

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 De Clue's complaint of hostile environment sexual harassment against her employer, the Central Illinois Light Company, for whom she 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," dissenting Judge Ilana Rovner would have allowed DeClue to pursue her hostile environment claim. But, writing for himself and Judge Bauer, Judge Richard Posner held that "defendant's failure to respond to the plaintiff's request for civilized bathroom facilities can [not] be thought a form of sexual harassment." 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-impact" in her papers, the district court had been right, in the majority's view, to grant summary judgment to the defendant. 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."²

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¹ DeClue v. Central Ill. Light Co., 223 F.3d 434, 435 (7th Cir. 2000) (Posner, J.).

² Id. at 437.

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.³ 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 e-mailed 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?”

Although I had e-mailed my query shortly after 10 P.M., I received a response in little more than an hour. It read, in its entirety:

“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!”

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 25 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, his 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 “can see men naked in their cells, the shower and the toilet.”⁴ The two Posner opinions 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

³ See e.g. <http://www.law.uchicago.edu/toiletsurvey/>; Mary Anne Case, Changing Room? A Quick Tour of Men's and Women's Rooms in U.S. Law Over the Last Decade, 13(2) Public Culture 333 (2001).

⁴ Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995)(Easterbrook, J.).

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.⁵

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 accommodate the first worker of a different sex.⁶ 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 the hypothetical is a failure of imagination.⁷ 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

⁵ 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.

⁶ I could have used a flight attendant or a Hooters waiter just as well as a nurse. See e.g. fnote [on Hooters] below; *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (striking down per se exclusion of males from job of flight attendant notwithstanding findings of fact to the effect that 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").

⁷ 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*, 769 F.2d 1128 (7th Cir. 1985), that "Few 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] it had never occurred to [him].... any... respectable figure in the history of thought had attempted such a thing." *Sex and Reason*, p. 1. 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 <http://etext.library.adelaide.edu.au/mirror/classics.mit.edu/Plato/symposium.1b.txt>.

to have occurred to Posner.⁸ I will have more to say shortly about Posner's assumptions concerning male privilege.⁹

First let me note that detailed consideration of such hypotheticals should demonstrate how right dissenting Judge Rovner was to insist that "the lines with which we attempt to divide the various categories of discrimination cannot be rigid."¹⁰ Posner 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 a disparate impact case 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, through 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 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 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, reduce, or apologize for the material than to shove it in her face or revel in her discomfort at it.¹¹ Nevertheless, like many a hostile environment plaintiff before her,

⁸ 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 e.g. Harry F. Rosenthal, *The Associated Press, EEOC quietly drops Hooters investigation*, *The Commercial Appeal (Memphis)* May 2, 1996.

⁹ 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.

¹⁰ DeClue at 440.

¹¹ 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 (i.e., inter alia, as "graphic sexually explicit subordination")? Are the men? See e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, (7th Cir. 1985)(striking down on First Amendment grounds version of the ordinance passed by Indianapolis).

DeClue complained that “[t]he pornographic material greatly upset, intimidated and embarrassed” her.¹² She was similarly upset to be exposed, even inadvertently, to her male colleagues urinating at the worksite.¹³

When DeClue’s worksite is so configured that DeClue is put at risk of her male colleagues urinating in her presence or observing her urinating, Posner treats this, not as deliberately demeaning or hostile to her, but as something that just happens, notwithstanding that, as Judge Rovner notes in her dissenting opinion, public urination is equally illegal for both men and women.¹⁴ Yet when the prison is similarly configured to put male prisoners like Albert Johnson at risk of observation by female guards, Posner decries this as “degrading or brutalizing treatment,” cruel and unusual punishment, notwithstanding that, as Judge Easterbrook notes in his majority opinion, Johnson “do[es] not allege either particular susceptibility or any design to inflict psychological injury.”¹⁵

Posner focuses 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 antipathy of the Church to nudity.”¹⁶ There is no question but that in what Posner describes as the “morally diverse populace”¹⁷ 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 U.S. 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*,”¹⁸ the fathers of the Church were historically far

¹² DeClue complaint at p. 7, Paragraph 38.

¹³ 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 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” De Clue Dep. at 94.

¹⁴ See e.g. DeClue at 439 (opinion of Rovner, J). Rovner’s opinion stressed that “the risk of being caught in the act is arguably greater for women, for whom it is a more cumbersome, awkward, and time-consuming proposition.” 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, are more likely to find public male urination offensive.

¹⁵ Johnson at 147.

¹⁶ Johnson at 152. 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.

¹⁷ Johnson at 152

¹⁸ “One, holy, catholic and apostolic church,” in the words of the creed authorized at that Church’s Council of Nicaea in 325 A.D.

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.¹⁹ Moreover, as Posner must know²⁰, 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 makes Audrey DeClue in 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 complains..

When DeClue chooses what Posner sees as the wrong doctrinal category for her claim, pleading only hostile environment and not disparate impact, Posner holds her to her choice and dismisses her claim. But when Johnson's case, though briefed "by a top-notch law firm,"²¹ exhibits a similar deficiency, Posner on his own initiative eagerly steps in to "recas[t] Johnson's right of privacy claim as a claim under the Eighth Amendment."²² This notwithstanding that, as Rovner correctly notes, hostile environment harassment and disparate impact are just judicially developed specifications of the single statutory harm of sex discrimination in employment, while the various constitutional provisions at issue in Johnson are not nearly so closely intertwined.

Posner hastens 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." Why not? Apparently because "[m]en have long been attended in hospitals by female nurses, and latterly by female doctors as well."²³ 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 amounts to treating the prisoners as "a type of vermin, devoid of human dignity and entitled to no respect,... the

¹⁹ See e.g. Catholic Encyclopedia, St. Francis of Assisi, <http://www.newadvent.org/cathen/06221a.htm>.

²⁰ Posner lists as the impetus for Sex and Reason, not only his reading of Plato, see note above, but also his participation in *Miller v. City of South Bend*, 904 F.2d 1081 (7th Cir. 1990)(en banc), reversed sub. mom. *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991)(described by Posner as "involving the constitutionality of a state statute that had been interpreted to forbid striptease dancers to strip to the buff") Sex and Reason p. 2.

²¹ Johnson at 148 (Easterbrook, J.)

²² Johnson at 153.

²³ Johnson at 154. 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 (e.g. orderlies, maintenance staff, and guards), given the differences in their roles and patients' reactions to them.

subject of experiments, including social experiments such as the experiment of seeing whether the sexes can be made interchangeable.”²⁴ Just as the arguments Johnson makes about female guards could very recently have been made about female doctors, so, as Justice Ginsburg observes in *U.S. v. Virginia*, 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 (“UVa”).²⁵

Plato, toilets, nudity and “the experiment of seeing whether the sexes can be made interchangeable” also come 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.”²⁶ Ginsburg’s response includes 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.”²⁷ 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 “condon[e] barbarism”²⁸ 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 “then the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex-bathroom movement.”²⁹

Moreover, Easterbrook’s majority opinion points out that “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.”³⁰ 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]”³¹ than the alternative of which Johnson complains? Does Posner

²⁴ Johnson at

²⁵*U.S. v. Virginia*, 518 U.S. 515, 537 (1996). Like the Virginia Military Institute, the University of Virginia, 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 “familiar arguments” such as that co-education 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;” but UVa had ultimately been forced to integrate and had done so successfully.

²⁶ *Id.* at n. 20.

²⁷ *Id.* (citations and internal quotation marks omitted).

²⁸ Johnson at 155. Whether or not Posner sees Plato as a “radical feminis[t] who regard[s] ‘sex’ as a social construction,” *id.* at 153, he almost certainly sees Plato’s “society ... as civilized,” and, of course, etymologically, “barbarism” is simply the condition of one who does not speak the language of Plato. See e.g. OED p.166 (deriving “barbarism” from the ancient Greek for “speak[ing] like a foreigner”).

²⁹ Johnson at 155.

³⁰ Johnson at 147-8.

³¹ Johnson at 151.

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.³² I would hate to think Posner is at all susceptible to such beliefs, but his choice of words in his e-mail 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 were simply being asked to wear the uniform all prior holders of the job had worn?³³ There is no physiological reason men can't wear all the components of a traditional nurses uniform as comfortably as women;³⁴ 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.”³⁵

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 previously prevailing rate given female nurses. A decade ago, I wrote a hundred page law review article³⁶ 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.

³² 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*, forthcoming in the Netherlands Defense Academy's *SEXUAL ABUSE AND EXPLOITATION OF WOMEN IN VIOLENT CONFLICT*.

³³ Was the first woman who put on judge's robes dressing up like a man or like a judge?

³⁴ Similarly, as Posner correctly observes, it is “social or psychological rather than physical” factors that are DeClue's primary motivation for being more demanding of privacy for excreting than her male colleagues. This distinguishes DeClue's situation from that of the plaintiff in the leading case of a successful disparate impact claim about toilets on the worksite, who objected to being restricted to using unsanitary, badly maintained port-a-pottys from which she and other women were at disparately greater risk of infection than their male co-workers.

³⁵ See e.g. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (upholding firing of female casino employee who declined to wear makeup); *Lanigan v. Bartlett Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979)(upholding firing of female secretary for wearing a pantsuit rather than a skirt to work); Cf. *Barbetta v. Chemlawn Servs. Corp.*, 669 E Supp. 569, 573 (W.D.N.Y. 1987) (finding "requirement that female employees wear skirts or dresses on certain occasions because a visiting supervisor liked to look at legs" evidence of hostile environment).

³⁶ *Mary Anne Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L. J. 1 (1995)

In Johnson, Posner says he has

“no patience with the suggestion that Title VII ... forbids a ... 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.”³⁷

As Posner acknowledges in Johnson,

“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.”³⁸

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 ultimately turn,”³⁹ it becomes clear that he does not view the equal rights 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.⁴⁰ (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.)⁴¹ 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 is so adamant that the dismissal of DeClue’s claim should be affirmed is 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

³⁷ Johnson at 153-4.

³⁸ Johnson at 151. It is beyond the scope of this paper and 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 to do so, I am more comfortable than I otherwise might be in undertaking limited speculation as to his thought processes and implicit assumptions.

³⁹ Johnson at 151.

⁴⁰ 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 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.

⁴¹ Cf. *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132(7th Cir.1995)(Easterbrook, J.) (“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’s majority opinion does, that, in Johnson, cost savings and women’s equality both weigh against Johnson’s claim.

facilities sufficiently private to meet the plaintiff's needs.”⁴² Men’s employment opportunities are not nearly so low on Posner’s scale, it would appear, given that he assumes in his e-mail to me that employers would voluntarily pay more to hire them.

Posner’s implicit assumption that, of course, the world is the way men would like it to be, because to the extent it ever weren’t it would be altered to suit them comes through in the DeClue opinion itself. Posner there blithely asserts, “Male 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.

First, 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 Posner’s opinions in Johnson, DeClue, and the e-mail - not as a doctrinal matter, but as a reflection of a consistent set of values and factual assumptions? Perhaps what is at stake here is Posner’s assumptions, not only about sex and gender, but about class. In explaining why he thinks prisoners are “not members of a different species” from himself, Posner stresses that, “Some 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 turns to DeClue’s case, he does 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 says, “Male linemen have never felt any inhibitions about urinating in the open.....” Are linemen a different species of males, a species “untroubled by the absence” of “civilized bathroom facilities” and the privacy in excreting of which it would be barbarous to deprive prisoners and which “normal women” are “not “unreasonable” to expect.⁴³

⁴² DeClue at 437.

⁴³ Adding additional data points from another Posner opinion sharpens the class analysis. In *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc), a case challenging random drug tests for “jockeys and other participants in horse races” Posner for the majority is dismissive of the claim that this would be an invasion of privacy for the sort of people who work at the track:

“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 under-going 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.” *Id.* at 682. Dissenting Judge Wood, like Judges Posner and Easterbrook also 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, sums up Posner’s conclusions in *Dimeo* as follows: “The

Second, Posner's assertion that male linemen "were untroubled by the absence of bathroom facilities at the job site" is not supported by the record in DeClue. Instead, the record 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 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."⁴⁴ 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 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 the essay as a continuation of my 2000 e-mail 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 engaged not merely in an academic discussion, but in the exercise of power, and who opines with such apparent confidence,⁴⁵ 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,⁴⁶ 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.'"⁴⁷

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.

⁴⁴ De Clue at

⁴⁵ 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 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.").

⁴⁶ See e.g. the Oxford English Dictionary p. 258 (defining "bowels" as "the intestines" but also as "(Considered as the seat of the tender and sympathetic emotions, hence) pity, compassion....").

⁴⁷ Learned Hand, *Morals in Public Life* (1951), in *The Spirit of Liberty: Papers and Addresses of Learned Hand*, ed. Irving Dillard (1952) p. 225, 229-30. Hand takes 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* (XIV ed. 1968) p. 328a.