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EXPANDING THE FRAME: USING MASCULINITIES ANALYSES
TO CHALLENGE GENDER AND RACE HIERARCHY

Nancy E. Dowd*

“[C]ourts and juries [should] not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”¹

Kimberly Bailey’s fascinating article, *Male Same-Sex “Horseplay”*: *The Epicenter of Sexual Harassment?*,² seeks to expose and to further analyze harassment of women by paying attention to the patterns and meaning of male-male harassment between straight men.³ By the sophisticated use of masculinities theory and research, she seeks to expand not only the boundaries of male-male harassment but also the linkages between male-male and male-female harassment.⁴ Sexual harassment doctrine as constructed thus far excludes certain conduct as not discriminatory.⁵ As Professor Bailey notes, in *Oncale v. Sundowner Offshore Services, Inc.*,⁶ the Court stated that it was not creating a “general civility code.”⁷ Professor Bailey seeks to carve out *some* male on male “horseplay” as discrimination that should be actionable under sexual harassment theory rather than tolerated or understood as non-discriminatory.⁸ More broadly, Professor Bailey suggests male on male harassment is central to all sexual harassment.⁹ Understanding and eliminating one would profoundly affect the other:

[I]f men no longer felt the need to maintain their spots in the masculine hierarchy, they would have no reason to harass each other or women to assert their masculinity. In other words, while the gendered relationship among gender-conforming men is often a hidden component of the systemic harassment of women and gender-nonconforming men, it is time to consider whether this competition among gender-conforming men is actually the epicenter of all sexual

* UF Distinguished Professor and David Levin Chair in Family Law, Emeritus. Eric Petterson provided valuable research assistance for this Essay.

1. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

2. Kimberly D. Bailey, *Male Same-Sex “Horseplay”*: *The Epicenter of Sexual Harassment?*, 73 FLA. L. REV. 95 (2021).

3. *Id.* at 95.

4. *Id.*

5. *See id.* at 97.

6. 523 U.S. 75 (1998).

7. *Id.* at 107 (quoting *Oncale*, 523 U.S. at 80).

8. “This Part argues that some of the harassment that is targeted at men who are perceived as gender-conforming is not merely male ‘horseplay’ that does not merit legal recognition; instead, it sometimes is discrimination based on sex.” Bailey, *supra* note 2, at 119.

9. *Id.* at 99–100.

harassment. If it is the epicenter, the response to the harassment of women and men perceived as gender-nonconforming men must include a more robust response to the harassment of men perceived as gender-conforming. If respectful treatment is reserved only for those who perform their masculinity the best, masculine supremacy will continue to reign throughout the workplace and beyond.¹⁰

I applaud this wonderful work. In this essay, I advocate amplifying and expanding it further. I argue:

1. *All* horseplay is gendered and should be actionable discrimination.
2. Masculinities analysis is essential not only to harassment doctrine but workplace discrimination doctrine broadly. It should be used to break down structures and systems as well as workplace culture, by gender, race, and intersectionally.
3. Masculinities analysis exposes the pervasiveness of hierarchy, and thus leads to broader interlocking contexts of inequality beyond the workplace.

I write from the perspective of my work on masculinities,¹¹ in which I identified the core conclusions of the research:

1. Men are not universal or undifferentiated.
2. Intersections of manhood particularly with race, class, and sexual orientation are critical to the interplay of privilege and disadvantage, of hierarchies among men, and of factors that may entirely trump male gender privilege.
3. Men pay a price for privilege.
4. The asymmetry of masculinities scholarship and feminist theory reflects the differences in the general position of men and women.

10. *Id.* at 134–35.

11. NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 1–5 (2010); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 229–34 (2008) [hereinafter *Masculinities and Feminist Legal Theory*]; Nancy E. Dowd, *Boys, Masculinities and Juvenile Justice*, 8 J. KOREAN L. 115, 127–29 (2008); Nancy E. Dowd, *Sperm, Testosterone, Masculinities, and Fatherhood*, 13 NEV. L.J. 438, 439–41 (2013); Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 418–19 (2010); Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U.L. REV. 1047, 1059–67 (2012).

5. Masculinity is a social construction.
6. Hegemonic masculinity is the dominant and most valued form of masculinity.
7. The patriarchal dividend is the benefit that all men have from the dominance of men in the overall gender order.
8. The two most common defining elements of masculinity are imperative negatives: not to be a woman and not to be gay.
9. Masculinity is as much about relation to other men as it is about relation to women.
10. Men, although powerful, feel powerless.
11. Masculinities study exposes how structures and cultures are gendered male.
12. The spaces and places that men and women inhabit and work within on a daily basis are remarkably different.
13. Men have little incentive to sacrifice privilege in pursuit of feminism's equality project; masculinities can help by conceptualizing a different model of manhood.¹²

Professor Bailey's article especially underscores that masculinity is as much or more about men's relationship to each other as it is about their relationship to women, and that hierarchy is central. Male predominance over all women is important, but at its core, masculinity is premised on the essential hierarchy among and between men. Male hierarchy crosses multiple expressions of what it means to be a man. This creates hierarchy among masculinities—among group expressions or norms—but no man is fixed within his group or in relation to other masculinities. Masculinities dictates that every man must position himself with respect to every man, thus requiring masculinity to be performed daily in multiple interactions between men. Even amidst the most privileged, valued men, their status and stature are not assured or assumed and require daily performance. This necessity makes masculinity an uncertain, ambiguous, and unreliable source of power. The male-male relationship, core to masculinity, is the key. As a consequence, it fosters the universal subordination of women. Male-female subordination may express a more stable assumed foundation of power, but this source of power fails to translate into male-male relationships.

12. Dowd, *Masculinities and Feminist Legal Theory*, *supra* note 10 at 229–34.

Professor Bailey's article focuses on harassment by straight men of straight men, particularly by engaging in "horseplay," conduct typically excluded from legal definitions of sexual harassment under Title VII. The focus on the most privileged male group and this category of conduct is a valuable lens from which to understand how masculinity functions more broadly.

Professor Bailey's article opens the door to several additional implications. First, this perspective invites exploring and challenging of what has been excluded from conduct examined within the framework of harassment doctrine. Why is "horseplay" excluded? Is this "male play," and if so, what excludes it from analysis? The origin of these terms and their cultural use point us toward some obvious, gendered norms and tolerances, as well as gendered assumptions of who is involved. How does changing the race or gender—or both—of who is involved in conduct labeled this way change the analysis? Second, this expanded perspective of sexual harassment invites a broader analysis of gendered work and gendered workplaces. The operation of masculinities is relevant not only to harassment but also to systems and structuring. These include sex segregation in work, the pay gap, and intersectional segregation that replicates intersectional hierarchies. They also include patterns within specific work, like the practice of law, that remain stubbornly "male." Third, the expanded use of masculinities analysis, in harassment doctrine and more broadly in all workplace contexts, powerfully suggests masculinities analyses' usefulness to uncover and expose patterns of inequality elsewhere. Masculinities insights are critical, for example, to confronting white supremacy, challenging the reassertion of power over women's bodies post-*Dobbs*,¹³ and upholding multiracial democracy.

1. Challenging the Exclusion of "Horseplay"

It is time to challenge the exclusion of "horseplay" and thus the scope of actionable conduct and actors.

Many commentators have critiqued the justification for or understanding of sexual harassment, as well as the articulation of the legal standard.¹⁴ The standard articulation specifically excludes certain conduct.¹⁵ With the expansion of sexual harassment to include same-sex

13. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

14. The standard for an actionable hostile environment claim is as follows: "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted).

15. The level of conduct must be "severe or pervasive," *id.*, a quantitative standard, and the exclusion of horseplay and flirtation is a qualitative exclusion of particular conduct deemed to be "socializing." *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

harassment, this exclusionary definition was underscored.¹⁶ What has been largely ignored, however, is that the excluded conduct is gendered conduct that is subordinating, not “harmless” or simply “playful” or “social.” The very articulation of the conduct names it as gendered: the Court excluded “*male-on-male* horseplay.”¹⁷

The articulation of horseplay as male-on-male conduct was hardly necessary. This is clear when the definition and etymology of “horseplay” is interrogated. The dictionary definition of “horseplay” is “rough, boisterous play.”¹⁸ According to one source, it is “vaguely dangerous,” so something one could get hurt doing.¹⁹ The term is of vague origin, dating from the 1500s, first recorded in 1580-90, with speculation that the term comes from descriptions of interactions between horses, interactions which are heavy, strong, and rough. Examples of “horseplay” found in various dictionaries include wrestling on the ground or splashing around in a pool.²⁰

Similar terms are “roughhousing” and “butting heads.” Roughhousing is defined as “act[ing] in a boisterous, violent manner.”²¹ Other definitions include to “fight in a way that is not serious,”²² “[t]o engage in rowdy, uproarious behavior or play,”²³ or “[a] violent disturbance or an instance of boisterous play.”²⁴ Roughhousing is often used as a synonym for “horseplay.” Its first known use as a noun or verb was in the early 1880s and late 1890s.²⁵ Interestingly, its evolution started as a description of a place like a tavern where brawls might occur, but came to mean something playful rather than dangerous, although engaging in such behavior could lead to injury or property damage because of its “rough” nature.²⁶

16. *Oncale*, 523 U.S. at 79–80.

17. *See id.* at 81.

18. *Horseplay*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/horseplay> [https://perma.cc/84GG-7UD6] (last visited Oct. 9, 2022).

19. *Horseplay*, VOCABULARY.COM, <https://www.vocabulary.com/dictionary/horseplay> [https://perma.cc/3ZH8-7X8F] (last visited Oct. 9, 2022).

20. *Horseplay*, *supra* note 17.

21. *Roughhouse*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/roughhouse> [https://perma.cc/ST2Q-KA8A] (last visited Oct. 9, 2022).

22. *Roughhousing*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/roughhousing> [https://perma.cc/5VBN-DTEW] (last visited Oct. 9, 2022).

23. *Roughhouse*, THE FREE DICTIONARY, <https://www.thefreedictionary.com/Roughhouse> [https://perma.cc/8VVE-99KB] (last visited Oct. 9, 2022).

24. *Roughhouse*, *supra* note 21.

25. *Roughhouse*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/roughhouse> [https://perma.cc/4SYL-CAJH] (last visited Oct. 9, 2022).

26. According to The Word Detective,

A similar term is “butting heads.” Although it denotes more aggression and potential harm, the term describes a verbal argument rather than the physical interaction of horseplay or roughhousing.²⁷ The key is a lack of compromise. Another related term is “grab ass,” or “grabass,” which is sometimes used as a synonym for “horseplay,” denoting rowdy behavior or slacking off from real work.²⁸

All these terms implicitly describe male conduct. This does not mean that girls do not or cannot engage in horseplay, roughhousing, butting heads, or grabass, but just that it is more likely common among boys or adult men. The behaviors described by these terms are behaviors designed to establish men’s place with each other. It is hierarchical conduct. The tolerance of such conduct in the workplace reinforces masculinity as defined by hierarchy and the “maleness” of the workplace. This strong gender and hegemonic masculinity association and the tacit acceptance of such conduct in *Oncala* is gender essentialist; it also suggests the behavior is biological or ingrained and therefore an expression of “natural” gender difference. If “horseplay” instead is socially constructed learned behavior, then it is important to recognize its meaning for men and the message it communicates to women when this conduct occurs in the workplace and is deemed not only legally non-actionable, but acceptable. If “horseplay” is excluded from sexual harassment, then it excludes gendered behavior socially typed as “male”

As a verb, “to roughhouse” (which is usually spelled as one word) first appeared in print in the late 19th century and is considered a US coinage. The initial meaning of “to roughhouse” back then was “to mistreat violently; to fight” (“Private James Tinan . . . in company with some companions yesterday ‘roughhoused’ a peddler and distributed his wares among the crowd,” NY Times, 1898), as well as “to create a disturbance or brawl.”

Within a few years, however, “to roughhouse” had acquired the milder meaning of “to engage in boisterous behavior and horseplay” (“Police spokesmen said the boys were ‘rough-housing’ on the grass,” 1971) or simply “to play energetically” (“The puppy, taking her laughter as a signal to play, romped all over her, and for a while they roughhoused together,” 1995). “Roughhousing” today may involve wrestling over a ball, for instance, but the days when the term was tantamount to “mugging” are, thankfully, long gone.

Roughhousing, THE WORD DETECTIVE, <http://www.word-detective.com/2011/10/roughhousing/> [<https://perma.cc/5LDG-563G>].

27. *Butt heads*, DEFINITIONS, <https://www.definitions.net/definition/butt+heads> [<https://perma.cc/W46P-UU5R>] (last accessed Oct. 9, 2022) (“To argue uncompromisingly with someone. Etymology: From the activities of some horned animals, which compete by butting, or hitting, their heads against one another.”).

28. *Grabass*, WIKTIONARY, <https://en.wiktionary.org/wiki/grabass> [<https://perma.cc/V2MC-H3E9>] (last accessed Oct. 9, 2022). The Urban Dictionary gives this example: “[q]uit playing grab ass and get back to work.” *Grab ass*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=grab%20ass> [<https://perma.cc/D46E-QXU7>] (last accessed Oct. 9, 2022).

and deems it acceptable workplace behavior. *Oncale* does precisely this by characterizing “horseplay” as “ordinary socializing.”²⁹ This characterization not only plays into male hierarchy as a core element of masculinity, but also excludes women who, if they engaged in the same behavior with men, or with other women, would most likely be treated differently. All of this is raced as well. If the assumed race and gender identities change, the reaction to the behavior may well change from harmless “play” to a dangerous “fight” or “improper” behavior.

This critique of *all* “horseplay” as harassment suggests that the preservation of “flirting” as distinguished from “sexual harassment” deserves the same careful masculinities-infused analysis. Similarly, the doctrinal requirement that harassment be severe and pervasive in order to be actionable in most instances should be reexamined from a masculinities lens. These are lines that preserve gendered workplaces; they preserve male privilege within sexual harassment doctrine by tacit approval of subordinating behavior or gendered forms of subordination that reinforce hierarchy. One can still flirt with a woman and engage in horseplay with a man. The assumed subject of these rules is a white heterosexual man.

This behavior should be included in sexual harassment doctrine under an understanding that tolerating gendered behavior in the workplace subordinates women and men by reinforcing a culture of hierarchy and exclusion. It is behavior designed to sustain the hierarchy in which some men are superior to other men that itself sustains the hierarchy in which men are superior to all women.

2. Expanding Masculinities Analysis to the Full Scope of Workplace Issues

The inclusion of gendered subordinating or exclusionary conduct within the scope of sexual harassment connects to a second, broader implication triggered by Professor Bailey’s article. Hierarchy is integral to masculinities, so it is integral for *all* men. The relationship of men *to* men is more important to a man’s value than his relationship to women because *all* women are deemed lesser. *This hierarchical nature of masculinities functions not only to generate harassment; it is present throughout workplace systems and structures.* Therefore, the insights of masculinities analysis as summarized above and discussed in Professor Bailey’s article should be used broadly to challenge the structures and systems, as well as the culture and norms, that are foundational to the support of a dominant masculinity that is not only gendered, patriarchal, and misogynous, but also just as strongly raced.

29. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

Powerful evidence of this structural hierarchy is the persistence of race and sex segregation in who does what work and continued race and gender wage gaps.³⁰ These are expressions of masculinities hierarchies in practice. For instance, white men make up over 50% of the top ten highest paying occupations, with white women constituting roughly 20–30% of most of these same occupations.³¹ This leaves only about 20% of these highly coveted positions to people of color across all genders.³² Women overall earn 73 cents for every dollar a white, non-Hispanic man earns, with Black women earning 58 cents per dollar and Latina women earning 49 cents per dollar.³³

Another example of structural hierarchy is work-family conflict. Joan Williams’s definition of the “ideal worker” as one with a family but no family responsibilities, or who puts work first above all other relationships and responsibilities, still rings true.³⁴ The patterns of workers during the COVID-19 pandemic made this reality even more stark. According to a study by the Pew Research Center, working moms were significantly more likely to leave their jobs in response to childcare challenges.³⁵ In fact, about one third of working mothers have left their jobs since the start of the pandemic.³⁶ The pandemic patterns simply

30. See Marina Zhavoronkova, Rose Khattar & Mathew Brady, *Occupational Segregation in America*, CTR. FOR AM. PROGRESS (Mar. 29, 2022), <https://www.americanprogress.org/article/occupational-segregation-in-america/> [<https://perma.cc/85Y3-D4F4>]; Ariane Hegewisch & Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap: A Job Half Done*, INST. FOR WOMEN’S POL’Y RSCH. (Jan. 2014), <https://iwpr.org/wp-content/uploads/2020/08/C419.pdf> [<https://perma.cc/AD39-JSPX>]; Kim A. Weeden, *Occupational Segregation*, in *PATHWAYS: THE POVERTY AND INEQUALITY REPORT* (Stan. Ctr. on Poverty and Inequality ed. 2019), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2019_OccupSegregation.pdf [<https://perma.cc/4JJQ-U9L6>]; *The Impact of Gender and Racial Inequality on Women Workers*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/wb/impact> [<https://perma.cc/GR3U-E397>].

31. Zhavoronkova, Khattar & Brady, *supra* note 30.

32. *Id.*

33. *Id.*

34. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 80 (2010).

35. Tracy Brower, *Working Parents Are In Crisis: New Data And The 5 Best Responses*, FORBES (June 5, 2022), <https://www.forbes.com/sites/tracybrower/2022/06/05/working-parents-are-in-crisis-new-data-and-the-5-best-responses/?sh=6d3e28417a8c> [<https://perma.cc/YM6F-P5BB>].

36. *Id.*; The Pew Research Center reported on gender disparities linked to childcare costs and disruptions, but the report exposed who responds when these issues arise.

The COVID-19 recession resulted in a steep but transitory contraction in employment, with greater job losses among women than men. The recovery began in April 2020 and is not complete. As of the third quarter of 2021, the labor force ages 25 and older remains nearly 2 million below its level in the same quarter of 2019. The disproportion in labor disruption is linked to sex

reflect a long-term reality of women in the workforce. As the Institute for Women's Policy Research observed:

[T]he development of an infrastructure to support workers with family caregiving responsibilities has been largely neglected. Many workers lack access to even the most basic supports such as earned sick days and job-protected paid parental leave. Quality child care is also out of reach for many families because it is not affordable. Women are the large majority of family caregivers, and in the absence of reliable family supports, too many women are forced to make difficult decisions between keeping their jobs and caring for their family members.³⁷

The persistent lack of substantive support such as guaranteed paid maternity and parental leave for all workers; guaranteed paid sick leave for essential family caregiving; and the availability of high-quality childcare at reasonable cost has remained stunningly unaddressed. The pattern of women disproportionately engaging in care work and household work remains, even as women are highly engaged in the workforce.³⁸

Male hierarchy is also reflected in who succeeds in male identified work. For example, male work (such as the practice of law) remains structured around a male paradigm that reinforces a limited sense of manhood (work and family) and prioritizes certain behaviors that track

segregation in jobs especially among lower educated women, and potentially to parental issues. The pandemic also widened the pay gap, which remains at roughly 85%.

Richard Fry, *Some Gender Disparities Widened in the U.S. Workforce During the Pandemic*, PEW RSCH. CTR. (Jan. 14, 2022), <https://www.pewresearch.org/fact-tank/2022/01/14/some-gender-disparities-widened-in-the-u-s-workforce-during-the-pandemic/> [<https://perma.cc/MB34-Q453>].

37. *Work & Family*, STATUS OF WOMEN IN THE STATES (2022), <https://statusofwomendata.org/explore-the-data/work-family/> [<https://perma.cc/CQA6-EHKD>].

38. According to the Institute for Women's Policy Research:

During the past four decades, the labor force participation rate for mothers of children under six has more than doubled, from just under a third (32.1 percent) in 1970 to just over two thirds (67.1 percent) in 2013 (IWPR 2015a). During the same period, the labor force participation rate of fathers hardly changed at all, falling from 97.9 percent in 1970 to 94.4 percent in 2013. Trends in the allocation of time between paid work, childcare, and housework between 1975 and 2011 show that both mothers and fathers of young children now spend more time on these three activities than they did forty years ago (Figure 3.7). Yet, while mothers spend more time in paid work and fathers more time on housework and childcare, overall mothers still do the large majority of family work and fathers still do the majority of paid work.

Id.

as “male,”³⁹ as well as leaving unaddressed both blatant and implicit bias. Those realities are so commonplace that they are easily portrayed fictionally. In the 2022 Netflix series *Partner Track*, about a hypothetical Asian American woman during her partnership year at a New York law firm, the lead character had done everything right (including meeting outrageous work demands as expected from the white male senior partner) and was widely expected to make partner.⁴⁰ The lead character expected to succeed because she had played by the male rules of the game.⁴¹ In the end, a white man was chosen instead.⁴² The only Asian American woman partner confirmed that even partnership did not mean acceptance.⁴³ One might become partner but one would never become equal.

I am not alone in calling for the broader use of masculinities analysis in the workplace. Ann McGinley’s voluminous work applying masculinities analysis to a broad range of workplace issues has been pathbreaking.⁴⁴ Professor McGinley’s work also is not limited to the workplace; she analyzes the presence and implications of dominant masculinities, infused by the core belief in hierarchy, outside the

39. See Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 873–74 (2018); *Representation of Women and People of Color in U.S. Law Firms in 2020*, NAT’L ASS’N FOR LAW PLACEMENT (June 2021), <https://www.nalp.org/0621research> [<https://perma.cc/LEY8-KGA6>]; *Lawyers by Race and Ethnicity*, A.B.A., https://www.americanbar.org/groups/young_lawyers/projects/men-of-color/lawyer-demographics/ [<https://perma.cc/FDL2-P4AB>] (last accessed Oct. 4, 2022); MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 120 (2019).

40. *Partner Track* (Netflix 2022).

41. *Id.*

42. *Id.*

43. *Id.*

44. See generally ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* (N.Y. Univ. Press 2016) (exploring multidimensional masculinities theories to employment discrimination law); Ann C. McGinley, *The Masculinity Mandate: #metoo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMP. RTS. & EMP. POL’Y J. 59 (2019) [hereinafter *The Masculinity Mandate*] (discussing masculinities theory rooted in feminist legal theory, critical race theory, and others); see Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 102–04 (2018); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 387, 387 nn.102–04 (2004); MICHAEL KIMMEL, *GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN* (2008) (exploring the idea of masculinity in America and its effect on the lives of men); David S. Cohen, *Keeping Men Men and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 544–49 (2010); Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 586 (2010); Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 242–47, 256–59 (2015); see generally Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 U. CHI. LEGAL F. 171, 172–74 (2019) (discussing the superior masculinity attitude men have over women which occurs in institutions).

workplace as well.⁴⁵ Professor McGinley has identified what she calls the “masculinity mandate,” a hegemonic set of norms that police all men and sustain male hierarchy.⁴⁶ These norms are “the strong pressure on men and boys to conform their behavior to society's expectations of them.”⁴⁷ As Professor McGinley succinctly states, “The mottos go: Boys don’t cry; fathers don’t take primary responsibility for children; real men don’t show fear.”⁴⁸ Professor McGinley’s work parallels my own in diverse contexts, and my final point about Professor Bailey’s analysis.

3. Expanding Masculinities Analysis Beyond the Workplace

The presence of masculinities in the structures and systems of work, and its pervasive presence in workplace culture, suggests intersections with other contexts. *If masculinities are central—core—to the discriminatory, unequal structure of work, masculinities also underlie and are expressed in the inequalities of other domains, and the contemporary fault lines of divisiveness.* The contexts external to work reinforce work hierarchies. At the same time, the insights of masculinities analysis, used so effectively by Professor Bailey to expose harassment among the subjects we least expect to suffer discrimination (white heterosexual males) makes visible what Professor Bailey calls the epicenter of harassment. Applying these insights outside the context of work similarly expose the toxic consequences of dominant masculinity norms. Hierarchy remains key; constant performance of hierarchy and defense of one’s position are critical. White supremacy, on the rise in multiple domains, expresses this dynamic. In its increasingly virulent mainstream expression, it has become a threat to democracy, epitomized by January 6 and recent statements that if the 2022 midterm elections do not result in the “right” or “correct” outcome, then the outcome will not be accepted.⁴⁹ The overwhelmingly male composition of the radical right is a defense of race and gender privilege and hierarchy.⁵⁰

The attempted assertion of control over women—literal control by

45. See, e.g., Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 U. CHI. LEGAL F. 171, 189 (2019) (discussing how harassment in schools serves to establish and preserve the society’s gender hierarchy).

46. *The Masculinity Mandate*, *supra* note 45, at 60–61.

47. *Id.* at 61 n.8.

48. *Id.* at 61.

49. See *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES (last updated Jan. 6, 2022), <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html> [<https://perma.cc/G2D7-7UKZ>].

50. See generally MICHAEL KIMMEL, *ANGRY WHITE MEN: AMERICAN MASCULINITY AT THE END OF AN ERA* (2017); see also Jillian Sunderland, *Masculinities and Alt-Right: Fighting for Masculine Hegemony: Contestation Between Alt-Right and White Nationalist Masculinities on Stormfront.org*, SAGE JOURNALS (Aug. 16, 2022), <https://journals.sagepub.com/doi/10.1177/1097184X221120664> [<https://perma.cc/9FPR-J9XF>].

control of their bodies—in current legislation proposed in the wake of *Dobbs*⁵¹ overturning *Roe v. Wade*⁵² appears to represent for some the reassertion of racial hegemony by assuring white births, as well as gender hegemony by denying women liberty to engage in the full scope of personhood and all of its choices. While not all anti-abortion activists fall within this description, and while masculinities in its gendered and racialized aspect is not the sole set of values that drive this movement, it is consistent with that agenda.⁵³

Gender and race hierarchy remains pervasive in multiple domains as characterized by the profile of leadership and power. According to a 2020 review of nearly a thousand persons in positions of power, 80% were white.⁵⁴ And an earlier evaluation of women in leadership or power positions in virtually every aspect of life found that women, while present, remain in the lower rungs of virtually every profession and are absent from leadership positions.⁵⁵ In the U.S. Senate, there are currently twenty-five women serving, or 25%; historically, there have been a total of fifty-nine women who have served, or 4.5%.⁵⁶ Of the current Senators, twenty-one are white women; one is Latina; and two are Asian American. With the election of Kamala Harris as Vice President, the Senate lost its only Black woman U.S. Senator.⁵⁷ Only eleven African Americans total have served in the Senate; and only briefly, in 2017, were there three African American senators serving at the same time.⁵⁸ Roughly one quarter of the House of Representatives is female, but historically—even

51. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

52. *Roe v. Wade*, 410 U.S. 113, *reh’g denied*, 410 U.S. 959 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

53. See Dara Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 431–32, 439 (2019).

54. Troy Griggs, Jon Huang, Denise Lu, Haeyoun Park & Ashwin Seshagiri, *Faces of Power: 80% Are White, Even as U.S. Becomes More Diverse*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/interactive/2020/09/09/us/powerful-people-race-us.html> [<https://perma.cc/Q6YP-RFQQ>].

55. Diana Boesch, Nora Ellmann & Judith Warner, *The Women’s Leadership Gap*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/article/womens-leadership-gap-2/> [<https://perma.cc/XG3J-K67M>].

56. *Women in the U.S. Senate 2022*, CTR. FOR AM. WOMEN AND POLITICS (2022), <https://cawp.rutgers.edu/facts/levels-office/congress/women-us-senate-2022> [<https://perma.cc/Q898-YJM3>] (last visited Nov. 23, 2022).

57. Lauren Camera, *Kamala Harris Makes History as First Female Vice President*, U.S. NEWS (Jan. 2021), <https://www.usnews.com/news/elections/articles/2021-01-20/kamala-harris-becomes-first-female-vice-president>.

58. *American Senators*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm [<https://perma.cc/G2M7-T4KM>] (last visited Oct. 9, 2022).

a decade ago—the number was half of that percentage.⁵⁹ Two thirds of women who have served were in Congress after 1992.⁶⁰ The first woman of color was elected in 1964; the total number of women of color who have served is eighty-three.⁶¹

One stark visual reminder of this pervasive hierarchy of masculinities are the identities of the statues in Statuary Hall at the Capitol building in Washington, D.C., which includes two statues per state of notable state citizens.⁶² Of one hundred statues, only eleven are women.⁶³ Until at least 2017, statues of Confederate soldiers and politicians outnumbered statues of Black people in the Capitol complex three to one.⁶⁴ Dr. Mary McLeod Bethune is the first Black woman represented in the Statuary Hall collection, and the first African American of either sex.⁶⁵ Dr. McLeod Bethune's statue was installed in 2022 and took the place formerly held by Confederate General Kirby Smith, who was removed by the State of Florida in 2016.⁶⁶ This first statue of a Black woman is carved from white marble, holding a black rose.⁶⁷ The symbolism is striking. But it is also a reminder of the hierarchy of masculinities that remains represented.⁶⁸

Masculinities is a totalistic identity and set of values that pervades all aspects of life, and has had a powerful impact on systems, structure, and culture. Expanding the perspective offered by masculinities analysis encourages us to look narrowly as well as broadly, just as feminist

59. Carrie Blazina & Drew DeSilver, *A Record Number of Women are Serving in the 117th Congress*, PEW RSCH. CTR. (Jan. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/01/15/a-record-number-of-women-are-serving-in-the-117th-congress/> [<https://perma.cc/Y57K-7FP2>].

60. *Id.*

61. *Id.*

62. *National Statuary Hall Collection By Location*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/statuary-hall-collection-by-location> [<https://perma.cc/4P2D-LJAX>].

63. *Id.*

64. Christopher Ingraham, *The U.S. Capitol Has At Least Three Times As Many Statues of Confederate Figures As It Does Of Black People*, WASH. POST (Aug. 16, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/08/16/the-u-s-capitol-has-at-least-three-times-as-many-statues-of-confederate-figures-as-it-does-of-black-people/> [<https://perma.cc/JP5C-9LZ9>].

65. April Rubin, *Statue of Black Educator Replaces Confederate General in U.S. Capitol*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/bethune-statue-confederate-capitol.html> [<https://perma.cc/6CY3-EY2P>].

66. *Id.*; Jim Turner, *Florida Lawmakers Voted to Remove a Confederate Statue in 2016. So Why Is It Still on Display?*, TAMPA BAY TIMES (Sept. 18, 2020), <https://www.tampabay.com/news/florida-politics/2020/09/18/this-confederate-generals-statue-cant-find-a-home-after-lawmakers-approved-its-removal/> [<https://perma.cc/S9VY-YX7P>].

67. Rubin, *supra* note 65.

68. Frederick Gooding Jr., *Not a Single Statue Honored a Black Person's Legacy Until 1974. That Has Had Very Real Repercussions*, FAST CO. (Feb. 17, 2022), <https://www.fastcompany.com/90722199/not-a-single-statue-honored-a-black-persons-legacy-until-1974-that-has-had-very-real-repercussions> [<https://perma.cc/L2PW-NZC8>].

analysis has identified both the everyday, microcosmic aspects of subordination, as well as the overall policies, beliefs, and structures that impede freedom by imposing hierarchy.