

## MEN AT WORK, FATHERS AT HOME: UNCOVERING THE MASCULINE FACE OF CAREGIVER DISCRIMINATION

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### *Abstract*

*Despite their many workplace advances, women remain constrained by an enduring social expectation that they will manage their families' domestic lives. Women will not achieve full workplace equality until men do more at home, and men will not enter the domestic sphere if they face employment retaliation for doing so. Men at Work, Fathers at Home addresses this problem by critically evaluating the legal challenges that fathers and other male caregivers face in proving claims of workplace discrimination. Drawing from Supreme Court precedent and gender theory, the Article explains how masculine norms deter men from asserting their caregiving needs at work, while undermining their ability to prosecute discrimination claims in court. By examining how these men can combat biases against male caregiving, the Article seeks to advance the goal of gender equality for both sexes.*

### INTRODUCTION

Women are quickly closing some of the most glaring gaps that have divided the sexes for generations. For example, they now earn more college degrees than men<sup>1</sup> and constitute

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1 BRAD HARRINGTON ET AL., THE NEW DAD: CARING, COMMITTED, AND CONFLICTED 3 (2011) (noting that women earn fifty-seven percent of bachelor's degrees and sixty percent of master's degrees); Mary Lou Santovac, *Women and Negotiations: Don't Wait to Be Asked/Offered*, WOMEN HIGHER EDUC., Nov. 1, 2011, at 22 (discussing strategies women can employ to achieve workplace gains); Katie Ziegler, *Hitting the Glass Dome*, ST. LEGISLATURES, July 1, 2009, at 30 (describing gains made by women in law, medicine, business, and politics).

a majority of professionals and managers in the U.S. labor force.<sup>2</sup> Although women still lag behind men in many important areas such as income, executive control, and political representation,<sup>3</sup> their ascendance in other sectors has given rise to a number of bold predictions that the “End of Men”<sup>4</sup> is upon us and that we will soon witness “the Big Flip”<sup>5</sup> when women overtake men in wages, wealth, and social power. However, one enormous barrier still stands in the way of women’s workplace advancement: the enduring expectation that they will manage their families’ domestic lives. Rooted in cultural mores and social practices, care work remains highly feminized work that most men are reluctant to perform.<sup>6</sup>

The notion that fathers would partially relieve women of this burden remains mostly an unrealized hope. Although second-wave feminists assumed that by enabling women to engage in wage work, men’s proportional share of household contributions would increase significantly,<sup>7</sup> that goal has not yet been achieved. Women today continue to work the “second shift” of unpaid domestic chores that Arlie Hochschild famously identified more

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2 U.S. BUREAU OF LABOR STATISTICS, *WOMEN IN THE LABOR FORCE: A DATA BOOK 2* (2013) (discussing women’s labor force participation by occupation and industry); see also LIZA MUNDY, *THE RICHER SEX: HOW THE NEW MAJORITY OF FEMALE BREADWINNERS IS TRANSFORMING SEX, LOVE, AND FAMILY* 6 (2012) (ascribing some of the gains made by women to a “gradual lifting of discriminatory practices”).

3 See Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 68 J. SOC. ISSUES (forthcoming 2013) (manuscript at 27) (on file with author) (noting that women still lag far behind men in terms of leadership positions despite their general gains in workforce representation); Stephanie Coontz, *The Myth of Male Decline*, N.Y. TIMES, Sept. 29, 2012, at SR1 (arguing that reports of male decline tend to exaggerate the shift in power from men to women).

4 HANNA ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* 4–5 (2012); Hanna Rosin, *The End of Men*, ATLANTIC, July/Aug. 2010, at 60 (noting that the “recession merely revealed—and accelerated—a profound economic shift that has been going on for at least 30 years, and in some respects even longer”).

5 MUNDY, *supra* note 2, at 6 (asserting that huge changes in gender dynamics are “just around the corner”).

6 See Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 313 (2004) (noting that women perform eighty percent of childcare tasks and that parenthood has a negative effect on women’s earnings).

7 See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 421 (2001) (concluding that the goal of having men perform more childcare “has not materialized”); see also Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 125 (2010) (summarizing the view among sex equality advocates during the 1970s that laws that drive men away from the domestic sphere inhibit women’s activity in the public sphere).

than twenty years ago.<sup>8</sup> Thus, despite some gains in men's contributions, women still assume eighty percent of childcare responsibilities and perform more than seventy percent of household work.<sup>9</sup>

These obsolete modes of domestic behavior have profound consequences for women. More than eighty percent of working women will become mothers in the course of their careers, and when they do their workplace advancement will end abruptly.<sup>10</sup> While young, childless women earn roughly the same wages as men, their earnings plunge to sixty percent of fathers' wages once they have children.<sup>11</sup> Although discrimination explains part of this "motherhood penalty,"<sup>12</sup> the fact remains that parenthood causes women to work dramatically fewer hours outside the home, while men increase their wage work after having children.<sup>13</sup> Thus, men remain bound by, and largely conform to, the historical expectation that they will provide for their families, avoid caregiving, and rely on their wives and partners to attend to domestic work.<sup>14</sup>

Women will not attain full equality at work until men do more at home. Today we hear descriptions of modern, "involved" fathers who want to trade wages for family time

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8 ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

9 Kaminer, *supra* note 6, at 313–14 (noting that the pay gap between men and women is mostly attributable to differing caregiving responsibilities, as opposed to differences in education or work experience); Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 437 (2007) (analyzing the normative force behind traditional divisions of labor).

10 Kaminer, *supra* note 6, at 312–13 (discussing earning losses associated with motherhood); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1325 (2008) (discussing different caregiving responsibilities women assume throughout their careers).

11 Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 77–78 (2003) (discussing the role that motherhood plays in creating a wage gap between men and women).

12 Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 68 J. SOC. ISSUES (forthcoming 2013) (manuscript at 5) (on file with author) (noting that many employers perceive mothers to have a lower work commitment).

13 *Id.* at 7 (explaining that the "fatherhood bonus" men enjoy after having children is largely attributable to the fact that fathers work more hours than childless men); Palazzari, *supra* note 9, at 439–40 (observing that "when a baby comes along, men go to work and women go home").

14 See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1066 (1994) (arguing that women who appear to "choose" to work fewer hours after having children "in reality have no choice").

to play more active roles in their children's lives.<sup>15</sup> In reality, though, most men pay mere lip service to such ideals, "talking the talk" about equal caregiving but failing to alter their work patterns in ways that actually create more time for childcare.<sup>16</sup> Nevertheless, a few men have begun to offer an alternative model. These fathers resist cultural expectations that result in uninvolved fathering.<sup>17</sup> They spend more time with their children than fathers have at any time since experts began measuring male caregiving.<sup>18</sup> This diverse group includes at-home fathers, single fathers, shared-custody fathers, gay fathers, and fathers who simply refuse to pay the emotional price of detached parenting. This Article is about them and the legal tools they can employ to combat employer resistance to male care work.

Legal claims that involve "family responsibilities discrimination" have risen to prominence only in the last decade.<sup>19</sup> Plaintiffs in these cases (typically women) characterize workplace discrimination based on care work as a form of illegal sex discrimination.<sup>20</sup> To date, these claims have been remarkably successful for women, winning at a rate nearly

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15 See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 922 (2005) (discussing the increased emphasis on the idea of fathers as nurturers); Tara Parker-Pope, *Now, Dad Feels as Stressed as Mom*, N.Y. TIMES, June 19, 2010, at WK1 (explaining how men increasingly express the desire to interact with their children).

16 JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 59 (2010) (noting that men's verbal commitments to greater gender equality do not necessarily result in greater contributions to household work).

17 See HARRINGTON ET AL., *supra* note 1, at 4 (attributing the shift to economic anxiety and changing attitudes among young men); see also Jeremy Adam Smith, *What Men Have to Do*, N.Y. TIMES, July 6, 2011, <http://www.nytimes.com/roomfordebate/2011/07/05/how-can-we-get-men-to-do-more-at-home/gender-equality-is-in-the-hands-of-men> (explaining how some men resist a model of fatherhood that perpetuates the ideal of "pure breadwinning").

18 JEREMY ADAM SMITH, *THE DADDY SHIFT: HOW STAY-AT-HOME DADS, BREADWINNING MOMS, AND SHARED PARENTING ARE TRANSFORMING THE AMERICAN FAMILY* xi (2009) (discussing the amount of time men spend fathering today).

19 See WILLIAMS, *supra* note 16, at 29 (summarizing data showing that the number of such claims quadrupled from 2000 to 2010); Katherine Van Wezel Stone et al., *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools, Section on Employment Discrimination Law*, 10 EMP. RTS. & EMP. POL'Y J. 233 (2006) (same); Michelle A. Travis et al., *Gender Stereotyping: Expanding the Boundaries of Title VII: Proceedings of the 2006 Annual Meeting, Association of American Law Schools, Section on Employment Discrimination Law*, 10 EMP. RTS. & EMP. POL'Y J. 271, 285 (2006) (same) [hereinafter *Gender Stereotyping*].

20 See Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1285–86 (2008) (noting the success plaintiffs have had in arguing that family responsibilities discrimination is a form of sex discrimination under Title VII).

twice that of other civil rights claims.<sup>21</sup> Yet, as with the feminization of family leave and other work-family policies, the issue of caregiver discrimination has been relegated to the long list of “women’s issues” that men mostly marginalize or ignore.<sup>22</sup>

In contrast to women, only a small number of men have asserted claims alleging caregiver discrimination.<sup>23</sup> Although some of these men have successfully challenged basic denials of family leave, courts have been less sympathetic to more complicated allegations of gender bias brought by male caregivers.<sup>24</sup> The failure of these claims, however, does not mean that only women suffer from caregiver discrimination. In fact, stories abound involving employers that harass men for taking paternity leave, demote male employees for attending their partners’ medical appointments, and fire fathers for staying home with sick children.<sup>25</sup> Women will not achieve full workplace equality until men do more at home, and men will not enter the domestic sphere if they continue to face employment retaliation for doing so.

Drawing from antidiscrimination law and gender theory, this Article develops a legal framework for challenging such instances of workplace discrimination against male caregivers. Part I explains how working mothers have successfully utilized anti-stereotyping theories to oppose workplace discrimination, whereas caregiving men have thus far failed to effectively combat the distinct stereotypes they experience at work. Because family responsibilities discrimination often involves gender stereotyping, Part II engages in a detailed analysis of the gender stereotypes associated with male caregiving. Utilizing the study of masculinities to frame the discussion, this section examines the gendered presumptions that caregiving men unconsciously challenge.

Masculinities theory, an interdisciplinary field that draws from sociology, psychology, feminist theory, and queer theory,<sup>26</sup> posits that masculinity is something that men “do” rather

21 *Gender Stereotyping*, *supra* note 19, at 285–86 (discussing parental status discrimination).

22 *Id.* at 286.

23 Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1326 (2012) (discussing claims involving caregiver bias against men).

24 *Id.* (explaining how “many courts” have failed to apply this theory to men).

25 See, e.g., Albiston et al., *supra* note 20, at 1300–01 (discussing examples of gender bias against working fathers); Joan C. Williams & Allison Tait, “*Mancection*” or “*Momcession*”? : *Good Providers, A Bad Economy, and Gender Discrimination*, 86 CHI.-KENT L. REV. 857, 865–66 (2011) (listing various forms of discrimination male caregivers encounter at work).

26 Ann C. McGinley, Ricci v. DeStefano: *A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581,

than something that men “have.”<sup>27</sup> Men perform their masculinity for other men to prove that they are not women and not subordinated men.<sup>28</sup> Men’s multiple performances explain why theorists favor the term “masculinities” over “masculinity” in order to emphasize the many behaviors men exhibit in different contexts.<sup>29</sup> A man’s success or failure in these daily performances generates a hierarchy among men as they constantly strive to establish and reestablish their masculinity within the group.<sup>30</sup> Because men define masculinity in oppositional terms against people and images that they are *not*, Part II outlines the negative performances that the typical, non-caregiving man stages to comply with the dominant masculine order. In short, a “real” man with children must prove that he is: (1) not nurturing, (2) not dependent, and (3) not vocal about his work-family problems. In contrast, if a man resists these performances, for example, by taking paternity leave or requesting time off to attend a school event, he disobeys the male code and faces immediate sanctions.

Utilizing the foregoing framework for evaluating the biases that caregiving men encounter, Part III analyzes the Supreme Court’s treatment of male caregivers through the lens of masculinities theory. The Court has strongly championed the cause of male caregivers on two occasions.<sup>31</sup> Both cases involved men engaged in care work: a husband who nursed his wife after a debilitating car accident,<sup>32</sup> and a father who cared for his infant after the mother’s tragic death.<sup>33</sup> Two gendered themes animated each decision: female absence and male breadwinning. In both cases, the wife or mother associated with the male plaintiff was either dead or incapacitated. Consistent with the masculine performances

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585 (2010) (defining masculinities as socially constructed identities that men perform for other men).

27 Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 782 (2000) (noting that other identity factors such as race, class, and sexual orientation give rise to multiple masculinities).

28 Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 707–08 (2011) (discussing the foundations of masculinities theory).

29 Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 685 (2009) (explaining how men take different gendered positions depending on cultural context); Dean Lusher & Garry Robins, *Hegemonic and Other Masculinities in Local Social Contexts*, 11 MEN & MASCULINITIES 387, 411 (2009) (discussing the “different configurations of masculinity”).

30 See NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 7 (2010) (noting that a detailed study of masculine identities can serve as an effective strategy for “degendering structures and cultures”) [hereinafter DOWD, *THE MAN QUESTION*].

31 Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

32 Hibbs, 538 U.S. 721.

33 Wiesenfeld, 420 U.S. at 636.

identified in Part II, the men continued to prove their manhood through breadwinning. Although these men resisted the dominant call to disregard their caregiving obligations, they did so in the context of female absence, while satisfying the providership expectation placed upon them by dominant masculine norms.

After a discussion of the gender stereotypes associated with caregiving men and the legal treatment they have received thus far, Part IV considers the unique challenges they face going forward. The Article explains why men who perform care work tend to disrupt gender hierarchies much more profoundly than caregiving women. Their threat to the gendered order may explain in part why courts have been less receptive to claims brought by male caregivers. Unlike men in the past who succeeded before the Supreme Court while abiding by the dominant rules of masculinity, male caregivers who wholly reject masculine ideals face harsher sanctions at work and less sympathy from judges. Without a method for understanding the nature of their gender-based transgressions, some courts may sympathize with employers that punish acts of male caregiving, thereby bolstering traditional notions of masculinity and undermining any change. Here, the study of masculinities offers an effective translative tool. By highlighting the surprisingly elusive fact that men, like women, are gendered beings who can be punished for deviating from prescribed roles, masculinities theory shines a light on the punishments that certain men endure for their gender nonconformity. In addition, the theory identifies specific masculine stereotypes that operate at work to discourage men from engaging in caregiving, thereby providing the foundation for the anti-stereotyping claims these men might pursue in court.<sup>34</sup> As such, the study of masculinities provides a powerful tool for decoding the gendered acts of male caregivers and the workplace punishments that flow from those acts.

This project is as much about workplace equality for women as it is gender equality for men. Although men enjoy many benefits in terms of social power and dominance,<sup>35</sup> they also pay a price for their privilege.<sup>36</sup> For example, the rule of masculinity that calls on men to remain silent and ignore their caregiving responsibilities comes at a cost to

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34 See Andrea Doucet, *"It's Almost Like I Have a Job, but I Don't Get Paid": Fathers at Home Reconfiguring Work, Care and Masculinity*, 2 FATHERING 277, 296 (2004) (explaining how at-home fathers contest and reconstruct certain masculinities); Maldonado, *supra* note 15, at 1001–02 (describing how norms conform to community expectations about acceptable behavior).

35 Nancy E. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 28 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (explaining how men benefit from male dominance) [hereinafter Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*].

36 DOWD, THE MAN QUESTION, *supra* note 30, at 2–3 (discussing the “burdens of masculinity”).

men's interpersonal relationships and emotional well-being.<sup>37</sup> But a number of fathers now question these expectations.<sup>38</sup> Refusing to engage in the masculine performances of stoicism and complete providership, they offer an alternative masculinity that can “empower men to disempower themselves.”<sup>39</sup> This Article seeks to further that goal by examining the legal tools male caregivers can employ in the decades to come.

## I. Caregiver Discrimination and Gender Stereotyping

Claims involving sex discrimination in the workplace have evolved considerably since the enactment of Title VII of the Civil Rights Act of 1964.<sup>40</sup> Initially, women who sued under Title VII attacked the most obvious forms of discrimination at work such as sex-based job classifications or harassment.<sup>41</sup> Eventually second-generation theories identified more complicated forms of mistreatment such as intersectional discrimination and discrimination based on identity performances.<sup>42</sup> Although courts have viewed these more recent claims with some skepticism, one second-generation theory that has experienced

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37 See WILLIAMS, *supra* note 16, at 83 (explaining how the “straightjacket of conventional masculinity” harms even those men who appear to succeed in satisfying masculine norms); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1113 (1996) (arguing that gender role stereotypes give rise to “universal harms”).

38 See SMITH, *supra* note 18, at xi (describing fathers who perform a greater share of caregiving tasks than their predecessors).

39 Carrie Paechter, *Masculine Femininities/Feminine Masculinities: Power, Identities, and Gender*, 18 GENDER & EDUC. 253, 257 (2006) (citing Peter Redman, “Empowering Men to Disempower Themselves”: *Heterosexual Masculinities, HIV and the Contradictions of Anti-Oppressive Education*, in UNDERSTANDING MASCUINITIES: SOCIAL RELATIONS AND CULTURAL ARENAS 168–79 (Máirtín Mac an Ghaill ed., 1996)).

40 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-7 (2000)).

41 See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 801–02 (2011) (explaining why courts generally do not view dress and grooming codes as equivalent to instances of first-generation discrimination); see also David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 513–14 (2010) (tracking the evolution of Title VII and constitutional challenges to sex-based classifications in the 1960s and 1970s) [hereinafter Cohen, *Keeping Men “Men” and Women Down*].

42 See Goldberg, *supra* note 41, at 765 (discussing the difficulty of identifying comparator employees in cases involving intersectional discrimination); see also Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 832–40 (1994) (discussing arguments for and against the theory of intersectionality in Title VII litigation); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (describing Title VII’s “single-axis framework”).



remarkable success involves discrimination based on caregiving responsibilities.<sup>43</sup>

### A. The Mother's Antidiscrimination Framework

Originally labeled “maternal wall discrimination” and now called “family responsibilities discrimination,”<sup>44</sup> claims alleging caregiver discrimination have been brought by and thought to involve mostly women. Given that Title VII prohibits *sex* discrimination—not discrimination against *caregivers*—women with caregiving responsibilities must prove that their mistreatment at work was based on gender bias rather than their status as caregivers.<sup>45</sup> For example, a woman who receives negative work evaluations after having a baby will not prevail in a Title VII suit merely by proving that her employer viewed parents unfavorably. Instead, she must prove that her employer mistreated her because of her status as a *woman* with children.<sup>46</sup> Of course, such claims do not change the default rule that employers are generally free to discipline or discharge employees for deficient performance, including if an employee’s performance declines after having a child.<sup>47</sup> Instead, employers violate Title VII by making decisions based on stereotypical beliefs about caregiving women without judging the mother’s actual performance.<sup>48</sup> As such, women in these cases do not demand special treatment, but instead simply seek an unbiased evaluation of their work.<sup>49</sup>

43 See Cynthia Thomas Calvert, *The New Sex Discrimination: Family Responsibilities*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 33, 33–34 (2009) (recounting the evolution of claims alleging discrimination based on family responsibilities).

44 See *id.* at 34–35 (discussing various forms of workplace discrimination involving family responsibilities); *Gender Stereotyping*, *supra* note 19, at 285–86 (explaining how maternal wall discrimination is a form of “straight line discrimination”).

45 See Interview by Jacqueline A. Berrien with Joan Williams, Founding Dir., Ctr. for WorkLife Law (Feb. 15, 2012) (discussing the importance of providing outreach to employers on the issue of caregiver discrimination).

46 See Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real Workers,”* 58 U. KAN. L. REV. 355, 374 (2010) (explaining how the EEOC Caregiver Guidance emphasizes the sex stereotyping theory).

47 See, e.g., Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 79–80 (2007) (discussing limitations of the at-will rule).

48 See EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <http://www.eeoc.gov/policy/docs/caregiving.html> (“Title VII does not permit employers to treat female workers less favorably merely on the gender-based assumption that a particular female worker will assume caretaking responsibilities or that a female worker’s caregiving responsibilities will interfere with her work performance.”).

49 See Joan C. Williams, *Correct Diagnosis: Wrong Cure: A Response to Professor Suk*, 110 COLUM. L. REV. SIDEBAR 24, 27 (2010) (explaining how the language of “accommodations” reinforces existing gendered

At their core, claims involving caregiver discrimination challenge gendered assumptions about the desires and capabilities of mothers in the workplace.<sup>50</sup> The Supreme Court paved the way for these claims over two decades ago in *Price Waterhouse v. Hopkins*.<sup>51</sup> The plaintiff, Ann Hopkins, was a successful employee who outstripped her counterparts in the male-dominated world of professional accounting.<sup>52</sup> After Price Waterhouse failed to promote Hopkins, partners at the firm told her that she was too “macho” and that she ought to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>53</sup> In a landmark ruling that established the legal theory of gender stereotyping under Title VII, the Supreme Court ruled that federal law prohibits discrimination based on gender nonconformity as well as more obvious forms of sex discrimination.<sup>54</sup> Thus, the term “because of sex” in Title VII extends beyond an employee’s biological sex to gendered expectations that society affixes to men and women.<sup>55</sup> For example, when an employee like Ann Hopkins acts “macho,” she challenges the cultural expectation that women ought to remain quiet and behave “femininely.” According to *Price Waterhouse*, adverse employment actions taken against a woman because of her gender nonconformity give rise to Title VII liability.<sup>56</sup>

In recent years, female plaintiffs alleging caregiver discrimination have effectively applied *Price Waterhouse*’s anti-stereotyping theory to the mistreatment of mothers at work.<sup>57</sup> Given that workplaces are “gender factories,” where men and women resist,

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presumptions about work).

50 Calvert, *supra* note 43, at 35–36 (arguing that sex stereotyping is a central component of most claims involving caregiver discrimination); Ylida Kopka, *Family Responsibility Discrimination*, 22 CBA REC. 50, 50–51 (Sept. 2008) (describing gender-based assumptions about a mother’s work commitment as evidence of sex discrimination).

51 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

52 *Id.* at 233–34 (summarizing the plaintiff’s accomplishments at Price Waterhouse).

53 *Id.* at 235 (discussing the feedback Hopkins received after her promotion was held over for another year).

54 *Id.* at 250 (“[A]n 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.”); *see also* Bornstein, *supra* note 23, at 1313–15 (discussing the historic nature of *Price Waterhouse*).

55 *See* Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1153–54 (2008) (explaining how *Price Waterhouse* defines the term “because of sex” in Title VII).

56 *Price Waterhouse*, 490 U.S. at 235–37 (discussing evidence of sex stereotyping in the case).

57 *See* Goldberg, *supra* note 41, at 799 (describing the success of claims involving caregiver discrimination

act upon, or react to social expectations about gender, it is unsurprising that advocates in these cases have uncovered a number of biases that caregiving women encounter at work.<sup>58</sup> Although there are many permutations of these stereotypes, they fall into two basic categories: first, the assumption that women with children do not *want* to perform at full capacity; or second, the assumption that mothers *cannot* perform at a high level. The first stereotype, known as “benevolent prescriptive stereotyping,” might occur when an employer “benevolently” removes a new mother from an important out-of-town job assignment based on the mistaken belief that she no longer wishes to travel.<sup>59</sup> The second stereotype, known as “negative competence assumption,” occurs, for example, when an employer refuses to promote a mother based on the belief that women with children are less committed to their jobs.<sup>60</sup>

These stereotypes are found in a broad range of media depictions of working mothers and social attitudes toward them.<sup>61</sup> Given the large amount of cultural evidence and social science data revealing anti-caregiver biases, advocates have effectively convinced courts and juries that they need no special expertise to link maternal stereotypes to workplace discrimination.<sup>62</sup> Although factfinders have begun to understand the biases female caregivers experience at work,<sup>63</sup> male caregivers have not made similar legal strides.

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as compared to other second-generation theories).

58 See WILLIAMS, *supra* note 16, at 2 (“Workplaces not only produce widgets. They also produce gender.”).

59 See *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at \*8–9 (S.D.N.Y. Dec. 30, 1998) (denying an employer’s motion to dismiss a claim alleging sex discrimination against a mother with young children); EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 48; *Gender Stereotyping*, *supra* note 19, at 289–90 (discussing different stereotypes mothers face at work).

60 See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 113 (2d Cir. 2004) (holding that an employer engages in sex stereotyping when relying on negative competence assumptions involving mothers to make promotion decisions); *Gender Stereotyping*, *supra* note 19, at 290 (summarizing social science data reflecting common attitudes toward women with children).

61 See Goldberg, *supra* note 41, at 799–800 (explaining how plaintiffs have effectively framed claims involving caregiver discrimination).

62 *Id.* at 800 (discussing the role social science has played in cases involving caregiver discrimination).

63 See WILLIAMS, *supra* note 16, at 28–29 (discussing the pervasiveness of workplace bias against mothers); Williams & Bornstein, *supra* note 10, at 1332 (explaining how many employers fail to recognize instances of caregiver discrimination).

## B. Male Caregivers and Title VII

In theory, lawsuits brought by caregiving men should mirror those of caregiving women. Both types of cases involve gendered expectations of caregivers, as well as the workplace sanctions parents face for failing to conform to those expectations. Although the stereotypes themselves might be different, the basic legal framework announced in *Price Waterhouse* should function similarly for men and women. In practice, however, caregiving men rarely bring, let alone win, Title VII claims alleging sex stereotyping.<sup>64</sup> Thus, in contrast to women's accomplishments in convincing courts to view caregiver discrimination as a manifestation of sex stereotyping, men have not yet succeeded in exposing the gender stereotypes they face as caregivers.<sup>65</sup>

This is not to say that male caregivers lack *any* effective recourse. Even though women represent more than ninety percent of claimants in cases brought by caregivers,<sup>66</sup> some men have successfully sued to recover benefits under the Family and Medical Leave Act of 1993 (FMLA) or other leave laws.<sup>67</sup> These claims often contain direct evidence of employer hostility toward male leave-takers.<sup>68</sup> Unfortunately, there are several reasons why the FMLA does not provide the best vehicle for exposing gender stereotypes against caregiving men. For example, by omitting small employers and short-term employees from

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64 See Bornstein, *supra* note 23, at 1300 (criticizing courts for “missing a wide swath of impermissible sex discrimination” against men); Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL’Y 1, 8–9 (2012) (stating that the number of men who assert family leave claims in court is quite small); Lori Jableczynski, Note, *Striking a Balance Between the “Parental” Wall and Workplace Equality: The Male Caregiver Perspective*, 31 WOMEN’S RTS. L. REP. 309, 310–12 (2010) (summarizing claims brought by male caregivers).

65 See Bornstein, *supra* note 23, at 1300 (discussing men’s experience with asserting claims involving caregiver discrimination).

66 MARY C. STILL, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 2, 8 (2006), <http://www.worklifelaw.org/pubs/FRDreport.pdf>; see also Jableczynski, *supra* note 64, at 310–12 (describing the denial of family leave as an example of a claim men bring); Christen Linke Young, Note, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 118 YALE L.J. 1182, 1226–27 (2009) (explaining how men rarely assert Title VII claims alleging sex discrimination).

67 Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601–2654 (1994)).

68 See Bornstein, *supra* note 23, at 1323–25 (summarizing the FMLA case law involving male caregivers); Williams & Tait, *supra* note 25, at 866–75 (discussing the workplace problems men encounter after requesting family leave).

coverage, the FMLA fails to protect roughly half of the workforce.<sup>69</sup> In addition, the law offers no protection to men who engage in many of the day-to-day tasks associated with caregiving such as attending parent-teacher conferences or staying home with sick children who do not satisfy the FMLA's "serious health condition" requirement.<sup>70</sup> Finally, even among covered employees, women are much more likely to take leave than men and for longer periods of time.<sup>71</sup> These and other trends have caused many scholars to criticize the FMLA for reinforcing family hierarchies and gender inequalities.<sup>72</sup> Given these limitations, the FMLA hardly seems like the best theory for scrutinizing gender bias against male caregivers.

Even though *Price Waterhouse* allows caregiving men to challenge sex stereotypes at work, courts have mostly failed to vindicate the rights of this group.<sup>73</sup> The case of *Ayanna v. Dechert*<sup>74</sup> demonstrates the difficulty male caregivers have with proving sex stereotyping claims.<sup>75</sup> Ariel Ayanna was an attorney who worked for two years at Boston's

69 See Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 37 (2005) (explaining how the FMLA's coverage limitations harm low-wage workers); Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 166–67 (2009) (explaining how the FMLA fails to cover a large percentage of the U.S. workforce).

70 29 U.S.C. § 2611 (2000).

71 Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 755–56 (2000) (summarizing studies of leave-taking patterns showing that the average man takes five days of leave upon the birth or adoption of a child).

72 See, e.g., Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 222 (2004) (describing the FMLA as "an example from which we should learn, but a base upon which we should not build"); Gerstel & Armenia, *supra* note 69, at 168–69 (arguing that the FMLA reproduces divisions of race, class, sexuality, and marital status); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 60–61 (2004) (summarizing predictions made before the FMLA's enactment that the act would not affect leave-taking patterns among parents).

73 See generally Bornstein, *supra* note 23, at 1336–44 (summarizing the development of Title VII claims involving caregiving men). Although not a Title VII case, *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001), provides the best example of a male plaintiff who successfully asserted a workplace discrimination claim based on caregiving responsibilities. Knussman challenged a state employer's decision to limit so-called "nurturing leave" to new mothers. *Id.* at 628. On review, the Fourth Circuit held that Knussman's employer had violated the Fourteenth Amendment's Equal Protection Clause by treating Knussman "unequally solely on the basis of a gender stereotype" involving "generalizations about typical gender roles in the raising and nurturing of children." *Id.* at 634–36.

74 *Ayanna v. Dechert LLP*, No. 10-12155-NMG, 2012 WL 5064041, at \*1 (D. Mass. Oct. 17, 2012).

75 See Bornstein, *supra* note 23, at 1343 (noting that *Ayanna* "may be the first [case] to plead the issue so clearly"); Williams & Tait, *supra* note 25, at 869 (observing how *Ayanna* exposes the penalties that men face

Dechert law firm.<sup>76</sup> During his second year at the firm, Ayanna's mentally ill wife attempted suicide while she was pregnant with their second child.<sup>77</sup> Ayanna took emergency family leave and was fired four months after he returned to the firm.<sup>78</sup> In suing Dechert for sex discrimination and family leave retaliation, Ayanna stated that Dechert had a policy of giving longer periods of paid family leave to women than to men.<sup>79</sup> In addition, Ayanna's supervisor allegedly berated Ayanna for leaving work to care for his hospitalized wife and made derisive comments about Ayanna's childcare obligations, but did not direct the same criticism at the firm's female employees.<sup>80</sup>

Reviewing Dechert's motion for summary judgment, the district court allowed Ayanna's family leave retaliation claim to proceed, but found insufficient evidence of sex discrimination.<sup>81</sup> The court stated, "At most the record suggests that [Ayanna's supervisor] may have disfavored him because Ayanna prioritized his family over his employment responsibilities." Given that female caregivers at Dechert had experienced discrimination as well, the court concluded that Ayanna's mistreatment was not because of his sex but because of his role as a caregiver.<sup>82</sup>

Yet even when male and female caregivers are subjected to similar forms of workplace mistreatment, courts are still obliged to interrogate the gendered expectations that each *individual* faces because of his or her sex.<sup>83</sup> Although certain outcomes may be identical (e.g., discharge) men and women may experience those outcomes for distinct, gender-specific reasons. For example, male behavior is often governed by a dominant masculine

for undertaking non-stereotypical gender roles).

76 Ayanna v. Dechert LLP, No. 10-12155-NMG, 2012 WL 5064041, at \*1 (D. Mass. Oct. 17, 2012).

77 *Id.*

78 *Id.* at \*2 (summarizing Dechert's contention that Ayanna was fired for failing to bill sufficient hours).

79 Complaint and Jury Demand at 10, Ayanna v. Dechert LLP, 2010 WL 5344371 (D. Mass. Dec. 14, 2010) (No. 10-12155-NMG).

80 *Id.* at 12 (alleging that Ayanna's supervisor substantially decreased his work assignments following his return from family leave).

81 Ayanna v. Dechert LLP, No. 10-12155-NMG, 2012 WL 5064041, at \*4 (D. Mass. Oct. 17, 2012).

82 *Id.* at \*5 ("The record reflects that female attorneys who took on caregiving roles also experienced negative outcomes at Dechert.").

83 See Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004) (noting that the central analysis for sex discrimination claims centers on an "*individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace") (internal citations omitted).

code that requires men to deny their care work and to remain silent about work-family conflicts—expectations that do not apply with the same force to women.<sup>84</sup> Abiding by these obligations, some of Ayanna’s male coworkers allegedly bragged about how little time they spent with their families.<sup>85</sup> In contrast, Ayanna stated that he took more family leave than any other man at Dechert, thereby rejecting “the macho stereotype” that called upon men to outsource their care work to women.<sup>86</sup> As such, Ayanna assumed a “female role” by becoming his children’s primary caregiver following his wife’s suicide attempt.<sup>87</sup> Yet, by lumping caregiving mothers and fathers together as similarly situated victims of “caregiver status” discrimination, the district court failed to evaluate the gendered code that applied to Ariel Ayanna for being a man with caregiving obligations and the distinct forms of discrimination he suffered for resisting that code.

Consider also the case of Dana Cumbie.<sup>88</sup> By day, Cumbie performed the decidedly manly job of truck driver, but by night he performed the decidedly unmanly task of caring for and living with his eighty-seven-year-old mother.<sup>89</sup> Several months after he was hired, Cumbie’s coworkers posted drawings throughout the worksite mocking Cumbie for his care work.<sup>90</sup> One poster, for example, showed Cumbie riding a motorcycle with his elderly mother.<sup>91</sup> In reviewing Cumbie’s Title VII complaint following his discharge, the district court held that the “boorish and juvenile” mistreatment Cumbie experienced was not “sexual” even though he was ridiculed for being a “Momma’s Boy.”<sup>92</sup> In so holding, the court completely sidestepped the issue of gender nonconformity, thereby mischaracterizing the discrimination Cumbie encountered for being his mother’s keeper. Cumbie challenged

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84 See *infra* Part II.B (applying masculinities theory to working fathers).

85 Complaint and Jury Demand at 2–4, *Ayanna v. Dechert LLP*, 2010 WL 5344371 (D. Mass. Dec. 14, 2010) (No. 10-12155-NMG) (“Ayanna did not conform to Dechert’s firm culture for males.”).

86 *Id.* at 4–5 (alleging that Dechert expected wives of male attorneys to care for children) (internal quotations omitted).

87 *Id.* at 1 (internal quotations omitted).

88 *Cumbie v. General Shale Brick, Inc.*, 508 F. Supp. 2d 486, 488 (E.D. Va. 2007), *vacated on other grounds*, 302 F. App’x 192 (4th Cir. 2008).

89 *Id.* at 489.

90 *Id.* at 488–90.

91 *Id.* at 488.

92 *Id.* at 491 (“The drawings posted in Plaintiff’s workplace—while offensive, tasteless, and insensitive—could not lead a person to reasonably believe that a Title VII violation has occurred.”).

the gender norm that requires men—especially truck-driving men—to refrain from caregiving. Cumbie’s performance as a “Momma’s Boy” was equivalent to Ann Hopkins’s performance as a “macho” accountant. Yet, somehow, Cumbie’s resistance to the masculine stereotype was harder for the court to recognize.

The case of Anthony Marchioli provides another example of the uneasiness courts have with male caregivers.<sup>93</sup> Hired as a sales representative for his company in New York, Marchioli received high workplace evaluations until he told his employer that he needed to care for his pregnant girlfriend.<sup>94</sup> Invoking many of the negative performance assumptions that employers hold against working mothers, Marchioli’s supervisor suddenly wondered aloud whether Marchioli was a “guy who does not give it his all.” Because of Marchioli’s new caregiving duties, the supervisor said he planned to “monitor very closely [Marchioli’s] progress from here on out.”<sup>95</sup> Accepting these facts as true, the district court nonetheless held that Marchioli’s discharge was because of Marchioli’s status as a “parent-to-be” rather than “because of sex.”<sup>96</sup> Noting that Title VII does not protect parenthood, the court dismissed his claim.<sup>97</sup>

As in the cases of Ariel Ayanna and Dana Cumbie, the district court seemed unable to recognize the gender stereotypes that pervaded Anthony Marchioli’s workplace. After all, Marchioli’s supervisor suggested that he was a “guy who does not give it his all” only after Marchioli said he wanted to attend his girlfriend’s prenatal appointment. In expressing his concerns, the supervisor specifically referred to the medical care and the “distractions you are going to have over the next 10 months.”<sup>98</sup> In other words, it was the prenatal assistance that Marchioli offered his girlfriend that drew his employer’s attention rather than Marchioli’s impending status as a father. Marchioli was not discriminated against because he was a “parent-to-be” but because he was a man trying to step outside the gendered expectation that obligates “real” men to avoid caring for their pregnant girlfriends.

Are courts better equipped to recognize instances of workplace discrimination against female caregivers, as compared to men? The Supreme Court found that it took “no special

93 *Marchioli v. Garland Co.*, No. 5:11-CV-124, 2011 WL 1983350, at \*5 (N.D.N.Y. May 20, 2011).

94 *Id.* at \*1.

95 *Id.*

96 *Id.* at \*5.

97 *Id.*

98 *Id.* at \*1.



training to discern sex stereotyping” against an overly aggressive Ann Hopkins.<sup>99</sup> As explained below, the study of masculinities teaches that it *does* take “special training” to identify biases against caregiving men. In order to understand the distinct challenges men must overcome in court, the stereotypes against male caregivers must first be analyzed.

## II. Masculinities Theory and Gender Performances

Men lack gender. Or so it appears. When we talk about people with gendered identities, we tend to talk about women. “I went to a female doctor.”<sup>100</sup> “My professor is a woman.” “She is a working mom.” But if we change the person described in each of the foregoing statements to a man, then the urge to talk about sex magically disappears. The maleness of the doctor, professor, or worker no longer seems worth mentioning. Because masculine identity operates behind a façade of neutrality and indiscernibility, it seems almost undetectable at times.<sup>101</sup>

A father who works outside the home is just a “worker” or an “employee.” Calling him a “working dad” seems odd and uncomfortable because it implies that he has multiple, conflicting obligations that are unacknowledged and unpleasant to discuss. As such, labeling him a “worker” rather than a “working dad” places the man in a “safe,” genderless place. As Michael Kimmel, a leading masculinities theorist, has explained, “gender is everywhere and yet masculinity is oddly invisible.”<sup>102</sup>

It was not until the end of the twentieth century that gender theorists began to fully consider how men formulate identities based on a complex set of social expectations and behaviors.<sup>103</sup> Of course, men played a central role in feminist scholarship long before that time. Feminists have sought to understand how men maintain their dominance through

99 Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989).

100 Michael Kimmel, *Toward a Pedagogy of the Oppressor*, in PROGRESSIVE BLACK MASculINITIES 63, 64 (Athena D. Mutua ed., 2006).

101 See Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, *supra* note 35, at 26 (describing the “everyday, taken-for-granted quality of masculinities”).

102 Michael S. Kimmel, *Integrating Men into the Curriculum*, 4 DUKE J. GENDER L. & POL’Y 181, 183 (1997); see also Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 212–13 (2008) (discussing how men largely avoid the focus of gender study) [hereinafter Dowd, *Masculinities and Feminist Legal Theory*].

103 See Michael Kimmel, *Foreword*, in MASculINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH xiv (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (marking this period as the time when scholars began to analyze the construction of masculinities).

social norms, institutions, and legal structures that privilege men over women.<sup>104</sup> Yet when such inquiries focus exclusively on male power and female subordination, they often fail to critically evaluate male identity in meaningful ways. Dominance feminists' depiction of men as equal-opportunity oppressors,<sup>105</sup> for example, does not acknowledge any variations in power among men or the costs that some men pay for their privilege.<sup>106</sup>

Essentialism—the mode of thought so powerfully critiqued by postmodern feminists that ascribes unitary truths to each sex without acknowledging the existence of multiple identities—often overtakes descriptions of male power in feminist critiques.<sup>107</sup> As Nancy Dowd has forcefully articulated, those who challenge the essentialized understanding of women as simplistic and unidimensional tend to fall back on the same types of undifferentiated presentations when they talk about men.<sup>108</sup> Instead, Dowd argues that gender theorists should strive to attain a more nuanced view of men because such an inquiry helps explain the continuation of gender hierarchies—a central feminist inquiry—while providing opportunities for collaboration between feminist and other scholars who share the common objective of dismantling those hierarchies.<sup>109</sup>

Masculinities scholars deconstruct the role gender plays in men's lives. To date, this conversation has taken place largely “outside the law” among social scientists who seek to determine how social norms inform masculine identities and how men perform masculinity

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104 Dowd, *THE MAN QUESTION*, *supra* note 30, at 13 (arguing that a great deal of feminist theory views men in an undifferentiated way).

105 See WILLIAMS, *supra* note 16, at 144 (observing that certain scholars such as Catharine MacKinnon fail to “distinguish between masculinity and men”); Levit, *supra* note 37, at 1049 (noting that dominance theory tends to circumscribe the understanding of men); see also MARY J. FRUG, *POSTMODERN LEGAL FEMINISM* 18 (1992) (discussing gender identity as a shifting and varied concept).

106 Ann C. McGinley & Frank Rudy Cooper, *Introduction: Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 3 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (criticizing this approach for its failure to consider “power differentials among men”).

107 See Levit, *supra* note 37, at 1049–51 (summarizing the postmodern feminist claim that “there are many incarnations of women”).

108 Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 102, at 204–06 (calling on feminist theorists to “ask the man question”).

109 *Id.* at 204–05 (explaining how masculinities scholarship can inform feminist theory); see also Dowd, *THE MAN QUESTION*, *supra* note 30, at 3 (criticizing unidimensional depictions of men).

within gendered institutions.<sup>110</sup> As a relatively new interdisciplinary field, masculinities theory still stands at the margins of mainstream legal studies, including much of critical legal scholarship.<sup>111</sup> But a growing body of legal writing is now exploring how masculinities theory can help expose the gendered nature of legal norms and institutions.<sup>112</sup> The following sections continue this work by connecting the theoretical insights of masculinities theory to antidiscrimination law.

### A. The Hierarchy of Men

As with feminism, masculinities theory argues that gender is socially constructed rather than genetically preordained.<sup>113</sup> Masculinities scholars explain how the idea of manhood forms, changes, and eventually attains the status of an unquestioned “truth” within the

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110 David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 139–40 (2009) (arguing that the discussion of how American law affects masculinity has only begun) [hereinafter Cohen, *No Boy Left Behind?*]; McGinley & Cooper, *supra* note 106, at 1 (arguing that critical legal theory has failed to fully explore masculinities).

111 See Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 433 (2010) (discussing the emergence of the study of masculinities among law and society scholars); Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 415 (2010) (explaining why questions raised in masculinities scholarship are central to feminist analysis).

112 See, e.g., RICHARD COLLIER, *MEN, LAW AND GENDER: ESSAYS ON THE “MAN” OF LAW* (2010); DOWD, *THE MAN QUESTION*, *supra* note 30; NANCY DOWD, *REDEFINING FATHERHOOD* (2000) [hereinafter DOWD, *REDEFINING FATHERHOOD*]; NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* (1998); MASCULINITIES AND THE LAW, *supra* note 35; WILLIAMS, *supra* note 16; Cohen, *No Boy Left Behind?*, *supra* note 110; Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) [hereinafter Cooper, *Against Bipolar Black Masculinity*]; Gail Dines, *The White Man’s Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 YALE J.L. & FEMINISM 283 (2006); Fadi Hanna, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913 (2005); Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999); Levit, *supra* note 37; Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) [hereinafter McGinley, *Masculinities at Work*]; Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1 (2005); Rachel L. Toker, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577 (1999); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68 (2002).

113 See DOWD, *THE MAN QUESTION*, *supra* note 30, at 26 (arguing that because they are socially constructed, masculinities are fluid and changeable); McGinley, *supra* note 28, at 707 (explaining how masculinities studies challenge the notion that masculine behavior is “natural for men and unnatural for women”).

social imagination.<sup>114</sup> Several key concepts drawn from the study of masculinities help advance this interrogation. Associated most closely with the work of sociologist R.W. Connell, “hegemonic” or “dominant” masculinity describes the “ideal” man.<sup>115</sup> Standing at the top of the male hierarchy, hegemonic masculinity is the “most honored or desired” form of masculinity.<sup>116</sup> Men are expected to conform to this ideal and position themselves according to their success or failure at meeting the definition of a “real” man provided by hegemonic masculinity.<sup>117</sup>

The precise attributes that individual men ascribe to dominant masculinity always change depending on their identity, location, and context.<sup>118</sup> For example, hegemonic masculinity in a corporate boardroom might be measured in terms of earning power, whereas on a schoolyard it might be measured in terms of bullying power.<sup>119</sup> Likewise, the plurality of identities created by race, class, and sexual orientation, among other factors, means that men in different intersectional categories will perform different masculinities.<sup>120</sup> However, even though the contours of hegemonic masculinity change as contexts and identity categories shift, certain characteristics tend to define dominant masculinity in Western cultures, including the qualities of rationality, aggression, individualism, whiteness, heterosexuality, and middle-class status.<sup>121</sup>

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114 See GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES 1880–1917* 7 (1995) (discussing the development of masculine ideals).

115 R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 *GENDER & Soc’y* 829, 832 (2005) (examining how hegemonic masculinity achieves cultural ascendancy); see also Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 102, at 211–12 (explaining how hegemonic masculinity presents male dominance as a natural condition of the social order).

116 R.W. CONNELL, *THE MEN AND THE BOYS* 10 (2000) (describing the hierarchy among masculinities).

117 Connell & Messerschmidt, *supra* note 115, at 832.

118 Cohen, *Keeping Men “Men” and Women Down*, *supra* note 41, at 523–24 (noting that although hegemonic masculinity is contextual, it represents an idealized mode of behavior for men).

119 See Emma Renold, “Other” Boys: *Negotiating Non-Hegemonic Masculinities in the Primary School*, 16 *GENDER & EDUC.* 247, 251 (2004) (discussing hegemonic masculinity in the school context).

120 See Cooper, *supra* note 29, at 685 (arguing that because identities intersect, there is no single form of masculine identity).

121 ROB GILBERT & PAM GILBERT, *MASCULINITY GOES TO SCHOOL* 48 (1998); MICHAEL S. KIMMEL, *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 30 (2005) (discussing how these traits serve as benchmarks for other men).

Hegemonic masculinity subordinates non-dominant men by classifying their acts and expressions as inferior to “true” manhood.<sup>122</sup> Thus, only certain boys or men earn the highest privileges reserved for them by the hegemonic norm.<sup>123</sup> But even they never fully meet the measure. As such, hegemonic masculinity is normative but not representative of any one man because no man is capable of perfectly performing this idealized form of masculinity.<sup>124</sup>

Given the unattainable nature of hegemonic masculinity, different masculinities evolve to compete and coexist with the dominant form. For example, subordinated masculinities resist hegemonic masculinity by redefining it.<sup>125</sup> Men in non-dominant groups may engage in this redefinitional process by presenting alternative ideologies that their group privileges above the dominant form; conversely, they may try to outdo the dominant group by acting “hypermasculine” through exhibitions of strength, aggression, or sexuality.<sup>126</sup>

Although hegemonic masculinity defines a singular ideal that men strive to attain (even though the ideal itself is context-specific), men perform different masculinities that simultaneously sanction and resist the ideal form.<sup>127</sup> No man is secure in this process. Because hegemonic masculinity gives rise to ongoing competitions, men feel the urge to constantly prove their manhood to other men.<sup>128</sup> This daily monitoring among men gives rise to a great deal of anxiety as men always fear that their lack of masculinity will be

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122 See Cohen, *Keeping Men “Men” and Women Down*, *supra* note 41, at 523 (explaining how hegemonic masculinity exerts pressure on men to conform to a certain masculine ideal).

123 See Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, *supra* note 35, at 26–27 (summarizing the evolution of masculinities scholarship).

124 Cohen, *No Boy Left Behind?*, *supra* note 110, at 143–44 (discussing the pressure men feel to conform to hegemonic masculinity).

125 See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 722–23 (2010) (noting that subordinated masculinities often constitute a more violent or forceful form of masculinity).

126 Harris, *supra* note 27, at 792–93; see also Lusher & Robins, *supra* note 29, at 404 (explaining how men who resist hegemonic masculinity take on different guises).

127 See Harris, *supra* note 27, at 782–83 (stating that multiple masculinities give rise to relations of dominance, subordination, and alliance).

128 See Dowd, *THE MAN QUESTION*, *supra* note 30, at 28 (arguing that hegemonic masculinity causes men to feel like their standing is never secure).

discovered.<sup>129</sup> Thus, although men as a whole remain socially dominant, individual men experience feelings of shame, fear, and emotional isolation due to this unending process of proof.<sup>130</sup> Working fathers are not immune to these expectations. As explained below, they also compete with one another and experience the consequent anxieties that come from these intra-group contests.

## B. Masculine Performances of Working Fathers

Men perform their masculinity.<sup>131</sup> Because hegemonic masculinity is constructed in relation to women and subordinated masculinities, these performances are designed to prove that a man is not a woman and not weak like non-dominant men.<sup>132</sup> Thus, he must denigrate contrast figures such as gay men to boost his masculine self-esteem and, in the process, establish himself as the “Big Man” within the group.<sup>133</sup>

These are negative performances designed to prove what the man is *not*.<sup>134</sup> For example, to establish that he is not gay, a man might engage in exaggerated acts of heterosexuality. Likewise, to avoid being associated with girls and their passive academic achievement, a boy might behave aggressively or hyperactively in school.<sup>135</sup> These same performances occur among men in the workplace. Whether it is blue-collar men proving their physical

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129 Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 18 (2010) (describing masculinity as a “fundamentally anxious” endeavor) [hereinafter Cooper, *Masculinities, Post-Racialism and the Gates Controversy*]; see also Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 102, at 208–09 (explaining the theory that masculinity is ultimately a “defense against humiliation”).

130 McGinley, *supra* note 28, at 707–08 (arguing that proof of one’s masculinity gives rise to a constant struggle).

131 See Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 533 (1999) (discussing the concept of gender performance); McGinley, *supra* note 28, at 706 (noting that there are different ways to perform masculinities).

132 See Collier, *supra* note 111, at 455–56 (explaining how masculinities maintain a hierarchical order).

133 Cooper, *Masculinities, Post-Racialism and the Gates Controversy*, *supra* note 129, at 18–19 (describing how men distinguish themselves from women and other groups of subordinated men); Paechter, *supra* note 39, at 255–56 (arguing that “Big Men” depict the dominant forms of masculinity within a particular community).

134 See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 102, at 209 (explaining how masculinity involves “a set of practices that one constantly engages in or performs”).

135 Lusher & Robins, *supra* note 29, at 387–88 (describing how hegemonic masculinity polices gender relations).

strength or high-tech professionals proving their stamina by working grueling hours,<sup>136</sup> male workers perform their masculinity in contrast to women's presumed weakness or lack of endurance. When these men have children, additional performances arise.

Drawing from masculinities theory and the observation that men must prove what they are not (i.e., women or non-dominant men), this section describes three negative performances required of working fathers: (1) non-nurturance, (2) non-dependence, and (3) non-expression. Stated another way, men must avoid care work, establish their status as breadwinners, and remain silent about work-family conflicts. Because masculine identity is oppositional in nature, each of these performances is understood in relation to the feminine. Care work, dependency, and emotiveness are qualities ascribed to women, and, as such, most men strongly resist these characteristics.<sup>137</sup> If a man deviates from these prescribed norms, he faces severe backlash from his coworkers, supervisors, and, possibly, courts.<sup>138</sup>

This evaluation of masculine workplace norms helps explain why antidiscrimination laws appear to function differently for caregiving men, as compared to women. First, because stereotyping theory requires plaintiffs to establish that their employers punished them for failing to conform to workplace gender norms, this analysis clarifies what precisely is expected of fathers and what behaviors will be viewed as gender-deviant. Second, by clarifying the sanctions that gender-deviant men encounter at work, masculinities theory can illuminate the unique challenges that male caregivers face in pursuing sex stereotyping claims in court. As such, the inquiry into the gendered expectations of men at work helps chart the legal course that these men must navigate in order to successfully prosecute discrimination claims.

### 1. Non-Nurturance

The more feminine an endeavor, the more men will resist it.<sup>139</sup> There is no cultural expectation more affixed to femininity than caregiving. Throughout history, women have

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136 WILLIAMS, *supra* note 16, at 86 (explaining how men enact their chosen masculinity based on class).

137 See DOWD, THE MAN QUESTION, *supra* note 30, at 22 (arguing that masculinity defines itself, first and foremost, as "not being a girl").

138 See Williams & Tait, *supra* note 25, at 864 (explaining how men and women are punished for gender deviance at work).

139 McGinley, *supra* note 125, at 721 (attributing the exclusion of women from positions of power as a result of the "anti-femininity" of masculinity).

been seen as biologically predetermined to care for children.<sup>140</sup> Despite the dramatic shift in women's labor force participation and contemporary survey data showing broad support for the concept of "shared parenting," the notion of maternal instinct remains a lasting fixture of popular mythology.<sup>141</sup> These beliefs are rooted in culture, not science. A wide body of social and scientific data demonstrates that men are as capable as women at caring for their children.<sup>142</sup> Parenting is a *learned* practice, and men, if allowed, can do it quite well. For example, in role-reversed couples where men act as a child's primary caretaker, fathers nurture as effectively as mothers, and their caregiving is as competent as that of similarly situated women.<sup>143</sup>

Notwithstanding evidence to the contrary, the association between caregiving and femininity remains ingrained in law and social practices. For example, despite the stated preference for shared custody arrangements in divorce proceedings, most courts still grant mothers custody of their children, while fathers usually receive limited custody or visitation rights.<sup>144</sup> Likewise, immigration law presumes that mothers are more attached to their children than fathers.<sup>145</sup> For instance, over a decade ago, the Supreme Court relied on this presumption to affirm an immigration rule requiring fathers to prove their connections

140 See Palazzari, *supra* note 9, at 439 (discussing the concept of maternal instinct); see, e.g., *Bradwell v. State*, 83 U.S. 130, 141 (1872) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

141 See Coltrane et al., *supra* note 12, at 3 (discussing cultural attitudes toward caregiving); Malin, *supra* note 14, at 1054 (noting the presence of this belief even among "role-reversed" couples); Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 596 (2007) (highlighting the inconsistency between polls showing support for equal parenting and data showing that women do significantly more care work than men).

142 See, e.g., LINDA HAAS, *EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN* 3–7 (1992) (surveying scientific studies that question the notion of maternal instinct); SMITH, *supra* note 18, at 125–32 (summarizing research on cognitive and hormonal shifts in new parents); Malin, *supra* note 14, at 1054–55 (arguing that no evidence in science, sociology, or anthropology demonstrates that women are superior caregivers).

143 DOWD, *REDEFINING FATHERHOOD*, *supra* note 112, at 45–46 (summarizing several studies discussing the role fathers play in childhood development); see also Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1317 (2005) (concluding that there is "no unique style of parenting for fathers") [hereinafter Dowd, *Fathers and the Supreme Court*].

144 Maldonado, *supra* note 15, at 938–39 (arguing that women who do not obtain custody of their children after a divorce are viewed as deficient mothers, whereas the same judgment does not apply to fathers after divorce).

145 *Nguyen v. INS*, 533 U.S. 53, 65 (2001).



to children without requiring mothers to make the same showing.<sup>146</sup> For the Court, male caregiving had to be proven, whereas female caregiving was self-evident.<sup>147</sup>

The labels we choose to describe caregiving relationships reflect these norms as well. We say that a nurturing father is “showing his feminine side,” while the inept father who stays at home is called “Mr. Mom.”<sup>148</sup> Even the government engages in this linguistic sleight of hand. For example, a recent census study of parenting trends labeled the woman in two-parent households as the “designated parent.” In contrast, when a father cared for his children while the mother worked, the Census Bureau called that a “child care arrangement.”<sup>149</sup> In other words, mother-based care was the default rule, while father-based care was an “arrangement” on par with daycare and babysitting.

Both men and women reinforce the feminization of care work. Today’s “new maternalism,” which emphasizes the distinctiveness of motherhood and causes some women to brag about maternal expertise on “mommy blogs,” leaves little room for men to engage in shared parenting.<sup>150</sup> Likewise, stories abound of men being excluded from female-led playdates and mothers’ support groups.<sup>151</sup> In addition, social expectations place enormous pressure on women—and women alone—to ensure that their children are completely stimulated and enriched at all times. Women who fail to engage in this form of “intensive mothering” are deemed unfit.<sup>152</sup> Yet society applies no corresponding caregiving expectation to men. It is unsurprising, then, that some mothers act as “gatekeepers” who

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146 *Id.*

147 *Id.*; see Dowd, *Fathers and the Supreme Court*, *supra* note 143, at 1273–74 (criticizing the Court’s decision embracing the notion of biological difference among parents).

148 WILLIAMS, *supra* note 16, at 105 (arguing that such labels allow society to code caregiving in feminine terms).

149 U.S. CENSUS BUREAU, WHO’S MINDING THE KIDS? CHILD CARE ARRANGEMENTS 1–2 (2010), <http://www.census.gov/prod/2010pubs/p70-121.pdf>; see also KJ Dell’Antonia, *The Census Bureau Counts Fathers as “Child Care,”* N.Y. TIMES (Feb. 8, 2012), <http://parenting.blogs.nytimes.com/2012/02/08/the-census-bureau-counts-fathers-as-child-care> (criticizing the Census Bureau for employing gendered presumptions).

150 See Naomi Mezey & Cornelia Nina Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 232 (2012) (critiquing a cultural movement that treats mothers as the “default parent”).

151 See, e.g., Mary Elizabeth Williams, *Rise of the Dad Wars*, SALON (Apr. 25, 2012), [http://www.salon.com/2012/04/25/rise\\_of\\_the\\_dad\\_wars](http://www.salon.com/2012/04/25/rise_of_the_dad_wars) (hypothesizing why this form of exclusion occurs).

152 WILLIAMS, *supra* note 16, at 22–24 (discussing the pressures that this form of parenting puts on mothers and children); Cahn, *supra* note 131, at 535 (noting that the “maternal imperative” does not match many women’s real-life desires).

supervise men when they attempt to interact with their children.<sup>153</sup> Regardless of whether such gatekeeping is a function of maternal control or paternal ineptitude,<sup>154</sup> it provides yet another indicator of the strong associations between caregiving and femininity.

When men dare to defy these norms, they expose themselves to social sanctions. To avoid this cost, some men attempt to redefine the terms of caregiving. This process is especially evident among at-home fathers. The number of men within this group has more than doubled in the last decade.<sup>155</sup> Although their ranks are growing, many at-home fathers still feel an ever-present need to prevent their care work from being associated with feminine activities. For example, Beth Burkstrand-Reid's study of media depictions of at-home fathers revealed a strong desire among at-home dads to engage in what she called "caregiving adaptive masculinity," which was a way for the men to recharacterize their care work in non-feminine terms.<sup>156</sup> Activities such as playing sports or forming support groups that excluded women enabled her subjects to mitigate the feminine qualities typically associated with their at-home work.<sup>157</sup> Andrea Doucet's study of at-home fathers exposed much the same trend.<sup>158</sup> In describing their work, the vast majority of men in Doucet's study emphasized the importance of imparting masculine qualities on their caregiving such as "physical and outdoor activities, independence, risk taking, and the fun and playful aspects of care."<sup>159</sup> Through this process of recharacterization, these men downplayed the feminine aspects of caregiving.

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153 See WILLIAMS, *supra* note 16, at 135 (attributing certain gatekeeping behaviors to men's refusal to do work); Sarah M. Allen & Alan J. Hawkins, *Maternal Gatekeeping: Mothers' Beliefs and Behaviors That Inhibit Greater Father Involvement in Family Work*, 61 J. MARRIAGE & FAM. 199, 203 (1999) (hypothesizing that such behavior may serve to protect female authority).

154 See WILLIAMS, *supra* note 16, at 23 (discussing the pressure placed on women by parenting expectations); Cahn, *supra* note 131, at 540–41 (suggesting that some gatekeeping women are correct that men lack caregiving skills because such skills were never encouraged or developed); Selmi, *supra* note 142, at 597 (discussing different explanations for gatekeeping).

155 See SMITH, *supra* note 18, at xii (describing shifts in male caregiving patterns); Alex Williams, *Just Wait Until Your Mother Gets Home*, N.Y. TIMES, Aug. 12, 2012, at ST1 (discussing cultural shifts in attitudes toward at-home fathers).

156 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 (2012).

157 *Id.* at 29 (arguing that at-home fathers "act in ways consistent with hegemonic masculinity even as they subvert it").

158 Doucet, *supra* note 34, at 293.

159 *Id.* (discussing the invisible contradictions contained in many of the fathers' narratives).

Against this powerful social and cultural backdrop, it is little wonder that women continue to perform the vast majority of care work in the United States.<sup>160</sup> When men buck this trend and embrace their childcare responsibilities,<sup>161</sup> their domestic forays always expose them to the danger of being labeled “unmanly.”<sup>162</sup> But the expectation to avoid nurturance is not the only requirement of hegemonic masculinity. Just as men feel the pressure to shun care work, an equally strong gender-based rule compels them to financially support their families.

## 2. Non-Dependence

Men “do gender” by proving their status as earners.<sup>163</sup> Robert Griswold’s seminal historical account of fatherhood in America identifies breadwinning as the “great unifying element in fathers’ lives” that shapes men’s “sense of self, manhood, and gender.”<sup>164</sup> Viewed through the lens of masculinities theory, providership allows men to reject the highly feminine attribute of dependency. In fact, the providership requirement represents hegemonic masculinity in its purest form.<sup>165</sup> It demands that men answer a constant, unrelenting call to stay in the marketplace and prove that they can do what women allegedly cannot: provide for their families. Except, of course, that as with most expectations of dominant masculinity, few men can actually satisfy this ideal.

For generations, men have longed to earn a “family wage” that would support a wife and children at home.<sup>166</sup> This breadwinner-homemaker ideal originated during the

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160 See Palazzari, *supra* note 9, at 436–37 (stating that women perform seventy percent of housework in the United States).

161 See SMITH, *supra* note 18, at xi (summarizing studies of male caregiving patterns).

162 See Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 102, at 239 (discussing how men are “blocked from embracing nurture”).

163 See Gerstel & Armenia, *supra* note 69, at 168 (explaining how men view providership as a way to care for their families).

164 ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 2 (1993) (discussing the historical resiliency of the providership expectation).

165 See Palazzari, *supra* note 9, at 442–43 (arguing that dominant masculine ideals require men to provide for their families and exhibit work competence).

166 See ALICE KESSLER-HARRIS, *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 10 (1990) (asserting that the concept of a “family wage” reinforces female dependency).

nineteenth century and established a gender system that sent men to the marketplace while requiring women to perform unpaid domestic work and suffer economic inequality as a result.<sup>167</sup> Yet even during the mid-twentieth century, when the family wage system was most idealized, it never reflected the lived experiences of most lower-class men and men of color.<sup>168</sup> Although some white, middle-class men were able to act as sole earners during this period, the family wage system came to a crashing halt in the 1970s when growth in workers' real wages began to decline dramatically.<sup>169</sup> Today, a crumbling industrial base, weakening social safety net, and shrinking middle class<sup>170</sup> mean that few American men can satisfy the providership expectation.<sup>171</sup>

Despite women's widespread market participation and increased earning power over the past forty years, the breadwinner myth still persists. Surveys consistently show that eighty to ninety percent of mothers expect fathers to serve as primary earners for families.<sup>172</sup> Even in situations where women earn enough to support their families, some wives still fault their husbands for failing to provide.<sup>173</sup> Consistent with masculinities theory, the providership expectation establishes an unreachable goal for men to achieve and then

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167 WILLIAMS, *supra* note 16, at 23 (explaining how proponents of separate spheres described the system as a natural byproduct of biology); Laura T. Kessler, *Feminism for Everyone*, 34 SEATTLE U. L. REV. 679, 686 (2012) (discussing the price women pay for domesticity) [hereinafter Kessler, *Feminism for Everyone*]; Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 44–45 (2005) (explaining the impracticalities of the family wage system).

168 Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1903 (1999) (arguing that the family wage system often operated at the expense of women's happiness); Kessler, *Feminism for Everyone*, *supra* note 167, at 186 (discussing the erosion of the system); see also WILLIAMS, *supra* note 16, at 59 (arguing that the "separate-spheres ideal was democratized" for two generations following World War II).

169 See Susan Fleck et al., *The Compensation-Productivity Gap: A Visual Essay*, MONTHLY LAB. REV., Jan. 2011, at 64; Arlie Hochschild, *The State of Families, Class and Culture*, N.Y. TIMES, Oct. 16, 2009, at BR27 (describing blue-collar families as the "shock absorber[s] of a broken new deal").

170 See Crain, *supra* note 168, at 1918–19 (arguing that postindustrialism has made the family wage unattainable for most families).

171 See Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 523–24 (1996) (discussing men's work patterns).

172 WILLIAMS, *supra* note 16, at 32 (reporting on survey data showing that a high percentage of women feel that their husbands should be the family's primary provider); Smith, *supra* note 17 (noting that few mothers say they would consider supporting an at-home father).

173 See, e.g., SMITH, *supra* note 18, at 39 (discussing media trend pieces that report on the anxieties of "breadwinning moms").

organizes them according to their success or failure at attaining the goal. According to psychologist Michael Kimmel, these expectations transform the average American male into a character he calls “Marketplace Man.”<sup>174</sup> Agitated and anxious, Marketplace Man strives to satisfy “impossible ideals of success leading to chronic terrors of emasculation, emotional emptiness, and a gendered rage that leaves a wide swath of destruction in its wake.”<sup>175</sup>

Despite their inability to satisfy the providership expectation, most American men continue to compete with Marketplace Man. The extraordinarily high number of hours American men work evinces this desire. Americans outstrip workers in other industrialized nations in terms of the average number of hours worked,<sup>176</sup> with employed American men working an average of forty-seven hours per week, as compared to employed women who work an average of roughly thirty-five hours per week.<sup>177</sup> The disparity increases after children arrive: women decrease the number of hours they work outside the home, while men’s employment participation and work hours both increase.<sup>178</sup> Marketplace Man’s call is reflected not only in the actual number of hours men work, but also in the personal beliefs they express toward paid labor. Three times as many men as women describe their lives as “work-centered.”<sup>179</sup> Likewise, two-thirds of Americans believe it is “very important” that men have the ability to financially support their families, but only one-third of Americans expect women to do the same.<sup>180</sup>

The same call to provide affects at-home fathers as well. The majority of fathers in Andrea Doucet’s study of this group felt compelled to downplay their lack of earning.<sup>181</sup>

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174 Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *GENDER RELATIONS IN GLOBAL PERSPECTIVE: ESSENTIAL READINGS* 75–76 (Nancy Cook ed., 2007) (arguing that American male identity derives from a man’s success in the capitalist marketplace).

175 *Id.* at 75.

176 See Shirley Lung, *Overwork and Overtime*, 39 *IND. L. REV.* 51, 52 (2005) (stating that Americans work more hours per year on average than workers in nineteen other industrialized countries).

177 Coltrane et al., *supra* note 12, at 8 (examining how the breadwinner expectation affects men’s work behavior).

178 See *id.* at 6 (noting that the disparity in working hours between men and women increases when men hold more conventional attitudes toward gender-related issues).

179 WILLIAMS, *supra* note 16, at 121.

180 MUNDY, *supra* note 2, at 27 (discussing the hold that the male breadwinner ideal still has on Americans).

181 Doucet, *supra* note 34, at 288 (describing working mothers who feel compelled to talk about their care

Many explained how they were *not* totally dependent on others, but instead were working part-time or at least planning to return to work.<sup>182</sup> In fact, all of the fathers in her seventy-person qualitative study referred to the social pressure they felt to earn and the weight of community judgment associated with that failure.<sup>183</sup> Given this pressure, it is unsurprising that men who provide primary care for young children are four times more likely to earn wages outside the home, as compared to women who are primary caregivers.<sup>184</sup>

Reflected in both the behaviors of “typical” men and the unique experiences of at-home fathers, the dominant call to earn wages continues to define American manhood. When men fail to satisfy this ideal, another attribute of idealized masculinity comes into play: the obligation to remain silent.

### 3. Non-Expression

Dominant masculinity forbids men from talking about their emotions. The masculine obligation to reject expressiveness means that boys learn from an early age to suppress their feelings and isolate themselves.<sup>185</sup> This is especially evident among adolescents. For example, a psychological survey asked middle school boys and girls to describe what they would do if their sex suddenly changed.<sup>186</sup> The girls took some time to answer, “expressed modest disappointment,” and then talked about careers they would pursue in sports, medicine, and other “masculine” fields. In contrast, the boys took almost no time to answer. Their most common response was “kill myself.”<sup>187</sup>

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work).

182 *Id.* at 285–86 (discussing why the at-home men involved in the study became primary caregivers).

183 *Id.* (referencing one father who wanted to “show that I am able to work, although I have chosen to do this”).

184 U.S. CENSUS BUREAU, *supra* note 149, at 1-10 (reporting that among parents who serve as primary caregivers of children, fifty-two percent of fathers engage in paid work, as compared to twelve percent of mothers).

185 *See* Cohen, *No Boy Left Behind?*, *supra* note 110, at 164–65 (examining the restrictions placed on boys by “[t]raditional masculinity”).

186 MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 41–42 (2000) (summarizing the survey of children in Michigan, Wisconsin, Minnesota, and the Dakotas).

187 *Id.* (examining contemplations of sex transition); *see also* DOWD, *THE MAN QUESTION*, *supra* note 30, at 2 (discussing the study and its use in understanding the privileges and burdens of masculinity).

The difficulty men have with expressing emotions cuts across categories of age, race, and class.<sup>188</sup> Although this “rule of manhood” applies to all areas of men’s lives, it is especially evident when work and family conflict.<sup>189</sup> Many employers expect men to refrain from talking about problems at home because they mistakenly assume that their male employees have wives who tend to such problems.<sup>190</sup> The truth, however, is that both men and women feel the stress of balancing work and family. In fact, fathers in dual-earner couples are more likely than mothers to report experiencing worklife conflict.<sup>191</sup> Yet because men cannot talk about these issues, they suffer the emotional turmoil that comes from such suppression. If they dare to speak out and acknowledge their caregiving commitments, men face the critical gaze of coworkers, supervisors, and community onlookers.<sup>192</sup>

Joan Williams’s recent study of ninety-nine union arbitrations exemplifies this rule of manhood.<sup>193</sup> All of the employees in these cases alleged that their employers had discriminated against them because of their caregiving responsibilities.<sup>194</sup> Although their claims were alike in many ways, Williams discovered that the men and women in her study differed in one key respect: their willingness to reveal their work-family conflicts to their employers.<sup>195</sup> No woman in Williams’s study refused to discuss her childcare problems, whereas men often chose to face discipline or discharge rather than talk about their caregiving dilemmas with their employers.<sup>196</sup> This pattern was present in case after case: a man who had to care for his grandchild told his supervisor that it was “none of

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188 See WILLIAMS, *supra* note 16, at 103 (describing the characteristics of a “typical man”).

189 Michael S. Kimmel, *Issues for Men in the 1990s*, 46 U. MIAMI L. REV. 671, 674 (1992); see also Levit, *supra* note 37, at 1062 (explaining how the law on same-sex harassment reinforces stoicism among men).

190 See *Gender Stereotyping*, *supra* note 19, at 286–87 (explaining how “[w]orkplace ideals are designed around men’s bodies . . . and men’s life patterns”); Williams & Bornstein, *supra* note 10, at 1323–24 (arguing that caregiving expectations reflect underlying gender biases in the workplace).

191 See HARRINGTON ET AL., *supra* note 1, at 4 (summarizing data showing that the percentage of men experiencing worklife conflict between 1977 and 2008 jumped significantly, while the percentage of women who experienced worklife conflict remained constant).

192 See Doucet, *supra* note 34, at 295 (explaining the importance of social networks to at-home fathers).

193 See WILLIAMS, *supra* note 16, at 42–64 (studying claims brought by a broad set of workers including janitors, bus drivers, carpenters, and nurses’ aides).

194 *Id.* at 43.

195 *Id.* at 56–57.

196 *Id.* at 57.

[his] business” when he refused to work overtime; another man revealed only that “family problems” kept him from working; still another father stated vaguely that “obligations at home” interfered with work.<sup>197</sup> In essence, all of these men accepted the rule of manhood that called them to silence, preferring to accept workplace discipline rather than violate the male code.

New fathers exhibit a similar behavior. Seeking to avoid the stigma associated with their status as caregivers, many new fathers covertly take a few days off from work rather than take advantage of an employer’s formal family leave policy.<sup>198</sup> The average new father leaves work for five days after the birth of a child, but many men avoid labeling their time away “paternity leave,” instead choosing “vacation” or “personal time” as the proper designations.<sup>199</sup> Although men’s aversion to taking formal leave is partially attributable to limitations in coverage,<sup>200</sup> the gag of manhood also influences their choice of terminology.<sup>201</sup> To call time away from work “paternity leave” is to openly acknowledge the man’s childcare responsibilities at home. Rather than make this revelation to coworkers and trigger the feminine associations that come with it, many men prefer to quietly recast their care work in non-gendered terms.

If the dominant form of masculinity requires men to shun expressiveness and avoid care work, what happens to men who break these rules? If men have no gender, how can they claim to be the victims of gender bias? Although these questions still perplex lower courts, the Supreme Court has championed the cause of male caregivers on two occasions. The masculine expectations of non-nurturance, non-dependence, and non-expression were present in each case.

### III. The Supreme Court’s Masculinities

Because men appear to lack gender, courts have difficulty recognizing the gender biases they encounter at work. Although the Supreme Court has never ruled on an anti-stereotyping claim brought by a male caregiver, other men with caregiving responsibilities have appeared

197 *Id.* at 56–57.

198 *See, e.g.,* HARRINGTON ET AL., *supra* note 1, at 15 (summarizing data showing that seventy-five percent of the men studied at Fortune 500 companies took time off that “resembled a vacation [more] than a leave”).

199 *See* Grossman, *supra* note 72, at 35 (arguing that the term “paternity leave” can be “emasculating” for many men); Selmi, *supra* note 71, at 756 (examining why few men take family leave).

200 *See supra* Part I.B (discussing the limitations of FMLA coverage).

201 Malin, *supra* note 14, at 1071–72 (outlining the many forms of “makeshift leaves” men take).



before the Court in a variety of contexts.<sup>202</sup> These fathers and husbands have raised claims involving custody and visitation rights,<sup>203</sup> challenged immigration regulations,<sup>204</sup> sought state benefits,<sup>205</sup> and explored the extent of congressional power.<sup>206</sup> Amidst these cases, the Supreme Court has twice written about the importance of male caregiving in broad and sweeping terms.<sup>207</sup> In one case, Justice Brennan forcefully critiqued a state's attempt to discriminate against a widowed father.<sup>208</sup> In the other, Justice Rehnquist condemned the breadwinner expectation, stating that this masculine norm impaired women's workplace advancement.<sup>209</sup>

Although these landmark decisions have been justifiably celebrated for their broad affirmation of gender equity principles,<sup>210</sup> they have never been analyzed through the lens of masculinities theory. When such a frame is applied, a different picture emerges. As explained below, the Court's most successful male caregivers were men of contradictions who engaged in a complex set of performances that both challenged and adhered to hegemonic masculinity. They were caregivers but also breadwinners, outspoken fathers but also men who nurtured in the midst of female absence. Filled with ambiguities, their stories help clarify the characteristics of those male caregivers who have prevailed before the Court thus far.

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202 See Dowd, *Fathers and the Supreme Court*, *supra* note 143, at 1271–72 (arguing that the Supreme Court's family law jurisprudence draws from deeply held stereotypes of fathers).

203 See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

204 See *Nguyen v. INS*, 533 U.S. 53 (2001).

205 See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

206 See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

207 *Id.*; *Wiesenfeld*, 420 U.S. at 653.

208 *Wiesenfeld*, 420 U.S. at 653.

209 *Hibbs*, 538 U.S. at 736.

210 See Mezey & Pillard, *supra* note 150, at 232 (analyzing the “radical implication of *Hibbs* that we cannot end sex discrimination outside the home without changing our beliefs about women's and men's differential attachments to family care within it”); Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 333–35 (1998) (discussing the importance of the Supreme Court's sex discrimination cases of the 1970s).

A. *Weinberger v. Wiesenfeld: The Consummate Provider*

In 1972, Stephen Wiesenfeld took care of his newborn son after his wife died in childbirth.<sup>211</sup> Just as many widows did at the time, Wiesenfeld sought to collect so-called “mother’s insurance benefits” from the government.<sup>212</sup> Because the Social Security Administration extended such benefits only to unemployed surviving wives, however, the government denied Wiesenfeld’s application.<sup>213</sup> At the same time, Ruth Bader Ginsburg was prosecuting sex discrimination cases across the country on behalf of the ACLU’s Women’s Rights Project.<sup>214</sup> As part of her storied litigation strategy, Ginsburg sought male plaintiffs like Stephen Wiesenfeld to serve as plaintiffs, believing that a male-dominated judiciary would sympathize with male victims of gender bias.<sup>215</sup>

In *Weinberger v. Wiesenfeld*, the Supreme Court struck down the Social Security provision on equal protection grounds.<sup>216</sup> Finding the distinction between widowed fathers and mothers “entirely irrational,” the Court critiqued the assumption that fathers were “family breadwinner[s]” who should avoid the role “of a homemaker.”<sup>217</sup> Such sex-role stereotypes “denigrat[ed] . . . the efforts of women who do work,”<sup>218</sup> while denying men the “constitutionally protected right to the companionship, care, custody, and management of the children [they have] sired and raised.”<sup>219</sup> According to the Court, these biases not only worked against gender-deviant men, they also harmed children who were coping with their mother’s death. As the Court observed, “It is no less important for a child to be cared for by

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211 *Weinberger v. Wiesenfeld*, 420 U.S. 636, 639 (1975).

212 *Id.* at 639.

213 *Id.* at 640 n.6.

214 *See* Morrison Torrey, *Thirty Years*, 22 WOMEN’S RTS. L. REP. 147, 148–49 (2001) (explaining how the Women’s Rights Project modeled its litigation strategy after the approach taken by the NAACP in civil rights cases).

215 *See id.* at 149 (noting that Ginsburg’s strategy produced “contradictory results”); Franklin, *supra* note 7, at 87 (arguing that Ginsburg’s use of male plaintiffs had more to do with highlighting occurrences of gender deviance than with litigation strategy).

216 *Wiesenfeld*, 420 U.S. at 643.

217 *Id.* at 650, 652 n.20.

218 *Id.* at 645.

219 *Id.* at 652 (internal citations and quotations omitted).

its sole surviving parent when that parent is male, rather than female.”<sup>220</sup>

Reflecting on the momentous victory, Ginsburg described *Wiesenfeld* as the “most critical” sex discrimination case of the 1970s.<sup>221</sup> According to Ginsburg, Stephen Wiesenfeld was the “perfect plaintiff” because his case exemplified how gender stereotypes harm both sexes.<sup>222</sup> Although *Wiesenfeld* remains a central part of the Court’s anti-stereotyping canon, the specific stereotypes involved in *Wiesenfeld* have not been subjected to a masculinities analysis. Viewed from this perspective, Wiesenfeld performed multiple, paradoxical masculinities. Wiesenfeld was a caregiver, but also a conflicted earner. He prioritized looking after his baby, but also sought assistance in providing childcare. He presented himself as a low-wage earner to the Court, but remained secretly committed to supporting his child financially.

Wiesenfeld’s wife Paula had been the family breadwinner. Her teacher’s salary of \$10,686 far exceeded his annual earnings of \$2,188.<sup>223</sup> Although such an arrangement was certainly unusual for the time, Wiesenfeld did not ignore his market work altogether. In fact, prior to his wife’s death, Wiesenfeld took a job with a defense contractor and started his own payroll business.<sup>224</sup> Given that the latter job allowed him to control his own hours and work from different locations, Wiesenfeld believed that he could operate his small business while simultaneously caring for his infant.<sup>225</sup>

When his wife died, Wiesenfeld reaffirmed his commitment to caregiving, but also refocused his accomplishments as a breadwinner. Within months of her death, Wiesenfeld

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220 *Id.* at 652.

221 Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL’Y 41, 43 (1986); see also Franklin, *supra* note 7, at 132 (discussing *Wiesenfeld*’s historical significance); Deborah Jones Merritt & Wendy Webster Williams, *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 805, 809, 815 (2009) (discussing *Wiesenfeld*).

222 Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 268 (1997) (explaining the importance of the case).

223 *Wiesenfeld*, 420 U.S. at 649 n.4; Brief for Appellee, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (No. 73-1892), 1974 WL 186057, at \*3; see also FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 5 (2009) (summarizing Stephen Wiesenfeld’s early employment background).

224 STREBEIGH, *supra* note 223, at 5.

225 *Id.* at 6.

found a high-paying job as an engineer earning \$18,000 per year.<sup>226</sup> These wages were nearly twice that of his wife's and far exceeded the couple's previous combined earnings.<sup>227</sup> Thus, at the moment he filed his lawsuit challenging the Social Security rule, Wiesenfeld had proven himself as a fatherly provider.<sup>228</sup> Yet his earnings created problems during the litigation. Given that Wiesenfeld had obtained gainful employment following his wife's death, the government argued that the Court should dismiss the case because applicants with Wiesenfeld's income were ineligible for survivor's benefits.<sup>229</sup> In response to this argument, Wiesenfeld took matters into his own hands. Without explaining his move to Ginsburg, he quit his job and opened a store selling high-end bicycles.<sup>230</sup> This shift allowed Wiesenfeld to continue supporting his family while also appearing to be unemployed to the Court.<sup>231</sup> As such, Wiesenfeld played the role of full-time homemaker for the Supreme Court, when in fact he was an invisible breadwinner.

As to caregiving, Wiesenfeld rejected calls from his family to put his son up for adoption.<sup>232</sup> But Wiesenfeld did not lack help. In fact, he relied on his parents, a live-in nanny, and an au pair to provide childcare.<sup>233</sup> Even Ginsburg advised Wiesenfeld about his nanny troubles. In a letter to her client she wrote, "Having gone through more helpers and housekeepers than I care to count over the past seventeen years . . . I know that eventually the right person does appear, and then you are set for a few years."<sup>234</sup>

As Cary Franklin's historical account of the *Wiesenfeld* decision demonstrates, the Supreme Court Justices were perplexed by the notion of a father who provided primary

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226 *Weinberger v. Wiesenfeld*, 420 U.S. 636, 641 n.7 (1975); Brief for the Appellants, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (No. 73-1892), 1974 WL 186056, at \*4.

227 Brief for the Appellants, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (No. 73-1892), 1974 WL 186056, at \*4.

228 *Wiesenfeld*, 420 U.S. at 641 n.7.

229 *Wiesenfeld v. Sec'y of Health, Educ. & Welfare*, 367 F. Supp. 981, 986 (D.C.N.J. 1973); see also STREBEIGH, *supra* note 223, at 68 (discussing the government's position in *Wiesenfeld*).

230 STREBEIGH, *supra* note 223, at 68–70.

231 *Id.* (stating that the government's attempt to dismiss the case surprised Wiesenfeld).

232 *Id.* at 6–7.

233 *Id.* at 7.

234 *Id.* at 67.

care to an infant.<sup>235</sup> Some of the lawyers and Justices laughed at the image of a caregiving man, while others expressed “anger and disgust” at the model of masculinity Wiesenfeld presented. For example, one law clerk questioned whether Wiesenfeld “continue[d] to receive these benefits, or whether he [had returned to work.]”<sup>236</sup> When Justice Brennan circulated a draft opinion suggesting that Wiesenfeld had been planning to stay home with his baby even before his wife’s death, Justice Blackmun scribbled “WOW!” next to the revelation.<sup>237</sup>

Wiesenfeld’s performances symbolize the paradox that hegemonic masculinity creates for men. In claiming the right to look after his infant son, Wiesenfeld undoubtedly resisted the dominant call to avoid care work, thereby championing a vision of subordinated masculinity. Yet in many ways, Wiesenfeld did not appear “subordinate” but rather attempted to recast his caregiving role in assertive, masculine terms. As he stated to Ginsburg, “My son is in my care . . . and I intend to keep it that way.”<sup>238</sup> Like many mothers of the 1970s and today, Wiesenfeld relied on a network of others—mostly women—to supplement his care work. The hiring of nannies was made necessary precisely because the state denied him the “mother’s benefits” that would have enabled him to stay home. He was a caregiver who responded to maternal absence through maternal supplementation.

Wiesenfeld’s resistance to the breadwinner norm was partial at best. Despite the Court’s characterization of Wiesenfeld as “unemployed,”<sup>239</sup> he was in fact an earner and entrepreneur. Rather than reject the providership expectation, Wiesenfeld found ways to satisfy the benchmark while simultaneously masking his achievements. He played by the rules of manhood, while trying to alter the game. But Wiesenfeld was not the only man to walk a fine line between dominant and subordinated masculinities while arguing his case before the Supreme Court. Thirty years later, the Court encountered another male caregiver who was engaged in a complicated act of masculine performances.

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235 Franklin, *supra* note 7, at 86–87 (discussing the difficulty lawyers and judges had with accepting the notion that Wiesenfeld wanted to care for his infant).

236 *Id.* at 87 n.13 (quoting Richard Blumenthal, Law Clerk to Justice Harry Blackmun).

237 *Id.* at 137 (noting that despite Justice Blackmun’s surprise, he still ruled with the majority in favor of Wiesenfeld).

238 STREBEIGH, *supra* note 223, at 9.

239 Weinberger v. Wiesenfeld, 420 U.S. 636, 641 n.7 (1975).

**B. *Nevada Department of Human Resources v. Hibbs: The Part-Time Caregiver***

In 1997, Robert Hibbs sought to take family leave to care for his wife who had been seriously injured in a car accident.<sup>240</sup> Although his employer, the State of Nevada, initially granted Hibbs intermittent leave, it eventually demanded that he return to work and fired him when he failed to do so.<sup>241</sup> In response to the claim brought by Hibbs for family leave benefits, Nevada argued that individuals could not sue states for money damages under the FMLA.<sup>242</sup> Given the Rehnquist Court's robust federalism jurisprudence at the time, many court watchers predicted that Nevada's argument would carry the day.<sup>243</sup> They were wrong. In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court ruled for Robert Hibbs, holding that Congress had properly abrogated the states' sovereign immunity through passage of the FMLA.<sup>244</sup> Justice Rehnquist found a strong governmental interest in combating workplace discrimination and explained how the breadwinner norm hurt men and women.<sup>245</sup> The Court stated:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination.<sup>246</sup>

In light of these harms, the Court held that Congress was within its power to enact family leave legislation that enabled men and women to attend to their caregiving obligations.<sup>247</sup> There is no Supreme Court decision that deconstructs masculine norms more

240 *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003); Appellant's Opening Brief, *Hibbs v. Nev. Dep't of Human Res.*, 273 F. 3d 844 (9th Cir. 2001) (No. 04-17391), 2005 WL 1789454, at \*7.

241 *Hibbs v. Nev. Dep't of Human Res.*, 273 F. 3d 844, 849 (9th Cir. 2001).

242 *Id.*

243 *See Dowd, Fathers and the Supreme Court*, *supra* note 143, at 1274 n.25 (discussing the surprising result in *Hibbs*).

244 *Hibbs*, 538 U.S. at 725–76.

245 *Id.* at 730.

246 *Id.* at 736–37 (explaining how Congress attempted to attack the problem of caregiver discrimination through passage of the FMLA).

247 *Id.* at 737–40.

incisively than *Hibbs*. According to Justice Rehnquist, when employers rely upon “invalid stereotypes” to deny men family leave, they erect sex-based barriers that injure women.<sup>248</sup>

Scholars have understandably praised the vision of egalitarianism expressed in *Hibbs*, calling it “radical”<sup>249</sup> and “a virtual paean to fatherhood and gender-neutral co-equal parenting.”<sup>250</sup> Yet for all of the sweeping language in *Hibbs* about gender equality, the decision itself says surprisingly little about the actual lives of Robert Hibbs and his wife Dianne. A closer examination of the case provides unique insights into the study of masculinities and helps explain how a caregiving husband danced between masculine norms while winning before the Supreme Court.

The story of Dianne Hibbs and the trauma she endured following a car accident is nothing short of tragic. After Dianne was injured in an auto collision in 1996, her physician negligently inserted a metal plate in her neck.<sup>251</sup> The screws soon became loose and pressed against Dianne’s neck, causing severe pain and threatening her life.<sup>252</sup> As a result, Dianne became depressed and addicted to painkillers.<sup>253</sup> Her condition deteriorated to such a point that Dianne’s psychiatrist told Robert that he had to stay with his wife to prevent her from committing suicide.<sup>254</sup>

By requesting family leave, Robert resisted the masculine norm to remain silent and avoid performing the care work that Dianne needed. But his transgression of gendered structures was not absolute. Adhering as closely to the breadwinner expectation as he could, Robert Hibbs took intermittent leave rather than step away from work completely.<sup>255</sup> He

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248 *Id.* at 734 n.10.

249 See Mezey & Pillard, *supra* note 150, at 231–232 (contrasting the language in *Hibbs* with a recent cultural trend that links women to parenting and home care).

250 Dowd, *Fathers and the Supreme Court*, *supra* note 143, at 1274 (comparing the gender-egalitarian terms of *Hibbs* with other Supreme Court decisions involving fathers).

251 Appellant’s Opening Brief, *Hibbs v. Nev. Dep’t of Human Res.*, 273 F. 3d 844 (9th Cir. 2001) (No. 04-17391), 2005 WL 1789454, at \*7.

252 *Id.*

253 *Id.*; Brief for Respondent William Hibbs, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 31655020, at \*6 (discussing Dianne Hibbs’s addiction to pain killers).

254 Appellant’s Opening Brief, *Hibbs v. Nev. Dep’t of Human Res.*, 273 F. 3d 844 (9th Cir. 2001) (No. 04-17391), 2005 WL 1789454, at \*7.

255 *Hibbs v. Nev. Dep’t of Human Res.*, 273 F. 3d 844, 849 (9th Cir. 2001) (discussing Robert Hibbs’s

broke the breadwinner norm and still abided by it. He earned wages, cared intermittently, and vowed to return to remunerative work as soon as he could. Robert described his “*random need*” for leave and said it was “*sometimes necessary . . . to take time off to care for [Dianne]*.”<sup>256</sup> Much like at-home fathers who constantly feel the urge to highlight their financial contributions to the family, Robert continued to work for the State of Nevada and found other ways to make money as well. After resolving Dianne’s medical malpractice claim, the family secured a \$305,000 settlement.<sup>257</sup> At that moment, Robert promised to “pay for his wife’s full time care” and resume his job.<sup>258</sup>

Robert Hibbs’s refusal to abide by hegemonic masculine norms was admirable, yet incomplete. He performed the subordinated masculine act of caregiving, but vowed to hire someone else to perform that care work the moment he could afford to do so. Part breadwinner, part caregiver of last resort, Robert Hibbs represents the tensions that masculine ideals create in men’s lives.

#### IV. Disrupted Hierarchies and the Costs of Gender Deviance

As both Supreme Court precedent and masculinities theory make clear, men must constantly comply with a dominant male code to avoid the backlash that gender deviance brings.<sup>259</sup> Although Stephen Wiesenfeld and Robert Hibbs were able to perform both dominant and subordinated masculinities while still winning legal claims that did not directly address employment discrimination, the question remains whether working men in the future can transgress gender norms and still combat any employment retaliation that flows from their transgressions. The following section considers this issue by discussing the prices men pay at work for acknowledging their caregiving obligations at home. It argues that employers tend to penalize caregiving men more than caregiving women and questions why courts have failed to take up their cause. This observation in no way diminishes the numerous forms of employment discrimination women still endure. Indeed, women as a whole undoubtedly experience much more caregiver bias at work than men.

leave-taking history).

256 Defendants-Appellees’ Answering Brief, *Hibbs v. Nev. Dep’t of Human Res.*, 273 F. 3d 844 (9th Cir. 2001) (No. 99-16321), 1999 WL 33621169, at \*6 (emphasis added).

257 *Id.* at \*11.

258 Joint App’x, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 3219476, at \*9.

259 See Cooper, *Against Bipolar Black Masculinity*, *supra* note 112, at 899 (discussing how dominant masculine ideals encourage non-dominant men to “prove their manhood”).



But for those few men who break away from hegemonic norms and embrace caregiving, the punishments are severe.

Utilizing masculinities theory to understand these sanctions, this section asserts that employers and judges view male caregivers more skeptically than women because male caregivers pose a greater threat to gender hierarchies than caregiving women. As such, employers are more likely to target the rare man who assumes care work, and courts are less likely to sympathize with him. Masculinities theory offers an effective method for responding to this problem. As explained below, the study of masculinities can enable courts to focus on male caregivers' status as gendered beings and the gender-specific stereotypes related to their work. Such an inquiry not only advances the anti-stereotyping claims they might bring, it allows plaintiffs to directly scrutinize the rules of manhood and the contingent nature of gender itself.

#### A. The Price of Caregiving

Hegemonic masculinity calls on men to prove their status as men, while denigrating women and other men who perform subordinated masculinities.<sup>260</sup> Consistent with this theory, men who violate the rules of manhood by engaging in caregiving face workplace mistreatment. Such retribution provides strong incentives for non-dominant men to engage in gender-conforming behavior.<sup>261</sup> Three recent sociological studies of male caregivers demonstrate this dynamic in operation.<sup>262</sup>

Jennifer Berdahl and Sue Moon conducted field studies of union members who worked in female-dominated occupations.<sup>263</sup> Comparing the treatment of six groups—caregiving fathers, traditional fathers, men without children, caregiving mothers, nontraditional mothers, and women without children—Berdahl and Moon found that caregiving fathers suffered the most “masculinity harassment” of all the employees.<sup>264</sup> Both men and women

260 See Cooper, *Against Bipolar Black Masculinity*, *supra* note 112, at 898–99 (characterizing hegemonic masculinity as a system based fundamentally in fear).

261 See Berdahl & Moon, *supra* note 3, at 9 (summarizing research demonstrating that those who violate social norms are targeted disproportionately for workplace mistreatment).

262 *Id.*; Coltrane et al., *supra* note 12; Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 68 J. Soc. Issues (forthcoming 2013) (manuscript at 1) (on file with author).

263 Berdahl & Moon, *supra* note 3, at 4–5, 16 (describing the authors' research methods).

264 *Id.* at 19.

were subjected to this form of harassment, which included telling workers to be more aggressive, questioning their toughness, demanding that they sacrifice family time, and teasing them for being shy or soft-spoken.<sup>265</sup> Although members in each subgroup experienced the harassment to one degree or another, Berdahl and Moon found that the most common victims were “men who violate[d] gender roles by actively caring for their children.”<sup>266</sup>

Scott Coltrane and a team of sociologists took the analysis one step further by focusing on the treatment of men who not only cared for their children but also reduced their work hours because of family needs.<sup>267</sup> Analyzing national longitudinal data involving more than 30,000 male workers,<sup>268</sup> Coltrane sought to build on previous research that had convincingly demonstrated the existence of a “motherhood penalty” for women who reduced their hours because of caregiving obligations.<sup>269</sup> Those earlier findings demonstrated that mothers suffered greater wage penalties as they had more children.<sup>270</sup> Studying male workers who reduced their work hours, quit, or remained unemployed because of caregiving duties, Coltrane found that these men earned significantly lower wages, as compared to men who reduced their hours for non-family reasons.<sup>271</sup> In fact, the difference between caregiving men and non-caregiving men was enormous. The authors determined that caregiving men suffered a wage penalty of more than twenty-five percent, which was virtually the same penalty that caregiving women suffered.<sup>272</sup> In contrast, men who reduced their hours for non-family reasons such as attending school, experiencing health problems, or being

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265 *Id.* at 17.

266 *Id.* at 20 (hypothesizing that women may harass men who threaten “traditionally female territories such as childcare”).

267 Coltrane et al., *supra* note 12, at 2.

268 *Id.* at 10.

269 *Id.* at 4–5 (citing REBECCA GLAUBER, RACE AND GENDER IN FAMILIES AT WORK: THE FATHERHOOD WAGE PREMIUM 8–30 (2008); Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Men and Women*, 7 LABOUR ECON. 689, 689–710 (2000)).

270 Coltrane et al., *supra* note 12, at 4–5 (discussing various explanations for the motherhood penalty including negative judgments involving the effort and time mothers can commit to work).

271 *Id.* at 16.

272 *Id.*

incarcerated<sup>273</sup> suffered a wage penalty of less than five percent.<sup>274</sup> It is difficult to overstate the influence of dominant masculinity when employers punish male caregivers more than convicted criminals and other men who “take off” time from work for non-family reasons.

In addition to experiencing wage loss, male caregivers suffer intangible workplace harms. Laurie Rudman and Kris Mescher studied the workplace mistreatment of men who took family leave. The researchers found that male leave-takers experienced a “femininity stigma,” which in turn lowered their chances of promotion.<sup>275</sup> Upon requesting leave, these men were rated higher in feminine traits (e.g., insecure, emotional, weak) and lower in masculine traits (e.g., confident, competitive, possesses leadership skills).<sup>276</sup> Beyond perceptions, this stigma imposed direct economic costs on these men, as they became less eligible for raises and upward advancements after taking leave.<sup>277</sup> This research is consistent with previous studies showing that men who experience work-family conflicts receive fewer reward recommendations than similarly situated women.<sup>278</sup> Likewise, other studies have documented how employers punish leave-taking men more than leave-taking women,<sup>279</sup> and that the price for taking family leave increases when a male supervisor is involved.<sup>280</sup>

Whether measured in terms of coworker perceptions, harassment, wages, or promotions, the caregiver stigma harms men as much as women, if not more. Perhaps counter-intuitively, this conclusion in no way discounts the well-documented “fatherhood bonus” in which men’s performance ratings and earnings tend to *increase* as they have

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273 *Id.* at 11.

274 *Id.* (“For both men and women, not working for family reasons has a more negative impact than doing it for non-family reasons, and the penalty is similar between men and women.”).

275 Rudman & Mescher, *supra* note 262, at 2.

276 *Id.* at 2–5.

277 *Id.* at 2–8.

278 *See, e.g.,* Adam Butler & Amie L. Skattebo, *What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job Performance Ratings*, 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 553, 553–564 (2004) (evaluating employment costs associated with work-family conflicts).

279 *See* McGinley, *supra* note 28, at 718 (explaining that men may behave rationally by remaining silent about their work-family conflicts to avoid the tangible harms that come with requesting accommodations).

280 *See* WILLIAMS, *supra* note 16, at 80 (arguing that men’s fear of being associated with feminine behavior cuts across class lines).

children.<sup>281</sup> In fact, both outcomes are entirely consistent with masculinities theory. Because fathers are expected to provide for their families, remain silent, and avoid care work, those who conform to these norms earn tangible benefits as a result.<sup>282</sup> In contrast, the studies discussed above do not measure gender-conforming men but focus on gender-deviant fathers. As these findings demonstrate, men pay enormous penalties for violating the rules of manhood. Unfortunately, for those men who dare to perform care work, the law currently offers only partial relief.

## B. Threatening Gendered Structures

The legal and social experiences of caregiving men and women reveal two trends: male caregivers are more likely to be punished at work and less likely to win in court. Why is this so? The answer to this question is illuminated by the story of Ann Hopkins, the overly aggressive woman who lost a promotion for failing to dress femininely, wear makeup, and avoid aggressive behavior.<sup>283</sup> Reflecting on her mistreatment, the Supreme Court observed, “It takes no special training to discern sex stereotyping in a description of an aggressive female employee.”<sup>284</sup>

Men lose sex stereotyping cases because, unlike women, special training *is* required to identify instances when men transgress masculine norms. Like all dominant forms, masculinity is most remarkable for its invisibility. Cloaked in a veneer of ordinariness, masculinity silently establishes social positions by convincing people that the dominant male form is the way things ought to be.<sup>285</sup> The taken-for-granted quality of masculinity discourages any challenge to its apparent normalcy.<sup>286</sup> Thus, when caregiving men encounter

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281 Berdahl & Moon, *supra* note 3, at 3–4 (discussing research examining the economic benefits that professional men gain when they become fathers); Coltrane, *supra* note 12, at 6 (examining the “fatherhood bonus”); Williams & Bornstein, *supra* note 10, at 1327 (summarizing data showing that men with children receive higher ratings than childless men).

282 See Berdahl & Moon, *supra* note 3, at 26 (suggesting that the “fatherhood benefit” applies to fathers who perform “relatively little caregiving in the home”).

283 Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

284 *Id.* at 256.

285 See Lusher & Robins, *supra* note 29, at 388 (explaining how cultural constructions are used to justify existing social positions).

286 See Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, *supra* note 35, at 26 (asserting that masculinity hides behind a veneer of neutrality and universality); Paechter, *supra* note 39, at 256 (arguing that masculinity reinforces existing positions of power).

discrimination at work, employers can feel justified in punishing them for such “abnormal” behavior. This punishment appears to lack any gender-based motive because hegemonic masculinity masks the victim’s gender and the punishment he suffers for engaging in nonconforming behavior.

It is masculinity’s undetectability that explains why men and women experience caregiver bias differently. The fact that society views women as gendered beings means that courts can identify their claims of gender discrimination, at least at times. As noted above, mothers face two forms of stereotypes at work: they are viewed either as less competent or less desirous of work.<sup>287</sup> Here it is useful to distinguish between “macho” mothers who show no sign of slowing down after having children and “tender” mothers who more obviously balance work with their caregiving demands.<sup>288</sup> Both types of women encounter stereotypes that some courts can recognize. Employers punish tender mothers for attending to their caregiving needs out of the mistaken view that all mothers are incompetent or unwilling to work.<sup>289</sup> They are victims of “maternal profiling,” which labels all women as slackers or potential slackers for having, or planning to have, children.<sup>290</sup>

Macho mothers encounter a different stereotype. If they refuse family leave, come back to work immediately, and put their children in daycare, for example, employers embrace the old separate-spheres ideology that assumes mothers belong at home. Although this stereotype remains deeply ingrained in the American consciousness, two generations of working mothers have proven it to be an empty shell.<sup>291</sup> Feminine and macho mothers are burdened by this ideology in different ways. Macho mothers fail to conform to the expectation that they ought to be at home, while tender mothers challenge the assumption that they cannot compete at work. It is not that the stereotypes associated with domesticity

287 See *supra* Part I.A (discussing the forms of caregiver bias women encounter at work).

288 See WILLIAMS, *supra* note 16, at 5 (employing the terms “tomboy” and “femme” to describe these categories).

289 See, e.g., Albiston, *supra* note 69, at 43 (critiquing the “personal choice narrative” that depicts mothers as “less committed workers”).

290 See Mary C. Still, *Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change*, 59 HASTINGS L.J. 1491, 1514–15 (2008) (explaining how the critique of caregiver discrimination has effectively tapped into cultural support for civil rights and family values); Grant Barrett, *All We Are Saying*, N.Y. TIMES, Dec. 23, 2007, at C3, available at <http://www.nytimes.com/2007/12/23/weekinreview/23buzzwords.html> (defining “maternal profiling” as “[e]mployment discrimination against a woman who has, or will have, children”).

291 See, e.g., Still, *supra* note 290, at 1496–1503 (describing how the resistance to mothers in the workplace has declined as their labor force participation has increased).

no longer exist; it is that factfinders can spot these biases and the harm they cause to both categories of women.

Not only are the workplace stereotypes encountered by working mothers more visible, courts are more comfortable punishing employers that utilize them. This is partly attributable to the fact that macho mothers and tender mothers do not threaten hegemonic masculinity in the same way that caregiving men do. For example, tender mothers remain loyal to the gendered script written for them as female caregivers. They nurture their children, tend to the home, and somehow magically perform all of their employment tasks as well. Thus, if a mother in this situation takes a short break from her work, say by briefly taking family leave, she assumes her natural role as the family nurturer.<sup>292</sup> Viewed in this light, an adverse employment action taken against this mother ought to be punished because she has done nothing more than benignly comply with social expectations.

Even macho mothers pose less of a challenge to existing gender norms than caregiving fathers. Although these mothers deviate from the gendered expectations of caregiving and face consequences for that deviance, they fully conform to the gendered nature of work. With its ongoing demand on employees to be constantly available without regard to any needs at home, the American workplace is a “masculine” workplace.<sup>293</sup> It is designed around the traditional right claimed by men to compete in the marketplace without having to attend to domestic tasks.<sup>294</sup> The macho mother does not challenge this gendered order. In fact, she reinforces it by shunning her care work and embracing the expectation that employees will work long hours and remain constantly available even outside of work.<sup>295</sup> Of course, she threatens other masculine hierarchies. By demanding her share of male power, she tries to become an “honorary boy” among men who may discriminate against her for defying feminine expectations.<sup>296</sup> But as was the case with Ann Hopkins, courts are

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292 See Rudman & Mescher, *supra* note 262, at 4 (arguing that leave-taking women exhibit gender-normative behavior).

293 See McGinley, *supra* note 28, at 710 (discussing the concept of “masculinities as work structures”).

294 *Gender Stereotyping*, *supra* note 19, at 286–87 (arguing against the continuation of masculine work norms).

295 See Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) (discussing the time demands placed on American workers); see also Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC, July 2012, at 94 (describing a “time macho” culture in which workers stay late and work hard).

296 Paechter, *supra* note 39, at 257 (asserting that “tomboys” distance themselves from stereotypical femininity, thereby making a claim to power).

somewhat capable of identifying this punishment. This is because even though the macho mother threatens men by her power grab, she also reinforces the masculinization of work by behaving as an ideal worker.<sup>297</sup>

In contrast to both macho mothers and tender mothers, caregiving men have failed to convince courts that they experience gender discrimination at all. Masculinities theory offers an explanation. In order to establish a cause of action based on gender stereotyping, caregiving men must prove: (1) that they have gender, (2) that norms attach to that gender, and (3) that their employer punished them for failing to conform to those norms.<sup>298</sup> The difficulty with proving any of this is the taken-for-granted nature of masculinity. If men appear to lack gender, then courts cannot identify the norms associated with their gender. Contrast that with caregiving women's experiences, where there is at least some social understanding of the biases they encounter at work. The public's emerging recognition that some employers discriminate against working mothers gives judges a certain level of confidence that in policing this misbehavior they are properly reflecting social disapproval of maternal profiling and not imposing their own subjective take on the contours of discriminatory conduct.<sup>299</sup>

Beyond identification, though, the caregiving man has an even higher hurdle to overcome. For at its core, his nonconformity represents a fundamental threat to masculine power and established gender hierarchies. Whereas macho mothers reinforce the masculinization of work and tender mothers reinforce the feminization of domestic life, caregiving men challenge the gendered nature of both spheres. In this way, they raise an exceedingly uncomfortable question: why should either realm be gendered at all? In order to avoid this question, the rules of manhood call upon every worker to "out man" the other, while feminizing and punishing men who refuse to compete.<sup>300</sup> Viewed in this light, it is understandable that men who perform care work experience greater workplace penalties, while garnering less judicial sympathy for their acts.<sup>301</sup>

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297 See McGinley, *Masculinities at Work*, *supra* note 112, at 367–75 (examining how men and women adapt to hegemonic masculine demands at work).

298 See *supra* Part I.A (outlining Title VII's anti-stereotyping framework).

299 Goldberg, *supra* note 41, at 800–01 (discussing the "legitimacy concerns" courts have with finding evidence of discrimination under second-generation theories).

300 Rudman & Mescher, *supra* note 262, at 5 (explaining why men who take family leave are "viewed as more punishable than women").

301 See Coltrane et al., *supra* note 12, at 9 (arguing that men who reduce their work hours for family care obligations violate gender expectations at home and at the workplace).

Masculinities theory offers a path forward. At the most fundamental level, the study of masculinities provides men with the chance to make their gender visible to courts.<sup>302</sup> Given masculinity's apparent undetectability, this process of presentation represents a crucial first step in vindicating the workplace rights of male caregivers. For example, masculinities theory can transform the image of a man who cares for his elderly mother into that of a gendered being who actively resists the dominant call of non-nurturance.<sup>303</sup> Likewise, the study of masculinities can reframe the perception of a man who cares for his ill wife or pregnant girlfriend into that of a discrimination victim who suffers retaliation for his gender nonconformity.<sup>304</sup> In short, masculinities theory can help highlight various aspects of men's gender, while enabling courts to identify the workplace discrimination some men encounter for failing to abide by the dominant rules of manhood.

But the process of bringing attention to masculine identities is not enough. Given the current sanctions men face for engaging in care work and the underlying gender hierarchies that such behavior threatens, the study of masculinities should also be employed to scrutinize and challenge the rules of manhood that sustain those gendered structures. For only when hegemonic masculinity is interrogated and contested can new forms of masculinity begin to compete with more dominant forms.<sup>305</sup> Given the contingent nature of concepts like fatherhood and gender, male caregivers can play a central role in this process of reconfiguration by drawing masculinity's center of gravity away from its current focus on stale qualities such as providership and stoicism.<sup>306</sup> As such, the male caregiver who litigates his case by employing the clarifying lens of masculinities theory not only brings greater legal coherence to his own claim, he creates space for new modes of masculine behaviors to emerge.

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302 KIMMEL, *supra* note 186, at 6 (explaining how the process of gender identification can be especially useful to men).

303 *Cumbe v. General Shale Brick, Inc.*, 508 F. Supp. 2d 486, 488 (E.D. Va. 2007), *vacated on other grounds*, 302 F. App'x 192 (4th Cir. 2008).

304 *Ayanna v. Dechert LLP*, No. 10-12155-NMG, 2012 WL 5064041, at \*1 (D. Mass. Oct. 17, 2012); *Marchioli v. Garland Co.*, No. 5:11-CV-124, 2011 WL 1983350, at \*5 (N.D.N.Y. May 20, 2011).

305 See CONNELL, *supra* note 116, at 13–14 (discussing the contingent nature of masculinity).

306 See DOWD, *THE MAN QUESTION*, *supra* note 30, at 10 (arguing that a redefined fatherhood can challenge the central values of masculinity); DOUCET, *supra* note 34, at 296 (explaining how masculinities change and evolve).



## CONCLUSION

Most men shun care work. Until recently, the common explanation for this obstinacy either blamed men for their laziness or attacked women for accepting male inflexibility.<sup>307</sup> Masculinities theory offers a more complicated account. It suggests that strong social and institutional forces require men to reject anything associated with femininity, especially care work. The majority of men will not break free from this mold without an effective legal mechanism for combating the biases against male caregiving.

The dominant call on men to avoid feminine behavior not only hamstring women's ability to compete in the workplace, it ensures the continuation of male power and privilege. Although they benefit tremendously from their privilege, men also pay social and psychological costs for abiding by existing masculine norms.<sup>308</sup> Given that no one wins in this dynamic, developments in law and society are needed to assist those few men who resist dominant forms of masculinity and embrace their role as caregivers. By highlighting and questioning the stereotypes such men encounter in the workplace, the study of masculinities can strengthen their legal claims, thereby advancing the goal of gender equality for both sexes.

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307 See WILLIAMS, *supra* note 16, at 2, 32 (citing male privilege and women's inability to bargain effectively as common explanations for the unequal division of household labor).

308 See DOWD, *THE MAN QUESTION*, *supra* note 30, at 3 (discussing the prices that men pay for their privilege).