.<sup>45</sup> The basic idea is relatively simple: how does society define what is masculine?<sup>46</sup> Notably, the inquiry is described as a question of *masculinities* rather

37. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>.

38. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>.

39. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

40. See J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1759–60 (2018).

41. Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017).

42. See Anthony S. Winer, *Action and Reaction: The Trump Executive Orders and Their Reception by the Federal Courts*, 44 MITCHELL HAMLINE L. REV. 907, 915–16 (2018).

43. *Id.* at 916–17.

44. See *id.* at 928–29.

45. Ann C. McGinley, Ricci v. Destefano: A *Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 585 (2010).

46. *Id.* (explaining that the study of masculinity was developed to understand men and define their masculinity).

than masculinity, to make explicit that there is no single essentialist definition of masculinity.<sup>47</sup> Instead, multiple conceptions of masculinities operate amidst other hierarchies such as class and race.<sup>48</sup> A fuller understanding of the different aspects of masculinities thus illuminates not just the oppression of other genders by men but also the oppression of some groups of men by other men.<sup>49</sup>

In the hierarchy of masculinities, hegemonic masculinity is at the top of the rankings.<sup>50</sup> Scholars have traced some basic principles of hegemonic masculinity, often as a process of exclusion.<sup>51</sup> For example, the two central principles of hegemonic masculinity are admonishments about what *not* to be: don't be a woman, and don't be gay.<sup>52</sup> Thus, hegemonic masculinity obviously sets masculinity above women and LGBTQ people but also allows for criticism of men if those men do not perfectly conform to the dictates of hegemonic masculinity.<sup>53</sup> Such men are inferior as inadequately masculine.<sup>54</sup>

Notably, these strictures of hegemonic masculinity are not internal states of being. Nor does a single achievement of hegemonic masculinity secure someone's status as a hegemonic man in perpetuity.<sup>55</sup> Instead, masculinity is constructed through external performances.<sup>56</sup> Such performances must constantly be executed and re-executed. As Keith Cunningham-Parmeter described it,

Because hegemonic masculinity gives rise to ongoing competitions, men feel the urge to constantly prove their manhood to other men. This daily monitoring among men gives rise to a great deal of anxiety as men always fear that their lack of masculinity will be discovered. Thus, although men as a whole remain socially dominant, individual men experience

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47. Richard Collier, *Masculinities, Law, and Personal Life: Towards A New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 441 (2010).

48. See Dowd, *supra* note 8.

49. *Id.* at 419–20.

50. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 272 (2013).

51. See, e.g., *id.* at 273; Dowd, *supra* note 8.

52. See Dowd, *supra* note 8; Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182, 185 (Peter F. Murphy ed., 2004); McGinley, *supra* note 45, at 586.

53. Cohen, *supra* note 9, at 523.

54. Cunningham-Parmeter, *supra* note 50, at 273.

55. Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 229 (2008) ("It is also a core insight of masculinity that men experience manhood as something constantly to be achieved, not something simply attained and lived.").

56. See Barzilay, *supra* note 24, at 347–48; McGinley, *supra* note 45, at 586.

feelings of shame, fear, and emotional isolation due to this unending process of proof.<sup>57</sup>

As Nancy Dowd summarized, even though masculinity is the dominant ideology oppressing nonmale people, masculinity is “to a large degree about fear and shame and emotional isolation.”<sup>58</sup> The constantly shifting status of one’s masculinity means that one must constantly reperform one’s manhood, demonstrating how one is not feminine and is not homosexual, lest other men believe that one’s conformity with the ideals of hegemonic masculinity is slipping.<sup>59</sup>

#### A. *Masculinities and Parental Leave*

Taking masculinities into account, the view of the Trump Administration’s support for paid parental leave shifts considerably. One reading is a progressive view: paid parental leave enables women to stay in the workforce; thus, support for paid parental leave is a feminist act supporting women’s choices to take on roles they were previously denied.<sup>60</sup> This is certainly the focus of legislative debate around paid parental leave. It is also descriptively true that paid parental leave has measurable results facilitating women’s paid work outside of the home: one study found that women who took paid leave were six percent more likely to still be employed full-time one year later.<sup>61</sup>

An alternative reading, however, points out how the Trump plan reinforces traditional gender norms that place primary responsibility for caregiving (especially of infants) upon women.<sup>62</sup> Arlie Hochschild and Anne Machung famously coined the term “second shift” to summarize the idea that women are free to *add* paid employment alongside their duties at home, but not to *replace* one with the other.<sup>63</sup> After a full day of employment outside of the home, in other words, women come home to start their second shift of caregiving and homemaking duties.

As outlined above, one of the central guiding rules of hegemonic masculinity is not to be a woman.<sup>64</sup> This means that a “true” man does not take on any womanly roles or duties, and chief among those

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57. Cunningham-Parmeter, *supra* note 50, at 273–74.

58. Dowd, *supra* note 55, at 213.

59. McGinley, *supra* note 45, at 586.

60. Jennifer E. Karr, *Where’s My Dad? A Feminist Approach to Incentivized Paternity Leave*, 28 HASTINGS WOMEN’S L.J. 225, 229–30 (2017).

61. Brusca, *supra* note 1, at 85–86.

62. *Id.* at 92.

63. See ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (1989) (describing the guilt felt by mothers who sacrificed domestic responsibilities for paid employment).

64. See *supra* notes 45–59 and accompanying text.

is caregiving responsibilities.<sup>65</sup> Hegemonic masculinity thus demands a model where a man is the breadwinner, providing financially for his children, and a woman is the one who actually provides care for the children.<sup>66</sup> A man providing care directly to his children would be seen as engaged in “gender betrayal,” and absolutely violating the rules of hegemonic masculinity.<sup>67</sup>

This understanding plays out in existing patterns of whether men and women take any parental leave.<sup>68</sup> Women are far more likely to take leave, even where it is available to employees of any gender.<sup>69</sup> There are scores of examples of employers who punish male employees for taking on caregiving responsibilities.<sup>70</sup> Whether because of concrete reactions from unsympathetic employers or internalized norms of masculinity, even men who take parental leave take an extremely small amount of leave, generally one week or less.<sup>71</sup> Such a short period of time indicates that the leave is not devoted to a new infant, but to assisting a man’s female partner as she deals with the immediate recovery of childbirth or a cesarean section delivery. Caregiving leave is made available to women, both literally because there is typically more parental leave offered to women and because a female employee taking parental leave is less often frowned upon by her employer.<sup>72</sup> A female employee taking parental leave in order to become a mother is following the rules of masculinity by operating in a purely feminine role.<sup>73</sup>

A man taking on caregiving work, however, is breaking the rules of hegemonic masculinity.<sup>74</sup> This can present a particularly difficult

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65. Beth A. Burkstrand-Reid, *Dirty Harry Meets Dirty Diapers: Masculinities, At-Home Fathers, and Making the Law Work for Families*, 22 TEX. J. WOMEN & L. 1, 11 (2012).

66. *Id.* at 10–11; see also Laura T. Kessler, *The Politics of Care*, 23 WIS. J.L. GENDER & SOC’Y 169, 170 (2008) (arguing that “when practiced by individuals whom the state has historically denied the privilege of family privacy, caregiving work may constitute a positive political practice of resistance to oppression”).

67. Dowd, *supra* note 19, at 1057–58.

68. It is worth noting that many employees of all genders face discrimination from their employer if they have any family caregiving responsibilities. The Center for WorkLife Law, based at UC Hastings College of the Law, has a major initiative centered on Family Responsibilities Discrimination, including comprehensive reports about litigation challenging such discrimination. See, e.g., Cynthia Thomas Calvert, *Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016*, WORKLIFE LAW, <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>.

69. Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 977, 999 (2018).

70. Cunningham-Parmeter, *supra* note 50, at 257; see also Karr, *supra* note 60, at 235–36.

71. Brusca, *supra* note 1, at 86.

72. Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1073–74 (1996).

73. Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 530 (1999).

74. Cunningham-Parmeter, *supra* note 50, at 259.

dilemma if a man's masculinity is threatened by circumstances not entirely within his control. If a husband earns less money than his wife, for example, one study found that the husband is less likely to help out with any work around the house.<sup>75</sup> Because his masculinity is threatened by his wife usurping his breadwinner role, he is more likely to reject and refuse to participate in the "feminine" activities of housework.<sup>76</sup>

Similarly, Beth Burkstrand-Reid found that men who became full-time caregiving fathers due to their inability to find full-time paid employment often increased their performances of masculine behaviors in order to reassert their masculinity.<sup>77</sup> Such caregiving men "may compensate for their socially constructed 'feminine' actions by engaging in other, traditionally masculine activities."<sup>78</sup> One particularly colorful example is a fathers' group that held their meetings at a shooting range.<sup>79</sup> This is certainly not limited to men pushed into caregiving work: Angela Harris has previously written about similar behaviors in the context of race, in which lower-status groups of men similarly engage in hypermasculine activities to reassert status.<sup>80</sup>

### 1. *Masculinities and Legal Gender*

The dynamics of masculinities and parental caregiving have played out in the courts as well as in society. Although gender equality is certainly not yet achieved, there have been notable examples of success in the courts identifying the dangers (and illegality) of punishing women for transgressing gender stereotypes. There has been less movement, however, to protect men who transgress gender stereotypes, particularly in the context of caregiving. A few examples demonstrate the problem.

One of the most famous cases involving women and gender stereotypes is *Price Waterhouse v. Hopkins*,<sup>81</sup> a landmark Supreme Court case from 1989.<sup>82</sup> The plaintiff was Ann Hopkins, who worked at Price Waterhouse as a senior manager.<sup>83</sup> In 1982, she was proposed as a candidate for partnership, the only candidate (of eighty-eight total) who was female.<sup>84</sup> As part of the consideration process, existing partners could submit written evaluations of Hopkins'

75. Cahn, *supra* note 73, at 535.

76. *Id.* at 535–36.

77. See Burkstrand-Reid, *supra* note 65, at 2.

78. *Id.* at 15; see also Dowd, *supra* note 19, at 1063–64.

79. See Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 996 (2013).

80. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785 (2000).

81. 490 U.S. 228 (1989).

82. *Id.*

83. *Id.* at 231.

84. *Id.* at 231–33.

performance.<sup>85</sup> Much of her feedback was positive, evaluating her performance at the firm highly.<sup>86</sup> She was also the subject, however, of criticism regarding her interpersonal skills, describing her as “sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.”<sup>87</sup>

Poor interpersonal skills or difficulty as a colleague might obviously be a potential roadblock in the way of any employee’s potential promotion. In Hopkins’ case, however, significant amounts of the feedback tied her perceived shortcomings in interpersonal relationships to her failure to conform to gender stereotypes and act appropriately feminine.<sup>88</sup> Partners criticized her as “macho,” suggested that she undergo “a course at charm school,” and criticized her use of profanity because, as another partner put it, “it’s a lady using foul language.”<sup>89</sup> Hopkins was not approved for promotion to partner, and the explanation given for what Hopkins could do to improve her candidacy in the future was that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>90</sup>

Hopkins sued under Title VII, which prohibits discrimination on the basis of sex.<sup>91</sup> The question before the Supreme Court was not whether some of Price Waterhouse’s partners had expressed sexist views in their evaluations of Hopkins but what the burden of proof was to find that the discrimination had risen to the level that it violated Title VII, and upon whom that burden of proof fell.<sup>92</sup> Price Waterhouse, predictably, argued that the burden was Hopkins’ to overcome, by demonstrating that had the sexism not been present in her evaluations, Price Waterhouse would have granted her partnership.<sup>93</sup>

The Supreme Court disagreed, citing “Congress’ intent to forbid employers to take gender into account in making employment decisions.”<sup>94</sup> The Court held instead:

[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.<sup>95</sup>

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85. *Id.* at 232.

86. *Id.* at 233–34.

87. *Id.* at 234–35.

88. *Id.* at 235.

89. *Id.*

90. *Id.*

91. *Id.* at 232.

92. *Id.*

93. *Id.* at 237–38.

94. *Id.* at 239.

95. *Id.* 244–45.

In other words, in order to show that Price Waterhouse violated Title VII, Hopkins first had to show that her gender played a motivating part in Price Waterhouse's decision not to promote her to partner. Once she demonstrated that, Price Waterhouse would be found to have violated Title VII unless it could show that even without the sexism in Hopkins' evaluations, she would not have been promoted.<sup>96</sup>

This discussion of how to establish a Title VII violation was one of the key holdings of the case, but the real significance for purposes of masculinities and gender has to do with what it means to show that gender played a motivating part in a given decision. The most simplistic reading of gender in this context might mean a belief about *all* women: for example, that women belong at home instead of at work or that women categorically lack the capabilities needed for a given job. That clearly was not the perceived problem with Hopkins—Price Waterhouse had a poor record in terms of female partnership, with only seven female partners of 662 total.<sup>97</sup> Seven out of 662 is a paltry number but at least demonstrates that Price Waterhouse did not literally bar all women from partnership.

Instead, the problem was that Hopkins was the wrong “kind” of woman—she demonstrated traits that were not seen as feminine.<sup>98</sup> The Court identified the problem with this type of stereotype and why it was also prohibited by Title VII: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch twenty-two: out of a job if they behave aggressively and out of a job if they do not.”<sup>99</sup> In one of the most memorable passages, the Court concisely summarized how clearly Price Waterhouse's stereotyping operated:

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.<sup>100</sup>

One of the key impacts of *Price Waterhouse* was to make clear that adverse employment actions taken against a person who does not conform to gender stereotypes constitute gender discrimination.<sup>101</sup> This at least opens the door to using antidiscrimination laws such as Title VII to work against hegemonic masculinity's demands that men

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96. *Id.* at 242.

97. *Id.* at 233.

98. *Id.* at 235–36.

99. *Id.* at 251.

100. *Id.* at 256.

101. *See id.* at 258.

be one certain kind of man and that other genders be viewed as different and inferior.

There is mixed legal treatment of how effective antidiscrimination protections have been when used to challenge hegemonic masculinity directly, particularly in core areas of hegemonic masculinity's mandates such as caregiving.<sup>102</sup>

One negative example occurred in 1995. Gregory McGarity was employed by Mary Kay Cosmetics as a Central Weigh Technician.<sup>103</sup> McGarity's wife was pregnant and due to give birth to their third child that fall, so McGarity informed Mary Kay that he would be taking FMLA leave when his wife delivered their child.<sup>104</sup> His supervisor complained that men should not take such leave after their partner gave birth, but McGarity's leave request was approved by Human Resources and he took three weeks off of work in October and November.<sup>105</sup>

After McGarity returned to work, he alleged that his supervisor began repeatedly targeting McGarity with poor evaluations and disciplinary violations, such as "accusations of workplace errors, inaccurate complaints that McGarity was not doing his job, directed to [his boss'] supervisor, and miscalculations of McGarity's efficiency ratings upon which he was judged," as well as a three-day suspension for a mistake involving his failure to correctly verify measurements taken by an employee under McGarity's supervision.<sup>106</sup> McGarity complained to Human Resources, quit his employment with Mary Kay, and later filed a complaint with the Equal Employment Opportunity Commission.<sup>107</sup>

The United States District Court for the Northern District of Texas, in assessing his claims against a motion for summary judgment, found that McGarity had established the first three (of four) elements of a gender discrimination claim under Title VII: he was a member of a protected class, was qualified for his job, and had suffered an adverse employment action.<sup>108</sup> The court found, however, that McGarity could not prove the fourth element, which the court articulated as "similarly situated members of the opposite sex received more favorable treatment because of gender, or his position was filled with someone of the opposite sex."<sup>109</sup> The court explained that because McGarity could not provide an example of a *woman* who took FMLA leave, made a mistake equivalent to McGarity's, and did

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102. See Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1316–25 (2012).

103. *McGarity v. Mary Kay Cosmetics*, No. 3:96-CV-3413-R, 1998 WL 50460, at \*1 (N.D. Tex. Jan. 20, 1998).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at \*3.

109. *Id.*

not suffer any adverse consequences such as suspension, McGarity's claim must fail:

Plaintiff can not, however, satisfy the fourth element of a prima facie case of gender discrimination. McGarity has not offered any evidence to show that similarly situated females were treated differently for similar behavior. Defendant, on the other hand, presented evidence that women in the company had taken FMLA leave and had not been treated any differently on return.<sup>110</sup>

As Stephanie Bornstein points out, however, Title VII does not require a plaintiff to provide evidence of a similarly situated person of a different gender.<sup>111</sup> A plaintiff must show that the adverse employment action occurred in circumstances that would give rise to an inference of discrimination, and pointing to a clear comparator fellow employee is a very strong method of creating that inference.<sup>112</sup> McGarity's case was decided as a motion for summary judgment, meaning that as long as some evidentiary support existed for the claim, the motion should have been denied.<sup>113</sup> McGarity presented evidence that his supervisor had said that men should not take parental leave and even that he would "get" McGarity when McGarity returned to work after his leave finished.<sup>114</sup> Despite such statements, the court found that the evidence did not justify an inference of discrimination.<sup>115</sup>

Since the McGarity case, the Supreme Court considered *Nevada Department of Human Resources v. Hibbs*,<sup>116</sup> which spoke directly to stereotypes about male caregiving parents.<sup>117</sup> The actual holding of the case did not speak directly to discrimination against caregiving fathers but instead discussed whether state employees could sue a state for monetary damages if the state failed to comply with the FMLA's requirements.<sup>118</sup> Such monetary damages were only available if Congress had abrogated state immunity under its power through the Fourteenth Amendment to enforce equal protection of the laws.<sup>119</sup>

It was important, therefore, to identify the antidiscrimination work performed by the FMLA, which, as the Court put it, was "protect[ing] the right to be free from gender-based discrimination in

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110. *Id.*

111. Bornstein, *supra* note 102, at 1338.

112. *Id.*

113. *McGarity*, 1998 WL 50460, at \*1.

114. *Id.* at \*5.

115. *Id.*

116. 538 U.S. 721 (2003).

117. *Id.* at 725.

118. *Id.* at 724–25.

119. *Id.* at 727.

the workplace.”<sup>120</sup> In explaining how the FMLA protected this right, the Court explicitly addressed stereotypes about societal assumptions assigning caregiving roles to women rather than men.<sup>121</sup> These stereotypes, the Court wrote, and associated “differential leave policies were not attributable to any differential physical needs of men and women but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>122</sup> The Court’s focus was primarily on the effect such stereotypes have on women, summarizing that “Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men,”<sup>123</sup> rather than a more gender-neutral explanation of the harm of stereotypes. That said, the Court’s decision identifies patterns of caregiving as the kind of harmful stereotype that constitutes sex discrimination.

Stephanie Bornstein has argued that targeting discrimination on the basis of nonconformity with gender stereotypes, including a focus on the strand of stereotyping fathers who take on caregiving work, has promise as a broader strategy in the struggle for equality.<sup>124</sup> She acknowledges, however, the deep-seated nature of such stereotypes, and the seven years since her argument’s publication have not yielded any clear victories in court vindicating such an approach.<sup>125</sup> Hegemonic masculinity has thus been implicated in gender stereotyping discrimination claims, but it has not yet been ameliorated through litigation.

Viewed against this background, the initial Trump proposal providing paid parental leave only to women is not a feminist or progressive move at all: it reifies caregiving as women’s work. Parental leave effectuated only as *maternity* leave underscores the gender hierarchy very literally, treating employment as a status that only men can possess unencumbered.<sup>126</sup> Although the later Rubio proposal at least made leave available to any gender, it financially punished parents for taking leave by funding it from their own retirement benefits.<sup>127</sup> This would simply replicate existing calculations in which parents decide whether they can afford to take any unpaid time off.<sup>128</sup> Given the precarious economic position of most American families, it is natural to assume only one parent will take any time off, and as long as the child is the result of pregnancy,

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120. *Id.* at 728.

121. *Id.* at 730.

122. *Id.* at 731.

123. *Id.* at 737.

124. *See* Bornstein, *supra* note 102, at 1333, 1344.

125. *See id.* at 1336–42 (surveying cases in which plaintiffs have alleged gender stereotyping related to caregiving).

126. *See* Cohen, *supra* note 9, at 524–25.

127. *See* Bruenig, *supra* note 11.

128. *See id.*

that parent will almost always be female.<sup>129</sup> The Rubio/Trump plans thus mask their true effect: taking money away from women's retirement.<sup>130</sup> It is increasingly clear that one of the chief causes behind economic inequality between men and women is the effect of childcare responsibilities on women's earnings.<sup>131</sup> The Rubio/Trump plans would exacerbate this, making paid leave today dependent upon decreased retirement funds tomorrow.

### B. *Masculinities and Transgender Servicemembers*

As outlined above, hegemonic masculinity is defined by its opposition to homosexuality.<sup>132</sup> It is easy to understand why the Trump Administration so emphatically targeted transgender people, but masculinities help to explain the urgency of such actions, particularly in the context of the military.

Again, the central principles of hegemonic masculinity are not to be a woman and not to be gay. These two rules often blur together, as homophobia is often tied to stereotypes that equate male homosexuality with feminine behavior.<sup>133</sup>

The vulnerability of men attempting to conform to the mandates of hegemonic masculinity magnify this confusion, often in contexts that heighten the "danger" of failing to be adequately masculine. As Eve Sedgwick has argued, men are in a double bind: hegemonic masculinity tells them not to be gay, but some of the most traditionally masculine environments "involve just the sort of close, emotionally intense, and frequently physical and sexually charged relationships that subject men to the suspicion that they are homosexual."<sup>134</sup> For example, the military is a perfect exercise of hegemonic masculinity in its literal battles for supremacy and traditionally male stereotype, yet it puts men in extremely close quarters under intense mental and emotional pressure.

The background of insecure masculinity helps to explain some of the controversy over previous shifts in military policies allowing nonwhite people, women, and gay and lesbian servicemembers to serve openly. Opening up a previously homogenous group, particularly one that is either exclusively or predominantly male, to new members is fraught.<sup>135</sup> Men at the top of hegemonic masculinity have the furthest to fall and the most to lose if their status as men is

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129. See Rimalt, *supra* note 69 ("Hence, two decades of a federally guaranteed right to a gender-neutral parental leave have not changed traditional leave-taking patterns, wherein working women take relatively long leaves for parental reasons while men take negligible leaves.").

130. See Bruenig, *supra* note 11.

131. See Eichner, *supra* note 21, at 1612.

132. See *supra* notes 45–59 and accompanying text.

133. See Dowd, *supra* note 55, at 222.

134. Harris, *supra* note 80, at 787.

135. See Cohen, *supra* note 9, at 527–28 (providing examples of military resistance to expanding female combat roles).

challenged, so groups of men captured by hegemonic masculinity actively police the conformity of their members.<sup>136</sup> As David S. Cohen explains:

[M]ales crossing gender boundaries threaten perceptions of ingroup cohesiveness and outgroup inferiority; in other words, if gender-nonconforming males were accepted by their male peer groups, they would call into question the cohesive identity of the group of males and risk making women look less inferior. When men display negative and dominating attitudes toward gender-nonconforming males, they also demonstrate to themselves and others that they are not feminine or gay and that they are indeed men and masculine.<sup>137</sup>

Cynthia Lee and Peter Kwan discuss a similar phenomenon in the context of the “trans panic” defense, in which a man argues that his murder of or other violence towards a transgender woman was provoked by her identity.<sup>138</sup> As they explain, the actual (if unconscious) motive of such men is fear: fear that others will find out that he had sex with a transgender woman and think he is homosexual.<sup>139</sup> Murdering his transgender sexual partner is a violent display of hegemonic masculinity and demonstrates that he is disgusted by the idea of sexual activity that others might view as gay.<sup>140</sup>

Obviously, a man engaging in sexual behavior with a transgender woman is not engaged in homosexual behavior: transgender women are women. But this confusion in the minds of such men illustrates the root “danger,” as masculinity would view it, with transgender people: their challenge to the concept of gender as unchangeable and binary.<sup>141</sup> For very obvious reasons, hegemonic masculinity depends upon a gender binary with very identifiable categories of characteristics and behaviors linked to each gender.<sup>142</sup> Transgender people offer a clear challenge to this worldview.<sup>143</sup>

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136. *See id.* at 550.

137. *Id.*

138. Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 80 (2014).

139. *Id.* at 109.

140. *Id.* at 110.

141. Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 SEX ROLES 738, 740 (2013).

142. *See Lee & Kwan, supra* note 138, at 109–10.

143. Janet Dolgin, *Discriminating Gender: Legal, Medical, and Social Presumptions About Transgender and Intersex People*, 47 SW. L. REV. 61, 74 (2017).

1. *Masculinities, the Gender Binary, and Military Service*

Framing claims by transgender people that they have suffered discrimination has been a difficult process, largely because there remains no constitutional or federal antidiscrimination protection that explicitly forbids discrimination on the basis of gender identity.<sup>144</sup> Instead, advocates have often used sex discrimination prohibitions as the operative claim and argued why discrimination against transgender people is an extension of other gendered bias.<sup>145</sup>

Initial legal claims involving transgender plaintiffs were often failures, as opponents to such claims argued that transgender people were, in the eyes of the law, whatever sex they were assigned at birth. One characteristic example occurred in the Texas case *Littleton v. Prange*.<sup>146</sup> The plaintiff, Christie Littleton, was assigned male at birth but identified as female from early childhood (she testified beginning at age three or four).<sup>147</sup> She began searching for a physician to perform gender confirmation surgery when she was just seventeen years old, and she began undergoing treatment leading to confirmation surgery when she was in her twenties.<sup>148</sup>

Christie later married John Littleton, and after his death in 1996 she sought to file a medical malpractice suit against her husband's physician.<sup>149</sup> Under Texas state law, Christie was only a proper person to file the claim if she were a surviving spouse of the decedent.<sup>150</sup> The physician filed a motion for summary judgment, arguing that Christie was a man, and because Texas did not allow or recognize marriages between two people of the same sex, she was not a surviving spouse under the wrongful death statute.<sup>151</sup>

From the very beginning of the opinion, the court took an extremely simplified view of the issues involved. The decision begins:

144. See Nicholas Fandos, *House Democrats' Agenda: Ethics, Infrastructure and Medical Legislation*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/house-democrats-nancy-pelosi.html> (discussing potential future federal legislation that would explicitly protect against discrimination on the basis of gender identity).

145. Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protection Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC'Y 245, 254–56 (2013).

146. 9 S.W.3d 223 (Tex. App. 1999).

147. *Id.* at 224.

148. *Id.* In part because of changes in accepted terms and perhaps in part because of the court's skepticism toward Christie's claims, the court uses many terms that are now considered outdated at best and offensive at worst (one example is sex reassignment surgery, now often referred to as gender confirmation surgery). I have changed terms where appropriate in my summary, and generally refer to the GLAAD Media Reference Guide as a helpful resource. *GLAAD Media Reference Guide – Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Feb. 2, 2019).

149. *Littleton*, 9 S.W.3d at 225.

150. *Id.*

151. *Id.*

This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries.<sup>152</sup>

Although the question of the legal recognition of a transgender person's gender identity was one of first impression in Texas at the time,<sup>153</sup> the court briefly summarized the relatively small number of previous cases answering similar questions, including an English case from 1970,<sup>154</sup> one New York case,<sup>155</sup> one Ohio case,<sup>156</sup> and one case from New Jersey.<sup>157</sup> The last case was the only case to have found that a marriage between a cisgender male husband and a transgender female wife was legally valid.<sup>158</sup>

Although the court acknowledged that some jurisdictions allowed transgender people to change their birth certificates to conform with their gender identity, in the absence of specific action by the Texas legislature, the court took an extremely unsympathetic view towards Christie's gender identity, which it referred to abstractly as "fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics" and "the misty fields of sociological philosophy."<sup>159</sup> Ignoring any nuanced discussion, the court summarized that Christie's "female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied."<sup>160</sup> The decision finished:

At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court.

There are some things we cannot will into being. They just are.<sup>161</sup>

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152. *Id.* at 223–24.

153. *Id.* at 230.

154. *Id.* at 226 (citing *Corbett v. Corbett*, [1971] P 83 (Eng.)).

155. *Id.* at 227 (citing *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971)).

156. *Id.* at 228 (citing *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987)).

157. *Id.* at 227–28 (citing *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).

158. *Id.*

159. *Id.* at 231.

160. *Id.*

161. *Id.*

Such early cases, viewed charitably, simply treated transgender people as confused, even if genuinely so.<sup>162</sup> Most judges at the time considered sex assigned at birth to be immutable. Characteristic of this perspective, the judge in Christie’s case ignored the fact that Christie had identified as female since very early childhood and lived as John Littleton’s wife for seven years.<sup>163</sup> This logic also ignored the complications of sex as a binary category, when in fact a range of factors create more of a bimodal than a binary distribution even before transgender people are considered.<sup>164</sup> The *Littleton* court did not explicitly voice many clear expressions of hegemonic masculinity—although one notable exception was a wincing reference to Christie’s medical treatment as “including a surgery that would make most males pale and perspire to contemplate.”<sup>165</sup> But the absolute rejection of any gray areas in the line between male and female (and masculine and feminine) is symptomatic of hegemonic masculinity’s dependence upon clear categories.

Christie Littleton did not raise an explicit antidiscrimination claim.<sup>166</sup> Later plaintiffs began framing such claims, although not with universal success. The United States Court of Appeals for the Tenth Circuit, for example, rejected such a claim in *Etsitty v. Utah Transit Authority*.<sup>167</sup> Krystal Etsitty, a transgender woman, worked for the Utah Transit Authority as a bus driver.<sup>168</sup> When she first applied for the job and began working, she used the name given to her at birth (Michael) and presented as stereotypically masculine.<sup>169</sup> If bus drivers needed to use restrooms while they were driving their routes, they used public restrooms, so initially Etsitty used male restrooms.<sup>170</sup> Shortly after she began work, however, she met with a supervisor, explained that she was transgender, and notified him that she would begin presenting as feminine or female at work.<sup>171</sup> After she began doing this, she started using female restrooms as needed as she drove her routes.<sup>172</sup>

A higher-up supervisor at the Transit Authority learned about Etsitty and expressed concerns in a meeting with her that, because she had not had gender confirmation surgery, a member of the public

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162. See, e.g., *id.* at 224, 226 (noting how Christie’s “[p]roblems with her sexual identity developed early” and how “[i]n her mind, she has corrected her physical features to line up with her true gender”).

163. *Id.* at 224, 227.

164. See Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination* “Because of . . . [Perceived] Sex”, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 62–63 (2010).

165. *Littleton*, 9 S.W.3d at 231.

166. See *id.* at 225.

167. 502 F.3d 1215, 1221 (10th Cir. 2007).

168. *Id.* at 1218–19.

169. *Id.*

170. *Id.* at 1219.

171. *Id.*

172. *Id.*

might see “a UTA employee with male genitalia . . . using the female restroom.”<sup>173</sup> After the meeting, Etsitty was placed on administrative leave and later fired.<sup>174</sup>

Etsitty challenged her termination as gender discrimination prohibited by Title VII.<sup>175</sup> She offered two theories of how her firing violated Title VII: first, she argued that discriminating against a transgender person was quite literally discriminating against them because of their sex.<sup>176</sup> Second, she argued that her employer also discriminated against her for failing to conform to stereotypes about men, citing *Price Waterhouse v. Hopkins*.<sup>177</sup>

The court swiftly rejected her first argument, quoting the United States Court of Appeals for the Seventh Circuit to say that Title VII’s prohibition of discrimination on the basis of sex means that it is “unlawful to discriminate against women because they are women and men because they are men.”<sup>178</sup> The court concluded that “[i]n light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual.”<sup>179</sup>

The court’s treatment of Etsitty’s stereotyping claim was slightly less simplistic. The court assumed without deciding that a *Price Waterhouse*-esque theory of stereotyping could present a viable claim under the circumstances, and that Etsitty had satisfied her initial burden of establishing the claim.<sup>180</sup> The court found, however, that the Utah Transit Authority had successfully shown a legitimate, nondiscriminatory reason for firing Etsitty: namely, that she would be using a public women’s restrooms as needed while driving her routes.<sup>181</sup> The court treated bathrooms as simply beyond the bounds of gender stereotypes: “However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.”<sup>182</sup>

The court’s reasoning betrays several problematic concepts that fit in hegemonic masculinity’s worldview. First, there is the description of Etsitty as “biologically male.”<sup>183</sup> This appears to refer

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173. *Id.*

174. *Id.*

175. *Id.* at 1219–20.

176. *Id.* at 1221.

177. *Id.*

178. *Id.* (quoting *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

179. *Id.* at 1222.

180. *Id.* at 1224.

181. *Id.* (explaining that the court agreed that the Utah Transit Authority’s concern that the use of women’s public restrooms by a biological male could result in liability for the Utah Transit Authority was a legitimate, nondiscriminatory business reason).

182. *Id.*

183. *Id.* at 1226.

to the fact that Etsitty had not had gender confirmation surgery, so that one of her supervisors explained in a deposition that “there was an image issue out there for us, that we could have a problem with having someone who, even though his appearance may look female, he’s still a male because he still had a penis.”<sup>184</sup> As referenced above, genetic and biological determinations of gender go far beyond whether a person has a penis or not, yet the court found that in context such a reductive binary view of sex was not proof of discrimination.<sup>185</sup> Second, there is the conclusory nature of the statement that bathrooms are an inappropriate context in which to apply a frame of gender stereotypes,<sup>186</sup> without any meaningful supporting analysis. The use of gender-segregated bathrooms by transgender people remains a politically fraught issue, but as a conceptual question it is not clear why Etsitty’s entrance into a public bathroom would be an issue for the public where her public service as a bus driver would not. One can imagine justifications: a greater concern for privacy is one currently raised in debates about bathroom access, for example.<sup>187</sup> But the court offers no further explanation and takes it as self-evident that bathrooms somehow do not implicate gender stereotypes, only biological sex.<sup>188</sup>

This leads into the third issue with the court’s logic: if gender stereotypes were irrelevant to bathroom usage, then Etsitty could have alleviated her supervisor’s concern by using public *male* bathrooms. But obviously that would have been even *more* problematic from her supervisor’s perspective: if the tiny risk that a member of the public would see Etsitty’s genitals in a female bathroom was enough to justify firing her, certainly an employee who, to all external appearances, was a woman walking into a male bathroom would be an even larger problem. The “problem,” in other words, was not that Etsitty was using the “wrong” bathroom—it is that she was using any bathroom at all, given that her supervisors (and the court) saw her as inextricably challenging their narrow idea of gender. Consistent with hegemonic masculinity’s reliance on gender as an unchangeable binary, Etsitty could not be allowed to change genders, nor could she exist in between genders. Each person must be irreversibly slotted into one of two categories, and anyone who challenged the categories themselves must be removed to the extent possible from public life.<sup>189</sup>

More recent cases take a very different approach to such claims. For example, in 2011, Vandiver Elizabeth Glenn, a transgender

184. *Id.* at 1225.

185. *See id.* at 1224; Gelfman, *supra* note 164, at 55–57.

186. *See Etsitty*, 502 F.3d at 1224.

187. *See* Scott W. Gaylord & Thomas J. Molony, *Individual Rights, Federalism, and the National Battle Over Bathroom Access*, 95 N.C. L. REV. 1661, 1663, 1667 (2017).

188. *See Etsitty*, 502 F.3d at 1224.

189. *See* Gelfman, *supra* note 164, at 56–57.

woman, was successful in arguing a gender stereotype claim before the United States Court of Appeals for the Eleventh Circuit.<sup>190</sup> Glenn was hired by the Georgia General Assembly's Office of Legislative Counsel ("OLC") in 2005, before she began to present her gender identity as female.<sup>191</sup> The following year, she told her supervisor that she was transgender and would begin transitioning her presentation of gender identity in the future.<sup>192</sup> She subsequently came to work on Halloween, when employees could all dress in costume, presenting as female.<sup>193</sup> Another supervisor told her to leave work and expressed prejudicial statements about how "unnatural" and "unsettling" it was to "to think of someone dressed in women's clothing with male sexual organs inside that clothing."<sup>194</sup> Several months later, when Glenn notified a supervisor that she was changing her legal name and would be coming to work presenting as a woman in the future, she was fired.<sup>195</sup> Glenn later sued her employer for, among other things, sex discrimination.<sup>196</sup>

The Eleventh Circuit, in contrast to the *Etsitty* court, found that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."<sup>197</sup>

In another parallel to *Etsitty*, because Glenn sued under the Equal Protection Clause of the Fourteenth Amendment rather than Title VII, her employer could have avoided liability if it had an exceedingly persuasive reason for its actions.<sup>198</sup> Her supervisor offered one: the concern that other female employees would object to Glenn using a women's bathroom.<sup>199</sup> The court seemed skeptical of the supervisor's very speculative concern even in the abstract, but the simple fact that the OLC had only single-occupancy restrooms undercut the idea entirely.<sup>200</sup>

The Eleventh Circuit's approach has been much more successful in recent years, but transgender legal claims have certainly not been universally successful. Challenges to the Trump Administration's attempted ban of transgender servicemembers, however, have up to the point of this Article going to press been extremely successful, albeit in early stages of litigation.

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190. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

191. *Id.* at 1314.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 1316.

198. *Id.* at 1321.

199. *Id.*

200. *See id.*

For example, the United States District Court for the District of Columbia applied heightened scrutiny, reasoning that transgender people are at least a quasi-suspect class.<sup>201</sup> The court also stated that banning transgender servicemembers was a form of gender discrimination, because the ban punished transgender people for failure to conform to gender stereotypes.<sup>202</sup> The court summarized very succinctly why transgender people offer such a challenge to gender stereotypes: “The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.”<sup>203</sup>

A later decision in a Maryland district court reached the same result, simply citing the D.C. court’s analysis and saying it agreed that the ban on transgender servicemembers was discrimination on the basis of gender.<sup>204</sup> The United States District Court for the Central District of California noted that the Ninth Circuit Court of Appeals had “strongly suggested that discrimination on the basis of one’s transgender status is equivalent to sex-based discrimination,”<sup>205</sup> and in turn approvingly cited the D.C. and Maryland decisions.<sup>206</sup> Going even further, the United States District Court for the Western District of Washington agreed with the previous decisions, finding that transgender people were in fact a suspect class.<sup>207</sup>

After the initial wave of litigation, President Trump directed then-Secretary of Defense Mattis to address the issue of transgender servicemembers on behalf of the Department of Defense.<sup>208</sup> Secretary Mattis later presented a memorandum to President Trump in February 2018 which ostensibly replaced the early reversal.<sup>209</sup> The Trump Administration subsequently argued that because the later plan “purports not to be a blanket ban on all ‘transgender individuals,’” existing lawsuits were mooted.<sup>210</sup> Multiple courts rejected this logic, noting that the policy had almost exactly the same

201. Doe 1 v. Trump, 275 F. Supp. 3d 167, 208 (D.D.C. 2017).

202. *Id.* at 209–10.

203. *Id.* at 210.

204. Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (citing Doe 1 v. Trump, 275 F. Supp. 3d 167, 208–10 (D.D.C. 2017)).

205. Stockman v. Trump, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, at \*15 (C.D. Cal. Dec. 22, 2017).

206. *See id.*

207. Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at \*9 (W.D. Wash. Apr. 13, 2018).

208. Helene Cooper & Thomas Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in the Military*, N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html>.

209. *See Military Service by Transgender Individuals*, 83 Fed. Reg. 13,367 (Mar. 23, 2018).

210. *See, e.g., Doe 2 v. Trump*, 315 F. Supp. 3d 474, 481–83 (D.D.C. 2018).

effect as a blanket ban of transgender servicemembers.<sup>211</sup> As the United States District Court for the District of Columbia stated:

[T]he Mattis Implementation Plan has not mooted Plaintiffs' claims because that plan is not a "new policy" that is meaningfully distinct from the President's 2017 directives that were originally challenged in this case. Instead, at a fundamental level, the Mattis Implementation Plan is just that—a plan that implements the President's directive that transgender people be excluded from the military.<sup>212</sup>

Despite the success of cases thus far, it seems likely that the Trump Administration will continue to defend the ban of transgender servicemembers and, given the replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh,<sup>213</sup> the Supreme Court will likely be significantly less sympathetic to LGBTQ plaintiffs and antidiscrimination claims. In what may be an early signal of the Court's future decisions, in January 2019 the Court lifted two injunctions of the transgender servicemember ban, allowing the military to begin implementing the ban as litigation challenging the policy continued in lower courts.<sup>214</sup> Additionally, the Trump Administration has reversed previous agency positions as to a variety of antidiscrimination protections, including Title VII<sup>215</sup> and Title IX,<sup>216</sup> making clear that this is a far-reaching strategy to reject characterization of gender stereotyping as a form of sex discrimination.

Looking at the Trump Administration's actions through the lens of masculinities studies, it is clear that a major reason for the absolute hostility to transgender Americans is rooted in hegemonic masculinity. To admit that transgender people face similar issues of gender discrimination as Ann Hopkins did at Price Waterhouse is to acknowledge that any deviation from the extreme norms of hegemonic masculinity is merely one step down a path that challenges the very concept of gender as binary. Further, transgender people serving in the military bring that challenge into the heart of an activity and

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211. See *id.* at 482; *Stockman v. Trump*, 331 F. Supp. 3d 990, 1000 (C.D. Cal. 2018).

212. *Doe 2 v. Trump*, 315 F. Supp. 3d at 484 (original emphasis omitted).

213. See Alana Abramson, *Brett Kavanaugh Confirmed to Supreme Court After Fight That Divided America*, TIME (Oct. 7, 2018, 5:11 PM), <http://time.com/5417538/bett-kavanaugh-confirmed-senate-supreme-court/>.

214. See Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>.

215. See William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 323 (2017).

216. See Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not*, 29 YALE J.L. & FEMINISM 373, 375–76 (2018).

culture that hegemonic masculinity sees as uniquely and inherently masculine, characterized by hierarchy, competition, and violence.<sup>217</sup> It is easy to understand, in other words, why an administration captured by the values of hegemonic masculinity would perceive transgender servicemembers as such a threat and take such sudden and public actions ejecting transgender soldiers from the military and preventing any more from enlisting.

#### IV. CONCLUSION

The Trump Administration's actions supporting paid parental leave and opposing service of transgender people in the military are not two warring impulses or conflicting ideological moves. They are consistent with a single ideology, that of hegemonic masculinity. The obvious next question is whether that presents advocates with any clear strategies for combating hegemonic masculinity in general, and these policies in particular.

In a political sense, one of the key insights of masculinities studies is to recognize that although patriarchal systems oppress anyone who is not a man, hegemonic masculinity also oppresses men. Even men at the hypothetical top of the hegemonic masculinity food chain are vulnerable in the sense that their achievement is perpetually in jeopardy, one that demands that masculinity be performed over and over to prevent other men from overtaking them. For the vast majority of men, moreover, the strictures of hegemonic masculinity are alienating and punitive. Greater recognition of the shared experiences of victimization by hegemonic masculinity and its values brings more people together in opposition. For example, during the hearings about Justice Brett Kavanaugh's nomination to the Supreme Court, after multiple allegations of sexual assault arose from his years in high school and college, many commentators tried to dismiss the allegations because "boys will be boys."<sup>218</sup> The vast majority of teenage boys never sexually assault anyone, and it is profoundly insulting to those people to imply that they did. Calling out examples of hegemonic masculinity and universalizing what is not universal behavior places more people, including men, on the side of questioning hegemonic masculinity's assumptions about the world, and, one hopes, questioning how those assumptions play into policy.

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217. See generally Jamie R. Abrams, *Examining Entrenched Masculinities in the Republican Government Tradition*, 114 W. VA. L. REV. 165 (2011).

218. See Megan Garber, *Brett Kavanaugh and the Revealing Logic of 'Boys Will Be Boys'*, THE ATLANTIC (Sept. 17, 2018), <https://www.theatlantic.com/entertainment/archive/2018/09/brett-kavanaugh-and-the-revealing-logic-of-boys-will-be-boys/570415/>; Jonathan Zimmerman, Opinion, *Is Brett Kavanaugh a Nice Guy? That's Irrelevant. So Is Alleged Sexual Assault as a Teen*, USA TODAY (Sept. 16, 2018, 5:04 PM), <https://www.usatoday.com/story/opinion/2018/09/16/what-kavanaugh-did-teen-irrelevant-so-whether-hes-nice/1328274002/>.

In the legal context, focusing on shared vulnerability suggests a revitalization of a famous strategy employed by Justice Ruth Bader Ginsburg in her own years as an activist. Justice Ginsburg used men as plaintiffs in several landmark cases challenging gender discrimination: although the individual claims being vindicated benefited men, the principles of gender equality benefited all genders.<sup>219</sup> Particularly given the Trump Administration's success filling judicial vacancies in all levels of the federal courts, the pace of legal evolution toward a just understanding of gender is likely to slow, if not reverse. Trump-appointed judges are likely to be far less sympathetic to female and LGBTQ plaintiffs. They may, however, be more sympathetic to plaintiffs presenting cases of shared vulnerability, where the legal implementation of hegemonic masculinity hurts someone who looks like them (overwhelmingly male and white).

This emphasis on the universal harm of hegemonic masculinity will not work universally, and if the recent resurgence of reactionary political forces subsides, it may not be necessary as a political or legal strategy in the long term. The Trump presidency, however, has developed into an undeniable example of how much damage hegemonic masculinity inflicts when it captures powerful institutions. However, the Trump brand of hegemonic masculinity is defeated, it will stand as a warning for generations to come.

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219. See *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, <https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> (last visited Feb. 2, 2019).