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All the World's the Men's Room

Mary Anne Case†

In August 2000, a panel of the Seventh Circuit Court of Appeals upheld the dismissal of Audrey Jo DeClue's complaint of hostile environment sexual harassment against her employer, the Central Illinois Light Company, for whom DeClue had completed an apprenticeship as a lineman. The panel was unanimous in holding that most incidents of which DeClue complained, "includ[ing] a coworker's deliberately urinating on the floor near where the plaintiff was working, repeated shoving, pushing, and hitting her, sexually offensive touching, exposing her to pornographic magazines, and—the point she particularly emphasizes—failing to make adequate provision for restroom facilities for her" had occurred "before the 300-day limitations period" and hence were time-barred.¹ With respect to "[t]he only significant act—omission would be more precise—of alleged sexual harassment that occurred during the limitations period[, . . .] the electric company's continued failure to provide restroom facilities for the plaintiff, who was the only woman in the crew of linemen to which she was assigned—in fact the only woman lineman employed by the company,"² dissenting Judge Ilana Rovner would have allowed DeClue to pursue her hostile environment claim. But, writing for himself and Judge William Bauer, Judge Richard Posner held that the "defendant's failure to respond to the plaintiff's request for civilized bathroom facilities can[not] be thought a form of sexual harassment."³ Because plaintiff had "insisted on litigating her case as a hostile-work-environment case throughout" and had not so much as mentioned the term "disparate-

† Arnold I. Shure Professor of Law, The University of Chicago Law School and 2006–2007 Crane Fellow in Law and Public Affairs, Princeton University. I am grateful to Audrey Jo DeClue for sharing her thoughts and documents; to Ava Baron, Margot Canady, Frank Easterbrook, Liz Emens, Katherine Franke, Beth Herstein, Claire Hill, Laura Kessler, Todd Preuss, Darren Rosenblum, and Cass Sunstein for comments on drafts; to Jake Glazeski, Allyson Newton Ho, and Sloan Speck for research assistance; and to the Arnold and Frieda Shure Fund and Princeton University's Crane Fellowship for support. An extended version of this paper was delivered at the University of Minnesota's Institute for Law and Rationality's Symposium "Self and Other: Cognitive Perspectives on Trust, Empathy and the Self" under the title "The Bowels of Christ and Those of Audrey Jo DeClue and Albert Johnson," and I am also grateful to the participants for their comments.

¹ *DeClue v Central Illinois Light Co.*, 223 F3d 434, 435–36 (7th Cir 2000).

² *Id.* at 436 (majority).

³ *Id.* at 436.

impact” in her papers, the district court had been right, in the majority’s view, to grant summary judgment to the defendant.⁴

According to Posner, “hostile work environment” harassment is:

the form of sex discrimination in the terms or conditions of employment that consists of efforts either by coworkers or supervisors to make the workplace intolerable or at least severely and discriminatorily uncongenial to women It is a form of, rather than a synonym for, sex discrimination. It is remote, for example, from a simple refusal to hire women, from holding them to higher standards than their male coworkers, or from refusing to make accommodations for differences in upper-body strength or other characteristics that differ systematically between the sexes. The last is the classic disparate-impact claim, and it is the claim suggested by the facts of this case but not presented by the plaintiff.⁵

At the time the *DeClue* case came down, I was a newcomer to the law faculty of The University of Chicago and had recently begun my still-ongoing work on public toilets as gendered spaces.⁶ I knew Dick Posner only well enough to suppose that he would at least indulge, if not revel in, the inquiries of a colleague about positions he had taken. So I emailed him, explaining my particular interest in *DeClue* and adding that I:

wondered if I could prevail on you in all seriousness to react to a hypothetical to help me understand the scope of your position in that case that “failure to alter working conditions that just happen, without any discriminatory intent, to bear more heavily” on employees of one sex cannot “be thought a form of sex harassment.” Would you have the same reasoning and the same result if the first and only male nurse in a hospital were required to wear exactly the same uniform as his female colleagues had been issued from time immemorial—white shirtdress, bonnet, pantyhose and pumps? If not, why not?⁷

Although I had emailed my query shortly after 10 pm, I received a response in little more than an hour. It read, in its entirety:

⁴ Id at 437.

⁵ Id.

⁶ See generally Mary Anne Case, *Toilet Survey*, online at <http://www.law.uchicago.edu/toiletsurvey> (visited Aug 11, 2007) (seeking to gather data on sex-segregated toilet facilities); Mary Anne Case, *Changing Room? A Quick Tour of Men’s and Women’s Rooms in U.S. Law over the Last Decade, from the U.S. Constitution to Local Ordinances*, 13 Public Culture 333 (2001).

⁷ Email from Mary Anne Case to Richard A. Posner (Nov 13, 2000).

That's not a good example, because the employer would have no reason to require the male nurse to dress that way. Since male nurses don't want to dress up as women, the employer would have to pay a higher wage to its male nurses (and hence to the female ones as well, because of the Equal Pay Act) to compensate them for the indignity, with no offsetting benefit to the employer. In contrast, the employer saves money by not making an accommodation to women's desire for greater privacy.

Think of a better example!⁸

At the time, I was speechless. Now, years later, I would like to take the opportunity offered by this commemoration of Judge Posner's first twenty-five years on the federal bench to explain why I have always remained convinced the example is a good one. The process will lead me to a number of more general observations about the law and the fact of sex discrimination and some speculation about an even more complicated subject—the way Judge Posner's mind works.

I will consider in this conjunction as well a second Posner opinion: Posner's dissent from the dismissal of prisoner Albert Johnson's complaint that his constitutional rights were violated when female guards were assigned to duties in the course of which they "c[ould] see men naked in their cells, the shower, and the toilet."⁹ The Posner opinions in *DeClue* and *Johnson* are characteristically pithy and my discussion of them will, regrettably, be far more convoluted, plodding, and prolix than the opinions themselves. Pithy responses to these opinions already exist in the form of Judge Ilana Rovner's concurring and dissenting opinion in *DeClue* and Judge Frank Easterbrook's majority opinion in *Johnson*, each of which I would have been happy to join had I been a member of the court.¹⁰

My own plodding here begins with an explication of aspects of my nursing hypothetical I had thought would be obvious to Dick Posner when I wrote to him. I had intended my hypothetical to be in some respects a mirror image of the facts of *DeClue*—a hypothetical in which a job historically all-female (as *DeClue*'s had been all-male) had working conditions constructed around a feminine standard (as work on the power lines had been constructed around a masculine standard) and no alteration in working conditions had been made to

⁸ Email from Richard A. Posner to Mary Anne Case (Nov 13, 2000).

⁹ *Johnson v Phelan*, 69 F3d 144, 145 (7th Cir 1995).

¹⁰ Although the consequence is to leave out of this essay several important lines of analysis, I will do my best in this limited space not simply to repeat arguments made in the Rovner and Easterbrook opinions, which I urge the interested reader to consult.

accommodate the first worker of a different sex.¹¹ I had intended to leave open the possibility that the first worker of a different sex had been hired, not out of genuine willingness to integrate the workplace, but in reluctant compliance with the law. An employer or supervisor obliged to hire (wo)men but less than eager to work with them might be at least indifferent, at most delighted, if a mere “failure to alter working conditions” would discourage them from applying for or remaining on the job. Evidence of delight in the unchanged working conditions having such a discouraging effect might be evidence of “discriminatory intent,” but evidence of indifference might not be.

It seems what caused Posner to miss the intended point of my hypothetical is a failure of imagination.¹² Apparently Posner simply cannot imagine an employer who is not willing, indeed eager, to hire men—so eager that it will, of course, alter working conditions and even pay scales as necessary to attract them. That an employer’s “reason to require the male nurse to dress that way” might be precisely to “make the workplace intolerable or at least severely and discriminatorily uncongenial to” him and others of his sex seems not to have oc-

¹¹ I could have used a flight attendant or a Hooters waiter in my hypothetical just as well as a nurse. See *Diaz v Pan American World Airways, Inc.*, 442 F2d 385, 387–88 (5th Cir 1971) (striking down per se exclusion of males from the job of flight attendant notwithstanding findings of fact to the effect that the job required characteristics gendered feminine and that “the admission of men to the hiring process, in the present state of the art of employment selection, would have increased the number of unsatisfactory employees hired”) (quotation marks omitted). See also note 13.

¹² Perhaps because he is so often so imaginative, failures of Posner’s imagination, not infrequently pertaining to sex and gender, can be particularly striking. Law students, raised in a culture in which a clip of one obviously aroused young man salaciously murmuring to another the word “lesbians” formed the centerpiece of the movie trailer for *American Pie 2*, have been caught up short by Posner’s confident assertion, in *Douglass v Hustler Magazine, Inc.*, 769 F2d 1128, 1135 (7th Cir 1985), that “[f]ew men are interested in lesbians.” Rational choice may have led Posner astray in this regard. For the rational heterosexual man, an interest in lesbians would be inefficient, given that lesbians have no (sexual) interest in him. Posner might have done well, however, to take to heart more of the lessons of Plato’s *Symposium*, in which, as he admits in the Introduction to *Sex and Reason*, he was “surprised to discover . . . a defense . . . of homosexual love [because i]t had never occurred to [him] . . . any [] respectable figure in the history of thought[] had attempted such a thing.” Richard A. Posner, *Sex and Reason* 1 (Harvard 1992). As Socrates reminds the other *Symposium* participants, we desire (and hence “are interested in”), not what we may have already, but precisely what we lack. See Plato, *Symposium*, in *On Homosexuality: Lysis, Phaedrus, and Symposium* 121–26 (Prometheus Books, 1991) (Eugene O’Connor, ed) (Benjamin Jowett, trans).

curred to Posner.¹³ I will have more to say shortly about Posner's assumptions concerning male privilege.¹⁴

First let me note that detailed consideration of such hypotheticals should demonstrate how right Judge Rovner was to insist in her *DeClue* dissent that "the lines with which we attempt to divide the various categories of discrimination cannot be rigid."¹⁵ Posner's assertions to the contrary notwithstanding, the forms of sex discrimination are not necessarily "remote" from one another. For example, although actual proof of discriminatory intent is not required in ordinary disparate impact litigation, it has been clear from the earliest such cases that at least some employment practices with a disparate impact were instituted precisely because of, and not in spite of or with indifference to, their discriminatorily disparate impact. Excusing plaintiffs from the potential difficulties of proving discriminatory intent in disparate impact cases provided remedies for both invidiously and inadvertently discriminatory practices.

Practices that contribute to a discriminatorily hostile work environment similarly can run the full spectrum from clearly disparate treatment, to disparate impact with discriminatory intent, to disparate impact "without any discriminatory intent." Most hostile environment harassment cases correctly focus, not on the intent of the harasser, but on the effect of the environment on the plaintiff and on a reasonable person in the plaintiff's position. Consider, for example, the display of pornographic materials in the workplace, something of which DeClue, like many other hostile environment sexual harassment plaintiffs, complained. In some instances, the female plaintiff is clearly the target of such materials—they are placed only at her work station, for example, or have her name written on them. In others, male workers who did or would display pornography even in an all-male workplace clearly relish the male bonding and negative impact on women's comfort level in the workplace such materials offer. In still others—and, from the evidence, DeClue's workplace seems to fall in this latter category—not only does the presence of pornographic materials predate the presence of women in the workplace, but, once there is a woman present, the men are if anything more likely to conceal, re-

¹³ Readers who also have trouble imagining such an employer may do well to recall the ads "featuring a burly mustachioed man wearing a blond wig and Hooters uniform" taken out by the Hooters restaurant chain to protest an EEOC demand that it hire men as well as buxom women in skimpy outfits to wait on tables. See Harry F. Rosenthal, *Hooted Down, EEOC Drops Investigation*, Chicago Sun-Times 50 (May 2, 1996).

¹⁴ Including the additional apparent failure to imagine that some men might actually "want to dress up as women" and that such men might find nursing particularly attractive.

¹⁵ 223 F3d at 440 (Rovner dissenting).

duce, or apologize for the material than to shove it in her face or revel in her discomfort at it.¹⁶ Nevertheless, like many a hostile environment plaintiff before her, DeClue complained that “[t]he pornographic material greatly upset, intimidated and embarrassed” her.¹⁷ She was similarly upset to be exposed, even inadvertently, to her male colleagues urinating at the worksite.¹⁸

When DeClue’s worksite was so configured that DeClue was put at risk of her male colleagues urinating in her presence or observing her urinating, Posner treated this not as deliberately demeaning or hostile to her, but as something that just happens,¹⁹ notwithstanding that, as Judge Rovner noted in her dissenting opinion, public urination is equally illegal for both men and women.²⁰ Yet when the prison was similarly configured to put male prisoners like Albert Johnson at risk of observation by female guards, Posner decried this as “degrading or brutalizing treatment,” cruel and unusual punishment²¹—notwithstanding that, as Judge Easterbrook noted in his majority opinion, Johnson “d[id] not allege either particular susceptibility or any design to inflict psychological injury.”²²

In his *Johnson* dissent, Posner focused on Johnson’s alleged “right ‘to practice Christian modesty,’” but it is clearly erroneous to say, as Posner does, that in the modern United States “the nudity taboo . . . is strongest among professing Christians, because of the historical an-

¹⁶ If this latter case is analytically akin to disparate impact without discriminatory intent, it may also be worth considering whether a spectrum ranging from disparate treatment through disparate impact can be set up depending on the subject of the pornographic representations: Are they only of nude women, only of men, equally of nude persons of both sexes? Are the women positioned so as to make the images “pornography” as the MacKinnon-Dworkin ordinance defines it (that is, *inter alia*, as “graphic sexually explicit subordination”)? Are the men? Consider *American Booksellers Association, Inc v Hudnut*, 771 F2d 323, 334 (7th Cir 1985) (striking down on First Amendment grounds a version of this ordinance passed by Indianapolis).

¹⁷ Complaint, *DeClue*, No 98-CV-1276, ¶ 38 (CD Ill filed Aug 24, 1998).

¹⁸ In response to deposition questions, DeClue made clear that she was not claiming that her “co-workers expose[d] themselves to [her] in the process of urinating” but rather that “knowing that they are [urinating] makes me feel uncomfortable because if I walk around the truck and they’re there . . . there is a very high possibility that I will see them.” DeClue Deposition, No 98-CV-1276, 94.

¹⁹ See *DeClue*, 222 F3d at 436.

²⁰ See *Id* at 438 (Rovner dissenting). Rovner’s opinion stressed that “the risk of being caught in the act is arguably greater for women, for whom [urination] is a more cumbersome, awkward, and time-consuming proposition.” *Id*. Conversely, however, given that when a man urinates in front of others he necessarily displays his sex organs to them, something not true of women, observers, including those who bring criminal charges, might be more likely to find public male urination offensive.

²¹ See *Johnson*, 69 F3d at 151 (Posner dissenting).

²² See *id* at 147 (majority).

tipathy of the Church to nudity.”²³ There is no question but that in what Posner describes as the “morally diverse populace”²⁴ of the United States the nudity taboo is far “strongest among professing” Muslims and stronger among observant Jews than among Christians because both Islam and orthodox Judaism have maintained their historical antipathy to nudity. Both Islam and orthodox Judaism to this day impose specific, textually grounded, and critically elaborated requirements of modest dress and body covering on persons of both sexes, requirements that go well beyond the prevailing norms in the United States. By comparison with the Torah and the Koran and their commentaries, the New Testament and commentaries on it say next to nothing on the subject. As for the asserted “historical antipathy of the Church to nudity,” it is far from clear what Posner has in mind. If by “the Church” he means what was, at least until the Reformation, “*unam sanctam catholicam et apostolicam Ecclesiam*,”²⁵ the fathers of the Church were historically far more opposed to luxurious apparel than to nudity; they also frequently spoke out against pampering the flesh in any way, and were perhaps more likely to recommend to someone in Albert Johnson’s position that he refrain from showering altogether than to concern themselves with who might see him doing so. They would certainly have absolved him from blame, particularly were he to cover himself as modestly as possible when excreting or bathing (neither activity strictly requires nudity; indeed, few modern Americans undress fully to excrete). After all, the public nakedness of the Christ and the martyrs was no shame, unkempt nakedness was the hallmark of penitents like the Magdalene, and Francis of Assisi was honored by the Church for stripping himself naked of his luxurious garments in the public square. Moreover, as Posner must know,²⁶ taboos on nudity in Western culture not only extend to, but often actually focus on, having the nudity of others displayed to one, and are not limited to control of one’s own nudity. This made Audrey Jo DeClue in

²³ See *id.* at 152 (Posner dissenting). I spend so much of my limited space on this assertion because a large part of my difficulty with the Posner opinions I discuss is the many unsupported, undefended, and (at least, in my view) erroneous assumptions on which they rest. Because the assumption that the “the nudity taboo . . . is strongest among professing Christians,” unlike so many of Posner’s assumptions, is both explicitly stated in his opinion and, in my view, quickly and decisively refutable, I use it by way of example.

²⁴ See *id.*

²⁵ “One, holy, catholic and apostolic church,” in the words of the creed authorized at that Church’s Council of Nicaea in 325 AD.

²⁶ Posner lists as the impetus for *Sex and Reason* not only his reading of Plato’s *Symposium*, see note 12, but also his participation in *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc), reversed as *Barnes v. Glen Theatre, Inc.*, 501 US 560, 572 (1991). See *Sex and Reason* at 2 (cited in note 12) (describing *Miller* as “involving the constitutionality of a state statute that had been interpreted to forbid striptease dancers to strip to the buff”).

some respects worse off than Albert Johnson, because, even if she practiced modesty in her own excreting behavior, she would still be at risk of exposure to her excreting male colleagues, something of which she complained.²⁷

When DeClue chose what Posner saw as the wrong doctrinal category for her claim, pleading only hostile environment and not disparate impact, Posner held her to her choice and dismissed her claim. But when Johnson's case, though briefed "by a top-notch law firm,"²⁸ exhibited a similar deficiency, Posner on his own initiative eagerly stepped in to "recast[] Johnson's right of privacy claim as a claim under the Eighth Amendment."²⁹ This notwithstanding that, as Rovner's dissent in *DeClue* correctly noted, hostile environment harassment and disparate impact are just judicially-developed specifications of the single statutory harm of sex discrimination in employment,³⁰ while the various constitutional provisions at issue in *Johnson* are not nearly so closely intertwined.

In *Johnson*, Posner hastened to add, "This is not to say that exposing the naked male body to women's eyes constitutes cruel and unusual punishment in all circumstances. A male prisoner has no constitutional right to be treated by a male doctor."³¹ Why not? Apparently because "[m]en have long been attended in hospitals by female nurses, and latterly by female doctors as well."³² Posner appears here again to be taking the state of the world at the time of the litigation as the only proper measure of how it should be for all time. Had Johnson brought his claim just a few years earlier, when female doctors were as uncommon as female prison guards, Posner might just as strenuously have insisted that "parading of naked male inmates in front of female" physicians amounted to treating the prisoners as "a type of vermin, devoid of human dignity and entitled to no respect, . . . the subject of experiments, including social experiments such as the experiment of seeing whether the sexes can be made interchangeable."³³ Just as the arguments Johnson made about female guards could very recently have been made about female doctors, so, as Justice Ginsburg ob-

²⁷ See *DeClue*, 223 F3d at 439 (Rovner dissenting).

²⁸ *Johnson*, 69 F3d at 147.

²⁹ *Id.* at 153 (Posner dissenting).

³⁰ See *DeClue*, 223 F3d at 439–40 (Rovner dissenting).

³¹ *Johnson*, 69 F3d at 154 (Posner dissenting).

³² *Id.* Coincidentally, Posner's dissent in *Johnson* illuminates one non-invidious reason why a hospital might want to insist on a single recognizable uniform for all nurses—to preserve the easy legibility of status differences as among doctors, nurses, and other hospital personnel (for example, orderlies, maintenance staff, and guards), given the differences in their roles and patients' reactions to them.

³³ *Id.* at 151.

served in *US v Virginia*,³⁴ the arguments against admitting women to the Virginia Military Institute (VMI) had all too recently been made against admitting them to the University of Virginia.³⁵

Plato, toilets, nudity, and “the experiment of seeing whether the sexes can be made interchangeable” also came together in the VMI case. VMI had argued that its adversative method, with its lack of privacy, “would destroy . . . any sense of decency that still permeates the relationship between the sexes.”³⁶ Ginsburg’s response included the observation that Plato, in questioning whether women should have equal opportunity to become guardians in his Republic, was initially concerned, not about “women’s native ability to serve,” but about the potential difficulty with their participating in the nude in exercise classes, yet he ultimately “concluded that their virtue would clothe the women’s nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender.”³⁷ Perhaps, just as Plato’s *Symposium* helped convince Posner that “homosexual love” was defensible, so he could learn from Plato’s *Republic* that to permit “cross-sex surveillance” is not necessarily to “condone[] barbarism”³⁸ and that, even if “the duty of a society that would like to think of itself as civilized to treat its prisoners humanely [is] acknowledged,” it need not follow that “the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex-bathroom movement.”³⁹

Moreover, as Easterbrook’s majority opinion in *Johnson* pointed out, “a prison could comply with the rule Johnson proposes, and still maintain surveillance, only by relegating women to the administrative wing, limiting their duties, . . . or eliminating them from the staff.”⁴⁰

³⁴ *United States v Virginia*, 518 US 515 (1996).

³⁵ *Id.* at 537. Like the Virginia Military Institute, the University of Virginia (“UVa”), with a long-established practice of admitting only men, had engaged in a bitter struggle over the admission of women, in the course of which it rehearsed what Ginsburg called “[f]amiliar arguments,” such as that coeducation would bring “new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust.” See *id.* at 537–38. UVa had, however, ultimately been forced to integrate, and had done so successfully. *Id.* at 538.

³⁶ *Id.* at 555 n 20.

³⁷ *Id.* (citations and quotation marks omitted).

³⁸ See *Johnson*, 69 F3d at 156 (Posner dissenting). Whether or not Posner sees Plato as a “radical feminist[] who regard[s] ‘sex’ as a social construction,” he almost certainly sees Plato’s “society . . . as civilized.” See *id.* at 152. And, of course, etymologically, “barbarism” is simply the condition of one who does not speak the language of Plato. See *Oxford English Dictionary* 166 (Clarendon 2d ed 1989) (deriving “barbarism” from the ancient Greek for “speak[ing] like a foreigner”).

³⁹ See *Johnson*, 69 F3d at 152.

⁴⁰ See *id.* at 147–48 (majority).

Does Posner really think a prison environment devoid of women, with an all-male prison population coming in contact only with an all-male group of guards, is more “civilized” and less “kennel[-like]”⁴¹ than the alternative of which Johnson complained? Does Posner see it as less “degrading and brutalizing” to male prisoners to be entirely isolated from women than to be at some risk of exposure to them when naked?

There are certainly precedents for the belief that any contact with women is itself degrading to men as well as for the belief that giving women the power over men that guards necessarily have over prisoners degrades men.⁴² I would hate to think Posner is at all susceptible to such beliefs, but his choice of words in his email response to me did raise concerns. Recall that Posner therein said: “Since male nurses don’t want to dress up as women . . . the employer would have . . . to compensate them for the indignity.” Why does Posner view the male nurses in my hypothetical as being required to “dress up as women” rather than required to “dress up as” nurses, given that by hypothesis, the men are simply being asked to wear the uniform all prior holders of the job had worn? Was the first woman who put on judge’s robes dressing up like a man or like a judge? There is no physiological reason men cannot wear all the components of a traditional nurse’s uniform as comfortably as women can.⁴³ Of course, many women might also find the uniform uncomfortable. And just as there are men who do “want to dress up as women,” there are also women who “don’t want to dress up as women.”⁴⁴

Most telling is Posner’s assumption that it is necessarily “an indignity” for men to wear clothing associated with women, an indignity for which they must be compensated at rates higher than the previ-

⁴¹ Id at 151 (Posner dissenting).

⁴² I will be discussing some of these precedents and the use elements of the U.S. military have recently sought to make of them in my paper *Gender Performance Requirements of the U.S. Military in the War on Islamic Terrorism as Violence Against and By Women*, in *Sexual Abuse and Exploitation of Women in Violent Conflict* (Netherlands Defense Academy, forthcoming 2007).

⁴³ Similarly, as Posner correctly observed, it was “social or psychological rather than physical” factors that were DeClue’s primary motivation for being more demanding of privacy for excreting than her male colleagues. See *DeClue*, 223 F3d at 436. This distinguishes DeClue’s situation from that of the plaintiff in the leading case of a successful disparate impact claim about toilets at the worksite, who objected to being restricted to using unsanitary, badly maintained port-a-potties from which she and other women were at disparately greater risk of infection than their male coworkers. See generally *Lynch v Freeman*, 817 F2d 380 (6th Cir 1986).

⁴⁴ See, for example, *Jespersen v Harrah’s Operating Co, Inc*, 444 F3d 1104, 1106 (9th Cir 2006) (en banc) (upholding the firing of a female casino employee who declined to wear makeup); *Lanigan v Bartlett and Co Grain*, 466 F Supp 1388, 1389 (WD Mo 1979) (upholding the firing of a female secretary for wearing a pantsuit rather than a skirt to work). Consider *Barbetta v Chemlawn Services Corp*, 669 F Supp 569, 573 (WDNY 1987) (finding the “requirement that female employees wear skirts or dresses on certain occasions because a visiting supervisor liked to look at legs” evidence of hostile environment).

ously prevailing rate given female nurses. A decade ago, I wrote a hundred-page law review article⁴⁵ arguing that so long as men saw it as an indignity to be seen to look or act like women, both women and the valuable feminine qualities associated with them would be inappropriately devalued and the liberty of both men and women would be damagingly restricted. I will not rehearse those arguments here, but I stand by them.

Unfortunately, Posner in his opinions appears to be less open than Plato in his *Republic* to taking seriously the equality of the sexes and being prepared to entertain such adjustments in existing attitudes and practices as are necessary to remove obstacles to it. In *Johnson*, Posner says he has

no patience with the suggestion that Title VII . . . forbids a prison or jail to impede, however slightly, the career opportunities of female guards by shielding naked male prisoners from their eyes. . . . Title VII cannot override the Constitution. . . . Although the equal protection clause of the Fourteenth Amendment has been held to protect women against sex discrimination by a state [actor like the jail,] . . . the clause is not plausibly interpreted to license the infliction of cruel and unusual punishments. Just as it would not be a defense to a charge that the rack and thumbscrew are forms of cruel and unusual punishment to demonstrate that they are cheaper than imprisonment, so it is not a defense to the infliction of cruel and unusual psychological punishments that they advance women's career opportunities.⁴⁶

As Posner acknowledged in his *Johnson* dissent:

The cruel and unusual punishments clause of the Eighth Amendment . . ., like so much in the Bill of Rights, is a Rorschach test. What the judge sees in it is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources of moral judgment.⁴⁷

Once Posner has "la[id] out the essential background of facts and values on which [he] believe[s] the judgment in [Johnson's] case must

⁴⁵ See generally Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L J 1 (1995).

⁴⁶ See 69 F3d at 153–54 (Posner dissenting).

⁴⁷ Id at 151. It is beyond the scope of this paper and beyond my competence to psychoanalyze Posner based on what he sees in the Rorschach of Johnson's case, but given what amounts to his invitation in the quoted paragraph above to do so, I am more comfortable than I otherwise might be in undertaking limited speculation as to his thought processes and implicit assumptions.

ultimately turn,”⁴⁸ it becomes clear that he does not view the equal right of women to employment as much of a value at all; certainly not a value of constitutional dimensions, rather a value at the level of cost savings.⁴⁹ (Of course, given Posner’s commitment to economic efficiency, it may be that his mistake is instead that he assumes that making punishments “cheaper” is a value of constitutional dimensions.⁵⁰) Once one adds into the mix Posner’s judgment in *DeClue*, it appears that women’s employment opportunities rank even lower on the scale of his values than employer cost savings. One reason why Posner was so adamant that the dismissal of DeClue’s claim should be affirmed was that “[b]y failing to present her case as one of disparate impact, the plaintiff prevented the defendant from trying to show that it would be infeasible or unduly burdensome to equip its linemen’s trucks with toilet facilities sufficiently private to meet the plaintiff’s needs.”⁵¹ Men’s employment opportunities are not nearly so low on Posner’s scale, it would appear, given that he assumed in his email to me that employers would voluntarily pay more to hire them.

Ironically, although Posner’s dismissal of DeClue’s claim seems intended to reinforce the status quo, his broad assertion that “social and psychological” differences between men and women, no less than physical differences, can form the basis for a successful disparate claim,⁵² could, if taken seriously, have just the opposite, potentially revolutionary effect. For example, taking seriously the disparate impact of “the social and psychological fact” of women’s greater caregiving burdens could lead to more successful demands that work be restructured to accommodate them, as feminist theorists long have argued.⁵³

⁴⁸ *Id.*

⁴⁹ Posner might respond that he is valuing highly the reciprocal right of female prisoners not to be observed by male guards, but that was not the case before him in *Johnson* and it is far from certain that under conventional doctrinal analysis (let alone under the analysis that would follow if Posner’s views prevailed) the two cases would or should be decided the same way.

⁵⁰ Consider *National Paint & Coatings Association v City of Chicago*, 45 F3d 1124, 1132 (7th Cir 1995) (Easterbrook) (“Just as the Constitution does not enact Mr. Herbert Spencer’s *Social Statics*, so it does not enact prescriptions from the pages of *The Journal of Law & Economics*.”). Note, by the way (as Easterbrook did in *Johnson*), that cost savings and women’s equality both weighed against Johnson’s claim. See 69 F3d at 148.

⁵¹ See *DeClue*, 223 F3d at 437.

⁵² See *id.* at 436.

⁵³ See, for example, *Roberts v United States Postmaster General*, 947 F Supp 282, 287 (ED Tex 1996) (denying defendant employer’s motion to dismiss a claim that a policy of prohibiting employees from using sick leave to care for sick family members had an impermissible disparate impact on women). Although Posner probably believes that the cost of making such changes, like the cost of providing DeClue with toilet facilities, will allow employers successfully to raise a business necessity defense, the costs may not in either case be as high as he suspects. Providing DeClue with “Brief Reliefs” seemed not to be prohibitively expensive for the Central Illinois Light Company. See *DeClue*, 223 F3d at 438. And, as Joan C. Williams and Nancy Segal argued in

Posner's implicit assumption that, of course, the world is the way men would like it to be because to the extent it ever were not, it would be altered to suit them comes through in the *DeClue* opinion. Posner therein blithely asserts that "[m]ale linemen have never felt any inhibitions about urinating in the open, as it were. They do not interrupt their work to go in search of a public restroom. . . . [D]efendant's male linemen were untroubled by the absence of bathroom facilities at the job site."

This assertion is interesting for a number of reasons. It may help answer the following question: other than by noting that the effect in all three cases is that men get what they are seen to want and that women lose employment opportunities, how can one reconcile—not as a doctrinal matter, but as the reflection of a consistent set of values and factual assumptions—Posner's opinions in *Johnson*, *DeClue*, and the email?

Perhaps what is at stake here are Posner's assumptions, not only about sex and gender, but about class. In explaining, in *Johnson*, why he thinks prisoners are "not members of a different species" from himself, Posner stressed that "[s]ome of them may actually be innocent. Of the guilty, many are guilty of sumptuary offenses, or of other victimless crimes uncannily similar to lawful activity . . . or of esoteric financial and regulatory offenses . . . some of which do not even require a guilty intent." When he turned to *DeClue*'s case, Posner did not say categorically that men "have never felt any inhibitions about urinating in the open, as it were." He could not, having heard and supported *Johnson*'s complaint. Instead, he said, "Male linemen have never felt any inhibitions about urinating in the open. . . ." ⁵⁴ Are linemen a different species of males ⁵⁵—a species "untroubled by the absence" of "civilized bathroom facilities" and of the privacy in excreting of which it would be "barbari[c]" to deprive prisoners and which "normal women" are "not 'unreasonable'" to expect? ⁵⁶

Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job, 26 Harv Women's L J 77, 88 (2003), "[f]amily-responsive policies hold the promise to save money by decreasing the costs associated with attrition, absenteeism, recruiting, quality control, and productivity."

⁵⁴ See *DeClue*, 223 F3d at 436.

⁵⁵ In contrast to Posner's apparent drawing of class distinctions among males, Judge Rovner in her *DeClue* dissent stressed the common need and frequent lack of civilized bathroom facilities for women of all social classes, including not only blue collar women, but federal judges and Congresswomen. See *id* at 437–38 (Rovner dissenting).

⁵⁶ Adding additional data points from another Posner opinion sharpens the class analysis. In *Dimeo v Griffin*, 943 F2d 679 (7th Cir 1991) (en banc), a case challenging random drug tests for "jockeys and other participants in horse races," Posner's majority opinion was dismissive of the claim that such tests would be an invasion of privacy for the sort of people who work at the track:

Posner's assertion that male linemen "were untroubled by the absence of bathroom facilities at the job site"⁵⁷ is not supported by the record in *DeClue*. Instead, the record in that case indicates that male linemen, too, were on occasion discomfited by the absence of privacy or facilities for excretion, as were those who observed them and complained to the company. The record also indicates, as Rovner's dissent points out, that after *DeClue* "filed a charge with the EEOC, the company began providing 'Brief Reliefs' (disposable urine bags) and privacy tents for *DeClue* and the other lineworkers to use at jobsites."⁵⁸ These bags and tents did more than accommodate *DeClue*; they facilitated compliance with applicable law on public urination, relieved the worksite's neighbors from having excretion inflicted on them, and gave the male linemen what Posner felt it would be "barbarism" to deny to Albert Johnson: the opportunity to excrete without the possibility of a woman watching.

* * *

I was asked by one of those with whom I discussed this essay who my intended audience was and what message I hoped that audience would take away. I had to acknowledge, on reflection, that in many respects I saw this essay as a continuation of my 2000 email conversation, for which Posner himself was my audience. I had hoped to engage the lively mind of my academic colleague Dick Posner in dialogue about matters I, at least, saw as intriguingly complicated and worth pursuing. For the Honorable Judge Richard Posner, who is en-

Urination is generally a private activity in our culture, though, for most men, not highly private. Men urinate side by side in public restrooms without embarrassment even though there is usually very little, and often no, attempt to partition the urinals. In hospitals and physicians' offices, urine samples of both men and women are generally taken by female nurses or technicians under conditions of privacy similar to those prescribed by the racing board's rule (there are female as well as male jockeys). The affront to the cluster of emotions that define the sense of privacy that is caused by the giving of a urine sample is not the same for everybody and of particular relevance here it is slight for people who for whatever reason are subject to frequent medical examinations. . . . As Hamlet said, 'The hand of little employment hath the daintier sense.' The less habituated a person is to undergoing medical or other intrusions into his private realm, the more sensitive he is apt to be to such intrusions; the more habituated he is to them, the less sensitive he is apt to be. . . . Self-selection will tend to allocate jobs in which privacy is limited to persons who value privacy less.

Dimeo, 943 F2d at 682. Dissenting Judge Wood, like Judges Posner and Easterbrook my University of Chicago Law School colleague—and, like Judge Easterbrook in *Johnson* and Judge Rovner in *DeClue*, someone whose opinion I would gladly join—summed up Posner's conclusions in *Dimeo* as follows: "The majority says that if you are a participant in Illinois horse racing you deserve fewer constitutional protections than the rest of us." *Id* at 686 (Wood dissenting).

⁵⁷ *DeClue*, 223 F3d at 436.

⁵⁸ See *id* at 438 (Rovner dissenting).

gaged not merely in an academic discussion, but in the exercise of power, and who opines with such apparent confidence,⁵⁹ I had in mind a somewhat different message, fittingly encapsulating a reference to the bowels, which are defined as organs both of excretion and of empathy,⁶⁰ each of which has been a central theme of this essay. The message is one with which another exceptionally intelligent, powerful, and influential judge, Learned Hand, once said he “should like to have every court begin, ‘I beseech ye in the bowels of Christ, think that we may be mistaken.’”⁶¹

⁵⁹ There is at least some evidence that for Posner, the appearance of confidence could be deceptive and deliberately calculated. See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U Chi L Rev 1421, 1441 (1995) (“Judges are not comfortable writing opinions to the effect that, ‘We have very little sense of what is going on in this case. The record is poorly developed, and the lawyers are lousy. We have no confidence that we have got it right. We know we’re groping in the dark. But we’re paid to decide cases and here goes.’ Nevertheless, this is the actual character of many appellate cases that are decided in published opinions.”).

⁶⁰ See, for example, the *Oxford English Dictionary* 258 (Clarendon 2d ed 1989) (defining “bowels” as “the intestines” but also “[c]onsidered as the seat of the tender and sympathetic emotions, [] hence pity, compassion”).

⁶¹ Learned Hand, *Morals in Public Life* (1951), in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 225, 229–30 (1952) (Irving Dillard, ed). Hand took the quotation from Oliver Cromwell, who wrote to the Church of Scotland on August 3, 1650, “I beseech you, in the bowels of Christ, think it possible you may be mistaken.” *Bartlett's Familiar Quotations* 328a (XIV ed 1968).

